HUMAN RIGHTS COMMITTEE

Baumgarten v. Germany

Communication No. 960/2000**

31 July 2003

CCPR/C/78/D/960/2000*

VIEWS

Submitted by: Klaus Dieter Baumgarten

Alleged victim: The author

State party: Germany

Date of communication: 30 September 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 July 2003,

Having concluded its consideration of communication No. 960/2000, submitted to the Human Rights Committee by Mr. Klaus Dieter Baumgarten under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Klaus Dieter Baumgarten, a German citizen, who, at the time of his initial submission, was imprisoned in the prison of Düppel in Berlin, Germany[*]. He claims to be the victim of violations by Germany of articles 15 and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

Facts:

2.1 From 1979 until his retirement in February 1990, the author was Deputy Minister of Defence and Head of Border Troops (*Chef der Grenztruppen*) of the former German Democratic Republic (GDR).

2.2 On 10 September 1996, the Regional Court of Berlin (*Landgericht Berlin*) convicted the author of homicide[1] and attempted homicide in several cases occurring between 1980 and 1989, sentencing him to a prison term of six years and six months. The Court found that the author was responsible for the killing or attempted killing of the persons concerned, who, upon attempting to cross the border between the former GDR and the Federal Republic of Germany (FRG) including West Berlin, were shot by border guards or set off mines. On 30 April 1997, the Federal Court (*Bundesgerichtshof*) dismissed the author's appeal. The Federal Constitutional Court (*Bundesverfassungsgericht*) rejected his constitutional motion on 21 July 1997, holding that the previous court decisions did not violate constitutional law.

2.3 The author testified before the Regional Court of Berlin that, since 1960, the highest military organ of the former GDR, the National Defence Council formulated general policy guidelines on the protection and defence of the border, which had to be implemented by the Minister of Defence . The border troops (*Grenztruppen*) were directly subordinate to the Minister of Defence; the Head of Border Troops was, at the same time, one of the Deputy Ministers.

2.4 In order to implement the general policy guidelines of the National Defence Council, the Minister of Defence issued his annual order no. 101 for the protection of the border to the Head of Border Troops who, in turn, spelled out the required defence and security measures in more concrete terms in annual order no. 80. The content of this order was thereupon further interpreted and refined through the different levels of hierarchy in the border troops, and eventually reached every unit for implementation.

2.5 As Head of Border Troops and under his sole responsibility, the author issued the following orders: no. 80/79 of 6 October 1979, no. 80/80 of 10 October 1980, no. 80/81 of 6 October 1981, no. 80/83 of 10 October 1983, no. 80/84 of 9 October 1984, no. 80/85 of 18 October 1985, no. 80/86 of 15 October 1986 and no. 80/88 of 26 September 1988. Excerpts from these orders[2] are cited in the judgment of the Berlin Regional Court:

"The guard sections and units must reliably and without interruption guard, in the border sections assigned to them, the inviolability of the state border of the German Democratic Republic, apprehend border violators, and not permit border violations or the expansion of border provocations onto the state territory of the GDR. […] The effectiveness of border security should be further increased. […]

[Border guards] are to be trained to act in a way that is politically clever, decisive and shows initiative. [They are] primarily to be trained to apprehend border violators or provocateurs without having resort to firearms. In marksmanship training, soldiers should be enabled to handle their

personal firearms safely and to safely combat targets that appear and that move by day and night. These tasks should be carried out with the least amount of ammunition."[3]
"The readiness and ability of the forces deployed in the Border Service to prevent any attack on the state border through politically correct and tactically clever, decisive, active, cunning and resourceful action is to be further perfected. […] [S]taff deployed for securing the border are trained in the uncompromising use of firearms in carrying out the combat order, if all other means of apprehension have been exhausted, in accordance with the regulations on the use of firearms […]

Particular attention is to be paid to constantly ensuring the functionality and full effectiveness of the [border] installations. There should be [...] 39.2 km of border fence I, 10 facilities or border installations with fragmentation mines […]. Transformation and main repair is to be implemented at […] border installations with fragmentation mines, 6 facilities, 104 km border fence I. […] In order to support the 'pioneer' and signal expansion in Border Command South, the exceptional service of two 'pioneer' companies should be ensured […] from 24 June 1982 to 15 October 1982 […]. The maintenance staff for the border installations with fragmentation mines […] should not be deployed in 24-hour shifts. They should be planned and deployed for at least 15 working days of maintenance work per month. […]

The efforts are to be directed at enabling the border soldiers to act in a way that is politically clever and shows initiative as well as determination in the Border Service, […] to hit their targets whether these appear and move by day or by night."[4]

"Border training is to be organized as a whole and shall respond to the requirements of reliably securing the state border day and night. The soldiers are to be trained in accurate shooting to combat […] targets in all situations and shall be enabled to use their personal firearm in accordance with the legal provisions and military regulations, as well as in a responsible and decisive manner, in the border area. To apprehend border violators and provocateurs using physical force, border troops shall receive training in border-related close combat."[5]

"Through the coordinated, dispersed employment of forces and means, […] attempts of border violations and other attacks on the state border should be recognized in time and be prevented reliably and through determined action."[6]

"The focus should be on […] the fast and precise recognition of indications of the preparation and the carrying out of border violations and provocations, actions in the border service which are politically clever, offensive as well as controlled under all circumstances, quick and targeted actions to arrest border violators without using firearms, […] the prevention of border breakthroughs and the successful defence against border provocations […]. In marksmanship training, the members of the border troops and units […] are to be trained in such a way that they hit the target with the first shot […] within the first third of the combat time available […]. The focus is to be placed on […] combating small targets at direct shooting distance with the personal firearm or with double arms."[7]

"Combat and special training should enable the units, services, crews and border guards to recognize any indications of the preparation and the carrying out of border violations in good time, to act decisively and with initiative to prevent border violations, to successfully prevent border provocations and armed attacks on the territory of the GDR. […] Effective measures are to be taken to improve marksmanship training. […] [M]embers of the border guard should become more able to use their arms safely, to hit their target under all conditions and […] with the first shot."[8]

Domestic context and legislation:

3.1 Between 1949 and 1961, approximately two and a half million Germans fled from the German Democratic Republic to the Federal Republic of Germany, including West Berlin. To stop this flow of refugees, the GDR started construction of the Berlin Wall on 13 August 1961 and reinforced security installations along the inner-German border, in particular by installing landmines, later replaced by SM-70 fragmentation mines. Hundreds of persons lost their lives attempting to cross the border, either because they set off mines, or because they were shot by East German border guards.

3.2 Following German reunification, public prosecutors started to investigate the killings of persons at the former inner-German border on the basis of the Treaty on the Establishment of a Unified Germany of 31 August 1990 (*Einigungsvertrag)*. The Unification Treaty, taken together with the Unification Treaty Act of 23 September 1990 declares, in the transitional provisions relating to the Criminal Code (articles 315 to 315c of the Introductory Act to the Criminal Code), that, as a rule, the law of the place where an offence was committed remains applicable for acts that occurred prior to the time when unification became effective. For offences committed in the former GDR, the Criminal Code of the former GDR remains applicable. Pursuant to section 2, paragraph 3, of the Criminal Code (FRG), the law of the FRG is applicable only if it is more lenient than that of the GDR.

3.3 The first chapter of the Special Section of the Criminal Code (GDR), 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 and the dignity and worth of human beings, and for the preservation of the rights of everyone."

Section 95 of the Criminal Code (GDR) provided:

"Any person whose conduct violates human or fundamental rights, international obligations or the national sovereignty of the German Democratic Republic may not invoke statute law, an order or instruction as justification; he shall be held criminally responsible."

Sections 112 and 113 of the Criminal Code (GDR) sanctioned murder and "manslaughter":

Section 112
Murder

"(1) Any person who intentionally kills another person shall be punished with no less than ten years' imprisonment or with life imprisonment.
[…]
(3) Preparation and the attempt shall be punishable."

Section 113
Manslaughter

"(1) The intentional killing of a person shall be punished with imprisonment of up to ten years if
1. the offender, without his own guilt, has been placed in a state of considerable excitement by mistreatment, serious threat or serious insult done to himself/herself or his/her family members by the person killed, and was forced or influenced thereby to commit the homicide;
2. a woman kills her child during or immediately following birth;
3. particular circumstances exist relating to the offence, reducing responsibility under criminal law.
(2) The attempt shall be punishable."

Article 258 of the Criminal Code (GDR) provided:

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

3.4 Pursuant to section 17, paragraph 2, of the People's Police Act (*Volkspolizeigesetz*) of 11 June 1968, the use of firearms was 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
- 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 re-arrest 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 clear warning or warning shot, 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 or female persons.

(6) The use of firearms shall be regulated in detail by the Minister of the Interior and Head of the German People's Police […]."

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

3.5 On 1 May 1982, the Act on the State Border (*Grenzgesetz*) of the GDR entered into force, replacing section 17, paragraph 2, of the People's Police Act insofar as the use of firearms by border guards was concerned. Section 27 of the State Border Act reads:

"(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, 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 desired result.

(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 clear 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

a) the life or health of third parties may be endangered;

b) the persons appear, from their outward aspect, to be children: or

c) the shots would violate the sovereign territory of a neighbouring State.

If possible, firearms should not be used against juveniles 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."

3.6 By contrast with the use of firearms, the installation of mines was not regulated by statutory

law, but by a series of service regulations and orders which provided for measures to secure border installations through mines, as well as the use of firearms.[9]

3.7 The term "serious crime" (*Verbrechen*) referred to in section 17, paragraph (2) (a), of the People's Police Act and in section 27, paragraph 2, of the State Borders Act was defined in section 1, paragraph 3, of the Criminal Code:

"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 criminal acts against life(*vorsätzlich begangene Straftaten gegen das Leben*). Similarly considered 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, and 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 penalties applicable, a sentence of over two years' imprisonment has been imposed."

3.8 In principle, the GDR denied its citizens the right to travel to a Western country including the FRG and Berlin (West). Approval was required to travel to these countries. Under the legal provisions applicable to the issuance of passports and visas in the GDR, it was, however, impossible for persons who enjoyed no political privileges, had not reached retirement age or had not been exempted on the basis of certain types of urgent family business, to leave the GDR legally for a Western country. Crossing the border without an authorization constituted a criminal offence under section 213 ("Illegal border crossing") of the Criminal Code (GDR) which read:

"(1) Any person who illegally crosses the border of the German Democratic Republic or contravenes provisions regulating temporary authorization 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.
(2) […]
(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 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 forgery, falsified documents or documents fraudulently used, or through the use of a hiding place;
5. the offence is committed jointly with others; or
6. the offender has already been convicted of illegally crossing the border.
(4) Preparation and attempt shall be criminal offences."

3.9 Serious cases of illegal border crossing, as defined in section 213, paragraph 3, of the Criminal Code, included the use of a ladder to climb over border fences, which was considered a commission of the offence by the use of dangerous means (section 213, para. 3, no. 2)[10], and the crossing of the border under considerable physical efforts (section 213, para. 3, no. 3: "particular

intensity")[11]. Depending on the intensity of commission, such acts constituted either misdemeanours (*Vergehen*) or serious crimes (*Verbrechen*).[12] Frequently, serious cases of illegal border crossing were deemed to constitute serious crimes[13], either because they were punishable by more than two years' imprisonment[14] or because they were considered "attacks dangerous to society" or a "serious violation of socialist legality"[15], under section 1, paragraph 3, of the Criminal Code (GDR).

3.10 No member of the border troops was ever prosecuted in the GDR for ordering the use of firearms or for executing such orders.

3.11 The Covenant entered into force for the German Democratic Republic on 23 March 1976. However, it was never incorporated into the GDR's domestic legal order by Parliament (*Volkskammer*), as required by article 51[16] of the GDR Constitution.[17]

The procedure before the domestic tribunals:

4.1 The Berlin Regional Court, in its judgment of 10 September 1996, found that, based on the provisions on homicide of the GDR Criminal Code, the author was responsible for the deaths or injuries inflicted on persons trying to cross the border at the inner-German border or, respectively, the Berlin Wall, by virtue of his annual orders, triggering a chain of subsequent orders and, thereby, inciting the acts committed by border guards in the cases at issue. While the Court recognized that it was not the author's direct intention to cause the death of border violators, it argued that he was fully aware, and accepted, that, as a direct consequence of the application of these orders, persons attempting to cross the border could lose their lives. It rejected the author's claim that he had erred about the prohibited nature of his orders, since such error was avoidable, given his high military rank, his competencies and the fact that his orders manifestly violated the right to life, thereby infringing the criminal laws of the GDR. It held that the author's acts were neither justified by the pertinent service regulations issued by the Minister of National Defence, nor under article 27, paragraph 2, of the State Border Act, arguing that these legal justifications were invalid because they manifestly violated basic principles of justice and internationally protected human rights, as enshrined in the International Covenant on Civil and Political Rights.

4.2 The Court argued that, by giving priority to the inviolability of the GDR's state borders over the right to life of unarmed fugitives who attempted to cross the inner-German border, these grounds of justification violated legal principles based on the intrinsic worth and dignity of the human person and recognized by the community of nations. The Court concluded that in such a case, the positive law had to be superseded by considerations of justice. Such a finding did not constitute a breach of the principle of non-retroactivity in article 103, paragraph 2, of the German Basic Law (*Grundgesetz*), since the expectation that the law, as applied in GDR state practice, would continue to be applied so as to broadly construe a legal justification contrary to human rights, did not merit protection of the law. The Court dismissed order no. 101 as a lawful excuse, holding that under article 258, paragraph 1, of the Criminal Code (GDR), criminal responsibility was not excluded where the execution of an order manifestly violated recognized rules of public international law or a criminal statute. In assessing the punishment, the Court balanced the following aspects: (1) the totalitarian structure of the GDR which left the author only with a limited

scope of action, (2) the author's high age and his expressions of regret for the victims, (3) the considerable lapse of time since the commission of the acts, (4) his (albeit avoidable) error as to the unlawfulness of his acts (in his favor), and (5) his participation, at a high level of hierarchy, in the maintenance and increased sophistication of the system of border control (to his detriment). Based on the relevant provisions of the Criminal Code (FRG), which were more lenient than the corresponding norms of the Criminal Code (GDR), the Court decided to impose a reduced sentence.

4.3 The Federal Constitutional Court, in its decision dated 21 July 1997, rejected the author's constitutional complaint that the decisions of the Berlin Regional Court and the Federal Court violated the principle of non-retroactivity in article 103, paragraph 2, of the Basic Law by retroactively declaring acts punishable which, under GDR law, had been lawful. The Court stated that it was precluded from reviewing the interpretation and application of the criminal law of the former GDR, its review being limited to the question of whether constitutional law had been violated by the lower courts' decisions. The Court found no breach of Article 103, paragraph 2, of the Basic Law since the author's expectation that his acts were justified under GDR practice did not merit constitutional protection. By reference to its previous decision on border shootings[18], the Court reiterated that the *bona fide* basis protected by article 103, paragraph 2, of the Basic Law was absent where a State codified norms which sanction the most severe criminal wrongs, such as the intentional killing of human beings, but at the same time provide for legal justifications that exclude criminal responsibility, and thereby encourage the commission of such wrongs and disregard universal human rights recognized by the community of nations. The strict protection, in article 103, paragraph 2, of the Basic Law, of the legitimate expectation of the legality of one's acts did not apply in the particular case, especially since the injustice of the GDR's system of border control could only prevail as long as that State had existed.

The complaint

5.1 The author claims that he is a victim of violations of articles 15 and 26 of the Covenant, because he was convicted for acts committed in the line of duty which did not constitute a criminal offence under GDR law or under international law.

5.2 With regard to the alleged violation of article 15 of the Covenant, the author claims that, by judging his acts, the State party's courts deprived the relevant GDR legislation of its original meaning, replacing it by their own concept of justice. He argues that the reasoning of the Courts amounts to the absurd contention that the East German Parliament placed members of the armed forces at double jeopardy, by enacting criminal laws requiring them to comply with their professional duties, and at the same time criminalizing such compliance, eventually only in order to prevent the prosecution of the fulfillment of such duties by means of legal justifications. He submits that compliance with professional duties never constituted a criminal offence under GDR law since it was not contrary to the interests of society, as required by section 1, paragraph 1, of the Criminal Code (GDR). On the contrary, non-compliance with service regulations or orders governing the protection of the state borders itself entailed criminal responsibility, the only exception pertaining to cases where the order manifestly violated the recognized rules of public international law or a criminal statute (section 258 of the GDR's Criminal Code).

5.3 The author contends that international law did not prohibit the installation of mines along the border between two sovereign states which, moreover, marked the demarcation line between the two largest military alliances in history and had been ordered by the Commander-in-chief of the Warsaw Pact. He notes that the mines were only used in military exclusion zones, were clearly indicated by warning signs, and that involuntary access was prevented by high fences. He further claims that, when considering the second periodic report of the GDR in 1983, the Committee found the East German system of border control to be in conformity with the Covenant.

5.4 Furthermore, the author argues that criminal intent required the apparent and wilful disregard of certain basic social norms, which obviously was not the case in instances of compliance with one's professional duties.

5.5 According to the author, at the time of the entry into force of the Unification Treaty on 3 October 1990, no basis for prosecuting his acts existed. The legal system of the GDR did not provide for incurring criminal responsibility on the sole basis of natural law concepts, which had no foundation in the GDR's positive law. When the FRG agreed to include the prohibition of the retroactive application of its criminal law in the Unification Treaty, it did so in the light of the historically unique chance to unify both German States, accepting that its own concepts of justice could not be applied to acts committed in the former GDR. The author concludes that his conviction, therefore, lacked a legal basis in the Unification Treaty.

5.6 With respect to the reference to "international law" in article 15, paragraph 1, and the limitation clause in article 15, paragraph 2, of the Covenant, the author submits that at the material time, his acts were not criminal under international law, nor under the general principles of law recognized by the community of nations.

5.7 Regarding the alleged violation of article 26 of the Covenant, the author claims that he had been discriminated against as a former citizen of the GDR because the German courts failed to apply the statutory provisions of the FRG relating to the use of firearms, which stipulate that the knowledge of the danger of such arms did not imply an intent to kill, to his case, and instead presumed that he had accepted the death of border violators as a consequence of his orders pertaining to the use of firearms.

5.8 The author states that he has exhausted all available domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement.

State Party's observations on admissibility and merits:

6.1 By *note verbale* of 5 September 2001, the State party made its submission on the admissibility and merits of the communication. It confirms the facts of the case as submitted by the author. However, it disputes the allegation that the author's conviction violated articles 15 and 26 of the Covenant.

6.2 As to the alleged violation of article 15 of the Covenant, the State party recalls that the

Regional Court of Berlin found that the author's acts were punishable under GDR law at the time of their commission. It quotes extensively from a landmark decision of the Federal Court[19], which is also cited in the judgment of the Berlin Regional Court[20]. According to that decision, the legal justification in section 27, paragraph 2, of the Border Act, as applied in the GDR's state practice, had to be disregarded in the application of the law because it violated basic notions of justice and humanity in such an intolerable manner that the positive law must give way to justice (so-called *Radbruch formula*[21]). In assessing the conflict with material justice, the Court refers to the Covenant, in particular articles 6 and 12, as "more specific criteria" for that assessment, concluding that the restrictive visa policy of the GDR was inconsistent with the limitations clause in article 12, paragraph 3, of the Covenant since it made the exception to the freedom to leave one's own country the general rule, thereby ignoring the close ties between the Germans from both States who belonged to one and the same nation. Similarly, the Court found the use of firearms against border violators, in its unprecedented perfection, to be inconsistent with article 6, since it was disproportionate to the itself illegitimate aim of deterring third persons from crossing the border without authorization. On these premises, the Court held that section 27, paragraph 2, of the Border Act had to be disregarded as a ground for justification because the GDR itself should have interpreted that provision restrictively on the basis of its international obligations, its constitutional provisions and the principle of proportionality laid down in article 30, paragraph 2, of the GDR Constitution and in section 27, paragraph 2, of the Border Act. In the Court's opinion, section 27, paragraph 2, first sentence, had to be construed as follows: "The border guard was allowed to use a firearm to prevent flight in the cases referred to there; but the ground for justification met its limits when, with conditional or unconditional intent to kill, shots were fired on a refugee who, in the circumstances, was unarmed and also did not otherwise constitute a danger to the life and limb of others."

6.3 The State party invokes another judgment[22], in which the Federal Court recalled that the GDR had always stated that it endorsed the principles of the United Nations and that article 91 of the GDR Constitution declared the generally recognized rules of international law on the punishment of crimes against humanity and of war crimes to be directly applicable law. The State party concludes from both judgments that the Federal Court did not, therefore, rely on international law, but derived its assessment that the author's acts were punishable from the domestic law of the GDR. The fact that these offences were not prosecuted in the GDR does not imply that they did not constitute criminal offences.

6.4 The State party refers to the Federal Constitutional Court's landmark decision[23] on the issue, which emphasized that, in the absence of a legitimate expectation not to be punished, the prohibition of the retroactive application of criminal laws in article 103, paragraph 2, of the Basic Law was not applicable to situations where the other state (the GDR) made provision for criminal offences to cover the most serious criminal wrongs, but at the same time excluded criminal liability through grounds of justification which went beyond the written norms, instigated such wrongs, and violated human rights recognized by the community of nations. In the interest of material justice, the strict application of article 103, paragraph 2, must give way. Otherwise the administration of criminal justice in the Federal Republic would run counter to its own rule of law premises. Although the wording of the GDR's provisions on the use of firearms at the inner-German border corresponded to that of the FRG's provisions on the use of force, the written law of the GDR was,

in fact, eclipsed by the requirements of political expediency, which subordinated the individual's right to life to the State's interest in preventing the unauthorized crossing of its borders. In the absence of any admissible justification for the border killings, the definition of homicide in sections 112 and 113 of the Criminal Code applied to the author's acts.

6.5 The State party recalls that, in accordance with the Committee's jurisprudence, it is primarily for the courts and authorities of the State party to interpret and apply domestic law. Only if such interpretation or application is arbitrary may the Committee intervene. The decisions of the German courts with regard to the author were, however, not arbitrary.

6.6 The State party submits that article 15 of the Covenant only applies if the person concerned cannot reasonably ascertain, from the wording of the law, that his or her acts are punishable and also cannot foresee that he could be held criminally responsible for his acts. Given the author's position as a trained and qualified, high-ranking "military scientist", it should have been obvious to him that his orders were contrary to articles 6 and 12 of the Covenant, and that he could be prosecuted for his acts, should the political circumstances in the GDR change.

6.7 The State party rejects the author's claim that the Committee never found the GDR's system of border control to be in violation of the Covenant and recalls that, prior to 1992, the Committee did not adopt concluding observations on the human rights situation in reporting States parties. However, when the former GDR presented its first and second periodic reports before the Committee in 1978 and in 1984, several Committee members expressed clear criticism with regard to the system of border control. The author should also have noted the disapproval of the system of border control in the practice of international organizations, in particular the appearance of the former GDR on the "1503-list" of the Commission on Human Rights, from 1981 to 1983, precisely because of border killings and violations of article 13 of the Universal Declaration of Human Rights.

6.8 The State party concludes that, in line with the Committee's General Comment No. 6[24] as well as its consistent jurisprudence[25], it is legally obliged under article 6, paragraph 1, of the Covenant to prosecute and punish those who arbitrarily deprived citizens of the former GDR of their lives. Subsidiarily, it submits that the author's conviction could be covered by article 15, paragraph 2, of the Covenant if his acts were criminal at the material time, according to the general principles of justice recognized by the community of nations. In that regard, the State party emphasizes the close link between the Nuremberg Principles and the *Radbruch formula* and contends that the system of border control led to grave violations of human rights.

6.9 With respect to the alleged violation of article 26 of the Covenant, the State party submits that the author's prosecution was solely based on his personal involvement in the system of border control and that the prohibition of discrimination does not mean that persons cannot be held criminally responsible. Criminal responsibility for offences under GDR law could be incurred by anyone subject to the GDR's criminal law, irrespective of his or her citizenship.

Comments by the author:

7.1 By letter of 14 November 2001, the author responded to the State party's submission. He reiterates the arguments stated in his initial communication and adds that article 15 of the Covenant required the German courts to apply the GDR's law of criminal procedure and, in particular, its law of burden of proof to establish his criminal liability. Under the GDR's criminal law, intent to kill could not be presumed on the basis of one's knowledge of the possible lethal consequences of the use of firearms. Instead, the expectation that a border violator would only be injured or would refrain from climbing over mine installations precluded such intent. Self-endangering behaviour always disrupted the chain of cause and effect required to establish criminal liability.

7.2 The author rejects the State party's contention that the GDR's written norms were eclipsed by orders which left no room for weighing the use of firearms against the principle of proportionality, and submits that all military orders and service regulations required soldiers to save the life of border violators, whenever possible.

7.3 Furthermore, he argues that, even in the hypothesis that fulfillment of military duties constituted a criminal offence under GDR law, the Unification Treaty precluded the German courts from negating the existing legal justifications solely because these justifications prevented criminal prosecution of such acts. The fact that German courts systematically violated the Unification Treaty does not make the State party's position any more justifiable.

7.4 The author admits that the GDR was bound by its legal obligations under the Covenant. However, since he was not identical with the GDR as a subject of international law, the Covenant could not create rights or duties for him, let alone establish his criminal liability, in the absence of an incorporation of that instrument into the GDR's domestic law. He indicates that, pursuant to article 2, paragraph 2 (b), of the European Convention for the Protection of Human Rights and Fundamental Freedoms, deprivation of life does not violate the human right to life when it results from the use of force which is absolutely necessary in order to effect a lawful arrest or to prevent the escape of a person lawfully detained.

7.5 The author submits that the installation of mines at the inner-German border was a preventive military measure against a possible attack by NATO forces. He denies that the mines were deployed with the intent to kill people. Instead, their enclosure by fences and the placement of clearly visible warning signs were intended to deter border violators from entering mined areas. No one forced border violators to enter the mine fields, the danger of which was known to them. The author recalls that border guards were never required to make excessive use of their firearms. Border violators were always warned by shouts to stop and by at least one warning shot. They could always stop their attempt to cross the border to prevent being shot at; shots were always aimed at their feet. According to the author, the death of persons attempting to cross the border was an exception rather than the general rule.

7.6 The author argues that, because of the complex chain of orders, a high-ranking member of the armed forces can never directly control the use of firearms in each individual case, but is limited to setting out the requirements for such use which have to be respected by each individual soldier. Although the use of firearms frequently implies a risk to life, ordering such use cannot be equated to intentionally killing the person concerned. Furthermore, the author argues that he cannot be held responsible for the GDR's visa policy.

7.7 The author submits that the State party's Parliament (*Bundestag*) enacted a law in 1993 which retroactively stayed the statutory limitations contained in sections 82 and 83 of the Criminal Code (GDR) for the period during which offences committed in relation to the system of border control had not been prosecuted in the GDR for political reasons. He argues that the State party ignored the adoption by the State Council (*Staatsrat*), the GDR government, of a general amnesty, dated 17 July 1987, which also applied to acts of homicide committed prior to 7 October 1987.

Issues and proceedings before the Committee:

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee also notes that the State party did not contest the admissibility of the communication. It therefore considers that there is no obstacle to the admissibility of the communication, and, accordingly, decides that the communication is admissible insofar as it raises issues under articles 15 and 26 of the Covenant.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 As regards the author's claim under article 15, the Committee is called upon to determine whether the conviction of the author for homicide and attempted homicide by the German courts amounts to a violation of that article.

9.3 At the same time, the Committee notes that the specific nature of any violation of article 15, paragraph 1, of the Covenant requires it to review whether the interpretation and application of the relevant criminal law by the domestic courts in a specific case appear to disclose a violation of the prohibition of retroactive punishment or punishment otherwise not based on law. In doing so, the Committee will limit itself to the question of whether the author's acts, at the material time of commission, constituted sufficiently defined criminal offences under the criminal law of the GDR or under international law.[26]

9.4 The killings took place in the context of a system which effectively denied to the population of the GDR the right freely to leave one's own country. The authorities and individuals

enforcing this system were prepared to use lethal force to prevent individuals from non-violently exercising their right to leave their own country. The Committee recalls that even when used as a last resort lethal force may only be used, under article 6 of the Covenant, to meet a proportionate threat. The Committee further recalls that States parties are required to prevent arbitrary killing by their own security forces.[27] It finally notes that the disproportionate use of lethal force was criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts.

9.5 The State party correctly argues that the killings violated the GDR's obligations under international human rights law, in particular article 6 of the Covenant. It further contends that those same obligations required the prosecution of those suspected of responsibility for the killings. The State party's courts have concluded that these killings violated the homicide provisions of the GDR Criminal Code. Those provisions required to be interpreted and applied in the context of the relevant provisions of the law, such as section 95 of the Criminal Code excluding statutory defences in the case of human rights violations (see paragraph 3.3) and the Border Act regulating the use of force at the border (see paragraph 3.5). The State party's courts interpreted the provisions of the Border Act on the use of force as not excluding from the scope of the crime of homicide the disproportionate use of lethal or potentially lethal force in violation of those human rights obligations. Accordingly, the provisions of the Border Act did not save the killings from being considered by the courts as violating the homicide provisions of the Criminal Code. The Committee cannot find this interpretation of the law and the conviction of the author based on it to be incompatible with article 15 of the Covenant.

10. With regard to the author's allegation of a violation of article 26 of the Covenant, the Committee notes that the Treaty on the Establishment of a Unified Germany provides for the applicability of the criminal law of the former GDR to all acts committed on the territory of the former GDR, prior to the unification becoming effective. The Committee takes note of the author's allegation that certain provisions of the State party's law that would have been applied on the use of firearms by officials of the FRG had not been applied in his case. However, the Committee observes that the author has failed to demonstrate that persons in a similar situation in the former GDR or FRG have, in fact, been treated differently. Therefore, the Committee concludes that he has not substantiated his claim and considers that there has been no violation of article 26 in this respect.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of articles 15 and 26 of the Covenant.

Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.

* Made public by decision of the Human Rights Committee.

** The following members of the Committee participated in the examination of the present

communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Notes:

*/ The Covenant and the Optional Protocol to the Covenant entered into force for the State Party on 23 March 1976 and 25 November 1993 respectively. Upon ratification of the Optional Protocol, the State Party entered the following reservation concerning article 5, paragraph 2 (a): "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 (a) to the effect that the competence of the Committee shall not apply to communications
a) which have already been considered under another procedure of international investigation or settlement, or
b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany
c) by means of which a violation of article 26 of the [said Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

1/ Referred to as "manslaughter" in the State party's submissions.
2/ The English translations of these excerpts are based on the translations provided by the State party.

3/ Order no. 80/79 of 6 October 1979 (excerpts).

4/ Order no. 80/81 of 6 October 1981 (excerpts).

5/ Order no. 80/83 of 10 October 1983 (excerpts).

6/ Order no. 80/84 of 9 October 1984 (excerpts).

7/ Order no. 80/85 of 18 October 1985 (excerpts).

8/ Order no. 80/86 of 15 October 1986 (excerpts).

9/ See the Federal Constitutional Court's decision of 21 July 1997, at pp. 4-5 (referring to the Federal Constitutional Court's decision of 24 October 1996 – BVerfGE 95, 96).

10/ *Cf.* Ministry of Justice of the German Democratic Republic (ed.), *Strafrecht der Deutschen Demokratischen Republik: Kommentar zum Strafgesetzbuch*, Berlin 1987, p. 475.

11/ *Ibid.*

12/ *Ibid.*, p. 474.

13/ *Cf.* Alexy, Robert, *Mauerschützen – zum Verhältnis von Recht, Moral und Strafbarkeit* (1993), at p. 11; Brunner, G., „Recht auf Leben", in: Brunner, G. (ed.), *Menschenrechte in der DDR* (1989), at p. 120; Polakiewicz, Jörg, „Verfassungs- und völkerrechtliche Aspekte der strafrechtlichen Ahndung des Schußwaffeneinsatzes an der innerdeutschen Grenze", *Europäische Grundrechtezeitschrift* 1992, at p. 179.

14/ See Alexy, *Mauerschützen*, at p. 11.

15/ See *ibid.*, at pp. 11-12.

16/ Article 51 of the GDR Constitution reads: "Parliament (the *Volkskammer*) approves State treaties of the German Democratic Republic and other international treaties, insofar as they modify Acts of Parliament. It decides upon the termination of such treaties."

17/ See Alexy, *Mauerschützen*, at pp. 16-17 (with further references).

18/ BVerfGE 95, 96 ("Mauerschützen").

19/ BGHSt 39, p. 1, at pp. 15 *et seq.*

20/ See pp. 104-106 of the Berlin Regional Court's judgment of 10 September 1996.

21/ See Radbruch, Gustav, "Gesetzliches Unrecht und übergesetzliches Recht", *Süddeutsche Juristen-Zeitung* (1946), p. 105, at p. 107.

22/ BGHSt 40, p. 241, at pp. 245 *et seq.*

23/ BVerfGE 95, p. 96, at pp. 133 *et seq.*

24/ See Human Rights Committee, 16th session (1982), General Comment No. 6, at para. 3.

25/ In this regard, the State party refers to, *inter alia*, Communication No. 161/1983, *Joaquin Herrera Rubio v. Colombia*, views adopted on 2 November 1987, UN Doc. CCPR/C/31/D/161/1983, at paras. 10.3 and 11.

27/ Human Rights Committee, 16th session (1982), General Comment No. 6: Article 6, at para. 3.