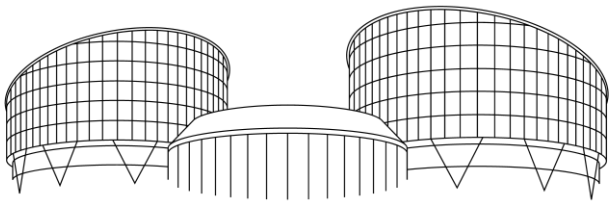

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIFTH SECTION

CASE OF M. v. GERMANY

(Application no. 19359/04)

JUDGMENT

STRASBOURG

17 December 2009

FINAL

10/05/2010

This judgment has become final under Article 44 § 2 of the Convention.

In the case of M. v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President*,
Renate Jaeger,
Karel Jungwiert,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 24 November 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 19359/04) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr M. ("the applicant"), on 24 May 2004. The applicant was granted legal aid. On 7 July 2008 the President of the Chamber acceded to the applicant's request of 1 July 2008 not to have his identity disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant alleged a breach of Article 5 § 1 of the Convention on account of his continued preventive detention beyond the ten-year period which had been the maximum for such detention under the legal provisions applicable at the time of his offence and conviction. He further claimed that the retrospective extension of his preventive detention to an unlimited period of time had breached his right under Article 7 § 1 of the Convention not to have a heavier penalty imposed on him than the one applicable at the time of his offence.

3. A Chamber of the Fifth Section communicated the application on 13 March 2007. A hearing on the admissibility and merits took place in public in the Human Rights Building, Strasbourg, on 1 July 2008 (Rule 54 § 3).

There appeared before the Court:

(a) *for the Government*
Mrs A. WITTLING-VOGEL, *Ministerialdirigentin*, *Agent*,
Mr H. SCHÖCH, Professor of criminal law, *Counsel*,
Mr M. BORNMANN, public prosecutor,
Mr B. BÖHM, *Ministerialdirigent*,
Mr B. BÖSERT, *Ministerialrat*,
Mrs G. LAUNHARDT, public prosecutor,
Mr J. BACHMANN, Governor of Schwalmstadt Prison, *Advisers*;

(b) *for the applicant*
Mr B. SCHROER,
Mr A.H. STOPP, *Counsel*,
Mr T. SCHULLA, *Adviser*.

The Court heard addresses by Mrs Wittling-Vogel, Mr Schöch and Mr Stopp as well as their replies to questions put to them.

4. By a decision of 1 July 2008, following the hearing, the Court declared the application admissible.

5. The applicant and the Government each filed written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1957 and is currently in Schwalmstadt Prison.

A. The applicant's previous convictions and the order for his preventive detention and execution thereof

1. The applicant's previous convictions

7. Since the applicant attained the age of criminal responsibility he has been convicted at least seven times and has spent only a couple of weeks outside prison.

8. Between 1971 and 1975 he was repeatedly convicted of theft committed jointly and burglary. He escaped from prison four times.

9. On 5 October 1977 the Kassel Regional Court, applying the criminal law relating to young offenders, convicted the applicant of attempted murder, robbery committed jointly with others, dangerous assault and blackmail and sentenced him to six years' imprisonment. It found that approximately one week after his release from prison the applicant, together with an accomplice, had injured and robbed an acquaintance of his and had forced the victim, a homosexual, to sign a borrower's note. Moreover, he had injured and attempted to kill his victim one day later when he learned that the latter had reported the robbery to the police. Having regard to a report submitted by expert D., the court found that the applicant suffered from a pathological mental disorder, with the result that his criminal responsibility was diminished (Article 21 of the Criminal Code).

10. On 8 March 1979 the Wiesbaden Regional Court convicted the applicant of dangerous assault, sentenced him to one year and nine months' imprisonment and ordered his subsequent placement in a psychiatric hospital under Article 63 of the Criminal Code (see paragraph 47 below). The applicant had injured a prison guard by throwing a heavy metal box at his head and stabbing him with a screwdriver after having been reprimanded. As confirmed by expert D., the applicant suffered from a serious pathological mental disorder, with the result that his criminal responsibility was diminished.

11. On 9 January 1981 the Marburg Regional Court, on appeal, convicted the applicant of assault of a disabled fellow prisoner following a discussion as to whether or not the cell window should remain open. Incorporating the sentence imposed by the judgment of the Wiesbaden Regional Court of 8 March 1979, it sentenced him to a cumulative sentence of two years and six months' imprisonment. Moreover, it upheld the order for the applicant's placement in a psychiatric hospital. In the proceedings, an expert found that there were no longer any signs that the applicant suffered from a pathological brain disorder.

2. The preventive detention order against the applicant

12. On 17 November 1986 the Marburg Regional Court convicted the applicant of attempted murder and robbery and sentenced him to five years' imprisonment. It further ordered his placement in preventive detention (*Sicherungsverwahrung*) under Article 66 § 1 of the Criminal Code (see paragraphs 49-50 below). It found that when the conditions of his detention in the psychiatric hospital where he had been detained since October 1984 had been relaxed, the applicant had on 26 July 1985 robbed and attempted to murder a woman who had volunteered to spend a day with him in a city away from the hospital. Having regard to the report of a neurological and psychiatric expert, W., the court found that the applicant still suffered from a serious mental disorder which could, however, no longer be qualified as pathological and did not have to be treated medically. He therefore had not

acted with diminished criminal responsibility and the preconditions for his placement in a psychiatric hospital under Article 63 of the Criminal Code were no longer met. However, he had a strong propensity to commit offences which seriously damaged his victims' physical integrity. It was to be expected that he would commit further spontaneous acts of violence and he was dangerous to the public. Therefore, his preventive detention was necessary.

3. Execution of the order for the applicant's preventive detention

13. Since 18 August 1991 the applicant, having served his full prison sentence, has been in preventive detention in Schwalmstadt Prison.

14. On 14 January 1992 the Gießen Regional Court refused to suspend on probation the applicant's preventive detention and his placement in a psychiatric hospital. It relied on a report submitted by expert M.-I., who had concluded that the applicant was likely to commit offences as a result of his propensity to reoffend within the meaning of Article 66 of the Criminal Code, whereas it was not very probable that he would commit offences as a result of his psychiatric condition within the meaning of Article 63 of the Criminal Code.

15. On 26 October 1995 the applicant took advantage of a day release to abscond, but gave himself up to the police on 17 November 1995.

16. On 17 November 1998 the Marburg Regional Court refused to suspend on probation the applicant's preventive detention and his placement in a psychiatric hospital, as it had previously done on 20 September 1994 and 13 November 1996. It took into consideration the fact that in the meantime the applicant, who at that time associated himself with skinheads, had assaulted and broken the nose of a fellow prisoner and had grossly insulted the governor of Schwalmstadt Prison.

B. The proceedings at issue

1. The decision of the Marburg Regional Court

17. On 10 April 2001 the Marburg Regional Court dismissed the applicant's requests to suspend on probation his preventive detention as ordered by that court on 17 November 1986 and his placement in a psychiatric hospital as ordered by it on 9 January 1981. Applying Article 67e § 3 of the Criminal Code (see paragraph 56 below), it declared that no request for review of this decision would be admissible within a two-year period.

18. Having regard to the applicant's previous convictions and his conduct in prison, the Regional Court found that it could not be expected that the applicant, if released, would not commit further serious offences

(Article 67d § 2 of the Criminal Code; see paragraph 53 below). The court had heard evidence from the applicant, who was represented by officially appointed counsel, in person. It had further consulted Schwalmstadt Prison and the Marburg public prosecutor's office, both of which had recommended not suspending on probation the orders for the applicant's detention. It also agreed with the report submitted by an external expert in forensic psychiatry, K. The expert had taken the view that the applicant, who had a narcissistic personality and a total lack of empathy, but could not be regarded as suffering from a psychopathic disorder, needed to be observed for several years before it could be assumed that he was no longer dangerous to the public.

19. The Regional Court stated that it was ordering the applicant's preventive detention also for the period after 8 September 2001, when (after a period during which the applicant had escaped from detention had been deducted) he would have served ten years in preventive detention. There were no constitutional obstacles to such a decision. According to the court, the applicant's continued preventive detention was authorised by Article 67d § 3 of the Criminal Code as amended in 1998 (see paragraph 53 below). In section 1a(3) of the Introductory Act to the Criminal Code, as amended in 1998, the Article in question had been declared applicable also to prisoners whose preventive detention had been ordered prior to the change in the law (see paragraph 54 below). The Federal Constitutional Court had refused to admit a constitutional complaint in which the change in the law had indirectly been at issue. In view of the gravity of the applicant's criminal past and possible future offences his continued preventive detention was not disproportionate.

20. As to the order for the applicant's placement in a psychiatric hospital, his request was premature as he was neither currently detained nor about to be detained in a psychiatric hospital.

2. The decision of the Frankfurt am Main Court of Appeal

21. On 26 October 2001 the Frankfurt am Main Court of Appeal, amending the decision of the Marburg Regional Court in this respect, quashed the order of 9 January 1981 for the applicant's placement in a psychiatric hospital. Upholding the remainder of the Regional Court's decision, it decided not to suspend on probation the applicant's preventive detention as ordered by the Marburg Regional Court's judgment of 17 November 1986, and ordered his continued detention also after the expiry of ten years of detention on 8 September 2001. It confirmed that a request for review of the decision would not be admissible within a two-year period.

22. The Court of Appeal found that the order for the applicant's placement in a psychiatric hospital was devoid of purpose. Having regard to the expert reports submitted to the criminal courts since 1985 and a new

report by expert K. requested by the court itself, it was clear that the applicant no longer suffered from a serious mental disorder which should be qualified as pathological.

23. As to the preventive detention of the applicant, who was represented by counsel, the Court of Appeal, endorsing the reasons given by the Regional Court, found that the applicant's dangerousness necessitated his continued detention. In view of the offences he had committed and could be expected to commit on release, his continued detention was proportionate. No material change in the circumstances decisive for his detention was to be expected within a two-year period (Article 67e § 3 of the Criminal Code).

24. According to the Court of Appeal, Article 67d § 3 of the Criminal Code, as amended in 1998, was constitutional. The court conceded that at the time when the applicant's preventive detention was ordered, it would have ceased after ten years of detention at the latest. However, Article 2 § 6 of the Criminal Code (see paragraph 48 below) authorised a retrospective worsening of the applicant's situation as far as measures of correction and prevention such as preventive detention were concerned. Such measures were not classified as penalties, but as preventive measures, and were therefore not prohibited under Article 103 § 2 of the Basic Law (see paragraph 61 below) as retrospective criminal provisions.

25. Likewise, the applicant's continued preventive detention did not infringe the prohibition in principle of retrospective provisions enshrined in the rule of law. Weighty public-interest grounds, namely the protection of the public from dangerous offenders, justified the adoption of such retrospective provisions by the legislator in the present case.

3. The decision of the Federal Constitutional Court

26. On 26 November 2001 the applicant, represented by counsel, lodged a complaint with the Federal Constitutional Court against the decisions ordering his continued preventive detention even on completion of the ten-year period. He claimed, in particular, that these decisions were based on Article 67d § 3 of the Criminal Code, as amended in 1998, under the terms of which the duration of a convicted person's first period of preventive detention could be extended retrospectively from a maximum period of ten years to an unlimited period of time. Accordingly, this provision violated the prohibition of retrospective punishment under Article 103 § 2 of the Basic Law, the prohibition of retrospective legislation enshrined in the rule of law, the principle of proportionality and his right to liberty under Article 2 § 2, second sentence, of the Basic Law (see paragraph 57 below). Moreover, the impugned provision entailed his being refused any relaxation in his conditions of detention which would allow him to obtain a positive finding to the effect that he was no longer dangerous to the public. As a consequence, it entailed lifelong imprisonment without any prospect of release.

27. On 5 February 2004 a panel of eight judges of the Federal Constitutional Court, having held a hearing at which it also consulted psychiatric experts and several prison governors, dismissed the applicant's constitutional complaint (no. 2 BvR 2029/01) as ill-founded. In its thoroughly reasoned leading judgment (running to 84 pages), it held that Article 67d § 3 of the Criminal Code, read in conjunction with section 1a(3) of the Introductory Act to the Criminal Code, as amended in 1998, was compatible with the Basic Law.

(a) Right to liberty

28. The Federal Constitutional Court held that preventive detention based on Article 67d § 3 of the Criminal Code restricted the right to liberty as protected by Article 2 § 2 of the Basic Law in a proportionate manner.

29. The court stressed that the longer a person was held in preventive detention, the stricter became the requirements concerning the proportionality of the deprivation of liberty. However, Article 67d § 3 of the Criminal Code took into account the increased importance of the right to liberty after ten years in custody. It set a higher standard with respect to the legal interest under threat (protecting only threats to the victims' physical or mental integrity) and the proof of the applicant's dangerousness (requiring a duly substantiated report by an experienced external psychiatric expert). It also made termination of detention the rule and extension the exception, to be used as a measure of last resort. Moreover, the procedural provisions on preventive detention (Articles 67c § 1, 67d §§ 2 and 3 and 67e of the Criminal Code) provided for regular review to determine whether the person's detention could be suspended or terminated. Due to the special significance which the relaxation of detention conditions had for the prognosis of future dangerousness, the court responsible for the execution of the sentence was not permitted to accept without sufficient reason a refusal by the prison authorities to relax detention conditions as a possible precursor to the termination of a detainee's preventive detention.

30. Preventive detention did not serve to avenge past offences but to prevent future ones. Therefore, the *Länder* had to ensure that a detainee was able to have his or her detention conditions improved to the full extent compatible with prison requirements.

(b) Prohibition of retrospective criminal laws

31. The Federal Constitutional Court further held that Article 67d § 3 of the Criminal Code, taken in conjunction with section 1a(3) of the Introductory Act to the Criminal Code, did not violate Article 103 § 2 of the Basic Law. The absolute ban on the retrospective application of criminal laws imposed by that Article did not cover the measures of correction and prevention, such as preventive detention, provided for in the Criminal Code.

32. Interpreting the notions of "punished" and "punishable act" in Article 103 § 2 of the Basic Law, the Federal Constitutional Court found that the Article applied only to State measures which expressed sovereign censure of illegal and culpable conduct and involved the imposition of a penalty to compensate for guilt. Having regard to the genesis of the Basic Law and the purpose of Article 103 § 2, it did not apply to other State measures interfering with a person's rights.

33. In particular, Article 103 § 2 of the Basic Law did not extend to measures of correction and prevention, which had always been understood as differing from penalties under the Criminal Code's twin-track system of penalties and measures of correction and prevention. The fact that a measure was connected with unlawful conduct or entailed considerable interference with the right to liberty was not enough. Unlike a penalty, preventive detention was not aimed at punishing criminal guilt, but was a purely preventive measure aimed at protecting the public from a dangerous offender. Therefore, preventive detention was not covered by Article 103 § 2, even though it was directly connected with the qualifying offence.

(c) Protection of legitimate expectations under the rule of law

34. The Federal Constitutional Court further held, by six votes to two on this issue, that the abolition of the maximum period of detention where preventive detention was ordered for the first time, and the application of the relevant provision (Article 67d § 3 of the Criminal Code read in conjunction with section 1a(3) of the Introductory Act to the Criminal Code) to criminals who had been placed in preventive detention prior to its enactment and entry into force and who had not yet fully served their sentences, were in conformity with the protection of legitimate expectations guaranteed in a State governed by the rule of law (Article 2 § 2 read in conjunction with Article 20 § 3 of the Basic Law; see paragraph 59 below).

35. The court stressed that Article 67d § 3 of the Criminal Code as amended did not retrospectively alter the legal consequences attaching to the offence as fixed in the final judgment of the sentencing court. It had always been the courts responsible for the execution of sentences which had jurisdiction to decide whether and for how long a convicted person was held in preventive detention.

36. Nevertheless, the maximum duration of a first period of preventive detention as laid down in the old version of Article 67d §§ 1 and 3 of the Criminal Code gave detainees reason to expect release when ten years had elapsed. However, pursuant to Article 2 § 6 of the Criminal Code (see paragraph 48 below), the ten-year maximum duration of preventive detention, like all other measures of correction and prevention, had been subject from the outset to changes in the law.

37. Weighing the interests involved, the Federal Constitutional Court concluded that the legislator's duty to protect members of the public against

interference with their life, health and sexual integrity outweighed the detainee's reliance on the continued application of the ten-year limit. As Article 67d § 3 of the Criminal Code was framed as an exception to the rule and in the light of the procedural guarantees which attached to it, its retrospective application was not disproportionate.

(d) Human dignity

38. The Federal Constitutional Court further found that a person's human dignity as enshrined in Article 1 § 1 of the Basic Law did not impose a constitutional requirement that there be a fixed maximum period for a convicted person's preventive detention. The person's dignity was not violated even by a long period of preventive detention if this was necessary owing to the continued danger which he or she posed. However, the aim of preventive detention had to be to rehabilitate detainees and to lay the foundations for a responsible life outside prison. Human dignity required laws and enforcement programmes which gave detainees real prospects of regaining their freedom.

39. Preventive detention in its present form met these requirements. The courts responsible for the execution of sentences had, in particular, to examine before the end of a convicted person's prison term (Article 67c § 1 of the Criminal Code) and subsequently at least every two years (Article 67e § 2 of the Criminal Code) whether the measure could be suspended. If ten years had been spent in preventive detention, they declared the measure terminated under Article 67d § 3 of the Criminal Code if no specific dangers remained. In practice, persons in preventive detention were released after having spent a certain length of time in prison.

(e) Removal from jurisdiction of the lawful judge

40. Lastly, the Federal Constitutional Court found that the prohibition on being removed from the jurisdiction of the lawful judge, as guaranteed by Article 101 § 1 of the Basic Law (see paragraph 60 below), did not apply. Article 67d § 3 of the Criminal Code did not render unnecessary a court decision on the continuation of preventive detention which took into account all the circumstances of the case in issue.

C. The execution in practice of the preventive detention order against the applicant

41. In Schwalmstadt Prison, persons in preventive detention like the applicant are placed in a separate building from prisoners serving their sentence. They have certain privileges compared with convicted offenders serving their sentence. For instance, they have the right to wear and wash their own clothes and have more pocket money. They can practise sport in a separate sports room and may stay outside in the yard for several hours

every day. They may equip their more comfortable cells with additional furniture and equipment and have longer visiting hours.

42. As to measures aimed at reintegration into society, persons held in preventive detention in Schwalmstadt Prison, like those detained in other prisons, are offered a weekly discussion group which proposes ideas for recreational activities and for structuring daily life. Furthermore, there are individual discussions to improve the detainee's integration into the group and a residential group evening every two weeks aimed, *inter alia*, at motivating detainees to accept the treatment on offer. Where it is considered appropriate, detainees are offered individual therapy sessions with an external therapist or group therapy in the socio-therapeutic facility of another prison. The detainee may also request a consultation with the psychologist or social worker in charge in order to deal with crisis situations.

43. The applicant has been receiving therapy since he was placed in preventive detention. Since the beginning of 1993 he has had therapy sessions with a psychologist in Schwalmstadt Prison. From September 2000 to March 2003 he also had regular individual therapy sessions with an external psychologist. At that point, the therapy was considered to have been completed and no longer necessary. In addition, the applicant has been examined by psychiatrists at regular intervals in order to evaluate his dangerousness and to permit relaxation of the prison regime as appropriate. As to relaxation of the conditions of the applicant's preventive detention, he is currently granted short periods of leave under escort (*Ausführungen*) a few times per year. He also receives regular visits (on average three times per month) from his fiancée, to whom he has been engaged since 2005. He has been working, with a short interruption, in prison and is currently working in the prison's metal workshop, with net earnings of approximately 350 to 543 euros (EUR) per month.

44. According to a psychiatric expert report and an additional psychological report drawn up in September 2006, the applicant had made important steps towards reintegration into society, in particular by turning away from his criminal identity, which he had developed since his childhood, and by trying to think before acting. His new relationship with his fiancée could be seen as a further positive development and would also improve his social circumstances in the event of his release from prison. However, this trend had not yet stabilised and a lack of loyalty and empathy towards others as well as a dangerous impulsiveness, which had manifested itself again when the applicant had punched a fellow detainee in the face following a dispute concerning a baking tin in 2005, persisted. The expert recommended maintaining and cautiously extending the current measures to relax the conditions of the applicant's preventive detention.

II. RELEVANT DOMESTIC, COMPARATIVE AND INTERNATIONAL LAW AND PRACTICE

A. Domestic law and practice

1. Penalties and measures of correction and prevention

45. The German Criminal Code distinguishes between penalties (*Strafen*) and so-called measures of correction and prevention (*Maßregeln der Besserung und Sicherung*) to deal with unlawful acts. This twin-track system of sanctions, the introduction of which had been considered and discussed since the end of the nineteenth century, was incorporated into the Criminal Code by the Law on dealing with dangerous habitual offenders and on measures of correction and prevention (*Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Besserung und Sicherung*) of 24 November 1933. The rules on preventive detention remained in force, essentially unchanged, after 1945 and underwent several reforms enacted by the legislator from 1969 onwards.

46. Penalties (see Articles 38 et seq. of the Criminal Code) consist mainly of prison sentences and fines. The penalty is fixed according to the defendant's guilt (Article 46 § 1 of the Criminal Code).

47. Measures of correction and prevention (see Articles 61 et seq. of the Criminal Code) consist mainly of placement in a psychiatric hospital (Article 63 of the Criminal Code) or a detoxification facility (Article 64 of the Criminal Code) or in preventive detention (Article 66 of the Criminal Code). The purpose of these measures is to rehabilitate dangerous offenders or to protect the public from them. They may be ordered for offenders in addition to their punishment (compare Articles 63 et seq.). They must, however, be proportionate to the gravity of the offences committed by, or to be expected from, the defendants as well as to their dangerousness (Article 62 of the Criminal Code).

48. The temporal applicability of provisions of the Criminal Code depends on whether they relate to penalties or measures of correction and prevention. The penalty is determined by the law which is in force at the time of the act (Article 2 § 1 of the Criminal Code); if the law in force on completion of the act is amended before the court's judgment, the more lenient law applies (Article 2 § 3). On the other hand, decisions on measures of correction and prevention are based on the law in force at the time of the decision unless the law provides otherwise (Article 2 § 6).

2. Provisions of the Criminal Code and the Code of Criminal Procedure governing preventive detention

(a) The preventive detention order

49. The sentencing court may, at the time of the offender's conviction, order his preventive detention under certain circumstances in addition to his prison sentence if the offender has been shown to be dangerous to the public (Article 66 of the Criminal Code).

50. In particular, the sentencing court orders preventive detention in addition to the penalty if someone is sentenced for an intentional offence to at least two years' imprisonment and if the following further conditions are satisfied. Firstly, the perpetrator must have been sentenced twice already, to at least one year's imprisonment in each case, for intentional offences committed prior to the new offence. Secondly, the perpetrator must previously have served a prison sentence or must have been detained pursuant to a measure of correction and prevention for at least two years. Thirdly, a comprehensive assessment of the perpetrator and his acts must reveal that, owing to his propensity to commit serious offences, notably those which seriously harm their victims physically or mentally or which cause serious economic damage, the perpetrator presents a danger to the general public (see Article 66 § 1).

51. Article 67c of the Criminal Code governs orders for the preventive detention of convicted persons which are not executed immediately after the judgment ordering them becomes final. Paragraph 1 of the Article provides that if a term of imprisonment is executed prior to a simultaneously ordered placement in preventive detention, the court responsible for the execution of sentences (that is, a special Chamber of the Regional Court composed of three professional judges; see sections 78a and 78b(1)(1) of the Court Organisation Act) must review, before completion of the prison term, whether the person's preventive detention is still necessary in view of its objective. If that is not the case, it suspends on probation the execution of the preventive detention order; supervision of the person's conduct (*Führungsaufsicht*) commences with suspension.

(b) The duration of preventive detention

(i) Provision in force prior to 31 January 1998

52. At the time of the applicant's offence and his conviction, Article 67d of the Criminal Code, in so far as relevant, was worded as follows:

Article 67d – Duration of detention

"1. Detention in a detoxification facility may not exceed two years and the first period of preventive detention may not exceed ten years. ...

2. If there is no provision for a maximum duration or if the time-limit has not yet expired, the court shall suspend further execution of the detention order on probation as soon as there are justifiable reasons for testing whether the detainee can be released without committing further unlawful acts. Suspension shall automatically entail supervision of the conduct of the offender.

3. If the maximum duration has expired, the detainee shall be released. The measure shall thereby be terminated."

(ii) Amended provision in force since 31 January 1998

53. Article 67d of the Criminal Code was amended while the applicant was in preventive detention for the first time, by the Combating of Sexual Offences and Other Dangerous Offences Act (*Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten*) of 26 January 1998, which entered into force on 31 January 1998. The amended provision, in so far as relevant, provided:

Article 67d – Duration of detention

"1. Detention in a detoxification facility may not exceed two years ...

2. If there is no provision for a maximum duration or if the time-limit has not yet expired, the court shall suspend on probation further execution of the detention order as soon as it is to be expected that the person concerned will not commit any further unlawful acts on his or her release. Suspension shall automatically entail supervision of the conduct of the offender.

3. If a person has spent ten years in preventive detention, the court shall declare the measure terminated if there is no danger that the detainee will, owing to his criminal tendencies, commit serious offences resulting in considerable psychological or physical harm to the victims. Termination shall automatically entail supervision of the conduct of the offender."

54. As to the applicability *ratione temporis* of Article 67d of the Criminal Code as amended, the Introductory Act to the Criminal Code, in so far as relevant, reads:

Section 1a(3) – Applicability of the rules on preventive detention

"Article 67d of the Criminal Code, as amended by the Combating of Sexual Offences and Other Dangerous Offences Act of 26 January 1998 (Federal Gazette I, p. 160), shall apply without restriction."

55. With respect to the judicial examination required under Article 67d § 3 of the Criminal Code and to the subsequent decisions under Article 67d § 2, Article 463 § 3 of the Code of Criminal Procedure, as amended by the Combating of Sexual Offences and Other Dangerous Offences Act, makes it compulsory for the court responsible for the execution of sentences both to consult an expert on the question whether the convicted person is likely to

commit serious offences when released and to appoint defence counsel to represent him or her.

(c) Review of a convicted person's preventive detention

56. In addition to Articles 67c § 1 and 67d §§ 2 and 3 of the Criminal Code, Article 67e of the Criminal Code provides for the review of a convicted person's preventive detention. The court may review at any time whether the further execution of the preventive detention order should be suspended on probation. It is obliged to do so within fixed time-limits (§ 1 of Article 67e). For persons in preventive detention, this time-limit is two years (§ 2 of Article 67e). The court may shorten this time-limit, but may also set terms within the statutory limits for review before which an application for review shall be inadmissible (§ 3 of Article 67e).

3. Provisions of the Basic Law and case-law of the Federal Constitutional Court

57. Article 2 § 2, second sentence, of the Basic Law provides that the liberty of the person is inviolable.

58. Pursuant to Article 20 § 3 of the Basic Law, the legislature is bound by the constitutional order, the executive and the judiciary by law and justice.

59. According to the well-established case-law of the Federal Constitutional Court, Article 2 § 2 read in conjunction with Article 20 § 3 of the Basic Law protects legitimate expectations in a State governed by the rule of law. A law may be retrospective in the sense that, while its legal effects are not produced until it is published, its definition covers events "set in motion" before it is published (so-called *unechte Rückwirkung*; see the decisions of the Federal Constitutional Court in the compendium of decisions of the Federal Constitutional Court (*BVerfGE*), vol. 72, pp. 200 et seq., 242, and vol. 105, pp. 17 et seq. and 37 et seq.). In respect of retrospective laws in that sense, the principles of legal certainty and protection of legitimate expectations are not given overall priority over the intention of the legislator to change the existing legal order in response to changing circumstances. The legislator may enact such retrospective laws if the importance of the purpose of the legislation for the common good outweighs the importance of the interest in protecting legitimate expectations (see the judgment of the Federal Constitutional Court in the instant case, pp. 70-73, with many references to its case-law).

60. Pursuant to Article 101 § 1 of the Basic Law, no one may be removed from the jurisdiction of the lawful judge.

61. Under Article 103 § 2 of the Basic Law, an act may be punished only if the fact of its being punishable was determined by law before the act was committed.

4. Rules and practice in relation to the execution of preventive detention orders

(a) The Execution of Sentences Act

62. The (Federal) Execution of Sentences Act (*Strafvollzugsgesetz*) lays down rules for the execution of sentences of imprisonment in prisons and for the execution of measures of correction and prevention depriving the persons concerned of their liberty (see section 1 of the Act). Its provisions were applicable in all *Länder* until 31 December 2007; since then, the *Länder* have had the power to legislate on these issues. In so far as they have already made use of this power, the provisions laid down by the *Länder* on the execution of preventive detention orders do not differ significantly from those laid down in the Execution of Sentences Act.

63. Section 2 of the Execution of Sentences Act deals with the purpose of the execution of sentences of imprisonment. During the execution of a sentence of imprisonment the detainee should become capable henceforth of leading a socially responsible life without committing offences (purpose of execution; first sentence). The execution of the sentence of imprisonment is also aimed at protecting the public from further offences (second sentence).

64. Sections 129 to 135 of the Execution of Sentences Act contain special rules for the execution of preventive detention orders. Section 129 provides that persons held in preventive detention shall be detained in secure conditions for the protection of the public (first sentence). They are to be given assistance in readjusting to life outside prison (second sentence). Unless stipulated otherwise (in sections 131 to 135 of the said Act), the provisions concerning the execution of prison sentences shall apply *mutatis mutandis* to preventive detention (section 130 of that Act).

65. According to section 131 of the Execution of Sentences Act, the equipment of the institutions in which persons are held in preventive detention, notably detention cells, and particular measures to promote their welfare, must be designed to help detainees to organise their life in the institution in a reasonable manner and to protect them from damage caused by a lengthy deprivation of liberty. Their personal needs are to be taken into account as far as possible. Section 132 of the said Act provides that detainees may wear their own clothes and use their own linen and bedding, unless this is prohibited for security reasons and provided they see to their cleaning, repair and regular changing at their own expense. Moreover, under section 133 of the said Act, detainees are allowed to occupy themselves against payment if this serves the objective of imparting, maintaining or promoting skills needed for paid employment after their release. They also receive pocket money. Pursuant to section 134 of the said Act, the conditions of detention may be relaxed and special leave for a period of up

to one month may be granted in order to test detainees' readiness and prepare them for release.

66. Section 140(1) of the Execution of Sentences Act provides that preventive detention is served either in a separate institution or in a separate wing of a prison for the execution of sentences of imprisonment.

(b) Statistical material

67. According to statistical material submitted by the Government, which was not contested by the applicant, the German sentencing courts made a total of 75 preventive detention orders in 2005, 42 of which concerned sexual offenders. A total of 415 persons were being held in preventive detention in Germany on 31 March 2007. In 2002, the average duration of a first period of preventive detention was between two years and three months and seven years in the different *Länder*. In that year, 261 persons placed in preventive detention for the first time were affected by the abolition of the maximum duration of preventive detention of ten years under Article 67d § 3 of the Criminal Code, read in conjunction with section 1a(3) of the Introductory Act to the Criminal Code as amended in 1998. In 2008, 70 persons were still affected by that change in the law and had been in preventive detention for more than ten years.

68. According to statistical material submitted by the Government, which was not contested by the applicant, Germany had 95 prisoners per 100,000 inhabitants in 2006, whereas there were, for example, 333 prisoners per 100,000 inhabitants in Estonia, 185 in the Czech Republic, 149 in Spain, 148 in England and Wales, 85 in France, 83 in Switzerland, 77 in Denmark and 66 in Norway. Furthermore, according to the Council of Europe Annual Penal Statistics, Survey 2006, of 12 December 2007 (PC-CP (2007) 9rev3 of 23 January 2006, p. 47), the total number of prisoners sentenced to terms of imprisonment ranging from ten years up to and including life imprisonment on 1 September 2006 was 2,907 in Germany, 402 in Estonia, 1,435 in the Czech Republic, 3,568 in Spain, 12,049 in England and Wales, 8,620 in France, 172 in Denmark and 184 in Norway.

B. Comparative law

1. Systems to protect the public against dangerous offenders

69. According to the information and material before the Court, the member States of the Council of Europe have chosen different ways of shielding the public from convicted offenders who acted with full criminal responsibility at the time of the offence (as did the applicant at the relevant time) and who risk committing further serious offences on release from detention and therefore present a danger to the public.

70. Apart from Germany, at least seven other Convention States have adopted systems of preventive detention in respect of convicted offenders who are not considered to be of unsound mind, in other words, who acted with full criminal responsibility when committing their offence(s), and who are considered dangerous to the public as they are liable to reoffend. These include Austria (see Articles 23 et seq. and 47 et seq. of the Austrian Criminal Code, and Articles 435 et seq. of the Austrian Code of Criminal Procedure), Denmark (see Articles 70 et seq. of the Danish Criminal Code), Italy (see Articles 199 et seq. of the Italian Criminal Code), Liechtenstein (see Articles 23 et seq. and 47 of the Liechtenstein Criminal Code and Articles 345 et seq. of the Liechtenstein Code of Criminal Procedure), San Marino (see Articles 121 et seq. of the San Marinese Criminal Code), Slovakia (see Articles 81 and 82 of the Slovakian Criminal Code) and Switzerland (see Articles 56 et seq. of the Swiss Criminal Code). Preventive detention in these States is ordered, as a rule, by the sentencing courts and is generally executed after the persons concerned have served their prison sentences (with the exception of Denmark, where preventive detention is ordered instead of a prison sentence). The detainees' dangerousness is reviewed on a periodic basis and they are released on probation if they are no longer dangerous to the public.

71. As to the place and duration of the placement, persons subject to preventive detention are placed in special institutions in Austria (see Article 23 of the Austrian Criminal Code), Liechtenstein (see Article 23 of the Liechtenstein Criminal Code), San Marino (see Articles 121 et seq. of the San Marinese Criminal Code), Slovakia (see Article 81 of the Slovakian Criminal Code) and Switzerland (see Article 64 of the Swiss Criminal Code). Even though Italian law also stipulates that preventive detention is to be served in special institutions (compare Articles 215 et seq. of the Italian Criminal Code), it appears that in practice these institutions no longer exist and that the persons concerned are kept in ordinary prisons under a special detention regime. Dangerous offenders in preventive detention in Denmark are also kept in ordinary prisons under a special detention regime. In Denmark, Italy, San Marino, Slovakia (see the express provisions of Article 82 § 2 of the Slovakian Criminal Code) and Switzerland, the applicable provisions do not fix a maximum duration of preventive detention. By contrast, in Austria and Liechtenstein, such detention may not exceed ten years (see Article 25 § 1 of both the Austrian and the Liechtenstein Criminal Codes).

72. As regards the temporal applicability of the provisions on preventive detention, it is to be noted that, according to the wording of the applicable provisions in some of the States concerned, they may be applied retrospectively. Thus, pursuant to Article 200 of the Italian Criminal Code, a decision on preventive measures is to be based on the law in force at the time of their execution, and pursuant to Article 2 § 3 of the Slovakian

Criminal Code, these decisions are to be based on the law in force at the time of the decision ordering the security measure. Under Article 4 § 1 of the Danish Criminal Code, the question whether an offence is to be punished by preventive detention is decided by applying the law in force at the time of the judgment in the criminal proceedings. The San Marinese Criminal Code likewise does not prohibit the retrospective application of preventive measures. By contrast, retrospective application appears to be prohibited in respect of preventive detention measures pursuant to Articles 23 § 1 et seq. of both the Austrian and the Liechtenstein Criminal Codes and under Swiss law.

73. In many other Convention States, there is no system of preventive detention and offenders' dangerousness is taken into account both in the determination and in the execution of their sentence. On the one hand, prison sentences are increased in the light of offenders' dangerousness, notably in cases of recidivism. In this respect it is to be noted that, unlike the courts in the majority of the Convention States, the sentencing courts in the United Kingdom expressly distinguish between the punitive and the preventive part of a life sentence. The retributive or tariff period is fixed to reflect the punishment of the offender. Once the retributive part of the sentence has been served, a prisoner is considered as being in custody serving the preventive part of his sentence and may be released on probation if he poses no threat to society (see, *inter alia*, sections 269 and 277 of the Criminal Justice Act 2003 and section 28 of the Crime (Sentences) Act 1997). On the other hand, offenders' dangerousness generally has an influence both on their conditions of detention and on their chances of benefiting from a reduction of their sentence or from release on probation.

2. The distinction between penalties and preventive measures and its consequences

74. As regards the distinction between penalties and preventive measures in the Convention States and the consequences drawn from the qualification of the sanction in question, it must be noted that the same type of measure may be qualified as an additional penalty in one State and as a preventive measure in another. Thus, the supervision of a person's conduct after release, for example, is an additional penalty under Articles 131-36-1 et seq. of the French Criminal Code and a preventive measure under Articles 215 and 228 of the Italian Criminal Code.

75. Moreover, the Act of 25 February 2008 on post-sentence preventive detention and diminished criminal responsibility due to mental deficiency (*Loi relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental*) has introduced preventive detention into French law. Under Article 706-53-13 of the French Code of Criminal Procedure, this measure may be ordered against particularly dangerous offenders who pose a high risk of recidivism because they suffer from a

serious personality disorder. The French Constitutional Council, in its decision of 21 February 2008 (no. 2008-562 DC, Official Gazette (*Journal officiel*) of 26 February 2008, p. 3272), found that such preventive detention, which was not based on the guilt of the person convicted but was designed to prevent persons from reoffending, could not be qualified as a penalty (§ 9 of the decision). To that extent, it thus took the same view as the German Federal Constitutional Court in respect of preventive detention under German law (see paragraphs 31-33 above). Nevertheless, in view of its custodial nature, the time it may last, the fact that it is indefinitely renewable and the fact that it is ordered after conviction by a court, the French Constitutional Council considered that post-sentence preventive detention could not be ordered retrospectively against persons convicted of offences committed prior to the publication of the Act (§ 10 of the decision). In this respect, it came to a different conclusion than the German Federal Constitutional Court (see paragraphs 31-33 and also paragraphs 34-37 above).

C. Observations made by international monitoring bodies on preventive detention

1. The Council of Europe's Commissioner for Human Rights

76. The Council of Europe's Commissioner for Human Rights, Mr Thomas Hammarberg, stated the following in his report on his visit to Germany from 9 to 11 and from 15 to 20 October 2006 (CommDH(2007)14 of 11 July 2007) regarding the issue of what he referred to as "secured custody" (*Sicherungsverwahrung*):

> "203. During the visit, the Commissioner discussed the issue of secured custody with several *Länder* authorities, judges and medical experts. The Commissioner is aware of the public pressure judges and medical experts are exposed to when they make decisions regarding the release of a person who might recommit a serious crime. It is impossible to predict with full certainty whether a person will actually reoffend. Psychiatrists regularly assess the behaviour of an imprisoned person who might act differently outside the prison. In addition, it is difficult to foresee all the conditions that wait for the offender outside the prison.
>
> 204. The Commissioner calls for an extremely considerate application of secured custody. Alternative measures should also be considered before recourse to secured custody is taken. The Commissioner is concerned about the rising number of people deprived of their liberty under secured custody. He encourages the German authorities to commission independent studies on the implementation of secured custody in order to evaluate the measure in terms of protecting the general public and its impact on the detained individual.
>
> ...

206. Furthermore, the Commissioner was informed that persons kept under secured custody regularly experience a loss of future perspective and give up on themselves. This would appear to call for the provision of psychological or psychiatric care. The medical opinion may occasionally be divided on the efficacy of care provided to persons kept under secured custody, yet the possibility of their eventual rehabilitation and release should not be excluded. Accordingly, people held under secured custody should receive adequate medical treatment or other care that addresses their specific situation."

2. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

77. In its report to the German Government on its visit to Germany from 20 November to 2 December 2005 (CPT/Inf (2007) 18 of 18 April 2007), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") made the following findings in respect of the "Unit for Secure Placement" (*Sicherungsverwahrung*) in Berlin-Tegel Prison:

"94. *Material_conditions* in the unit were of a good or even very good standard, with several particularly positive elements: well equipped single rooms with sanitary annexes; a light and reasonably spacious communal environment; a small kitchen with equipment for inmates to prepare hot drinks and light snacks, and an area where washing, drying and ironing could be done.

95. In principle, inmates had access to the same *activities* as ordinary prisoners (in terms of work, education, etc.). In addition, in accordance with the relevant legislation, inmates benefited from a number of special privileges. In particular, cell doors remained open throughout the day, and inmates were granted additional entitlements for visits (two hours instead of one hour per month), outdoor exercise (four hours instead of one hour on non-working days), the supply of parcels (six rather than three per year) and pocket money (if there was no work). It is also noteworthy that all inmates had unrestricted access to the telephone.

96. In theory, at least, the unit offered opportunities for a positive custodial living environment. However, not all inmates were capable of making the best of these opportunities, which was not surprising if one takes into account that, according to medical staff, most if not all of the inmates were suffering from multiple personality disorders. The vast majority of inmates were completely demotivated, with only two taking any outdoor exercise, three working full-time and one part-time. Twelve inmates were offered work, but were not willing to take part in it. Thus, the vast majority of inmates was idling away their time alone in their cells, occupying themselves with watching TV or playing video games.

Even among those inmates who apparently assumed and coped with the responsibility for their daily lives on the unit, the sense was that the activities were strategies to pass time, without any real purpose. As might be expected, this appeared to be related to their indefinite *Sicherungsverwahrung*. Several inmates interviewed expressed a clear sense that they would never get out and one stated that the only thing he could do was prepare himself to die.

97. According to the prison administration, staff worked according to special treatment criteria, the aim being the individual's release from placement in *Sicherungsverwahrung*; the focus was to minimise the risk to the general public, as well as to deal with the physical and psychological effects of long-term custody. Yet, the delegation observed that in practice, staff (including the social worker) were conspicuous by their absence in this unit, thereby keeping staff-inmate contacts to a minimum.

...

99. Even for the other inmates who were apparently coping better with their situation, the lack of staff engagement on the unit was not justifiable. Allowing inmates responsibility and a degree of independence does not imply that staff should leave them to their own devices. The duty of care cannot be ignored, particularly in relation to such a special group of inmates. The delegation gained the distinct impression that the staff themselves were not clear as to how to approach their work with these inmates. As well as empowering inmates to take charge of their lives in custody, there is a need for ongoing support to deal with indefinite detention, as well as to address the legacy of serious past histories of aberrant behaviour and apparent psychological problems. Psychological care and support appeared to be seriously inadequate; *the CPT recommends that immediate steps be taken to remedy this shortcoming*.

100. The difficult question of how to implement in practice a humane and coherent *policy* regarding the treatment of persons placed in *Sicherungsverwahrung* needs to be addressed as a matter of urgency at the highest level. Working with this group of inmates is bound to be one of the hardest challenges facing prison staff.

Due to the potentially indefinite stay for the small (but growing) number of inmates held under *Sicherungsverwahrung*, there needs to be a particularly clear vision of the objectives in this unit and of how those objectives can be realistically achieved. The approach requires a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option. The system should also allow for the maintenance of family contacts, when appropriate.

The CPT recommends that the German authorities institute an immediate review of the approach to *Sicherungsverwahrung* at Tegel Prison and, if appropriate, in other establishments in Germany accommodating persons subject to *Sicherungsverwahrung*, in the light of the above remarks."

3. The United Nations Human Rights Committee

78. In its Concluding Observations adopted at its session from 7 to 25 July 2008 on the report submitted by France under Article 40 of the International Covenant on Civil and Political Rights (see CCPR/C/FRA/CO/4 of 31 July 2008), the United Nations Human Rights Committee found:

"16. The Committee is concerned by the State Party's claim of authority under Act No. 2008/174 (25 February 2008) to place criminal defendants under renewable

one-year terms of civil preventive detention (*rétention de sûreté*) because of 'dangerousness', even after they have completed their original prison sentences. While the Constitutional Council has prohibited retroactive application of the statute, and the judge who sentences a criminal defendant contemplates the possibility of future civil preventive detention as part of the original disposition of a case, nonetheless, in the view of the Committee, the practice may remain problematic under Articles 9, 14 and 15 of the Covenant."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

79. The applicant complained that his continued preventive detention beyond the period of ten years which had been the maximum for such detention under the legal provisions applicable at the time of his offence and conviction breached Article 5 § 1 of the Convention which, in so far as relevant, provides:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

..."

80. The Government contested this view.

A. The parties' submissions

1. The applicant

81. In the applicant's submission, his preventive detention was not covered by Article 5 § 1 (a) of the Convention. There was not a sufficient

causal connection between his continued detention after the completion of ten years in detention and his conviction in 1986. When the Marburg Regional Court had ordered his preventive detention in 1986, such detention could last for ten years at the most under the applicable legal provisions. It could not be ruled out that the Marburg Regional Court might not have ordered his preventive detention if it had known that the measure could remain in force for more than ten years. His continued preventive detention after the completion of ten years in detention was therefore based solely on the change in the law in 1998 which had abolished the maximum duration of a first period of preventive detention, and no longer on his conviction in 1986. If there had been no change in the law he would have been released automatically in 2001, without the court responsible for the execution of sentences having jurisdiction to order an extension of his preventive detention. In view of the absolute time-limit on the first period of preventive detention fixed by law at the time of his conviction, the change in the law abolishing the maximum duration concerned the question whether preventive detention should be applicable and not just the arrangements for executing it, so that the causal link between his conviction and his preventive detention no longer existed after ten years of detention.

82. The applicant further took the view that his detention was neither "lawful" nor "in accordance with a procedure prescribed by law" as required by Article 5 § 1. Unlike the Federal Constitutional Court, many scholars considered preventive detention and the abolition of its maximum duration of ten years if ordered for the first time to be unconstitutional. The maximum period for a first period of preventive detention had been fixed by law. When he committed his offence, he could not have foreseen that this maximum duration would be abolished with immediate effect at a time when he was already in preventive detention and that he might be held in preventive detention for a period exceeding ten years. His right to lawful detention could not be balanced against public safety concerns.

2. The Government

83. In the Government's view, the applicant's continued preventive detention complied with Article 5 § 1 (a) of the Convention. The applicant's preventive detention after the completion of ten years of detention had occurred "after conviction", as there was still a sufficient causal connection between his initial conviction and the deprivation of liberty. In its judgment of 17 November 1986, the Marburg Regional Court had convicted and sentenced the applicant to five years' imprisonment and had ordered his preventive detention without reference to any maximum duration. Under the provisions of the Criminal Code, it was for the Marburg Regional Court, giving sentence, to decide whether or not to order a measure of prevention, but for the Regional Court responsible for the execution of sentences to decide on the execution of that measure, in particular on the duration of a

convicted person's preventive detention. Thus, both the sentencing court and the court responsible for the execution of sentences had participated in the applicant's "conviction by a competent court". Under Article 2 § 6 of the Criminal Code (see paragraph 48 above), it had always been open to the legislator to reintroduce preventive detention without a maximum duration with immediate effect. In view of this, the subsequent abolition of the maximum duration of a first period of preventive detention had not broken the causal link between the applicant's initial conviction in 1986 and his continued preventive detention.

84. The Government further argued that the applicant's continued preventive detention was "lawful" and "in accordance with a procedure prescribed by law" as stipulated by Article 5 § 1. The domestic courts had confirmed the compliance of the applicant's further detention with national law. Contrary to the applicant's submission, his preventive detention was not based exclusively on the change to Article 67d of the Criminal Code, but had been ordered by the Marburg Regional Court in April 2001 in accordance with the procedures laid down in the Code of Criminal Procedure. It also satisfied the test of foreseeability. The maximum duration of a period of preventive detention did not have to be foreseeable at the time of the offence as the dangerousness of an offender did not necessarily cease after a fixed period of time. Nor could the applicant have legitimately expected that the maximum duration of a first period of preventive detention would not be abolished, not least because priority over that expectation had to be given to the protection of society. According to Article 2 § 6 of the Criminal Code, decisions concerning measures of correction and prevention were to be taken on the basis of the provisions in force at the time of the decision (of both the sentencing court and the courts responsible for the execution of sentences), and not on the basis of those applicable at the time of commission of the offence. Therefore, it had been clear that the legislator could authorise the courts at any time to order preventive detention for an indefinite period of time. Moreover, there had been numerous requests to re-abolish the maximum period for a first period of preventive detention, which had been introduced only in 1975.

85. Furthermore, the Government submitted that the applicant's continued preventive detention was not arbitrary, as the courts responsible for the execution of sentences ordered preventive detention in excess of ten years only as an exception to the rule that the measure was then terminated and on the basis that its extension was possible only if there was a danger that the person concerned would commit serious sexual or violent offences.

B. The Court's assessment

1. Recapitulation of the relevant principles

(a) Grounds for deprivation of liberty

86. Article 5 § 1 sub-paragraphs (a) to (f) contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see, *inter alia*, *Guzzardi v. Italy*, 6 November 1980, § 96, Series A no. 39; *Witold Litwa v. Poland*, no. 26629/95, § 49, ECHR 2000-III; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008). However, the applicability of one ground does not necessarily preclude that of another; a deprivation of liberty may, depending on the circumstances, be justified under one or more sub-paragraphs (see, among other authorities, *Eriksen v. Norway*, 27 May 1997, § 76, *Reports of Judgments and Decisions* 1997-III; *Erkalo v. the Netherlands*, 2 September 1998, § 50, *Reports* 1998-VI; and *Witold Litwa*, cited above, § 49).

87. For the purposes of sub-paragraph (a) of Article 5 § 1, the word "conviction", having regard to the French text (*condamnation*), has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence (see *Guzzardi*, cited above, § 100), and the imposition of a penalty or other measure involving deprivation of liberty (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50).

88. Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the "detention" must follow the "conviction" in point of time: in addition, the "detention" must result from, follow and depend upon or occur by virtue of the "conviction" (ibid.). In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see *Weeks v. the United Kingdom*, 2 March 1987, § 42, Series A no. 114; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV; *Waite v. the United Kingdom*, no. 53236/99, § 65, 10 December 2002; and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 117, ECHR 2008). However, with the passage of time, the link between the initial conviction and a further deprivation of liberty gradually becomes less strong (compare *Van Droogenbroeck*, cited above, § 40, and *Eriksen*, cited above, § 78). The causal link required by sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision (by a sentencing court) or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5 (compare *Van*

Droogenbroeck, cited above, § 40; *Eriksen*, cited above, § 78; and *Weeks*, cited above, § 49).

89. Furthermore, under sub-paragraph (c) of Article 5 § 1, detention of a person may be justified "when it is reasonably considered necessary to prevent his committing an offence". However, that ground of detention is not adapted to a policy of general prevention directed against an individual or a category of individuals who present a danger on account of their continuing propensity to crime. It does no more than afford the Contracting States a means of preventing a concrete and specific offence (see *Guzzardi*, cited above, § 102; compare also *Eriksen*, cited above, § 86). This can be seen both from the use of the singular ("an offence") and from the object of Article 5, namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (see *Guzzardi*, cited above, § 102).

(b) "Lawful" detention "in accordance with a procedure prescribed by law"

90. It is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Erkalo*, cited above, § 52; *Saadi*, cited above, § 67; and *Kafkaris*, cited above, § 116). This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Stafford*, cited above, § 63, and *Kafkaris*, cited above, § 116). "Quality of the law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III; *Nasrulloyev v. Russia*, no. 656/06, § 71, 11 October 2007; and *Mooren v. Germany* [GC], no. 11364/03, § 76, 9 July 2009). The standard of "lawfulness" set by the Convention thus requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports* 1998-VII, and *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III).

91. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp v. the Netherlands*, 24 October 1979,

§ 37, Series A no. 33; *Saadi*, cited above, § 67; and *Mooren*, cited above, § 72).

2. Application of these principles to the present case

92. The Court is called upon to determine whether the applicant, during his preventive detention for a period exceeding ten years, was deprived of his liberty in accordance with one of the sub-paragraphs (a) to (f) of Article 5 § 1. It will examine first whether the applicant's initial placement in preventive detention as such falls under any of the permissible grounds for detention listed in Article 5 § 1. If it does not, the more specific question whether the abolition of the maximum duration of ten years for a first period of preventive detention affected the compatibility with Article 5 § 1 of the applicant's continued detention on expiry of that period need not be answered.

93. In the Government's submission, the applicant's preventive detention was justified under sub-paragraph (a) of Article 5 § 1. It is indeed true that the Commission repeatedly found that preventive detention ordered by a sentencing court in addition to or instead of a prison sentence was, in principle, justified as being "detention of a person after conviction by a competent court" within the meaning of Article 5 § 1 (a) of the Convention (as regards preventive detention pursuant to Article 66 of the German Criminal Code, see *X. v. Germany*, no. 4324/69, Commission decision of 4 February 1971, and *Dax v. Germany*, no. 19969/92, Commission decision of 7 July 1992, with further references; as regards placement "at the disposal of the Government" in the Netherlands, a similar measure concerning persons with certain mental defects, see *X. v. the Netherlands*, no. 6591/74, Commission decision of 26 May 1975, Decisions and Reports (DR) 3, p. 90; as regards preventive detention in Norway, another similar measure applied to persons of impaired mental capacity, see *X. v. Norway*, no. 4210/69, Commission decision of 24 July 1970, Collection 35, pp. 140-50, with further references; and, as regards detention in a special detention centre of persons with certain mental defects in Denmark, see *X. v. Denmark*, no. 2518/65, Commission decision of 14 December 1965, Collection 18, pp. 44-46).

94. The Court itself has affirmed, for instance, that the Belgian system of placement of recidivist and habitual offenders at the Government's disposal, ordered in addition to a prison sentence, constituted detention "after conviction by a competent court" for the purposes of Article 5 § 1 (a) (see *Van Droogenbroeck*, cited above, §§ 33-42). Likewise, it considered the Norwegian system of preventive detention imposed by way of a security measure on persons of underdeveloped or impaired mental capacity to fall in principle within Article 5 § 1 (a) (see *Eriksen*, cited above, § 78).

95. The Court reiterates that "conviction" under sub-paragraph (a) of Article 5 § 1 signifies a finding of guilt of an offence and the imposition of

a penalty or other measure involving deprivation of liberty (see paragraph 87 above). It observes that the applicant's preventive detention was ordered by judgment of the Marburg Regional Court of 17 November 1986 (the sentencing court), which found him guilty of, *inter alia*, attempted murder (see paragraph 12 above). Since August 1991 the applicant, having served his prison sentence, has been in preventive detention as the courts responsible for the execution of sentences refused to suspend the preventive detention order on probation (see paragraphs 13 et seq. above).

96. The Court is satisfied that the applicant's initial preventive detention resulted from his "conviction" by the sentencing court in 1986. The latter found him guilty of attempted murder and ordered his preventive detention, a penalty or other measure involving deprivation of liberty. It notes that in the Government's view, preventive detention is not fixed with regard to an offender's personal guilt, but with regard to the danger he presents to the public (see paragraph 113 below). It considers that pursuant to Article 66 § 1 of the Criminal Code, an order of preventive detention is nevertheless always dependent on and ordered together with a court's finding that the person concerned is guilty of an offence (see paragraphs 49-50 above). The applicant's placement in preventive detention was thus initially covered by sub-paragraph (a) of Article 5 § 1. The Court would add, however, that, contrary to the Government's submission, the decisions of the courts responsible for the execution of sentences to retain the applicant in detention do not satisfy the requirement of "conviction" for the purposes of Article 5 § 1 (a) as they no longer involve a finding of guilt of an offence.

97. In order to determine whether the applicant's preventive detention beyond the ten-year period was justified under Article 5 § 1 (a), the Court needs to examine whether that detention still occurred "after conviction", in other words whether there was still a sufficient causal connection between the applicant's conviction by the sentencing court in 1986 and his continuing deprivation of liberty after 8 September 2001.

98. The Court notes that according to the Government, the sentencing court had ordered the applicant's preventive detention without reference to any time-limit and that it was for the courts responsible for the execution of sentences to determine the duration of the applicant's preventive detention. As Article 2 § 6 of the Criminal Code permitted the abolition of the maximum duration of a first period of preventive detention with immediate effect, the courts responsible for the execution of sentences had the power to authorise the applicant's continued preventive detention beyond the ten-year period, following the change in the law in 1998. The Government argued that therefore, the amendment of Article 67d of the Criminal Code did not break the causal link between the applicant's conviction and his continued detention.

99. The Court is not convinced by that argument. It is true that the sentencing court ordered the applicant's preventive detention in 1986

without fixing its duration. However, the sentencing courts never fix the duration, by virtue of the applicable provisions of the Criminal Code (Articles 66 and 67c-e of the Criminal Code; see paragraphs 49 et seq. above); as the Government themselves submitted, the sentencing courts have jurisdiction only to determine whether or not to order preventive detention as such in respect of an offender. The courts responsible for the execution of sentences are subsequently called upon to decide on the detailed arrangements for execution of the order, including the exact duration of the offender's preventive detention. However, the courts responsible for the execution of sentences were competent only to fix the duration of the applicant's preventive detention within the framework established by the order of the sentencing court, read in the light of the law applicable at the relevant time.

100. The Court observes that the order for the applicant's preventive detention was made by the sentencing court in 1986. At that time a court order of that kind, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force (see paragraph 52 above), meant that the applicant, against whom preventive detention was ordered for the first time, could be kept in preventive detention for a maximum period of ten years. Thus, had it not been for the amendment of Article 67d of the Criminal Code in 1998 (see paragraph 53 above), which was declared applicable also to preventive detention orders which had been made – as had the order against the applicant – prior to the entry into force of that amended provision (section 1a(3) of the Introductory Act to the Criminal Code; see paragraph 54 above), the applicant would have been released when ten years of preventive detention had expired, irrespective of whether he was still considered dangerous to the public. Without that change in the law, the courts responsible for the execution of sentences would not have had jurisdiction to extend the duration of the applicant's preventive detention. Therefore, the Court finds that there was not a sufficient causal connection between the applicant's conviction by the sentencing court in 1986 and his continued deprivation of liberty beyond the period of ten years in preventive detention, which was made possible only by the subsequent change in the law in 1998.

101. The Court considers that the present case must be distinguished in that respect from that of *Kafkaris* (cited above). In *Kafkaris* it found that there was a sufficient causal connection between the applicant's conviction and his continuing detention after twenty years' imprisonment. Mr Kafkaris' continuing detention beyond the twenty-year term was in conformity with the judgment of the sentencing court, which had passed a sentence of life imprisonment and had expressly stated that the applicant had been sentenced to imprisonment for the remainder of his life as provided by the Criminal Code, and not for a period of twenty years as set out in the Prison Regulations, subordinate legislation in force at the time

(ibid., §§ 118-21). By contrast, the preventive detention of the applicant in the present case beyond the ten-year point was not ordered in the judgment of the sentencing court read in conjunction with the provisions of the Criminal Code applicable at the time of that judgment.

102. The Court shall further examine whether the applicant's preventive detention beyond the ten-year point was justified under any of the other sub-paragraphs of Article 5 § 1. It notes in this connection that the domestic courts did not address that issue because they were not required to do so under the provisions of the German Basic Law. It considers that sub-paragraphs (b), (d) and (f) are clearly not relevant. Under sub-paragraph (c), second alternative, of Article 5 § 1, the detention of a person may be justified "when it is reasonably considered necessary to prevent his committing an offence". In the present case the applicant's continued detention was justified by the courts responsible for the execution of sentences with reference to the risk that the applicant could commit further serious offences – similar to those of which he had previously been convicted – if released (see paragraphs 18 and 23 above). These potential further offences are not, however, sufficiently concrete and specific, as required by the Court's case-law (see, in particular, *Guzzardi*, cited above, § 102) as regards, in particular, the place and time of their commission and their victims, and do not, therefore, fall within the ambit of Article 5 § 1 (c). This finding is confirmed by an interpretation of paragraph 1 (c) in the light of Article 5 as a whole. Pursuant to paragraph 3 of Article 5, everyone detained in accordance with the provisions of paragraph 1 (c) of that Article must be brought promptly before a judge and tried within a reasonable time or be released pending trial. However, persons kept in preventive detention are not to be brought promptly before a judge and tried for potential future offences. The Court notes in this connection that criminological experience shows that there is often a risk of recidivism on the part of a repeatedly convicted offender, irrespective of whether or not he or she has been sentenced to preventive detention (§ 203 of the report of the Council of Europe's Commissioner for Human Rights dated 11 July 2007; see paragraph 76 above).

103. The Court has further considered whether the applicant could have been kept in preventive detention beyond September 2001 under sub-paragraph (e) of Article 5 § 1 as being a person "of unsound mind". While it does not rule out the possibility that the preventive detention of certain offenders may meet the conditions of that ground for detention, it observes that, according to the decision of the Frankfurt am Main Court of Appeal in the instant case, the applicant no longer suffered from a serious mental disorder (see paragraph 22 above). In any event, the domestic courts did not base their decisions to further detain the applicant on the ground that he was of unsound mind. Therefore, his detention cannot be justified under Article 5 § 1 (e) either.

104. The Court further observes that the present application raises an issue in terms of the lawfulness of the applicant's detention. It reiterates that national law must be of a certain quality and, in particular, must be foreseeable in its application, in order to avoid all risk of arbitrariness (see paragraph 90 above). It has serious doubts whether the applicant, at the relevant time, could have foreseen to a degree that was reasonable in the circumstances that his offence could entail his preventive detention for an unlimited period of time. It doubts, in particular, whether he could have foreseen that the applicable legal provisions would be amended with immediate effect after he had committed his crime. However, in view of the above finding that the applicant's preventive detention beyond the ten-year period was not justified under any of the sub-paragraphs of Article 5 § 1, it is not necessary to decide this question.

105. Consequently, there has been a violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

106. The applicant further complained that the retrospective extension of his preventive detention from a maximum period of ten years to an unlimited period of time violated his right not to have a heavier penalty imposed on him than the one applicable at the time of his offence. He relied on Article 7 § 1 of the Convention, which reads:

> "1. 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."

107. The Government contested this allegation.

A. The parties' submissions

1. The applicant

108. In the applicant's submission, a heavier penalty had been imposed on him retrospectively, contrary to the second sentence of Article 7 § 1 of the Convention, by virtue of the order made for his continued preventive detention after he had been in preventive detention for ten years. Preventive detention constituted a "penalty" within the meaning of that Article. He claimed that the domestic courts' view that, since its introduction into German criminal law, preventive detention had not been considered as a "penalty" and could thus be applied retrospectively, should be given less weight in the light of the fact that preventive detention had been introduced by the Law of 24 November 1933 on dealing with dangerous habitual

offenders and on measures of correction and prevention ("the Habitual Offenders Act"), that is, during the Nazi regime. According to section 129 of the Execution of Sentences Act (see paragraph 64 above), the sanction in question, imposed following an offence and administered by the criminal courts, pursued exactly the same aims as the execution of a prison sentence (section 2 of the Execution of Sentences Act; see paragraph 63 above), namely both to protect the public from the detainee (prevention) and to help the latter to readjust to life outside prison (reintegration into society).

109. In the applicant's view, preventive detention was also a penalty by its nature. This was illustrated by the fact that the measure was ordered by the criminal courts in connection with an offence and that the rules governing it were contained in the Execution of "Sentences" Act. Preventive detention was related to an offender's guilt, not least because it could be imposed only following certain previous offences and could not be ordered against a person who had acted without criminal responsibility.

110. The applicant further stressed that there were no special facilities in Germany for persons being held in preventive detention. Persons held in preventive detention in ordinary prisons were granted some minor privileges compared to persons serving their sentence in the same prisons (sections 131-35 of the Execution of Sentences Act; see paragraphs 64-65 above), such as the right to wear their own clothes. However, even if put into practice, these privileges did not alter the fact that the execution of a preventive detention order did not differ significantly from that of a prison sentence. As a person in preventive detention, the applicant was in fact granted fewer relaxations of the conditions of his sentence than ordinary prisoners. Moreover, no special measures in addition to those taken for ordinary prisoners were taken for persons held in preventive detention to help them prepare for a responsible life outside prison. The applicant's conditions in preventive detention in Schwalmstadt Prison did not differ from those he had encountered when serving the major part of his sentence there. He was working as he had already worked when serving his sentence and, apart from occasional short periods of leave under escort, no efforts were made to prepare him for life outside prison, nor was there any therapy available. If one looked at the realities of detainees' situation rather than the wording of the Criminal Code, there was therefore no substantial difference between the execution of prison sentences and of preventive detention orders.

111. Moreover, the severity of a measure of indefinite preventive detention, which was executed after and in addition to his prison sentence of only five years, was illustrated by the fact that it had led to the applicant being deprived of his liberty – on the basis of the order for his preventive detention alone – for approximately eighteen years already. He claimed that, as a result, he had been detained for a considerably longer period of time than the period generally served by convicted offenders who unlike him had

actually killed someone and had been ordered to serve just a prison sentence, without an additional order for their preventive detention. Given that he had been detained for more than twenty-two years already following his conviction in 1986, the fact that there had been only two incidents, which had occurred many years previously in a high-security prison setting, proved that he had learned to control his emotions and that his continued imprisonment was not justified.

112. The applicant submitted that the retrospective prolongation of his preventive detention, a penalty which had been clearly fixed by law at a maximum term of ten years at the time he had committed his offence, therefore violated the principle that only the law can prescribe a penalty (*nulla poena sine lege*), enshrined in Article 7.

2. The Government

113. In the Government's view, the applicant's preventive detention for a period exceeding ten years did not violate the prohibition under Article 7 § 1 on increasing a penalty retrospectively, because preventive detention was not a "penalty" within the meaning of that provision. German criminal law had a twin-track system of sanctions which made a strict distinction between penalties and what were referred to as measures of correction and prevention, such as preventive detention. Penalties were of a punitive nature and were fixed with regard to the offender's personal guilt. Measures of correction and prevention, on the other hand, were of a preventive nature and were ordered because of the danger presented by the offender, irrespective of his or her guilt. This twin-track system, introduced in 1933, had been evaluated and confirmed by the democratically elected legislature on several occasions since the end of the Second World War. Preventive detention was a measure of last resort aimed only at the prevention of dangers to the public emanating from the most dangerous offenders, as shown by the restrictive conditions laid down in the Criminal Code concerning preventive detention orders and the continuation of preventive detention (see paragraphs 47 and 49-56 above), and their restrictive application by the domestic courts. Unlike a penalty, preventive detention could be suspended on probation at any time, provided that it could be expected that the detainee would no longer commit serious criminal offences outside prison. As confirmed by the Federal Constitutional Court in its judgment in the present case, preventive detention was therefore not a penalty to which the prohibition of retrospective punishment applied.

114. According to the Government, the execution of preventive detention orders differed significantly from the enforcement of prison sentences, as regards both the legislative provisions (see, in particular, sections 129-35 of the Execution of Sentences Act; paragraphs 64-65 above) and practice. It was true that there were no separate preventive detention facilities in the German *Länder* for economic reasons and in view of the

range of treatment facilities required. Creating one central facility in Germany for all persons kept in preventive detention would render impossible visits by relatives or persons helping in the detainee's social reintegration, both of which were desirable. Persons in preventive detention were therefore kept in separate wings of prisons. However, compared to ordinary prisoners, persons in preventive detention had a number of privileges: unlike the former, they had the right to wear their own clothes and to receive longer visits of at least two hours per month. They also had more pocket money and the right to receive more parcels than ordinary prisoners. Moreover, if they so wished, they could have an individual cell which was not locked during the day, which they could furnish and equip in a personal manner. As regards the applicant's preventive detention in particular, the Government stressed that he no longer received any therapy as the psychologist he had consulted had considered his treatment to be completed. The applicant had almost daily discussions with the social worker and the psychologist in charge at his own initiative and participated in a discussion group which met every fortnight. In line with a psychiatric expert's recommendation, the applicant was benefiting from measures to relax the conditions of his preventive detention, such as short periods of leave under escort (see paragraphs 43-44 above).

115. The severity and duration of preventive detention alone did not suffice to classify it as a "penalty" within the meaning of Article 7 § 1. As found by the competent courts, the applicant was still dangerous to the public, irrespective of whether he had committed any offences in prison, and of what kind. The Government further argued that, according to the Court's judgment in the case of *Kafkaris* (cited above, §§ 151-52), subsequent changes which did not affect the penalty imposed in the initial judgment, but only the duration of the execution of that penalty, did not violate Article 7 § 1. This applied with even greater force to a case like the present one in which the initial judgment ordered a preventive measure (as opposed to a penalty), namely preventive detention, without stating a time-limit.

116. The Government stressed that the twin-track system of penalties and measures of correction and prevention made it possible to limit penalties for all offenders to what was strictly necessary to compensate the perpetrator's guilt. As shown by the penal statistics published by the Council of Europe (see paragraph 68 above), Germany had a low rate of enforced prison sentences as a result and its courts imposed short prison sentences compared to other Council of Europe member States. This proved that the twin-track system led to a restrictive and responsible sanctioning practice. However, the principle enshrined in the Basic Law that punishment should not exceed a person's guilt prevented German criminal courts from imposing longer prison sentences instead of ordering preventive detention to serve the preventive aim of the protection of society. Other Convention

States, in particular Austria, Denmark, Italy, Liechtenstein, San Marino, Slovakia and Switzerland, also applied systems of preventive detention.

B. The Court's assessment

1. Recapitulation of the relevant principles

117. 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 of the Convention 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 (see *S.W. v. the United Kingdom*, 22 November 1995, § 34, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, § 32, Series A no. 335-C; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; and *Kafkaris*, cited above, § 137).

118. Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular the retrospective application of the criminal law to an accused's disadvantage (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A) or extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Uttley v. the United Kingdom* (dec.), no. 36946/03, 29 November 2005, and *Achour v. France* [GC], no. 67335/01, § 41, ECHR 2006-IV).

119. 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 implies qualitative requirements, including those of accessibility and foreseeability (see *Cantoni v. France*, 15 November 1996, § 29, *Reports* 1996-V; *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; and *Achour*, cited above, § 42). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (see *Achour*, cited above, § 41, and *Kafkaris*, cited above, § 140). An individual must 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 and what penalty will be imposed for the act committed and/or omission (compare *Cantoni*, cited above, § 29; *Uttley*, cited above; and *Kafkaris*, cited above, § 140).

120. The concept of "penalty" in Article 7 is autonomous in scope. To render the protection afforded by Article 7 effective the Court must remain

free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 30, Series A no. 317-B; and *Uttley*, cited above). The wording of the second sentence of Article 7 § 1 indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other relevant factors are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity (see *Welch*, cited above, § 28; *Jamil*, cited above, § 31; *Adamson v. the United Kingdom* (dec.), no. 42293/98, 26 January 1999; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV; and *Kafkaris*, cited above, § 142). The severity of the measure is not, however, in itself decisive, since, for instance, many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see *Welch*, cited above, § 32; compare also *Van der Velden*, cited above).

121. Both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7 (see, *inter alia*, *Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, DR 46, p. 231; *Grava v. Italy*, no. 43522/98, § 51, 10 July 2003; and *Kafkaris*, cited above, § 142). However, in practice, the distinction between the two may not always be clear cut (see *Kafkaris*, cited above, § 142; see also *Monne v. France* (dec.), no. 39420/06, 1 April 2008).

2. Application of these principles to the present case

122. The Court shall thus examine, in the light of the foregoing principles, whether the extension of the applicant's preventive detention from a maximum of ten years to an unlimited period of time violated the prohibition of retrospective penalties under Article 7 § 1, second sentence.

123. The Court observes that at the time the applicant committed the attempted murder in 1985, a preventive detention order made by a sentencing court for the first time, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force, meant that the applicant could be kept in preventive detention for ten years at the most (see also paragraphs 99-100 above). Based on the subsequent amendment in 1998 of Article 67d of the Criminal Code, read in conjunction with section 1a(3) of the Introductory Act to the Criminal Code, which abolished that maximum duration with immediate effect, the courts responsible for the execution of sentences then ordered, in 2001, the applicant's continued preventive

detention beyond the ten-year point. Thus, the applicant's preventive detention was prolonged with retrospective effect, under a law enacted after the applicant had committed his offence – and at a time when he had already served more than six years in preventive detention.

124. The Court, having regard to the criteria established in its case-law, therefore needs to determine whether the applicant's preventive detention constitutes a "penalty" within the meaning of the second sentence of Article 7 § 1. It notes at the outset that the applicant's preventive detention was imposed by the Marburg Regional Court in 1986 following his conviction for a "criminal offence", namely attempted murder and robbery. Indeed, pursuant to Article 66 § 1 of the Criminal Code, preventive detention can only be ordered against someone who has, among other requirements, been sentenced for an intentional offence to at least two years' imprisonment (see paragraphs 49-50 above).

125. As to the characterisation of preventive detention under domestic law, the Court observes that in Germany, such a measure is not considered as a penalty to which the absolute ban on retrospective punishment applies. The findings of the courts responsible for the execution of sentences to that effect in the present case were confirmed by the Federal Constitutional Court in a thoroughly reasoned leading judgment (see paragraphs 27-40 above). Under the provisions of the German Criminal Code, preventive detention is qualified as a measure of correction and prevention. Such measures have always been understood as differing from penalties under the long-established twin-track system of sanctions in German criminal law. Unlike penalties, they are considered not to be aimed at punishing criminal guilt, but to be of a purely preventive nature aimed at protecting the public from a dangerous offender. This clear finding is, in the Court's view, not called into question by the fact that preventive detention was first introduced into German criminal law, as the applicant pointed out, by the Habitual Offenders Act of 24 November 1933, that is, during the Nazi regime. As the Commission found as far back as 1971 (see *X. v. Germany*, cited above), the provisions on preventive detention were confirmed by the German legislator – on several occasions – after 1945.

126. However, as reiterated above (paragraph 120), the concept of "penalty" in Article 7 is autonomous in scope and it is thus for the Court to determine whether a particular measure should be qualified as a penalty, without being bound by the qualification of the measure under domestic law. It notes in this connection that the same type of measure may be and has been qualified as a penalty in one State and as a preventive measure to which the principle of *nulla poena sine lege* does not apply in another. Thus, the "placement at the Government's disposal" of recidivists and habitual offenders in Belgium, for instance, which is in many ways similar to preventive detention under German law, has been considered as a penalty under Belgian law (see *Van Droogenbroeck*, cited above, § 19). The French

Constitutional Council, for its part, found in its decision of 21 February 2008 (no. 2008-562 DC) that the preventive detention recently introduced into French law could not be qualified as a penalty, but could nevertheless not be ordered retrospectively, notably in view of its indefinite duration (see paragraph 75 above; see, for a further example, paragraph 74 above).

127. The Court shall therefore further examine the nature of the measure of preventive detention. It notes at the outset that, just like a prison sentence, preventive detention entails a deprivation of liberty. Moreover, having regard to the manner in which preventive detention orders are executed in practice in Germany, compared to ordinary prison sentences, it is striking that persons subject to preventive detention are detained in ordinary prisons, albeit in separate wings. Minor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, cannot mask the fact that there is no substantial difference between the execution of a prison sentence and that of a preventive detention order. This is further illustrated by the fact that there are very few provisions in the Execution of Sentences Act dealing specifically with the execution of preventive detention orders and that, apart from these, the provisions on the execution of prison sentences apply *mutatis mutandis* (sections 129 to 135 of the said Act; see paragraphs 64-65 above).

128. Furthermore, having regard to the realities of the situation of persons in preventive detention, the Court cannot subscribe to the Government's argument (see paragraph 113 above) that preventive detention served a purely preventive, and no punitive, purpose. It notes that, pursuant to Article 66 of the Criminal Code, preventive detention orders may be made only against persons who have repeatedly been found guilty of criminal offences of a certain gravity. It observes, in particular, that there appear to be no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, directed at persons subject to preventive detention and aimed at reducing the danger they present and thus at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences.

129. The Court agrees with the findings of both the Council of Europe's Commissioner for Human Rights (§ 206 of his report; see paragraph 76 above) and the CPT (§ 100 of its report; see paragraph 77 above) that persons subject to preventive detention, in view of its potentially indefinite duration, are in particular need of psychological care and support. The achievement of the objective of crime prevention would require, as stated convincingly by the CPT (ibid.), "a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option". The Court

considers that persons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible. The Court does not lose sight of the fact that "[w]orking with this group of inmates is bound to be one of the hardest challenges facing prison staff" (§ 100 of the CPT's report; see paragraph 77 above). However, in view of the indefinite duration of preventive detention, particular endeavours are necessary in order to support these detainees who, as a rule, will be unable to make progress towards release by their own efforts. It finds that there is currently an absence of additional and substantial measures – other than those available to all long-term ordinary prisoners serving their sentence for punitive purposes – to secure the prevention of offences by the persons concerned.

130. Moreover, pursuant to sections 2 and 129 of the Execution of Sentences Act, the execution of both penalties and measures of correction and prevention serves two aims, namely to protect the public and to help the detainee to become capable of leading a socially responsible life outside prison. Even though it could be said that penalties mainly serve punitive purposes whereas measures of correction and prevention are mainly aimed at prevention, it is nonetheless clear that the aims of these sanctions partly overlap. Furthermore, given its unlimited duration, preventive detention may well be understood as an additional punishment for an offence by the persons concerned and entails a clear deterrent element. In any event, as the Court has previously found, the aim of prevention can also be consistent with a punitive purpose and may be seen as a constituent element of the very notion of punishment (see *Welch*, cited above, § 30).

131. As regards the procedures involved in the making and implementation of orders for preventive detention, the Court observes that preventive detention is ordered by the (criminal) sentencing courts. Its execution is determined by the courts responsible for the execution of sentences, that is, courts also belonging to the criminal justice system, in a separate procedure.

132. Finally, as to the severity of preventive detention – which is not in itself decisive (see paragraph 120 above) – the Court observes that this measure entails detention which, following the change in the law in 1998, no longer has any maximum duration. Moreover, the suspension of preventive detention on probation is subject to a court's finding that there is no danger that the detainee will commit further (serious) offences (Article 67d of the Criminal Code; see paragraph 53 above), a condition which may be difficult to fulfil (see, to that effect, also the Commissioner for Human Rights' finding that it was "impossible to predict with full certainty whether a person will actually reoffend"; § 203 of his report, cited in paragraph 76 above). Therefore, the Court cannot but find that this measure appears to be among the most severe – if not the most severe –

which may be imposed under the German Criminal Code. It notes in this connection that the applicant faced more far-reaching detriment as a result of his continued preventive detention – which to date has been more than three times the length of his prison sentence – than as a result of the prison sentence itself.

133. In view of the foregoing the Court, looking behind appearances and making its own assessment, concludes that preventive detention under the German Criminal Code is to be qualified as a "penalty" for the purposes of Article 7 § 1 of the Convention.

134. The Court further reiterates that it has drawn a distinction in its case-law between a measure that constitutes in substance a "penalty" – and to which the absolute ban on retrospective criminal laws applies – and a measure that concerns the "execution" or "enforcement" of the "penalty" (see paragraph 121 above). It therefore has to determine whether a measure which turned a detention of limited duration into a detention of unlimited duration constituted in substance an additional penalty, or merely concerned the execution or enforcement of the penalty applicable at the time of the offence of which the applicant was convicted.

135. The Court observes that in the Government's submission the sentencing court had ordered the applicant's preventive detention without stating a time-limit. They argued that the prolongation of that measure therefore merely concerned the execution of the penalty imposed on the applicant by the sentencing court. The Court is not convinced by that argument. As it has found above (see paragraphs 99-101 and 123), at the time the applicant committed his offence, the sentencing court's order for his preventive detention, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force, meant that the applicant could be kept in preventive detention for a maximum period of ten years. The prolongation of the applicant's preventive detention by the courts responsible for the execution of sentences following the change in Article 67d of the Criminal Code therefore concerns not just the execution of the penalty (preventive detention for up to ten years) imposed on the applicant in accordance with the law applicable when he committed his offences. It constitutes an additional penalty which was imposed on the applicant retrospectively, under a law enacted after the applicant had committed his offence.

136. In this respect the present case must again be distinguished from that of *Kafkaris* (cited above). Mr Kafkaris was sentenced to life imprisonment in accordance with the criminal law applicable at the time of his offence. It could not be said that at the material time, a life sentence could clearly be taken to amount to twenty years' imprisonment (ibid., §§ 143 et seq.). By contrast, in the present case, the applicable provisions of criminal law at the time the applicant committed his offences clearly and

unambiguously fixed the duration of a first period of preventive detention at a maximum of ten years.

137. In view of the foregoing, the Court concludes that there has been a violation of Article 7 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

138. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

139. The applicant claimed at least 172,000 euros (EUR) in respect of non-pecuniary damage for the long period of unlawful detention undergone since 2001 in clear contravention of Articles 5 and 7 and despite the fact that he had brought numerous sets of lengthy proceedings in the domestic courts in an attempt to obtain his release. He referred to the amounts of compensation awarded by the Court in the cases of *Karataş v. Turkey* ([GC], no. 23168/94, ECHR 1999-IV), and *Kokkinakis v. Greece* (25 May 1993, Series A no. 260-A) and argued that he should be granted compensation amounting to EUR 2,000 per month, that being the average monthly income attainable in Germany. As to pecuniary damage, the applicant submitted that he had been granted legal aid in the proceedings before the domestic courts. The applicant's lawyer requested any payments to be made into his own account, referring to his power of attorney authorising him, *inter alia*, to accept any payments to be made by the other party to the proceedings.

140. The Government considered the applicant's claim in respect of non-pecuniary damage to be excessive. They argued that under section 7(3) of the Act on Compensation for Criminal Prosecution Measures (*Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen*), EUR 11 per day was payable in compensation for unlawful detention. They left it to the Court's discretion to fix an equitable amount.

141. The Court observes that it has found that the applicant's detention beyond the ten-year period breached both Article 5 § 1 and Article 7 § 1 of the Convention and that the applicant has thus been detained in breach of the Convention since 8 September 2001 (see paragraph 19 above). This must have caused non-pecuniary damage such as distress and frustration, which cannot be compensated solely by the findings of violations. Having regard to all the circumstances of the case and making its assessment on an

equitable basis, it awards the applicant EUR 50,000 under this head, plus any tax that may be chargeable. Having regard to the power of attorney presented by the applicant's lawyer, which authorises him to accept any payments to be made by the other party to the proceedings, it orders this sum, awarded to the applicant, to be paid to him into his lawyer's fiduciary bank account.

B. Costs and expenses

142. The applicant, who was granted legal aid in the proceedings both before the domestic courts and before the Court, did not submit a claim for costs and expenses incurred in either of these proceedings. Accordingly, the Court does not make any award under this head.

C. Default interest

143. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

2. *Holds* that there has been a violation of Article 7 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 50,000 (fifty thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be paid into his lawyer's fiduciary bank account;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and notified in writing on 17 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Peer Lorenzen
Registrar	President