
The German Border Guard Cases and International Human Rights

Rudolf Geiger*

Abstract

After the reunification of Germany on 3 October 1990 the German courts were required to deal with charges of homicide against GDR border guards who had killed fugitives trying to escape over the Berlin Wall or across the border separating East from West Germany. According to the Unification Treaty, the law relevant to crimes committed on GDR territory prior to the date of unification was the criminal law of the GDR, unless the law of the Federal Republic of Germany was more favourable to the defendant. Thus, defendants invoked GDR law to establish that their actions had been lawful and could not be held to be criminal. This article demonstrates how international human rights were brought into play by the courts in arguing that the laws of the GDR had to yield to a higher law. It also refers to the reasoning of the Federal Constitutional Court when it addressed the question of ex post facto laws. There the Court's arguments remained exclusively within the sphere of German constitutional law. It is contended that the Court's reasoning would have been more convincing had it also taken into account in this instance the relevant provisions of international human rights instruments.

1 Introduction

The reunification of Germany, which came about through the accession of the German Democratic Republic (GDR) to the Federal Republic of Germany on 3 October 1990,¹ entailed specific legal problems that were posed by the continuing effects of the defunct socialist regime. In order to resolve these problems, the annexes to the Unification Treaty contain, *inter alia*, elaborate lists of rules which modify the entry into force of the laws of the Federal Republic in the territory of the former GDR.

* Professor of Law, University of Leipzig, Otto-Schill-Strasse 2, D-04109 Leipzig, Germany.

¹ Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity ('Unification Treaty') of 31 August 1990; English version in 30 ILM (1991) 457.

In criminal matters the Unification Treaty provided that the law applicable to acts committed in GDR territory prior to the date of unification continued to be the criminal law of the GDR, unless in individual cases the criminal law of the Federal Republic was more favourable to the defendant.² This approach did not create any substantial problems in cases of 'ordinary' crimes, such as theft, robbery or murder committed by private persons. But the situation proved to be quite different for cases of so-called 'government criminality', where GDR officials or soldiers committed acts that were held to be lawful or were even legally required in the GDR legal system as practised at that time but were considered serious crimes in West German law.

An important example of such government criminality came to light with the border guard cases. In these cases the courts were required to deal with the objections put forward by defendants that GDR law had indeed provided justification for their actions and that it should consequently be applied in their cases. In dealing with these objections, the courts, *inter alia*, referred to the infringement of international human rights by the GDR practices. In this way, they made use of new ways in which international human rights standards could arguably have effects in the domestic order of a state.

2 The Border Guard Cases

In the border guard cases, East German soldiers who had killed fugitives or other trespassers on the GDR or East Berlin border were tried on charges of homicide. Those found guilty were sentenced to prison terms.³ Government officials, such as members of the GDR National Defence Council, held responsible as the guards' superiors, were similarly brought to trial.⁴ On appeal from the judgments of the trial courts, the *Bundesgerichtshof* (the federal court for civil and criminal matters having jurisdiction as a court of last instance for the entire Germany) gave its approval to the trial courts' opinion, holding that the acts the defendants were accused of were crimes which could not be justified by reference to the laws of the GDR.

Since the cases were rather similar it may suffice to report the *facts* of only two of them in order to illustrate the situations faced by the Court.

In the first of the border guard cases to come before the *Bundesgerichtshof*⁵ the defendants, two young soldiers of the GDR Border Guard Troops, shot at a 20 year-old East German trying to escape over the wall to West Berlin during the night of 1 December 1984. When the fugitive climbed the wall on a ladder he had brought with him, one of the defendants shouted at him to freeze and, after firing some warning shots in the air, both of the soldiers fired at him with automatic rifles in order to stop the escape, even at the cost of the fugitive's life. The man, hit by bullets in his back and knee, fell from the ladder. After some time he was dragged to a watchtower by two

² Unification Treaty, Annex I, Chapter III, Subject Matter C.

³ Between 3 October 1990 and 6 February 1997 a total of 78 persons were sentenced and 45 were acquitted (reported by *Die Welt*, 7 February 1997).

⁴ Judgment of 26 July 1994, *BGHSt* 40, 218.

⁵ Judgment of 3 November 1992, *BGHSt* 39, 1.

other soldiers where, despite his repeated requests for medical treatment, he received no attention. Since the incident had to be kept secret no civilian or other person on emergency duty was allowed to be called. Only after two hours was the fugitive taken to a police hospital, where he died shortly afterwards.

Most of the cases followed the same pattern: fugitives trying to climb over the border installations or to swim across the border at points where it ran through waters separating East from West Berlin. One case, however, seemed to be slightly different. There the *Bundesgerichtshof*⁶ had to review a case in which the fatal shots were not directed at a fugitive from the GDR, but at two West Berlin sunbathers — a 42 year-old man and his 21 year-old daughter, both wearing swimming suits — who were sitting in a small inflatable motor boat coming from West Berlin waters at noon on 15 June 1965. Apparently they did not realize that the border fence was situated well behind the line where East Berlin territory began. When they had inadvertently intruded into East Berlin waters to a distance of about 10 metres, the defendant fired some warning shots from his watchtower. Although the father and daughter turned the boat around right away and headed for the West Berlin side, the defendant fired at them, immediately before the boat crossed the border line again, hitting each of them with several shots. The boat floated to the West Berlin side. Both persons had been hit in the head; the man died on the spot, his daughter became irreversibly disabled. A GDR military investigation committee finally reported that the defendant had acted in accordance with his orders and deserved commendation.

All the cases showed some *characteristics* in common: first, the border guards had been instructed daily that under no circumstances were fugitives to be allowed to escape across the border line — in the last resort they had to be ‘annihilated’ (*‘vernichtet’*); second, the incidents had to be kept secret as far as possible, even at the cost of the fugitives’ lives; third, border guards, successful in keeping fugitives from leaving GDR territory, merited commendation.

3 International Human Rights versus GDR Law

The defendants claimed that their actions were justified by the laws of the GDR in force at the time of the incidents. Thus in the first border guard case the defendants invoked Section 27 para. 2 *GDR Grenzgesetz* (Border Statute),⁷ which provided that border guards may, if necessary, shoot at a person to prevent or to stop the commission of a major crime. Crossing the wall with a special tool (in this case a ladder) was considered a major crime under GDR law. They pleaded that Section 27 Border Statute was applicable according to the Unification Treaty, because this ground for justification was part of the GDR law governing their case.

The *Bundesgerichtshof*, however, confirmed the trial court’s conviction of the defendants on charges of homicide and rejected the defendants’ argument that Section 27 Border Statute could provide an acceptable justification. At this point,

⁶ Judgment of 20 March 1995, *NJW* 1995, 2732 (5 StR 378/94).

⁷ Border Statute (*Grenzgesetz*) of 25 March 1982. Prior to the entering into force of the Statute, the use of firearms at the border was dealt with in administrative regulations.

international human rights came into play. Since the Court's reasoning is rather complex, its view on the relevant provisions of the International Covenant on Civil and Political Rights of 19 December 1966⁸ will be presented before examining the Court's arguments on the impact that international human rights standards might have had within the domestic law of the GDR.

A Identification of the Human Rights being Infringed

In the Court's view, Section 27 para. 2 Border Statute, as interpreted by GDR authorities, was incompatible with Articles 6 and 12 of the Covenant. Article 12 para. 2 of the Covenant provides that '[e]veryone shall be free to leave any country, including his own', and permits restrictions on the exercise of this right only under exceptional circumstances.⁹

The Court held that the border regime of the GDR as it was actually practised was incompatible with this right. In GDR law, the possibility of leaving the country was not the rule, but the exception.¹⁰ Persons under the age of retirement were not usually able to obtain the necessary permission to leave the country. In practice, no reasons were given for rejections of requests to leave and no recourse to the courts was available.¹¹ The rejection of an application was considered by the Court as being especially harsh because the applicants were separated from persons belonging to the same common nation with whom they enjoyed family relations and other close ties which they wanted to maintain.

Furthermore, the Court argued that the border regime violated Article 6 para. 1 of the Covenant, which provides *inter alia* that '(n)o one shall be arbitrarily deprived of his life'. Under GDR law, as it was interpreted at that time, the escape of a citizen across the border had to be prevented by all means, even at the cost of his or her life. In this context, the Court observed a trend in many countries towards limiting the powers of state authorities to make use of firearms.¹² The Court also quoted General Comment 6(16) of the Human Rights Committee, according to which the 'circumstances under which state organs may deprive someone of his life must strictly be defined and limited by law'.¹³ The Court concluded that depriving a person of his or her life is arbitrary in cases where the fugitive was not carrying any weapons and did not cause danger to anybody; the purpose of preventing the escape in those cases was thus only to deter others from making similar attempts.

⁸ 6 ILM (1967) 368.

⁹ Art. 12 para. 3 reads: 'The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.'

¹⁰ See the Passport Statute of the GDR of 1979, referred to in BGHSI 39, at 1.

¹¹ Art. 12 of the Covenant implies a right to recourse to the courts when permission to leave was denied, see H. Hannum, *The Right to Leave and Return in International Law and Practice* (1987), at 148.

¹² The Court drew attention to a judgment of the US Supreme Court in the case of *Tennessee v. Garner*, 471 US 1 (1985); see also Boyle, 'The Concept of Arbitrary Deprivation of Life', in B. G. Ramcharan (ed.), *The Right to Life in International Law* (1985), at 241.

¹³ General Comment 6(16), GAOR, 37th Sess., Suppl. 40, at 93 *et seq.*

In some of its later judgments the Court, however, could not rely on the International Covenant on Civil and Political Rights. The Covenant had entered into force for the GDR on 23 March 1976.¹⁴ Hence, it could not be referred to in cases where the incident had occurred prior to that date. There the Court relied on the Universal Declaration of Human Rights, Article 3 (right to life) and Article 13 para. 2 (right to leave every country, including one's own).¹⁵

B Effects on GDR Domestic Law

In its first decision, the *Bundesgerichtshof*,¹⁶ having concluded that the border regulations as practised were not compatible with international human rights standards, dealt with the problem that the Covenant, although it had become binding for the GDR in 1976, was not incorporated into East German domestic law.¹⁷

The Court treated the problem in a very long and detailed opinion, which contained two lines of argument. Although intertwined, these arguments should be kept separate.

1 'Positivist' Arguments

The Court's first set of arguments followed what could be called a positivist line. It relied on well-established rules on the impact of international law on the interpretation of national laws; where national laws allow a margin for interpretation, they must be interpreted in favour of the state's international obligations. The Court argued that international human rights had to be taken into account in the interpretation of the GDR Border Statute because (i) these rights were designed to regulate the relationship between the state and its citizens, and (ii) the wording of Section 27 para. 2 Border Statute left room for an interpretation in light of the requirements of the Covenant. Although the Border Statute could be interpreted so as to allow an unlimited use of firearms to stop escapes, a human rights-oriented interpretation must exclude cases where fatal shots are fired at an unarmed fugitive who is not dangerous to anybody. In such situations, the human right to life and to leave one's own country outweigh the state's interest in stopping the fugitive. Thus, Section 27, being interpreted in favour of international human rights, did not establish a sufficient justification for the defendants.

2 'Natural Law' Arguments

The second line of reasoning in the Court's opinion reveals a strong affinity to natural

¹⁴ *Gesetzblatt GDR* 1974 II, 57.

¹⁵ Art. 3 reads: 'Everyone has a right to life, liberty and security of person.' Art. 13 para. 2 reads: 'Everyone has the right to leave any country, including his own, and to return to his country.' Limitations of these rights are provided for in the general clauses of Art. 29, especially para. 2: 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

¹⁶ Judgment of 3 November 1992, see *supra* note 5.

¹⁷ According to Art. 51 of the GDR Constitution of 1974, the GDR Parliament had to consent to an international treaty, the implementation of which made it necessary to change domestic statutes. But this act of the *Volkskammer* did not transform the treaty into domestic law unless it was self-executing.

law arguments.¹⁸ The Court refers to its jurisprudence on post-war trials dealing with Nazi crimes.¹⁹ In these trials the German courts had relied on the so-called '*Radbruch formula*', which traces back to a famous article by Gustav Radbruch, an eminent German legal philosopher and former minister of justice. In his opinion, the laws of the Nazi period were null and void if they constituted unbearable violations of fundamental principles of justice and humanity which must be respected by any state, no matter what its form of government.²⁰

In the border guard cases, the Court broke new ground by defining, with the aid of international human rights instruments, the content of these fundamental principles. The Court emphasized for the first time that the core of international human rights gives substance and meaning to these basic principles because human rights express the shared opinions of all nations on important elements of justice and human dignity. The Court concluded that a national law which allowed the escape of an unarmed fugitive to be prevented at the cost of the person's life, in contradiction to the Covenant, was null and void and could not be invoked by the defendant.

In its later decisions the *Bundesgerichtshof* created a clearer distinction between the two lines of reasoning and evidently relied more heavily on the Radbruch formula,²¹ holding that grounds for exceptions to the right to life or to the right to leave one's own country could never have been valid if they constituted unbearable infringements of justice. There it also referred to the Universal Declaration on Human Rights.²² Although the legally binding nature of the Declaration was not considered clear by the Court, it set forth that the Declaration could be conceived as putting into concrete terms the legal conviction common to all peoples on the content of basic human values and human dignity.

As can be seen from this argument, the Court did not distinguish between different sources of international law. Only in passing did it in one case mention the *Barcelona Traction* judgment of the International Court of Justice,²³ referring to that Court's opinion that the basic rights of the human person were valid *erga omnes*. Neither did it scrutinize whether the Universal Declaration met the requirements of an international legal obligation. Apparently the main concern of the *Bundesgerichtshof* was not to find the proof of 'hard' international law but rather evidence of a common conviction about basic elements of justice which could be considered as forming a 'higher law' prevailing over the domestic laws and administrative rules of the GDR.²⁴

¹⁸ For a theoretical analysis of natural law in post-war Germany, see Welzel, 'Was bleibt?', in H. Welzel, *Naturrecht und materiale Gerechtigkeit* (1962), at 236 *et seq.*

¹⁹ Judgment of 29 January 1952, BGHSt 2, 234, 237 *et seq.*

²⁰ See G. Radbruch, *Gesetzliches Unrecht und übergewaltiges Recht*, *Süddeutsche Juristenzeitung* (1946), at 105. For a positivist critique of the Radbruch formula, see H. L. A. Hart, *The Concept of Law* (1961), at 207.

²¹ Compare judgment of 20 March 1995, BGHSt 41, 101.

²² Judgment of 26 July 1994, BGHSt 40, 241, 245 *et seq.*

²³ *Ibid.*, at 247, referring to International Court of Justice, *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, ICJ Reports (1970) 3, at 32 *et seq.*

²⁴ Surprisingly even at this point the Court did not rely on Art. 8 GDR Constitution. By this provision the generally recognized principles of international law serving the peaceful coexistence and cooperation of peoples were transformed into domestic law. In the opinion of the *Bundesgerichtshof* these principles were

C Discussion of the Judgments

The Federal Court's reasoning has stimulated a particularly intense debate in the German legal literature.²⁵ On the one hand, the Court was criticized, in terms of the 'positivist' line of argument, for determining the content of East German domestic law in the light of human rights concepts interpreted from a position of Western democratic values. It was contended that this was not the law in force in the GDR at that time, and that the wording of the East German laws could not be separated from the ends they were intended to serve.

The GDR had indeed always insisted that there was a basic difference between the socialist and the general concept of human rights.²⁶ Many authors found it unconvincing to neglect this difference, especially with regard to a highly politicized field like the border regulations. The Marxist–Leninist concept stressed the superiority of the socialist state's interest over the preferences of individuals. Human rights were considered meaningful only within the limits set by the socialist collective values. The laws and orders leading to the unconditional 'annihilation' of fugitives in the interest of the socialist regime were perfectly in line with this concept. Applying human rights standards as interpreted in the light of Western democratic values could not mean — as the *Bundesgerichtshof* contended — arguing from within the GDR's legal order; on the contrary, it meant applying standards from outside.

On the other hand, opposing views were also held in relation to the 'natural law' arguments using the Radbruch formula. Apart from the question whether the concept of natural law was acceptable at all, it was contended²⁷ that natural law concepts since their conception have been invoked only to justify revolutionary acts, such as resistance against a ruler, even the assassination of a tyrant, but not to serve as a basis for criminal prosecution; that natural law addressed the legislative organs, formulating an obligation to change the law but without having self-executing

not meant to cover the relationship between a state and its citizens, in contrast to interstate relations. Neither did the Court rely on Art. 91 GDR Constitution, which provided for the direct applicability in the domestic sphere of the international provisions on the punishment of crimes against peace, humanity and war crimes. The Court confined the ambit of this provision to crimes committed during the Nazi era, because its purpose was only to implement Art. 8 of the Statute of the Nuremberg Tribunal.

²⁵ See J. Isensee (ed.), *Vergangenheitsbewältigung durch Recht. Drei Abhandlungen zu einem deutschen Problem* (1992); H. Dreier, *Gustav Radbruch und die Mauerschützen*, *Juristenzeitung* (1997), at 421; H. Roggemann, *Die strafrechtliche Aufarbeitung der DDR-Vergangenheit am Beispiel der 'Mauerschützen' und der Rechtsbeugungsverfahren*, *Neue Justiz* (1997), at 226. A long list of further writings is cited in the *Bundesgerichtshof's* judgment of 20 March 1995, *BGHSt* 41, 101, at 107.

²⁶ The GDR semi-official treatise on international law stressed the difference between the principles of international law governing the relations of states in general on the one hand and the socialist international law principles on the other, which, although identically worded, differed in their meanings: see Arbeitsgemeinschaft für Völkerrecht beim Institut für Internationale Beziehungen an der Akademie für Staats- und Rechtswissenschaft der DDR (ed.), *Völkerrecht, Lehrbuch*, Teil I (2nd ed., 1981), 134 *et seq.*, 231 *et seq.*; see also B. Graefrath, *Menschenrechte und internationale Kooperation* (1988), at 50 *et seq.*, who points out that the international covenants on human rights were not self-executing because the treaty states, due to the differences in their social orders, enjoyed wide freedom in interpreting and implementing their human rights obligations.

²⁷ See H. Dreier, *Gustav Radbruch und die Mauerschützen*, *Juristenzeitung* (1997), at 421, 428 *et seq.* and the writings cited in *supra* note 25.

character; and that the rules of natural law were much too vague to be suitable for immediate application in a criminal case. Another argument put forward was that, whatever the merits of the Radbruch formula at the end of World War II, the acts committed at the GDR border could not be compared to the atrocities of the Nazi regime for which that formula was intended.²⁸

If these arguments were well founded, there seem to be only two alternatives: either the defendants had to be acquitted because GDR law had justified the acts they were accused of, or it must be deemed that the exceptions or grounds for justification furnished by GDR law could be set aside retroactively.

4 The Problem of Non-Retroactivity of Criminal Laws

The principle *nullum crimen/nulla poena sine lege* has from the very outset been adopted in the German Constitution. Article 103 Section 2 *Grundgesetz* provides that an act can be punished only if it is a criminal offence determined by a law in force before the act was committed.

In Germany, individual constitutional rights enjoy special protection by the *Bundesverfassungsgericht* (Federal Constitutional Court). Thus, the members of the former GDR National Defence Council and one of the border guards whose conviction had been confirmed by the *Bundesgerichtshof* lodged a complaint with the *Bundesverfassungsgericht*, pleading violation of the constitutional prohibition of *ex post facto* criminal laws. The *Bundesverfassungsgericht*, however, dismissed these complaints.²⁹

The Court began by considering the idea underlying the rule of non-retroactivity, namely, that a person should be protected in his or her legitimate expectation that his or her activities could only be prosecuted as criminal offences if this was provided for by law at the time the activities occurred. In the Court's opinion, this principle, set forth in Article 103 Section 2 *Grundgesetz*, was as a rule meant to apply to the criminal law shaped under the *Grundgesetz*. In this case, where a parliament, authorized and bound by the *Grundgesetz*, passed the statutes defining crimes and their limitations, absolute and strict protection of a person's expectations is guaranteed by Article 103 Section 2. This constitutional provision does not, however, afford absolute protection when applying the laws of a political system which was not a democracy, did not practise the division of powers and did not protect human rights. In this case, there might emerge a conflict between the *nullum crimen sine lege* principle and the most basic requirements of material justice, which had to be resolved in favour of the latter.

Thus, where a state seriously disregards basic human rights generally recognized by the international legal community, the rules of criminal law neglecting such

²⁸ Still another argument, apparently underlying legal considerations, referred to doubts on the adequacy of dealing with revolutionary developments in the terms of criminal law; cf. Jakobs, 'Vergangenheitsbewältigung durch Strafrecht? Zur Leistungsfähigkeit des Strafrechts nach einem politischen Umbruch', in Isensee, *supra* note 25, at 64.

²⁹ Decision of the *Bundesverfassungsgericht* of 24 October 1996, *EuGRZ* 1996, 538.

standards could not legitimately be expected to be considered valid under the *Grundgesetz*. The *Bundesverfassungsgericht* agreed with the *Bundesgerichtshof* that the border regime of the GDR obviously failed to meet these basic human rights standards.

As could be expected, the opinion of the *Bundesverfassungsgericht* did not settle the question of *ex post facto* laws in the legal literature.³⁰ There it was mainly argued that the constitutional proscription of retroactive criminal laws did not only formulate a *problem* of colliding principles, but also provided the *solution* to it:³¹ the constitutional guarantee must be applied strictly and literally, leaving no room for any exceptions.

The *Bundesverfassungsgericht* did not refer in this connection to the guarantee of non-retroactivity in international human rights instruments. This is surprising because on the one hand the conflict between a strict prohibition of *ex post facto* (national) laws and grossly inhumane state practices is expressly addressed in such instruments and, on the other hand, the *Bundesverfassungsgericht* did for all practical purposes relax the strict rules of Article 103 para. 2 *Grundgesetz* by giving priority to basic international human rights over laws of the GDR in the context of executing criminal justice. The International Covenant on Civil and Political Rights, in dealing with the principle of non-retroactivity, includes *international* crimes as a basis for punishment; in Article 15 para. 2 it emphasizes that:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

It is not clear why the *Bundesverfassungsgericht* refrained from even mentioning this provision. Maybe it silently shared the opinion of the *Bundesgerichtshof*, which had argued that Article 15 Section 2 of the Covenant was irrelevant because in the domestic sphere the *constitutional* guarantees of human rights (the *nullum crimen* principle in Article 102 Section 2 *Grundgesetz*) ranked higher and thus had priority over the rules of international law.³² This argument is not convincing because it is established in the case law of the *Bundesverfassungsgericht* that constitutional provisions should be interpreted in the light of the human rights treaties to which Germany is a party.³³ Another reason which the *Bundesgerichtshof* mentioned only briefly was the German reservation of 5 December 1952 to Article 7 para. 2 of the European Convention on Human Rights,³⁴ according to which Germany

will only apply the provisions of Article 7 paragraph 2 of the Convention within the limits of Article 103 clause 2 of the Basic Law of the German Federal Republic. This provides that 'any act is only punishable if it was so by law before the offence was committed'.³⁵

³⁰ See Dreier, *supra* note 27, at 421, 431.

³¹ *Ibid.*, at 432.

³² Judgment of 3 November 1992, BGHSt 39, 1, at 27.

³³ Decision of 26 March 1987; BVerfGE 74, 352, at 370.

³⁴ Art. 7 Sec. 2 of the European Convention on Human Rights reads: 'This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.'

³⁵ *Bundesgesetzblatt* 1954 II, 14.

But Germany did not make a similar reservation when acceding to the International Covenant on Civil and Political Rights in 1974. So Article 103 para. 2 *Grundgesetz* would be open for interpretation in conformity with Article 15 of the Covenant, while the reservation to the European Convention would not exclude it. There may have been a third reason which was not mentioned by either court: that the courts did not want to address the problem of identifying international crimes.³⁶ But that posed a problem only if one was looking for an international penal code. And there was no sufficient reason to speak of international crimes only where an international penal code existed. As Professor Meron has put it: 'The fact that international rules are normally enforced by national institutions and national courts applying municipal law does not in any way diminish the status of the violations as international crimes.'³⁷

Instead of exclusively interpreting the constitutional proscription of *ex post facto* criminal law from within the domestic context, the courts could have placed the problem in a broader — i.e. international — legal context. They could have drawn on the solution which the Covenant on Civil and Political Rights had to offer. Had they done so, they would have shown that their reasoning on the *nullum crimen sine lege* problem was compatible with the general legal principles of the community of states. And by confirming such principles they would simultaneously have contributed to the further development of international criminal law.

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³⁶ For this problem see, M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (1992); Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale L.J.* (1991) 2537; see also Meron, 'Criminalization of Internal Atrocities', 89 *AJIL* (1995) 554, at 567 *et seq.*

³⁷ Meron, *supra* note 36, at 563.