Caso de K.-H. W. contra Alemania, de 22/03/2001 [ENG]

No violation of Art. 7-1

EUROPEAN COURT OF HUMAN RIGHTS

CASE OF K.-H. W. v. GERMANY

(*Application no. 37201/97*)

JUDGMENT

STRASBOURG

22 March 2001

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In the case of K.-H. W. v. Germany,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. Wildhaber, *President*,

Mrs E. Palm,

Mr C.L. Rozakis,

Mr G. Ress,

Mr J.-P. Costa,

Mr L. Ferrari Bravo,

Mr L. Caflisch,

Mr L. Loucaides,

Mr I. Cabral Barreto,

Mr K. Jungwiert,

Sir Nicolas Bratza,

Mr B. Zupancic,

Mrs N. Vajic,

Mr M. Pellonpää,

Mrs M. Tsatsa-Nikolovska,

Mr E. Levits,

Mr A. Kovler, *judges*,

and also of Mr M. de Salvia, *Registrar*,

Having deliberated in private on 8 November 2000 and on 14 February 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 37201/97) against the Federal Republic of Germany lodged with the European Commission of Human Rights ("the Commission") by a German national, Mr K.-H. W. ("the applicant"), under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 5 May 1997. The applicant asked the Court not to disclose his identity

and the President granted his request in accordance with Rule 47 § 3 of the Rules of Court.

2. The applicant, who was granted legal aid, was represented by Mr Piers Gardner, of the London (United Kingdom) Bar, and by Mr Dirk Lammer, of the Berlin (Germany) Bar. The German Government ("the Government") were represented by their Agent, Mr Klaus Stoltenberg, *Ministerialdirigent*.

3. The applicant alleged that the act on account of which he had been prosecuted did not constitute an offence, at the time when it was committed, under national or international law, and that his conviction by the German courts had therefore breached Article 7 § 1 of the Convention. He also relied on Articles 1 and 2 § 2 of the Convention.

4. The application was transferred to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. It was assigned to the Fourth Section of the Court, at the same time as the applications of Mr Fritz Streletz, Mr Heinz Kessler and Mr Egon Krenz (nos. 34044/96, 35532/97 and 44801/98), likewise lodged against the Federal Republic of Germany (Rule 52 § 1).

On 9 December 1999 a Chamber constituted within that Section, composed of the following judges: Mr M. Pellonpää, *President*, Mr G. Ress, Mr A. Pastor Ridruejo, Mr L. Caflisch, Mr J. Makarczyk, Mr I. Cabral Barreto and Mrs N. Vajic, and also of Mr V. Berger, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was fixed in accordance with Article 27 §§ 2 and 3 of the Convention and Rule 24 (former version). The President of the Grand Chamber decided that in the interests of the proper administration of justice the present application and those of Mr Streletz, Mr Kessler and Mr Krenz should be assigned to the same Grand Chamber (Rules 24, 43 § 2 and 71).

7. The applicant and the Government each filed written observations on the admissibility and merits of the application.

8. A hearing on the admissibility and merits of the present application, and those of Mr Streletz, Mr Kessler and Mr Krenz, took place in public in the Human Rights Building, Strasbourg, on 8 November 2000 (Rule 54 § 4).

There appeared before the Court:

(a) *for the Government*

Mr K. Stoltenberg, *Ministerialdirigent*, *Agent*,

Mr C. Tomuschat, Professor of public international law,

Mr K.-H. Stör, *Ministerialrat*, *Advisers*;

(b) *for the applicant*

Mr P. Gardner, of the London Bar,

Mr D. Lammer, of the Berlin Bar, *Counsel*;

(c) *for Mr Streletz, Mr Kessler and Mr Krenz*

Mr F. Wolff,

Mr H.-P. Mildebrath,

Mr R. Unger, all of the Berlin Bar, *Counsel*.

The Court heard addresses by them.

9. By decisions of 8 November 2000, the Grand Chamber declared admissible the present application and those of Mr Streletz, Mr Kessler and Mr Krenz.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant is a German national who was born in 1952 and lives in Berlin (Germany).

A. The general background

11. Between 1949 and 1961 approximately two and a half million Germans fled from the German Democratic Republic ("the GDR") to the Federal Republic of Germany ("the FRG"). In order to staunch the endless flow of fugitives, the GDR built the Berlin Wall on 13 August 1961 and reinforced all the security measures along the border between the two German States, in particular by installing anti-personnel mines and automatic-fire systems (*Selbstschussanlagen*). Many people who tried to cross the border to reach the West subsequently lost their lives, either after triggering anti-personnel mines or automatic-fire systems or after being shot by East-German border guards. The official death toll, according to the FRG's prosecuting authorities, was 264. Higher figures have been advanced by other sources, such as the "13 August Working Party" (*Arbeitsgemeinschaft 13. August*), which speaks of 938 dead. In any event, the exact number of persons killed is very difficult to determine, since incidents at the border were kept secret by the GDR authorities.

12. The Council of State (*Staatsrat*) of the GDR laid down the principles to be followed in matters of national defence and security and organised defence with the

assistance of the GDR's National Defence Council (*Nationaler Verteidigungsrat – NVR*; Article 73 of the GDR's Constitution – see paragraph 22 below).

The Political Bureau (*Politbüro*) of the SED's Central Committee was the party's decision-making organ and the most powerful authority in the GDR. It took all policy decisions and all decisions concerning the appointment of the country's leaders. The number of its members varied: after the SED's XIth and last Congress in April 1986 it had 22 members and five candidate members.

The presidents of both these bodies, and the president of the GDR's parliament – the *Volkskammer* – were members of the GDR's Socialist Unity Party (*Sozialistische Einheitspartei Deutschlands* – "the SED").

The Secretary-General of the SED's Central Committee presided over the National Defence Council, and all the members of the Council were party officials. It met in general twice a year and took important decisions about the establishment and consolidation of the border-policing regime (*Grenzregime*) and about orders to open fire (*Schiessbefehle*).

13. GDR border guards (*Grenztruppen der DDR*) were members of the National People's Army (*Nationale Volksarmee* – "the NVA") and were directly answerable to the Ministry of Defence (*Ministerium für nationale Verteidigung*). The annual orders of the Minister of Defence were themselves based on decisions of the National Defence Council.

For example, in a decision of 14 September 1962 the National Defence Council made it clear that the orders (*Befehle*) and service instructions (*Dienstvorschriften*) laid down by the Minister of Defence should point out to border guards that they were "fully responsible for preservation of the inviolability of the State border in their sector and that 'border violators' (*Grenzverletzer*) should in all cases be arrested as adversaries (*Gegner*) or, if necessary, annihilated (*vernichtet*)". Similarly, a service instruction of 1 February 1967 stated: "Mines are to be laid in targeted positions and in close formation ... with a view to halting the movements of border violators and ... bringing about their arrest or annihilation".

From 1961 onwards, and especially during the period from 1971 to 1989, consolidation and improvement of the border security installations (*Grenzsicherungsanlagen*) and the use of firearms were regularly discussed at meetings of the National Defence Council. The orders issued by the Minister of Defence as a result likewise insisted on the need to protect the GDR's State border at all costs and stated that border violators had to be arrested or "annihilated"; these orders were then implemented by the commanding officers of the border guard regiments. All acts by border guards, including mine-laying and the use of firearms against fugitives, were based on this chain of command.

14. The applicant, who had enlisted for a three-year period of military service, from 1970 to 1973, at the instigation of his father, a career officer, was a member of the 35th regiment of the GDR's border guards from 1971 onwards.

15. In autumn 1989 the flight of thousands of citizens of the GDR to the FRG's embassies in Prague and Warsaw, and to Hungary, which had opened its border with Austria on 11 September 1989, demonstrations by tens of thousands of people in the streets of Dresden, Leipzig, East Berlin and other cities and the restructuring and

openness campaign conducted in the Soviet Union by Mikhail Gorbachev ("perestroika" and "glasnost") precipitated the fall of the Berlin Wall on 9 November 1989, the collapse of the system in the GDR and the process that was to lead to the reunification of Germany on 3 October 1990.

By a *note verbale* of 8 September 1989 Hungary suspended Articles 6 and 8 of the bilateral agreement with the GDR of 20 June 1969 (in which the two States had agreed to waive entry visas for each other's nationals and refuse travellers permission to leave for third countries), referring expressly, in doing so, to Articles 6 and 12 of the International Covenant on Civil and Political Rights (see paragraph 40 below) and to Article 62 (fundamental change of circumstances) of the Vienna Convention on the Law of Treaties.

16. During the summer of 1990 the GDR's newly-elected parliament urged the German legislature to ensure that criminal prosecutions would be brought in respect of the injustices committed by the SED (*die strafrechtliche Verfolgung des SED-Unrechts sicherzustellen*).

B. The proceedings in the German courts

17. In a judgment of 17 June 1993 the Berlin Regional Court (*Landgericht*) sentenced the applicant to one year and ten months' juvenile detention (*Jugendstrafe*), suspended on probation (*auf Bewährung*), for intentional homicide (*Totschlag*).

The Regional Court found that it had been established that during the night of 14 to 15 February 1972 he and another border guard had fired five bursts of two shots each which had caused the death of a fugitive trying to swim away from East-Berlin, after shouting out to him and firing warning shots (*Warnschüsse*). The victim was Mr Manfred Weylandt, aged 29, who was hit in the head by one of the shots and instantly sank and drowned. His body was recovered in the afternoon and handed over to officials of the Ministry of National Security (*Ministerium für Staatssicherheit*). The guards who had fired at Mr Weylandt were congratulated, decorated with the "Order of Merit of the GDR's border troops" (*Leistungsabzeichen der Grenztruppen der DDR*) and awarded a bonus of 150 marks. Mr Weylandt's widow was told that her husband had committed suicide, that the urn containing his ashes had already been buried and that she could apply to the cemetery management for the card identifying the burial site (*Grabkarte*).

On the basis of the criminal law applicable in the GDR at the material time, the Regional Court first declared the applicant guilty of intentional homicide (*Totschlag* – Article 113 of the GDR's Criminal Code – StGB-DDR; see paragraph 25 below); with regard to the question of limitation, the Regional Court referred to the established case-law of the Federal Court of Justice (see Federal Court of Justice, Criminal Cases, decisions published in the Monthly German Law Review – *Monatszeitschrift des Deutschen Rechts* 1994, p. 704 and in the New Criminal Law Review – *Neue Strafrechtszeitschrift* 1994, p. 330), and to the Act of 26 March 1993 on the suspension (*Ruhen*) of limitation in respect of injustices committed under the SED regime, also known as the Limitations Act (*Gesetz über das Ruhen der Verjährung bei SED-Unrechtstaten – Verjährungsgesetz*; see paragraph 39 below).

The Regional Court then applied the criminal law of the FRG, which was more lenient than that of the GDR, and convicted the applicant of intentional homicide

(*Totschlag* – Articles 212 and 213 of the FRG's Criminal Code – StGB; see paragraph 38 below).

The Regional Court also held that the applicant could not justify his conduct by pleading section 17(2) of the GDR's People's Police Act (*Volkspolizeigesetz* – see paragraph 31 below) because Mr Weylandt's attempt to cross the border could not be classified as a serious crime within the meaning of Article 213 § 3 of the GDR's Criminal Code (see paragraph 28 below).

It further held that the applicant could not rely on Article 258 of the GDR's Criminal Code (see paragraph 30 below). He had, admittedly, acted in accordance with the following order given to border guards at the time: "The unit (*der Zug*) ... will ensure the security of the GDR's State border ... its duty is not to permit border crossings (*Grenzdurchbrüche*), to arrest border violators or to annihilate them (*vernichten*) and to protect the State border at all costs (*unter allen Bedingungen*)...". Moreover, he had been part of a military system subject to absolute discipline and obedience in which he had undergone intense political indoctrination; in the event of a successful crossing of the border, the guards on duty knew that an investigation would be conducted by the military prosecutor (*Militärstaatsanwalt*). However, the Regional Court held that, even for a private soldier, it should have been obvious that firing at an unarmed person infringed the duty of humanity (*Gebot der Menschlichkeit*) and that the applicant could have fired into the water without having to fear the consequences of disobeying orders, since it would have been impossible to observe the exact trajectory of the bullets under water.

18. In a judgment of 26 July 1994, separate from its judgment of the same day concerning Mr Streletz and Mr Kessler, likewise applicants before the European Court (applications nos. 34044/96 and 35532/97) and former members of the National Defence Council, the Federal Court of Justice (*Bundesgerichtshof*) upheld the judgment of the Regional Court.

It first gave an account of the facts of the case, accepting that it could not be gainsaid that the first shots fired by the applicant had been warning shots, but pointing out that the subsequent shots had been fired immediately afterwards and that the two soldiers knew that the fugitive might be fatally wounded by these later shots.

The Federal Court of Justice went on to observe that a ground of justification which placed the prohibition of crossing the border above the right to life "flagrantly and intolerably infringe[d] elementary precepts of justice and human rights protected under international law" ("*verstösst offensichtlich und unerträglich gegen elementare Gebote der Gerechtigkeit und gegen völkerrechtlich geschützteMenschenrechte*") and was invalid. It also referred to the Universal Declaration of Human Rights.

The Federal Court of Justice held that the statutory grounds of justification provided in the law of the GDR should have been interpreted strictly and in a manner favourable to human rights (*menschenrechtsfreundlich*), so that the killing of an unarmed fugitive who merely wanted to swim from one part of Berlin to the other was unlawful (*rechtswidrig*).

Like the Regional Court, the Federal Court of Justice considered that it should have been obvious to the applicant that the order to annihilate "border violators" contravened the criminal law as laid down in Article 258 § 1 of the GDR's Criminal Code (see paragraph 30 below), the equivalent provision to which was Article 5 § 1 of the FRG's Military Criminal Code (see paragraph 38 below).

In conclusion, the Federal Court of Justice held that the decisive factor was that the killing (*Tötung*) of an unarmed fugitive by sustained fire (*Dauerfeuer*) was, in the circumstances of the case, such a dreadful act, not justifiable by any defence whatsoever, that it must have been immediately apparent and obvious even to an indoctrinated person that it breached the proportionality principle and the elementary prohibition on the taking of human life.

19. The applicant then lodged a constitutional appeal with the Federal Constitutional Court (*Bundesverfassungsgericht*).

20. In a judgment of 24 October 1996 the Federal Constitutional Court joined the applicant's appeal to those of Mr Streletz and Mr Kessler.

After hearing submissions from the Federal Ministry of Justice (*Bundesministerium für Justiz*) and the Administration of Justice Department of the Land of Berlin (*Senatsverwaltung für Justiz*), the Federal Constitutional Court dismissed the appeals as being ill-founded, basing its decision on the following grounds in particular:

"Article 103 § 2 of the Basic Law has not been infringed.

The appellants submitted that Article 103 § 2 of the Basic Law had been breached mainly on account of the fact that the criminal courts had refused to allow them to plead a ground of justification provided for at the material time in the GDR's provisions on the border-policing regime [*Grenzregime*], as interpreted and applied by the GDR authorities. The first, second and third appellants [Mr Hans Albrecht, who did not lodge any application with the Court, Mr Kessler and Mr Streletz] further submitted that they had been victims of the violation of a right guaranteed by Article 103 § 2 of the Basic Law in that they had been convicted, pursuant to the law of the Federal Republic, as indirect principals [*mittelbare Täter*].

Neither complaint is well-founded.

1. (a) Article 103 § 2 of the Basic Law is an expression of the principle of the rule of law... This principle forms the basis for the use of civil rights and liberties, by guaranteeing legal certainty, by subjecting State power to statute law and by protecting trust. In addition, the principle of the rule of law includes, as one of the guiding ideas behind the Basic Law, the requirement of objective justice... In the sphere of the criminal law, these concerns relating to the rule of law are reflected in the principle that no penalty may be imposed where there is no guilt. That principle is at the same time rooted in the human dignity and personal responsibility which are presupposed by the Basic Law and constitutionally protected by Articles 1 § 1 and 2 § 1 thereof, and to which the legislature must have regard when framing the criminal law... It also underlies Article 103 § 2 of the Basic Law...

Article 103 § 2 of the Basic Law secures these aims by allowing conviction only for acts which, at the time when they were committed, were defined by statute with sufficient precision as criminal offences. It further prohibits the imposition of a higher penalty than the one prescribed by law at the time when the offence was committed. In the interests of legal certainty and justice, it provides that in the sphere of the criminal law, which permits extremely serious interference with personal rights by the State, only the legislature may determine what offences shall be punishable. Article 103 § 2 of the Basic Law thus reinforces the rule of law by strictly reserving law-making to Parliament... The citizen's trust is earned by the fact that Article 103 § 2 gives him the assurance that the State will

punish only acts which, at the time when they were committed, had been defined by Parliament as criminal offences, and for which it had prescribed specific penalties. That allows the citizen to regulate his conduct, on his own responsibility, in such a way as to avoid committing a punishable offence. This prohibition of the retroactive application of the criminal law is absolute... It fulfils its role of guaranteeing the rule of law and fundamental rights by laying down a strict formal rule, and in that respect it is to be distinguished from other guarantees of the rule of law...

(b) Article 103 § 2 of the Basic Law protects against retroactive modification of the assessment of the wrongfulness of an act to the offender's detriment... Accordingly, it also requires that a statutory ground of justification which could be relied on at the time when an act was committed should continue to be applied even where, by the time criminal proceedings begin, it has been abolished. However, where justifications are concerned, in contrast to the definition of offences and penalties, the strict reservation of Parliament's law-making prerogative does not apply. In the sphere of the criminal law grounds of justification may also be derived from customary law or case-law. Where grounds of justification not derived from written law but nevertheless recognised at the material time subsequently cease to be applied, the question arises whether and to what extent Article 103 § 2 of the Basic Law likewise protects the expectation that they will continue to be applied. No general answer to that question need be given here, because in the instant case a justification – based partly on legal provisions and partly on administrative instructions and practice – has been advanced in circumstances that make it possible to restrict the absolute prohibition of retroactiveness in Article 103 § 2 of the Basic Law.

(aa) Article 103 § 2 of the Basic Law contemplates as the normal case that the offence was committed and falls within the scope of the substantive criminal law of the Federal Republic of Germany, as shaped by the Basic Law, and that it is being judged in that context. In this normal case the criminal law, having been enacted in accordance with the precepts of democracy, the separation of powers and respect for fundamental rights, and therefore meeting in principle the requirements of objective justice [*materielle Gerechtigkeit*], provides the rule-of-law basis [*rechstaatliche Anknüpfung*] necessary for the absolute, strict protection of trust afforded by Article 103 § 2 of the Basic Law.

(bb) This principle no longer applies unrestrictedly in that, as a consequence of reunification, and as agreed in the Unification Treaty, Article 315 of the Introductory Act to the Criminal Code, taken together with Article 2 of that Code, provides that GDR criminal law is to be applied when criminal proceedings are brought in respect of offences committed in the former GDR. That rule is a consequence of the Federal Republic's assumption of responsibility for the administration of criminal justice in the territory of the GDR; it is accordingly compatible with Article 103 § 2 of the Basic Law, since citizens of the former GDR are tried according to the criminal law that was applicable to them at the material time, the law of the Federal Republic in force at the time of conviction being applied only if it is more lenient. However, this legal situation, in which the Federal Republic has to exercise its authority in criminal matters on the basis of the law of a State that neither practised democracy and the separation of powers nor respected fundamental rights, may lead to a conflict between the mandatory rule-of-law precepts of the Basic Law and the absolute prohibition of retroactiveness in Article 103 § 2 thereof, which, as has been noted, derives its justification in terms of the rule of law [*rechtsstaatliche Rechtfertigung*] in the special trust reposed in criminal statutes when these have been enacted by a democratic legislature required to respect fundamental

rights. This special basis of trust no longer obtains where the other State statutorily defines certain acts as serious criminal offences while excluding the possibility of punishment by allowing grounds of justification covering some of those acts and even by requiring and encouraging them notwithstanding the provisions of written law, thus gravely breaching the human rights generally recognised by the international community. By such means those vested with State power set up a system so contrary to justice that it can survive only for as long as the State authority which brought it into being actually remains in existence.

In this wholly exceptional situation, the requirement of objective justice, which also embraces the need to respect the human rights recognised by the international community, makes it impossible for a court to accept such justifications. Absolute protection of the trust placed in the guarantee given by Article 103 § 2 of the Basic Law must yield precedence, otherwise the administration of criminal justice in the Federal Republic would be at variance with its rule-of-law premisses [*rechtsstaatliche Prämissen*]. A citizen now subject to the criminal jurisdiction of the Federal Republic is barred from relying on such grounds of justification; in all other respects the principle of trust continues to apply, every citizen enjoying the guarantee that if he is convicted it will be on the basis of the law applicable to him at the time when the offence was committed.

(cc) The Federal Republic has experienced similar conflicts when dealing with the crimes of National Socialism.

1. In that connection, the Supreme Court of Justice for the British Zone, and later the Federal Court of Justice, ruled on the question whether an act might become punishable retroactively if a provision of written law was disregarded on account of a gross breach of higher-ranking legal principles. They took the view that there could be provisions and instructions that had to be denied the status of law, notwithstanding their claim to constitute law, because they infringed legal principles which applied irrespective of whether they were recognised by the State; whoever had behaved in accordance with such provisions remained punishable... The Federal Court of Justice pointed out that in such cases the conduct of the offenders was not being judged by criteria which had acquired general validity only later. Nor were the offenders being called upon to answer the charges against them on the basis of criteria not yet valid or no longer valid at the material time. It could not be supposed that the offenders were not already familiar at the material time with the relevant principles, which were indispensable to human coexistence and belonged to the inviolable core of the law...

2. The Federal Constitutional Court has so far had to deal with the problem of 'statutory injustice' [*gesetzliches Unrecht*] only in spheres other than that of the criminal law. It has taken the view that in cases where positive law is intolerably inconsistent with justice the principle of legal certainty may have to yield precedence to that of objective justice. In that connection it has referred to the writings of Gustav Radbruch[1] ... and in particular to what has become known as Radbruch's formula... On that point it has repeatedly stressed that positive law should be disapplied only in absolutely exceptional cases and that a merely unjust piece of legislation, which is unacceptable on any enlightened view, may nevertheless, because it also remains inherently conducive to order, still acquire legal validity and thus create legal certainty... However, the period of National Socialist rule had shown that the legislature was capable of imposing gross 'wrong' by statute ..., so that, where a statutory provision was intolerably inconsistent with justice, that provision should be disapplied from the outset...

2. The decisions challenged meet the constitutional criterion set forth under 1.

(a) The Federal Court of Justice has since further developed its case-law when trying cases of so-called Government criminality [*Regierungskriminalität*] during the SED regime in the GDR... That case-law also forms the basis for the decisions challenged here. It states that a court must disregard a justification if it purports to exonerate the intentional killing of persons who sought nothing more than to cross the intra-German border unarmed and without endangering interests generally recognised as enjoying legal protection, because such a justification, which puts the prohibition on crossing the border above the right to life, must remain ineffective on account of a manifest and intolerable infringement of elementary precepts of justice and of human rights protected under international law. The infringement in question is so serious as to offend against the legal beliefs concerning the worth and dignity of human beings that are common to all peoples. In such a case positive law has to give way to justice.

The Federal Court of Justice described the relationship between the criteria which together make up Radbruch's formula and the human rights protected under international law as being that the criteria of Radbruch's formula, which were difficult to apply because of their imprecision, had been supplemented by more specific assessment criteria, since the international human-rights covenants provided a basis for determining when a State was infringing human rights according to the convictions of the world-wide legal community.

(b) That assessment is in keeping with the Basic Law. It is also supported by this Court's judgment of 31 July 1973 on the Basic Treaty [*Grundlagenvertrag*], which acknowledged that the GDR's practice at the intra-German border was inhuman, and that the Wall, the barbed wire, the 'death strip' [*Todesstreifen*] and the shoot-to-kill order were incompatible with the treaty obligations entered into by the GDR...

(c) Against the finding that a ground of justification derived from State practice and purporting to allow 'border violators' to be killed must be disregarded as an instance of extreme State injustice, it cannot be objected by the appellants that the right to life and the right to freedom of movement are not unreservedly guaranteed by the International Covenant on Civil and Political Rights and that even democratic States of the Western type, based on the rule of law, have adopted legal provisions which expressly provide for the use of firearms under certain circumstances, particularly in connection with the pursuit and arrest of criminals. Admittedly, the wording of the GDR's legal provisions, in so far as they regulated the use of firearms at the intra-German border, corresponded to that of the Federal Republic's provisions on the use of force [*unmittelbarer Zwang*]. But the findings in the impugned judgments show that, superimposed on those legal provisions, there were orders which left no room for limitation of the use of firearms according to the principle of proportionality, and which conveyed to the border guards on the spot the view of their superiors – and ultimately of the National Defence Council – that border violators were to be 'annihilated' if they could not be prevented from crossing the border by other means. Through that subordination of the individual's right to life to the State's interest in preventing border crossings the written law was eclipsed by the requirements of political expediency. Objectively speaking, this constituted extreme injustice.

(d) Nor can the appellants argue that, having accepted that a justification could be disregarded, the Federal Court of Justice had still not answered the question whether and in what circumstances the act thus held to be unlawful was punishable... To establish

punishability there is no need here for recourse to supra-positive legal principles [*überpositive Rechtsgrundsätze*]. Reference need only be made to the values which the GDR itself took as the basis for its criminal law. At the material time Articles 112 and 113 of the GDR's Criminal Code absolutely prohibited the intentional taking of human life and marked the seriousness of such offences by prescribing severe punishment. If, for the reasons discussed above, there is no admissible ground of justification for a homicide, the definition of the offences in the above-mentioned provisions of criminal law makes such a homicide a punishable criminal offence.

3. The first three appellants object that it was incompatible with Article 103 § 2 of the Basic Law for the Federal Court of Justice, applying the law of the Federal Republic, to find them guilty of intentional homicide as indirect principals. That objection fails.

The criminal courts established, on the basis of the provisions in force in the GDR at the material time, that the appellants had rendered themselves liable to punishment through their involvement in the killing of fugitives. The Federal Court of Justice expressly endorsed the Regional Court's finding that according to those provisions the appellants were guilty of incitement to murder (Articles 2 § 2, sub-paragraph 1 and 112 § 1 of the GDR's Criminal Code). Only at a second stage did the Federal Court of Justice apply the law of the Federal Republic of Germany, in one case on the basis of Article 315 § 4 of the Introductory Act to the Criminal Code taken together with Article 9 § 1 of the Criminal Code (the place of commission – or place of effect – rule) and in the other cases under Article 315 § 1 of the Introductory Act taken together with Article 2 § 3 of the Criminal Code, the law of the Federal Republic being more lenient than that of the GDR. In neither case were those decisions contrary to Article 103 § 2 of the Basic Law. Regarding the application of the place-of-commission rule, the Chamber [*Senat*] has already ruled on the issue in its decision of 15 May 1995 and it stands by that decision.

In view of its protective purpose, Article 103 § 2 of the Basic Law does not preclude the application of law more lenient than that applicable at the material time. The Federal Court of Justice, in agreement with academic writings ..., took the view that the more lenient law was the law which, on the basis of an overall comparison in the specific individual case, yielded a judgment more favourable to the offender, even if this or that criterion of assessment might appear to be less favourable than criteria laid down by the other law, the decisive factor being the legal consequences of the offence. That conclusion is compatible with the above-mentioned protective purpose of Article 103 § 2 of the Basic Law and cannot be questioned on constitutional grounds."

As regards more particularly the present applicant, the Federal Constitutional Court added:

"The impugned decisions are not open to any serious objections on constitutional grounds.

The Regional Court regarded it as established that the fourth appellant [K.-H. W.] both knew, when firing the fatal shots, that the fugitive was likely to be mortally wounded and willingly accepted that risk. All relevant grounds for excluding guilt were considered on the basis of the case-law of the highest courts and rejected. Criminal responsibility was thus established in a constitutionally unobjectionable manner. That applies also inasmuch as the requirements for acting in obedience to orders (*Handeln auf Befehl*) were held not to have been satisfied. The fact that the Federal Court of Justice, like the Regional Court, based its examination on Article 5 § 1 of the Military Criminal Code, as

interpreted by the highest courts, and treated it as being identical in content with Article 258 of the Criminal Code of the GDR is a matter for the criminal courts since it concerns the interpretation and application of the criminal law. On the basis of their findings of fact, those courts – likewise unobjectionably from a constitutional point of view – assumed that the ground for exempting the appellant from punishment could be excluded only under the second limb of Article 5 § 1 of the Military Criminal Code, because the unlawfulness of the order to use firearms at the border was obvious in the circumstances known to the appellant. According to the settled case-law of the Federal Court of Justice, that condition is satisfied where the breach of criminal law is clear beyond doubt; soldiers are not under any duty to check or make inquiries. What is decisive is rather whether the breach of the criminal law was so obvious that it was plain without further thought or inquiry to an average soldier possessed of the information which the recipient of the order had (cf. BGHSt 39 at 168 and 188 et seq.).

That interpretation satisfies the constitutional criterion of the principle of guilt (*Schuldgrundsatz*). Admittedly, misgivings as to whether the breach of criminal law was clear beyond all doubt might arise from the fact that the GDR leadership, exercising the authority of the State, broadened the justification intended to cover the conduct of the border guards and thereby made that justification available to them. That being so, it is not self-evident that the dividing-line between criminal and non-criminal conduct would be crystal clear to the average soldier, and it would be inconsistent with the principle of guilt to hold that the breach of criminal law was obvious to the soldiers on the sole basis that there had – objectively – been a serious breach of human rights; it must therefore be shown in greater detail why the individual soldier, in view of his education, indoctrination and other circumstances, was in a position to recognise that his action undoubtedly contravened the criminal law. The criminal courts did not discuss the facts in detail from this point of view in the initial proceedings. They did, however, show that the killing of an unarmed fugitive by sustained fire (*Dauerfeuer*) was, in the circumstances they had found, such a dreadful and wholly unjustifiable act that it must have been immediately apparent and obvious even to an indoctrinated person that it breached the principle of proportionality and the elementary prohibition on the taking of human life. The other explanations given by those courts likewise show sufficiently clearly, in the light of all the reasons stated in the judgments and the reference to statements made in the earlier decisions of 3 November 1992 (BGHSt 39 at 1) and 25 March 1993 (BGHSt 39 at 168) concerning cases of the same type, that the principle of guilt has been respected.

The length of the sentence likewise stands up to scrutiny from the constitutional point of view. In a manner that was both careful and wholly compatible with the Constitution, the courts below took all relevant points of view into consideration and weighed them against each other in an acceptable manner. The difference in gravity between the wrong done by the first, second and third appellants as givers of orders and that done by the fourth appellant as the recipient of orders was clearly reflected in the length of the sentences imposed. The special political situation prevailing in the former GDR, in particular, was taken into account in mitigation of the sentence imposed on the fourth appellant, whose prison sentence was suspended on probation."

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. The Treaty on German Unification

21. The Unification Treaty (*Einigungsvertrag*) of 31 August 1990, taken together with the Unification Treaty Act (*Einigungsvertragsgesetz*) of 23 September 1990, provides, in the transitional provisions of the Criminal Code (sections 315 to 315(c) of the Introductory Act to the Criminal Code (*Einführungsgesetz in das Strafgesetzbuch*)), that the applicable law is in principle the law of the place where an offence was committed (*Tatortrecht*). That means that, for acts committed by citizens of the GDR inside the territory of the GDR, the applicable law is in principle that of the GDR. Pursuant to Article 2 § 3 of the Criminal Code, the law of the FRG is applicable only if it is more lenient than GDR law.

B. The legislation applicable in the GDR at the material time

1. The 1968 and 1974 versions of the GDR's Constitution, identical as far as the provisions relevant to the present case are concerned, with the exception of Article 89 § 3 (see below)

22. The relevant provisions of the Constitution were the following:

Article 8

"The generally recognised rules of international law intended to promote peace and peaceful cooperation between peoples are binding (*sind verbindlich*) on the State and every citizen."

Article 19 § 2

"Respect for and protection of the dignity and liberty of the person (*Persönlichkeit*) are required of all State bodies, all forces in society and every citizen."

Article 30 §§ 1 and 2

"(1) The person and liberty of every citizen of the German Democratic Republic are inviolable.

(2) Restrictions are authorised only in respect of conduct punishable under the criminal law ... and must be prescribed by law. However, citizens' rights may be restricted only in so far as the law provides and when such restriction appears to be unavoidable (*unumgänglich*)."

Article 73

"The Council of State shall lay down the principles to be followed in matters of national defence and security. It shall organise the defence of the State with the assistance of the National Defence Council."

Article 89 § 3

(1968 version; in the 1974 version this sentence appeared in Article 89 § 2)

"Legal rules shall not contradict the Constitution"

2. The 1968 and 1979 versions of the GDR's Criminal Code, identical as far as the provisions relevant to the present case are concerned, with the exception of Article 213 (see below)

23. The first chapter of the Special Part (*Besonderer Teil*) of the Criminal Code, entitled "Crimes against the national sovereignty of the German Democratic Republic, peace, humanity and human rights", included the following introduction:

"The merciless punishment of crimes against the national sovereignty of the German Democratic Republic, peace, humanity and human rights, and of war crimes, is an indispensable prerequisite for stable peace in the world, for the restoration of faith in fundamental human rights (*Wiederherstellung des Glaubens an grundlegende Menschenrechte*) and the dignity and worth of human beings, and for the preservation of the rights of all."

24. Article 95 of the Criminal Code was worded as follows:

"Any person whose conduct violates human or fundamental rights, international obligations or the national sovereignty of the German Democratic Republic may not plead (*kann sich nicht berufen auf*) statute law, an order or written instructions in justification; he shall be held criminally responsible."

25. Article 113 § 1 of the Criminal Code prescribed a maximum sentence of ten years' imprisonment for intentional homicide (*Totschlag)*. Pursuant to Article 82 § 1 (4) of the Criminal Code, the limitation period for prosecution in respect of offences attracting a maximum penalty of ten years' imprisonment was 15 years.

26. Article 84 of the Criminal Code provided:

"Crimes against peace, humanity or human rights, and war crimes shall not be subject to the rules on limitation set out in this law [laying down the limitation periods for the various categories of offences]."

27. Article 119 of the Criminal Code was worded as follows:

"Any person present at the scene of an accident or a situation in which human life or health are endangered who fails to lend necessary assistance within his capacity to provide, although able to do so without any real danger to his own life or health and without breaching other important obligations, must give a satisfactory account of his conduct to a social organ of justice (*gesellschaftliches Organ der Rechtspflege*) or shall be punished by a public reprimand, a fine, a suspended sentence or a term of imprisonment of up to two years."

28. Article 213 of the Criminal Code (1968 version) provided:

"(1) Any person who enters or resides in the territory of the German Democratic Republic unlawfully, or contravenes the statutory provisions or restrictions on entry or exit, through-routes, time-limits or residence ... or leaves the territory of the German Democratic Republic ... without the State's authorisation shall be punished by a custodial sentence of up to two years, a suspended sentence with probation, imprisonment, a fine or a public reprimand.

...

(2) In serious cases the offender shall be sentenced to one to five years' imprisonment. Cases are to be considered serious in particular where

1. the offence (*die Tat*) is committed by causing damage to border security installations, through the use of specialised tools or equipment, with weapons or by dangerous means or methods;

2. the offence is committed through the fraudulent use or falsification of identity papers, border-crossing documents (*Grenzübertrittdokumente*) or other similar documents, or through the use of a hiding-place (*Versteck*);

3. the offence is committed by a group;

4. the offender has committed the offence more than once or has previously attempted to commit the offence inside the border-zone or has previously been convicted of illegally crossing the border.

(3) Preparations and attempts shall be criminal offences."

29. Article 1 § 3 of the second chapter of the Criminal Code, which defined the term "serious crime" (*Verbrechen*), was worded as follows:

"Serious crimes are attacks dangerous to society (*gesellschaftsgefährliche Angriffe*) against the sovereignty of the German Democratic Republic, peace, humanity or human rights, war crimes, offences against the German Democratic Republic and deliberately committed life-endangering criminal acts (*vorsätzlich begangene Straftaten gegen das Leben).* Likewise considered serious crimes are other offences dangerous to society which are deliberately committed against the rights and interests of citizens, socialist property and other rights and interests of society, which constitute serious violations of socialist legality and which, on that account, are punishable by at least two years' imprisonment or in respect of which, within the limits of the applicable penalties, a sentence of over two years' imprisonment has been imposed."

30. Article 258 of the Criminal Code provided:

"(1) Members of the armed forces shall not be criminally responsible for acts committed in execution of an order issued by a superior save where execution of the order manifestly violates the recognised rules of public international law or a criminal statute.

(2) Where a subordinate's execution of an order manifestly violates the recognised rules of public international law or a criminal statute, the superior who issued that order shall also be criminally responsible.

(3) Criminal responsibility shall not be incurred for refusal or failure to obey an order whose execution would violate the rules of public international law or a criminal statute."

3. The GDR's People's Police Act 1968

31. Section 17 of the People's Police Act, which came into force on 11 June 1968, provided:

"(2) The use of firearms is justified

(a) to prevent the imminent commission or continuation of an offence (*Straftat*) which appears, according to the circumstances, to constitute

– a serious crime (*Verbrechen*) against the sovereignty of the German Democratic Republic, peace, humanity or human rights

– a serious crime against the German Democratic Republic

– a serious crime against the person (*Persönlichkeit*)

– a serious crime against public safety or the State order

– any other serious crime, especially one committed through the use of firearms or explosives;

(b) to prevent the flight or effect the rearrest (*Wiederergreifung*) of persons

– who are strongly suspected of having committed a serious crime or who have been arrested or imprisoned for committing a serious crime

– who are strongly suspected of having committed a lesser offence (*Vergehen*), or who have been arrested, taken into custody or sentenced to prison for committing an offence, where there is evidence that they intend to use firearms or explosives, or to make their escape by some other violent means or by assaulting the persons charged with their arrest, imprisonment, custody or supervision, or to make their escape jointly with others

– who have received a custodial sentence and been incarcerated in a high-security or ordinary prison;

(c) against persons who attempt by violent means to effect or assist in the release of persons arrested, taken into custody or sentenced to imprisonment for the commission of a serious crime or lesser offence.

(3) The use of firearms must be preceded by a shouted warning (*Zuruf*) or warning shot (*Warnschuss*), save where imminent danger may be prevented or eliminated only through targetted use of the firearm.

(4) When firearms are used, human life should be preserved wherever possible. Wounded persons must be given first aid, subject to the necessary security measures being taken, as soon as implementation of the police operation permits.

(5) Firearms must not be used against persons who appear, from their outward aspect, to be children, or when third parties might be endangered. If possible, firearms should not be used against juveniles (*Jugendliche*) or female persons.

..."

Under section 20(3) of the Act, these provisions were also applicable to members of the National People's Army.

4. The GDR's State Borders Act 1982

32. Section 27 of the State Borders Act, which came into force on 1 May 1982, and which replaced the People's Police Act 1968, provided:

"(1) The use of firearms is the most extreme measure entailing the use of force against the person. Firearms may be used only where resort to physical force (*körperliche Einwirkung*), with or without the use of mechanical aids, has been unsuccessful or holds out no prospect of success. The use of firearms against persons is permitted only where shots aimed at objects or animals have not produced the result desired.

(2) The use of firearms is justified to prevent the imminent commission or continuation of an offence (*Straftat*) which appears in the circumstances to constitute a serious crime (*Verbrechen*). It is also justified in order to arrest a person strongly suspected of having committed a serious crime.

(3) The use of firearms must in principle be preceded by a shouted warning or warning shot, save where imminent danger may be prevented or eliminated only through targetted use of the firearm.

(4) Firearms must not be used when

the life or health of third parties may be endangered;

the persons appear, from their outward aspect, to be children; or

the shots would impinge on the sovereign territory of a neighbouring State.

If possible, firearms should not be used against juveniles (*Jugendliche*) or female persons.

(5) When firearms are used, human life should be preserved where possible. Wounded persons must be given first aid, subject to the necessary security measures being taken."

5. The legal provisions on the issue of passports and visas in the GDR

33. Under the legal provisions on the issue of passports and visas in the GDR (the Passport Act – *Passgesetz* – of 1963 and the Passport Act and Order on Passports and Visas of 28 June 1979, as supplemented by the Order of 15 February 1982 – *Passgesetz und Pass- und Visaanordnung vom 28. Juni 1979, ergänzt durch die Anordnung vom 15. Februar 1982*), it was impossible until 1 January 1989, for persons who enjoyed no political privileges, had not reached retirement age or had not been exempted on account of certain types of urgent family business, to leave the GDR legally.

Under Article 17 of the Order of 28 June 1979, no reasons had to be given before 1 January 1989 for decisions on applications for permission to leave, and no appeal lay against such decisions until the Order on Visas of 30 November 1988 was promulgated.

C. The International Covenant on Civil and Political Rights

1. The relevant provisions

34. The United Nations International Covenant on Civil and Political Rights was ratified by the GDR on 8 November 1974 (see paragraph 15 above).

The relevant provisions of the Covenant are worded as follows:

Article 6 §§ 1 and 2

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present

Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court."

Article 12 §§ 2 and 3

"2. Everyone shall be free to leave any country, including his own.

3. 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 recognised in the present Covenant."

2. The practice of the United Nations

35. Before the reunification of Germany several members of the United Nations Human Rights Committee, which is charged under Article 28 of the Covenant with the task of ensuring that Contracting Parties fulfil their obligations, expressed criticisms of the border-policing regime set up in the GDR.

The summary records of the 533rd and 534th meetings of the Human Rights Committee refer to the following comments, among other criticisms.

On 19 July 1984 Sir Vincent Evans, the British member of the Committee, pointed out

"[that with] respect to automatic weapons positioned along frontiers ... Article 6 § 2 of the Covenant authorised capital punishment 'only for the most serious crimes'. An attempt to cross a frontier, even illegally, could in no case be considered a most serious crime. The killing of a person in such circumstances was simply a summary execution, without trial – a practice that was unjustifiable under Article 6."

Sir Vincent also said

"that ... he was not convinced that the German Democratic Republic was really complying with the provisions of Article 12 of the Covenant. Everyone had the basic freedom to leave his own country; some restrictions were permitted by Article 12 § 3, but on three grounds only. The basic principle which determined whether or not persons might leave the German Democratic Republic was consistency with the rights and interests of that country; that seemed unduly broad when compared with the provisions of Article 12 § 3 of the Covenant."

On the same day Mr Birame Ndiaye, the Senegalese member of the Committee, said

"that ... it seemed that the Government of the German Democratic Republic envisaged the possibility of restricting freedom of movement on grounds other than those provided for in Article 12 of the Covenant."

36. By Resolution 1503, adopted in 1970, the United Nations Economic and Social Council put in place a procedure under which individuals could refer complaints to the Commission on Human Rights, which was charged with investigating whether these

complaints revealed the existence of a "consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms".

On account of its restrictive policy on the freedom of movement, the GDR was repeatedly criticised under the Resolution 1503 procedure for failure to comply with the general obligation to respect human rights enshrined in Articles 1 § 3, 55 and 56 of the United Nations Charter. Thus, in the years 1981 to 1983, the GDR appeared in the list of countries to be examined under the Resolution 1503 procedure, as more than fifty persons (the number required for it to be possible to speak of a "consistent pattern of gross violations") had complained to the Commission on Human Rights about the GDR's policy of holding its people captive. However, the GDR authorised some of the complainants to leave its territory, thus succeeding in bringing their number below fifty and avoiding censure.

D. The legislation applicable in the FRG at the material time

37. Article 103 § 2 of the Basic Law (*Grundgesetz*) provides:

"An act shall not be punishable unless it has been so defined by law before it was committed."

38. Article 212 of the FRG's Criminal Code prescribes a prison sentence of from five years to life, in particularly serious cases, for intentional homicide (*Totschlag*). Article 213 prescribes a prison sentence of under ten years in a less serious case of intentional homicide (*minderschwerer Fall des Totschlags*). Article 5 of the Military Criminal Code (*Wehrstrafgesetz – WStG*) provides:

"1. Where, in executing an order, a subordinate commits an unlawful act which constitutes a criminal offence, his guilt shall not be established unless he understands (*erkennt*) that the act is unlawful or unless that is obvious in the circumstances of which he is aware.

2. Where the subordinate's guilt is slight, regard being had to the special situation he found himself in when executing the order, the court may reduce his sentence in accordance with Article 49 § 1 of the Criminal Code, or even order his discharge in the case of a minor offence."

39. Section 1 of the Act of 26 March 1993 on the suspension (*Ruhen*) of limitation in respect of injustices committed under the SED regime, also known as the Limitations Act (*Gesetz über das Ruhen der Verjährung bei SED-Unrechtstaten – Verjährungsgesetz*), provides:

"For calculation of the limitation period for the prosecution of acts committed under the unjust regime of the Socialist Unity Party but in respect of which no prosecution was brought, by the express or implied will of the State or Party leadership of the former German Democratic Republic, for political reasons or reasons incompatible with the essential principles of a liberal order governed by the rule of law (*freiheitliche rechtsstaatliche Ordnung*), the period between 11 October 1949 and 2 October 1990 shall not be taken into account. During that period limitation was suspended."

III. THE FRG's RESERVATION IN RESPECT OF ARTICLE 7 § 2 OF THE CONVENTION

40. The instrument of ratification of the Convention deposited by the German Government on 13 November 1952 included a reservation and a declaration worded as follows:

"In conformity with Article 64 of the Convention [Article 57 since the entry into force of Protocol No 11], the German Federal Republic makes the reservation that it will only apply the provisions of Article 7 paragraph 2 of the Convention within the limits of Article 103 paragraph 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.

The territory to which the Convention shall apply extends also to Western Berlin."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 7 § 1 OF THE CONVENTION

41. The applicant submitted that the act on account of which he had been prosecuted did not constitute an offence, at the time when it was committed, according to the law of the GDR or international law, and that his conviction by the German courts had therefore breached Article 7 § 1 of the Convention, which provides:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

A. Arguments of those appearing before the Court

1. The applicant

42. According to the applicant, his conviction after the reunification of Germany was not foreseeable, and moreover he had never been prosecuted in the GDR. He alleged that even the German courts had accepted that the reason why he had not been prosecuted at the material time was that the act on account of which he had been charged did not constitute an offence under the criminal law of the GDR, regard being had to the wording of section 17(2) of the GDR's People's Police Act. He had acted at the material time in accordance with the orders he had been given, by firing at the fugitive, after shouting a warning, as the ultimate means of preventing the crossing of the border ("*letztes Mittel zur Verhinderung eines Grenzdurchbruchs*"). In general, moreover, border guards had no way of knowing whether fugitives were criminals or persons who simply wanted to leave the GDR.

The *ex post facto* interpretation of the GDR's criminal law by the courts of reunified Germany was not based on any case-law of the GDR's courts and would have been impossible for the applicant to foresee at the time of the events which gave rise to the charges. What had taken place, therefore, had not been a gradual development in the interpretation of GDR law but rather a total refusal to accept the justifications the applicant

had invoked, on the ground that these were contrary to the FRG's Basic Law (Radbruch's formula of "statutory unlawfulness" – *Radbruch'sche Formel des* "*gesetzlichen Unrechts*").

The applicant further alleged that the act in issue did not constitute an offence under international law either. Moreover, in the majority of States access to the border was forbidden or strictly regulated, and the use of firearms by border guards authorised if the persons hailed by them did not heed their warnings.

2. The Government

43. The Government submitted that the applicant, like any other citizen of the GDR, could easily have realised that the GDR's border-policing regime, with its unparalleled technical sophistication and its ruthless use of firearms, was directed against persons who had been forbidden to leave the GDR by administrative authorities which constantly refused, without giving reasons, to allow citizens of the GDR to travel to the FRG, and particularly to West Berlin. Consequently, he could also have foreseen that the killing of unarmed fugitives who were not a threat to anyone might give rise to a criminal prosecution under the relevant legal provisions, notwithstanding the contrary practice followed by the GDR regime. In particular, anyone could have foreseen that in the event of a change of regime in the GDR these acts might constitute criminal offences. That was particularly true in the case of Germany, a divided State, on account of the family and other ties which transcended the border.

The Government submitted that the German courts had interpreted GDR law in a legitimate way. If the GDR authorities had correctly applied their own relevant legal provisions, taking account of the GDR's international obligations after ratification of the International Covenant on Civil and Political Rights and of general human-rights principles, including protection of the right to life in particular, they should have arrived at the same interpretation. The question whether or not the International Covenant had been transposed into the GDR's domestic law was of no consequence in that regard.

B. The Court's assessment

1. General principles

44. Firstly, the Court reiterates the fundamental principles established by its case-law on the interpretation and application of domestic law.

While the Court's duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention (see, among many other authorities, the Schenk v. Switzerland judgment of 12 July 1988, Series A no. 140, p. 29, § 45).

Moreover, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, *mutatis mutandis*, the Kopp v. Switzerland judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 541, § 59).

45. Secondly, the Court reiterates the fundamental principles laid down in its case-law on Article 7 of the Convention, particularly in the S.W. v. the United Kingdom and

C.R. v. the United Kingdom judgments of 22 November 1995 (Series A nos. 335-B and 335-C, pp. 41-42, §§ 34-36, and pp. 68 and 69, §§ 32-34, respectively):

"The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.

Accordingly, as the Court held in its Kokkinakis v. Greece judgment of 25 May 1993 (Series A no. 260-A, p. 22, § 52), Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. The Court thus indicated that when speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see ... the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, pp. 71-72,§ 37).

However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in ... the ... Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."

2. Application of the above principles to the present case

46. In the light of the above principles concerning the scope of its supervision, the Court observes that it is not its task to determine whether the applicant as an individual was guilty, that being primarily a matter for the assessment of the domestic courts, but to consider, from the standpoint of Article 7 § 1 of the Convention, whether his act, at the time when it was committed, constituted an offence defined with sufficient accessibility and foreseeability by the law of the GDR or international law.

47. In that connection, it notes that one special feature of the present case is that its background is the transition between two States governed by two different legal systems, and that after reunification the German courts convicted the applicant for a crime he had committed as a GDR border guard.

(a) National law

i. The legal basis for the applicant's conviction

48. The Court notes that the Berlin Regional Court first found the applicant guilty of intentional homicide on the basis of the criminal law applicable in the GDR at the material time (Article 113 of the GDR's Criminal Code – see paragraph 17 above). It held that during the night of 14 to 15 February 1972, together with another border guard, he had fired five shots which had led to the death of a person trying to flee from East Berlin by swimming, and rejected the grounds of justification pleaded by the applicant, based on the law and practice of the GDR and the fact that he had been obeying orders. The Regional Court then applied the criminal law of the FRG, as being more lenient than that of the GDR, sentencing the applicant for intentional homicide to one year and ten months' juvenile detention (*Jugendstrafe*), suspended on probation (see paragraph 17 above). The Federal Court of Justice upheld the applicant's conviction, and the Federal Constitutional Court held that it was compatible with the Basic Law (see paragraphs 18 and 20 above).

49. The German courts thus applied the principle, formulated in the Unification Treaty of 31 August 1990 and in the Treaty's implementing Act of 23 September 1990, that for acts committed by citizens of the GDR inside the territory of the GDR the applicable law is that of the GDR, the law of the FRG being applied only where it is more lenient (*lex mitius* – see paragraph 21 above).

50. The legal basis for the applicant's conviction was therefore the criminal law of the GDR applicable at the material time, and his sentence corresponded in principle to the one prescribed in the relevant provision of the GDR's legislation; in the event, the sentence imposed on the applicant was lower, thanks to the principle of applying the more lenient law, which was that of the FRG.

ii. Grounds of justification under GDR law

51. However, the applicant submitted that by virtue of the grounds of justification provided for in section 17(2) of the People's Police Act, taken together with Article 213 of the GDR's Criminal Code (see paragraphs 28 and 31 above), he had acted in accordance with the law of the GDR, and moreover that he had never been prosecuted on that account in the GDR.

52. Since the term "law" in Article 7 § 1 of the Convention comprises written as well as unwritten law, the Court must first consider the relevant rules of the GDR's written law before examining whether the interpretation of those rules by the German courts complied with Article 7 § 1. In doing so it must also analyse, with regard to that provision, the nature of the GDR's State practice, which was superimposed on these rules at the material time.

53. As the event in issue took place in 1972, the rules of written law applicable at the material time included the 1968 version of the Criminal Code, the People's Police Act 1968 and the 1968 version of the GDR's Constitution.

54. It is true that section 17(2) of the People's Police Act justified the use of firearms to prevent the imminent commission or continuation of an offence which appeared in the circumstances to constitute a serious crime or in order to arrest a person strongly suspected of having committed a serious crime. The term "serious crime" was defined in Article 213 § 3 of the Criminal Code, which listed the cases in which the offence of illegal border-crossing was considered to be serious, notably where it was committed "by

causing damage to border security installations", "with weapons", "through the fraudulent use or falsification of identity papers" or "by a group".

55. Section 17 of the People's Police Act thus listed exhaustively the conditions under which the use of firearms was authorised and further provided, in subsection 4: "When firearms are used, human life should be preserved where possible. Wounded persons must be given first aid." In addition, Article 119 of the Criminal Code defined the offence of failing to lend assistance to a person in danger (see paragraph 27 above).

56. These provisions, which therefore expressly included the principle of proportionality and the principle that human life must be preserved, should also be read in the light of the principles enshrined in the Constitution of the GDR itself. Article 89 § 3 of the Constitution provided: "Legal rules shall not contradict the Constitution"; Article 19 § 2 provided: "Respect for and protection of the dignity and liberty of the person are required of all State bodies, all forces in society and every citizen"; lastly, Article 30 §§ 1 and 2 provided: "The person and liberty of every citizen of the German Democratic Republic are inviolable" and "citizens' rights may be restricted only in so far as the law provides and when such restriction appears to be unavoidable (*unumgänglich*)" (see paragraph 22 above).

57. Moreover, the first chapter of the Special Part of the GDR's Criminal Code provided: "The merciless punishment of crimes against ... peace, humanity and human rights ... is an indispensable prerequisite for stable peace in the world, for the restoration of faith in fundamental human rights (*Wiederherstellung des Glaubens an grundlegende Menschenrechte*) and the dignity and worth of human beings, and for the preservation of the rights of all" (see paragraph 23 above).

58. In the present case the German courts convicted the applicant for firing several shots at a person who had attempted to swim across the border between the two German States. The victim had been unarmed and did not represent a threat to anyone; his one aim had been to leave the GDR, as it was almost impossible at that time for ordinary citizens, apart from pensioners and a few privileged persons, to leave the GDR legally (see the statutory provisions on the issue of passports and visas in the GDR – paragraph 33 above). His attempt to cross the border, although prohibited by GDR law, could not therefore be classified as a serious crime since it did not fall into the category of serious offences as defined in Article 213 § 3 of the GDR's Criminal Code.

59. In the light of the above-mentioned principles, enshrined in the Constitution and the other legal provisions of the GDR, the Court therefore considers that the applicant's conviction by the German courts, which had interpreted the above provisions and applied them to the case in issue, does not appear at first sight to have been either arbitrary or contrary to Article 7 § 1 of the Convention.

60. Admittedly, the German courts took different approaches to the interpretation of the grounds of justification pleaded by the applicant on the basis of section 17(2) of the GDR's People's Police Act in particular.

The Berlin Regional Court held that these grounds of justification did not apply in the present case because Mr Weylandt's attempt to cross the border could not be classified as a serious crime within the meaning of Article 213 § 3 of the GDR's Criminal Code (see paragraph 17 above).

The Federal Court of Justice considered that the statutory grounds of justification in GDR law should have been interpreted restrictively and in a manner favourable to human rights, so that the killing of an unarmed fugitive who merely wanted to swim from one part of Berlin to the other was unlawful (see paragraph 18 above).

Lastly, the Federal Constitutional Court held: "In this wholly exceptional situation, the requirement of objective justice, which also embraces the need to respect the human rights recognised by the international community, makes it impossible for a court to accept such a defence. Absolute protection of the trust placed in the guarantee given by Article 103 § 2 of the Basic Law must yield precedence, otherwise the administration of criminal justice in the Federal Republic would be at variance with its rule-of-law premisses" (see paragraph 20 above).

61. However, as the interpretation and application of domestic law are primarily matters to be assessed by the domestic courts, it is not for the Court to express an opinion on these different approaches, which illustrate the legal complexity of the case. It is sufficient for the Court to satisfy itself that the result reached by the German courts was compatible with the Convention, and specifically with Article 7 § 1.

iii. Grounds of justification derived from GDR State practice

62. Since the term "law" in Article 7 § 1 of the Convention includes unwritten law, the Court must also, before going further into the merits of the case, analyse the nature of the GDR's State practice, which was superimposed on the rules of written law at the time of the offence in issue.

63. In that context, it should be pointed out that at the material time the applicant was not prosecuted for the offence in the GDR. This was because of the contradiction between the principles laid down in the GDR's Constitution and its legislation, on the one hand, which were very similar to those of a State governed by the rule of law, and the repressive practice of the border-policing regime in the GDR and the orders issued to protect the border, on the other.

64. To staunch the endless flow of refugees, the GDR built the Berlin Wall on 13 August 1961 and reinforced all the security measures along the border between the two German States with anti-personnel mines and automatic-fire systems. In addition to these measures, border guards were ordered "not to permit border crossings, to arrest border violators (*Grenzverletzer*) or to annihilate them (*vernichten*) and to protect the State border at all costs". In the event of a successful crossing of the border, the guards on duty knew that an investigation would be conducted by the military prosecutor; in the opposite case, they could expect congratulations (see paragraph 17 above).

65. As the German courts found, the above measures and orders had incontestably been decided upon by the organs of government of the GDR mentioned in Article 73 of its Constitution (see paragraph 22 above), namely the Council of State and the National Defence Council.

66. As the Court held in its *Streletz, Kessler and Krenz* judgment of 22 March 2001 (§§ 71-72), even though the aim of the above State practice had been to protect the border between the two German States "at all costs" in order to preserve the GDR's existence, which was threatened by the massive exodus of its own population, the reason of State thus invoked must be limited by the principles enunciated in the Constitution and legislation of the GDR itself; it must above all respect the need to preserve human life,

enshrined in the GDR's Constitution, People's Police Act and State Borders Act, regard being had to the fact that even at the material time the right to life was already, internationally, the supreme value in the hierarchy of human rights (see paragraph 96 below).

67. The Court considers that recourse to anti-personnel mines and automatic-fire systems, in view of their automatic and indiscriminate effect, and the categorical nature of the border guards' orders to "annihilate border violators and protect the border at all costs" flagrantly infringed the fundamental rights enshrined in Articles 19 and 30 of the GDR's Constitution, which were essentially confirmed by the GDR's Criminal Code (Article 213) and successive statutes on the GDR's borders (section 17(2) of the People's Police Act 1968 and section 27(2) of the State Borders Act 1982). This State practice was also in breach of the obligation to respect human life and the other international obligations of the GDR, which, on 8 November 1974, ratified the International Covenant on Civil and Political Rights, expressly recognising the right to life and to the freedom of movement (see paragraph 34 above), regard being had to the fact that it was almost impossible for ordinary citizens to leave the GDR legally. Even though the use of anti-personnel mines and automatic-fire systems ceased in about 1984, the border guards' orders remained unchanged until the fall of the Berlin Wall in November 1989.

iv. Foreseeability of the conviction

68. However, the applicant argued that as a GDR border guard he had been the last link in the chain of command and that he had always obeyed the orders he had been given. His conviction by the German courts, therefore, had not been foreseeable and it had been absolutely impossible for him to foresee that he would one day be called to account in a criminal court because of a change of circumstances.

69. That argument merits consideration.

70. In the *Streletz, Kessler and Krenz v. Germany* judgment (ibid., paragraph 78), the Court stressed the former leaders' obvious responsibility for the deliberate implementation and continuation of a State practice which they knew or should have known to be in flagrant breach of the principles of the GDR's own legislation and internationally protected human rights. However, that reasoning does not, as it stands, apply to the facts of the present case.

71. As a young soldier (aged 20 at the material time) stationed on the border between the two German States, the applicant had undergone the indoctrination of young NVA recruits, had to obey his superiors' orders to protect the border "at all costs" and ran the risk of becoming the subject of an investigation by the military prosecution service if a fugitive succeeded in crossing the border (see paragraph 17 above).

72. In the present case the question therefore arises to what extent the applicant, as a private soldier, knew or should have known that firing on persons who merely wanted to cross the border was an offence according to GDR law.

73. In that connection, the Court first observes that the written law was accessible to all. The provisions concerned were the Constitution and Criminal Code of the GDR, not obscure regulations. The axiom "ignorance of the law is no defence" applied to the applicant too.

74. Moreover, he had voluntarily enlisted for a three-year period in the NVA. Every citizen of the GDR knew the State's restrictive policy on the freedom of movement, the nature of the border-policing regime, the desire of the majority of its people to be allowed to go abroad and the fact that a number of them, known as "fugitives from the Republic" (*Republikflüchtlinge*), attempted by all available means to do so. The applicant therefore knew or should have known that enlisting for a three-year period of military service amounted to giving his allegiance to the regime in power and entailed the possibility of being posted to the border, where he would run the risk of being obliged to fire on unarmed fugitives.

75. Furthermore, the Court takes the view that even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognised human rights, in particular the right to life, which is the supreme value in the hierarchy of human rights.

76. Even though the applicant was in a particularly difficult situation on the spot, in view of the political context in the GDR at the material time, such orders could not justify firing on unarmed persons who were merely trying to leave the country.

77. Already at that time Article 95 of the 1968 version of the GDR's Criminal Code provided: "Any person whose conduct violates human or fundamental rights ... may not plead statute law, an order or written instructions in justification; he shall be held criminally responsible" (see paragraph 24 above).

78. Similarly, Article 258 of the GDR's Criminal Code provided: "Members of the armed forces shall not be criminally responsible for acts committed in execution of an order issued by a superior save where execution of the order manifestly violates the recognised rules of public international law or the written criminal law" (see paragraph 30 above).

79. In addition, the principles affirmed in Resolution 95 (I) of the United Nations General Assembly in 1946 (known as "the Nuremberg principles") include the following principle: "The fact that the Defendant acted pursuant to [an order] shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires".

80. The Court notes that the German courts examined in detail the extenuating circumstances in the applicant's favour before giving the following ruling: "The decisive factor is that the killing of an unarmed fugitive by sustained fire was, in the circumstances of the case, such a dreadful act, not justifiable by any defence whatsoever, that it must have been immediately apparent and obvious even to an indoctrinated person that it breached the proportionality principle and the elementary prohibition on the taking of human life" (see paragraph 18 above).

81. Moreover, in passing sentence, the German courts duly took account of the differences in responsibility between the former leaders of the GDR and the applicant by sentencing the former to terms of imprisonment (previously cited Streletz, Kessler and Krenz judgment, § 53), whereas the applicant in the present case was given a suspended sentence subject to probation (see paragraphs 17 and 18 above).

82. Furthermore, the fact that the applicant had not been prosecuted in the GDR, and was not prosecuted and convicted by the German courts until after the reunification,

on the basis of the legal provisions applicable in the GDR at the material time, does not in any way mean that his act was not an offence according to the law of the GDR.

83. In that connection, the Court notes that the problem Germany had to deal with after reunification as regards the attitude to adopt *vis-à-vis* persons who had committed crimes under a former regime has also arisen for a number of other States which have gone through a transition to a democratic regime.

84. The Court considers that it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.

85. Indeed, the Court reiterates that for the purposes of Article 7 § 1, however clearly drafted a provision of criminal law may be, in any legal system, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances (see the S.W. v. the United Kingdom and C.R. v. the United Kingdom judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41-42, §§ 34-36, and pp. 68-69, §§ 32-34 respectively – paragraph 45 above). Admittedly, that concept applies in principle to the gradual development of case-law in a given State subject to the rule of law and under a democratic regime, factors which constitute the cornerstones of the Convention, as its preamble states (see paragraph 86 below), but it remains wholly valid where, as in the present case, one State has succeeded another.

86. Contrary reasoning would run counter to the very principles on which the whole system of protection put in place by the Convention is built. The framers of the Convention referred to those principles in the preamble to the Convention when they reaffirmed “their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend” and declared that they were “like-minded” and had “a common heritage of political traditions, ideals, freedom and the rule of law”.

87. It should also be pointed out that the parliament of the GDR democratically elected in 1990 had expressly requested the German legislature to ensure that criminal prosecutions would be brought in respect of the injustices committed by the SED (see paragraph 16 above). That makes it reasonable to suppose that, even if the reunification of Germany had not taken place, a democratic regime taking over from the SED regime in the GDR would have applied the GDR’s legislation and prosecuted the applicant, as the German courts did after reunification.

88. Moreover, regard being had to the pre-eminence of the right to life in all international instruments on the protection of human rights (see paragraphs 94, 95 and 96 below), including the Convention itself, in which the right to life is guaranteed in Article 2, the Court considers that the German courts’ strict interpretation of the GDR’s legislation in the present case was compatible with Article 7 § 1 of the Convention.

89. The Court notes in that connection that the first sentence of Article 2 § 1 of the Convention enjoins States to take appropriate steps to safeguard the lives of those within

their jurisdiction. That implies a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences which endanger life, backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions (see, among other authorities, the Osman v. the United Kingdom judgment of 28 October 1998, *Reports* 1998–VIII, p. 3159, § 115, and *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, 10.10.2000, § 77, unreported).

90. The Court considers that a State practice such as the GDR's border-policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7 § 1 of the Convention. That practice, which emptied of its substance the legislation on which it was supposed to be based, and which was imposed on all organs of the GDR, including its judicial bodies, cannot be described as "law" within the meaning of Article 7 of the Convention.

91. Having regard to all of the above considerations, the Court holds that at the time when it was committed the applicant's act constituted an offence defined with sufficient accessibility and foreseeability in GDR law.

(b) International law

i. Applicable rules

92. The Court considers that it is its duty to examine the present case from the standpoint of the principles of international law also, particularly those relating to the international protection of human rights, especially because the German courts used arguments grounded on those principles (see paragraph 18 above).

93. It is therefore necessary to consider whether, at the time when it was committed, the applicant's act constituted an offence defined with sufficient accessibility and foreseeability under international law, particularly the rules of international law on the protection of human rights.

ii. International protection of the right to life

94. The Court notes in the first place that in the course of the development of that protection the relevant conventions and instruments have constantly affirmed the pre-eminence of the right to life.

95. Article 3 of the Universal Declaration on Human Rights of 10 December 1948, for example, provides: "Everyone has the right to life". That right was confirmed by the International Covenant on Civil and Political Rights of 16 December 1966, ratified by the GDR on 8 November 1974, Article 6 of which provides: "Every human being has the inherent right to life" and "No one shall be arbitrarily deprived of his life" (see paragraph 34 above). It is also included in the Convention, Article 2 § 1 of which provides:

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

96. The convergence of the above-mentioned instruments is significant: it indicates that the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights.

97. However, the applicant alleged that his conduct had been justified by the exceptions in Article 2 § 2 of the Convention, which provides:

"Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

98. The Court considers that, regard being had to the arguments set out above, the deaths of the fugitives were in no sense the result of a use of force which was "absolutely necessary"; the State practice implemented in the GDR did not protect anyone against unlawful violence, was not pursued in order to make any arrest that could be described as "lawful" according to the law of the GDR and had nothing to do with the quelling of a riot or insurrection, as the fugitives' only aim was to leave the country.

99. It follows that the applicant's conduct was not justified in any way under Article 2 § 2 of the Convention.

iii. International protection of the freedom of movement

100. Like Article 2 § 2 of Protocol No. 4 to the Convention, Article 12 § 2 of the International Covenant on Civil and Political Rights provides: "Everyone shall be free to leave any country, including his own." Restrictions on that right are authorised only where they are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the Covenant (see paragraph 34 above).

101. Still in connection with the right to freedom of movement, the Court points out that when Hungary opened its border with Austria on 11 September 1989 it denounced a bilateral agreement between itself and the GDR, referring expressly to Articles 6 and 12 of the International Covenant and to Article 62 (fundamental change of circumstances) of the Vienna Convention on the law of treaties (see paragraph 15 above).

iv. The GDR's State responsibility and the applicant's individual responsibility

102. Thus, by installing anti-personnel mines and automatic-fire systems along the border, and by ordering border guards to "annihilate border violators and protect the border at all costs", the GDR had set up a border-policing regime that clearly disregarded the need to preserve human life, which was enshrined in the GDR's Constitution and legislation, and the right to life protected by the above-mentioned international instruments; that regime likewise infringed the right to the freedom of movement mentioned in Article 12 of the International Covenant on Civil and Political Rights.

103. If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State responsibility the applicant individually bore criminal responsibility at the material time. Even supposing that such responsibility cannot be inferred from the above-mentioned international instruments on the protection of human rights, it may be deduced from those instruments when they are read together with Article 95 of the GDR's Criminal

Code, which explicitly provided, and from as long ago as 1968 moreover, that individual criminal responsibility was to be borne by those who violated human rights, fundamental freedoms or the GDR's international obligations.

104. Although the applicant was not directly responsible for the above State practice, and although the event in issue took place in 1972, and therefore before ratification of the International Covenant, he should have known, as an ordinary citizen, that firing on unarmed persons who were merely trying to leave their country infringed fundamental and human rights, as he could not have been unaware of the legislation of his own country.

105. In the light of all of the above considerations, the Court considers that at the time when it was committed the applicant's act constituted an offence defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights.

106. In addition, the applicant's conduct could be considered, likewise under Article 7 § 1 of the Convention, from the standpoint of other rules of international law, notably those concerning crimes against humanity. However, the conclusion reached by the Court (see paragraph 105 above) makes consideration of that point unnecessary.

(c) The question of limitation

107. The Court observes, firstly, that it has jurisdiction to review the circumstances complained of by an applicant in the light of the entirety of the Convention's requirements. In the performance of that task it is, notably, free to attribute to the facts of the case, as found to be established on the evidence before it, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner; furthermore, it has to take account not only of the original application but also of the additional documents intended to complete the latter by eliminating initial omissions or obscurities (see, among other authorities, the Foti and Others v. Italy judgment of 10 December 1982, Series A no. 56, p. 15, § 44).

108. The Court notes that in the present case, contrary to the position in the Foti case, the applicant did not raise the question of limitation either in his original application or in his additional written or oral submissions.

109. However, even if he had done so, the Court considers that it is not required to consider the question in the present case for the following reasons.

110. Admittedly, under Article 82 § 1 (4) of the 1968 version of the GDR's Criminal Code, the limitation period for offences attracting a maximum sentence of ten years' imprisonment, a category which included intentional homicide, was fifteen years (see paragraph 25 above). But Article 84 of the same Code provided: "Crimes against peace, humanity or human rights ... shall not be subject to the rules on limitation set out in this law" (see paragraph 26 above). That provision, which excluded certain categories of crime, including human rights violations, from those subject to limitation, was already in force at the time of the act in issue. Similarly, the right to life was also, at that time, already one of the human rights whose violation was excluded from the rules on limitation by Article 84 of the GDR's Criminal Code, even though it was not recognised by the GDR in a treaty until 1974. The Court has found in the present case that the applicant committed a violation of human rights (see paragraph 105 above). Accordingly, even if he had pleaded limitation, his argument could not have been accepted.

111. Moreover, on 26 March 1993 the FRG enacted a statute of which the first section provided for the suspension of limitation in respect of "acts committed under the unjust regime of the Socialist Unity Party"; the result of that suspension was to make limitation periods begin to run, not at the time when the offence was committed, but on 3 October 1990, when the GDR ceased to exist. Similar legislation was enacted in Poland in respect of "communist crimes", particularly those which involved human rights violations between 1939 and 1989. However, given that it can be deduced from the law of the GDR itself that the offence for which the applicant was prosecuted was not subject to limitation (see paragraph 110 above), the Court is not required to consider the scope of the FRG's Limitations Act of 26 March 1993.

112. The Court accordingly considers that, even if the applicant had pleaded limitation, his argument could not have been accepted on account of the rule laid down in Article 84 of the GDR's Criminal Code, whatever the scope of the Limitations Act adopted by the FRG on 26 March 1993 might be.

(d) Conclusion

113. Accordingly, the applicant's conviction by the German courts after the reunification did not breach Article 7 § 1.

114. In the light of that finding, the Court is not required to consider whether his conviction was justified under Article 7 § 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF THE CONVENTION

115. The applicant submitted that the decision of the Federal Constitutional Court was incompatible with Article 1 of the Convention, which provides:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

116. According to the applicant, the decision of the Federal Constitutional Court created a discriminatory system of justice through its reliance on "Radbruch's formula" (see paragraph 20 above) in order to deny former citizens of the GDR, now citizens of the FRG, the possibility of invoking the principle of the non-retroactiveness of criminal statutes enshrined in Article 7 § 1 of the Convention.

117. The Court reiterates that it has jurisdiction to review the circumstances complained of by an applicant in the light of the entirety of the Convention's requirements. In the performance of that task it is, notably, free to attribute to the facts of the case, as found to be established on the evidence before it, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner (see, among other authorities, the Foti and Others v. Italy judgment, cited above, p. 15, § 44, and *Rehbock v. Slovenia*, 28.11.2000, no. 29462/95, ECHR-..., § 63).

118. Thus, in the present case, the applicant's complaint cannot be raised under Article 1 of the Convention, which is a framework provision that can not be breached on its own (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 90, § 238). It could, however, be examined under Article 14 of the Convention taken together with Article 7, as the applicant complained in substance of discrimination

he had allegedly suffered as a former citizen of the GDR. Article 14 of the Convention provides:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

119. However, the Court considers that the principles applied by the Federal Constitutional Court had general scope and were therefore equally valid in respect of persons who were not former nationals of the GDR.

120. Accordingly there has been no discrimination contrary to Article 14 of the Convention taken together with Article 7.

FOR THESE REASONS, THE COURT

1. *Holds* by fourteen votes to three that there has been no violation of Article 7 § 1 of the Convention;

2. *Holds* unanimously that there has been no discrimination contrary to Article 14 of the Convention taken together with Article 7 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 March 2001.

Luzius Wildhaber

President

Michele De Salvia

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Loucaides;

(b) concurring opinion of Mr Bratza, joined by Mrs Vajic;

(c) partly dissenting opinion of Mr Cabral Barreto;

(d) partly dissenting opinion of Mr Pellonpää, joined by Mr Zupancic.

L.W.

M. De S.

CONCURRING OPINION OF JUDGE LOUCAIDES

I agree with the conclusions set out in the judgment but at the same time I refer to my separate opinion in the case of Streletz, Kessler and Krenz v. Germany, where I found that the conduct for which the applicants were convicted amounted to crimes against humanity under customary international law. I believe that the same applies in the present case.

There are two basic factual differences between the present case and the above-mentioned case:

(a) unlike the applicants in the other case, the applicant in the present case was not involved in the organisation of the former GDR's border-control system, his role being confined to duties as a border guard during the course of which he killed a young man who was trying to escape from East Berlin by swimming;

(b) the killing in question took place in February 1972.

I do not think that these differences between the two cases justify an approach different from the one I adopted in the Streletz, Kessler and Krenz v. Germany case.

As I explained in my separate opinion in the latter case, a crime against humanity is established in cases of murder committed against a civilian population as part of systematic or organised conduct in furtherance of a certain policy. This cannot, in my opinion, be interpreted as meaning that in order for a person to be held responsible for that crime he must have committed many murders against a number of persons belonging to the civilian population or that he must himself initiate or be directly responsible for the systematic or organised conduct which led to the commission of murder.

I believe that the reasonable interpretation of the notion of a crime against humanity, as established through customary international law, is that the crime may be committed by any individual act of murder against any member of the civilian population so long as that act is part of an organised pattern of behaviour aimed at the indiscriminate killing of members of the civilian population in furtherance of a certain policy. In fact, a crime against humanity can only reasonably be held to have been committed where there is a series of individual killings by persons who carry out the relevant inhuman policy on a systematic basis. Therefore, any person who knowingly kills a member of the civilian population as part of a general plan should be considered responsible for the crime in question. An interpretation contrary to the above would lead to the absurd result that only the organisers of mass murders may be responsible for crimes against humanity, but not the individuals who by a single murder knowingly execute the relevant plan.

My interpretation is supported by a similar approach in the recent ICTY case of Tadic[1] where the International Tribunal held:

"Clearly a single act by a perpetrator taken within the context of a widespread systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable... Even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution."

Further support for the same approach is derived from the following statement of the International Tribunal in the Vukovar Hospital Rule 61 Decision, cited by the Appeals Chamber in the Tadic case:[2]

"...as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above."

Therefore, I believe that, by associating himself as a border guard with the execution of the relevant murderous plan against civilians who attempted to escape from the GDR and by intentionally killing a fugitive, the applicant in this case became responsible for the commission of a crime against humanity.

On the other hand, the fact that the applicant's relevant conduct took place in 1972, i.e. about a year before the adoption of the UN Resolution 3074 (XXVIII), which, as I stated in my above-mentioned separate opinion, rendered indisputable the position that the Nuremberg principles were customary international law, cannot reasonably result in the conduct in question not being considered a crime against humanity. This is because the establishment of such a crime in customary international law even as early as 1972 could not be seriously questioned taking into account the fact that the resolution in question was part of a sequence of resolutions on the same subject-matter from 1969 to 1972, and it is reasonable to assume that it was based on and expressed a view which prevailed at least over the years immediately preceding its adoption.

In the light of the above, I find that the act for which the applicant in this case was convicted was also a crime against humanity under the principles of customary international law.

CONCURRING OPINION OF JUDGE Sir Nicolas BRATZA,

JOINED BY JUDGE VAJIC

I have with some hesitation voted with the majority of the Court in favour of a finding that the applicant's rights under Article 7 of the Convention were not violated in the present case.

I see considerable force in the view of Judge Pellonpää that, to a soldier in the situation of the present applicant, operating as he was under the legal system and culture which then prevailed in the GDR and indoctrinated in the importance of preserving the integrity of the border at all costs, it would not have been reasonably foreseeable that to shoot at a person intent on escape, after shouting a warning and firing warning shots, would amount to the commission of a criminal offence.

I note that the Federal Constitutional Court itself appeared to share these misgivings. Having observed that the GDR leadership had, with the authority of the State, broadened the defence that was intended to cover the border soldiers, the Court went on as follows:

"That being so, it is not self-evident that the dividing-line between criminal and non-criminal conduct would be crystal clear to the average soldier, and it would be

inconsistent with the principle of guilt to hold that the breach of criminal law was obvious to the soldiers on the sole basis that there had – objectively – been a serious breach of human rights; it must therefore be shown in greater detail why the individual soldier, in view of his education, indoctrination and other circumstances, was in a position to recognise that his action undoubtedly contravened the criminal law."

The Constitutional Court noted that the criminal courts had not discussed the facts in detail from the above point of view. But, in an important passage, the Court continued:

"They did, however, show that the killing of an unarmed fugitive by sustained fire (*Dauerfeuer*) was, in the circumstances they had found, such a dreadful and wholly unjustifiable act that it must have been immediately apparent and obvious even to an indoctrinated person that it breached the principle of proportionality and the elementary prohibition on the taking of human life. The other explanations given by those courts likewise show sufficiently clearly, in the light of all the reasons stated in the judgments and the reference to statements made in the earlier decisions of 3 November 1992 ... and 25 March 1993 ... concerning cases of the same type, that the principle of guilt has been respected."

It seems to me that similar considerations should guide the Court's approach to the issues under Article 7 of the Convention and, more particularly, to the question whether the applicant could reasonably have foreseen that his actions amounted to a breach of the criminal law. I readily accept that the situation for a soldier such as the applicant, who had undergone the indoctrination of young NVA recruits and who ran the risk of military prosecution if a fugitive succeeded in crossing the border, was one

of acute difficulty. I accept, too, that the situation in the GDR was such that the applicant could hardly have foreseen at the time that his actions would result in his prosecution for the offence of intentional homicide. But this is a very different question from the one facing the Court, namely whether the applicant could reasonably have foreseen that his actions amounted to such an offence. While this question may be open to differing opinions, I can find no reason to depart from the considered opinion of the national courts that opening fire on a defenceless person, who was attempting to swim away from East-Berlin and who posed no threat to life or limb, so clearly breached any principle of proportionality that it was foreseeable that it violated the legal prohibition on killing.

PARTLY DISSENTING OPINION OF

JUDGE CABRAL BARRETO

(*Translation*)

To my keen regret, and for the reasons set out below, I cannot concur with the majority in this case.

1. The transition from a "State of non-law" to a State based on the rule of law always raises the thorny question of the crimes committed under the previous regime which have gone unpunished.

Europe's recent history provides examples of three different attitudes on this question, namely:

(a) total forgiveness, a kind of amnesty intended to permit national reconciliation;

(b) punishment of offences committed by a certain category of persons;

(c) punishment of certain offences.

Moreover, as the Court pointed out in its judgment (paragraph 84), the prosecution of persons who have committed such crimes is in itself legitimate.

It is not open to criticism provided that, in the procedure itself and in the punishment of the perpetrators, the principles enshrined in the Convention are applied.

Since such prosecution involves punishment for acts committed under a previous regime, the principles of legality and non-retroactive application of the law are necessarily stretched.

That is why some States, either because they are not entirely sure whether prosecution for such crimes under their criminal law would be compatible with the Convention or because they seek to protect themselves against future development of the case-law, deposit reservations when they ratify the Convention (cf. Portugal's reservation in respect of Article 7 of the Convention).

2. It is settled case-law that Article 7 of the Convention requires the offence to be clearly defined by law, and that this implies that the law must be clear, foreseeable as to its effects and accessible.

The requirement of clearly defined law is satisfied where it is possible to say, on the basis of the relevant legal provision, what acts or omissions will entail criminal responsibility, even if this has to be determined by the courts interpreting the provision concerned.

Foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see the Groppera Radio AG and Others v. Switzerland judgment of 28 March 1990, Series A no. 173, p. 26, § 68). A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see the Cantoni v. France judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1629, § 35).

Accessibility presupposes that information concerning the legal rule making the acts in question punishable must be available to the person concerned.

3. It is difficult for me to concur in the majority's conclusion that all these requirements were satisfied in the instant case.

I can accept that the relevant statutes were accessible inasmuch as interested parties could obtain them and inform themselves of their content.

However, I have doubts about their clarity and foreseeability.

Admittedly, the taking of human life was punishable under the GDR's Criminal Code.

But the GDR's legal system also required border guards to open fire on persons trying to cross the border, after complying with certain rules relating to warning shots.

Faced with the conflict between the prohibition on killing and the obligation to obey the competent authorities, which had given orders to open fire in order to prevent escapes, I have no hesitation in concluding that, in the context at the material time, firing at a person crossing the border after complying with the rules on warnings could not, in the applicant's mind, have amounted to intentional homicide within the meaning of his country's Criminal Code.

It should not be forgotten that at the time there was no relevant case-law to which the applicant could have turned for guidance, and if he had consulted a lawyer it is not difficult to guess what the latter's answer would have been.

Regard being had to the statutes in force at the time of the acts for which the applicant stood trial and the way in which those statutes were interpreted, it cannot now be said that the applicant should have realised, at the time of the offence, that by firing at the fugitive he would be committing intentional homicide.

On the contrary, what he could foresee was that, after the warning shots, if he did not fire at the person to prevent his escape his conduct would make him liable to a disciplinary inquiry and could therefore be censured.

In my opinion, to take the view that the applicant, who was at the time a young soldier of 20, should have foreseen that his conduct could be held to constitute intentional homicide in the circumstances of the present case is to go beyond the conditions which, according to settled case-law, govern the interpretation of Article 7 of the Convention; the foreseeability required of the law in issue must be assessed by the yardstick of a normal person at the same time and in the same place as the applicant.

In spite of the loss of human life, which is always to be deplored, I fail to see how, from the strictly legal point of view, one can reach the conclusion that the GDR's legal system, as it existed and was interpreted at the material time, required the applicant to forget the justification of his action, observing only the rule that the taking of human life constituted intentional homicide.

I can readily accept that the applicant acted in the firm belief that his conduct was lawful and that he did not for a moment think that what he did amounted to intentional homicide within the meaning of the 1968 version of the GDR's Criminal Code. I further consider that, at that time in the GDR, any normal person placed in an identical situation would have acted in the same way.

I can therefore only find that the requirements of foreseeability and accessibility were not satisfied and that there has accordingly been a violation of Article 7 § 1 of the Convention on account of the applicant's conviction by the German courts for intentional homicide.

4. As regards the question whether the applicant's action could be considered (paragraph 2 of Article 7), I endorse Mr Pellonpää's dissenting opinion.

I must emphasise once again that what matters is whether the act could be considered criminal "at the time when it was committed".

Despite the development of this concept which had already taken place since the adoption of the Nuremberg principles, I consider that in 1972 the applicant's individual action could not yet be considered "criminal according to the general principles of law

recognised by civilised nations" (see below my remarks on "crimes against human rights").

5. Moreover, I consider that the majority should have reached a different conclusion with regard to the question of limitation (paragraphs 108 to 111 of the judgment).

5.1 Under Article 82 § 1 (4) of the 1968 version of the GDR's Criminal Code, the limitation period for intentional homicide was fifteen years.

As the offence for which the applicant stood trial was committed in February 1972, prosecution became statute-barred in 1987.

It is true that Article 84 of the Code provided: "Crimes against peace, humanity or human rights, and war crimes shall not be subject to the rules on limitation..." That is what led the majority to conclude that once it had been established that the offence for which the applicant stood trial constituted a crime against human rights the GDR's Criminal Code permitted no limitation on prosecution.

But it should not be forgotten that what is important is the question whether, at the time when it was committed, the offence was, according to the GDR's Criminal Code, a crime against "human rights".

In that connection, although the gradual develoment of the concept of "crimes against human rights" since 1972 cannot be denied, even in a country like the GDR, I still find it inconceivable that a plausible interpretation of that concept as it stood at the time of the offence could include the applicant's action.

I also find it difficult to accept that the interpretation of the concept had developed sufficiently for it to be possible to conclude, notably with the assistance of judicial interpretation, that at least by the month of February 1987, when the limitation period expired, the applicant's action constituted a "crime against human rights".

According to the dominant ideology at the time in the GDR, and to the world view and outlook on life which prevailed there, the applicant's action, though regrettable, as I must reiterate, was regarded not as a crime but as a praiseworthy deed.

Moreover, in interpreting the provisions of the 1968 Criminal Code, it is not appropriate to substitute for the ideas which prevailed at the time those which are current today. The only factors to be taken into consideration are the objective definition of what was illegal in that historical context and the applicant's subjective assessment of the situation in which he acted.

5. 2 The majority also mentioned the FRG's Act of 26 March 1993 on the suspension of limitation in respect of "acts committed under the unjust regime of the Socialist Unity Party", under which limitation periods begin to run not from the time when the offence was committed but from 3 October 1990, the date when the GDR ceased to exist.

There has always been disagreement among academic writers about the legal nature of limitation, but it seems more appropriate to accept that with regard to criminal prosecution limitation is mixed in nature, being both procedural and substantive at the same time.

That means that the principle of not applying the law retrospectively to the detriment of the accused covers limitation once the period initially laid down has expired.

The Court has not yet had the opportunity to determine that issue.

However, in the Coëme and Others v. Belgium judgment of 22 June 2000 (not yet published), it held:

"146. Limitation may be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period of time since the offence was committed. Limitation-periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time (see the Stubbings and Others v. the United Kingdom judgment of 22 October 1996, *Reports* 1996-IV, p. 1502, § 51).

...

149. ...

The question whether Article 7 would be breached if a legal provision were to restore the possibility of punishing offenders for acts which were no longer punishable because they had already become subject to limitation is not pertinent to the present case and the Court is accordingly not required to examine it, even though, as Mr Hermanus maintained, the Court of Cassation, in the proceedings against him, held that time had been caused to run again by a measure which did not have that effect on the date when it was taken.

150. The Court notes that the applicants, who could not have been unaware that the conduct they were accused of might make them liable to prosecution, were convicted of offences in respect of which prosecution never became subject to limitation. The acts concerned constituted criminal offences at the time when they were committed and the penalties imposed were not heavier than those applicable at the material time. Nor did the applicants suffer, on account of the Law of 24 December 1993, greater detriment than they would have faced at the time when the offences were committed (see, *mutatis mutandis*, the previously cited Welch judgment, p. 14 § 34)."

Reading between the lines of that judgment, it would seem that Article 7 of the Convention is breached where a law lengthens a limitation period after it has expired.

Any other principle would run counter to the principle of legal certainty.

The Act of 26 March 1993 should therefore be interpreted with the following restriction: suspension of the running of time should be limited to limitation periods still running and does not apply where the limitation period expired before the Act's entry into force.

6. In conclusion, I consider that in the present case there has been a violation of Article 7 of the Convention on account of the applicant's conviction for his actions in February 1972.

Lastly, I remain convinced that the applicant, who was then a young man without maturity or independence, and who had been indoctrinated in accordance with the dominant ideology, was rather the victim of a regime and a system which the Court, with my full support, has just censured today in the Streletz, Kessler and Krenz judgment.

PARTLY DISSENTING OPINION OF JUDGE PELLONPÄÄ,

JOINED BY JUDGE ZUPANCIC

I voted against the majority's conclusion that there had been no violation in the present case but in favour of that conclusion in the case of *Streletz, Kessler and Krenz v. Germany* that was also decided today. It is a somewhat curious consequence of the complexities of recent German history that the very same reasons which speak in favour of not finding a violation in the case of the three political leaders in part support the opposite conclusion in the *K.-H. W.* case. While the applicants Streletz, Kessler and Krenz are among those responsible for the former GDR's inhuman border-control system and therefore cannot with "clean hands" justify their actions or omissions with reference to that system, applicant W. appears to some extent to have been a victim of the same system. The border regime that was "imposed" (see paragraph 90 of the judgment) on the applicant with the threat of sanctions constituted an essential feature of the legal framework and social context within which he had to adjust his conduct at the time of his act. After reunification, however, he was in effect told that in order to have escaped conviction, he should, in 1972, have detached himself from that context and been guided by those elements of the GDR legal order which bore a resemblance to systems based on the rule of law.

Before going further, let me make it clear that I do not in any way underestimate the seriousness of the act committed by the applicant in 1972. To kill a helpless person is an abominable act, and had the applicant refused to commit it, he would deserve all admiration. However, the fact that he failed to live up to that standard is not conclusive when assessing his conviction from the point of view of Article 7 of the Convention.

To be compatible with Article 7, a criminal conviction must have a legal basis in the applicable law, which moreover must be sufficiently accessible and foreseeable. The German courts sentenced the applicant on the basis of the criminal law of the GDR, the FRG's law being applied only in so far as it was more lenient. The question therefore is whether the applicant's conduct at the time of the shooting incident constituted, under GDR law with the accessibility and foreseeability required by Article 7, a criminal offence. If the answer is no, the further question arises whether the act constituted an offence under international law (paragraph 1 of Article 7) or was "criminal according to the general principles of law recognised by civilised nations" (paragraph 2).

I am ready to accept that there was a sufficient legal basis in GDR law and that "the applicant's conviction by the German courts, which had interpreted and applied the above provisions [i.e. section 17(2) of the Police Act and the other relevant provisions] to the case in issue, does not appear at first sight to have been either arbitrary or contrary to Article 7 § 1 of the

Convention" (see paragraph 59 of the judgment). I also agree that the fact that the German courts took different approaches to the interpretation of the grounds of defence pleaded by the applicant does not as such deprive the laws in question of their foreseeability or otherwise violate Article 7 (see paragraph 60).

Even so, those differences on their own indicate that the interpretation of the grounds of defence afforded by section 17(2) of the Police Act was by no means straightforward. The difficulties were compounded by the fact that the applicant could not,

of course, benefit from any settled case-law clarifying the contents of the provision. Moreover, the legal framework within which the applicant lived did not consist only in legislation emanating from Parliament. In order for the guarantee of Article 7 to be "real and effective" rather than "theoretical and illusory" (see, for example, the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, § 24), provisions such as the above-mentioned section 17(2) should not be looked upon in isolation from the context of the GDR's legal system as a whole.

According to Article 73 of the GDR's Constitution, the Council of State laid down the principles to be followed in matters of national defence and security and organised defence with the assistance of the National Defence Council (see paragraphs 12 and 22 of the judgment). As stated in the judgment, the orders on which, among others, the applicant acted "had incontestably been decided upon by the organs of government of the GDR mentioned in Article 73 of its Constitution" (see paragraph 65). In other words, the applicant seems to have acted in accordance with orders emanating from prima facie "constitutionally competent" organs. I find it somewhat unreasonable to require that the applicant should have been able to decide a conflict between those orders and other provisions (such as section 17(2) of the Police Act), applying methods used in a State based on the rule of law. That such methods were not generally applied in the GDR is indicated, for example, by Article 89 § 3 of the 1968 Constitution, according to which the Council of State (and not, say, the Supreme Court) was to decide if doubt arose about the constitutionality of legal provisions emanating from the Council of Ministers or other State organs ("*Über Zweifel an der Verfassungsmäßigkeit von Rechtsvorschriften des Ministerrates und anderer staatlicher Organe entscheidet der Staatsrat*").

It would be a futile effort (and one beyond my present role) to try to find the "correct" interpretation of the relevant GDR law. The above remarks

were made in order to show that, in my view, when the applicant and his co-accused, after shouting a warning, fired first warning shots and then the fatal shot[1], the applicant could not reasonably foresee that he could be convicted of intentional homicide. The GDR law that was applied therefore did not fulfil the test of foreseeability required by Article 7 of the Convention. The question then arises whether his act was criminal under international law, within the meaning of either paragraph 1 or paragraph 2 of Article 7.

Before addressing that question, I should emphasise that, unlike the applicants in *Streletz, Kessler and Krenz*, the present applicant cannot be held responsible for the "contradiction between the principles laid down in the GDR's Constitution and its legislation ... and the repressive practice" (see paragraph 63 of the judgment). Nor am I fully convinced that persons in the applicant's position were envisaged by the democratically elected parliament of the GDR, which in the summer of 1990 requested the legislature of the united Germany "to ensure that criminal prosecutions would be brought in respect of the injustices committed by the SED" (see paragraph 87). The fact that the applicant volunteered to serve in the army for three years does not show any particular allegiance to the inhuman border-control system. As can be seen from the judgments of the trial court and the Federal Court of Justice, he appears to have done this reluctantly and at the insistence of his father, a professional soldier. Thus his voluntary service is an indication rather of a lack of independence and maturity than of any particular commitment to the system. However that may be, his decision to do three

years' military service did not in my view increase the foreseeability required by Article 7 in any legally relevant manner.

There remains the question whether the applicant's act was nevertheless "criminal according to the general principles of law recognised by civilised nations" for the purposes of paragraph 2 of Article 7, or constituted a crime under international law on other grounds (paragraph 1).

I accept that there are arguments for the proposition that a policy of closing a State's borders constituted, even in the 1970s, a crime against humanity according to the Nuremberg principles as they had developed over the years[2]. Such a policy could be regarded as a large-scale and systematic violation of human rights within the meaning of the Nuremberg principles. Thus it would arguably have been possible to justify the conviction of those responsible for that policy also with reference to paragraph 2 of Article 7. Whether an individual act, such as the one in issue here, was able to trigger responsibility for a crime against humanity is, however, a different question. Regardless of what the answer to that question might be today, I can find no authority for the proposition that the act committed by the applicant in 1972 was at that time a crime against humanity within the meaning of the Nuremberg principles. That being so, I also conclude that Resolution 95(I) of the UN General Assembly (see paragraph 79 of the judgment), which applies to acts covered by those principles, has no direct bearing in the present case.

I am no more persuaded that the applicant's individual criminal responsibility under international law could be based on other sources, such as comparative considerations. Although the GDR border-control system was in many respects unique, the use of deadly force has been tolerated – to varying degrees – in democratic societies as well. Thus in a 1988 decision (BGHSt 35, 379) the German Federal Court of Justice acquitted a customs officer who had fired in a life-threatening manner at a person on a motorcycle trying to escape controls at the German-Dutch border, on the ground that he was objectively entitled to suspect that the persons fleeing were serious drug offenders or had a comparable reason for fleeing. Although one should not draw a parallel between that case and the applicant's case, the Federal Court's decision of 1988 is nevertheless one indication that the right to life had not become of such overriding importance as to justify the conclusion that the present applicant's act was, in 1972, criminal "according to the general principles of law recognised by civilised nations". Nor do I find convincing arguments for the conclusion (see paragraph 105) that the right to life as guaranteed in general human-rights instruments created, as of 1972, individual criminal responsibility for the kind of act committed by the applicant.

I therefore conclude that there has been a violation of Article 7. I do not consider, however, that this violation is aggravated by discrimination contrary to Article 14. In view of the lenient sentence imposed on the applicant and the other circumstances, I would, moreover, without any doubt consider that the finding of this violation would in itself constitute sufficient just satisfaction for any non-pecuniary damage which the applicant might have sustained.

1. Gustav Radbruch (1878-1949): German professor of law who considerably influenced the philosophy of law. Following the crimes of the Nazis, he formulated the principle, also known as "Radbruch's formula" (*Radbruch'sche Formel*), that positive law

must be considered contrary to justice where the contradiction between statute law and justice is so intolerable that the former must give way to the latter.

1. IT-94-1, paragraph 623.

2. Paragraph 248, footnote 311.

1. The Regional Court found that it could not be determined which of the two accused had fired the fatal shot. In addition, it appears from the domestic judgments that at the time of the shooting the guns of the applicant and his co-accused were switched to automatic fire (*auf Dauerfeuer eingestellt*) and that they pulled their triggers five times altogether, each time producing a burst of two shots. As mentioned in the judgment (paragraphs 17 and 18), the Regional Court and the Federal Court accepted the contention of the applicant and his co-accused that the first shots had been warning shots.

2. In this connection, reference may be made to the separate opinion of Judge Loucaides in *Streletz, Kessler and Krenz v. Germany*.