CASE OF STRELETZ, KESSLER AND KRENZ v. GERMANY

(*Applications nos. 34044/96, 35532/97 and 44801/98*)

JUDGMENT

STRASBOURG

22 March 2001

In the case of Streletz, Kessler and Krenz 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. ZUPANČIČ,
Mrs N. VAJIĆ,
Mr M. PELLONPÄÄ,
Mrs M. TSATSA-NIKOLOVSKA,
Mr E. LEVITS,
Mr A. KOVLER,

and also of Mr M. DE SALVIA, *Registrar*,

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

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

PROCEDURE

1. The case originated in three applications (nos. 34044/96, 35532/97 and 44801/98) against the Federal Republic of Germany. Two German nationals, Mr Fritz Streletz and Mr Heinz Kessler ("the first and second applicants") applied to the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 20 November 1996 and 28 January 1997 respectively. A third German national, Mr Egon Krenz ("the third applicant"), applied to the Court under Article 34 of the Convention on 4 November 1998.

2. The applicants were granted legal aid.

3. The applicants alleged that the acts on account of which they had been prosecuted did not constitute offences, at the time when they were committed, under national or international law, and that their conviction by

the German courts had therefore breached Article 7 § 1 of the Convention. They also relied on Articles 1 and 2 § 2 of the Convention.

4. The first two applications were transmitted 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. The three applications were assigned to the Fourth Section of the Court, at the same time as the application (no. 37201/97) of Mr K.-H.W., likewise lodged against the Federal Republic of Germany (Rule 52 § 1 of the Rules of Court).

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. Vajić, 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 (as it stood at the time). The President of the Grand Chamber decided that in the interests of the proper administration of justice the three applications and that of Mr K.-H.W. should be assigned to the same Grand Chamber (Rules 24, 43 § 2 and 71).

7. The applicants and the German Government ("the Government") each filed written observations on the admissibility and merits of the applications.

8. A hearing on the admissibility and merits of the three applications, and that of Mr K.-H.W., 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 applicants*
Mr P. GARDNER, of the London Bar,
Mr F. WOLFF, for the first applicant,
Mr H.-P. MILDEBRATH, for the second applicant,
Mr R. UNGER, for the third applicant, all of the Berlin Bar, *Counsel*;

(c) *for Mr K.-H.W.*
Mr D. LAMMER, of the Berlin Bar, *Counsel*.

The Court heard addresses by them.

9. By decisions of 8 November 2000 [*Note by the Registry*. The Court's decisions are obtainable from the Registry] the Grand Chamber declared admissible the three applications in the present case and that of Mr K.-H.W.

10. On 14 February 2001 the Grand Chamber decided to join the applications of Mr Streletz, Mr Kessler and Mr Krenz (Rule 43 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicants are German nationals, born in 1926, 1920 and 1937 respectively.

12. After their conviction by the German courts, the first two applicants (Mr Fritz Streletz and Mr Heinz Kessler) were imprisoned under a semi-custodial regime (*offener Strafvollzug*) and then released after serving approximately two-thirds of their sentences. They now live in Strausberg (Germany) and Berlin (Germany) respectively.

The third applicant (Mr Egon Krenz) has been serving a semi-custodial sentence at Plötzensee Prison, Berlin, since January 2000.

A. The general background

13. Between 1949 and 1961 approximately two and a half million Germans fled from the German Democratic Republic (GDR) to the Federal Republic of Germany (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.

14. 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*; Article 73 of the GDR's Constitution – see paragraph 28 below).

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

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

The Secretary-General of the Party's Central Committee presided over the National Defence Council, and all the members of that 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*).

15. GDR border guards (*Grenztruppen der DDR*) were members of the National People's Army (*Nationale Volksarmee*) 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.

16. The applicants occupied senior positions in the GDR's State apparatus and the Socialist Unity Party leadership:

– the first applicant was a member of the National Defence Council from 1971 onwards, of the Socialist Unity Party's Central Committee from 1981 and Deputy Defence Minister from 1979 to 1989;

– the second applicant was a member of the Socialist Unity Party's Central Committee from 1946 onwards, Chief of Staff of the National People's Army and a member of the National Defence Council from 1967 and Minister of Defence from 1985 to 1989;

– the third applicant was a member of the Central Committee of the Socialist Unity Party from 1973 onwards, of the Council of State from 1981 onwards and of the Political Bureau and the National Defence Council from 1983 onwards, and Secretary-General of the Socialist Unity Party's Central Committee (taking over from Mr E. Honecker) and President of the Council of State and the National Defence Council from October to December 1989.

17. 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.

18. 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 Socialist Unity Party (*die strafrechtliche Verfolgung des SED-Unrechts sicherzustellen*).

B. The proceedings in the German courts

1. The first two applicants (Mr Streletz and Mr Kessler)

19. In a judgment of 16 September 1993 the Berlin Regional Court (*Landgericht*) sentenced the first and second applicants to five years and six months' imprisonment and seven years and six months' imprisonment respectively for incitement to commit intentional homicide (*Anstiftung zum Totschlag*), on the ground that they shared responsibility for the deaths of a number of young people aged between 18 and 28 who had attempted to flee

the GDR between 1971 and 1989 by crossing the border between the two German States (six and seven cases respectively). The victims had died after triggering anti-personnel mines laid along the border or after being shot by East German border guards.

The cases concerned were the following.

On 8 April 1971 Mr Klaus Seifert, aged 18, stepped on a landmine (*Erdmine*) while attempting to cross the border and lost his left leg. He nevertheless managed to reach the territory of the FRG, where, after a series of operations, he died of his injuries.

On 16 January 1973 Mr Hans-Friedrich Franck, aged 26, was seriously wounded by the explosion of a fragmentation mine (*Splittermine*) while trying to cross the border. He nevertheless managed to reach the territory of the FRG, where he died of his injuries soon after.

On 14 July 1974 Mr Wolfgang Vogler, aged 25, was seriously wounded by the explosion of a fragmentation mine while attempting to cross the border. Twenty minutes later GDR border guards dragged him to a lorry outside the border zone. Two hours later he arrived at a hospital, where he died of his injuries.

On 7 April 1980 Mr Wolfgang Bothe, aged 28, was likewise seriously wounded by the explosion of a fragmentation mine while trying to cross the border. After a series of operations, he died of his injuries.

On 22 March 1984 Mr Frank Mater, aged 20, was seriously wounded by the explosion of a fragmentation mine while attempting to cross the border. He died a few moments later.

On 1 December 1984 two GDR border guards fired shots at Mr Michael-Horst Schmidt, aged 20, as he was trying to climb over the Berlin Wall using a ladder, hitting him in the back. He was not given any first aid. He did not reach the hospital of the GDR's People's Police until two hours later, by which time he had bled to death. The guards who had shot him were congratulated, the only regret expressed being that they had used that much ammunition.

During the night of 5 to 6 February 1989 Mr Chris Gueffroy and Mr Christian Gaudian, both aged 20, attempted to climb over the Berlin Wall.

Mr Gueffroy was shot by a GDR border guard and died instantly. Mr Gaudian received bullet wounds. The guards who had shot them were congratulated.

The Regional Court noted that all the orders of the Minister of Defence, including those concerning the use of firearms at the border, were based on decisions of the National Defence Council, of which the applicants had been members. Border guards had been ordered to protect the border of the GDR at all costs, even if that meant that "border violators" (*Grenzverletzer*) thereby lost their lives.

The Regional Court further noted that the practice of the East German authorities deliberately went beyond the wording of statute law (*Wortlaut des Gesetzes*), written orders and service instructions; the provisions on the use of firearms at the border were disregarded. What was important for the border guards was not written law but what had been inculcated in them during their training, through political instruction and during their everyday service. The order actually given to border guards was: "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*] ..."

In the event of a successful crossing of the border, the guards on duty could expect to be the subject of an investigation conducted by the military prosecutor (*Militärstaatsanwalt*).

On the basis of the criminal law applicable in the GDR at the material time, the Regional Court began by declaring the first and second applicants guilty of incitement to murder (*Anstiftung zum Mord*) (Articles 22 § 2 (1) and 112 § 1 of the GDR's Criminal Code – "the StGB-DDR"; see paragraph 32 below). It held that the applicants could not justify their actions by pleading section 27(2) of the GDR's State Borders Act (*Grenzgesetz* – see paragraph 38 below), which, in practice, had been used to cover the killing of fugitives by means of firearms, automatic-fire systems and anti-personnel mines. It ruled that this State practice "flagrantly and intolerably infringed elementary precepts of justice and human rights protected under international law" ("*diese Staatspraxis hat offensichtlich und unerträglich gegen elementare Gebote der Gerechtigkeit und gegen völkerrechtlich geschützte Menschenrechte verstoßen*"). The Regional Court then applied the criminal law of the FRG, which was more lenient than that of the GDR, and convicted both applicants of incitement to commit intentional homicide (Articles 26 and 212 § 1 of the FRG's Criminal Code – "the StGB").

20. In a judgment of 26 July 1994 the Federal Court of Justice (*Bundesgerichtshof*) first upheld the findings of the Regional Court regarding the classification of the offences under GDR law and then applied the criminal law of the FRG, partly because it was the law applicable in the place where the result of the offences had come about (*Tatort – Erfolgsort*), since one of the fugitives had died inside FRG territory, and partly because the criminal law of the FRG was more lenient than that of the GDR. Secondly, the Federal Court of Justice reclassified the offences according to the criminal law of the FRG and amended the charges against the two applicants to intentional homicide as indirect principals (*Totschlag in mittelbarer Täterschaft*) (Articles 25 and 212 of the StGB – see paragraph 44 below). The length of the sentences to which the applicants were liable remained unchanged. Like the Regional Court, the Federal Court of Justice joined the cases of the first and second applicants.

The Federal Court of Justice then found the two applicants guilty of intentional homicide as indirect principals, on the ground that they had been members of the National Defence Council, the body whose decisions were a necessary precondition (*zwingende Voraussetzung*) for the issuing of orders concerning the GDR's border-policing regime (*Grenzregime*). The applicants knew that these orders would be obeyed and that fugitives had died at the border as a result of acts of violence. Like the Regional Court, the Federal Court of Justice held that the two applicants could not plead in justification section 27(2) of the State Borders Act. It ruled that section 27(2) and its interpretation by the GDR regime flagrantly infringed human rights and in particular the right to freedom of movement and the right to life enshrined in the International Covenant on Civil and Political Rights, a treaty ratified by the GDR on 8 November 1974 (see paragraph 40 below). The fact that the GDR had not transposed those provisions into its domestic law did not alter its obligations under public international law. Lastly, the Regional Court's decision had not contravened Article 103 § 2 of the Basic Law (*Grundgesetz* – see paragraph 43 below) since the applicants could not rely on a ground of justification (*Rechtfertigungsgrund*) which was contrary to higher-ranking legal rules. Even at the material time, a correct interpretation of section 27(2) of the GDR's State Borders Act would have shown that such grounds of justification could not be pleaded on account of the limits laid down by the Act itself and in the light of the GDR's Constitution and its international obligations.

21. On 9 September 1994 the two applicants lodged constitutional appeals with the Federal Constitutional Court (*Bundesverfassungsgericht*). They submitted that their actions had been justified under the law applicable in the GDR at the material time and should not have made them liable to criminal prosecution. The Federal Court of Justice's divergent *ex post facto* interpretation had infringed the principle that the criminal law was not to be applied retroactively (*Rückwirkungsgebot*) and Article 103 § 2 of the Basic Law. In the FRG, they argued, there were provisions similar to section 27 of the GDR's State Borders Act, and every State limited the right to life where the pursuit of criminals was concerned. In that connection, the two applicants referred to Article 2 § 2 of the Convention. They also relied on Article 7 § 2 of the Convention and the reservation in respect of that provision made by the FRG (see paragraph 45 below).

22. In a judgment of 24 October 1996 the Federal Constitutional Court joined the first applicant's appeal to those of the second applicant and Mr K.-H.W., a former East German border guard who is also an applicant before the European Court of Human Rights.

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 three 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 [*rechtsstaatliche 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 [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] ... 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

Socialist Unity Party 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."

2. The third applicant (Mr Krenz)

23. In a judgment of 25 August 1997 the Berlin Regional Court sentenced the third applicant to six years and six months' imprisonment for intentional homicide as an indirect principal, on the ground that, as he had participated in two decisions of the Political Bureau (on 7 June 1985 and 11 March 1986) and two decisions of the National Defence Council (on 2 February 1984 and 25 January 1985) on the GDR's border-policing regime, he shared responsibility for the deaths of four young people who had attempted to flee the GDR between 1984 and 1989 by crossing the border between the two German States. These persons had been shot to death by East German border guards.

The cases concerned were the following.

On 1 December 1984 two GDR border guards fired shots at Mr Michael-Horst Schmidt, aged 20, as he was trying to climb over the Berlin Wall using a ladder, hitting him in the back. He was not given any first aid. He did not reach the hospital of the GDR's People's Police until two hours later, by which time he had bled to death. The guards who had shot him were congratulated, the only regret expressed being that they had used that much ammunition.

On 24 November 1986 two GDR border guards shot at Mr Michael Bittner, aged 25, who was also trying to climb over the Berlin Wall using a ladder, hitting him in the back. He lost his balance, fell to the ground and died a few minutes later from a wound to the heart while he was being taken outside the border zone. The guards who had shot him were awarded medals and given a few days' special leave.

On 12 February 1987 Mr Lutz Schmidt, aged 24, attempted to climb over the Berlin Wall with his friend, Mr Peter Schultze, aged 34, using a ladder. As the ladder was too short, the two men helped each other with their hands, but Mr Schultze fell on the west side of the Wall and Mr Schmidt on the east, where he was mortally wounded in the heart by shots fired by two GDR border guards. The guards who had shot him were awarded medals and given a few days' special leave and a bonus of 300 German marks.

During the night of 5 to 6 February 1989 Mr Chris Gueffroy and Mr Christian Gaudian, both aged 20, attempted to climb over the Berlin Wall. Mr Gueffroy was shot by a GDR border guard and died instantly. Mr Gaudian received bullet wounds. The guards who had shot them were congratulated.

On the basis of the criminal law applicable in the GDR at the material time, the Regional Court first declared the third applicant guilty of incitement to murder (Articles 22 § 2 (1) and 112 § 1 of the StGB-DDR – see paragraph 32 below), basing its decision on the grounds it had already given for the convictions of the first two applicants in its judgment of 16 September 1993 (see paragraph 19 above). It then applied the criminal law of the FRG, as being more lenient than that of the GDR, and convicted the applicant as an indirect principal in the intentional homicides committed (Articles 25 and 212 of the StGB – see paragraph 44 below).

The Regional Court further held that the applicant could not plead in justification the fact that the GDR's sovereignty had been limited by its dependence on the Soviet Union, since obligations arising from an alliance (*Bündnisverpflichtung*) did not absolve an individual of his criminal responsibility (*strafrechtliche Verantwortung*). In fixing the length of the applicant's sentence, the Regional Court likewise applied the criminal law of the FRG, as it was more lenient than that of the GDR.

24. On 9 April 1998 the applicant appealed against the above judgment to the Federal Court of Justice, relying, in particular, on Article 103 § 2 of

the Basic Law and the principle of the non-retroactive application of criminal laws.

25. After holding a hearing on 27 October 1999, the Federal Court of Justice gave judgment on 8 November 1999, upholding on every point the judgment of the Regional Court and referring to a number of landmark judgments it had previously delivered on the same issues, including, in particular, the judgment of 26 July 1994 (see paragraph 20 above).

It noted, moreover, that the Regional Court had meticulously detailed the successive instructions given in the case (*Anordnungsketten*), starting with the decisions of the Political Bureau and the National Defence Council in which the applicant had participated, going on to the military chain of command (*militärische Befehlskette*), and ending with the orders given to border guards and the fatal shootings.

26. On 12 January 2000, sitting as a panel of three judges, the Federal Constitutional Court refused to entertain a constitutional appeal by the applicant, referring, in particular, to its landmark judgment of 24 October 1996 (see paragraph 22 above).

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. The Treaty on German Unification

27. The German 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 (Articles 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 applicable in 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 § 2 (see below)*

28. 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 § 2
(1974 version; in the 1968 version this sentence appeared in Article 89 § 3)

"Legal rules shall not contradict the Constitution."

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

29. The first chapter of the Special Part (*Besonderer Teil*) of the StGB-DDR, 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."

30. Article 95 of the StGB-DDR 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."

31. Article 84 of the StGB-DDR 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]."

32. Article 112 § 1 of the StGB-DDR prescribed a prison sentence of ten years to life for murder (*Mord*). Article 22 § 1 of the StGB-DDR contemplated the offence of participation (*Teilnahme*) in an offence, and in particular incitement (*Anstiftung*) to commit one. Article 22 § 2 provided that criminal responsibility was to be determined by the law defining the offence. Article 82 § 1 (5) of the StGB-DDR laid down a limitation period of twenty-five years for the prosecution of offences attracting a sentence of more than ten years' imprisonment.

33. Article 119 of the StGB-DDR 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."

34. Article 213 of the StGB-DDR (1979 version) provided:

> "(1) Any person who illegally crosses the border of the German Democratic Republic or contravenes provisions regulating temporary authorisation to reside in the German Democratic Republic and transit through the German Democratic Republic shall be punished by a custodial sentence of up to two years, a suspended sentence with probation, imprisonment or a fine.
>
> ...
>
> (3) In serious cases the offender shall be sentenced to one to eight years' imprisonment. Cases are to be considered serious, in particular, where
>
> 1. the offence [*die Tat*] endangers human life or health;
>
> 2. the offence is committed through the use of firearms or by dangerous means or methods;
>
> 3. the offence is committed with particular intensity;
>
> 4. the offence is committed by means of a forgery [*Urkundenfälschung*], falsified documents [*Falschbeurkundung*] or documents fraudulently used, or through the use of a hiding-place [*Versteck*];

5. the offence is committed jointly with others; or

6. the offender has already been convicted of illegally crossing the border.

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

35. Article 1 § 3 of the second chapter of the StGB-DDR, 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."

36. Article 258 of the StGB-DDR 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 the 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

37. 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 targeted 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

38. 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 targeted 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

39. 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

40. The United Nations International Covenant on Civil and Political Rights was ratified by the GDR on 8 November 1974 (see paragraph 20 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

41. Before German reunification several members of the United Nations Human Rights Committee, which is charged under Article 28 of the Covenant with the task of ensuring that the 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 to 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".

42. 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

43. 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."

44. Article 212 of the FRG's Criminal Code ("the StGB") prescribes a prison sentence of from five years to life, in particularly serious cases, for intentional homicide (*Totschlag*). Article 25 of the StGB provides that the perpetrator of an offence is the person who committed it or who caused another to act in his place (*mittelbare Täterschaft*).

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

45. 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

46. The applicants submitted that the acts on account of which they had been prosecuted did not constitute offences, at the time when they were committed, according to the law of the GDR or international law, and that their 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 applicants

47. According to the applicants, their convictions after the reunification of Germany were not foreseeable, and moreover they had never been prosecuted in the GDR. They alleged that even the German courts had accepted that the reason why they had not been prosecuted at the material time was that the acts on account of which they had been charged did not constitute offences under the criminal law of the GDR, regard being had to the wording of section 27(2) of the GDR's State Borders Act. 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 applicants 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 applicants had pleaded, on the ground that these were contrary to the FRG's Basic Law (Radbruch's formula of "statutory injustice" – *Radbruch'sche Formel des "gesetzlichen Unrechts"*). Moreover, implementation of the border-policing regime had been essential to preserve the existence of the GDR.

While all three applicants considered that they had acted in accordance with GDR law, the third applicant contended, in particular, that by the time he became a member of the Political Bureau and the National Defence Council, in 1983, the latter body had decided to remove the anti-personnel mines and the automatic-fire systems. He had therefore been convicted only for the use of firearms by border guards. However, even that conviction had been unjustified since the applicant had not participated in a single meeting of the Political Bureau or the National Defence Council during which an express order to use firearms at the border had been given.

The applicants further alleged that the acts in issue did not constitute offences under international law either. As regards the International Covenant on Civil and Political Rights, ratified by the GDR, they observed that no international body had censured the GDR for violation of its provisions and that, even if that had been the case, there was a fundamental distinction between a State's responsibility under international law, on the one hand, and the criminal responsibility of an individual under domestic criminal law, on the other. 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

48. The Government submitted that the applicants, as leaders 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, they could also have foreseen that the killing of unarmed fugitives who were not a threat to anyone might give rise to criminal prosecutions 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, on account of the family and other ties which transcended the border dividing Germany.

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

49. 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, *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*, *Kopp v. Switzerland*, judgment of 25 March 1998, *Reports of Judgments and Decisions* 1998-II, p. 541, § 59).

50. Secondly, the Court reiterates the fundamental principles laid down in its case-law on Article 7 of the Convention, particularly in *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom* (judgments of 22 November 1995, Series A no. 335-B, pp. 41-42, §§ 34-36, and Series A no. 335-C, pp. 68-69, §§ 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

51. In the light of the above principles concerning the scope of its supervision, the Court observes that it is not its task to rule on the applicants' individual criminal responsibility, 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 the applicants' acts, at the time when they were committed, constituted offences defined with sufficient accessibility and foreseeability by the law of the GDR or international law.

52. 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 applicants for crimes they had committed in their capacity as leaders of the GDR.

(a) National law

(i) The legal basis for the applicants' convictions

53. The Court notes that the German courts first found the applicants guilty of incitement to murder on the basis of the criminal law applicable in the GDR at the material time (Articles 22 § 2 and 112 § 1 of the GDR's Criminal Code ("the StGB-DDR") – see paragraph 32 above). After rejecting the grounds of justification pleaded by the applicants – based on the law and practice of the GDR – they held that, on account of the very senior positions which the applicants had occupied in the GDR's State apparatus, they shared responsibility for the deaths of a number of people aged between 18 and 28 who had attempted to leave the GDR between 1971 and 1989 by crossing the border between the two German States. They then applied the criminal law of the FRG, as being more lenient than that of the GDR, sentencing the applicants for a number of counts of intentional homicide as indirect principals, under Articles 25 and 212 of the FRG's Criminal Code, to terms of imprisonment of five and a half years, seven and a half years and six and a half years respectively (see paragraphs 19, 20, 23 and 25 above).

54. The German courts thus applied the principle, formulated in the German Unification Treaty of 31 August 1990 and in this 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 27 above).

55. The legal basis for the applicants' convictions was therefore the criminal law of the GDR applicable at the material time, and their sentences corresponded in principle to those prescribed in the relevant provisions of the GDR's legislation; in the event, the sentences imposed on the applicants were lower, by virtue of the principle of applying the more lenient law, which was that of the FRG.

(ii) Grounds of justification under GDR law

56. However, the applicants submitted that by virtue of the grounds of justification provided for in section 17(2) of the People's Police Act and section 27(2) of the State Borders Act, taken together with Article 213 of the StGB-DDR (see paragraphs 34 and 37-38 above), they had acted in accordance with the law of the GDR, and moreover that they had never been prosecuted on that account in the GDR.

57. 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.

58. As the events in issue took place between 1971 and 1989, the rules of written law applicable at the material time included the 1968 and 1979 versions of the Criminal Code, the People's Police Act 1968, superseded by the State Borders Act 1982, and the 1968 and 1974 versions of the GDR's Constitution.

59. It is true that section 17(2) of the People's Police Act and section 27(2) of the State Borders Act justified the use of firearms "to prevent the imminent commission or continuation of an offence which appears 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 StGB-DDR, which listed the cases in which the offence of illegal border-crossing was considered to be serious, which included those where it "endanger[ed] human life or health", where it was "committed through the use of firearms or by dangerous means or methods", where it was "committed with particular intensity", or where it was "committed jointly with others".

60. Section 17 of the People's Police Act and section 27 of the State Borders Act thus listed exhaustively the conditions under which the use of firearms was authorised and further provided, in subsections 4 and 5 respectively: "When firearms are used, human life should be preserved

where possible. Wounded persons must be given first aid." Section 27(1) provided: "The use of firearms is the most extreme measure entailing the use of force against the person." Section 27(4) stated: "If possible, firearms should not be used against juveniles [*Jugendliche*]." In addition, Article 119 of the Criminal Code defined the offence of failing to lend assistance to a person in danger (see paragraph 33 above).

61. 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 § 2 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 28 above).

62. 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 Menschenrecht*] and the dignity and worth of human beings, and for the preservation of the rights of all" (see paragraph 29 above).

63. In the present case the German courts convicted the applicants on account of their responsibility for the deaths of a number of persons who had attempted to cross the border between the two German States, often with very rudimentary equipment such as ladders. They were mostly very young (the youngest was 18 and four of the others were only 20), they were unarmed, they did not represent a threat to anyone and their one aim was 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 provisions on the issue of passports and visas in the GDR – paragraph 39 above). Their attempts to cross the border, although prohibited by GDR law, could not therefore be classified as serious crimes since none of the cases fell into the category of serious offences as defined in Article 213 § 3 of the GDR's Criminal Code.

64. 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 applicants' conviction by the German courts, which had interpreted the above provisions and applied them to the cases in issue, does not appear at first sight to have been either arbitrary or contrary to Article 7 § 1 of the Convention.

65. Admittedly, the German courts took different approaches to the interpretation of the grounds of justification pleaded by the applicants on the basis of section 27(2) of the GDR's State Borders Act in particular.

The Berlin Regional Court held that these grounds of justification could not be relied on because they flagrantly and intolerably infringed "elementary precepts of justice and human rights protected under international law" (see paragraphs 19 and 23 above).

The Federal Court of Justice considered that, even at the material time, a correct interpretation of section 27(2) of the State Borders Act would have shown that such grounds of justification could not be pleaded on account of the limits laid down by the Act itself and in the light of the GDR's Constitution and its obligations under public international law (see paragraphs 20 and 25 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 paragraphs 22 and 26 above).

66. 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

67. 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 material time.

68. In that context, it should be pointed out that at the time of the offences in issue none of the applicants was prosecuted for them 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.

69. 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 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 paragraphs 19 and 23 above).

70. 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 28 above), namely the Council of State and the National Defence Council, of which the applicants were members: the first applicant (Mr Streletz) was a member of the National Defence Council from 1971 onwards; the second (Mr Kessler) from 1967; the third applicant (Mr Krenz) was a member of the Central Committee of the Socialist Unity Party from 1973 onwards, of the Council of State from 1981, and of the National Defence Council from 1983.

71. Thus the aim of the above State practice, implemented by the applicants, 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.

72. However, the Court points out that the reason of State thus pleaded 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 94 below).

73. 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 [*Grenzverletzer*] 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 rights and the other international obligations of the GDR, which, on 8 November 1974, had ratified the International Covenant on Civil and Political Rights, expressly recognising the right to life and to the freedom of movement (see paragraph 40 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 had ceased in about 1984, the border guards' orders remained unchanged until the fall of the Berlin Wall in November 1989.

74. The Court further notes that, in justification, the applicants relied on the order to fire which they themselves had issued to the border guards and on the ensuing practice, on account of which they had been convicted. However, according to the general principles of law, defendants are not entitled to justify the conduct which has given rise to their conviction simply by showing that such conduct did in fact take place and therefore formed a practice.

75. Moreover, irrespective of the GDR's responsibility as a State, the applicants' acts as individuals were defined as criminal by Article 95 of the StGB-DDR, which already provided in its 1968 version, in terms repeated in 1979: "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 30 above).

76. There is accordingly no doubt that the applicants bore individual responsibility for the acts in question.

(iv) Foreseeability of the convictions

77. However, the applicants argued that in view of the reality of the situation in the GDR their conviction by the German courts had not been foreseeable and that it had been absolutely impossible for them to foresee that they would one day be called to account in a criminal court because of a change of circumstances.

78. The Court is not convinced by that argument. The broad divide between the GDR's legislation and its practice was to a great extent the work of the applicants themselves. Because of the very senior positions they occupied in the State apparatus, they evidently could not have been ignorant of the GDR's Constitution and legislation, or of its international obligations and the criticisms of its border-policing regime that had been made internationally (see paragraphs 41-42 above). Moreover, they themselves had implemented or maintained that regime, by superimposing on the statutory provisions, published in the GDR's Official Gazette, secret orders and service instructions on the consolidation and improvement of the border-protection installations and the use of firearms. In the order to fire given to border guards they had insisted on the need to protect the GDR's borders "at all costs" and to arrest "border violators" or "annihilate" them (see paragraph 15 above). The applicants were therefore directly responsible for the situation which obtained at the border between the two German States from the beginning of the 1960s until the fall of the Berlin Wall in 1989.

79. Moreover, the fact that the applicants had not been prosecuted in the GDR, and were 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 their acts were not offences according to the law of the GDR.

80. 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.

81. 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.

82. 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 *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*, both cited above, loc. cit. – paragraph 50). 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 83 below), but it remains wholly valid where, as in the present case, one State has succeeded another.

83. Contrary reasoning would run counter to the very principles on which the 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".

84. 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 Socialist Unity Party (see paragraph 18 above). That makes it reasonable to suppose that, even if the German reunification had not taken place, a democratic regime taking over from the Socialist Unity Party regime in the GDR would have applied the GDR's legislation and prosecuted the applicants, as the German courts did after reunification.

85. 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 92-94 below), including the Convention itself, in which the right to life is guaranteed by 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.

86. 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, *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, § 77, ECHR 2000-X).

87. 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.

88. The Court, accordingly, takes the view that the applicants, who, as leaders of the GDR, had created the appearance of legality emanating from the GDR's legal system but then implemented or continued a practice which flagrantly disregarded the very principles of that system, cannot plead the protection of Article 7 § 1 of the Convention. To reason otherwise would run counter to the object and purpose of that provision, which is to ensure that no one is subjected to arbitrary prosecution, conviction or punishment.

89. Having regard to all of the above considerations, the Court holds that at the time when they were committed the applicants' acts constituted offences defined with sufficient accessibility and foreseeability in GDR law.

(b) International law

(i) Applicable rules

90. 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 paragraphs 19 *in fine* and 20 above).

91. It is therefore necessary to consider whether, at the time when they were committed, the applicants' acts constituted offences 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

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

93. Article 3 of the Universal Declaration of 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 40 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."

94. 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.

95. However, the applicants alleged that their actions 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."

96. 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 by the applicants 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.

97. It follows that the applicants' acts were not justified in any way under Article 2 § 2 of the Convention.

(iii) International protection of the freedom of movement

98. 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 40 above).

99. The applicants relied on those restrictions to justify the introduction and continued operation the GDR's border-policing regime.

100. However, the Court considers that in the present case none of the above exceptions applied. Firstly, the acts in issue were orders, given and executed, which were not compatible with either the Constitution or statute law. Secondly, it cannot be contended that a general measure preventing almost the entire population of a State from leaving was necessary to protect its security, or for that matter the other interests mentioned. Secondly, the way in which the GDR put into practice the prohibition barring its nationals from leaving the country and punished contravention of that policy was contrary to another right secured under the Covenant, namely the right to life guaranteed by Article 6, for those who were its victims.

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 17 above).

(iv) The GDR's State responsibility and the applicants' 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. The State practice in issue was to a great extent the work of the applicants themselves, who, as political leaders, knew – or should have known – that it infringed both fundamental rights and human rights, since they could not have been ignorant of the legislation of their own country. Articles 8 and 19 § 2 of the 1968 Constitution already provided, respectively: "The generally recognised rules of international law intended to promote peace and peaceful cooperation between peoples are binding on the State and every citizen" and "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" (see paragraph 28 above). Furthermore, as early as 1968 the first chapter of the Special Part of the Criminal Code included an introduction that provided: "The merciless punishment of crimes against ... humanity and human rights ... is an indispensable prerequisite for stable peace in the world, for the restoration of faith in fundamental human rights and the dignity and worth of human beings, and for the preservation of the rights of all" (see paragraph 29 above). Similarly, as noted above (paragraph 78), the applicants could not have been ignorant of the international obligations entered into by the GDR or of the repeated international criticism of its border-policing regime.

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

105. In the light of all of the above considerations, the Court considers that at the time when they were committed the applicants' acts also constituted offences defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights.

106. In addition, the applicants' 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) Conclusion

107. Accordingly, the applicants' conviction by the German courts after the reunification was not in breach of Article 7 § 1.

108. In the light of that finding, the Court is not required to consider whether their convictions were justified under Article 7 § 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 1 OF THE CONVENTION

109. The applicants 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."

110. According to the applicants, the decision of the Federal Constitutional Court created a discriminatory system of justice through its reliance on "Radbruch's formula" (see paragraph 22 above) in order to deny former citizens of the GDR, now citizens of the FRG, the possibility of relying on the principle of the non-retroactiveness of criminal statutes enshrined in Article 7 § 1 of the Convention.

111. The Court observes 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, *Foti and Others v. Italy*, judgment of 10 December 1982, Series A no. 56, pp. 15-16, § 44, and *Rehbock v. Slovenia*, no. 29462/95, § 63, ECHR 2000-XII).

112. Thus, in the present case, the applicants' complaint cannot be raised under Article 1 of the Convention, which is a framework provision that cannot be breached on its own (see *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 in conjunction with Article 7, as the applicants complained in substance of discrimination they had allegedly suffered as former citizens 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."

113. 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.

114. Accordingly, there has been no discrimination contrary to Article 14 of the Convention taken in conjunction with Article 7.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been no violation of Article 7 § 1 of the Convention;

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

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
Registrar

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 Zupančič;
(c) concurring opinion of Mr Levits.

L.W.
M. de S.

CONCURRING OPINION OF JUDGE LOUCAIDES

I agree with the conclusions set out in the judgment but I would like to explain my own approach regarding the question whether the conduct of the applicants constituted an offence under international law at the material time for the purposes of Article 7 § 1 of the Convention.

The majority found that the applicants were convicted on account of acts which constituted at the material time offences defined with sufficient accessibility and foreseeability by the international rules on human rights protection. In that respect, the majority relied on international law rules on the protection of the right to life and the freedom of movement. As regards the applicants' individual criminal responsibility for the breaches of those rules, the majority relied on Article 95 of the GDR's Criminal Code which provided that individual criminal responsibility was to be borne by those who violated the GDR's international obligations in terms of human rights and fundamental freedoms. In other words, the majority, in deciding whether the conduct of the applicants constituted "a criminal offence under international law", relied on obligations under international law binding the State of the GDR and, as regards the individual criminal responsibility of the applicants, the majority relied on the domestic law of the GDR. I do not agree with that approach. I believe that when Article 7 speaks about a "criminal offence under international law", it clearly means an offence which is made criminal directly by international law both as regards the prohibited conduct as well as the individual criminal responsibility for such conduct.

Therefore, one has to see whether, in terms of the rules of international law, as distinct from those of domestic law, the conduct of the applicants did constitute a criminal offence.

I believe that the answer should be in the affirmative. More specifically, I think that the conduct for which the applicants were convicted (as set out in the judgment) amounted to the international law crime known as a "crime against humanity", which, at the material time, had already been established as part of the general principles of customary international law.

In that connection, I do not find it necessary to go into the whole history of the relevant international law developments regarding the status and concept of crimes against humanity. It is, I believe, sufficient to refer to the following.

The Charter of the International Military Tribunal For the Prosecution of the Major War Criminals of the European Axis (IMT) was the first instrument to define "crimes against humanity" in positive international law.

The Charter included in the definition of "crimes against humanity" "murder ... committed against civilian populations before or during the war

...” The Nuremberg Trials applied the Charter and attributed criminal responsibility to individuals for “crimes against humanity”. However, this crime was linked to the conduct of war. Furthermore, it was not at the time clearly established that such crime was part of customary international law, especially when it was not linked to acts of war. It was however gradually so established.

Resolution 95 (I) of the United Nations General Assembly of 11 December 1946 expressly affirmed “the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal” and the formulation of those principles was entrusted to the International Law Commission, “in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code”. This resolution was evidence of the prevailing views of States and of State practice as regards the principles in question and, for that matter, gave solid legal support to the claim that these principles were part of customary international law [see, *inter alia*, Daillier and Pellet, *Droit international public*, 6th edition, p. 677].

The connection of crimes against humanity with war activities was not considered a requirement for the establishment of such crimes [see “Question of the punishment of war criminals and of persons who have committed crimes against humanity: Note by the Secretary-General”, UN GAOR, 22nd session, Annex Agenda Item 60, pp. 6-7, UN DOC A/6813 (1967). See also International Criminal Tribunal for the former Yugoslavia, Tadić case IT-94-1, § 623]. As rightly observed by Lord Millett in the Pinochet (3) judgment of the House of Lords [[1999] 2 Weekly Law Reports 909 et seq.]

> “The Nuremberg Tribunal ruled that crimes against humanity fell within its jurisdiction only if they were committed in the execution of or in connection with war crimes or crimes against peace. But this appears to have been a jurisdictional restriction based on the language of the Charter. There is no reason to suppose that it was considered to be a substantive requirement of international law. The need to establish such a connection was natural in the immediate aftermath of the Second World War. As memory of the war receded, it was abandoned.”

The view that the Nuremberg principles were customary international law became indisputable after Resolution 3074 (XXVIII) of the United Nations General Assembly of 3 December 1973, which proclaimed the need for international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. One may add here that the position has also been maintained and adopted by judgments of international *ad hoc* criminal tribunals that “since the Nuremberg Charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned” [Tadić case, op. cit.]. In any event what is important for the purposes of our case is the fact that, at

the time when the offences attributed to the applicants were committed, "crimes against humanity" were unquestionably established as offences under customary international law.

As regards the elements of crimes against humanity, one may take the recent Rome Statute of the International Criminal Court as declaratory of the international law definition of this crime and as necessary guidance for its application in our case. In Article 7 of the Statute, we find the following:

> "1. ... 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
>
> ...
>
> 2. For the purpose of paragraph 1:
>
> (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;
>
> ..."

But even if one is only guided by the concept of "crimes against humanity" emerging from the Charter of the International Military Tribunal of Nuremberg – the principles of which were affirmed by the United Nations resolutions mentioned above – and the present case is examined only by reference to the minimum requirements of such a concept, as far as it relates to the facts of the present case, there is no difficulty in concluding that the activities for which the applicants were found guilty did undoubtedly qualify as "crimes against humanity", of the most serious nature. The minimum elements of the offence in question appear to be the following:

(a) murder;
(b) committed against a civilian population; and
(c) systematic or organised conduct in furtherance of a certain policy.

The last element is implied from the combination of elements (a) and (b).

For the above reasons, I find that the actions for which the applicants were convicted did constitute at the material time not only criminal offences under the domestic German law but also under international law.

CONCURRING OPINION OF JUDGE ZUPANČIČ

I voted for finding no violation in this case because I consider the application of the GDR's criminal law by the FRG's courts legally consistent (see paragraphs 19-39 of the judgment). For the purposes of Article 7 § 1, this is sufficient.

Likewise, I agree that Article 2 § 2 is not applicable in this case (see paragraphs 95-97 of the judgment) although it may be applicable in other cases where the test of weighing personal integrity against a justified and lawful arrest yields a different result (see, for example, my dissenting opinion in *Rehbock v. Slovenia*, no. 29462/95, ECHR 2000-XII).

It is important to understand that this judgment does not rely on Article 7 § 2 or on the concept of an "international offence" in Article 7 § 1.

Article 7 § 2 is an exception to the principle *nullum crimen, nulla poena sine lege praevia* formulated by the famous German criminal-law theorist Anselm von Feuerbach. Franz von Liszt later maintained that the substantive guarantees enshrined in the principle of legality are the *Magna Carta Libertatum* of criminal defendants. This tradition of substantive criminal-law protection goes back to at least 1764 and Cezare Beccaria's classic work *Dei delitti e delle pene*, which decisively influenced the whole continental tradition of legality in criminal law. This is all the more important because, in counter-distinction to the Anglo-Saxon legal model, although Magna Carta had a similar provision in its clause 39 (*lex terrae*), the guarantees are preponderantly to be found in substantive rather than in procedural law. Thus, the principle of legality (*Legalitätsprinzip*, *principe de legalité*) is typically interpreted to entail only the restrictive interpretation of the State's power to punish.

In this case, as we shall see, the principle of legality has the opposite effect. It precludes the applicants from relying on their own interpretation of the law.

I find it difficult to agree with the sentence in paragraph 105 referring to "offences defined with sufficient *accessibility* and *foreseeability* by the international law rules on human rights protection" [emphasis added]. The powerful *objective* guarantees of substantive criminal law entrenched in the principle of legality cannot be reduced to the *subjective* right to advance notice of what is punishable under positive law.

The import of the principle of legality has to do with objective, rigorous semantic and logical legal restrictions (*lex certa*) on the State's power to punish. Where the law gives an offender the *formal* possibility of foreseeing the criminal and punishable nature of his acts or omissions, irrespective of his everyday reliance on the prevalent and established "State practice" of impunity, the rule of law will sanction subsequent criminal liability. To maintain otherwise would make the criminal actor a legislator *in casu proprio*. This is the real significance of this case.

Conversely, excessive reliance upon the subjective criteria of *accessibility* and *foreseeability* would facilitate the applicants' defence based on the principle of legality. They could maintain that they had in fact relied upon the official, accessible and foreseeable interpretation of the law at the time, and upon "the GDR's State practice, which was superimposed on the rules of written law at the material time" (see paragraph 67 of the judgment). The applicants could then also maintain that their reliance on State practice, only later proved to be mistaken in the light of a strict interpretation of positive criminal law, was at the time nevertheless consistent with the official, constant and foreseeable State practice. Such an argument would then introduce the defence of an excusable mistake of law (*error juris*).

For example, section 2.04(3)(b)(iv) of the United States Model Penal Code, provides:

> "A belief that conduct does not legally constitute an offence is a defence to a prosecution for that offence based upon such conduct when [the actor] acts *in reasonable reliance upon ... an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offence*." [emphasis added]

Depending on the mistake-of-law provisions in either the GDR's or the FRG's substantive criminal law, the applicants' acts could then possibly be excused (not justified!).

In such a context the mistake of law could become a bridge between the objective meaning of the law constituting the offence and the subjective understanding of this law. If the latter is not entirely subjective and arbitrary because it is based upon such objective elements as the relevant "State practice", "official interpretation of the public officer", etc., the mistake of law may become an excuse, that is, in German law "a reason to exclude criminal responsibility" (*Schuldausschliessungsgrund*).

The applicants' *subjective* reliance upon the "the GDR's State practice, which was superimposed on the rules of written law at the material time", would in effect mean that their (and the GDR's) schizophrenic interpretation, that is, dispensing with the positive law on the statute book, however realistic this was in view of the "the GDR's State practice", would prevail over the *objective* significance of the relevant definitions of offences in the GDR's own criminal law.

This case, however, goes at least one step further in that direction. The applicants did not simply "rely" on the "GDR's State practice". They helped create that very real State practice of impunity. This practice of impunity, however, was not formalised through legislative means, no doubt because to the outside world the GDR wanted to maintain the image of a *Rechtsstaat*. If the practice of impunity had been legitimated through positive legislation this would have been a different case since it would probably have fallen under Article 7 § 2 of the Convention.

In terms of their own criminal law, the applicants were the co-conspirators in a large and consistent conspiracy to disregard the objective meaning of the law on the statute book, meaning that they co-conspired to create and maintain a two-faced situation in which the so-called "State practice" of impunity and even of rewarding the criminal behaviour of other co-conspirators was in unqualified contradiction with the formal language of the relevant criminal statutes. The distinctive characteristic of this case is that it was the applicants themselves who were "the public officer[s] or [members of the] body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offence".

Here there was a self-referential situation in which the very same people who were charged with responsibility for the interpretation, administration or enforcement of the law defining the offence propagated the "State practice" which they now claim to have been the source of their own understanding of the law and thus of their excuse under the law. What is more, the applicants maintain that the GDR's State practice was part and parcel of contemporaneous objective impunity and that it is therefore unacceptable *ex post* to activate criminal liability for their acts.

Clearly, this raises the issue of the rule of law and more specifically the issue of the rule of substantive criminal law. For the European Court of Human Rights to accept this "State practice" as an integral part of the "law defining the offence" for the purposes of Article 7 § 1, or to accept the defence of mistake of law would seal this circuitous self-justification in contradiction to the rule of law.

It is easy to imagine an analogous case in which the applicants were high judicial officers of the GDR who had themselves participated in creating the judicial "practice" (case-law, jurisprudence) of impunity. Would we then say that this "element of judicial interpretation" (see paragraph 82 of the judgment) amounted to the "law defining the offence"?

As the German legal theorist von Ihering rightly emphasised, the rule of law is founded upon the *formal* meaning of legal wording. If the rule of law is to be preserved, this objective meaning must remain independent and must in the last analysis be strictly separate from any subjective and arbitrary interpretation, no matter how prevalent it is as a "State practice" – all the more so if this prevalent arbitrary interpretation of the "law in (in)action" contradicting the law on the statute book is the result of collusion between the executive, legislative and judicial branches of the State.

To maintain the separation of the objective and the subjective in law is the only way of ensuring that nobody is above the law.

CONCURRING OPINION OF JUDGE LEVITS

1. I agree with the conclusions set out in the judgment.

Nevertheless, I would like to explain my approach on two points: firstly, on the interpretation of law under democratic and non-democratic (socialist) regimes and treatment of that problem after the transition to democracy, and secondly on the term "crime against humanity" in international law.

I.

2. The judgment is based on an interpretation of international law (for example, in the International Covenant on Civil and Political Rights of 16 December 1966) and the national law of the GDR (for example, in the Constitution of the GDR, the People's Police Act and other laws). The Court comes to the conclusion that the conduct of the applicants at the material time was contrary to both international law and the national law of the GDR (see paragraphs 64, 72, 75, 102, 104 and others of the judgment).

3. The applicants contested that approach (also adopted by the German domestic courts) saying in fact that in the GDR international law and national law were interpreted and applied differently (see paragraph 47 of the judgment) and that in the light of that interpretation and application of the law their conduct had been lawful.

4. It seems to me that that objection raises one of the most serious issues of the present judgment – a point which is very important in situations where a previous, non-democratic (for example, socialist) regime has been abolished and a new democratic regime has been established. It shows clearly that interpretation and application of the law depend on the general political order, in which the law functions as a sub-system.

5. In fact, the courts of the GDR, by applying the same provisions of the GDR Constitution (Articles 19 and 30) and other laws, and also the International Covenant on Civil and Political Rights (Article 12), would never have come to the same result as the German courts did after the reunification and this Court has done in the present judgment because of their completely different approach to interpretation and application of the law.

6. The differences in interpretation and application of the law between democratic and socialist systems cover all important elements of the law in the broad sense – especially the sources of law, autonomy of legal reasoning and the interpretation of legal norms (especially by independent judges), methods of interpretation of legal norms, the hierarchy of legal norms and the binding character of the law for the State authorities. Therefore, the same legal texts (the Constitution of the GDR or the International Covenant on Civil and Political Rights), when applied according to different methodologies of application of the law inherent in the political order concerned, will lead to different results.

7. That brings us to the question whether, after a change of political order from a socialist to a democratic one, it is legitimate to apply the "old" law, set by the previous non-democratic regime, according to the approach to interpretation and application of the law which is inherent in the new democratic political order.

8. I would like to stress that in my view there is no room for other solutions. Democratic States can allow their institutions to apply the law – even previous law, originating in a pre-democratic regime – only in a manner which is inherent in the democratic political order (in the sense in which this notion is understood in the traditional democracies). Using any other method of applying the law (which implies reaching different results from the same legal texts) would damage the very core of the *ordre public* of a democratic State.

9. The same principles are equally valid with regard to the interpretation and application of the norms of international law, like the International Covenant on Civil and Political Rights. The Covenant has been signed and ratified by most States in the world – democratic and non-democratic (including the GDR). A democratic State can interpret and apply the Covenant (and other international legal norms) only according to the methodology of application of the law which is inherent in the democratic political order. In the present case that was done by the German domestic courts (see the judgment of the Federal Constitutional Court, quoted in paragraph 22 of the judgment).

10. Consequently, interpretation and application of national or international legal norms according to socialist or other non-democratic methodology (with intolerable results for a democratic system) should from the standpoint of a democratic system be regarded as wrong. That applies both to *ex post facto* assessment of the legal practice of previous non-democratic regimes (as in the instant case, although the same situation may obviously arise in other new democracies) and to assessment of the actual legal practice (for example, regarding the Covenant) of today's non-democratic regimes. That practice should be regarded as a misuse of law. After the change to a democratic political order the persons responsible cannot rely for justification of their conduct on the "specific" way in which law is interpreted by non-democratic regimes.

11. In my view, that is a compelling conclusion, which derives from the inherent universality of human rights and democratic values, by which all democratic institutions are bound. At least since the time of the Nuremberg Tribunal, that conception of the democratic order has been well understood in the world and it is therefore foreseeable for everybody.

12. That, in my view, is confirmed also by the conclusions of the present judgment.

II.

13. Paragraph 107 of the judgment confirms that the applicants' conduct could also be considered under Article 7 § 1 of the Convention from the standpoint of other rules of international law, notably those concerning crimes against humanity, but that in view of the Court's findings after applying international human rights norms in conjunction with the norms of the GDR's national law it is not necessary to examine this question.

14. In principle, I agree with that approach. However, the conclusions of the present judgment were reached mainly because the Constitution and other laws of the GDR were well-formulated in a language which was similar to the language of the constitutional and other legal provisions of democratic States governed by the rule of law (for example, constitutional provisions on human rights). That was not the real intention of the non-democratic regime of the GDR. The human rights provisions in the Constitutions of the former socialist States were rather of a propagandistic character. Nevertheless, the German domestic courts and this Court, for what in my view are compelling reasons, as explained above, have "taken these rights seriously" (Ronald Dworkin) by giving them the meaning derived from the wording of the various legal norms as construed according to the methodology of application of the law inherent in the democratic system.

15. I think that the ability of courts in the newly established democracies to deal with the "legacy" of former non-democratic regimes should not depend solely on the wording of the legal norms of the non-democratic regimes, formulated in the first place not for legal but rather for propagandistic purposes.

16. The judgment left the door open also for the examination of such conduct as the applicants' under the heading of a criminal offence under international law (see paragraph 106 of the judgment).

17. In that connection, I would like to stress recent developments in international law in respect of the strengthening of the protection of human rights, including norms on crimes against humanity. Despite the fact that many legal problems in this field are not yet entirely resolved, the direction of these developments is obvious.

18. I therefore endorse the convincing analysis of Judge Loucaides in his concurring opinion, that at the material time the applicants' conduct was not only a criminal offence under domestic law but could also be considered an offence under international law.