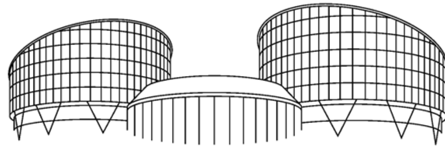

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF ILNSEHER v. GERMANY

(Applications nos. 10211/12 and 27505/14)

JUDGMENT

STRASBOURG

4 December 2018

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Ilnseher v. Germany,

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

Guido Raimondi, *President,*
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Helena Jäderblom,
Robert Spano,
Vincent A. De Gaetano,
Kristina Pardalos,
Paulo Pinto de Albuquerque,
Aleš Pejchal,
Dmitry Dedov,
Iulia Antoanella Motoc,
Jon Fridrik Kjølbro,
Stéphanie Mourou-Vikström,
Georges Ravarani,
Alena Poláčková,
Pauliine Koskelo,
Lətif Hüseynov, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 29 November 2017 and on 11 July 2018,

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

PROCEDURE

1. The case originated in two applications (nos. 10211/12 and 27505/14) 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 Daniel Ilnseher (“the applicant”), on 24 February 2012 and 4 April 2014 respectively.

2. The applicant, who had been granted legal aid in connection with the presentation of both applications, was initially represented in application no. 10211/12 by Mr A. Ahmed, a lawyer practising in Munich, and subsequently in both applications by Mr I.-J. Tegebauer, a lawyer practising in Trier. The German Government (“the Government”) were represented by theirs Agents, Ms A. Wittling-Vogel, Mr H.-J. Behrens and Ms K. Behr, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged, in particular, that his "retrospective" preventive detention (*nachträgliche Sicherungsverwahrung*; see for the terminology also paragraphs 104-106 and 157 below) – at issue, ordered in the main proceedings, had violated Article 5 § 1 and Article 7 § 1 of the Convention. Relying on Article 6 § 1 of the Convention, he further complained that the domestic courts had not decided speedily on the lawfulness of his provisional preventive detention, and that Judge P. had been biased against him in the main proceedings concerning the order for his "retrospective" preventive detention.

4. The applications were allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 26 November 2013 the Government were given notice of application no. 10211/12. On 22 December 2014 the complaints concerning the order for the applicant's subsequent preventive detention and the complaint about the partiality of Judge P. made in application no. 27505/14 were communicated to the Government, and the remainder of that application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. On 2 February 2017 a Chamber of the Fifth Section composed of Erik Møse, President, Angelika Nußberger, Ganna Yudkivska, Faris Vehabović, Yonko Grozev, Síofra O'Leary and Mārtiņš Mits, judges, and Milan Blaško, Deputy Section Registrar, unanimously decided to join the applications. It struck part of the applications out of its list of cases following the Government's unilateral declaration under Articles 5 and 7 § 1 of the Convention relating to the applicant's preventive detention from 6 May 2011 to 20 June 2013, and declared the remainder of the applications admissible. It further held, unanimously, that there had been no violation of Article 5 § 1 of the Convention and no violation of Article 7 § 1 of the Convention on account of the applicant's preventive detention from 20 June 2013 onwards. Moreover, it unanimously held that there had been no violation of Article 5 § 4 of the Convention on account of the duration of the proceedings for review of the applicant's provisional preventive detention and no violation of Article 6 § 1 of the Convention on account of the alleged lack of impartiality of Judge P. in the main proceedings resulting in a new preventive detention order against the applicant.

6. On 15 March 2017 the applicant requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention and Rule 73 of the Rules of Court. On 29 May 2017 the Panel of the Grand Chamber accepted that request.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court. At the first deliberations, Stéphanie Mourou-Vikström, substitute judge, replaced Işıl Karakaş, who was unable to take part in the further consideration of the case (Rule 24 § 3).

8. The applicant and the Government each filed a memorial on the merits (Rule 59 § 1). In addition, third-party comments were received from the European Prison Litigation Network, which had been granted leave by the President on 30 August 2017 to intervene in the written proceedings (Article 36 § 2 of the Convention and Rule 44 §§ 3 and 4).

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 29 November 2017 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms A. WITTLING-VOGEL, Federal Ministry of Justice and Consumer Protection,
Ms K. BEHR, Federal Ministry of Justice and Consumer Protection, *Agents*,
Mr T. GIEGERICH, Professor of EU Law, Public International Law and Public Law, University of Saarland, *Counsel*,
Ms P. VIEBIG-EHLERT, Federal Ministry of Justice and Consumer Protection,
Ms K. MÜLLER, Chair of EU Law, Public International Law and Public Law, University of Saarland,
Mr B. BÖSERT, Federal Ministry of Justice and Consumer Protection,
Mr C.-S. HAASE, Federal Ministry of Justice and Consumer Protection,
Ms S. BENDER, Bavarian Ministry of Justice,
Mr A. STEGMANN, Bavarian Ministry of Justice, *Advisers*;

(b) for the applicant

Mr I.-J. TEGEBAUER, lawyer,
Mr M. MAVANY, *Counsel*,
Ms D. THÖRNICH, *Adviser*.

The Court heard addresses by Mr Tegebauer, Mr Mavany and Mr Giegerich and their replies to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1978 and is currently detained in the centre for persons in preventive detention on the premises of Straubing Prison (hereinafter “the Straubing preventive detention centre”).

A. Background to the case: the applicant's conviction and the first order for his subsequent preventive detention

11. On 29 October 1999 the Regensburg Regional Court convicted the applicant of murder and, applying the criminal law relating to young offenders, sentenced him to ten years' imprisonment. It found that in June 1997 the applicant, then aged nineteen, had strangled a woman who had been jogging on a forest path by use of considerable force with a cable, a tree branch and his hands, had partly undressed the dead or dying victim and had then masturbated. The court, having consulted two medical experts, found that the applicant had acted with full criminal responsibility when killing the woman for sexual gratification and in order to cover up his intended rape. The court noted that, despite indications to that effect, both experts had not wished to draw the conclusion that the applicant suffered from a sexual deviancy as the young applicant had made few statements on the motives for his offence.

12. On 12 July 2008 a new legislative provision, section 7(2) of the Juvenile Courts Act, entered into force. It authorised the ordering of subsequent preventive detention (see for the terminology also paragraphs 104-106 and 157 below) of persons convicted under the criminal law relating to young offenders (see paragraphs 54-57 below).

13. From 17 July 2008 onwards, after he had served his full prison sentence, the applicant was remanded in provisional preventive detention under Article 275a § 5 of the Code of Criminal Procedure (see paragraph 61 below).

14. On 22 June 2009 the Regensburg Regional Court, with Judge P. sitting on the bench, ordered the applicant's subsequent preventive detention under section 7(2)(1) of the Juvenile Courts Act, read in conjunction with section 105(1) of the Juvenile Courts Act (see paragraphs 56 and 59 below). The court, having regard to the reports made by a criminological expert (Bo.) and a psychiatric expert (Ba.), found that the applicant continued to harbour violent sexual fantasies and that there was a high risk that he would again commit serious sexual offences, including murder for sexual gratification, if released. On 9 March 2010 the Federal Court of Justice dismissed the applicant's appeal on points of law against the Regional Court's judgment.

15. On 4 May 2011 the Federal Constitutional Court, in a leading judgment, allowed the applicant's constitutional complaint. It quashed the Regional Court's judgment of 22 June 2009 and the Federal Court of Justice's judgment of 9 March 2010 and remitted the case to the Regional Court. It further found the order for the applicant's provisional preventive detention – which had become devoid of purpose once the order for the applicant's subsequent preventive detention in the main proceedings had become final – to be unconstitutional (file no. 2 BvR 2333/08 and no.

2 BvR 1152/10). The Federal Constitutional Court found that the impugned judgments and decisions had violated the applicant's right to liberty and the constitutional protection of legitimate expectations guaranteed in a State governed by the rule of law (see in more detail paragraphs 68-75 below).

B. The proceedings at issue in application no. 10211/12 concerning the applicant's provisional preventive detention

1. Proceedings before the Regional Court

16. On 5 May 2011 the applicant requested that the Regensburg Regional Court order his immediate release. He claimed that following the Federal Constitutional Court's judgment of 4 May 2011, which had quashed the judgment ordering his subsequent preventive detention, there was no longer any legal basis for his detention.

17. On 6 May 2011 the Regensburg Regional Court, allowing the Public Prosecutor's request of 5 May 2011, again ordered the applicant's provisional preventive detention under sections 7(4) and 105(1) of the Juvenile Courts Act, read in conjunction with Article 275a § 5, first sentence, of the Code of Criminal Procedure (see paragraphs 59 and 61 below). The court found that the applicant's provisional preventive detention was necessary because there were weighty grounds for expecting that his subsequent preventive detention would be ordered under section 7(2)(1) of the Juvenile Courts Act, read in the light of the judgment of the Federal Constitutional Court of 4 May 2011.

18. By submissions dated 27 June 2011, received by the Regional Court on 29 June 2011, the applicant lodged an appeal against the Regional Court's decision, for which he submitted further statements of grounds on 15, 19, 22, 25 and 26 July 2011. He claimed, in particular, that his provisional preventive detention was unlawful.

19. On 4 July 2011 the Regensburg Regional Court refused to amend its decision of 6 May 2011.

2. Proceedings before the Court of Appeal

20. On 16 August 2011 the Nuremberg Court of Appeal dismissed the applicant's appeal as ill-founded. It had regard to: (i) a request lodged by the Nuremberg General Public Prosecutor on 20 July 2011 requesting the dismissal of the applicant's appeal; (ii) the findings of fact made by the Regensburg Regional Court in its judgment of 22 June 2009; (iii) the findings of two medical experts in the proceedings leading to the judgment of 22 June 2009; (iv) the findings of two other experts in previous proceedings regarding the applicant's mental condition and the level of danger that he posed; and (v) the new restrictive standards set by the Federal Constitutional Court in its judgment of 4 May 2011.

21. On 29 August 2011 the Nuremberg Court of Appeal dismissed the applicant's complaint regarding a breach of his right to be heard and his objection to the decision of 16 August 2011. The decision was served on counsel for the applicant on 6 September 2011.

3. Proceedings before the Federal Constitutional Court

22. On 7 September 2011 the applicant lodged a constitutional complaint with the Federal Constitutional Court against the decision of the Regensburg Regional Court dated 6 May 2011, as confirmed by the Nuremberg Court of Appeal. He further requested that the execution of those decisions be stayed by way of an interim measure until the Federal Constitutional Court delivered its decision. The applicant claimed, in particular, that his right to a speedy decision, enshrined in his constitutional right to liberty, had not been respected in the proceedings concerning the review of his provisional preventive detention.

23. On 18 October 2011 the Federal Constitutional Court communicated the applicant's constitutional complaint to the regional Government of Bavaria, to the President of the Federal Court of Justice and to the General Public Prosecutor at the latter court.

24. On 25 October 2011 the Federal Constitutional Court, in a reasoned decision, refused to stay the order for the applicant's provisional preventive detention by way of an interim measure.

25. By submissions dated 1 January 2012 the applicant replied to the submissions of the regional Government of Bavaria, of the President of the Federal Court of Justice and of the General Public Prosecutor at the latter court dated 28, 24 and 25 November 2011 respectively.

26. On 22 May 2012 the Federal Constitutional Court, without giving reasons, declined to consider the applicant's constitutional complaint (file no. 2 BvR 1952/11). The decision was served on counsel for the applicant on 30 May 2012.

4. Subsequent developments

27. On 17 November 2011 the applicant lodged a fresh request for judicial review of his provisional preventive detention. By a decision of 28 November 2011 the Regensburg Regional Court upheld the applicant's provisional preventive detention as ordered on 6 May 2011. On 2 January 2012 the Nuremberg Court of Appeal dismissed the applicant's appeal against that decision.

C. The proceedings at issue in application no. 27505/14, concerning the main proceedings on the applicant's subsequent preventive detention

1. *Proceedings before the Regensburg Regional Court*

(a) Decision on the applicant's motion for bias

28. In the resumed proceedings before the Regensburg Regional Court following the remittal of the case to it (see paragraph 15 above), the applicant lodged a motion against Judge P. for bias. The latter had been a member of the bench of the Regensburg Regional Court which had ordered the applicant's subsequent preventive detention on 22 June 2009 (see paragraph 14 above). The applicant alleged that Judge P. had remarked to the applicant's female defence counsel on 22 June 2009, immediately after the delivery of the Regional Court's judgment ordering the applicant's subsequent preventive detention, in reference to the applicant: "Be careful that after he is released, you don't find him standing in front of your door waiting to thank you." He claimed that the remark had been made in the course of a discussion *in camera* between the judges of the Regional Court and the applicant's two lawyers concerning the applicant's possible transfer to a psychiatric hospital following the Regional Court's judgment.

29. In a comment of 13 December 2011 on the applicant's motion for bias, Judge P. explained that he remembered having had a discussion about the applicant's possible transfer to a psychiatric hospital at a later stage, after the delivery of the judgment. However, given the length of time that had elapsed, he neither recalled the precise contents of the discussion nor the exact context in which he had allegedly made the impugned remark.

30. On 2 January 2012 the Regensburg Regional Court dismissed the motion for bias lodged by the applicant. The court considered in particular that, even assuming that the applicant had established to the satisfaction of the court that Judge P. had made the remark in question, there were no objectively justified doubts as to P.'s impartiality as a result thereof. Even assuming that the applicant could reasonably consider the sense of the words "thank you" in the above context as meaning that the applicant could commit a violent offence, it had to be noted that the Regional Court, including Judge P., had just established that the applicant still suffered from fantasies of sexual violence and that there was at that time a high risk that he would again commit serious offences against the life and sexual self-determination of others. Assuming that Judge P. had indeed made the remark in question, his "advice" had therefore constituted in substance nothing more than the application of the Regional Court's said findings to a particular case. The remark had further been made in the context of a confidential exchange between the participants in the proceedings in the absence of the applicant. Judge P. could have expected that the applicant's

female counsel would interpret his remark in the above-mentioned manner within that context.

31. Furthermore, Judge P.'s remark had reflected his view as it had been on the day of the Regional Court's judgment of 22 June 2009. It did not suggest in any way that Judge P. had not been ready to take an impartial decision in the present proceedings, more than two years after the impugned remark and following the conclusion of a new main hearing. The fact that Judge P. had previously dealt with the applicant's case did not in itself render him biased.

(b) The new order for the applicant's subsequent preventive detention

32. On 3 August 2012 the Regensburg Regional Court, having held hearings over twenty-four days, again ordered the applicant's subsequent preventive detention.

33. The Regional Court based its 164-page judgment on sections 7(2)(1) and 105(1) of the Juvenile Courts Act, read in conjunction with the Federal Constitutional Court's judgment of 4 May 2011. It considered, firstly, that a comprehensive assessment of the applicant, his offence and, in addition, his development during the execution of the sentence relating to young offenders revealed that there was a high risk that the applicant, owing to specific circumstances relating to his person or his conduct, could commit the most serious types of violent crimes and sexual offences, similar to the one he had been found guilty of, if released.

34. The Regional Court found, secondly, that the applicant suffered from a mental disorder for the purposes of section 1(1) of the Therapy Detention Act (see paragraph 85 below), namely sexual sadism. Having regard to the case-law of the Federal Court of Justice and the Federal Constitutional Court, it considered that, whereas a mere "accentuation of the personality" was not sufficient to constitute a mental disorder within the meaning of the said Act, such disorder did not have to be so serious as to exclude or diminish the criminal responsibility of the person concerned for the purposes of Articles 20 and 21 of the Criminal Code (see paragraphs 82-83 and 88-89 below). Given that the sexual sadism from which the applicant suffered was of a serious nature and had substantially affected his development since adolescence, it amounted to a mental disorder within the meaning of the Therapy Detention Act.

35. The Regional Court based its view on the reports of two experienced external medical experts whom it had consulted, K. and F., who were professors and doctors for psychiatry and psychotherapy at two different university hospitals. One of the experts consulted, K., was firmly convinced that the applicant continued to suffer from sexual sadism while the other expert, F., formulated his findings more cautiously, stating that it was certain that the applicant had suffered from sexual sadism in 2005 and that this disorder could not be expected to have disappeared.

36. Having regard to the findings of these experts, as well as to those of several medical experts who had previously examined the applicant since his arrest following his offence, the Regional Court was satisfied that the applicant has had violent sexual fantasies involving the strangulation of women since the age of seventeen. He was suffering from a sexual preference disorder, namely sexual sadism, as described by the relevant tool for the classification of diseases, the International Statistical Classification of Diseases and Related Health Problems in its current version (ICD-10);[1] this disorder had caused, and been manifested in, his brutal offence, and still persisted. The court, having regard to the experts' findings, observed that the applicant had hidden the sadistic motives behind his offence in the proceedings before the trial court in 1999, which, despite some indications of sexual deviance, had then interpreted the offence as an intended rape which had failed. The applicant, who had given diverging versions of the motive for his offence, had only admitted in 2005/2006, during his examination by a psychological and a psychiatric expert, that in his murder he had put into practice intensifying fantasies of exercising power over women by attacking their neck and by masturbating on their inanimate bodies. The applicant's new statements concerning his fantasies were more reconcilable with the trial court's findings as to the manner in which the offence had been carried out.

37. The court further observed that the therapy followed by the applicant up until 2007, in particular social therapy, which both experts K. and F. had considered as appropriate treatment for his condition, had been unsuccessful. Even though the applicant appeared not to refuse further therapy as a matter of principle, he was not currently undergoing any treatment. He had, in particular, opposed the prosecution's request to the Regensburg Regional Court in 2010/2011 to transfer him to a psychiatric hospital under Article 67a §§ 2 and 1 of the Criminal Code (see paragraph 67 below) in order to treat his condition in a different setting. He had further refused meetings aimed at establishing a new individualised therapeutic programme with reference to the pending court proceedings.

2. Proceedings before the Federal Court of Justice

38. In an appeal on points of law against the Regional Court's judgment of 3 August 2012, the applicant complained of the unlawfulness of his "retrospective" preventive detention and of the fact that the judgment had been delivered with the participation of a biased judge, P.

---

[1] The International Statistical Classification of Diseases and Related Health Problems (10th Revision), the ICD-10, is issued by the World Health Organisation. The ICD is the international standard tool for classifying diseases and health conditions. It defines diseases, disorders, injuries and other related health conditions, listed in a comprehensive, hierarchical fashion.

39. On 5 March 2013 the Federal Court of Justice dismissed the applicant's appeal on points of law as ill-founded.

3. *Proceedings before the Federal Constitutional Court*

40. On 11 April 2013 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He complained, in particular, that the "retrospective" order for his preventive detention had infringed the prohibition on retrospective penalties under the Constitution and Article 7 § 1 of the Convention. Furthermore, that order had failed to comply with his constitutional right to liberty, with the protection of legitimate expectations in a State governed by the rule of law and with Article 5 § 1 of the Convention. He further argued that his constitutional right to a tribunal established by law had been violated because Judge P. had been biased against him.

41. On 5 December 2013 the Federal Constitutional Court declined to consider the applicant's constitutional complaint without giving reasons (file no. 2 BvR 813/13).

D. Subsequent developments

42. The Regensburg Regional Court subsequently reviewed the necessity of the applicant's preventive detention at regular intervals. It decided on 18 September 2014, 2 March 2016 and 6 April 2017 that the detention had to continue because the applicant's mental disorder and consequent dangerousness persisted. Each of the court's review decisions was based on a fresh report by a different psychiatric expert, all the experts consulted having diagnosed the applicant with sexual sadism. The applicant is currently still in preventive detention.

E. The conditions of the applicant's detention prior to and during the execution of the preventive detention order

43. During the execution of his ten-year prison term (up until July 2008) the applicant was, in particular, detained in the social-therapeutic department for sexual offenders of Bayreuth Prison from 2001 to 2007, where he underwent social therapy. As the applicant failed to pursue the therapy with the requisite sincerity and motivation, the core issue of his deviant sexual fantasies could not be sufficiently addressed and the therapy was not completed successfully. In 2007 he was transferred to the social therapy for sexual offenders department of Straubing Prison, where a fresh attempt to treat him also failed owing to the applicant's lack of motivation *vis-à-vis* the different therapies provided.

44. During the execution of his first preventive detention order, issued on 22 June 2009, the applicant had objected to the prosecution's request to transfer him to a psychiatric hospital under Article 67a §§ 2 and 1 of the Criminal Code (see paragraph 67 below) in order to consolidate further his rehabilitation by undergoing treatment in that hospital. Moreover, he had turned down proposals for a further therapeutic programme in Straubing Prison.

45. On 7 May 2011, following the quashing of the first preventive detention order and the new order for the applicant's provisional preventive detention, he was transferred from the wing for persons in preventive detention in Straubing Prison to a wing for persons in detention on remand. As a consequence, the applicant lost the privileges reserved for persons in preventive detention. In particular, he was no longer able to undergo any kind of therapy. On 13 September 2011 he was transferred back to, and once again detained in, the preventive detention wing of Straubing Prison until 20 June 2013, where he was offered social therapy. He rejected the proposal.

46. Since 20 June 2013 the applicant has been detained in the newly built Straubing preventive detention centre. That institution, which is situated in a separated fenced-off compound on the premises of Straubing Prison and can house up to 84 detainees, has more staff than Straubing Prison, namely one psychiatrist, seven psychologists, one general practitioner, four nurses, seven social workers, one lawyer, one teacher, one prison inspector, forty-four general prison staff members and four administrative staff members, providing for the detainees. Inmates can stay outside their cells, which nowadays measure 15 m² (compared to some 10 m² previously) and now include a kitchen unit and a separate bathroom, between 6 a.m. and 10.30 p.m.

47. In the Straubing preventive detention centre, inmates are provided with individualised medical and therapeutic treatment by specialised staff in accordance with an individual treatment plan. The treatment options have been considerably increased as compared to those proposed under the previous preventive detention regime in Straubing Prison. The applicant initially refused all types of therapeutic provision at that centre, including one-to-one or group social therapy, participation in an intensive treatment programme for sexual offenders, and therapy administered by an external psychiatrist. He took up one-to-one psychotherapy only after the period covered by the proceedings here at issue, from 10 June 2015 until 30 June 2017, with a psychologist from the preventive detention centre.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General legal framework of the preventive detention regime

48. In accordance with a long-standing legal tradition, 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. In this twin-track system of sanctions, penalties (see Articles 38 et seq. of the Criminal Code) mainly consist of prison sentences and fines, which are fixed in accordance with the defendant's guilt (Article 46 § 1 of the Criminal Code). 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), in a detoxification facility (Article 64 of the Criminal Code) or in preventive detention (Articles 66 et seq. of the Criminal Code). The purpose of these measures is to rehabilitate dangerous offenders and to protect the public from them. They may be imposed on criminally liable offenders in addition to their punishment (cf. Articles 63 et seq.). Such measures must, however, be proportionate to the seriousness of the offences committed, or expected to be committed, by the defendants, as well as to their dangerousness (Article 62 of the Criminal Code).

49. Preventive detention can be ordered under German law against persons who have committed a criminal offence while acting with full criminal responsibility or with diminished criminal responsibility (see Articles 66 et seq. of the Criminal Code). Initially, a preventive detention order could only be made by a criminal court at the time of the defendant's conviction, additionally to a term of imprisonment. Under Article 66 of the Criminal Code, this required, in particular, that the criminal court had convicted the defendant of an offence of a certain gravity (as specified in the law) and that, owing to his propensity to commit serious offences, the defendant presented a danger to the general public. Under the law in force prior to 31 January 1998 (Article 67d § 1 of the Criminal Code), the first period of preventive detention executed against a defendant could not exceed ten years. Following a change in the law, that maximum duration was abolished with immediate effect (see, for further details, *M. v. Germany*, no. 19359/04, §§ 49-54, ECHR 2009).

50. In 2004, a new Article 66b was inserted into the Criminal Code authorising the imposition of subsequent preventive detention on adult offenders. Preventive detention could from then on be imposed also on adult offenders against whom no preventive detention had been ordered by the trial court having found them guilty of certain serious offences. Such orders could be made separately and subsequently, after the trial court's judgment, if, before the end of enforcement of a term of imprisonment, evidence came to light which indicated that the detainee concerned posed a significant

danger to the general public. By a law which entered into force on 1 January 2011, the legislature substantially restricted the conditions under which preventive detention could be ordered subsequently (see for more details *B. v. Germany*, no. 61272/09, §§ 33-35, 19 April 2012).

51. In 2008 section 7(2) of the Juvenile Courts Act – the provision at issue in the present case – entered into force, authorising the imposition of subsequent preventive detention also on young offenders (see in more detail paragraphs 54-58 below).

52. In addition to the above-mentioned more recent reforms of the preventive detention regime in 1998, 2004 and 2008, further legislative amendments were made following this Court's judgment in the case of *M. v. Germany* (cited above) of 17 December 2009 and the Federal Constitutional Court's judgment of 4 May 2011 (see paragraphs 68-75 below). These were brought about, in particular, by the adoption of the Reform of Preventive Detention Act (*Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung*) of 22 December 2010, which included the new Therapy Detention Act (see paragraphs 85-89 below) and entered into force on 1 January 2011, and by the Preventive Detention (Distinction) Act, which entered into force on 1 June 2013 (see paragraphs 78 et seq. below).

53. As regards the procedure for the execution of measures of correction and prevention in general, Article 463 § 1 of the Code of Criminal Procedure stipulates that the provisions on the execution of terms of imprisonment shall apply *mutatis mutandis* on the execution of measures of correction and prevention, unless provided otherwise.

B. Preventive detention orders against juveniles and young adults

1. The order for a young offender's subsequent preventive detention

54. Initially, the Juvenile Courts Act did not authorise orders for preventive detention in respect of juveniles (persons aged between fourteen and eighteen) or young adults aged between eighteen and twenty-one (see section 1[2] of the Juvenile Courts Act) to whom the criminal law relating to young offenders was applied. Since 29 July 2004, following a change to section 106 of the Juvenile Court Act, subsequent preventive detention could be ordered against young adults aged between eighteen and twenty-one who were convicted under the ordinary criminal law for adult offenders.

55. Under the Act on the introduction of subsequent preventive detention for convictions under the criminal law relating to young offenders (*Gesetz zur Einführung der nachträglichen Sicherungsverwahrung bei Verurteilungen nach Jugendstrafrecht*) of 8 July 2008, which came into force on 12 July 2008, section 7(2) was inserted into the Juvenile Courts Act.

56. The wording of section 7(2) of the Juvenile Courts Act, as in force up until 31 May 2013, provided:

> "If, following the imposition of a sentence applicable to young offenders of at least seven years for ... a felony
>
> 1. against life, physical integrity or sexual self-determination, or
>
> 2. ...
>
> through which the victim either suffered grave mental or physical damage or was exposed to the risk of suffering such damage, there is evidence prior to the end of the sentence ... indicating that the convicted person poses a significant danger to the general public, the court may order preventive detention subsequently if a comprehensive assessment of the convicted person, his offence or offences and, on a supplementary basis, his development during the serving of the sentence ... determines that it is very likely that he will again commit offences of the nature described above."

57. The Federal Government, when submitting the draft Act on the introduction of subsequent preventive detention for convictions under the criminal law relating to young offenders to Parliament (see Publication of the Federal Parliament (*Bundestagsdrucksache*) no. 16/6562, p. 1), had argued that recent examples had shown that, like adult offenders, young offenders sentenced under the Juvenile Courts Act could, in exceptional cases, prove to be very dangerous to others even after having served a term of imprisonment of several years. Where young offenders could not be placed in a psychiatric hospital, there was, at that time, no legal basis for remanding them in detention as necessary for the protection of the public.

58. Under the Preventive Detention (Distinction) Act, which entered into force on 1 June 2013 (see, for further details, paragraphs 76 et seq. below), the legislature substantially restricted the conditions under which preventive detention could be ordered subsequently against young offenders.

59. Section 105(1) of the Juvenile Courts Act provides that the court shall apply certain provisions of that Act relating to juveniles, particularly section 7 thereof, if a young adult aged between eighteen and twenty-one commits an offence and if, in particular, a comprehensive assessment of the perpetrator's personality, taking into account his living environment, has shown that the perpetrator only had the moral and intellectual development of a juvenile at the time of his offence.

60. Section 43(2) of the Juvenile Courts Act provides that in criminal proceedings against young offenders, an expert qualified to examine juveniles should, if possible, be charged with carrying out necessary examinations of the offender.

2. Provisional preventive detention and judicial review thereof

61. While proceedings concerning a young offender's subsequent preventive detention are pending, a court may order the person's provisional preventive detention (until the relevant judgment on subsequent preventive

detention becomes final) if there are weighty reasons to expect that that person's subsequent preventive detention will be ordered (see section 7(4) of the Juvenile Courts Act, read in conjunction with Article 275a § 5, first sentence, of the Code of Criminal Procedure, in the wording in force at the relevant time under the applicable transitional provision).

62. Under Articles 304 § 1 and 305 of the Code of Criminal Procedure there is a possibility (which is not subject to any time-limit) of lodging an appeal with the Court of Appeal against a provisional preventive detention order from a Regional Court; under Article 310 of the Code of Criminal Procedure no further appeal lies before the ordinary courts against the Court of Appeal's decision.

63. However, a detainee may lodge a fresh request for judicial review of his detention with the competent Regional Court in accordance with Articles 117 et seq. of the Code of Criminal Procedure read in conjunction with Article 275a § 5, fourth sentence, of the Code of Criminal Procedure following the Court of Appeal's decision. A further appeal lies against the Regional Court's judicial review decision (Articles 304 et seq. of the Code of Criminal Procedure) with the Court of Appeal.

3. Judicial review of subsequent preventive detention and duration thereof

64. Under section 7(4) of the Juvenile Courts Act, in the wording in force up until 31 May 2013, read in conjunction with Article 67e of the Criminal Code, the courts were obliged to examine at yearly intervals whether a particular preventive detention order under section 7(2) of the Juvenile Courts Act might be terminated or suspended and a measure of probation applied. In its judgment of 4 May 2011 (see paragraphs 68-75 below), the Federal Constitutional Court ordered that this time-limit be reduced from one year to six months.

65. Since 1 June 2013, under Article 67d § 2 of the Criminal Code, read in conjunction with section 316f(2) and (3) of the Introductory Act to the Criminal Code, courts have been able to order subsequent preventive detention to continue only if the person concerned suffers from a mental disorder and if, owing to specific circumstances relating to his personality or his conduct, there is a high risk that he will commit the most serious types of violent crimes or sexual offences as a result of that disorder. If these criteria are not met, the court will suspend on probation further enforcement of the detention order and order the supervision of the person's conduct.

66. Since 1 June 2013, Article 67d § 2 of the Criminal Code has additionally provided that the court will also suspend on probation the further enforcement of the detention order if it finds that the continuation of the detention would be disproportionate because the person concerned had not been provided, within a maximum six-month time-limit fixed by the court, with sufficient care within the meaning of Article 66c § 1

sub-paragraph 1 of the Criminal Code (see paragraphs 79-80 below). If sufficient care has not been provided, it is for the court to fix that time-limit when it reviews the continuation of the detention and to specify the measures which have to be offered. Suspension of the detention automatically entails supervision of the conduct of the person concerned.

4. *Transfer for implementation of a different measure of correction and prevention*

67. Article 67a of the Criminal Code contains provisions on the transfer of detainees for the implementation of a measure of correction and prevention different from the measure originally ordered in the judgment against them. Under Article 67a § 2, read in conjunction with § 1, a court may subsequently transfer a person in respect of whom preventive detention has been ordered to a psychiatric hospital or detoxification facility if the person's reintegration into society can thereby be better promoted.

C. The Federal Constitutional Court's judgment of 4 May 2011 and the ensuing amendments to the German preventive detention regime

1. *The Federal Constitutional Court's leading judgment on preventive detention of 4 May 2011*

68. On 4 May 2011 the Federal Constitutional Court delivered a leading judgment on preventive detention following constitutional complaints both of detainees remanded in preventive detention which had been prolonged subsequently beyond the former ten-year maximum period and of detainees – including the applicant in the present case – remanded in subsequently ordered preventive detention under Article 66b § 2 of the Criminal Code or section 7 (2) of the Juvenile Courts Act (file nos. 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10 and 2 BvR 571/10).

69. The Federal Constitutional Court's judgment was adopted after this Court had, on 17 December 2009, delivered a leading judgment in the case of *M. v. Germany* (cited above) in which it had held that the subsequent extension of Mr M.'s preventive detention beyond the former statutory maximum period of ten years applicable at the time of that applicant's offence and conviction had breached both Article 5 § 1 and Article 7 § 1 of the Convention.

70. The Federal Constitutional Court, reversing its previous position adopted notably in its judgment of 5 February 2004 (file no. 2 BvR 2029/01), held that all provisions concerned by the constitutional complaints, both on the subsequent prolongation of preventive detention and on the subsequent ordering of such detention, were incompatible with the Basic Law as they failed to comply with the constitutional protection of

legitimate expectations guaranteed in a State governed by the rule of law, read in conjunction with the constitutional right to liberty.

71. The Federal Constitutional Court further held that all the relevant provisions of the Criminal Code on the imposition and duration of preventive detention were incompatible with the fundamental right to liberty of persons in preventive detention. It found that those provisions did not satisfy the constitutional requirement of differentiating between preventive detention and imprisonment (*Abstandsgebot*).

72. The Federal Constitutional Court held that all provisions declared incompatible with the Basic Law remained applicable until the entry into force of new legislation, and until 31 May 2013 at the latest, under additional restrictive conditions. In relation to detainees whose preventive detention had been prolonged subsequently, or ordered subsequently under Article 66b § 2 of the Criminal Code or section 7(2) of the Juvenile Courts Act, the courts responsible for the execution of sentences had to examine without delay whether there was a high risk that the persons concerned, owing to specific circumstances relating to their personality or their conduct, would commit the most serious types of violent crimes or sexual offences and if, additionally, they suffered from a mental disorder within the meaning of section 1(1) of the newly enacted Therapy Detention Act (see paragraph 85 below). As regards the notion of mental disorder, the Federal Constitutional Court explicitly referred to the interpretation of the notion of persons of unsound mind in Article 5 § 1 sub-paragraph (e) of the Convention made in this Court's case-law (see §§ 138 and 143-56 of the Federal Constitutional Court's judgment). If the above preconditions were not met, those detainees had to be released no later than 31 December 2011. The other provisions on the imposition and duration of preventive detention could only be applied in the transitional period subject to a strict review of proportionality; as a general rule, proportionality was respected where there was a danger of the person concerned committing serious crimes of violence or sexual offences if released.

73. In its reasoning, the Federal Constitutional Court relied on the interpretation of Article 5 and Article 7 of the Convention made by this Court in its judgment in the case of *M. v. Germany* (cited above; see §§ 137 et seq. of the Federal Constitutional Court's judgment). It stressed, in particular, that the constitutional requirement to differentiate between preventive detention and imprisonment and the principles laid down in Article 7 of the Convention required individualised and intensified therapeutic provision and care for the persons concerned. In line with the Court's findings in the case of *M. v. Germany* (cited above, § 129), it was necessary to provide a high level of care by a team of multi-disciplinary staff and to provide the detainees with individualised therapy if the standard therapies available in the institution had no prospects of success (see paragraph 113 of the Federal Constitutional Court's judgment).

74. The Federal Constitutional Court confirmed its constant case-law that the absolute ban on the retrospective application of criminal law under Article 103 § 2 of the Basic Law did not cover preventive detention. The latter was a measure of correction and prevention, which was not aimed at punishing criminal guilt, but was a purely preventive measure aimed at protecting the public from a dangerous offender (see paragraphs 100-101 and 141-42 of the Federal Constitutional Court's judgment). The Federal Constitutional Court noted that the European Court of Human Rights had considered preventive detention to be a penalty within the meaning of Article 7 § 1 of the Convention (ibid., paragraphs 102 and 140). It considered that it was not necessary schematically to align the meaning of the constitutional notion of penalty with that under the Convention. Recourse should rather be had to the value judgments (*Wertungen*) under the Convention in a result-oriented manner in order to prevent breaches of public international law (ibid., paragraphs 91 and 141 et seq.).

75. Taking account of the constitutional right to protection of legitimate expectations in a State governed by the rule of law and the value judgments of Article 5 of the Convention, the prolongation of preventive detention beyond the former ten-year maximum period or the subsequent ordering of such detention was only constitutional in practice if, *inter alia*, the requirements of Article 5 § 1 (e) were met (ibid., paragraphs 143 and 151-56). The Federal Constitutional Court expressly referred in that context to the case-law of the European Court of Human Rights, according to which the detention of a person as a mental-health patient would only be lawful for the purposes of Article 5 § 1 (e) of the Convention if effected in a hospital, clinic or other appropriate institution (ibid., paragraph 155).

2. Implementation in practice of the Federal Constitutional Court's judgment

76. Having regard to the requirements laid down in the Federal Constitutional Court's judgment of 4 May 2011, the legislature adopted the Act on the establishment, at federal level, of a difference between the provisions on preventive detention and those on prison sentences (*Gesetz zur bundesrechtlichen Umsetzung des Abstandsgebotes im Recht der Sicherungsverwahrung*, hereinafter the "Preventive Detention (Distinction) Act") of 5 December 2012, which entered into force on 1 June 2013.

77. At the same time, the different German *Länder* adopted Acts reforming the implementation of preventive detention. These Acts contain detailed rules on the execution in practice of the new preventive detention regime, which should focus on therapeutic provision for detainees and be adapted to the general living conditions as far as possible (see, for the *Land* of Bavaria, where the applicant is being detained, the Bavarian Preventive Detention Execution Act – *Bayerisches Sicherungsverwahrungsvollzugs-gesetz / Gesetz über den Vollzug der Sicherungsverwahrung und der*

Therapieunterbringung –, and in particular sections 2 and 3 thereof, of 22 May 2013, which entered into force on 1 June 2013; the Act contains a total of 105 sections).

78. Under the new legislation (see, in particular, Article 66c of the Criminal Code), persons in preventive detention must now be detained in institutions offering them not only conditions more assimilated to general living conditions but, in particular, individual and intensive care for enhancing their willingness to participate in psychiatric, psychotherapeutic or socio-therapeutic treatment tailored to their needs.

79. Article 66c of the Criminal Code, on the manner in which preventive detention and prior terms of imprisonment are implemented, in so far as relevant, provides as follows:

> “1. Detainees held in preventive detention are placed in institutions which
>
> (1) offer the detainee, on the basis of a comprehensive examination and a personal treatment plan which is to be updated regularly, care that is
>
> (a) individual and intensive as well as suitable for raising and furthering his readiness to participate, in particular psychiatric, psychotherapeutic or socio-therapeutic treatment, tailored to the detainee’s needs if standardised offers do not have prospects of success, and
>
> (b) aimed at reducing the threat he poses to the public to such an extent that the measure may be suspended and probation granted or that it may be terminated as soon as possible,
>
> (2) guarantee a form of detention that
>
> (a) places as small a burden as possible on the detainee, complies with the requirements for care under sub-paragraph 1 and is assimilated to general living conditions in so far as security concerns allow, and
>
> (b) is separate from detainees serving terms of imprisonment in special buildings or departments in so far as the treatment within the meaning of sub-paragraph 1 does not exceptionally require otherwise, and
>
> (3) in order to attain the aim laid down in sub-paragraph 1 (b)
>
> (a) grant relaxations in the enforcement of the detention and make preparations for release unless there are compelling reasons not to do so, in particular if there are concrete facts constituting a risk that the detainee might abscond or abuse the relaxations in order to commit considerable offences, and
>
> (b) allow for follow-up care once at liberty in close cooperation with public or private institutions.”

80. Under a transitional provision, section 316f(3) of the Introductory Act to the Criminal Code, the new Article 66c of the Criminal Code is also applicable to persons who committed the offence(s) with regard to which preventive detention was ordered prior to 1 June 2013.

81. In accordance with this judicial and legislative framework, new centres for persons in preventive detention have been constructed, equipped and staffed in the *Länder* in order to comply with the requirements of

establishing a difference between the execution of preventive detention and that of prison sentences and of focusing on the therapy of the detainees. According to the material provided by the Government, which has not been contested by the applicant, twelve new preventive detention centres were built and/or equipped in the different *Länder*, at total costs exceeding 200 million euros. The detainees are placed in cells (measuring between 14 and 25 m²) which are larger than prison cells and usually include a kitchen unit and a separate bathroom, and may move more freely within the respective centres, which comprise further rooms and outside spaces for therapy, occupational and recreational activities. They may wear their own clothes. In the centres, detainees are, in particular, provided with individualised comprehensive and interdisciplinary therapies, which have been extended as compared to the previous preventive detention regime, including psychotherapeutic conversations aimed at motivating detainees to pursue therapy, offence-specific therapies for violent and sexual offenders and social training courses, either as an individual or a group measure and partly involving external therapists if necessary. New therapeutic staff members were employed in all centres to provide the requisite therapies.

D. Criminal liability and detention of persons with mental disorders

1. *Provisions on criminal liability*

82. Article 20 of the Criminal Code contains rules on lack of criminal responsibility owing to mental disorders. It provides that a person who, upon commission of an act, is incapable of appreciating the wrongfulness of the act or of acting in accordance with such appreciation owing to a pathological mental disorder, a profound consciousness disorder, a mental deficiency or any other serious mental abnormality, acts without guilt.

83. Article 21 of the Criminal Code governs diminished criminal responsibility. It provides that punishment may be mitigated if the perpetrator's capacity to appreciate the wrongfulness of the act or to act in accordance with such appreciation was substantially diminished upon commission of the act owing to one of the reasons indicated in Article 20 of the Criminal Code.

2. *Detention of persons with mental disorders*

(a) Detention under Article 63 of the Criminal Code

84. The detention of mentally ill persons is provided for, primarily, in the Criminal Code as a measure of correction and prevention if the detention is ordered in relation to an unlawful act committed by the person concerned. Article 63 of the Criminal Code provides that if someone commits an unlawful act without criminal responsibility (Article 20) or with diminished

criminal responsibility (Article 21), the court will order his placement – without any maximum duration – in a psychiatric hospital. A comprehensive assessment of the defendant and his acts must have revealed that, as a result of his condition, he is likely to commit further serious unlawful acts and that he is therefore a danger to the general public.

(b) Detention under the Therapy Detention Act

85. Furthermore, on 1 January 2011, following the Court's judgment in the case of *M. v. Germany* (cited above), the Act on Therapy and Detention of Mentally Disturbed Violent Offenders (*Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter*, the "Therapy Detention Act") entered into force. Under sections 1(1) and 4 of that Act, the civil sections of the Regional Court may order the placement in a suitable institution of persons who may no longer be kept in preventive detention in view of the prohibition on subsequent aggravations in relation to preventive detention. Such detention for therapy may be ordered if the person concerned has been found guilty by final judgment of certain serious offences for which preventive detention may be ordered under Article 66 § 3 of the Criminal Code. The person must also be suffering from a mental disorder as a result of which it is highly likely that, if at liberty, the person would considerably impair the life, physical integrity, personal liberty or sexual self-determination of another person. The person's detention must be deemed necessary for the protection of the public.

86. Under section 2(1) of the Therapy Detention Act, institutions suitable for "therapy detention" are only those that can guarantee, by means of medical care and therapeutic provision, adequate treatment of the mental disorder of the person concerned on the basis of an individualised treatment plan aimed at keeping the confinement to a minimum duration (point [1]). Furthermore, the institutions concerned must allow detention to be effected in the least burdensome manner possible for the detainee, taking into account therapeutic aspects and the interests of public security (point [2]). They must be separated, geographically and organisationally, from institutions in which terms of imprisonment are enforced (point [3]). Under section 2(2) of the Therapy Detention Act, as in force since 1 June 2013, institutions within the meaning of Article 66c § 1 of the Criminal Code are also suitable for therapy detention if they comply with the requirements of section 2(1) points (1) and (2) of that Act.

87. The Federal Constitutional Court interpreted the Therapy Detention Act restrictively, holding that detention under that Act was only possible under the same restrictive conditions under which preventive detention could be ordered or prolonged subsequently (see that court's decision of 11 July 2013, file nos. 2 BvR 2302/11 and 2 BvR 1279/12, summarised in the case of *Bergmann v. Germany*, no. 23279/14, §§ 75-76, 7 January 2016;

and paragraph 72 above). Detention under that Act only rarely occurred in practice.

88. As for the interpretation of the notion of "mental disorder" in section 1(1) of the Therapy Detention Act, the Federal Constitutional Court found that in view of the standards flowing from Article 5 § 1 (e) of the Convention, that notion did not require that the disorder was so serious as to diminish or exclude the criminal responsibility of the person concerned for the purposes of Articles 20 and 21 of the Criminal Code (see file no. 2 BvR 1516/11, decision of 15 September 2011, paragraphs 35-36; and file nos. 2 BvR 2302/11 and 2 BvR 1279/12, cited above).

89. According to the Federal Constitutional Court, specific disorders affecting a person's personality, conduct, sexual preference and control of impulses were covered by the notion of "mental disorder" in section 1(1) of the Therapy Detention Act. This notion therefore was not limited to mental illnesses which could be treated clinically, but could extend also to dissocial personality disorders of sufficient severity (see file no. 2 BvR 1516/11, cited above, paragraphs 35-40). In line with this Court's case-law relating to Article 5 § 1 (e) (the court referred, in particular, to *Kronfeldner v. Germany*, no. 21906/09, 19 January 2012, and *B. v. Germany*, cited above) the Federal Constitutional Court found that the detention of a person for being of unsound mind could be justified provided that the detention was effected in an appropriate psychiatric institution, which, in turn, required the mental disorder to be of corresponding intensity (see file nos. 2 BvR 2302/11 and 2 BvR 1279/12, cited above).

(c) Detention under public safety legislation of the *Länder*

90. Under the *Länder* legislation relating to public safety and risk prevention, such as the Bavarian Act on the placement in an institution of, and care for, mentally ill persons (Bavarian (Mentally Ill Persons') Placement Act – *Gesetz über die Unterbringung psychisch Kranker und deren Betreuung*) of 5 April 1992, the civil courts may order a person's placement in a psychiatric hospital at the request of the authorities of a town or county if the person concerned is mentally ill or suffers from a mental disorder resulting from an intellectual impairment or addiction and thereby poses a severe threat to public security and order (see sections 1(1), 5 and 7(3) of the Act, read in conjunction with sections 312 point 4 and 313(3) of the Act on proceedings in family matters and matters of non-contentious jurisdiction – *Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*). Such an order may only be executed if no measure under Article 63 of the Criminal Code has been taken (section 1(2) of the said Act).

E. Statistic information

91. According to statistical material submitted by the Government, which was not contested by the applicant, on 10 May 2010, when the judgment in the case of *M. v. Germany* (cited above) became final, 102 persons were in subsequently prolonged preventive detention. On 31 March 2017 a total of 51,129 persons were serving a prison sentence in the whole German territory (with a population of some 81 million), and 591 persons were in preventive detention. 41 of the 591 persons in preventive detention were in subsequently ordered or prolonged preventive detention.

92. As regards the number of persons against whom long terms of imprisonment and preventive detention orders are being executed, according to the Council of Europe Annual Penal Statistics (SPACE I) for 2015, in Germany 2,471 persons were serving prison terms of 10 years or more, whereas 7,603 (figure available for 2014 only) were doing so in France, 9,747 in Italy, 12,012 in Spain and 16,511 in the United Kingdom (see document PC-CP (2016) 6, pp. 87-88, table 7; and SPACE I for 2014, document PC-CP (2015) 7, p. 90, table 7). In addition, 521 persons were under security measures or preventive detention orders in Germany and 540 in Italy (see SPACE I for 2015, document PC-CP (2016) 6, p. 78, table 5.2).

III. RELEVANT INTERNATIONAL LAW MATERIAL

1. United Nations Human Rights Committee

93. The United Nations Human Rights Committee, in its Concluding observations on the sixth periodic report of Germany, adopted by the Committee at its 106th session (15 October - 2 November 2012, CCPR/C/DEU/CO/6), found the following:

> “14. While welcoming the steps taken by the State party to revise its legislation and practice on post-conviction preventive detention in accordance with human rights standards and noting information that a draft bill addressing the issue is currently before parliament, the Committee is concerned about the number of persons who are still detained in such detention in the State party. It is also concerned about the duration of such a detention in some cases as well as the fact that conditions of detention have not been in line with human rights requirements in the past (arts. 9 and 10).
>
> The State party should take necessary measures to use the post-conviction preventive detention as a measure of last resort and create detention conditions for detainees, which are distinct from the treatment of convicted prisoners serving their sentence and only aimed at their rehabilitation and reintegration into society. The State party should include in the Bill under consideration, all legal guarantees to preserve the rights of those detained, including periodic psychological assessment of

their situation which can result in their release or the shortening of the period of their detention.”

2. United Nations Committee against Torture (CAT)

94. The United Nations Committee against Torture, in its Concluding observations on the fifth periodic report of Germany adopted at the forty-seventh session (31 October - 25 November 2011) (CAT/C/DEU/CO/5 of 12 December 2011) found as follows:

> **“Preventive detention**
>
> 17. The Committee takes note of the judgement of the Federal Constitutional Court of 4 May 2011 which has considered that all provisions of the Criminal Code and the Youth Courts Act on the imposition and duration of preventive detention are unconstitutional and welcomes the fact that the federal and Länder authorities have already started to implement the ruling. The Committee nonetheless notes with regret the information that more than 500 persons remain in preventive detention, some of them having been in preventive detention for more than twenty years (arts. 2 and 11).
>
> The Committee urges the State party to:
>
> (a) Adapt and amend its laws on the basis of the Federal Constitutional Court’s decision by 31 March 2013, as requested by the Court, in order to minimize the risks arising from preventive detention; and
>
> (b) Take all necessary actions, in the meantime, to comply with the institutional measures requested by the Court’s decision, in particular with regard to release of persons in preventive detention, reduction of its duration and the imposition thereof, and take into account the provisions of the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) when devising the measures alternative to preventive detention.”

3. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

95. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) found as follows in its Report to the German Government on the visit to Germany carried out from 20 November to 2 December 2005 (CPT/Inf (2007) 18, 18 April 2007) in respect of the unit for preventive detention in Berlin-Tegel Prison:

> “(...)
>
> 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. (...) 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 on-going 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."

96. Subsequently, the CPT found as follows in its Report to the German Government on the visit to Germany carried out from 25 November to 3 December 2013 (CPT/Inf (2014) 23, 24 July 2014):

"A. Preventive detention (*Sicherungsverwahrung*)

(...)

10. The purpose of the 2013 visit was to review the implementation in practice of the new system of preventive detention and the action taken by the relevant authorities in this connection since the 2010 visit. To this end, the delegation focused on the situation of persons in preventive detention in Baden-Württemberg and Rhineland-Palatinate (...).

(...)

14. As regards conditions of detention, the delegation was particularly impressed by the newly constructed unit for preventive detention at Diez Prison. All accommodation rooms were spacious (measuring some 18 m² including the sanitary annexe) and well-equipped (including ... a toilet, shower and kitchenette). (...) In addition, there were various association and activity rooms (including a fitness room). It is also praiseworthy that, during the day, inmates could move freely within the building in which the unit is located and could go outside into the open air or to another detention unit whenever they wished (throughout the day and, except at weekends, also in the evening).

15. At Freiburg Prison, material conditions were generally good in the new unit for preventive detention. All the rooms were in a very good state of repair, spacious (some 14 m² without counting the sanitary annexe) and well-equipped (...). On every floor, there was a large living/dining room (measuring some 50 m² and equipped with tables, chairs, a sofa, a television set, a refrigerator and plants), a kitchen and a laundry room. In addition, the detention unit comprised a large workshop, a computer room and an art therapy room. That said, it is somewhat regrettable that the entire detention unit remained rather prison-like and that the freedom of movement of inmates within the establishment and access to the outdoor exercise yard was more restricted than at Diez Prison (in particular, at weekends). (...)

In this regard, the CPT wishes to recall that, according to the relevant legal provisions, persons in preventive detention are in principle entitled to have unrestricted and unlimited access to the open air outside night lock-up periods. (...)

(...)

17. As regards the regime and treatment measures (*Behandlungsmassnahmen*), the delegation was informed that, at Freiburg Prison, all inmates were offered work, individual counselling sessions with a psychologist and a range of recreational activities. In addition, a number of group therapies were provided, including a treatment programme for sex offenders (10 participants, duration 1½ years), social competence training (6 participants, duration six to seven months), art therapy (5 participants), drama and movement therapy (5 participants) and a programme for control of addiction (9 participants). Out of a total of 58 inmates, 48 participated in individual counselling sessions, including 13 who were also involved in one of the above-mentioned group therapies and eleven who were involved in two treatment groups. Seven inmates refused to take part in any therapy, two were new arrivals and not assigned yet to a treatment programme and one was apparently not capable of participating in any treatment programme (due to brain damage). The team of specialised staff comprised three psychologists and four social workers (one on each floor). The delegation was informed that, based on the staff/inmate ratio applied in sociotherapeutic institutions, the unit for preventive detention would need at least six full-time psychologists. (...) The head of the psychology service indicated that, due to the limited staff resources, it was not possible to organise individual therapy on a weekly basis (...), that it was not possible to reach out to those who were lacking any motivation and were unwilling to engage themselves in therapeutic measures and that it was not possible to organise milieu therapy in an effective manner.

18. The situation appeared to be even more worrying at Diez Prison. Although a comprehensive and detailed concept for the treatment of persons in preventive detention had been prepared by the prison administration of Rhineland-Palatinate in May 2013, the visit revealed a striking discrepancy between theory and practice. Out of 40 inmates, only 24 were receiving individual therapy and only eight were participating in group therapy. It is also regrettable that no efforts had thus far been made by the prison administration to organise group sessions for art, music or drama therapy which may be particularly beneficial for those inmates who are unwilling or unable to participate in any other group therapy programme. Moreover, the delegation noted that attempts had to a large extent failed to motivate inmates to take part in weekly meetings in the living unit, which were organised by staff as part of the ongoing milieu therapy.

19. The CPT acknowledges that the implementation of the new legislation governing preventive detention was still at an early stage and that it may take some time until all the planned measures are fully implemented in practice. However, there can be no doubt that the existing resources for treatment measures for persons in preventive detention in Baden-Württemberg and Rhineland-Palatinate were insufficient to meet the requirements of the relevant federal and *Länder* legislation, namely to have a system of programmes focused on therapeutic needs and promoting individual liberty and motivation (*therapiegerichtet, freiheitsorientiert* and *motivationsfördernd)*. (...)

The Committee recommends that the relevant authorities of Baden-Württemberg and Rhineland-Palatinate redouble their efforts to further develop individual and group treatment measures which are offered to persons in preventive detention at Freiburg and Diez Prisons and increase the number of specialist staff accordingly.

20. The delegation gained a favourable impression of the therapeutic measures offered to inmates at (...) the socio-therapeutic department at Diez Prison, which accommodated inmates in preventive detention who were considered to be suitable to undergo an intensive therapeutic programme for violent and/or sex offenders. (...)”

4. *Commissioner for Human Rights of the Council of Europe*

97. The Commissioner for Human Rights of the Council of Europe, Mr Thomas Hammarberg, stated the following in his report of 11 July 2007 on his visit to Germany from 9 to 11 and 15 to 20 October 2006 (see CommDH(2007)14) regarding the issue of what he referred to as “secured custody”, executed in accordance with the provisions applicable at that time:

“8.2. Secured custody

201. Under German penal law, a criminal who has committed a serious crime such as homicide or rape may be kept under secured custody (*Sicherungsverwahrung*) after having served his/her prison term. A decision on secured custody can only be taken by the court who issued the original verdict on the basis of expert medical advice. The term of custody is indefinite but subject to court review (...). The possibility of imposing secured custody can either be included in the original verdict itself or it can be ordered shortly before the prison term expires.

202. The purpose of keeping a person under secured custody has no punitive element but aims at protecting the general public from crimes the perpetrator concerned is likely to commit. Accordingly, prison conditions are adapted to the specific situation and unnecessary restrictions are not applied.

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 re-offend. 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.

205. The Commissioner is also aware of proposed amendments which would allow the ex post imposition of secured custody on juvenile offenders in extreme cases. The Commissioner urges the German authorities to reconsider such proposals due to their extreme consequences on juvenile offenders. Alternative measures should be applied in the case of juvenile offenders whenever possible.

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."

IV. RELEVANT COMPARATIVE LAW

98. As regards the measures chosen by other Contracting Parties to the Convention to protect the public from convicted offenders of unsound mind who risk committing further serious offences on their release, the comparative law material before the Court shows the following. Out of the thirty-two Contracting States examined, ten allow for the application of protective measures entailing deprivation of liberty after a criminal sentence. Half of these States allow for such measures to be ordered after the imposition of the sentence. Such measures are imposed by a judicial body. In most of these States, these measures are not classified as "penalties" under domestic law. Facilities for enforcing such measures are quite varied, ranging from special detention facilities to psychiatric hospitals, psychiatric wards in prison and regular detention centres.

THE LAW

I. THE SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

99. The Grand Chamber would observe at the outset that the Chamber struck the present applications out of the Court's list of cases in so far as the applicant had complained under Articles 5 § 1 and 7 § 1 of the Convention about his preventive detention from 6 May 2011 until 20 June 2013, executed in Straubing Prison. The strike-out decision was taken under Article 37 § 1 (c) of the Convention on the basis of a unilateral declaration by the respondent Government acknowledging a breach of the Convention in this regard because the applicant had not been detained in a suitable institution for mental health patients during the said period (see *Ilnseher v. Germany*, nos. 10211/12 and 27505/14, §§ 45-58, 2 February 2017; and paragraph 5 above).

100. The Court reiterates that the content and scope of the "case" referred to the Grand Chamber are delimited by the Chamber's decision on admissibility (see, *inter alia*, *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-141, ECHR 2001-VII; *Göç v. Turkey* [GC], no. 36590/97, §§ 36-37, ECHR 2002-V; and *Simeonovi v. Bulgaria* [GC], no. 21980/04, § 83, 12 May 2017). This means that the Grand Chamber cannot examine those parts of the application which have been declared inadmissible by the

Chamber (see *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 61, ECHR 2007-I; *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 78, 21 June 2016; and *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 84, 24 January 2017).

101. The Court holds that the same considerations apply where, as in the present case, parts of the applications, instead of having been declared inadmissible, were struck off the Court's list of cases prior to the Chamber's decision on admissibility in this respect. Those parts of the applications are consequently not part of the "case" referred to the Grand Chamber.

102. The Court would note that this is in no way contested by the parties. The applicant relied on the Government's unilateral declaration in support of his submissions (see paragraph 114 below). The Government, who declared that they considered themselves bound by their unilateral declaration and the Chamber's strike-out decision, had paid, on 28 April 2017, the compensation stipulated in the unilateral declaration to the applicant, who accepted the payment. The Court does not, therefore, discern any basis for a decision under Article 37 § 2 of the Convention either.

103. Consequently, the compliance with Articles 5 § 1 and 7 § 1 of the Convention of the applicant's preventive detention from 6 May 2011 until 20 June 2013 in Straubing Prison does not fall within the Grand Chamber's jurisdiction.

II. TERMINOLOGY

104. In the light of the findings on the scope of the case before the Court, the Grand Chamber would further observe the following. In the Court's judgments to date, the German term *"nachträgliche Sicherungsverwahrung"*, that is, preventive detention which was imposed on a convicted offender in a judgment adopted separately from, and after a previous criminal conviction, has been translated into English by "retrospective" or "retrospectively ordered" preventive detention, and into French by "*détention de sûreté rétroactive*" or "*détention de sûreté ordonnée rétroactivement*".

105. The Grand Chamber agrees that there is a retrospective element in the order of such preventive detention in that it is a precondition for the order that the person concerned was sentenced in a previous judgment to a term of imprisonment for a serious criminal offence. However, there is equally a strong prospective element in that the order must be based on an *ex nunc* assessment that it is likely that the person concerned would commit new offences in the future. That prospective element is further reinforced after the changes made by the Federal Constitutional Court and the German legislator to the preventive detention regime applicable to persons such as the applicant. In line with these changes, it is required, in addition, that at

the time of the order the persons concerned suffer from a mental disorder, as a result of which they are dangerous to the public.

106. In view of these strong prospective elements, the Grand Chamber considers that the concept of *"nachträgliche Sicherungsverwahrung"* is more adequately translated into English by "subsequent preventive detention", and into French by "*détention de sûreté subséquente*", thus denominating a measure which is imposed at a later point in time compared to the conviction and which, while having regard to the last conviction of the person concerned, is essentially based on a mental disorder existing at the time when the measure is imposed and rendering the person dangerous.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

107. The applicant complained that his "retrospectively" ordered preventive detention executed on the basis of the Regensburg Regional Court's 3 August 2012 judgment from 20 June 2013 onwards in the Straubing preventive detention centre had been in breach of his right to liberty, as provided in Article 5 § 1 of the Convention. That provision, in so far as relevant, reads as follows:

> "1. 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;
>
> ..."

108. The Government contested that argument.

A. The Chamber judgment

109. The Chamber, having regard to the Court's considerations in the leading case of *Bergmann v. Germany* (cited above, §§ 77-134), found that the applicant's preventive detention from 20 June 2013 onwards had complied with Article 5 § 1. It considered that the applicant's detention had been justified under sub-paragraph (e) of Article 5 § 1. The applicant, who

suffered from sexual sadism and was likely to commit another murder if released, was a person of unsound mind for the purposes of this provision. Furthermore, since his transfer from prison to the Straubing preventive detention centre on 20 June 2013, the applicant's detention had been lawful as it had then been executed in a suitable institution for mental health patients.

B. The parties' submissions

1. The applicant

110. The applicant submitted that his preventive detention based on the Regional Court's judgment of 3 August 2012 had violated Article 5 § 1 of the Convention also from 20 June 2013 onwards, as had his preventive detention preceding that date.

111. The applicant claimed that his detention had been justified under none of the sub-paragraphs (a) to (f) of Article 5 § 1. In particular, it could not be justified under Article 5 § 1 (e) as detention of a person "of unsound mind" as interpreted in the Court's case-law (he referred to *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 145, ECHR 2012). First of all, he had not reliably been shown to be of unsound mind, as required by sections 7(2)(1) and 105 of the Juvenile Courts Act, read in conjunction with the Federal Constitutional Court's judgment of 4 May 2011 (see paragraphs 56, 59 and 72 above). Half of the experts who had examined him since 1999, including expert F. who had been consulted in the proceedings at issue, had not found that he suffered from a mental disorder, and in particular from sexual sadism, so that a true mental disorder had not been proven. Moreover, contrary to what was desirable under section 43(2) of the Juvenile Courts Act, none of the experts was qualified to examine young people.

112. Secondly, a mental disorder under section 1 of the Therapy Detention Act, which had been established by the domestic courts only, might be less restrictive than the notion of persons of unsound mind in Article 5 § 1 (e) (the applicant referred to the case of *Glien v. Germany*, no. 7345/12, § 87, 28 November 2013). Therefore, it had not been established that he was of unsound mind, that is to say suffering from a mental disorder warranting compulsory confinement.

113. Thirdly, the applicant accepted that under domestic law (Article 67e of the Criminal Code: see paragraph 64 above), the validity of his continued confinement depended upon the persistence of a mental disorder.

114. Moreover, the applicant argued that his detention as a mental-health patient had not been lawful within the meaning of Article 5 § 1 (e). He argued that the Government had acknowledged in their unilateral

declaration that the Regensburg Regional Court's judgment of 3 August 2012 had been unlawful. In the applicant's view, this could not be cured at a later stage by merely transferring him to the new preventive detention centre. Without a new judgment ordering his preventive detention, there had been no legal basis for his confinement also after 20 June 2013.

115. In the applicant's submission, his preventive detention from 20 June 2013 onwards was also unlawful for another reason, namely that it had not been effected in an appropriate institution for mental-health patients, as required by the Court's case-law (the applicant referred, in particular, to *Glien*, cited above, § 75). The new Straubing preventive detention centre to which he had been transferred on 20 June 2013 was not an appropriate institution for the detention of persons of unsound mind as it lacked an appropriate medical and therapeutic environment. Only five persons, including the applicant, out of a total of 57 inmates in the Straubing preventive detention centre were being detained as mental health patients. Therefore, he was being detained in a prison environment rather than in a psychiatric setting.

2. The Government

116. In the Government's view, the applicant's preventive detention from 20 June 2013 onwards had complied with Article 5 § 1. It had been justified under sub-paragraph (e) of Article 5 § 1 as detention of a person of unsound mind.

117. The Government explained that in its leading judgment of 4 May 2011, the Federal Constitutional Court had endeavoured to adapt the standards of the Constitution to the requirements of Article 5 § 1 (and also Article 7 § 1) of the Convention as elaborated by the Court in the case of *M. v. Germany* (cited above). The Federal Constitutional Court had expressly held that subsequent preventive detention could henceforth only be ordered if the requirements of Article 5 § 1 (e) had been met (see paragraphs 72 and 75 above).

118. In the Government's submission, the conditions laid down in the Court's case-law for detaining the applicant as a person of unsound mind (the Government referred to *Bergmann*, cited above, § 96) were satisfied. In the main proceedings, the applicant had been found by the Regional Court, which had consulted two renowned external psychiatric experts, to suffer from a true mental disorder, namely a serious form of sexual sadism, at the relevant time, that is to say when the subsequent preventive detention order had been issued. That persisting disorder warranted compulsory confinement as there was a high risk that he would commit the most serious types of violent crimes or sexual offences if released.

119. As had been confirmed in the case of *Glien* (cited above, § 84), the applicant could be considered as a person of unsound mind for the purposes of Article 5 § 1 (e) despite the fact that he had not suffered from a condition

which excluded or diminished his criminal responsibility at the time when he committed his offence.

120. Moreover, the applicant's detention as a person of unsound mind had been lawful for the purposes of Article 5 § 1 (e) since 20 June 2013. It had a sufficiently precise legal basis, namely sections 7(2) and 105(1) of the Juvenile Courts Act, read in conjunction with the Federal Constitutional Court's judgment of 4 May 2011. Furthermore, the applicant had been detained in an appropriate institution for mental health patients from 20 June 2013 onwards.

121. The Government stressed in that regard that the Regensburg Regional Court had not ordered the applicant's detention in an inappropriate institution on 3 August 2012, even though the applicant had initially been detained in prison. On the contrary, in line with the Court's judgment in the case of *M. v. Germany* (cited above) and the judgment of the Federal Constitutional Court of 4 May 2011, the applicant was to be detained in a suitable institution (as soon as possible). This could not, however, be put into practice until 20 June 2013 as the new preventive detention centre was still under construction. Some time had been necessary to adapt the conditions of preventive detention to the requirements of the Convention. From 20 June 2013 onwards, the applicant had been detained in a suitable institution and the breach of Article 5 § 1, as acknowledged by the Government in its unilateral declaration during the period from 6 May 2011 until 20 June 2013, had then ended, without the Regional Court having to issue a new judgment.

122. In line with the reformed legal framework for preventive detention on federal and *Länder* levels (in particular, Article 66 (c) of the Criminal Code and the relevant Bavarian Preventive Detention Execution Act, see paragraphs 77-80 above), the therapeutic treatment available to persons with mental disorders detained in the preventive detention centres, while being adapted to the fact that they had been criminally liable for their offences, was similar to that available to patients in a closed psychiatric hospital. The focus of the new overall concept of preventive detention now lay on the individualised medical and therapeutic treatment of the detainees. The statistical material available (see paragraph 91 above) showed that many of the detainees whose preventive detention had been prolonged or ordered subsequently had been released since the *M. v. Germany* judgment had become final. It was thus clear that only some of the detainees concerned had been considered as persons of unsound mind and remained in detention and that there could be no question of all the preventive detainees concerned being classified as suffering from a true mental disorder.

123. In the Straubing preventive detention centre, which, for practical purposes, had been built on the premises of Straubing prison but was entirely separate from the prison in terms of – substantially improved – material conditions and therapeutic provision by many new specialised staff

members, the applicant had accordingly been provided with intensive care, based on an individualised treatment concept, and comprehensive therapy. The Government further stressed that while only a small number of inmates in the preventive detention centre had been sexual sadists, most of the inmates had suffered from personality disorders and each of them had been provided with the individualised treatment appropriate to his specific disorder.

C. The third party's submissions

124. The European Prison Litigation Network (EPLN) submitted that the Chamber's interpretation of the notion of "persons of unsound mind" within the meaning of sub-paragraph (e) of Article 5 § 1 in the case of *Bergmann* and in the present application so as to cover persons in preventive detention amounted to depriving these persons of their Convention rights. The interpretation of that term was too broad and imprecise. The EPLN noted that according to the Federal Constitutional Court, the notion of mental disorder under German law also covered non-pathological disorders. However, the term persons of unsound mind, or *aliéné* in the French text, designated persons who were at least in a severe pathological state and whose capacity for assessing the wrongfulness of their acts was non-existent or at least diminished. Moreover, in order to be convicted, the persons concerned had to have been criminally liable at the time of their offence, which was incompatible with the subsequent finding that these persons were of unsound mind.

125. The EPLN took the view that in the *Bergmann* and *Ilnseher* cases the Chamber had failed to protect the persons concerned from arbitrariness as it had not prevented the notion of persons "of unsound mind" from being assimilated and confused with the dangerousness of the persons concerned. This served to detain these persons by means of a circumvention of the Convention rights as interpreted in the case of *M. v. Germany*.

D. The Grand Chamber's assessment

1. *Recapitulation of the relevant principles*

(a) Grounds for deprivation of liberty

126. The Court reiterates that sub-paragraphs (a) to (f) of Article 5 § 1 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 *Del Río Prada v. Spain* [GC], no. 42750/09, § 123, ECHR 2013 and the references therein). The applicability of one ground does not necessarily preclude that of another; detention may, depending on the circumstances, be justified under more than one sub-paragraph

(see *Kharin v. Russia*, no. 37345/03, § 31, 3 February 2011 and the references therein). Only a narrow interpretation of the exhaustive list of permissible grounds for deprivation of liberty is consistent with the aim of Article 5, namely to ensure that no one is arbitrarily deprived of his liberty (see, among many others, *Winterwerp*, cited above, § 37, and *Shimovolos v. Russia*, no. 30194/09, § 51, 21 June 2011).

127. As regards the justification of a person's detention under sub- paragraph (e) of Article 5 § 1, the Court reiterates that the term "persons of unsound mind" in that provision has to be given an autonomous meaning (cf. *Glien*, cited above, §§ 78 et seq.). It does not lend itself to precise definition since its meaning is continually evolving as research in psychiatry progresses (see *Winterwerp*, cited above, § 37, and *Rakevich v. Russia*, no. 58973/00, § 26, 28 October 2003). An individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp*, cited above, § 39; *Stanev*, cited above, § 145; and *Bergmann*, cited above, § 96).

128. In deciding whether an individual should be detained as a person "of unsound mind", the national authorities are to be recognised as having a certain discretion, since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case; the Court's task is to review under the Convention the decisions of those authorities (see *Winterwerp*, cited above, § 40, and *S. v. Germany*, no. 3300/10, § 81, 28 June 2012).

129. As regards the first condition for a person to be deprived of his liberty as being of "unsound mind", namely that a true mental disorder must have been established before a competent authority on the basis of objective medical expertise, the Court recalls that, despite the fact that the national authorities have a certain discretion in particular on the merits of clinical diagnoses (see *H.L. v. the United Kingdom*, no. 45508/99, § 98, ECHR 2004-IX), the permissible grounds for deprivation of liberty listed in Article 5 § 1 are to be interpreted narrowly. A mental condition has to be of a certain severity in order to be considered as a "true" mental disorder for the purposes of sub-paragraph (e) of Article 5 § 1 as it has to be so serious as to necessitate treatment in an institution for mental health patients (cf. *Glien*, cited above, §§ 82-85, and *Petschulies v. Germany*, no. 6281/13, § 76, 2 June 2016).

130. As for the requirements to be met by an "objective medical expertise", the Court considers in general that the national authorities are better placed than itself to evaluate the qualifications of the medical expert

in question (see, *mutatis mutandis*, *Sabeva v. Bulgaria*, no. 44290/07, § 58, 10 June 2010; *Biziuk v. Poland (no. 2)*, no. 24580/06, § 47, 17 January 2012; and *Ruiz Rivera v. Switzerland*, no. 8300/06, § 59, 18 February 2014). However, in certain specific cases, it has considered it necessary for the medical experts in question to have a specific qualification, and has in particular required the assessment to be carried out by a psychiatric expert where the person confined as being "of unsound mind" had no history of mental disorders (see *C.B. v. Romania*, no. 21207/03, § 56, 20 April 2010; *Ťupa v. the Czech Republic*, no. 39822/07, § 47, 26 May 2011; *Ruiz Rivera*, cited above, § 59; and *Vogt v. Switzerland* (dec.), no. 45553/06, § 36, 3 June 2014) as well as, sometimes, the assessment to be made by an external expert (see in this respect *Ruiz Rivera*, cited above, § 64).

131. Moreover, the objectivity of the medical expertise entails a requirement that it was sufficiently recent (cf. *Varbanov v. Bulgaria*, no. 31365/96, § 47, ECHR 2000-X; *Witek v. Poland*, no. 13453/07, § 41, 21 December 2010; *Ruiz Rivera*, cited above, § 60; and *W.P. v. Germany*, no. 55594/13, § 49, 6 October 2016). The question whether the medical expertise was sufficiently recent depends on the specific circumstances of the case before it (see *Aurnhammer v. Germany* (dec.), no. 36356/10, § 35, 21 October 2014).

132. In order for the mental disorder to have been established before a competent authority, and particularly the domestic courts, the Court reiterates that it has stressed in the context of preventive detention of dangerous offenders that the domestic courts must sufficiently establish the relevant facts on which their decision to detain the person concerned is based with the help of adequate medical expert advice (see, in the context of Article 5 § 1 (a), *H.W. v. Germany*, no. 17167/11, §§ 107 and 113, 19 September 2013, and *Klinkenbuß v. Germany*, no. 53157/11, § 48, 25 February 2016; and, in the context of Article 5 § 1 (e), *W.P. v. Germany*, cited above, § 49). In the Court's view, this requires the domestic authority to subject the expert advice before it to a strict scrutiny and reach its own decision on whether the person concerned suffered from a mental disorder with regard to the material before it.

133. As regards the second requirement for an individual to be deprived of his liberty as being of "unsound mind", namely that the mental disorder must be of a kind or degree warranting compulsory confinement (see paragraph 127 above), the Court reiterates that a mental disorder may be considered as being of a degree warranting compulsory confinement if it is found that the confinement of the person concerned is necessary because the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him from, for example, causing harm to himself or other persons (see, for example, *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003-IV; and *Petschulies*, cited above, § 61).

134. The relevant time at which a person must be reliably established to be of unsound mind, for the requirements of sub-paragraph (e) of Article 5 § 1, is the date of the adoption of the measure depriving that person of his liberty as a result of that condition (cf. *Luberti v. Italy*, 23 February 1984, § 28, Series A no. 75; *B. v. Germany*, cited above, § 68; and *Bergmann*, cited above, § 98). However, as shown by the third minimum condition for the detention of a person for being of unsound mind to be justified, namely that the validity of continued confinement must depend on the persistence of the mental disorder (see paragraph 127 above), changes, if any, to the mental condition of the detainee following the adoption of the detention order must be taken into account.

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

135. Any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, 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 v. the Netherlands*, 2 September 1998, § 52, *Reports of Judgments and Decisions* 1998-VI; *Baranowski v. Poland*, no. 28358/95, § 50, ECHR 2000-III; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008).

136. Compliance with national law is not, however, sufficient in itself: 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*, cited above, §§ 37 and 45; *Saadi,* cited above, § 67; and *Reiner v. Germany*, no. 28527/08, § 83, 19 January 2012).

137. In order for the detention to be "lawful" and not arbitrary, the deprivation of liberty must be shown to have been necessary in the circumstances (see *Varbanov*, cited above, § 46; and *Petschulies*, cited above, § 64). The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest (see *C.B. v. Romania*, cited above, § 48; *Karamanof v. Greece*, no. 46372/09, § 42, 26 July 2011; *Stanev*, cited above, § 143; and *V.K. v. Russia*, no. 9139/08, § 30, 4 April 2017 and the references therein).

138. The "lawfulness" of detention further requires that there be some relationship between the grounds of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental-health patient will only be "lawful" for the purposes of sub-paragraph (e) of Article 5 § 1 if effected in a hospital, clinic or other appropriate institution (see *Hutchison Reid*, cited above, § 49; *Brand v. the*

Netherlands, no. 49902/99, § 62, 11 May 2004; *Glien*, cited above, § 75; and *Bergmann*, cited above, § 99, and the references therein).

139. The Court observes in this context that, as illustrated by the present case, the person's conditions of detention, while being based on the same detention order, can change during the execution of the detention based on that order.

140. It observes that in the case of *W.P. v. Germany* (cited above, §§ 24 et seq.), the Court struck the application out of the list in respect of the alleged breaches of Article 5 § 1 (and Article 7 § 1) of the Convention in view of the Government's unilateral declaration acknowledging breaches of these provisions in a first period of detention as a result of that applicant not having been detained in a suitable institution. As for a second period of detention, following Mr W.P.'s transfer to a different institution but still based on the same detention order, the Court found that Mr W.P.'s detention had complied with Article 5 § 1 (and Article 7 § 1) as he was detained in a suitable institution for mental health patients with the aim of treating his mental disorder during that second period.

141. The approach taken by the Court thus implies that the detention of a person of unsound mind on the basis of the same detention order may become lawful and thus comply with Article 5 § 1 once that person is transferred to a suitable institution. Under the above-mentioned interpretation of the term "lawfulness", there is indeed an intrinsic link between the lawfulness of a deprivation of liberty and its conditions of execution. This stance is further comparable to the approach taken in the assessment of the compliance of conditions of detention with Article 3, where a change in the conditions of detention is also determinative for assessing compliance with the prohibition on degrading treatment (see, in particular, *Muršić v. Croatia* [GC], no. 7334/13, §§ 136 et seq., ECHR 2016). It follows that the relevant point in time, or period, for assessing whether a person was detained in a suitable institution for mental health patients is the period of detention at issue in the proceedings before this Court, and not the time when the detention order was made.

2. Application of these principles to the present case

142. The Court is called upon to determine whether, in the light of the above principles, the applicant's preventive detention at issue both fell within one of the permissible grounds for deprivation of liberty under sub-paragraphs (a) to (f) of Article 5 § 1 and was "lawful" for the purposes of that provision, and thus complied with Article 5 § 1.

143. The Court would clarify that the period at issue in the proceedings before the Grand Chamber started on 20 June 2013, when the applicant was transferred from Straubing Prison to the new Straubing preventive detention centre (see paragraph 46 above). As shown above (see paragraphs 99-103), the prior period from 6 May 2011 to 20 June 2013 does not fall within the

Grand Chamber's jurisdiction. The period ended on 18 September 2014, when a fresh decision ordering the continuation of the applicant's preventive detention was adopted in periodical judicial review proceedings (see paragraph 42 above), which the applicant could contest separately before the domestic courts.

(a) Grounds for deprivation of liberty

144. In examining whether the applicant's detention could be justified under any of the sub-paragraphs (a) to (f) of Article 5 § 1, the Court observes at the outset that his preventive detention was ordered subsequently, in a separate judgment of 3 August 2012 adopted after the trial court's judgment of 29 October 1999. Having regard to the Court's well-established case-law (see *M. v. Germany*, cited above, §§ 96-101; *Glien*, cited above, § 107; and *Bergmann*, cited above, § 104, concerning subsequently prolonged preventive detention, as well as *B. v. Germany*, cited above, §§ 71-76, and *S. v. Germany*, cited above, §§ 84-90, concerning subsequently imposed preventive detention), his detention could not, therefore, be justified under sub-paragraph (a) of Article 5 § 1 as detention "after conviction" as there was no sufficient causal connection between the applicant's conviction by the trial court – which did not comprise a preventive detention order – and his deprivation of liberty as a result of the preventive detention order imposed in 2012.

145. Likewise, the applicant's preventive detention could not be justified under sub-paragraph (c) of Article 5 § 1 as being "reasonably considered necessary to prevent his committing an offence". Under the Court's well- established case-law, this ground of detention was not adapted to a policy of general prevention directed against an individual who presented a danger on account of his propensity to crime. It only afforded Contracting States a means of preventing sufficiently concrete and specific offences as regards, in particular, the time and place of their commission and their victims (see *M. v. Germany*, cited above, §§ 89 and 102, and the references therein, and *Jendrowiak v. Germany*, no. 30060/04, § 35, 14 April 2011), which did not cover potential further offences the applicant might commit. This is indeed uncontested between the parties.

146. The Court will therefore examine, as alleged by the Government and contested by the applicant, whether the applicant's detention can be justified as detention of a person of unsound mind for the purposes of Article 5 § 1 (e). As pointed out above (see paragraphs 127 and 134), this requires, in the first place, that, at the relevant time of the decision ordering his preventive detention on 3 August 2012, the applicant was reliably shown to be of unsound mind, that is, a true mental disorder must have been established before a competent authority on the basis of objective medical expertise.

147. The Court observes that the Regional Court, which had consulted two external psychiatric experts, K. and F., was convinced that the applicant suffered from a sexual preference disorder, namely sexual sadism, as described by the relevant tool for the classification of diseases, the International Statistical Classification of Diseases and Related Health Problems in its current version (ICD-10). The court was satisfied that the applicant has had fantasies of sexual violence entailing attacks on the neck and the strangulation of women and masturbation on their inanimate bodies. That sexual sadism was of a serious nature and had affected the applicant's development since his adolescence. The mental disorder had caused and been manifested in his brutal offence and still persisted. The applicant therefore suffered from a mental disorder for the purposes of section 1(1) of the Therapy Detention Act. It specified that under that Act, a mental disorder did not have to be so serious as to exclude or diminish the criminal responsibility of the person concerned (see paragraphs 32-37 above).

148. In determining whether the Regional Court can thereby be said to have established that the applicant suffered from a true mental disorder for the purposes of Article 5 § 1 (e) of the Convention, the Court notes that the applicant contested this, arguing that the domestic court's interpretation of the term mental disorder might be wider than the term of unsound mind and that he did not suffer from a mental disorder (see paragraphs 111-112 above). The third party, for its part, argued that the term persons of unsound mind should be interpreted as covering only persons in a serious pathological state whose capacity for assessing the wrongfulness of their acts was excluded or at least diminished (see paragraph 124 above).

149. Having regard to the fact that the notion of persons of unsound mind must be given an autonomous meaning, it is not a requirement that the person concerned suffered from a condition which would be such as to exclude or diminish his criminal responsibility under domestic criminal law when committing an offence (see also *Glien*, cited above, §§ 83-84, and *Petschulies*, cited above, §§ 74-75).

150. The Court further refers to its previous findings, relied upon by the applicant, that it appears that the notion of "persons of unsound mind" ("*aliéné*" in the French version) in Article 5 § 1 (e) of the Convention might be more restrictive than the notion of "mental disorder" ("*psychische Störung*") referred to in section 1(1) of the Therapy Detention Act (see *Glien*, cited above, §§ 87-88; *Bergmann*, cited above, § 113; and *W.P. v. Germany*, cited above, § 60). However, the Convention does not require that the notions used in domestic law, and in particular the notion of mental disorder for the purposes of section 1(1) of the Therapy Detention Act, be defined or interpreted in the same manner as terms used in the Convention. What is decisive, in the Court's view, is whether the domestic courts, in the case before them, have established a disorder which can be said to amount to a true mental disorder as defined by this Court's case-law. In this context,

the Court again stresses the need to interpret the permissible grounds for deprivation of liberty narrowly (see paragraphs 126 and 129 above).

151. In the present case, the domestic courts, as detailed above, found the applicant to suffer from a form of sexual sadism which must be considered as being of a serious nature. The applicant's condition necessitated comprehensive therapy, to be provided either in the preventive detention centre or in a psychiatric hospital (see paragraphs 32-37 above). The Court is therefore satisfied that the condition with which the applicant was diagnosed amounted to a true mental disorder for the purposes of Article 5 § 1 (e).

152. As for the requirement that the finding of a true mental disorder be based on objective medical expertise, the Court takes note of the applicant's argument that a number of experts had not found him to suffer from a mental disorder and that the experts consulted in the proceedings at issue had not been qualified to examine young people (see paragraph 111 above). As shown above, it is in the first place for the domestic courts to evaluate the qualifications of the medical expert(s) they consult (see paragraph 130 above). In the proceedings at issue, the Regional Court consulted two experienced external psychiatric experts, K. and F., who, in sum, had both considered the applicant to suffer from sexual sadism (see paragraph 35 above). The court had further regard to the findings of several medical experts who had previously examined the applicant since his arrest before concluding that the applicant suffered from sexual sadism (see paragraph 36 above). The applicant, who was aged 33 at the time when the experts drew up their report, did not bring forward any specific elements capable of demonstrating that the experts consulted manifestly lacked the necessary qualification to assess his mental condition and dangerousness. The Court is therefore satisfied that the Regional Court's finding, confirmed on appeal, was based on objective medical expertise.

153. As to whether the domestic courts "established" that the applicant suffered from a true mental disorder for the purposes of Article 5 § 1 (e), the Court notes that the Regensburg Regional Court, in the impugned judgment of 3 August 2012, thoroughly scrutinised the findings made in the reports of the two psychiatric experts it had consulted, as well as the findings of numerous medical experts who had previously examined the applicant since his arrest following his offence, and decided on that basis that the applicant suffered from sexual sadism (see paragraphs 34-36 above).

154. The Court does not overlook in this context the fact that the Regional Court concluded in the proceedings at issue in 2012 that the applicant suffered from this serious mental disorder, whereas the trial court had not considered that the applicant had suffered from a severe mental disorder and had therefore found that he had acted with full criminal responsibility when committing his offence in 1997. This does not, however, suffice to cast any doubt on the establishment of the facts by the

domestic courts concerning the applicant's mental condition in the circumstances of the proceedings at issue in the present case, i.e. starting from 20 June 2013 (paragraph 103 above).

155. In this connection, it must be noted, firstly, that the domestic courts have a certain discretion regarding the merits of clinical diagnoses. Moreover, in the applicant's case, the Regional Court in fact addressed the evolution in the assessment of the applicant's mental condition by the medical experts and the courts. Having regard to the material before it, the Regional Court found that the applicant had hidden the sadistic motives for his offence at his trial in 1999. The trial court, which had also consulted two medical experts, had nevertheless already discerned some indications that the young applicant suffered from a sexual deviation. It was only in 2005/2006 that the applicant had admitted to two experts his fantasies of sexual violence which he had put into practice with his murder. The Regional Court further explained that the applicant's new statements concerning his fantasies were more reconcilable with the trial court's findings as to the manner in which the offence had been carried out (see paragraph 36 above).

156. The Court would add in this context that the statistical material before it (see paragraph 91 above) shows that a considerable number of persons remanded in subsequently ordered or prolonged preventive detention have been released since the Court's judgment in the case of *M. v. Germany* (cited above). This can be seen as indicating that an individual assessment of the mental condition of persons remanded in subsequently ordered preventive detention is carried out.

157. Furthermore, a person's mental condition is liable to change over time. As shown above, in the context of Article 5 § 1 (e) it is only necessary to assess whether the person concerned is of unsound mind at the date of adoption of the measure depriving that person of his liberty (as opposed to the date of the commission of a previous offence, which, in any event, is not a precondition for detention under that sub-paragraph). Moreover, in determining whether the mental disorder is of a kind or degree warranting compulsory confinement, it is usually necessary to assess the danger a person poses to the public at the time of the order and in the future. In view of these essential prospective elements, the preventive detention ordered against the applicant can best be described as "subsequent" to his previous offence and conviction, despite the fact that in the assessment of his dangerousness regard should also be had to his history of offences, thus embracing a retrospective aspect (see also paragraphs 104-106 above).

158. The Court further considers that, as for the second condition for a person to be classified as "of unsound mind", the Regional Court was justified in considering that the applicant's mental disorder was of a kind or degree warranting compulsory confinement in view of the high risk, as established by that court, that the applicant, as a result of this disorder,

would again commit another serious offence similar to the one he had been found guilty of, that is to say another murder for sexual gratification, if released.

159. Third, the validity of the applicant's continued confinement depended upon the persistence of his mental disorder. In accordance with domestic law (Article 67d § 2 of the Criminal Code, read in conjunction with section 316(f)(2) and (3) of the Introductory Act to the Criminal Code, see paragraph 65 above), the domestic courts could order the continuation of his preventive detention in the subsequent periodical judicial review proceedings (see paragraphs 42 and 64 above) only if, and as long as, there was a high risk that he would reoffend as a result of that disorder if released. Nothing in the file indicates that this risk had ceased to exist during the period of time at issue in the present case.

160. The Court therefore concludes that the applicant was a person of unsound mind for the purposes of Article 5 § 1 (e).

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

161. As for the lawfulness of the applicant's detention, the Court notes that the detention was ordered in a judgment of the Regional Court of 3 August 2012, and confirmed on appeal, under sections 7(2)(1) and 105(1) of the Juvenile Courts Act, read in conjunction with the Federal Constitutional Court's judgment of 4 May 2011 (see paragraphs 56, 59 and 72 above).

162. The Court takes note of the applicant's submission that the Regional Court's judgment of 3 August 2012 was unlawful, as allegedly conceded by the Government in its unilateral declaration, and that there was thus no legal basis for his detention at issue. However, in their unilateral declaration the Government only acknowledged that the applicant had not been detained in a suitable institution for mental health patients in a period prior to the one at issue in the present case (see paragraph 99 above). This does not cast doubt upon the validity of the detention order as such and thus upon the compliance with domestic law of the applicant's detention.

163. The Court observes in this regard that, as the Government convincingly explained, the Regional Court, in its judgment of 3 August 2012, had not ordered the applicant's preventive detention in a particular institution but had only generally ordered his preventive detention. Under the principles established by the Federal Constitutional Court in its leading judgment (paragraphs 15 and 68-75, in particular 75 above), as applied by the Regional Court, this meant that the applicant was to be detained in a suitable institution. The applicant's transfer, on 20 June 2013, to the preventive detention centre thus complied with the initial order made by the Regional Court, which remained a valid basis for the applicant's detention.

164. The lawfulness of the applicant's detention under Article 5 § 1 (e) further requires the detention to have been effected in an appropriate

institution for mental-health patients. In line with the Court's case-law (see paragraphs 138-141 above), the relevant point in time for the assessment of this question is the period of detention at issue, from 20 June 2013 until the next periodical judicial review decision on the continuation of the applicant's preventive detention which was made on 18 September 2014, and not the moment when the detention order was made (here 3 August 2012). During the period from 20 June 2013 until 18 September 2014, the applicant was detained in the newly-established Straubing preventive detention centre.

165. The Court notes that the applicant did not contest that there had been a change in the medical and therapeutic care provided for him in that centre, compared to the conditions prevailing in Straubing Prison. The Court observes that, according to the material before it, a total of 71 members of staff are in charge of a maximum of 84 detainees in the Straubing preventive detention centre (see paragraph 46 above). In particular, one psychiatrist, seven psychologists, one physician and four nurses are entrusted with providing medical and therapeutic treatment. A broad range of treatment is provided for persons suffering from mental disorders, such as treatment programmes for violent or sexual offenders, individual therapy tailored to the detainee's needs, group social therapy and individual social pedagogical support, if necessary involving external therapists. The applicant was offered, in particular one-to-one or group social therapy, an intensive treatment programme for sexual offenders and therapy administered by an external psychiatrist.

166. The Court takes note of the applicant's argument that, despite these elements, the preventive detention centre was not an appropriate institution for mental health patients as the majority of the persons placed in the centre had not been found to suffer from a mental disorder.

167. The Court observes that, in accordance with the constitutional requirement of differentiating between preventive detention and imprisonment, all persons placed in preventive detention, irrespective of whether or not they are detained for suffering from a mental disorder, are now generally provided with substantially improved material conditions of detention compared to those in which they had previously been detained in separate prison wings (see paragraph 81 above). However, this does not warrant the conclusion that the medical and therapeutic provision in the preventive detention centre was not suitable for mental health patients such as the applicant. As mentioned above, the applicant is being provided with an individualised therapy programme tailored to his needs and his mental condition. It further takes note of the Government's explanation that a large number of detainees in that centre suffer at least from personality disorders warranting treatment, and that all detainees are provided with individualised treatment tailored to their specific disorders.

168. In view of these factors, the Court is satisfied that the applicant was offered the therapeutic environment appropriate for a person remanded as a mental health patient and was thus detained in an institution suitable for the purposes of Article 5 § 1 (e). It would note in that context that the same conclusion as to the suitability of a new preventive detention centre for the detention of mental health patients had also been drawn, in particular, in respect of the applicant in the case of *Bergmann* (cited above, §§ 118-128).

169. Furthermore, in order for the detention to be "lawful" and not arbitrary, the deprivation of liberty must be shown to have been necessary in the circumstances (see paragraph 137 above). In the present case, as set out above (see paragraphs 33 and 158), the domestic courts found that there was a high risk that the applicant would commit another murder for sexual gratification if released and did not consider measures less severe than a deprivation of liberty to be sufficient to safeguard the individual and public interest. Given that in the circumstances of the instant case the domestic courts, with the help of expert advice, established a considerable danger for the individuals concerned of becoming the victims of one of the most serious offences punishable under the German Criminal Code, the Court is satisfied that the applicant's deprivation of liberty had also been shown to have been necessary in the circumstances.

(c) Conclusion

170. It follows that the applicant's subsequently ordered preventive detention, in so far as it was executed as a result of the impugned judgment from 20 June 2013 until 18 September 2014 in the Straubing preventive detention centre, was justified under sub-paragraph (e) of Article 5 § 1 as the lawful detention of a person of unsound mind.

171. Accordingly, the Court finds that there has been no violation of Article 5 § 1 of the Convention in this respect.

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

172. The applicant further complained that his "retrospectively" ordered preventive detention, executed on the basis of the Regensburg Regional Court's judgment of 3 August 2012 from 20 June 2013 onwards in the Straubing preventive detention centre, had also breached his right not to have a heavier penalty imposed than the one applicable at the time of his offence in June 1997. He relied on Article 7 § 1 of the Convention, which reads as follows:

> "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."

173. The Government contested that argument.

A. The Chamber judgment

174. The Chamber found that its considerations under Article 7 § 1 in the case of *Bergmann* (cited above), which concerned preventive detention prolonged beyond a former statutory time-limit, also applied to the present case of preventive detention ordered "retrospectively" in a separate judgment. As in the *Bergmann* case, the Court found that where preventive detention was, and could only be, ordered or extended to treat a mental disorder in a suitable institution, the punitive element of preventive detention, and its connection with the applicant's criminal conviction, was erased to such an extent that the measure was no longer a penalty within the meaning of Article 7 § 1. The applicant's preventive detention could therefore no longer be classified as a penalty. Consequently, there had been no violation of Article 7 § 1.

B. The parties' submissions

1. The applicant

175. The applicant took the view that his preventive detention served as from 20 June 2013 in the Straubing preventive detention centre had breached Article 7 § 1 of the Convention.

176. The applicant submitted that his preventive detention had been ordered "retrospectively". At the time of the commission of his offence in June 1997, the Juvenile Courts Act had not yet authorised preventive detention orders in respect of young offenders and consequently, no preventive detention order had been made in the judgment convicting him in 1999. It was only on 12 July 2008 that Article 7 § 2 of the Juvenile Courts Act, which authorised "retrospective" preventive detention orders against young offenders, entered into force (see paragraphs 54-57 above), on which the preventive detention order of 3 August 2012 against him was based.

177. Furthermore, the applicant argued that his preventive detention had to be classified as a penalty. In the applicant's view, the material point in time for assessing whether a measure imposed on a person in a judgment constituted a penalty for the purposes of Article 7 § 1 was the date of the delivery of the judgment ordering the measure. At the time of the delivery of the judgment ordering his preventive detention on 3 August 2012, which was then executed in Straubing Prison, that detention had constituted a penalty, as had been acknowledged by the Government in their unilateral declaration. The judgment of 3 August 2012 remained in breach of the Convention, and the preventive detention order made therein was unlawful also following his transfer to the new preventive detention centre. He argued

that the unlawfulness of the order could not be remedied at a later stage, irrespective of whether the modalities of execution of his preventive detention in that centre had changed to such an extent that such preventive detention could no longer be classified as a penalty. The judgment therefore had to be quashed and his case be remitted for a new trial.

178. Referring to the criteria for determining whether a measure constituted a penalty for the purposes of Article 7 § 1 as summarised by the Court in the case of *M. v. Germany* (cited above, § 120), the applicant further argued that, looking behind the appearances, his preventive detention, in any event, still constituted a penalty within the autonomous meaning of the term under that provision also after his transfer to the Straubing preventive detention centre.

179. The applicant submitted that his preventive detention had been imposed following conviction for a criminal offence. He stressed that such detention could not be ordered without a previous conviction of an offence.

180. In the applicant's view, preventive detention was a criminal law measure under domestic law, given that the provisions governing it were essentially laid down in Articles 66-66c of the Criminal Code and Article 463 of the Code of Criminal Procedure.

181. As for the nature and purpose of the measure, the applicant argued that preventive detention as executed in the Straubing preventive detention centre in accordance with the changes introduced under the Preventive Detention (Distinction) Act of 5 December 2012 was still fundamentally different from detention in a psychiatric hospital. He stressed that of the 71 new posts created in the Straubing preventive detention centre (see paragraph 46 above), only 13 were therapeutic staff whereas the majority of staff consisted of administrative personnel and uniformed prison officers. Moreover, despite the modified conditions of detention in the preventive detention centre, there was no separation in terms of organisation between the prison and the preventive detention centre, the latter being merely a department of the former and located on the premises of a penal institution.

182. As for the procedures involved in the making and implementation of a preventive detention order, the applicant noted that the measure had been ordered by a criminal court. Its execution had been determined by the courts responsible for the execution of sentences. Furthermore, the provisions governing the order and execution of preventive detention were still part of the Criminal Code (Articles 66-66c) and of the Code of Criminal Procedure (Article 463).

183. In the applicant's submission, civil courts were at least as experienced as criminal courts in assessing the necessity of confining mental health patients whose condition could lead to serious crimes. Civil courts had jurisdiction to decide on the detention of persons of unsound mind who were suspected of posing a danger to public under the Bavarian

(Mentally Ill Persons') Placement Act (see paragraph 90 above). Furthermore, civil courts had jurisdiction to order therapy detention of persons of unsound mind in an appropriate institution under the Therapy Detention Act (see paragraph 85 above).

184. Preventive detention, which no longer had any maximum duration and was only terminated when a court found that there was no longer a high risk that the detainee would commit the most serious types of violent or sexual offences on account of his mental disorder, was still one of the severest measures – if not the severest measure – which could be imposed under the German Criminal Code. In the applicant's view, regard should be had to the fact that he had committed his offence as a young adult, that he was a first offender and that therefore, in his case, preventive detention could mean virtually lifelong deprivation of liberty.

185. In sum, in the applicant's view, all the criteria under the Court's case-law for classifying his preventive detention as a penalty for the purposes of Article 7 § 1 were met.

186. The applicant further argued that, having regard to the comparative law material available in the case of *M. v. Germany* (cited above, §§ 70-73), few States authorised preventive detention for adults, and probably none apart from Germany authorised preventive detention for young offenders.

2. The Government

187. The Government took the view that, since the applicant's transfer to the Straubing preventive detention centre on 20 June 2013, the preventive detention order of 3 August 2012 did not impose a heavier penalty on him than the one which was applicable at the time of his offence and therefore complied with Article 7 § 1 of the Convention.

188. The Government conceded that it was only after the applicant had committed his offence in 1997 that section 7(2) of the Juvenile Courts Act had entered into force, which permitted ordering preventive detention subsequently, that is to say after the conviction.

189. However, in the Government's view, the applicant's detention at the relevant time, from 20 June 2013 onwards, could no longer be classified as a penalty. Referring to the criteria established in the Court's case-law for determining whether a particular measure was a penalty as summarised in the case of *Bergmann* (cited above, §§ 149-150), they argued that the only static factor to be taken into account was the question whether the measure concerned was imposed following conviction for a criminal offence. All other criteria were dynamic and could thus change over time.

190. Consequently, as recognised by the Court in the case of *Bergmann* (cited above, §§ 164-177), if sufficient changes were implemented, a measure could lose its previously punitive character. This could also occur during the execution of the measure on the basis of the same court order. It would be overly formalistic to require a new judicial decision on the

applicant's preventive detention following the applicant's transfer to the new preventive detention centre as soon as it had been ready to accommodate detainees. As his condition had not changed, a fresh decision in June 2013 could only have been exactly the same as that taken on 3 August 2012.

191. The Government further explained that the specific criteria for classifying the applicant's preventive detention as a penalty were no longer met after his transfer to the Straubing preventive detention centre. As regards the question whether the measure concerned was imposed following conviction for a criminal offence, the Government noted that, other than in the *Bergmann* case where that applicant's preventive detention order had been made in the sentencing court's judgment and been prolonged subsequently, the order for the applicant's preventive detention in the present case had been made in 2012, many years after his conviction in 1999 – which had not entailed a preventive detention order – in separate proceedings. The connection between the applicant's criminal conviction and his preventive detention was therefore not as close as in the *Bergmann* case.

192. As for the characterisation of the measure under domestic law, preventive detention had never been considered as a penalty under the long-established twin-track system of sanctions in German criminal law, but as a corrective and preventive measure. The aim of that twin-track system of penalties and measures of correction and prevention was to make it possible to limit penalties for all offenders to what was strictly necessary to compensate for the perpetrator's guilt. The Government stressed that, as shown by the Council of Europe's Annual Penal Statistics (see paragraph 92 above), this twin-track system lead to Germany having a relatively low rate of long prison sentences compared to many other Contracting Parties to the Convention.

193. As for the nature and purpose of the measure, the Government explained that the applicant was no longer being detained as an offender for punitive purposes, but as a person of unsound mind with a criminal history in need of treatment, his mental disorder having become a new precondition for his detention. In accordance with the constitutional principle of proportionality, persons of unsound mind could only be detained for an extended period of time if their dangerousness had already manifested itself in a serious offence. The applicant's detention was being executed in the relevant period in a new preventive detention centre focused on comprehensive therapy provided by a multi-disciplinary team of experts, which had made intensive efforts to motivate the applicant to undergo suitable treatment for his disorder. As the preventive detention order had not been made in the trial court's judgment, but the seriousness of his offence had only at a later stage been a reason for examining whether he suffered

from a mental disorder and was consequently dangerous, the preventive nature of the measure was even clearer than in the *Bergmann* case.

194. The Government explained in that context that after the Federal Constitutional Court's judgment, which had been intended to implement the Court's judgment in the case of *M. v. Germany*, the whole system of preventive detention had been overhauled by federal legislation and implementation laws in each of the sixteen *Länder*. The *Länder* had built new preventive detention centres at considerable cost (exceeding 200 million euros) and employed numerous new expert staff members in order to ensure individualised care and comprehensive therapy for all detainees. The Government stressed that the reform of the German preventive detention system had been accompanied, examined and ultimately approved by a series of Chamber judgments of this Court. It was a model of successful dialogue and cooperation between this Court and a national supreme court with a view to enhancing fundamental rights protection in Europe.

195. The preventive detention centre in which the applicant was being held was thus not a prison, but a therapeutic institution for the treatment of persons with mental disorders which met standards comparable to those in closed wards of psychiatric hospitals. Therefore, the connection between the applicant's detention and his conviction of an offence had been erased.

196. As for the procedures involved in the making and implementation of the measure, the Government conceded that the decisions on the imposition and review of preventive detention were still taken by criminal and not by civil courts. This was based on considerations of practicability. The courts belonging to the criminal justice system also took decisions on detention in a psychiatric hospital under Article 63 of the Criminal Code. As accepted in the case of *Bergmann* (cited above, § 146), they were thus particularly experienced in assessing the necessity of confining mental health patients whose condition could lead to serious crimes. In any event, the legal requirements to be applied would be the same irrespective of whether the civil or the criminal courts decided on the imposition and review of preventive detention.

197. The Government further argued that, while preventive detention was a severe measure as the law did not lay down any maximum duration, it was subject to regular judicial review.

198. The Government concluded that, as in the case of *Bergmann*, both the nature and the purpose of the applicant's preventive detention had changed so substantially since his transfer to the preventive detention centre on 20 June 2013 that the measure could no longer be classified as a penalty.

199. Finally, the Government submitted that a number of Contracting Parties to the Convention, including the Czech Republic, France, Italy, Poland, Switzerland and the United Kingdom, permitted the preventive detention of persons who had committed crimes as young adults and that the

applicant had been more than thirty years old when his preventive detention had been ordered.

C. The third party's submissions

200. The EPLN considered that the *Bergmann* case, to which the present application was a follow-up case, constituted a radical change in the Court's case-law in that preventive detention which was ordered for therapeutic purposes against a person suffering from a mental illness was deemed no longer to constitute a penalty. In the EPLN's view, preventive detention executed in the new preventive detention centres in accordance with the Preventive Detention (Distinction) Act still had to be classified as a penalty. It was only applicable to persons convicted of criminal offences. It was ordered by the criminal courts. It was aimed at prolonging the detention after convicted offenders had served their sentence. Furthermore, it was executed in centres located on the premises of prisons. Being of potentially unlimited duration, it was one of the most serious infringements of fundamental rights in a democratic society. Its "retrospective" imposition therefore breached Article 7 § 1.

201. In the EPLN's view, the aim of the German legislature in enacting the Preventive Detention (Distinction) Act, had been to circumvent the Court's finding in the case of *M. v. Germany* that preventive detention as it stood then was incompatible with the Convention by making that detention fall within the ambit of Article 5 § 1 (e). However, treatment in a prison environment could not be compared to non-penal psychiatric internment.

D. The Grand Chamber's assessment

1. Recapitulation of the relevant principles

202. The Court reiterates that 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 *Kafkaris v. Cyprus* [GC], no. 21906/04, § 137, ECHR 2008; *M. v. Germany*, cited above, § 117; and *Bergmann*, cited above, § 149).

203. 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 *Del Río Prada*, cited above, § 81). The wording of the second sentence of Article 7 § 1 indicates that the starting-point – and thus a very weighty factor (see *Glien*, cited above, § 121; and *Bergmann*, cited above, § 150) – in any assessment of the existence of a penalty is whether the measure in question was 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; *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 many non-penal measures of a preventive nature may, just as measures which must be classified as a penalty, have a substantial impact on the person concerned (see *Welch*, cited above, § 32; *Del Río Prada*, cited above, § 82; and *Bergmann*, cited above, § 150).

204. The specific conditions of execution of the measure in question may be relevant in particular for the nature and purpose, and also for the severity of that measure and thus for the assessment of whether or not the measure is to be classified as a penalty for the purposes of Article 7 § 1. These conditions of execution may change during a period of time covered by the same judicial order. Just as in the context of Article 5 § 1, it is then necessary to clarify whether it is the conditions of execution at the time when the measure – such as a person's detention – was ordered or the conditions of execution during a later period to be assessed by the Court which are relevant for assessing whether the measure in question was a penalty within the meaning of Article 7 § 1.

205. A rare case in which the Court was confronted with such a situation was the application of *W.P. v. Germany* (cited above, §§ 76-80). In that case, the Court had considered that the conditions of the applicant's preventive detention had substantially changed during the period covered by the same detention order. As shown above (see paragraph 140), while the Court had struck the application out of the list in respect of the alleged breach of Article 7 § 1 following the Government's unilateral declaration acknowledging a violation of this provision during the time in which Mr W.P. was detained in prison, it found that Mr W.P.'s detention had complied with Article 7 § 1 in the period in which he had been detained in a new preventive detention centre. Accordingly, in the assessment of whether the measure in question, namely Mr W.P.'s preventive detention, was to be classified as a penalty, the Court, as in the context of Article 5 § 1, took into account changes in the conditions of detention occurring during the execution of the measure on the basis of the same detention order.

206. This approach implies that in some rare cases, especially if national law does not qualify a measure as a penalty and if its purpose is therapeutic, a substantial change, in particular in the conditions of execution of the

measure, can withdraw the initial qualification of the measure as a penalty within the meaning of Article 7 of the Convention, even if that measure is implemented on the basis of the same order.

207. The Grand Chamber considers that the wording of Article 7 § 1, second sentence, according to which no heavier penalty may be "imposed" than the one that was applicable at the time the criminal offence was committed, does not stand in the way of an interpretation of this provision which has regard to the fact that a measure may continue to be "imposed" over a longer period of time while changing its manner of execution, and thus its characteristics, during its imposition.

208. Furthermore, the Court considers that it is only in a position to fully assess whether a measure amounts in substance to a penalty in the light of the criteria developed in its case-law (see paragraph 203 above) if it takes into account changes in the actual execution of a measure on the basis of the same order. It notes that some of these criteria can be described as "static" or not susceptible to change after the point in time when the measure was ordered, particularly the criterion whether the measure in question was imposed following conviction for a "criminal offence" or that of the procedures involved in its making. In contrast, other criteria, including those of the nature and purpose of the measure and of its severity, can be described as "dynamic" or susceptible to change over time. In order to assess the compliance of a measure with Article 7 § 1 during a given period, the actual manner in which the measure was executed throughout that period must therefore be considered relevant and must be taken into consideration by the Court.

209. Consequently, the relevant point in time, or period, for assessing whether a measure was a penalty within the meaning of Article 7 § 1 is the period of time at issue in the proceedings before this Court, that is between 20 June 2013 and 18 September 2014, and not the time when the measure was ordered.

2. *Application of these principles to the present case*

(a) The Court's assessment in previous preventive detention cases

210. When examining whether the impugned preventive detention of the applicant should be classified as a penalty for the purposes of Article 7 § 1, second sentence, the Court observes at the outset that it was called upon to determine whether a person's preventive detention amounted to a penalty in a number of applications lodged against Germany since 2004. These applications concerned different preventive detention regimes, which evolved in respect of both their legal basis and their implementation in practice. In accordance with its case-law, the Court had to interpret the notion of penalty in Article 7 § 1 autonomously in these cases, also bearing in mind the classification of comparable measures in other Contracting

Parties to the Convention (see *M. v. Germany*, cited above, § 126; *Glien*, cited above, § 124; and *Bergmann*, cited above, §§ 161-163).

211. In the case of *M. v. Germany* (cited above, §§ 124-33), the Court concluded that preventive detention ordered and enforced in accordance with the German Criminal Code as it stood at the relevant time, that is detention in separate prison wings and without a mental disorder being a condition for such detention, had to be classified as a penalty. In the case of *Glien* (cited above, §§ 120-30) it found that the applicant's preventive detention as enforced in the transitional period between the Federal Constitutional Court's judgment of 4 May 2011 and the application in practice of the Preventive Detention (Distinction) Act (see paragraphs 76-80 above), which entered into force on 1 June 2013 and entailed detention under a fresh regime in new preventive detention centres, still constituted a penalty for the purposes of Article 7 § 1. It considered that there had not been any substantial changes in the implementation of Mr *Glien*'s preventive detention, which was still being executed in a separate prison wing, compared with the situation at issue in *M. v. Germany*.

212. In the case of *Bergmann* (cited above, §§ 151-83), the Court was finally called upon to determine whether the subsequently prolonged preventive detention of the applicant, which was executed after the expiry of the above-mentioned transitional period, in accordance with the Preventive Detention (Distinction) Act, in a new separate centre for persons in preventive detention, that is to say in accordance with the new preventive detention regime, was compatible with Article 7 § 1 of the Convention.

213. The Court found that preventive detention, as a rule, still was to be considered as a penalty for the purposes of Article 7 § 1. However, in cases such as that of the applicant, where preventive detention was extended because of, and with a view to the need to treat a mental disorder, which was a new precondition for subsequently extending his preventive detention, its nature and purpose changed to such an extent that it was no longer to be classified as a penalty within the meaning of Article 7. Such preventive detention thus complied with Article 7 (see also *W.P. v. Germany*, cited above, §§ 76-79).

214. In determining whether the subsequently imposed preventive detention of the applicant in the present case constituted a penalty for the purposes of the second sentence of Article 7 § 1, the Court, as explained above, considers it necessary to analyse the characteristics of the measure during the period at issue before it, that is between 20 June 2013 and 18 September 2014. During that period, the applicant, who was being detained in Straubing, was placed in a new preventive detention centre. The Court notes that the present case has this element in common with the cases of *Bergmann* (cited above) and *W.P. v. Germany* (cited above), which, for their part, concerned preventive detention which was subsequently prolonged beyond the former statutory maximum duration.

(b) Measure imposed following conviction for a criminal offence

215. As for the question whether the measure at issue was imposed following conviction for a “criminal offence”, the Court notes that the preventive detention order against the applicant had not been made together with his conviction (as in the above-mentioned *Bergmann* case), but had been imposed in a separate judgment in 2012, several years after the applicant’s conviction in 1999. However, the order was nevertheless linked to the conviction – and thus “following” the latter – as it was a precondition for the preventive detention order under section 7(2) of the Juvenile Courts Act (see paragraph 56 above) that the young offender concerned had been imposed a sentence of at least seven years for a felony, in particular, against life, physical integrity or sexual self-determination. Moreover, under that provision, the procedure concerning the offender’s preventive detention had to be based on evidence obtained prior to the end of the term of imprisonment imposed for the said offence.

216. The Court would add that the Regional Court, in its judgment of 3 August 2012, had not ordered the applicant’s preventive detention in a particular institution but had only generally ordered his preventive detention. It was clear when the Regional Court made its order that, following the judgment of the Federal Constitutional Court of 4 May 2011 which the Regional Court applied, the applicant was to be transferred as soon as possible to an institution offering him not only conditions more assimilated to general living conditions but, in particular, therapeutic provision tailored to his needs as a mental-health patient. The preventive detention order therefore covered the applicant’s detention in the new preventive detention centre in the period here at issue.

(c) Characterisation of the measure under domestic law

217. As regards the characterisation of preventive detention under domestic law, the Court notes that in Germany such detention is not, and has never been, considered as a penalty to which the constitutional absolute ban on retrospective punishment applies. In its leading judgment of 4 May 2011, the Federal Constitutional Court again confirmed that preventive detention, contrary to this Court’s findings concerning the notion of penalty under Article 7 of the Convention, was not a penalty for the purposes of the absolute prohibition on the retrospective application of criminal law under the Basic Law (see paragraph 74 above). It further found that the provisions of the Criminal Code on the imposition and duration of preventive detention as they then stood failed, however, to meet the constitutional requirement of differentiating between purely preventive measures of correction and prevention, such as preventive detention, and penalties, such as prison sentences (see paragraphs 70-72 above). The court therefore ordered the legislature to amend the provisions on preventive detention in the Criminal Code so as to reflect that difference.

218. In line with this requirement, the legislative amendments to the Criminal Code introduced by the Preventive Detention (Distinction) Act serve to clarify and extend the differences between the way in which preventive detention and prison sentences are enforced (see in particular the new Article 66c of the Criminal Code). They thus confirm and expand the differences between measures of correction and prevention, such as preventive detention, under the provisions of the Criminal Code and measures which are classified as penalties under the long-established twin- track system of sanctions in German criminal law (see *M. v. Germany*, cited above, §§ 45-48 and 125).

(d) Nature and purpose of the measure

219. As for the nature and purpose of the measure of preventive detention, the Court observes that at the material time, the applicant was detained in the Straubing preventive detention centre. His deprivation of liberty was thus not effected in an ordinary prison in a separate wing for persons in preventive detention as was the case for the applicants in the above-mentioned *M. v. Germany* and *Glien* cases, but in an institution comparable to that at issue in the *Bergmann* case. He was further deprived of his liberty as a person of unsound mind and was provided with treatment with a view to addressing his mental disorder (see paragraphs 142 et seq. above).

220. The Court observes that there were considerable differences between the deprivation of liberty in an ordinary prison and the applicant's preventive detention in the new preventive detention centre set up to comply with the new preventive detention regime (see in particular Article 66c of the Criminal Code and the Bavarian Preventive Detention Execution Act, paragraphs 76-81 above). In that centre, the applicant was being deprived of his liberty under considerably improved material conditions compared to ordinary prison conditions, with a view to differentiating between those two forms of detention, as required by the German Constitution. He was, for instance, detained in a larger cell measuring 15 m² and including a kitchen unit and a separate bathroom and could move more freely within the centre, which provided for rooms and outside spaces for occupational and recreational activities (see paragraph 46 above).

221. More importantly, the Court notes that in the Straubing preventive detention centre, as in other such centres (see paragraphs 47 and 81 above), an increased number of specialised therapeutic staff provided inmates such as the applicant with individualised medical and therapeutic treatment in accordance with an individual treatment plan. The comprehensive therapeutic provision for the applicant, addressing his mental condition, now included, in particular, one-to-one or group social therapy, participation in an intensive treatment programme for sexual offenders and therapy administered by an external psychiatrist. The Court notes that it was only

after the period covered by the proceedings here at issue that the applicant accepted a part of the treatment offers made to him (see paragraph 47 above). However, the Court does not have any reason to doubt that the treatment offers made to the applicant were adequate, sufficient and available to the applicant at the relevant time. It is therefore of no impact to its findings on the nature and purpose of the applicant's preventive detention that he did not immediately accept the offers made to him.

222. As it has been noted in previous judgments (see, in particular, *Glien*, cited above, §§ 98-99; and *Bergmann*, cited above, §§ 121-23), following the Court's judgment in the case of *M. v. Germany* (cited above) and the Federal Constitutional Court's judgment of 4 May 2011 responding to it, the domestic authorities have taken wide-ranging measures at the judicial, legislative and executive levels with a view to tailoring the execution of preventive detention to the requirements both of the Constitution and the Convention. Substantive measures have been taken at considerable cost in order to provide detainees in preventive detention with individual and intensive psychiatric, psychotherapeutic or socio-therapeutic treatment aimed at reducing the risk they pose to the public.

223. The Court, having regard to the material before it, is satisfied that the said measures taken by the domestic authorities entailed a substantive improvement of the conditions in which persons remanded in preventive detention are detained. Treatment aimed at reducing the threat these persons pose to the public to such an extent that the detention may be terminated as soon as possible is now at the heart of that form of detention, both in the interest of the detainee and in that of the public.

224. The Court agrees in this context with the Government's view that the reform of the German preventive detention system was conducted and put in practice against the background of a dialogue between this Court and the Federal Constitutional Court (see in particular the Court's judgments in the cases of *M. v. Germany*, *Jendrowiak,* cited above*; Schmitz v. Germany*, no. 30493/04, 9 June 2011; *Glien* and *Bergmann*, cited above; and the judgments and decisions of the Federal Constitutional Court of 4 May 2011, file nos. 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10 and 2 BvR 571/10, cited above, of 15 September 2011; file no. 2 BvR 1516/11, cited above of 6 February 2013; file nos. 2 BvR 2122/11 and 2 BvR 2705/11 of 11 July 2013; file nos. 2 BvR 2302/11 and 2 BvR 1279/12, cited above, and of 29 October 2013, file no. 2 BvR 1119/12).

225. In the Court's view, the changes to the manner of execution of preventive detention are fundamental for persons who, like the applicant, are detained as mental-health patients. The Court attaches decisive importance, in this context, to the fact that under sections 7(2) and 105(1) of the Juvenile Courts Act read in conjunction with the requirements set out in the Federal Constitutional Court's judgment of 4 May 2011, his subsequent preventive detention could, at the relevant time, only be ordered under a

new, additional precondition, namely that he was found to suffer from a mental disorder.

226. This condition was independent of the initial sanction imposed for a criminal offence. It thus distinguishes the type of preventive detention in the applicant's situation from preventive detention of dangerous offenders which was not ordered (or prolonged) subsequently. For the detention of this group of persons it is not required under domestic law that they suffer from mental disorders and they are not detained for the purposes of treating such disorders.

227. For persons detained as medical health patients, the preventive purpose pursued by the amended preventive detention regime carries decisive weight. The Court does not overlook the fact that also in respect of this group of persons remanded in preventive detention, the link between the measure and the offence(s) in regard of which it was ordered is not completely severed. It remains a precondition for ordering or prolonging preventive detention subsequently that the person concerned was found guilty of a serious offence. However, having regard to the setting in which preventive detention orders are executed under the new regime, the Court is satisfied that the focus of the measure now lies on the medical and therapeutic treatment of the person concerned. The medical and therapeutic provision was central to the specific measures of care provided to the applicant. This fact altered the nature and purpose of the detention of persons such as the applicant and transformed it into a measure focused on the medical and therapeutic treatment of persons with a criminal history (cf. also *Bergmann*, cited above, §§ 164-177).

228. The Court would clarify in that context that, in line with the findings in the judgment in the case of *Bergmann* (ibid., § 181) as well as its previous case-law (see *M. v. Germany*, cited above, §§ 124-32), "ordinary" preventive detention which is not executed with a view to treating the detainee's mental disorder, even if implemented in accordance with the new legislative framework, still constitutes a penalty for the purposes of Article 7 § 1 of the Convention. The improved material conditions and care do not, in these circumstances, suffice to erase the factors indicative of a penalty.

(e) Procedures involved in the making and implementation of the measure

229. As for the procedures involved in the making and implementation of the preventive detention order against the applicant, the Court observes that the applicant's preventive detention was imposed by the (criminal) trial courts; its subsequent implementation was to be determined by the courts responsible for the execution of sentences, that is to say courts also belonging to the criminal justice system.

230. The Court finds that it might have highlighted the therapeutic nature of the measure if the civil courts had been entrusted with orders on

the confinement of particularly dangerous persons with a criminal history suffering from a mental disorder, as was foreseen under sections 1 and 4 of the Therapy Detention Act (see paragraph 85 above), which does not appear to have acquired any importance in practice.

231. However, the Court takes account of the Government's argument that the courts belonging to the criminal justice system were particularly experienced in assessing the necessity of confining mental-health patients who had committed a criminal act as they also dealt with decisions concerning detention in psychiatric hospitals under Article 63 of the Criminal Code (see paragraph 84 above; cf. also *Bergmann*, cited above, § 178). It further observes that the criteria for the imposition of preventive detention would have been the same, irrespective of whether the civil or the criminal courts, which both belong to the courts with ordinary jurisdiction, had jurisdiction to impose that measure.

(f) Severity of the measure

232. Finally, the Court observes, on the matter of the severity of the measure against the applicant, that the preventive detention order against him entailed detention without any maximum duration. It therefore remained among the most serious measures which could be imposed under the Criminal Code. The Court notes in that context that both the Council of Europe Annual Penal Statistics and the statistics submitted by the Government confirm that preventive detention orders are imposed as an *ultima ratio* measure. In March 2017, 591 persons were in preventive detention in Germany, a country of some 81 million inhabitants.

233. Nor does the Court overlook the fact that the applicant was a young adult when he committed his first offence, with regard to which his preventive detention at issue was ordered in 2012, when he was thirty-five years old. He could therefore potentially be remanded in detention for a longer period of time than persons against whom such an order had been made at a more advanced age.

234. However, as the Court has repeatedly confirmed (see paragraph 203 above), the severity of the measure is not decisive in itself. Moreover, unlike in the case of prison sentences, the detention had no minimum duration either. The applicant's release was not precluded until after a certain lapse of time, but was dependent on the courts' finding that there was no longer a high risk that the applicant would commit the most serious types of violent crimes or sexual offences as a result of his mental disorder.

235. The duration of the applicant's detention thus depended to a considerable extent on his cooperation in necessary therapeutic measures. The Court notes in that context that the applicant's transfer to the new Straubing preventive detention centre placed him in a better position to work towards his release by means of therapies tailored to his needs. Furthermore, his detention was subject to regular judicial reviews at

relatively short intervals (see paragraph 64 above). That increased the probability that the measure would not last overly long. The severity of the preventive detention order was alleviated by these factors (cf. also *Bergmann*, cited above, §§ 179-80).

(g) Conclusion

236. In view of the foregoing considerations, the Court, having assessed the relevant factors in their entirety and making its own assessment, considers that the preventive detention implemented in accordance with the new legislative framework in the applicant's case during the period here at issue can no longer be classified as a penalty within the meaning of Article 7 § 1. The applicant's preventive detention was imposed because of and with a view to the need to treat his mental disorder, having regard to his criminal history. The Court accepts that the nature and purpose of his preventive detention, in particular, was substantially different from those of ordinary preventive detention executed irrespective of a mental disorder. The punitive element of preventive detention and its connection with the criminal offence committed by the applicant was erased to such an extent in these circumstances that the measure was no longer a penalty.

237. In view of these findings, it is not necessary to examine whether, by the order for and execution of the applicant's subsequent preventive detention, a heavier measure was imposed on the applicant than the one that was applicable at the time he committed his criminal offence.

238. The Court observes that its findings are in line with its conclusions in the case of *Bergmann* (cited above, §§ 182-83). As in its previous case-law (see, *inter alia*, *M. v. Germany*, cited above, §§ 122 et seq., on the one hand, and K. *v. Germany*, no. 61827/09, §§ 79 et seq., 7 June 2012 and G. *v. Germany*, no. 65210/09, §§ 70 et seq., 7 June 2012, on the other), it does not consider that the differences between the subsequent prolongation of preventive detention beyond a former statutory time-limit (at issue in the cases of *Bergmann* and *W.P. v. Germany*, both cited above) and the subsequent imposition of such detention in a judgment separate from and subsequent to the trial court's judgment are such as to change the assessment of the compliance of these measures with the Convention.

239. There has accordingly been no violation of Article 7 § 1 of the Convention.

V. ALLEGED LACK OF A SPEEDY JUDICIAL REVIEW

240. The applicant further complained in application no. 10211/12 that the domestic courts had not decided speedily in the proceedings in which he had sought to challenge the lawfulness of his provisional preventive detention. He relied on Article 6 § 1 of the Convention.

241. As the Chamber had found, proceedings for judicial review of the lawfulness of detention such as the proceedings at issue fall to be examined under Article 5 § 4 of the Convention, which reads as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

242. The Government contested that argument.

A. The Chamber judgment

243. The Chamber found that the period to be examined had started on 29 June 2011, when the Regional Court had received the applicant's appeal against the detention order of 6 May 2011. It had ended on 30 May 2012 when the Federal Constitutional Court's decision of 22 May 2012 had been served on counsel for the applicant. It had thus lasted eleven months and one day over three levels of jurisdiction. The proceedings before the Federal Constitutional Court as such had lasted eight months and twenty-two days.

244. Having regard, in particular, to the special features of constitutional court proceedings and to the complexity of the proceedings before the Federal Constitutional Court, the Chamber found that the speediness requirement had nevertheless also been complied with in the proceedings before that court. It stressed that the different role of the Constitutional Court within the domestic legal order had been reflected by the fact that a detainee could obtain a fresh judicial review of a detention order before the ordinary courts even while a previous set of proceedings before the Constitutional Court was still pending.

B. The parties' submissions

1. The applicant

245. The applicant argued that the length of the proceedings in which he had sought to challenge the lawfulness of his provisional preventive detention had violated the speediness requirement of Article 5 § 4 of the Convention.

246. The applicant took the view that the total length of the proceedings concerning the lawfulness of his provisional preventive detention had been excessive. From the time when, on 27 June 2011, he had lodged his appeal against the decision of the Regensburg Regional Court of 6 May 2011, some eleven months had passed before the Federal Constitutional Court, by decision of 22 May 2012 served on his counsel on 30 May 2012, had taken its final decision on the lawfulness of his provisional preventive detention. In particular, the proceedings before the Federal Constitutional Court, which had declined to consider his constitutional complaint of 7 September 2011,

had lasted eight months and twenty-three days, an unreasonably long period.

247. The applicant contested the assertion that the special features of constitutional complaint proceedings had justified the longer duration of proceedings. The Constitutional Court had only had to examine the compliance of the impugned decisions with the fundamental right to liberty and could therefore be expected to have taken a decision within a reasonable time, as the Regional Court and the Court of Appeal had done. The proceedings before that court had only been of average complexity as the judges adjudicating on the applicant's complaint had been familiar with his case, having adopted the leading judgment of 4 May 2011 in the applicant's case only a year before. Moreover, there had been a long delay between the applicant's reply of 1 January 2012 to the submissions of the institutions to whom the constitutional complaint had been communicated and the delivery of the Constitutional Court's decision on 22 May 2012. He claimed that he could not have filed another appeal while the proceedings before the Constitutional Court were pending.

2. The Government

248. In the Government's view, the proceedings at issue had been conducted speedily, as required by Article 5 § 4.

249. The Government emphasised that at the relevant time, the German courts had been obliged to adapt German law on subsequent preventive detention as closely as possible to the requirements of the Convention. In the period between 4 May 2011 and 1 June 2013 in which the legislature had not yet amended the German preventive detention system, they had been alone in attempting to accomplish that task.

250. The Government referred to and agreed with the Chamber's findings in respect of Article 5 § 4. They argued, in particular, that the proceedings before the Federal Constitutional Court had complied with the speediness requirement. The proceedings had been complex in that the Constitutional Court had had to assess for the first time whether the ordinary courts had applied its leading judgment of 4 May 2011 correctly. Furthermore, account had to be taken of the special features of constitutional court proceedings and the special role of the Federal Constitutional Court in the German judicial system. Moreover, the applicant had had, and had taken, the opportunity to lodge a new request with the Regional Court for judicial review of his provisional preventive detention while the proceedings at issue had been pending before the Federal Constitutional Court.

C. The Grand Chamber's assessment

1. Recapitulation of the relevant principles

251. The Court reiterates that Article 5 § 4 of the Convention, in guaranteeing to detained persons the right to institute proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it proves unlawful (see *Mooren v. Germany* [GC], no. 11364/03, § 106, 9 July 2009, and *Idalov v. Russia* [GC], no. 5826/03, § 154, 22 May 2012).

252. The question of whether the right to a speedy decision has been respected must be determined in the light of the circumstances of each case (see, *inter alia*, *R.M.D. v. Switzerland*, 26 September 1997, § 42, *Reports* 1997-VI; *Fešar v. the Czech Republic*, no. 76576/01, § 68, 13 November 2008; and *Stephens v. Malta (no. 2)*, no. 33740/06, § 84, 21 April 2009) and – as is the case for the "reasonable time" stipulation in Articles 5 § 3 and 6 § 1 of the Convention – including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter (see *Mooren*, cited above, § 106, and the references therein; *S.T.S. v. the Netherlands*, no. 277/05, § 43, ECHR 2011; and *Shcherbina v. Russia*, no. 41970/11, § 62, 26 June 2014).

253. The Court accepts that the complexity of medical – or other – issues involved in an examination of an application for release can be a factor which may be taken into account when assessing compliance with the requirement of "speediness" laid down in Article 5 § 4. It does not mean, however, that the complexity of a given dossier – even exceptional – absolves the national authorities from their essential obligations under this provision (cf. *Musiał v. Poland* [GC], no. 24557/94, § 47, ECHR 1999-II; *Baranowski*, cited above, § 72; and *Frasik v. Poland*, no. 22933/02, § 63, ECHR 2010 (extracts)).

254. Article 5 § 4 does not compel the Contracting Parties to set up more than one level of jurisdiction for the examination of the lawfulness of detention and for hearing applications for release. Nevertheless, a State which offers a second level of jurisdiction must in principle accord to the detainees the same guarantees on appeal as at first instance (see *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B; *Khudobin v. Russia*, no. 59696/00, § 124, ECHR 2006-XII (extracts); and *S.T.S. v. the Netherlands*, cited above, § 43), including as regards the speediness of the review by the appellate body of a detention order imposed by a lower court (see *Piotr Baranowski v. Poland*, no. 39742/05, § 63, 2 October 2007). The same applies to constitutional courts which decide on the legality of detention and order the release of the person concerned if the detention is not lawful (cf. *Smatana v. the Czech Republic*, no. 18642/04, § 123,

27 September 2007; and *Mercan v. Turkey* (dec.), no. 56511/16, § 24, 8 November 2016).

255. In order to determine whether the requirement that a decision be given "speedily" has been complied with, it is necessary to perform an overall assessment where the proceedings were conducted at more than one level of jurisdiction (see *Navarra*, cited above, § 28, and *Mooren*, cited above, § 106). Where the original detention order was imposed by a court (that is, by an independent and impartial judicial body) in a procedure offering appropriate guarantees of due process, and where the domestic law provides for a system of appeal, the Court is prepared to tolerate longer periods of review in proceedings before a second-instance court (see *Lebedev v. Russia*, no. 4493/04, § 96, 25 October 2007, and *Shcherbina*, cited above, § 65). These considerations also apply in respect of complaints under Article 5 § 4 concerning proceedings before constitutional courts which were separate from proceedings before ordinary courts under the relevant provisions of the law on criminal procedure (see *Žúbor v. Slovakia*, no. 7711/06, § 89, 6 December 2011).

256. The Court has laid down relatively strict standards in its case-law concerning the question of State compliance with the speediness requirement. An analysis of its case-law reveals that in appeal proceedings before the ordinary courts which follow a detention order imposed by a court at first instance, delays exceeding three to four weeks for which the authorities must be held responsible are liable to raise an issue under the speediness requirement of Article 5 § 4 unless a longer period of review was exceptionally justified in the circumstances of the case (cf., *inter alia*, *G.B. v. Switzerland*, no. 27426/95, §§ 27 and 32-39, 30 November 2000 – which determined that a duration of thirty-two days for a federal attorney and a federal court to decide on the applicant's request for release constituted a breach of Article 5 § 4; *Lebedev*, cited above, §§ 98-102 – which determined the authorities' responsibility for twenty-seven days of the overall time it took the appeal court to decide on the applicant's request for release, which was incompatible with Article 5 § 4; for further examples see *Piotr Baranowski*, cited above, § 64, and *Shcherbina*, cited above, § 65).

2. Application of these principles to the present case

257. As regards the period to be taken into consideration in determining whether the respondent State complied with the speediness requirement under Article 5 § 4, the Court observes that the period started on 29 June 2011, when the Regional Court received the applicant's appeal against the detention order of 6 May 2011. It ended on 30 May 2012 when the Federal Constitutional Court's decision of 22 May 2012 was served on counsel for the applicant (for the calculation of the period, cf. *Smatana*, cited above, § 117, and the references therein). It thus lasted eleven months and one day over three levels of jurisdiction.

258. The Court observes that the applicant contested the compliance of the length of the proceedings before the Federal Constitutional Court (eight months and twenty-three days) and of the resulting total duration of the proceedings with Article 5 § 4; he does not appear to argue that the proceedings before the ordinary courts failed to comply with the speediness requirement under that provision.

259. The Court agrees that the Regional Court, which took the decision refusing to amend its detention order of 6 May 2011 five days after having received the applicant's appeal on 29 June 2011, namely on 4 July 2011, conducted the proceedings before it with expedition.

260. Following the Regional Court's decision, the Court of Appeal, having obtained the prosecution and defence submissions, took its decision on the applicant's appeal on 16 August 2011; the proceedings before that court thus lasted forty-three days.

261. It does not appear that the applicant, who supplemented grounds for his appeal on five occasions (see paragraph 18 above), substantially contributed to the duration of the proceedings before that court.

262. The Court considers, however, that the proceedings before the Court of Appeal were relatively complex, both from a legal and a factual point of view. Following the Federal Constitutional Court's reversal of its case-law in a leading judgment, it was necessary for the Court of Appeal to examine whether under the new restrictive standards set by the Constitutional Court there continued to be weighty grounds for expecting that the applicant's subsequent preventive detention would be ordered. It had become necessary, in particular, to determine whether there were sufficient grounds for assuming that the applicant suffered from a mental disorder. Such an assessment had not been necessary under the Juvenile Courts Act as interpreted previously. In making that assessment in the applicant's case, the Court of Appeal had regard to the findings of fact made by the Regensburg Regional Court in its judgment of 22 June 2009, as well as to the reports of four medical experts ordered in the course of these and previous proceedings. It thoroughly reasoned its decision ordering the applicant's provisional preventive detention.

263. Having regard to the complexity of the proceedings and the fact that the Court of Appeal reviewed, as a court of second instance, a detention order imposed and reviewed by a first-instance court –in which situation the Court is prepared to tolerate longer periods of review (see paragraph 255 above) – the Court finds that the proceedings before the Court of Appeal still complied with the speediness requirement in the circumstances of the case.

264. The Court further observes that on 29 August 2011 the Court of Appeal took its decision on the applicant's complaint regarding a breach of his right to be heard and his objection to the decision of 16 August 2011; that decision was served on counsel for the applicant on 6 September 2011.

The proceedings thus lasted twenty-one days which, in the light of the above considerations, cannot be considered as excessive.

265. As regards the proceedings before the Federal Constitutional Court, the Court notes that the applicant lodged his constitutional complaint with that court on 7 September 2011. On 25 October 2011, that is to say within forty-seven days, the Federal Constitutional Court took an interim decision refusing the applicant's request for stay of execution of the detention order against him. Its decision of 22 May 2012, declining to consider the complaint was served on counsel for the applicant on 30 May 2012. The proceedings before that court thus lasted a total period of eight months and twenty-three days.

266. In determining whether, in view of this relatively long period, the applicant's right to a speedy decision was respected in the circumstances of the present case, the Court accepts that the proceedings before the Federal Constitutional Court were complex. Following its leading judgment of 4 May 2011, which had been delivered, *inter alia*, in respect of the applicant, that court had to assess for the first time whether the ordinary courts' interpretation and application of that leading judgment complied with the Constitution. The court had to determine, in particular, whether the ordinary courts interpreted the new restrictive criteria for imposing preventive detention subsequently, and in particular the requirement that the person concerned suffered from a mental disorder, which involved complex medical and legal issues, in compliance with the constitutional right to liberty.

267. The complexity of the proceedings is also reflected by the fact that the Federal Constitutional Court communicated the constitutional complaint to the regional Government of Bavaria, to the President of the Federal Court of Justice and to the General Public Prosecutor at the latter court and obtained their observations, as well as the applicant's observations in reply, before taking its decision.

268. The Court finds that the applicant, who replied to the submissions of the regional Government of Bavaria, of the President of the Federal Court of Justice and of the General Public Prosecutor dated 28, 24 and 25 November 2011 respectively by submissions dated 1 January 2012, cannot be said to have greatly contributed to the duration of the proceedings before the Federal Constitutional Court.

269. The Federal Constitutional Court, for its part, was not inactive during the period in which the proceedings were pending before it. It conducted the proceedings with due regard to the importance of the applicant's right to liberty in that it fairly quickly issued a reasoned interim decision on his request for a stay of execution of the detention order against him and communicated the constitutional complaint, asking several parties to submit their observations.

270. The Court further considers that the Federal Constitutional Court conducted the proceedings before it in a different legal context from that of the ordinary courts and that the special features of the proceedings before that court must be taken into account in assessing compliance with the speediness requirement of Article 5 § 4. The Court notes that in its examination of the compliance of a detention order with the fundamental right to liberty, the Constitutional Court also reviews, as do the lower courts, the lawfulness of a complainant's detention and has jurisdiction to quash the decision of the ordinary courts and, if appropriate, order the release of the detained person if the detention is unlawful (see as an example in this respect the Constitutional Court's leading judgment of 4 May 2011, paragraphs 68-75 above).

271. However, the Federal Constitutional Court does not carry out its review as an additional instance on the merits, but examines the detention order's compliance with the Constitution alone. This different role of the Constitutional Court within the domestic legal order is reflected by the fact that under domestic law decisions become final once the last-instance ordinary court has delivered its decision. A detainee may obtain a fresh judicial review of a detention order before the ordinary courts even while a previous set of proceedings before the Constitutional Court is still pending (see paragraph 63 above; compare also *Şahin Alpay v. Turkey*, no. 16538/17, § 137, ECHR 2018).

272. The Court further observes that the applicant availed himself of this possibility in the present case. Shortly after having lodged his constitutional complaint on 7 September 2011, he submitted a fresh request for judicial review of his provisional preventive detention with the Regional Court on 17 November 2011. The Regional Court and the Court of Appeal examined the applicant's fresh request and rejected it on the merits on 28 November 2011 and 2 January 2012 respectively, prior to the Constitutional Court's decision of 22 May 2012 (see paragraph 27 above).

273. In the Court's view, this possibility does not exempt the Constitutional Court from its obligation under Article 5 § 4 to decide speedily on the lawfulness of the applicant's detention in order to guarantee that the right to a speedy decision remains practical and effective (cf. also, *mutatis mutandis*, *Smatana*, cited above, §§ 124 and 131). However, taking this element into account in the overall assessment of whether a decision has been given speedily is in line with the rationale behind its case-law (cited in paragraph 255 above) tolerating longer periods of review in proceedings before a second-instance court where the original detention order was imposed by a court in a procedure offering appropriate guarantees of due process.

274. The Court considers that these considerations apply *a fortiori* to proceedings before a constitutional court as an additional instance charged with examining compliance with the fundamental right to liberty of a

detention alone and during which fresh proceedings for judicial review before the ordinary courts can already be initiated. It would add that the relatively strict standards in its case-law concerning the question of State compliance with the speediness requirement, as described in a number of cases above (see paragraph 256), were not developed in cases concerning proceedings before domestic constitutional courts challenging the lawfulness of the complainant's detention.

275. In sum, the Court, having regard to the complexity of the proceedings before the Federal Constitutional Court in the instant case, the conduct of the proceedings, including the adoption of a reasoned interim decision on the continuation of the applicant's detention by that court and the special features of the proceedings before that court, which permitted the applicant to obtain a fresh judicial review of his detention by the ordinary courts while the proceedings at issue were still pending before the Constitutional Court, finds that in the particular and specific circumstances of the case (see paragraphs 270 and 271 above), the requirement of speediness under Article 5 § 4 has nevertheless been complied with.

276. In the light of these findings, the Court, making an overall assessment, further considers that the applicant's right to a speedy decision was complied with in the overall proceedings concerning the lawfulness of his provisional preventive detention.

277. There has accordingly been no violation of Article 5 § 4 of the Convention.

VI. ALLEGED LACK OF IMPARTIALITY OF JUDGE P.

278. The applicant finally complained that Judge P. had been biased against him in the main proceedings before the Regensburg Regional Court concerning the order for his "retrospective" preventive detention. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

279. The Government contested that argument.

A. The Chamber judgment

280. The Chamber, which had considered Article 6 § 1 to be applicable under its civil head to the proceedings concerning the lawfulness of the order for the applicant's preventive detention, found that in the circumstances of the present case, there had neither been personal prejudice

on the part of Judge P. nor objectively justified doubts as to his impartiality, for the purposes of Article 6 § 1, in the proceedings at issue.

B. The parties' submissions

1. The applicant

281. In the applicant's submission, the Regensburg Regional Court, which had ordered his preventive detention with Judge P.'s participation, had not been impartial, as required by Article 6 § 1 of the Convention.

282. The applicant argued that there was sufficient evidence to establish that Judge P. had not been impartial on the basis of his personal conviction and behaviour (subjective test). Judge P. had warned the applicant's female defence lawyer to be careful after the applicant's release not to find him standing in front of her door waiting to "thank" her in person. As the Chamber had rightly found, that remark was to be understood as meaning that P. considered it a risk that the applicant would commit a serious violent or sexual offence against his lawyer if at liberty.

283. The applicant stressed that Judge P. had not made his comment about the threat which the applicant allegedly posed while giving reasons for the Regional Court's judgment of 22 June 2009. The impugned remark had been made in a conversation concerning the possibility of the applicant's subsequent transfer to a psychiatric hospital which Judge P. had had with the applicant's female defence lawyer after the Regional Court had delivered the said judgment. In that context, that danger had been completely irrelevant and there had not been any reason to make the impugned remark. Judge P. had thus unduly interfered in the lawyer-client relationship with his defence counsel and had failed to act in a professional manner. He had therefore been partial and the applicant had had reason to believe that Judge P.'s lack of impartiality subsisted in the proceedings at issue in which P. had again been on the bench.

2. The Government

284. The Government argued that, as the Chamber had rightly found, the applicant's right to a fair trial before an impartial tribunal under Article 6 § 1 of the Convention had not been breached.

285. The Government agreed that the remark which Judge P. had allegedly made in 2009 to the applicant's then defence counsel had meant that he had considered that there was a risk that the applicant would commit a serious violent or sexual offence against his lawyer if released. However, there was no evidence that Judge P. had been personally prejudiced against the applicant. He had made his impugned remark in the course of a confidential meeting immediately after the Regional Court, of which he was a member, had ordered the applicant's subsequent preventive detention as

there was a high risk of his committing serious offences including murder for sexual gratification if released. The remark had thus been a drastic summary of the assessment of the risk emanating from the applicant which had just been made in the Regional Court's judgment and it had been made to legal professionals who knew the case and context.

286. Moreover, the fact that Judge P. had somewhat drastically confirmed his conviction that the applicant was dangerous on 22 June 2009 did not raise objectively justified doubts that the judge lacked impartiality in the proceedings at issue, which took place some three years later, ending with the Regional Court's judgment of 3 August 2012. There was no legitimate reason to fear that Judge P. would not carry out the necessary fresh assessment of the applicant's dangerousness on the basis of the new evidence produced and under the law as modified by the Federal Constitutional Court's judgment of 4 May 2011 in the meantime.

C. The Grand Chamber's assessment

1. Recapitulation of the relevant principles

287. In its judgment of 2 February 2017 in the present case, the Chamber aptly summarised the principles relevant to the present case as follows (ibid., §§ 120-123):

> "The Court reiterates that the existence of impartiality for the purposes of Article 6 § 1 must be determined according to (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge – that is to say whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 191, ECHR 2003-VI, and *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 104, ECHR 2013).
>
> ... As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Morel v. France*, no. 34130/96, § 41, ECHR 2000-VI, and *Micallef v. Malta* [GC], no. 17056/06, § 94, ECHR 2009).
>
> ... As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein v. Switzerland*, no. 33958/96, § 44, ECHR 2000-XII, and *Micallef*, cited above, § 96).
>
> ... It cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority (see *Ringeisen v. Austria*, 16 July 1971, § 97, Series A no. 13, and *Diennet v. France*, 26 September 1995, § 38, Series A no. 325-A)."

2. Application of these principles to the present case

288. The Court notes that, in its judgment in the present case, the Chamber gave the following reasons for its finding that the applicant had been heard by an impartial tribunal for the purposes of Article 6 § 1 in the proceedings at issue (ibid., §§ 124-128):

> "As regards the alleged lack of impartiality of Judge P. in the present case, the Court observes that the domestic courts examined the case on the assumption that Judge P. could have made the statement in question ... and it will therefore proceed on the basis of the same assumption. It further notes that Judge P. made the impugned statement in the course of a confidential exchange between the judges of the Regional Court and the applicant's two defence lawyers. That discussion, which took place just after the Regional Court had delivered its first judgment ordering the applicant's retrospective preventive detention on 22 June 2009, concerned the applicant's possible future transfer to a psychiatric hospital. It appears uncontested between the parties, and the Court agrees with that interpretation, that the remark allegedly made by Judge P. within that context to the effect that the applicant's female counsel should be careful that the applicant would not visit and "thank" her when released was to be understood as meaning that Judge P. considered that there was a risk that the applicant would commit a serious violent or sexual offence against his lawyer (similar to the one he had been found guilty of) if released.
>
> ... The Court would stress at the outset the importance of professional conduct in the discharge of judicial functions. In determining whether it was established in view of this alleged remark that Judge P. was personally prejudiced against the applicant (see the above-mentioned "subjective test"), the Court attaches decisive weight to the context in which Judge P.'s statement was made. Assuming, as the national courts did, that he actually made the alleged remark, he did so immediately after the Regional Court, of which he was a member, had ordered the applicant's retrospective preventive detention as it considered that the applicant was still suffering from violent sexual fantasies and that there was a high risk that the applicant would again commit serious sexual offences, including murder for sexual gratification, if released .... In these circumstances, Judge P.'s alleged remark amounted in substance to a confirmation of the Regional Court's finding in the judgment it had just delivered. The Court therefore is not persuaded that, even assuming that the remark was made, there is sufficient evidence that Judge P. displayed hostility for personal reasons and was thus personally biased against the applicant.
>
> ... The Court shall further examine whether Judge P.'s conduct may prompt objectively justified doubts as to his impartiality from the point of view of an external observer (see the above-mentioned "objective test"). It notes that in the proceedings at issue, the Regional Court, including Judge P., had to take a new decision on whether it was necessary to order the applicant's retrospective preventive detention after the Federal Constitutional Court had quashed its judgment of 22 June 2009 and remitted the case to the Regional Court.
>
> ... The Court, having regard to its case-law ..., considers that the mere fact that Judge P. had already been a member of the bench which had made the first order for the applicant's retrospective preventive detention and moreover, following the quashing of that judgment, had been a member of the bench ordering the applicant's retrospective preventive detention anew on 3 August 2012, did not suffice to raise objectively justified doubts as to his impartiality.

> ... The Court further finds that the fact that Judge P., in his impugned remark, allegedly confirmed that he considered the applicant to be dangerous on 22 June 2009 does not raise objectively justified doubts that the judge lacked impartiality in the proceedings at issue here. In these proceedings, which were terminated some three years after the impugned remark, the Regional Court heard fresh evidence in order to determine whether, at that time and under the law as modified by the Federal Constitutional Court's judgment reversing its previous case-law, the applicant's retrospective preventive detention had to be ordered. The impugned statement does not give any legitimate reason to fear that Judge P. would not have carried out that necessary fresh assessment of the level of danger that the applicant posed on the basis of the evidence produced and arguments heard in the new proceedings."

289. The Grand Chamber would stress that assuming that Judge P. actually made the highly inappropriate remark in question, he would have displayed unprofessional behaviour. However, it considers that, for the reasons set out in detail by the Chamber which it endorses, this conduct, in the circumstances of the present case, neither showed that Judge P. was personally biased against the applicant nor that there were objectively justified doubts as to his impartiality in the proceedings at issue.

290. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Holds*, by fifteen votes to two, that there has been no violation of Article 5 § 1 of the Convention on account of the applicant's preventive detention from 20 June 2013 onwards as a result of the impugned order for his subsequent preventive detention;

2. *Holds*, by fourteen votes to three, that there has been no violation of Article 7 § 1 of the Convention on account of the applicant's preventive detention from 20 June 2013 onwards as a result of the impugned order for his subsequent preventive detention;

3. *Holds*, unanimously, that there has been no violation of Article 5 § 4 of the Convention on account of the duration of the proceedings for review of the applicant's provisional preventive detention;

4. *Holds*, by fifteen votes to two, that there has been no violation of Article 6 § 1 of the Convention on account of the alleged lack of impartiality of Judge P. in the main proceedings concerning the order for the applicant's subsequent preventive detention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 4 December 2018.

Johan Callewaert	Guido Raimondi
Deputy to the Registrar	President

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

(a) concurring opinion of Judge Ravarani;

(b) partly dissenting opinion of Judge Sicilianos;

(c) dissenting opinion of Judge Pinto de Albuquerque joined by Judge Dedov.

G.R.
J.C.

CONCURRING OPINION OF JUDGE RAVARANI

Translation

1. I agree with my colleagues that there was no violation of Article 7 of the Convention, and also concur with the other parts of the judgment. The reason I am setting out a separate opinion is that I think that some clarification is needed in the wording of the general principles set out in paragraphs 202 to 209 of the judgment concerning Article 7 of the la Convention.

2. The Court concludes that, particularly "where domestic law does not classify the measure as a penalty and it has a therapeutic aim, a significant change in the conditions of imposition of the measure, in particular, may cancel out the classification as a 'penalty' which it would have had for the purposes of Article 7 of the Convention before the change, even if the measure is still being imposed on the basis of the same order as before". Furthermore, the Court considers that "the wording of Article 7 § 1, second sentence, according to which no heavier penalty may be 'imposed' than the one that was applicable at the time the criminal offence was committed, does not stand in the way of an interpretation of this provision which has regard to the fact that a measure may continue to be 'imposed' over a longer period of time while changing its manner of execution, and thus its characteristics, during its imposition" (see paragraphs 206-207 of the judgment).

3. In short, as the Court makes clear in paragraph 208, some of the criteria set out in the case-law of the Court to assess whether a measure constitutes a penalty for the purposes of Article 7 are "static" or "not susceptible to change after the point in time when the measure was ordered". That holds particularly for the criterion on whether the measure in question was imposed following conviction for a "criminal offence" or that of the procedures involved in its making. "In contrast, other criteria, including those of the nature and purpose of the measure and of its severity, can be described as 'dynamic' or susceptible to change over time". Therefore, "in order to assess the compliance of a measure with Article 7 § 1 during a given period, the actual manner in which the measure was executed throughout that period must therefore be considered relevant and must be taken into consideration by the Court" (see paragraph 208 of the judgment).

4. Such reasoning calls for clarification in order to prevent any misunderstandings. We might, in fact, have to accept that the "punishment" concept under Article 7 was not fixed and objective but fluid or "dynamic", as stated in paragraph 208 of the judgment itself, in the sense that we could be dealing with either a "penalty" or an "enforcement measure", depending on the conditions of its implementation.

5. Admittedly, the judgment also refers to measures which are "static", or not susceptible to change after the time when they are ordered, more specifically targeting measures which are imposed on a person convicted of a "criminal offence" and the criterion of the procedures involved in its making. However, there is something else: in order to remain within one of the categories used by the Court, even in terms of the measure itself, a distinction might be drawn between a static element and a dynamic element after the adoption of the said measure. Yet these terms seem rather unsuited to reflecting the reality underlying the punishment envisaged by Article 7. It would appear more appropriate to distinguish between the actual nature – under domestic legislation – of a measure ordered (which is its *abstract* aspect) and its effective implementation (which is its *concrete* aspect).

6. It is essential to ascertain the actual nature of a measure in the light of Article 7, because this marks a necessary stage in delimiting the respective scopes of that provision and of Article 5 (1) of the Convention. The latter prohibits, in principle, depriving an individual of his liberty, but authorises it under certain conditions. Those conditions include, in particular, that, set out in indent (e), of persons of unsound mind, who may be detained under very specific conditions as defined by the case-law of the Court (see paragraphs 126 et seq. of the judgment).

7. The starting point in the *Ilnseher* case was as follows: the applicant was first of all convicted under the German Penal Code and subsequently sentenced to "preventive detention", which, according to the classification used in German legislation, is not a criminal penalty but an amending measure which, when applied as in the present case to a psychiatric patient, must be carried out in a hospital providing adequate psychological and psychiatric treatment. In fact the applicant, immediately after the measure was ordered, had been in a prison providing no medical support, and had only afterwards been transferred to an appropriate establishment providing treatment worthy of the name.

8. The Court was called upon to adjudicate on the compatibility with the Convention of that second phase of detention under Article 7, which prohibits penalties which are not prescribed by law and those imposed retroactively. In the instant case the issue was the "penalty" categorisation, to the extent that if the Court reached the conclusion that the measure had not amounted to a penalty, there had been no breach of Article 7. The question was whether, in assessing whether or not the measure constituted a penalty, the Court could confine itself to the classification used by domestic law and, if – as was actually the situation in the present case – domestic law did not classify the measure as a criminal penalty, immediately rule out the applicability of Article 7, going on to assess whether the conditions of detention had been compatible with the requirements of Article 5 § 1 (e).

9. Such an approach would have excessively restricted the scope of Article 7, and, furthermore, would have allowed the State to escape that provision (from which no derogation is permissible under Article 15 of the Convention, whereas the reinforced protection laid down in the latter provision is not applicable to Article 5) by merely laying down in its legislation that certain detention measures did not come under criminal law. It would be underestimating the Court's power and duty to confer an autonomous meaning on the concepts used in the Convention, which process is vital if the Court is to apply the same standards to all member States (and which also prevents States from attempting to elude the application of the Convention, or of specific provisions thereof, by resorting to abusive or erroneous characterisations).

10. In fact, in order to characterise a measure as a penalty, the Court merely regards the classification of a measure under domestic legislation as one stage (among others, for example the imposition of the measure following a criminal conviction), which stage might be described as "abstract". Where a measure is not classified as a penalty, the Court will consider how it is *conceived*: it will assess the nature and purpose of the measure (in particular its preventive or punitive intent), the procedures involved in the making and implementation of the measure, and its severity (see *Welch v. the United Kingdom*, 9 February 1995, § 28, Series A no. 307-A, and *Del Río Prada v. Spain* [GC], no. 42750/09, § 82, ECHR 2013).

11. And indeed, in the present case, the Court assessed not only how the measure was conceived but also how it was *enforced*, pushing its autonomous assessment of the actual situation to very great lengths. The conclusion it reached is that the nature of a measure can change in the course of its enforcement. Depending on its mode of enforcement, it can successively take on the characteristics of a penalty, a therapeutic measure, possibly reverting to being a penalty, and so on. This is what the Court refers to as the "dynamic" aspect of the measure.

12. There is one obvious drawback: if a measure can change in nature during its period of enforcement – in the worst case changing several times at very short intervals – the definition of a "penalty" is liable to suffer, or even be deprived of all effective substance.

13. That being the case, could we consider a two-stage assessment, starting with an examination of the characterisation of the measure in national legislation – a penalty or a measure – and then go on to consider how national legislation *provides for* its enforcement, after which the Court could effect an autonomous interpretation of the domestic legal provisions in order to decide whether, under Article 7 of the Convention, it is a case of a penalty or another measure? That is where the examination of the measure's compatibility with Article 7 would end. If it transpired from the assessment that domestic law classified the measure as non-criminal and provided for a mode of execution lying outside the criminal-law field,

Article 7 would not have been violated. And if the concrete, *de facto* mode of enforcement of a measure classified in law as "therapeutic" amounted to a deprivation of liberty at variance with Article 5 (1) (e), the latter provision would have been breached rather than Article 7.

14. We might wonder whether such an approach covers all the existing realties in this sphere and the whole range of situations which can arise, and in particular whether it covers the present case. In the instant case, not only did the law classify the measure as "preventive detention" and not as a penalty, but it also prescribed appropriate treatment in an establishment specialising in psychological disorders. However, as regards the facts, pursuant to a *systematic and consistent administrative practice*, such measures were – for an initial period, until the applicant was transferred to a new suitable establishment – enforced in prisons that did not offer appropriate treatment. The situation was not accidental, but structural: all persons held in preventive detention who were suffering from a mental disorder were systematically and invariably held in prisons, for the simple reason that no specialised establishments existed. In view of that situation, can we consider that the measure was not a penalty, knowing that in line with systematic administrative practice it was enforced in exactly the same way as a penalty? Should we not take into account all the structural facts and conclude that the measure indeed constituted a penalty?

15. If we consider that a measure which is classified as therapeutic by domestic law, and which, moreover, provides for its enforcement in an appropriate establishment, but which is systematically enforced in a prison, constitutes a penalty, does any mode of execution which does not comply with domestic legislation providing for a measure other than a penalty nonetheless constitute a penalty if, in practical terms, such execution is akin to a deprivation of liberty, which is incompatible with that provision? The answer is no: if the deprivation of liberty infringes the requirements of domestic law and is not the subject of a general and systematic administrative practice, in other words if the deprivation of liberty is proved to be a situational, accidental, short-lived and non-systematic phenomenon, it breaches the requirements of Article 5 (1) (e).

16. Therefore, the criterion for the applicability of Article 7 would appear, above and beyond the classification of a detention measure under national law, to be *the systematic or structural nature of the enforcement of the measure*: if, under the autonomous criteria applied by the Court, a therapeutic measure is systematically enforced – either pursuant to national law (and even if the latter states that such measure does not constitute a penalty), or in line with a general administrative practice – according to procedures classifying it as a penalty under the criteria applied by the Court, it constitutes a penalty for the purposes of Article 7. If the actual mode of enforcement is unlawful but is not part of a system, it constitutes deprivation of liberty contrary to Article 5 (1) (e).

17. The application of the aforementioned criterion looks complicated and unwieldy at first sight, but one may doubt whether that really is the case. It has the advantage of not unduly reducing the scope of Article 7 and allowing the Court to probe deeply into the realities of the case. It also permits the conclusion that if the administrative practice changes during the enforcement of a measure *the nature of the measure may also change*. In the present case, after the radical changes brought in by the German authorities, a measure which, by dint of its mode of enforcement, fell under criminal law changed its nature and became a therapeutic measure.

18. Does such a system under which a measure can change its nature during its enforcement comprise any risks, for instance where an unsavoury regime has attempted to use it to pretend that measures hitherto classified as penalties are therapeutic? In fact, there would not appear to be any such risk, and the system in question could even reinforce the applicability of Article 7 (from which no derogation is permissible, which is not the case of Article 5). There are two possible scenarios: either a penalty becomes a measure or a measure becomes a penalty. In both cases, by definition, the law must classify the measure *ab initio* as a measure and not as a penalty, otherwise the Article 7 criteria are met *ipso facto*. In the first scenario, which applies to the instant case, unacceptable, unlawful conditions of enforcement are replaced by appropriate conditions. The Court will assess whether the latter are indeed appropriate. It is difficult to imagine a regime "abusing" the possibility of improving the conditions of enforcement. In the second case, the administrative practice degenerates and the formerly acceptable treatment of persons subject to a therapeutic measure is enforced in a non-therapeutic manner rendering it akin to imprisonment. The Court will hold that the measure now falls foul of Article 7 because it has all the hallmarks of a penalty. This would expose an illiberal regime to tighter supervision by the Court.

19. In conclusion, I am in full agreement with the passages in the judgment stating that a measure may change in nature in the course of its execution, but it should be made clear that that is only possible if (1) domestic law classifies the measure as therapeutic; (2) domestic law provides for a mode of enforcement which, according to the Court's autonomous benchmarks, rules out classification as a penalty; and (3) the consistent administrative practice enables the Court to rule out classification as a penalty under an autonomous assessment. In the present case, over the period to be assessed by the Court, those three concurrent criteria were fulfilled.

PARTLY DISSENTING OPINION OF JUDGE SICILIANOS

Translation

1. I voted with the majority for a finding of no violation of Article 5 § 1 of the Convention, agreeing with the conclusion that in so far as the applicant's subsequently-ordered preventive detention was enforced pursuant to the impugned 20 June 2013 judgment up until 18 September 2014 in the Straubing detention centre, it was justified under Article 5 § 1 (e). Apart from the fact that the applicant suffers from a mental disorder and that he is still dangerous, the decisive argument in reaching that finding was the considerable improvement in the applicant's conditions of detention over the period under review, including, above all, his placement in an establishment suited to the needs of psychiatric patients.

2. It is clear from the Court's established case-law that conditions of detention are an important factor for the lawfulness of detention. Thus the Court has found on several occasions that detention ordered "in accordance with a procedure prescribed by law" may prove incompatible with Article 5 § (1) of the Convention if the conditions of detention are (or become) inappropriate (see, among many other authorities, the leading judgment in the case of *Bouamar v. Belgium*, 29 February 1988, Series A no. 129). That was explicitly acknowledged by the respondent Government in the present case in its unilateral declaration concerning the period between 3 August 2012, when the Regional Court adopted its judgment, and 20 June 2013. The contrary proposition – that is to say a finding that unlawful detention has become lawful because of a substantial improvement in the conditions of detention – is, on the face of it, more difficult to accept. However, the arguments set out in paragraphs 162-169 of the judgment in particular convinced me that the applicant's detention during the period in issue had been justified under Article 5 (1) (e) of the Convention.

3. It would, however, be a quantum leap to conclude that the positive developments in the applicant's conditions of detention, particularly his placement in an appropriate therapeutic institution, also suffice to justify the impugned detention in the light of Article 7 § 1 of the Convention. It should be remembered that the impugned facts date back to 1997, when the applicant was nineteen years old, and that he was convicted in 1999. At the time, the Law on Youth Courts had not authorised preventive detention orders for minors or young adults such as the applicant. That option has only been available since 12 July 2008, when the Act of 8 July 2008 introducing subsequent preventive detention in cases of convictions based on criminal law applicable to young offenders came into effect (see paragraphs 55 and 56 of the judgment). The 3 August 2012 order placing the applicant in preventive detention was based on that new law. Consequently, it is obvious that the applicant's situation was affected by a

legislative provision which had not been applicable at the time of the offence. Now, according to Article 7 § 1 of the Convention "... a heavier penalty (shall not) be imposed than the one that was applicable at the time the criminal offence was committed". The whole question is therefore whether the impugned measure amounted to a "penalty" within the autonomous meaning of that concept under the Convention.

4. As the Court pointed out in paragraph 203 of the judgment:

> "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 *Del Río Prada*, cited above, § 81). The wording of the second sentence of Article 7 § 1 indicates that the starting-point – and thus a very weighty factor (see *Glien*, cited above, § 121; and *Bergmann*, cited above, § 150) – in any assessment of the existence of a penalty is whether the measure in question was 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; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV; and *Kafkaris*, cited above, § 142)."

5. As regards the first factor mentioned above, the judgment reiterates that the impugned measure was "linked to the conviction – and thus 'following' the latter – as it was a precondition for the preventive detention order under section 7 (2) of the Juvenile Courts Act (see paragraph 56 above) that the young offender concerned had been imposed a sentence of at least seven years for a felony, in particular, against life, physical integrity or sexual self-determination" (see paragraph 215 of the judgment).

6. Concerning the criterion on procedures involved in the making of the impugned measure, it should be noted that the measure was made by a criminal court in accordance with the applicable provisions of the Code of Criminal Procedure. Moreover, as noted in paragraph 215 of the judgment, "the procedure concerning the offender's preventive detention had to be based on evidence obtained prior to the end of the term of imprisonment imposed for the said offence."

7. In short, the criteria which the judgment describes as "static" or "not susceptible to change after the point in time when the measure was ordered" – that is to say the existence of a measure imposed following a conviction for an offence and the criterion on procedures involved in its making – (see paragraph 208 of the judgment) argue in favour of classifying the measure in question as a "penalty" for the purposes of Article 7 of the Convention.

8. We must now examine the so-called "dynamic" criteria, that is to say the nature, the aim and the severity of the impugned measure.

9. As regards the "severity" criterion, I first of all note that its characterisation as "dynamic" is based on the fact that the applicable provisions specify neither a maximum nor a minimum length of preventive detention (see paragraphs 232 and 234 of the judgment). In other words, the detention can be terminated on the basis of the subsequent assessment of the applicant's situation and of the danger which he represents, in the case of a positive assessment, but on the other hand it might – theoretically at least – continue for the rest of his life. That is why the majority agrees that preventive detention has "therefore remained among the most serious measures which could be imposed under the Criminal Code" (see paragraph 232 of the judgment).

10. Personally, I doubt that the severity of preventive detention constitutes a "dynamic" criterion. I would point out, in that regard, that the third *Engel* criterion has regard to the maximum severity of the measure, in accordance with the applicable provisions. In other words, the third *Engel* criterion – which constitutes the principal source of inspiration in the present case – is not flexible or changeable but inflexible and rigid. If it were to be applied as it stands in the instant case, regard would have to be had solely to the fact that the applicable law does not set out any maximum period and that the preventive detention can consequently continue for the person's whole life.

11. At any event, the applicant had finished serving his sentence on 17 July 2008 and today, more than ten years later, he is still in detention. Under those circumstances I consider that the severity of the impugned measure is a further argument in favour of classifying it as a "penalty". Although the statistics mentioned in paragraph 232 of the judgment – to the effect that at March 2017 591 persons were being held in preventive detention in Germany, which at the time had a population of 81 million – indicate that the impugned measure is used sparingly, from the legal point of view those statistics cannot alter the characterisation of preventive detention as a "penalty" within the autonomous meaning of the concept.

12. We now come to the nature and the aim of preventive detention. This is the principal criterion on which the majority relied to find that the impugned detention did not constitute a "penalty". In my view, it might nevertheless be legitimate to ponder whether that criterion, which is "dynamic" and therefore flexible and changeable, could conceivably counterbalance the other three criteria mentioned previously. In other words, can the nature and aim of the detention turn a "penalty" into a mere preventive measure falling outside the scope of Article 7 of the Convention?

13. In attempting to answer this crucial question, I note that in rounding up the discussion of the nature and aim of the impugned measure, the majority accepts that "'ordinary' preventive detention which is not executed with a view to treating the detainee's mental disorder, even if implemented in accordance with the new legislative framework, still constitutes a penalty

for the purposes of Article 7 § 1 of the Convention. The improved material conditions and care do not, in these circumstances, suffice to erase the factors indicative of a penalty" (see paragraph 228 of the judgment). In other words, the decisive point in "eras[ing] the factors indicative of a penalty" is not so much the improvement of material conditions and care – which can fluctuate over time and is therefore unreliable – but rather the aim of the measure, which must focus on "treating the detainee's mental disorder".

14. With specific regard to the aim of the preventive detention, the judgment would appear to indicate that that aim is in fact twofold. As paragraph 223 of the judgment points out, "[t]reatment aimed at reducing the threat these persons pose to the public to such an extent that the detention may be terminated as soon as possible is now at the heart of that form of detention, both in the interest of the detainee and in that of the public." In other words, preventive detention is geared, first of all, to reducing the danger which individuals such as the applicant pose to society, and secondly to helping the latter to reintegrate into society. The "collective interest" takes precedence over the interests of the detainee.

15. This overall approach would seem to explain the majority's attitude to the relative inertia of the authorities at the Straubing detention centre. Indeed, it emerges from the judgment and the case-file that although the staff at the centre made themselves available to the applicant and provided him with "adequate" and "sufficient" treatment (see paragraph 221 of the judgment), it would not appear that during the impugned period the staff in question offered the applicant any concrete, practical therapeutic protocol or tried to persuade him to follow such a protocol by explaining that it was in his own interests to do so. In substance, the staff would appear to have told the applicant "if you decide to accept treatment, we are there to treat you". Is such an attitude sufficient to pursue the therapeutic aim of preventive detention vigorously enough to erase any other weighty arguments in favour of characterising this measure as a "penalty"? With all due respect to the majority, I think not. I consider that the therapeutic aim criterion, which seems to constitute the majority's main argument, is in fact a fairly weak criterion – at least in the particular circumstances of the present case.

16. More generally, the use of a criterion which is "dynamic", and therefore ongoing and changeable by definition, could well lead to uncertainties incompatible with the substance of the *nullum crimen nulla poena sine lege* principle. It is almost platitudinous to reiterate that that principle is the cornerstone of criminal law and criminal proceedings, and that it forms part of the hard core of the Convention, as a provision from which no derogation is permissible. Any attempt to limit its scope would require recourse to criteria which are reliable and stable enough to ensure the certainty of the law necessary in criminal matters.

17. For all those reasons I believe that the impugned measure was a "penalty", that it fell within the ambit of Article 7 of the Convention, and that there was a violation of that provision in the instant case.

DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE JOINED BY JUDGE DEDOV

Table of contents

I. Introduction (§ 1)..85
First Part – Testing preventive detention under domestic law (§§ 2-55) 86
II. The history of preventive detention (§§ 2-35) 86
A. Forgetting the dark past (§§ 2-20) 86
(i) Fighting the “parasites in the people’s body” (§§ 2-11) 86
(ii) “Lock up - and forever” (§§ 12-18) 90
(iii) Going beyond Hitler (§§ 19-20) 94
B. The slick response to *M.* (§§ 21-31) 95
(i) The legislative response (§§ 21-24) 95
(ii) The judicial response (§§ 25-28) 99
(iii) The Government’s response (§§ 29-31) 103
C. Preliminary conclusion (§§ 32-35) 104
III. The dogmatic of preventive detention (§§ 36-55) 106
A. Adult and young adult offenders (§§ 36-48) 106
(i) Back to the “purposeless majesty” of prison (§§ 36-41)...........................106
(ii) The manipulation of psychiatry (§§ 42-44) 109
(iii) Frustrating legitimate expectations (§§ 45-48) 110
B. Juvenile and young adult offenders (§§ 49-52) 112
(i) No proportionality-based policy (§ 49)..112
(ii) Failing the educational purpose (§ 50)..113
(iii) The inequality of treatment vis-a-vis adults (§§ 51-52)..........................113
C. Preliminary conclusion (§§ 53-55) 114
Second part – Testing preventive detention under international law (§§ 56-129) 116
IV. The context of the dialogue between Strasbourg and Karlsruhe (§§ 56-89) 116
A. The constitutional law context (§§ 56-74)..116
(i) The international-law-friendliness of the Basic Law (§§ 56-59) 116
(ii) The caveat of multipolar human rights’ relations (§§ 60-61) 118
(iii) The Convention-unfriendly interpretation of preventive detention (§§ 62-74)..119
B. The international and comparative law context (§§ 75-85) 124
(i) The United Nations standards (§§ 75-79) 124
(ii) The Council of Europe standards (§§ 80-83)...126
(iii) The comparative law standards (§§ 84-86)..127

C. Preliminary conclusion (§§ 87-89) 129
V. The Strasbourg Court on a slippery slope (§§ 90-129) 131
A. The new illiberal criminal-law standards (§§ 90-110) 131
(i) The minimalist understanding of the principle of legality (§§ 90-94) 131
(ii) The "erasure" of the autonomous meaning of "penalty" (§§ 95-107) 133
(iii) The catch-all construction of "person of unsound mind" (§§ 108-110) 138
B. The overly repressive approach to the present case (§§ 111-127) 139
(i) The biased determination of the applicant's "mental illness" (§§ 111-115) 139
(ii) The unlawfulness of the applicant's detention order (§§ 116-121) 141
(iii) The "special sacrifice" of the applicant's preventive detention (§§ 122-126) 145
C. Preliminary conclusion (§§ 127-128) 147
VI. Final conclusion (§§ 129-130) 149

I. Introduction (§ 1)

1. I voted for a violation of Article 5 § 1 (on account of the applicant's preventive detention from 20 June 2013 onwards), Article 6 § 1 (on account of the lack of impartiality of Judge P.) and Article 7 § 1 (on account of the applicant's mentioned preventive detention) and for no violation of Article 5 § 4 of the European Convention on Human Rights ("the Convention") (on account of the duration of the proceedings for review of the applicant's provisional preventive detention).

My separate opinion concerns only the dissenting vote. It consists of two parts. The first part is devoted to the study of preventive detention under domestic law, with regard to adults, young adults (*Heranwachsenden*)[1] and juveniles (*Jugendlichen*),[2] since it seems to me that the majority judgment has not fully taken into account the historical background (II.) and the dogmatic framework (III.) of this measure and therefore misunderstood its nature and purposes and underestimated its theoretical shortcomings and practical deficiencies.

The second part of the opinion presents the context of the dialogue between the European Court on Human Rights ("the Court") and the Federal Constitutional Court of Germany ("the Constitutional Court" or "the Karlsruhe court") on preventive detention (IV.A.), discussing the latter's Convention-unfriendly interpretation of preventive detention, as well as the international- and comparative-law context of that dialogue (IV.B.). Special emphasis is placed on the contribution of the United Nations and the

---

1 Offenders from 18 to 21 years of age at the time of the commission of the offence.
2 Offenders from 14 to 18 years of age at the time of the commission of the offence.

Council of Europe to this dialogue and, most importantly, to their formal positions on the German preventive detention system. Against the background of the Court's minimalist understanding of the principle of legality, the opinion then assesses how the majority erase the autonomous meaning of the "penalty" notion set out in Article 7 of the Convention and instead put forward a catch-all construction of the Article 5 concept of "person of unsound mind" (V.A.). Finally, on the basis of the collected international, comparative and constitutional law materials, the opinion analyses the domestic authorities' overly repressive approach to the proceedings concerning the applicant's retrospective[3] preventive detention order, which the majority confirmed by large (V.B.). In my view, the complaint under Article 7 logically precedes that under Article 5, because the former pertains to the nature and purpose of the applicant's preventive detention in the Straubing Prison preventive detention centre from 20 June 2013 onwards, while the latter refers to the execution of that detention in an adequate facility and in a proper manner.[4] At all events, this opinion maintains that there was a violation of both provisions (VI.).

First Part – Testing preventive detention under domestic law (§§ 2-55)

II. The history of preventive detention (§§ 2-35)

A. Forgetting the dark past (§§ 2-20)

(i) Fighting the "parasites in the people's body" (§§ 2-11)

2. Introduced in 1933,[5] preventive detention of "habitual offenders"[6] was one of the two main instruments of the national socialist "criminal law

---

[3] For reasons that I will explain below, I use the word "retrospective" with reference to *nachträgliche Sicherungsverwahrung*.

[4] The issue of the lawfulness of the applicant's detention as a person "of unsound mind" under Article 5 § 1 (e) of the Convention arises because that period of preventive detention was not considered as a "penalty" for the purposes of Article 7. If that period of preventive detention were considered as a "penalty" for the purposes of Article 7, the detention would be tested under Article 5 § 1 (a) of the Convention.

[5] Habitual Offenders' and Security Measures Act (*Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung*), of 24 November 1933. On this law see Michael Wagner-Kern, *Präventive Sicherheitsordnung. Zur Historisierung der Sicherungsverwahrung*, Berlin: Berliner Wissenschaftsverlag, 2016; Christian Müller, *Das Gewohnheitsverbrechergesetz vom 24. November 1933, Kriminalpolitik als Rassenpolitik*, Baden-Baden: Nomos, 1997; Jörg Kinzig, *Die Sicherungsverwahrung auf dem Prüfstand: Ergebnisse einer theoretischen und empirischen Bestandsaufnahme des Zustandes einer Maßregel*, Freiburg: iuscrim, 1996; and Joachim Hellmer, *Der Gewohnheitsverbrecher und die Sicherungsverwahrung 1934-1945*, Berlin: Duncker &Humblot, 1961.

[6] Articles 42 e, 42 f Criminal Code of the German Empire.

of the enemy" (*Feindstrafrecht)*, alongside with "defensive detention" (*Schutzhaft*). The crucial difference between these instruments of Nazi criminal policy was that preventive detention could be imposed by the courts in addition to a prison sentence while "defensive detention" was imposed by the SA,[7] the SS[8] and the Gestapo,[9] independently of any pending or future criminal procedure and without any judicial oversight or time limitation.

In the new framework of the German two-track system (*zweispurigen System*) of criminal sanctions, preventive detention was considered as a "custodial measure of correction and prevention" (*freiheitsentziehende Maßregel der Besserung und Sicherung*) applicable whenever the offender's conduct could be perceived as an "act symptomatic of dangerousness" (*Symptomtat für die Gefährlichkeit*). The measure was therefore built upon the offender's "tendency to commit criminal offences" (*Hang, Straftaten zu begehen*).

3. The Nazi Act on Habitual Offenders also introduced retrospective preventive detention, in two types of cases: first, when an offence had been committed before 1 January 1934 and the conditions for preventive detention were met, the court should impose it when public safety so required,[10] and second, the court could retrospectively order (*nachträglich anordnen*) preventive detention for specific recidivists who were serving a prison sentence as of 1 January 1934, when public safety so required.[11]

4. Preventive detention was widely applied to adults, even retrospectively.[12] People in preventive detention (the so-called *Sicherungsverwahrten*) were "unworthy life in the highest potency" (*unwertes Leben in höchster Potenz*), according to Hitler's Minister of Justice Otto Georg Thierack,[13] who also considered them as "parasites on the people's body" (*Parasit am Volkskörper*) in his famous *Richterbrief* no. 4 and called for "the extermination of these foreign bodies of the

---

[7] SA stands for *Sturmabteilung*, which was a paramilitary force of the National Socialist Party during the Weimar Republic. After the taking of power by the Nazi Party, it became a *Hilfspolizei* under Göring. In 1945 the Allied Control Council prohibited and dissolved this organisation.

[8] SS stands for *Schutzstaffel*, which was the military force responsible for the management of the concentration and extermination camps. Although it was initially a Nazi organisation, it was merged with the regular police under Himmler. In 1945 the Allied Control Council prohibited and dissolved this organization.

[9] Gestapo stands for *Geheime Staatspolizei*, which was the secret political police of Hitler. In 1945 the Allied Control Council prohibited and dissolved this organization.

[10] Article 5 § 1 of the Criminal Code of the German Empire.

[11] Article 5 § 2 of the Criminal Code of the German Empire: "*... so kann das Gericht die Sicherungsverwahrung des Verurteilten nachträglich anordnen, wenn die öffentliche Sicherheit es erfordert. ....*"

[12] Joachim Hellmer, *Der Gewohnheitsverbrecher...*, cited above, p. 16.

[13] Tobias Mushoff, *Strafe-Maßregel-Sicherungsverwahrung: eine kritische Untersuchung über das Verhältnis von Schuld und Prävention*, Frankfurt: Lang, 2008, p.25, footnote 118.

community” (*Vernichtung dieser Fremdkörper der Gemeinschaft*).[14] In 1942, Minister Thierack and the SS leader Heinrich Himmler agreed to the handover of “anti-social elements” in the prison system, including those in preventive detention (*Sicherungsverwahrten*), to the police for “extermination by work” (*Auslieferung asozialer Elemente aus dem Strafvollzug an den Reichsführer SS zur Vernichtung durch Arbeit*)[15]. In the concentration camp Mauthausen alone 6 736 people in preventive detention (*SV-Häftlinge*) died in the years leading up to February 1944.[16] The introduction of the preventive detention by the Nazi regime was also closely linked to its infamous euthanasia programme which targeted such criminals, among other groups of people.[17]

5. The 1939 Order on Protection against Dangerous Juvenile Criminals (*Verordnung zum Schutz gegen jugendliche Schwerverbrecher*) and the 1943 Order on the Simplification and Harmonisation of the Criminal Law relating to Juvenile Offenders (*Verordnung über die Vereinfachung und Vereinheitlichung des Jugendstrafrechts*) made it possible to apply the general criminal law to juvenile offenders and therefore also to impose preventive detention.

6. After the end of the Second World War, the Allied Control Council did not revoke preventive detention,[18] in spite of the repeated criticisms of

---

[14] The *Richterbriefe* were political guidelines directed to the judges for the performance of judicial work. If they all make for grim reading, *Richterbrief* Nr. 4 is particularly striking: “*Stellungnahme des Reichsministers der Justiz Thierack zur „Bekämpfung Asozialer“: „Der rücksichtslose Kampf gegen das Berufs- und Gewohnheitsverbrechertum steht seit der Machtergreifung durch den Nationalsozialismus im Vordergrund der gesamten Verbrechensbekämpfung. ...Bereits im Jahr der Machtübernahme wurde dem gefährlichen Gewohnheitsverbrecher durch das Gesetz vom 24. November 1933 mit der Erhöhung der Strafen (§ 20 a RStGB) und Einführung der Sicherungsverwahrung ein unerbittlicher Kampf angesagt. ... Der gefährliche Gewohnheitsverbrecher, der sich stets von neuem an der Volksgemeinschaft vergreift, war schon im Frieden ein Parasit am Volkskörper; im Kriege ist er ein Schädling und Saboteur der inneren Front erster Ordnung.…Der Gesetzgeber hat daraus die erforderlichen Folgerungen gezogen und dem Richter die Mittel an die Hand gegeben, mit denen dieser den Kampf gegen den unverbesserlichen Gewohnheitsverbrecher nunmehr bis zur Vernichtung dieser Fremdkörper der Gemeinschaft fortführen kann…*”, http://www.wienerlibrary.co.uk/Search-document-collection?item=551

[15] Annemarie Dax, *Die Neuregelung des Vollzugs der Sicherungsverwahrung: Bestandsaufnahme sowie kritische Betrachtung der bundes- und landesrechtlichen Umsetzung des Abstandsgebots*, Berlin: Duncker & Humblot, 2017, p. 38, and Tobias Mushoff, *Strafe-Maßregel-Sicherungsverwahrung...*, cited above, p. 25.

[16] *Ibid.*

[17] Christian Müller, *Das Gewohnheitsverbrechergesetz...*, cited above, p. 22.

[18] The Council had initially recommended the suppression of the preventive detention regime, considering it as typical Nazi denial of the right to liberty, but the Cold War and the related tensions between the allied forces led to the failure of the reform. See Michael Wagner-Kern, *Präventive Sicherheitsordnung…*, cited above, p. 60; Jan-David Jansing, *Nachträgliche Sicherungsverwahrung, Entwicklungslinien in der Dogmatik der Sicherungsverwahrung*, Münster: LIT Verlag, 2004, p. 49; and Matthias Etzel, *Die*

"fraudulent labelling" (*Etikettenschwindel*) levelled against it, in view of its severity and the difficulty of distinguishing it from a prison sentence.[19] In the German Democratic Republic, preventive detention was repealed and replaced by other provisions,[20] whereas the Federal Republic of Germany kept it.

7. In January 1953,[21] the Constitutional Court decided that the Basic Law was not breached by the lack of differentiation between the execution of punishment in a penitentiary for penal servitude (*Zuchthaus*) and preventive detention, despite the different legal purpose of the two sanctions. For security reasons it accepted this lack of differentiation as an exception to the general obligation of treating different cases differently, in accordance with the principle of equal treatment (Article 3 of the Basic Law).

8. The Juvenile Courts Act of 4 August 1953 prohibited the imposition of preventive detention on juveniles[22] and on young adults being dealt with under the criminal law relating to juvenile offenders[23], but it remained permissible for young adults who were convicted under the general criminal law,[24] until the First Act to Reform Criminal Law (*Erstes Gesetz zur Reform des Strafrechts*), of 25 June 1969, also prohibited this form.

9. In the Second Act to Reform Criminal Law (*Zweiten Gesetz zur Reform des Strafrechts*), of 4 July 1969, preventive detention became a measure of last resort (*ultima ratio*) in the German two-track system of sanctions, and a maximum of 10 years was introduced.[25]

10. Following a memorable decision of the Constitutional Court of 14 March 1972,[26] the Act on the Execution of Detention and the Custodial Measures of Correction and Prevention (*Gesetz über den Vollzug der*

Aufhebung von nationalsozialistischen Gesetzen durch den Alliierten Kontrollrat (1945-1948), Tübingen: Mohr Siebeck, 1992, p. 169.

19 This was already how Kohlrausch criticised the draft laws on preventive detention during the Weimar Republic (Michael Wagner-Kern, *Präventive Sicherheitsordnung…*, cited above, p. 41). See for a renewal of this critique, Axel Dessecker, "Etikettenschwindel oder Behandlungsvollzug? Kritik der Sicherungsverwahrung und neues Recht" (2012) 33 *Zeitschrift für Rechtssoziologie* 265-282.

20 J. Kinzig, *Die Sicherungsverwahrung...*, cited above, p. 23.

21 BVerfGE 2, 119.

22 Section 7 of the Juvenile Court Act.

23 Section 105 (1) of the Juvenile Court Act.

24 Section 106 (2) of the Juvenile Court Act.

25 As explained by the Constitutional Court, the introduction of that time-limit was needed to respond to the judges' reluctance to use unlimited preventive detention, which they saw as equivalent, in practice, to a life sentence. The insufficiency of the prognosis methodology was also considered as grounds for limiting detention (BVerfGE 109, 133, § 14).

26 BverfGE 2 BvR 41/71. Its main finding was that executing a custodial sentence breached the constitution if interferences with fundamental rights, in addition to the deprivation of liberty, lacked an explicit statutory basis.

Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung) entered into force on 1 January 1977. It included only seven special provisions on preventive detention (sections 129-135), which, moreover, were subject to a reservation as regards feasibility. When drafting the Act, the legislator justified the paucity of those special provisions with the 1953 decision of the Constitutional Court, mentioned above.[27] According to the legislator, preventive detention lacked any therapeutic purpose, unlike other custodial measures of correction and prevention (Articles 63 and 64 of the Criminal Code), which should be executed outside a prison environment, in view of their therapeutic nature.

11. An attempt to replace preventive detention by an autonomous, compulsory, freedom-limiting social therapy measure for the treatment of offenders with severe personality disorders, enshrined in the new Article 65 of the Criminal Code, was discontinued in 1984, the provision being deleted and the solution downgraded to an "optional mode of execution" (*Vollzugslösung*).[28] In addition to the financial costs that such alternative would entail, the main objection raised was the problematic nature of compulsory therapy for offenders who had been declared sane and therefore criminally responsible.

(ii) "Lock up - and forever" (§§ 12-18)

12. Following a series of high-profile murder cases, the formal requirements of preventive detention were softened and the former 10-year limit was removed in 1998, which meant that preventive detention became effectively an order of indefinite duration.[29] The legislator justified that removal on the grounds that the new law did not impact the measure itself, but only its duration, and therefore the constitutional protection against retrospective legislation was not applicable with the same degree of cogency.[30] In the following few years, five German Federal *Länder* enacted laws to detain prospective recidivists in prison.[31]

13. In July 2001, *Bundeskanzler* Gerard Schröder reacted to the murder of an eight-year-old and the burning of its dead body with these words: "there can only be the maximum penalty for a person who puts himself

[27] Zweiter Schriftlicher Bericht des Sonderausschusses für die Strafrechtsreform BT-Drs. 5/4095, p. 31.

[28] Pollähne, in Kindhäuser, Neumann and Paeffgen (eds.), *Strafgesetzbuch Nomos Kommentar*, volume 1, 4. edition, Baden-Baden: Nomos, 2013, annotation 4 to § 61.

[29] The Combat of Sexual Offences and Other Dangerous Offences Act (*Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten*) of 26 January 1998, entered into force on 31 January 1998.

[30] As the Constitutional Court explained in BVerfGE, 109, 133, § 42.

[31] Baden Württemberg (2001), Bavaria (2001), Saxony-Anhalt (2002), Thuringia (2003), Lower Saxony (2003). See also Jörg Kinzig, *Die Legalbewährung gefährlicher Rückfalltäter – Zugleich ein Beitrag zur Entwicklung des Rechts der Sicherungsverwahrung*, Berlin: Duncker & Humblot, 2010, p. 17-28.

outside the human community in such a way" (*Wer sich so außerhalb der menschlichen Gemeinschaft stellt, für den kann es nur die Höchststrafe geben*).[32] The solution was clear for the politician: "lock up - and forever" (*wegschließen - und zwar für immer*), because such conduct showed in itself that the offender was "not recoverable" (*nicht therapierbar*). The punitive mind-set of the Chancellor could not be more transparent. The legislator very quickly followed suit. Accordingly, in 2002, the German Parliament introduced a deferred order of preventive detention, under which the sentencing court may defer the application of a future order of preventive detention, when at the time of the judgment it is probable that the convicted person poses a danger to the general public due to his or her tendency to commit serious offences.[33] Under the Act in question, the final decision as to whether preventive detention is imposed or not is made by the end of the prison term, and furthermore, preventive detention could now be imposed in addition to life-long imprisonment.

14. The following year, deferred preventive detention was extended to young adults who were sentenced under general criminal law.[34] Like the general measure for adults, the new measure could be applied on the basis of the offender's dangerousness at the time of the judgment.

15. By judgment of 5 February 2004,[35] the Constitutional Court confirmed this policy trend by deciding that removing the 10-year limit with retrospective effect was not unconstitutional, since it breached neither the principle of human dignity (Article 1 (1) of the Basic Law),[36] nor the right to liberty (Article 2 (2) of the Basic Law),[37] or the principle of prohibition of absolute retroactivity (*absolute Rückwirkungsverbot*) (Article 103 (2) of the Basic Law),[38] or the principle of protection of legitimate trust (*Vertrauensgrundsatz*) (Article 2 (2) of the Basic Law). In the court's view, measures of correction and prevention, like preventive detention, were not penalties (*Strafen*) within the meaning of Article 103 (2) of the Basic Law and its predecessor, Article 116 of the Weimar Constitution, and could therefore be applied retrospectively.[39] The basic assumption was that the preventive detention was "linked" (*verknüpft*) to unlawful and reproachable

32 *Bild am Sonntag*, 8 July 2001.

33. The Deferred Preventive Detention Act (*Gesetz zur Einführung der vorbehaltenen Sicherungsverwahrung*), of 21 August 2002, entered into force on 28 August 2002.

34 Section 106 of the Juvenile Courts Act in the version of the Reform of the Provisions on Offences against Sexual Self-determination and of Other Provisions Act (*Gesetz zur Änderung der Vorschriften über die Straftaten gegen die sexuelle Selbstbestimmung und zur Änderung anderer Vorschriften*), of 27 December 2003, coming into force on 1 April 2004.

35 BVerfGE 109, 133.

36 *Ibid*., § 70.

37 *Ibid*., § 94.

38 *Ibid*., § 127.

39 *Ibid*., §§ 133, 136 and 144.

conduct on the part of a sane person, but this "link" (*Verknüpfung*) did not give preventive detention the character of a penalty (*Strafe*).[40] The intra-systematic constitutional incoherence that Article 74 (1) No. 1 of the Basic Law subsumed measures of correction and prevention under the concept of "criminal law" (*Strafrecht*), while those same measures were not considered as "penalties" for the purposes of Article 103 (2) of the same Basic law, was dismissed with the argument that the former provision concerned the distribution of legislative competences between the Federal State and the Federate States and had no "liberty-guaranteeing function" (*freiheitsgewährleistende Funktion*).[41]

Yet the Karlsruhe court formulated a caveat: despite the fact that a preventive detention order must be executed in accordance with the general prison rules, as determined by section 130 of the Act on the Execution of Detention and the Custodial Measures of Correction and Prevention (cited above), there should be a "distance" (*Abstand*) between the execution of the preventive detention and that of a prison sentence, "which makes the special prevention purpose of preventive detention clear for the detained person and society at large".[42] This is the so-called "distance requirement" (*Abstandsgebot*). Although the constitutional judges found that it was not for the court to determine the practical features of such principle, they expressed the view that in case of "specially prolonged" preventive detention the "hopeless" detainee should be provided with "additional facilities" in order to guarantee "minimum quality of life".[43]

16. A few days later, on 10 February,[44] another judgment of the same court decided that preventive detention comes under criminal law for the purposes of Article 74 (1) No. 1 of the Basic Law, and is consequently a matter for Federal legislation. Yet the Constitutional Court declared the impugned *Länder* laws regarding preventive detention, namely the Bavarian *Straftäterunterbringungsgesetz*[45] and the Saxony-Anhalt *Unterbringungsgesetz*[46], as merely incompatible (*unvereinbar*) with the Basic Law, according to section 31 (2)(3) of the Federal Constitutional Court Act, and not as null and void (*nichtig*), according to section 95 (3)(1)

---

40 *Ibid*., § 151.
41 *Ibid*., § 137.
42 *Ibid*., § 126.
43 *Ibid*.
44 BVerfGE 109, 190.
45. Bavarian Act on the Committal of Highly Dangerous Offenders particularly prone to recidivism (*Bayerisches Gesetz zur Unterbringung von besonders rückfallgefährdeten hochgefährlichen Straftätern*), of 24 December 2001.
46. Act of the *Land* Saxony-Anhalt on the Committal of Persons particularly prone to recidivism in order to avert serious dangers to public safety and order (*Gesetz des Landes Sachsen-Anhalt über die Unterbringung besonders rückfallgefährdeter Personen zur Abwehr erheblicher Gefahren für die öffentliche Sicherheit und Ordnung*), of 6 March 2002.

of the same Act, in order to avoid the immediate release of all detained persons under the impugned laws.[47] Furthermore, the court determined that the said laws could remain in force until 30 September 2004 with a view to allowing the competent Federal organ to repeal and replace them by other constitutionally compatible legislation.[48] Adopting a proactive stance on the matter, the Constitutional Court instructed the Federal legislator to consider, within a prescribed deadline, the possibility of taking a retrospective decision on the continued detention of the dangerous offenders still detained.[49]

17. Still in 2004, the German Parliament diligently complied with the instruction and approved the retrospective applicability of preventive detention without a previous deferred order when new facts (*nova*) are disclosed before the custodial sentence has been fully served demonstrating that the prisoner poses a danger to the public.[50] The new law entered into force one month before the deadline set by the Constitutional Court. The new measure was extended to both adults and young adults sentenced under the general criminal law. It could be applied to multiple offenders (first constellation of cases: Article 66b § 1 of the Criminal Code) as well as to first offenders (second constellation of cases: Article 66b § 2 of the same Code), and when confinement in a psychiatric hospital was terminated because the condition which excluded or reduced the defendant's criminal responsibility and on which the confinement was based did not exist or no longer existed (third constellation of cases: Article 66b § 3 of the same Code).

18. By decision of 23 August 2006,[51] the Constitutional Court considered that Article 66b § 2 of the Criminal Code (the second constellation of cases) did not violate the ban on the retrospective application of criminal laws and was in conformity with the protection of legitimate expectations guaranteed in a State governed by the rule of law. The legislator's decision, to the effect that the paramount public interest in effective protection of the public from very dangerous offenders outweighed the reliance of the convicted offender on the fact that the law would not be changed to his or her detriment so as to allow his or her continued detention, was compatible with the Basic Law. The Constitutional Court further considered that the said provision did not violate the right to liberty of the

---

[47] BVerfGE 109, 190, § 168. Three judges joined a dissenting opinion, arguing that the impugned provisions were null and void and the persons detained under these provisions should be released immediately, since there were other less intrusive measures that could be adopted to prevent recidivism.

[48] *Ibid*., § 166.

[49] *Ibid*., § 167.

[50] The Retrospective Preventive Detention Act (*Gesetz zur Einführung der nachträglichen Sicherungsverwahrung*) of 23 July 2004, which entered into force on 29 July 2004, inserted Article 66b §§ 1 and 2 into the Criminal Code.

[51] BVerfGE, 2 BvR 226/06.

person concerned. The legislator was authorised by the Basic Law to deprive of his or her liberty a person who is expected to commit offences against life or limb or the liberty of citizens, having regard to the principle of proportionality. As Article 66b § 2 of the Criminal Code applied only in very exceptional cases, that provision had to be considered as a proportionate restriction on the right to liberty.

With similar arguments, the constitutionality of the provision on the first constellation of cases was confirmed by a decision of Constitutional Court of 22 October 2008[52] and that on the third constellation of cases was confirmed by a decision of 5 August of 2009.[53]

(iii) Going beyond Hitler (§§ 19-20)

19. In July 2008 retrospective preventive detention was further extended to juveniles aged between fourteen and eighteen,[54] including when confinement in a psychiatric hospital had been terminated because the condition which excluded or reduced the defendant's criminal responsibility and on which the confinement was based did not exist or no longer existed.[55] Contrary to the legislation on adults, the juvenile regime lost any connection to "habitual offenders", since the "tendency" (*Hang*) to commit offences was not required. In addition, the juvenile regime departed from the adults' law which required that before the end of the execution of the prison sentence facts "have become known" (*werden ... vor Ende des Vollzugs dieser Freiheitsstrafe Tatsachen erkennbar*) which are indicative of the prisoner's dangerousness. In the Juvenile Courts Law the wording was changed to "facts are known ... before the end of youth custody ..." (*Sind ... vor Ende des Vollzugs dieser Jugendstrafe Tatsachen erkennbar*). The important difference is that, according to juveniles' law, the facts had to be

[52] BVerfG, 2 BvR 748/08.
[53] BVerfG, 2 BvR 2098/08.
[54] Section 7 (2) of the Juvenile Courts Act in the version of the Act on the introduction of retrospective preventive detention for convictions under the criminal law relating to young offenders (*Gesetz zur Einführung der nachträglichen Sicherungsverwahrung bei Verurteilungen nach Jugendstrafrecht*) of 8 July 2008, which came into force on 12 July 2008. On this law see Hauke Brettel, "Nachträgliche Sicherungsverwahrung bei jugendlichen Sexualstraftätern", in B. Bannenberg und J.-M. Jehle (eds), *Gewaltdelinquenz, Lange Freiheitsentziehung, Delinquenzverläufe*, Mönchengladbach: Forum Verlag, 2011, 309-316; Heribert Ostendorf and Sandra Petersen, "Nachträgliche Sicherungsverwahrung im Jugendstrafrecht" (2010) *Zeitschrift für Rechtspolitik* 245-249; Christine Graebsch, "Sicherungsverwahrung im Jugendstrafrecht" (2008) *Zeitschrift für Jugendkriminalrecht und Jugendhilfe* 284-287; Jörg Kinzig, "Die Einführung der nachträglichen Sicherungsverwahrung für Jugendliche" (2008) *Zeitschrift für Jugendkriminalrecht und Jugendhilfe* 245-250; and "Entwicklung, Stand und Perspektiven einer Sicherungsverwahrung für Jugendliche und Heranwachsende" (2007) *Recht der Jugend und des Bildungswesens* 155-166.
[55] Section 7 (3) of the Juvenile Courts Act in the version of the 2008 Act mentioned previously.

known before the end of the time in prison, but did not have to be new at that point in time.[56]

20. Among the many criticisms levelled at the governmental proposal during the debate before the competent parliamentary commission of the *Bundestag,*[57] one expert pointed out that, if adopted, this measure would go even further than Nazi legislation had.[58] Others called it a "legislative trick" (*legislativer Kunstgriff*)[59] and an "absurdity" (*Unding*).[60]

B. The slick response to *M.* (§§ 21-31)

(i) The legislative response (§§ 21-24)

21. As a beacon of liberal criminal law reform, the Court reacted to this trend. In *M. v. Germany,*[61] the Court put an end to Germany's criminal law

[56] This change was intentional, since reasons are given for it in the draft law. The draft law explains the harsher conditions in juvenile's law as opposed to adult's law by referring to difficulties with prognosis with respect to people of young age: "*Diese Verlagerung des Entscheidungszeitpunkts an das Ende des Vollzugs ist bei jungen Menschen im Regelfall zur Erhöhung der Prognosesicherheit geboten. Allerdings ist der neue § 7 Abs. 2 JGG, wie sein Wortlaut verdeutlicht ('sind nach einer Verurteilung ... Tatsachen erkennbar' und nicht 'werden nach einer Verurteilung ... Tatsachen erkennbar'), auch dann anwendbar, wenn die wesentlichen die Gefährlichkeit begründenden Tatsachen bereits zum Zeitpunkt des Urteils erkennbar waren und im Jugendstrafvollzug keine erheblichen 'neuen' Tatsachen hervorgetreten sind.*" (BT-Drs. 16/6562, p. 7).

[57] BT-Drs 16/6562.

[58] Intervention of Professor Jörg Kinzig, BT-Dr 16/6562, p. 2.

[59] N. Nestler and C. Wolf, "Sicherungsverwahrung gem. § 7 Abs. 2 JGG und der Präventionsgedanke im Strafrecht - kritische Betrachtung eines legislativen Kunstgriffs" (2008) *Neue Kriminalpolitik* 153-159.

[60] T. Ullenbruch, "Das "Gesetz zur Einführung der nachträglichen Sicherungsverwahrung bei Verurteilungen nach Jugendstrafrecht" - ein Unding?" (2008) *Neue Juristische Wochenschrift* 2609-2615.

[61] *M. v. Germany*, no. 19359/04, 17 December 2009. On the impact of this judgment, see Jörg Kinzig, "The ECHR and the German System of Preventive Detention: An Overview of the Current Legal Situation in Germany", in M. Caianiello and M. Corrado (eds), *Preventing danger: new paradigms in criminal justice*, Durham, NC: Carolina Acad. Press., 2013, 71-95; E. Janus et al, "M. v. Germany: The European Court of Human Rights Takes a Critical Look at Preventive Detention" (2013) 29 *Arizona Journal of International and Comparative Law* 605-622; S. Schlickewei, "Preventive Detention Revisited Before the ECtHR: O.H. v. Germany" (2012) *German Yearbook of International Law* 659-669; T. Bartsch, "Aspekte der Sicherungsverwahrung im Straf- und Maßregelvollzug", in B. Bannenberg und J.-M. Jehle (eds), *Gewaltdelinquenz, Lange Freiheitsentziehung, Delinquenzverläufe*, Mönchengladbach: Forum Verlag, 2011, 291-308; G. Merkel, "Incompatible Contrasts - Preventive Detention in Germany and the European Convention on Human Rights" (2010) *German Law Journal* 1046-1066; H. Müller, "Die Sicherungsverwahrung, das Grundgesetz und die Europäische Menschenrechtskonvention" (2010) *Strafverteidiger* 207-212; M. Möllers, "Die 'Einkesselung' des EGMR durch BVerfG und BGH bei der nachträglichen Anordnung der Sicherungsverwahrung" (2010) *Zeitschrift für Rechtspolitik* 153-156; and M. Grosse-Brömer and O. Klein, "Sicherungsverwahrung als Verfassungsauftrag" (2010) *Zeitschrift für Rechtspolitik* 172-

policy trend of never-ending expansion of preventive detention, by holding that the removal of the 10-year limit with retrospective effect breached Article 7 § 1 of the Convention. The argument was simple: preventive detention was, in the "law in the books", about punishing convicted offenders on the basis of their criminal past and, in the "law in action", its execution was not very different from that of a prison sentence.[62] Therefore, it should be considered as a penalty for the purposes of Article 7 of the Convention and could not be applied retrospectively.[63] Looking back in time, the judges delivered a strong rebuke to the legislator for having failed to implement the distance requirement, set out in the constitutional judgment delivered five years before.

In addition, there was no sufficient causal connection between the applicant's conviction by the sentencing court and his continued deprivation of liberty beyond the ten-year period in preventive detention. His continued detention was therefore not justified under sub-paragraph (a) of Article 5 § 1 of the Convention. Nor was the applicant's preventive detention beyond the ten-year point justified under sub-paragraph (c) of Article 5 § 1, because the applicant's potential future offences were not sufficiently concrete and specific as regards, in particular, the place and time of their commission and their victims.[64] Finally, paragraph (e) could not make the detention lawful either, because the applicant did not have a mental disorder and the domestic courts did not refer to any such disorder.[65]

22. The response of the German authorities was threefold. The legislative response aimed at an overhaul reform of preventive detention.[66]

175.

[62] In *M.*, cited above, § 128, the Court made first a principled argument (the one 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") and only mentioned the situation on the ground as an additional specifying argument ("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.")

[63] After *M. v. Germany*, cited above, the Court was confronted with the question of the compatibility with the Convention of retrospective preventive detention in *Kallweit v. Germany*, no. 17792/07, 13 January 2011, and of the 2002 Bavarian Therapy Placement Act in *Haidn v. Germany*, no. 6587/04, 13 January 2011, and in both cases declared it incompatible.

[64] *M. v. Germany*, cited above, § 102.

[65] *M. v. Germany*, cited above, § 103.

[66] Reform of Preventive Detention Act (*Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung*) of 22 December 2010, which entered into force on 1 January 2011. On this law see Arthur Kreuzer, "Beabsichtigte bundesgesetzliche Neuordnung des Rechts der Sicherungsverwahrung" (2011) *Zeitschrift für Rechtspolitik* 7-11; "Strafrecht als präventiver Opferschutz? — Plädoyer für eine einheitliche vorbehaltene Sicherungsverwahrung anstelle des dringend reformbedürftigen dreigeteilten Systems" (2010) 22 (3) *Neue Kriminalpolitik* 89-95; and Jörg Kinzig, "Die Neuordnung des Rechts der Sicherungsverwahrung" (2011) *Neue juristische Wochenschrift* 177-182.

The main changes were as follows. Firstly, the application of primary preventive detention under Article § 66 of the Criminal Code was substantially narrowed. Secondly, the deferred preventive detention system was expanded. Under certain circumstances, deferred preventive detention under Article 66a of the Criminal Code became possible for offenders who are only sentenced to a five-year prison term. Thirdly, retrospective preventive detention under Article 66b of the Criminal Code and section 106 of the Juvenile Courts Act was removed, with the exception of cases where committal to a psychiatric hospital was terminated because the condition which excluded or reduced the defendant's criminal responsibility and on which the confinement was based did not exist or no longer existed. However, section 316(e)(1) of the Introductory Act to the Criminal Code laid down that the new provisions were to apply only if the offence, or at least one of the offences, for the commission of which preventive detention was to be imposed or deferred had been committed after the Act entered into force on 1 January 2011. Offences committed before this time were still subject to the earlier law.

23. Additionally, a new measure of "therapy placement" (*Therapieunterbringung*)[67] was introduced with the explicit aim of keeping people in detention who would otherwise be released from preventive detention under the Court's case-law. As can be deduced from the wording of the law itself, the aim of this legislation was to continue the deprivation of liberty for more serious offenders with an order of preventive detention, which could no longer be maintained under Article 5 § 1 (a) of the Convention in the wake of *M. v. Germany*.[68] Since referring to Article 5 § 1 (e) did not seem to pose the same problem with respect to retrospective legislation, the German legislator decided to ground the confinement of the very same population (except for the release of some minor cases) on the legal purpose of providing therapy for "persons of unsound mind", seemingly detaching it from the offences that were the original basis for their detention. When drafting the law, the legislator was aware of the fact that by no means all the offenders whom he intended to keep behind bars suffer from a real mental disorder in the strict forensic-psychiatric sense[69],

---

[67] The Act on Therapy and Detention of Mentally Disturbed Violent Offenders (*Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter*) entered into force on 1 January 2011. On this law see Katrin Höffler and Cornelius Stadtland, "Mad or bad? Der Begriff 'psychische Störung' des ThUG im Lichte der Rechtsprechung des BVerfG und des EGMR" (2012) *Strafverteidiger* 239-246; Volker Dittmann, "'Psychische Störung' im Therapieunterbringungsgesetz (ThUG) und im Urteil des Bundesverfassungsgerichts zur Sicherungsverwahrung vom 4. Mai 2011 – Versuch einer Klärung", in J.L. Müller et al. (eds.), *Sicherungsverwahrung – wissenschaftliche Basis und Positionsbestimmung*, Berlin, 2012, 27-42; and C. Morgenstern, "Krank - gestört - gefährlich: Wer fällt unter § 1 Therapieunterbringungsgesetz und Art. 5 Abs. 1 lit. e EMRK?" (2011) *Zeitschrift für internationale Strafrechtsdogmatik* 974-981.

[68] *M. v. Germany*, cited above.

and that, even if they did, there was by no means a serious reason in all cases to believe they could be cured by therapy.[70]

The competent court – which according to this law was a civil law court – could order confinement for therapy if the person suffered from a "mental disorder" (*psychische Störung*), a high probability of certain serious crimes was established and the confinement was necessary for protecting the public. This could take place independent from the fact whether the person was still detained in preventive detention or had been released already.

24. In other words, the Therapy Placement Act engaged in a pure exercise of mislabelling (*Umetikettierung*) of the Convention-incompatible retrospective preventive detention as an allegedly non-criminal, non-punitive measure of therapeutic placement.[71] Although applicable by civil courts, the non-criminal nature of the internment was unclear, as was its concept of "mental disorder" (*psychische Störung*). The artifice used was the intensification of the "magic formula"[72] of the distance requirement. In other words, the legislator doubled down on the distance requirement with a

---

[69] The draft law summarises with respect to the meaning of "*psychische Störung*" in Article 1 of Therapy Placement Act: "*Letztlich deckt der Begriff der „psychischen Störung" ein breites Spektrum von Erscheinungsformen ab, von denen nur ein Teil in der psychiatrisch-forensischen Begutachtungspraxis als psychische Erkrankung gewertet wird*." (BT-Drs. 17/3403, p. 54). During the parliamentary hearings the expert Norbert Leygraf resumed from a psychiatrist's perspective: "*Da eine als gefährlich eingeschätzte Gruppe bislang als psychisch gesund geltender 'Hangtäter' mit Mitteln des Strafrechtes nicht weiter gesichert werden kann, wird eine psychiatrisch verbrämte neue Form der Unterbringung geschaffen, um den weiteren Freiheitsentzug dieser Menschen sicherzustellen. Hierzu wird auf psychiatrische Klassifikationssysteme zurückgegriffen (ICD 10 bzw. DSM IV), obschon die genannten Diagnosemanuale gerade ausdrücklich hervorheben, dass sie als Grundlage einer gerichtlichen Entscheidung nicht hinreichend sind*."
(http://webarchiv.bundestag.de/archive/2013/1212/bundestag/ausschuesse17/a06/anhoerungen/archiv/02_Sicherungsverwahrung/04_Stellungnahmen/Stellungnahme_Leygraf.pdf, p. 5).

[70] This is in fact stated in the explanations to section 9 (2) of the Therapy Placement Act: *Die Sachverständigen sollen zugleich auch Behandlungsvorschläge unterbreiten. Sollte eine Therapie des Betroffenen ausgeschlossen werden, sind in den Gutachten zumindest Vorschläge für eine Behandlung, z. B. mit Medikamenten, der psychischen Störung des Betroffenen zu unterbreiten*." (BT-Drs. 17/3403, p. 57). Norbert Leygraf also pointed to the fact that the legislation explicitly demands from a medical expert to propose at least medical treatment even if treatment for the respective person is in principle considered to be impossible: *Bei den von den Gutachtern vorzuschlagenden Behandlungen werden explizit medikamentöse Behandlungsformen genannt, die vom Gutachter sogar auch dann noch vorgeschlagen werden sollen, wenn eine Therapie des Betroffen eigentlich ausgeschlossen ist (Erläuterungen zu § 8 Abs. 2 ThUG GE)*. (source cited in the previous note).

[71] For a similar problem in *Kuttner v. Austria*, no. 7997/08, 16 July 2015, my opinion, § 9.

[72]. Katrin Höffler and Johannes Kaspar, "Warum das Abstandsgebot die Probleme der Sicherungsverwahrung nicht lösen kann Zugleich ein Beitrag zu den Aporien der Zweispurigkeit des strafrechtlichen Sanktionssystems" (2012) 124 (1) *Zeitschrift für die gesamte Strafrechtswissenschaft* 87, 88.

view to making the practical features of the execution of preventive detention as a non-punitive therapeutic internment appear distinct from the service of a prison sentence and therefore save retrospective preventive detention from Strasbourg reprobation. The political move was risky, but turned out to be quite successful, since the reaction of the national judiciary was supportive.

(ii) The judicial response (§§ 25-28)

25. The judicial response to *M.* was no less dexterous.[73] On 4 May 2011,[74] the Constitutional Court declared the incompatibility of the provisions on the imposition and duration of preventive detention with the fundamental right to liberty, because they did not satisfy the constitutional requirements of the distance requirement.[75] Going further than its 2004 judgment, the court insisted on the "release- and therapy-oriented execution" (*freiheitsorientierte und therapiegerichteten Vollzug*) of preventive detention and its "solely preventive character" (*den allein präventiven Charakter*).[76] According to the Karlsruhe judges, the distance requirement was imperative for all public authorities and should be specified by the legislator alone, who should develop a "release-oriented global concept of preventive detention" (*freiheitsorientiertes Gesamtkonzept der*

[73] On the judicial response to *M.* see J. Kaspar, "Die Zukunft der Zweispurigkeit nach den Urteilen von Bundesverfassungsgericht und EGMR" (2015) *Zeitschrift für die gesamte Strafrechtswissenschaft* 654-690; C. Michaelsen, "From Strasbourg, with Love' - Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights" (2012) *Human Rights Law Review* 148-167; M. Payandeh and H. Sauer, "Menschenrechtskonforme Auslegung als Verfassungsmehrwert: Konvergenzen von Grundgesetz und EMRK im Urteil des Bundesverfassungsgerichts zur Sicherungsverwahrung" (2012) *Juristische Ausbildung* 289-298; B. Sonnen, "Verfassungswidrige Sicherungsverwahrung" (2011) *Zeitschrift für Jugendkriminalrecht und Jugendhilfe* 321-324; M. Pösl, "Die Sicherungsverwahrung im Fokus von BVerfG, EGMR und BGH" (2011) *Zeitschrift für das juristische Studium* 132-146; A. Kreuzer and T. Bartsch, "Urteilsanmerkung zum BVerfG-Urteil" (2011) *Strafverteidiger* 472-480; U. Eisenberg, "Urteilsanmerkung zum BVerfG-Urteil" (2011) *Strafverteidiger* 480-482; Karl Nußstein, "(Kein) Anwendungsbereich des Therapieunterbringungsgesetzes nach dem Sicherungsverwahrungs-Urteil des BVerfG?" (2011) *Strafverteidiger* 633-635; F. Streng, "Die Zukunft der Sicherungsverwahrung nach der Entscheidung des Bundesverfassungsgerichts" (2011) *Juristenzeitung* 827-835; and U. Volkmann, "Fremdbestimmung - Selbstbehauptung – Befreiung" (2011) *Juristenzeitung* 835-842.

[74] BVerfGE 128, 326.

[75] *Ibid.*, §§ 95 and 119. But Article 66 of the Criminal Code in its version in force since 27 December 2003 was not declared void with retrospective effect, but remained applicable and thus a valid legal basis under domestic law, in particular, for the time preceding the Constitutional Court's 2011 judgment. Therefore, the lawfulness of preventive detention ordered and executed in accordance with a previous version of Article 66 for the purposes of Article 5 § 1 (a) of the Convention was not called into question (*Ostermunchner v. Germany*, no. 36035/04, § 84, 22 March 2012).

[76] *Ibid.*, § 101

Sicherungsverwahrung)[77] with such a plethora of norms that it determined the executive's and the judiciary's conduct in "all important fields" (*allen wesentlichen Bereichen*).[78] Acting as a "substitute legislator" (*Ersatzgesetzgeber*), the court set out the required "minimum constitutional standards" (*verfassungsrechtlichen Mindestanforderungen*)[79] for the legislative implementation of the distance requirement and, in addition, set the deadline of 31 May 2013 for the unconstitutional provisions to be replaced by new regulations based on these standards.[80]

Based on the philosophy of the Therapy Placement Act, which was not under review in the constitutional appeal, the Constitutional Court justified confinement in cases where preventive detention was not possible because of the prohibition of retrospective legislation, with the emergence of a "mental disorder" (*psychische Störung*).[81] Since it would be impossible for the future to justify any kind of retrospective preventive detention on the basis of Article 5 § 1 (a) of the Convention, the Constitutional Court explicitly looked for a different justification for retrospective preventive detention in its Article 5 § 1 (e).[82] With this justification, the court accepted the perpetuation of retrospective preventive detention under section 316e of the Introductory Act to the Criminal Code in the "old cases",[83] using a strict proportionality test (*strikten Verhältnismäßigkeitsprüfung*).[84]

Hence, the legislator's rhetoric of the "therapy-orientation" (*Therapieorientierung*) as a means to distinguish the execution of preventive detention from the service of a prison sentence received explicit constitutional approval from Karlsruhe,[85] which imposed an understanding of the distance requirement "with even clearer contours" *(noch deutlicher zu konturieren*).[86] It stressed, in particular, that the constitutional requirement to establish a difference between preventive detention and the service of a prison sentence warranted an individualised and intensified offer of therapy and care by a team of multi-disciplinary staff to those in preventive detention if the standard therapies available in the institution had no prospects of success.[87] At the end of the day, the Karlsruhe court confirmed

---

77 *Ibid*.
78 *Ibid*., § 121.
79 *Ibid*., §§ 171 and 110.
80 *Ibid*., § 167. It is important to note that the court rejected the possibility of interpreting the existing provisions on preventive detention in the light of Article 5 § 1 (e) of the Convention, because the normative content of these provisions could not be changed in this way (*ibid*., § 160).
81 *Ibid*., §§ 120, 130 and 173.
82 *Ibid*., §§ 132, 143 and 151.
83 Cases in which the offence or at least one of the offences for the commission of which preventive detention is to be imposed or deferred was committed before 1 January 2011.
84 *Ibid*., §§ 96, 97, 120, 132, 133 and 172.
85 *Ibid*., §§ 130 and 173.
86 *Ibid*., § 141.
87 *Ibid*., § 113.

its own understanding of a penalty as being different from that of the Strasbourg Court,[88] but insisted that the two notions did not have to be aligned, because what matters is the consideration of the value judgments of the Court in a result-oriented manner.[89] Ultimately, the "matured" (*gewachsene*) German constitutional order should prevail over the "flexibility and lack of precision" (*Flexibilität und Unschärfe*) of the Court's concept formation.[90]

26. In 2012, the German Parliament passed the Prevention Detention (Distinction) Act,[91] inserting a new Article 66c into the Criminal Code.[92] This Act converted the Constitutional Court's standards for the execution of preventive detention into national law, and oddly enough into a provision of the Criminal Code, while keeping intact the old-fashioned Article 129 of the Act on the Execution of Detention and the Custodial Measures of Correction and Prevention (cited above). Given that the *Länder* hold authority for the execution of prison sentences, each *Land* enacted new legislation in order to implement the distance requirement in practice.[93] Deferred preventive detention remained applicable to juveniles,[94] but retrospective preventive detention was removed from Article 7 of the Juvenile Courts Act, with the exception of cases where confinement in a psychiatric hospital was terminated because the condition which excluded or reduced the defendant's criminal responsibility and on which the confinement was based did not exist or no longer existed.[95]

27. The legislator established an important transitional provision, namely Article 316f of the Introductory Act to the Criminal Code, which provided for the application of the retrospective provisions on preventive detention whenever the triggering offence (*Anlasstat*), that is to say the offence or at least one of the offences for the commission of which preventive detention is to be imposed or deferred, had been committed before 31 May 2013. This provision was explicitly designed to enable the courts to make use of the old provisions until the protection of public safety was made possible by deferred preventive detention orders, in other words, for decades to come, in spite of the confessed factually and legally problematic character of the former.[96] Put simply, the new provision of

---

[88] *Ibid*., § 142.
[89] *Ibid*., §§ 91 and 141.
[90] *Ibid*., § 142.
[91] The Prevention Detention (Distinction) Act (*Gesetz zur bundesrechtlichen Umsetzung des Abstandsgebotes im Recht der Sicherungsverwahrung*), of 5 December 2012, entered into force on 1 June 2013.
[92] Paragraph 79 of the present judgment.
[93] Paragraph 77 of the present judgment. For an evaluation of this legislation see Annemarie Dax, *Die Neuregelung des Vollzugs...*, cited above.
[94] Article 7 (2) of the Juvenile Courts Act in the version of the Law of 5 December 2012.
[95] Article 7 (4) of the Juvenile Courts Act in the version of the Law of 5 December 2012.
[96] The draft law which later had been passed gives the following reasoning: "*Damit wird*

Article 316f, like its predecessor, Article 316d, prolonged the transitional period of the Constitutional Court's judgment for an indefinite period of time.

28. On 11 July 2013,[97] the Constitutional Court declared the Therapy Placement Act constitutional provided that it was interpreted strictly, in the sense that internment under the Act had to observe the same restrictive conditions under which retrospective preventive detention could be imposed[98], because the Act was to be considered as "criminal law" for the purposes of Article 74 (1) No. 1 of the Basic Law[99] and the intensity of its intervention in the interned person's right to freedom corresponded to that of preventive detention.[100] In particular, detention under the Therapy Placement Act would only be lawful if the concrete facts suggested that there was a high risk that the person concerned would commit extremely serious crimes. Nevertheless, the concept of "mental disorder" was interpreted broadly, including not only mental illnesses that needed clinical treatment, but also personality disorders of sufficient severity.[101]

Following this decision, all the remaining cases of detention under the Therapy Placement Act were reassessed by the relevant authorities and those concerned were gradually released. At the time of the Committee for the Prevention of Torture ("the CPT") visit in November 2013, only one person in the country was still being subjected to a detention order under the Act in question. The delegation was informed that the aforementioned person was also expected to be released at some stage and that thereafter the Therapy Placement Act would become "obsolete" *de facto*.[102]

Since Article 316 f § 2 allowed for the continuation of preventive detention in cases of its formerly retrospective ordering or prolongation if a mental disorder on the part of the offender was expected to result in extremely serious violent or sexual offences, there was almost no room left for the application of the Therapy Placement Act. Hence, it was not necessary to use this civil-law option of detention because the targeted people could simply be kept in preventive detention by using a similar criminal-law option. This was evidently made possible by the Constitutional

---

... diese rechtlich und tatsächlich problematische Anordnungsform noch so lange fortgeführt, bis der Schutz der Bevölkerung durch den Ausbau insbesondere der vorbehaltenen Sicherungsverwahrung übernommen werden kann." (BT-Drs. 17/9874, p. 12)

[97] Decision of the Federal Constitutional Court of 11 July 2013, BVerfGE 2 BvR 2302/11 and 2 BvR 1279/12.

[98] *Ibid*., § 83.

[99] *Ibid*., § 66.

[100] *Ibid*., § 80.

[101] *Ibid*., §§ 97-117.

[102] Report to the German Government on the visit to Germany by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 November to 2 December 2013, CPT/Inf (2014) 23, § 9.

Court's May 2011 judgment, which had decided, shortly after the Therapy Detention Act had entered into force on 1 January 2011, that under the very conditions stated by this Act, offenders could be kept in preventive detention.

(iii) The Government's response (§§ 29-31)

29. The Government's response in Strasbourg was ingenious. They insisted before the Court on the need to admit under the Convention not only the unlimited retrospective preventive detention of offenders with "mental disorder" (*psychische Störung*), but even the pre-crime detention of allegedly dangerous people for preventive purposes. The tactic paid off. Just two years after *Schwabe and M. G.,*[103] the Court backtracked, in *Ostendorf,*[104] from its previous position, conceding that the obligation to keep the peace by not committing a criminal offence can be considered as sufficiently "specific and concrete" for the purposes of Article 5 § 1 (b) of the Convention "if the place and time of the imminent commission of the offence and its potential victim(s) have been sufficiently specified"[105]. In that same year, the Court delivered judgment in *Bergmann,*[106] reviewing *M.* The present judgment confirms the Court's conceding stance.

30. If an interpretation of Article 5 § 1 (e) of the Convention were accepted that supported the German model of preventive detention as detention of a person of "unsound mind" independent from the criminal law system, this would open the door to preventive detention without a prior offence. The Government's reasoning perceives the connection between the prior offence and the detention as rather loose, because otherwise the detention would have been subsumed as one under Article 5 § 1 (a). This opens up a wide door to detaining someone because of nothing more than a prediction of dangerousness.

31. The Government's success has resonated in some Federal *Länder* which have not shied away from introducing new drastic forms of preventive detention, such as unlimited preventive detention ordered under police regulations (for example, Article 20 of the Bavarian *Polizeiaufgabengesetz* and § 18 of the Bremen *Polizeigesetz*). Although they are imposed under judicial supervision, these are detention measures based on the mere suspicion of future criminal conduct, independently of any pending or future criminal procedure and without any time-limit.[107] *Schutzhaft* is back again, albeit with judicial backing this time.

---

[103] *Schwabe and M. G. v. Germany*, nos. 8080/08 and 8577/08, 1 December 2011.

[104] *Ostendorf v. Germany*, no. 15598/08, 7 March 2013.

[105] *Ibid*, § 93. In their separate opinion joined to *Ostendorf*, Judges Lemmens and Jäderblom considered that purely preventive detention could be justified under Article 5 § 1 (c) of the Convention. This position as now been confirmed by the Grand Chamber in *S., V. and A. v. Denmark*, nos. 35553/12 and others, 22 October 2018.

[106] *Bergmann v. Germany,* no. 23279/14, 7 January 2016.

C. Preliminary conclusion (§§ 32-35)

32. In the logic of the German criminal law system, preventive detention had no therapeutic purpose. An offender of unsound mind is sent, under a hospital detention order, to a forensic psychiatric hospital (Article 63 of the Criminal Code) after an expert concludes that there is a danger of further offences as a consequence of a mental disorder. An offender is sent into preventive detention (Article 66 of the Criminal Code) when there is no underlying mental disorder, only a vicious tendency which could lead to the commission of future offences. Article 63 was aimed at the "mad" offender (that is to say an insane dangerous offender who has committed a criminal offence owing to a mental illness), while Article 66 targeted the "bad" offender (namely a sane dangerous offender who repeatedly commits serious offences (*Gewohnheitsverbrecher*) and is considered as "untreatable" (*unverbesserlich*).[108] This is still the case today: while Article 67d § 6 of the Criminal Code determines that the Article 63 security measure based on a hospital detention order should be terminated (*erledigt*) when the respective requirements no longer prevail, Article 66b of the Criminal Code and section 7(4) of the Juvenile Courts Act still provide for retrospective preventive detention in that situation, which would not be possible if this measure had a therapeutic purpose. Furthermore, Article 67 of the Criminal Code lays down the so-called vicarious system. In case of a mental hospital order or an addiction treatment order, the measure as a rule has to be executed before the prison sentence. When a measure is executed while a prison sentence is still open for execution, the time spent in the clinic in execution of the measure will be counted as prison time up to a total of two-thirds of the prison sentence. Preventive detention is excluded from the vicarious system,[109] obviously because it is not perceived as treatment, but rather as punishment. The *Feindstrafrecht* is still very much alive.

---

[107] Jörg Kinzig, "Die Ausweitung der Sicherungsverwahrung und die daraus resultierenden Probleme für eine zuverlässige Kriminalprognose", in B. Bannenberg und J.-M. Jehle (eds.), *Gewaltdelinquenz, Lange Freiheitsentziehung, Delinquenzverläufe*, Mönchengladbach: Forum Verlag, 2011, 355-366.

[108] In the concept of von Liszt, preventive detention was not supposed to be a measure of correction and prevention, but a punishment for reasons of security, because there was no prospect of success for treatment perceived. Von Liszt compared the habitual offender to a sick limb influencing the health of the whole body, to a cancerous ulcer poisoning society (von Liszt, 'Der Zweckgedanke im Strafrecht' (1883) 3 *Zeitschrift für die gesamte Strafrechtswissenschaft* 36), in this respect anticipating National Socialist thinking and its eliminative practice (Johannes Kaspar, *Die v. Liszt-Schule und der Umgang mit gefährlichen Gewohnheitsverbrechern*, in Arnd Koch and Martin Löhnig (eds.), *Die Schule Franz von Liszts*, Tübingen: Mohr Siebeck, 2016, p. 124).

[109] In the Criminal Code there is no provision similar to that of Article 5 § 3 of the Juvenile Courts Act.

33. In sum, during the over 85 year-long period of existence of preventive detention in German criminal law, it has never been connected to medical or psychiatric treatment, indeed not even to treatment at all. On the contrary, preventive detention has always been considered as being predominantly a freedom-limiting security measure[110] as opposed to the primarily treatment-oriented measures of Article 63 of the Criminal Code (confinement in a mental health hospital) and Article 64 (confinement for drug or alcohol treatment).

34. The epistemic turn-around operated by the Constitutional Court in May 2011, which aligned itself with the Therapy Placement Act's strategic political choice to avoid direct confrontation with Strasbourg, was crowned by the new Article 66c in the Criminal Code introduced by the 2012 Prevention Detention (Distinction) Act. In fact, the German parliamentarians engaged first in a policy of "transubstantiating" preventive detention into a non-criminal law, a non-punitive measure of therapy placement in order to safeguard its autonomy from imprisonment and above all its retrospective applicability. Subsequently, in its judgment of 4 May 2011, the Constitutional Court based the further confinement of those who were subjected to retrospective preventive detention on the conditions set out in the Therapy Placement Act. In practice, this resulted in their continued detention, but not in their placement in therapy, which would have to be ordered by a civil court and in accordance with civil law. Furthermore, the Constitutional Court referred to a new law (the Therapy Placement Act) for the justification of the continuance of preventive detention, including detainees under the juvenile law,[111] for which it had acknowledged a violation of the principle of legitimate expectation (albeit not of the prohibition of retrospective legislation) in the very same judgment. In so doing, the Constitutional Court's judgment produced a retrospective cure of preventive detention even though it explicitly resulted from a new perception of *Sicherungsverwahrte* as people of "unsound mind" and a seemingly *ex nunc* perspective on their dangerousness and the necessity of their future treatment.

35. While Article 316f of the Introductory Act to the Criminal Code limited retrospective preventive detention to offenders with a "mental disorder" and to a high degree of danger of committing the most serious violent or sexual offences, it is a provision not on therapeutic placement in a psychiatric hospital, but on retrospective preventive detention, closely linked to the crime committed in the past for which a conviction without an

---

110. In the Constitutional Court's own words: "*Dieser besondere Charakter der Sicherungsverwahrung tritt bei dauerhafter Unterbringung besonders augenfällig zutage, weil hier der Besserungszweck der Maßregel hinter ihren Sicherungszweck zurücktritt.*" (BVerfGE 109, 133, § 124).

111 Referring to Article 7 of the Juvenile Courts Act see BVerfGE 128, 326, §§ 99 and 156.

order of preventive detention had been proffered. As the distinction of cases with the triggering offence (*Anlasstat*) before or after 31 May 2013 shows, this offence – and not the offender's mental condition – is still the relevant category for the courts' decision.

III. The dogmatic of preventive detention (§§ 36-55)

A. Adult and young adult offenders (§§ 36-48)

(i) Back to the "purposeless majesty" of prison (§§ 36-41)

36. The preventive detention policy of the respondent State is fundamentally flawed. The distinction between guilt (*Schuld*) -based penalties applied to criminally liable persons and dangerousness (*Gefährlichkeit*) -based measures of correction and prevention applicable to non-criminally liable persons and the characterisation of preventive detention as a measure of correction and prevention, despite the fact that it is applied to criminally liable persons, does not stand the scrutiny of the basic principles of modern criminal law, namely human dignity and resocialisation.

37. The fundamental dogmatic error is that of ignoring that a prison sentence should be just as therapy- and liberty-oriented as preventive detention.[112] The principles set out in §§ 106 to 118 of the constitutional judgment of 4 May 2011 and incorporated into Article 66c of the German Criminal Code by the Prevention Detention (Distinction) Act should be applicable both to prison sentences and to preventive detention orders. The provision of individualised treatment which is based on a comprehensive needs assessment and a regularly updated plan of execution (*Vollzugsplan*)[113] is an imperative feature of a resocialisation-oriented organisation of the prison system,[114] especially of long-term prison terms, according to the European Prison Rules and other international standards.[115] Likewise, the focus on therapeutic needs and the promotion of individual liberty, participation and motivation, as well as the goal of the treatment programme to foster the willingness of inmates to become involved in attempting to reduce their dangerousness to society so that they can be conditionally released as soon as possible, are prevailing features of the rational management of the prison system. As a rule, treatment programmes for

[112] The Constitutional Court expanded extensively on the "similarities" (*Ähnlichkeiten*), "functional overlaps" (*Funktionsüberschneidungen*) and "parallels" (*Parallelen*) between these two prison regimes (BVerfGE 109, 2133, §§ 157-162).

[113] This was already at the centre of the Constitutional Court's reasoning in BVerfGE 128, 326, §§ 108 and 109.

[114] *Vinter and Others v. the United Kingdom [GC]*, nos. 66060/09, 130/190 and 3896/10, ECHR 2013 (extracts).

[115] See the commentary to Rule 103 of the 2006 European Prison Rules.

prisoners must include progressive relaxation of the regime and authorisation of temporary prison leave.

38. In other words, the allegedly specific features of preventive detention should also be part and parcel of prison sentences. German legislation itself acknowledges this when, in connection with convicted prisoners who have been conditionally earmarked for preventive detention in their sentences, it determines that the relevant prison authorities are under a legal obligation to provide specific treatment measures to inmates while they are serving their sentence, with a view to rendering subsequent preventive detention as unnecessary as possible (Article 66c § 2 of the Criminal Code).[116] Moreover, even before the inclusion of Article 66c in the Criminal Code, the specific provisions for the execution of preventive detention were already modelled on the enforcement of prison sentences (Articles 130-135 of the Act on the Execution of Detention and the Custodial Measures of Correction and Prevention, cited above).[117] In this context, it comes as no surprise that the Karlsruhe judges consider that resocialisation applies equally to the execution of a prison sentence and to the execution of preventive detention, which "may impose certain *de facto* limits on the details of the distance requirement".[118]

39. More importantly, the distance requirement is based on the assumption that prison sentences and preventive detention have different purposes, the former being primarily a repressive reaction to blameworthy conduct with the objective of "compensating for wrongdoing" (*Schuldausgleich*),[119] and the latter being solely aimed at "the future protection of society" (*zukünftigen Sicherung der Gesellschaft*)[120] against offenders who, on the basis of their previous conduct, are deemed highly dangerous. The assumption that retribution for a wrong (*Schuldvergeltung*) or "compensation for wrongdoing" (*Schuldausgleich*)[121] is the primary purpose of the prison sentence contradicts not only the basic principle of modern criminal law of resocialisation (positive special prevention) of offenders responsible for the culpable commission of a criminal wrong, but also its reliance on human dignity.[122]

40. Since its famous *Lebach* decision in 1973,[123] the Constitutional Court has reiterated that the sole purpose of a prison sentence is

---

116 On this provision see the critical remarks of Norbert Nedopil, "Sicherungsverwahrung und 'psychische Störung' aus psychiatrischer Sicht" in Johannes Kaspar (ed.), *Sicherungsverwahrung 2.0*, Baden-Baden: Nomos, 2017, 57-68.

117 The Constitutional Court itself admits that these provisions are "rudimentary", relating to "marginal areas" (BverfGE 128, 326, § 121).

118 *Ibid*., § 108.

119 *Ibid*., § 105.

120 *Ibid*.

121 *Ibid*., § 108.

122 It is important to recall that the Federal Constitutional Court grounded its demand for a distinction in the 2004 decision in human dignity (Article 1 § 1 of Basic Law).

rehabilitation, and the right to rehabilitation is derived from the principle of human dignity and the humaneness of penalties. Contrary to its long-standing commitment to resocialisation in many other subsequent landmark judgments,[124] the hidden underlying assumption in the German constitutional case-law on preventive detention is still that of a prison sentence as a penalty with its "purposeless majesty", in the famous words of Maurach.[125] When the Constitutional Court acknowledged that blameworthy conduct was "the point of contact" (*Anknüpfungspunkt*) of preventive detention, but not its "ground" (*Grund*), assuming that a prison sentence has its "ground" on such conduct,[126] the metaphysical repressive function of the prison sentence re-entered by the back door and took centre stage in criminal law in Germany.

41. Worse still, this assumption diverts the public authorities from their obligation to provide the means needed for a resocialisation-driven prison system. Put another way, such an assumption dangerously imperils the principle of resocialisation of prisoners, because the full realisation of this principle in prisons would violate the distance requirement as well. Or does the distance requirement mean that the constitutional judges accept that an unconstitutional practice continues to prevail in prisons? This requirement does not fit into the modern criminal-law approach of counteracting the possible damage to the personality (*Haftschäden*) caused by any kind of long-term detention.[127] If the assumption of the "purposeless majesty" of a prison sentence is wrong, as modern criminal law tells us, the distance requirement cannot subsist and, "without the distance requirement, the institution of preventive detention is incompatible with the fundamental right to liberty of detainees under preventive detention."[128]

(ii) The manipulation of psychiatry (§§ 42-44)

42. For a variety of reasons, the respondent State's post-*M.* policy runs the risk of manipulation of psychiatry for the purposes of social repression.[129]

---

123 BverfG 35, 202.

124 For example, BVerfGE 39, 46; and 72, 114.

125. Maurach, *Strafrecht, Allgemeiner Teil*, Karlsruhe: Müller Verlag, 1971, p. 77. For reasons of economy of space, I cannot delve here into the German dogmatic debate on the purposes of punishment, but I refer to my text "Ein unausrottbares Missverständnis, Bemerkungen zum strafrechtlichen Schuldbegriff von Jakobs" (1998) 110 *Zeitschrift für die Gesamte Strafrechtswissenschaft* 640-657.

126 BVerfGE 128, 326, § 104.

127 As reflected in the Constitutional Court's decision on life imprisonment of 21 June 1977 (1 BvL 14/76).

128 BVerfGE 128, 326, § 130.

129 On these reasons see, among many others, Katrin Höffler, "Die Kriminalprognose und das Risiko" and Hauke Brettel, "'Ist gestört, wer ständig stört?' Zum Verhältnis von psychischer Störung und Straffälligkeit", in Johannes Kaspar (ed.), *Sicherungsverwahrung 2.0*, Baden-Baden, Nomos, 2017, respectively, 35-56, and 245-252; Michael Alex, *Nachträgliche Sicherungsverwahrung – ein rechtsstaatliches und kriminologisches*

As a matter of science, there is no correlation between psychiatric diagnosis and dangerousness, especially with regard to juveniles and young adults, whose prognosis is most uncertain. Prognosis of very serious crimes is extremely difficult due to their low base rate, and is arguably impossible in the artificial world of imprisonment, especially in the case of young people of an age conducive to resistance and with a comparatively shorter criminal biography. It is regrettable that the domestic authorities turned a blind eye to the well-documented problems of overestimating the probability of recidivism, leading to the proliferation of "false positives". In fact, the Karlsruhe judges considered the problem of unsafe empirical evidence as a specific ground for the distance requirement and the execution of preventive detention according to this requirement, but failed to take into account that same unsafe aspect with regard to prison sentences. These problems are compounded by recent developments in psychiatry and psychology which have triggered a massive expansion of diagnoses under the category of mental disorders.[130] Many of these disorders are circular constructs in so far as it is the offence which leads to the statement of a disorder. This is especially true for anti-social disorder and sexual preference disorder.

43. In a typically Kafkaesque situation, mental disorder is in practice equated with the detainee's dangerousness ("re-labelling"). Considering that mental illness is not a general requirement of preventive detention, which means that there are offenders with such a mental condition and offenders without it who are detained under § 66 of the Criminal Code, the latter cannot be subject to medical internment in a mental health institution. Yet the Constitutional Court's broad interpretation of "mental disorder" (*psychische Störung*) leads to the serious risk of equating mental disorder with the detainee's dangerousness, just for the sake of keeping him or her in detention longer. This risk of a circular reasoning – in the sense of "anyone who offends in that way has to be mentally disordered, and anyone who offends in that way and has a mental disorder must be dangerous"[131] – is aggravated by the Constitutional Court's understanding of "mental

---

Debakel, Holzkirchen: Felix-Verlag, Holzkirchen, 2013; K. Drenkhahn and C. Morgenstern, "Dabei soll es uns auf den Namen nicht ankommen - Der Streit um die Sicherungsverwahrung" (2012) *Zeitschrift für die gesamte Strafrechtswissenschaft* 132-203; A. Kreuzer, "Kriminalpolitische und rechtliche Aspekte der Reform des Sicherungsverwahrungsrechts", in B. Bannenberg und J.-M. Jehle (eds), *Gewaltdelinquenz, Lange Freiheitsentziehung, Delinquenzverläufe*, Mönchengladbach: Forum Verlag, 2011, 291-308; V. Schöneburg, "Rechtsstaat und Sicherheit: Die Sicherungsverwahrung auf dem Prüfstand" (2010) *Menschenrechtsmagazin* 83-90; H. Ostendorf, "Jugendstrafrecht - Reform statt Abkehr" (2008) *Strafverteidiger* 148-153; Michael Alex, "Nachträgliche Sicherungsverwahrung - eine empirische Bilanz" (2008) *Neue Kriminalpolitik* 150-153; U. Eisenberg, "Nachträgliche Sicherungsverwahrung bei zur Tatzeit Jugendlichen bzw. Heranwachsenden?" (2007) *Juristenzeitung* 143-144.

[130] See my opinion in *Kuttner*, cited above.

[131] See my opinion in *Kuttner*, cited above.

disorder" as a legal concept based on a vague psychiatric diagnosis of antisocial disorder or deviant behaviour and the domestic authorities' uncertain and abstract practice of categorising detainees as dangerous.[132]

44. In this context, it is plain to see that having preventive detention for convicted offenders who had been found mentally fit to stand trial and legally responsible but are mislabelled as "mentally disordered" persons only serves the purpose of prolonging their incarceration *ad aeternum*, and if need be, retrospectively, regardless of whether they are recoverable or not. In fact, the Constitutional Court, in its judgment of 4 May 2011, also adopted this perspective in the case of an appellant *G.* who had been confined in psychiatric hospitals under measures of correction and prevention (Article 63 of the Criminal Code), and whose confinement had been terminated on the grounds that the complainant was unamenable to therapy (*therapieunfähig*), the court having ordered the remainder of the custodial sentences to be executed, and subsequently his preventive detention.[133]

(iii) Frustrating legitimate expectations (§§ 45-48)

45. The uncertainty of the domestic legal framework is compounded by the Constitutional Court's case-law on legitimate expectations.[134] According to the Karlsruhe court, the law may be retrospective in the sense that, while its legal effects are produced only after its publication, it covers events "set in motion" (*ins Werk gesetzt*) before it enters into force, but still not completed at this moment.[135] This is the so-called "spurious retrospectivity" (*unechte Rückwirkung*), which must be differentiated from "genuine retrospectivity" (*echte Rückwirkung*), whereby the new law changes the legal effects of events completed before its entry into force. In respect of retrospective laws in the former 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.

---

132 Karl Nußstein, "Das Therapieunterbringungsgesetz - Erste Erfahrungen aus der Praxis" (2011) *Neue juristische Wochenschrift* 1194-1197.

133 BVerfGE 128, 326, § 64.

134. For a summary of the discussion, Monika Werndl, "Altfallproblematik und rechtsstaalicher Vertrauensschutz in Sachen Sicherungsverwahrung" in Johannes Kaspar (ed.), *Sicherungsverwahrung 2.0*, Baden-Baden: Nomos, 2017, 71-102; Karl Nußstein, "Das Therapieunterbringungsgesetz...", cited above, p. 1194; Jörg Kinzig, "Die Neuordnung ...", cited above, p. 177; and Arthur Kreuzer, "Beabsichtige ...", cited above, p.10.

135 BVerfGE 109, 133, §§ 173 and 174.

46. This is exactly what the Constitutional Court concluded in the *M.* case, which concerned the removal of the 10-year limit with retrospective effect. In this case, the court decided that such removal only affected those who were already under preventive detention at the time of entry into force of the law, and not those whose preventive detention measure had already come to an end at that time. Furthermore, the "common weal" (*das Wohl der Allgemeinheit*) prevailed over the targeted detainees' trust that the lawful 10-year maximum would be kept.[136]

47. In addition to the artificiality of the argument according to which the new law did not affect the measure itself as a legal consequence of the offender's conduct, but only its duration, the balancing exercise performed by the Karlsruhe court obviously comprises the danger that retrospective preventive detention might be misused, in practice, as a corrective action for flawed judgments, in a flagrant distortion of the principle of *ne bis in idem.*

48. In its judgment of 4 May 2011, the Constitutional Court not only did not clarify what situation it referred to as the point of departure from which retroactivity is discussed – the preventive detention (not yet completed), the conviction (completed) or the crime committed in the past (completed) –, but admitted that both in the case of retrospective extension of the time limit of preventive detention (Article 67d § 3 No. 1 of the Criminal Code in conjunction with Article 2 § 6), and in the case of retrospective application of preventive detention (Article 66b § 2 of the Criminal Code and section 7 § 2 of the Juvenile Courts Act), there was an encroachment upon the legitimate expectations of the targeted detainees, irrespective of whether it is assumed as a "genuine" or "spurious" case of retrospectivity[137], and that the violation of the distance requirement gives the legitimate expectations of the targeted person a weight approaching that of an absolute protection of legitimate expectations.[138] The court conceded that in this context the protection of legitimate expectations is closely related and structurally similar to the *nulla poena sine lege* principle.[139] Indeed, it is incomprehensible why an offender sentenced to a prison term benefits from the full protection provided by the principle of legality, including the prohibition of retrospective *lex gravior*, while serving the prison sentence,

---

[136] *Ibid.*, §§ 177 and 187. This justification was later extended by the Constitutional Court's decision of 23 August 2006 on Article 66 § 2 of the Criminal Code (BVerfGE 2 BvR 226/06, §§ 14-16), by its decision of 22 October 2008 on Article 66b § 1, sentence 2, of the Criminal Code (BVerfGE 2 BvR 226/06, §§ 26-37) and by its decision of 5 August 2009 on Article 66b § 3 of the Criminal Code (BVerfGE 2 BvR 2098 and 2 BvR 2633/08, §§ 22-33). This latter case is particularly interesting because in it the court admitted that "genuine" retrospective preventive detention could be compatible with the Basic Law. This position has been reviewed in the decision of 6 February 2013 (BVerfGE 2 BvR 2122/11, 2 BvR 2705/11).

[137] BVerfGE 128, 326, § 134.

[138] *Ibid.*, § 138.

[139] *Ibid.*, § 141.

but loses that protection when in preventive detention after having served his or her prison sentence and "paid" for his or her wrongdoing. Both sanctions are severe interferences with the offender's right to liberty and should therefore be subjected to the same test of legality and the same absolute prohibition of retrospective *lex gravior*, regardless of his or her mental condition. Or should one assume that the *Sicherungsverwahrten,* especially those with a mental disorder, are less worthy of dignity and humanity?

B. Juvenile and young adult offenders (§§ 49-52)

(i) No proportionality-based policy (§ 49)

49. Preventive detention applied to juveniles and young adults was no empirically tested, proportionality-based policy choice.[140] Study of the legislative procedure speaks volumes here. There was neither an evaluation of the results of such regime when applied to adults, nor any consideration of possible less intrusive alternative measures. For juveniles, *a fortiori*, the Human Rights Committee's views on preventive detention of adults should have been taken into account, as follows:

> "To avoid arbitrariness, in these circumstances, the State Party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 14 years during which he was in prison."[141]

Furthermore, the political choice of retrospective application of preventive detention to juveniles was determined by one single case, that of the applicant. In fact, during the parliamentary hearings of the experts, Mr. Konopka, the director of the Straubing detention centre, defended the indispensability of the measure on the basis of the need to keep the applicant in detention.[142] In its decision of 9 March 2010, the Supreme

[140] On this discussion see Bernd-Dieter Meyer, 'Sicherungsverwahrung bei Jugendlichen und Heranwachsenden", in Johannes Kaspar (ed.), *Sicherungsverwahrung 2.0*, Baden-Baden: Nomos, 2017, 217-238; Christian Laue, "Die Sicherungsverwahrung im Jugendstrafrecht", in vorgänge (2015) 205 *Zeitschrift für Bürgerrechte und Gesellschaftspolitik* 43-50; Katharina Karmrodt, *Sicherungsverwahrung bei Verurteilungen nach Jugendstrafrecht*, Berlin, LIT Verlag, 2012; Tillmann Bartsch, "Eine verpasste Chance! Zur Reform der Vorschriften über die Sicherungsverwahrung im JGG" (2013) *Zeitschrift für Jugendkriminalrecht und Jugendhilfe* 182-189; Stefanie Kemme, "Sicherungsverwahrung nach Jugendstrafrecht" (2011) *Praxis der Rechtspsychologie* 93-114.

[141] United Nations Human Rights Committee, *Fardon v. Australia*, (CCPR/C/98/D/1629/2007 10 May 2010) § 7.4.

[142] Mr. Konopka mentioned the case of the applicant as the first of three cases in which preventive detention would be necessary. See P r o t o k o l l der 103. Sitzung am 28. Mai

Court explicitly admitted the connection between the new law and the specific case of the applicant.[143] A criminal law that is approved, in practical terms, for one single person is not just a flagrant breach of the principle of proportionality: it is an attack to the rule of law itself.

(ii) Failing the educational purpose (§ 50)

50. Worse still, the German legislator paid no attention to the specific situation of juvenile offenders, especially regarding the peculiarities of the age of adolescence, the shorter criminal career, the enhanced possibility of therapy and the risk of preventive detention potentially becoming a life sentence. This resulted in no specific instructions being provided for the execution of preventive detention regarding juveniles and young adults.[144] Furthermore, the preventive detention order imposed on juveniles remained focused on neutralisation, rather than resocialisation. Finally, the requirement of at least seven years of imprisonment seems arbitrary and inappropriate to juvenile law, in particular with regard to aggregate penalties. All in all, the policy choice is hardly compatible with the educational concept of juvenile law.

(iii) The inequality of treatment vis-a-vis adults (§§ 51-52)

51. This conclusion is reinforced by the suppression of the requirements of a "tendency" (*Hang*) to commit offences and new facts (*nova*) indicative of the offender's dangerousness during imprisonment in the case of juveniles, which raises a serious issue of inequality *vis-à-vis* adult offenders. With the stated aim of increasing the accuracy of prognosis, it was established that not only new facts which arose during the time in custody could be considered, but any kind of fact, including facts that had already been known to the trial court but had at the time been assessed differently.

52. This political choice was by no means a result of humanist thinking or serious consideration of the problems related to prognosis with young

2008, *Stellungnahme für den BT-Rechtsausschuss*, BT-Drucksache 16/6562 http://webarchiv.bundestag.de/archive/2010/0304/bundestag/ausschuesse/a06/anhoerungen/Archiv/37_Jugendstrafrecht-Sichver/04_Stellungnahmen/Stellungnahrne_Konopka.pdf.

[143]. BGH 1 StR 554/09: "Vorliegend ist zudem die zeitliche Nähe des Erlasses dieses Gesetzes zum Ende des Strafvollzugs des Verurteilten in dieser Sache zu berücksichtigen. Der Verurteilte verbüßte die Strafe aus der Anlassverurteilung bis 17. 7. 2008. Das Gesetz zur Einführung der nachträglichen Sicherungsverwahrung bei Verurteilungen nach Jugendstrafrecht (BGBl I 1212) vom 8. 7. 2008 trat unmittelbar vorher am 12. 7. 2008 in Kraft. Diese zeitliche Nähe lässt den Schluss zu, dass der Gesetzgeber Fallgestaltungen der vorliegenden Art bei Erlass des Gesetzes im Blick gehabt hat und auch diese erfassen wollte."

[144] Hauke Brettel, "Der Vollzug der Sicherungsverwahrung nach § 7 Abs. 2 JGG" (2009) *Zeitschrift für Jugendkriminalrecht und Jugendhilfe* 331-335.

people. Instead it was an obvious opportunity to get rid of the true limiting condition that could in practice obstruct the ordering of retrospective preventive detention. With respect to the law for adults, it had been the necessity of *nova* which, according to the case-law of the Federal Court of Justice, often led to a dismissal of retrospective preventive detention.[145] The Federal Court of Justice made clear that any fact that was considered or could have been considered by a careful trial judge could not serve as *nova* justifying retrospective preventive detention.[146] The requirement of *nova*, as understood by the Federal Court of Justice, was at the time the only serious, effective barrier to the ordering of retrospective preventive detention for numerous prisoners. This was exactly what the legislator wanted to avoid in the case of juveniles.

C. Preliminary conclusion (§§ 53-55)

53. The endless fudging and patching-up legislative exercise regarding preventive detention was made possible by jurisprudential connivance with the "makeshift"[147] solution of the distance requirement. In reality, apart from some quantitative differences (such as cell size or doubling the minimum time for visits per month) the difference between the execution of a preventive detention order and of a prison sentence is only apparent because of the lack of effective implementation of prisoner's rights in prison facilities. If the latter were implemented according to European standards and domestic law, that difference would diminish significantly, or even vanish.[148] Worse still, empirical data show that in practice people in preventive detention either have no access to or do not accept therapeutic proposals.[149] This is usually regarded as being the detainees' fault, but in fact it is quite revealing of the quality of the porposals.[150]

54. Even if we accept, for argument's sake, that preventive detention was imposed in the hospital-like conditions that the Government have depicted, this should not distract us from the hard reality that *Sicherungsverwahrten* are detained, and may remain in detention for the rest of their lives. In the case of juveniles, this can mean life-long imprisonment.

---

[145] In the 2010 law that almost abolished retrospective preventive detention for adults, the Government referred to its ineffectiveness owing to the precondition of *nova* as requested by the Federal Court of Justice (Bundestags-Drucksache 17/3403, p. 13).
[146] BGH NJW 2006, 384.
[147]. Arthur Kreuzer and Tillmann Bartsch, "Gesetzgeberische Flickschusterei und Vollzugsprobleme bei der Sicherungsverwahrung" (2008) *Forum Strafvollzug* 30-33.
[148] Johnannes Kaspar, "Die Zukunft... ", cited above; Franz Streng, "Die Zukunft... ", cited above; and Hauke Brettel, "Nachträgliche Sicherungsverwahrung …", cited above.
[149] T. Bartsch, "Aspekte der Sicherungsverwahrung im Straf- und Maßregelvollzug", in B. Bannenberg und J.-M. Jehle (eds.), *Gewaltdelinquenz, Lange Freiheitsentziehung, Delinquenzverläufe*, Mönchengladbach: Forum Verlag, 2011, 291-308.
[150] As the Constitutional Court has admitted (BverfGE 128, 326, § 123).

As a matter of historical accuracy, one should not forget that the distance requirement was created to guarantee these detainees a "modicum of quality of life", which shows that the underlying assumption was that these were "hopeless" people who were not amenable to therapy and who would stay behind bars for the rest of their lives.[151] At the end of the day, the Constitutional Court recognised that the encroachment made by preventive detention upon the right to liberty, "even if the distance requirement is complied with" (*selbst bei Währung des Abstandsgebotes*), is "comparable" (*vergleichbar*) to a custodial sentence with regard to the permanent deprivation of external liberty[152] and, when explaining why Federal rather than *Länder* legislation was competent to introduce retrospective preventive detention, referred to it as a "penalty" (*Strafe*).[153] The same applied even to therapeutic placement.[154] In the light of the general principles of systematic interpretation of constitutional law, it is indeed hard to understand why the Constitutional Court considers penalties and measures of prevention and correction as two subject-matters of the same nature, namely criminal law (*Strafrecht*), but separates them for the purpose of the principle of legality. This selective position of the Karlsruhe judges speaks volumes about the true punitive meaning of preventive detention and therapy placement.

55. By abandoning the essential feature of the preventive detention regime, that is to say the "tendency" to commit serious offences, the legislator de-characterised the measure when applicable to juveniles.[155] Worse still, by giving up the *nova* requirement, he paved the way for an unlimited repressive juvenile policy, which not only treats juveniles differently, but discriminates against them, since the reasons provided for the difference of treatment do not obtain. This specific bone of contention is of particular importance in the present case, because it was raised by the applicant before the Federal Supreme Court and the Constitutional Court, which confirmed the above-mentioned policy.[156] These arguments can only be fully understood in the context of the conflicting constitutional and international law standards binding the German courts, to which I now turn.

---

151 BVerfGE 109, 133, § 126.
152 *Ibid*., § 136
153 BVerfGE 109, 190.
154 BVerfGE 2 BvR 2302/11, 2 BvR 1279/12 (Zweiter Senat), § 59.
155 BVerfGE 109, 133, § 152.
156 As mentioned explicitly in BVerfGE 128, 326, § 56.

Second part – Testing preventive detention under international law (§§ 56-129)

IV. The context of the dialogue between Strasbourg and Karlsruhe (§§ 56-89)

A. The constitutional law context (§§ 56-74)

(i) The international-law-friendliness of the Basic Law (§§ 56-59)

56. According to the Constitutional Court, the Convention ranks below the Basic Law, being assigned the rank of a Federal law[157]. In view of this

---

[157] BVerfGE 111, 307, § 31. On the relationship betwenn the Convention and the Basic law, Luis López Guerra, "Dialogues between the Strasbourg Court and national courts", in Amrei Müller (ed.), *Judicial dialogue and human rights*, Cambridge, Cambridge University Press, 2017, p. 401-409; Andreas Paulus, "Engaging in judicial dialogue: the practice of the German Federal Constitutional Court", in Amrei Müller (ed.), *Judicial dialogue and human rights*, Cambridge, Cambridge University Press, 2017, p. 258-266; Amrei Müller, "The ECtHR's engagement with German and Russian courts' decisions: encouraging effective cooperation to secure ECHR rights", in Amrei Müller (ed.), *Judicial dialogue and human rights*, Cambridge, Cambridge University Press, 2017, p. 287-338; Julia Rackow, "From conflict to cooperation : the relationship between Karlsruhe and Strasbourg", in Katja S. Ziegler et al (eds.), *The UK and European human rights : a strained relationship?*, Oxford, Hart, 2015, p. 379-399; Thomas Giegerich, "The Struggle by the German Courts and Legislature to Transpose the Strasbourg Case Law on Preventive Detention into German Law", in Anja Seibert-Fohr and Mark E. Villiger (eds.), *Judgments of the European Court of Human Rights : effects and implementation*, Baden-Baden, Nomos, 2014, p. 207-236; Markus Ludwigs, "Kooperativer Grundrechtsschutz zwischen EuGH, BVerfG und EGMR" (2014) 41 *Europäische Grundrechte Zeitschrift* 273-285; Andreas Paulus, "From implementation to translation : applying the ECtHR judgments in the domestic legal orders", in Anja Seibert-Fohr and Mark E. Villiger (eds.), *Judgments of the European Court of Human Rights : effects and implementation*, Baden-Baden, Nomos, 2014, p. 267-283; Andreas Vosskuhle, "Pyramid or mobile? Human rights protection by the European constitutional courts" (2014) 34 *Human Rights Law Journal* 1-3; Christoph Grabenwarter, "Deutschland und die Menschenrechtskonvention : eine Aussensicht", in Sabine Leutheusser-Schnarrenberger (ed.), *Vom Recht auf Menschenwürde : 60 Jahre Europäische Menschenrechtskonvention*, Tübingen, Mohr Siebeck, 2013, p. 109-121; Renate Jaeger and Christiane Schmaltz, "Die deutsche Rechtsprechung und der EGMR : Kooperation oder Konfrontation?" in Sabine Leutheusser-Schnarrenberger (ed.), *Vom Recht auf Menschenwürde : 60 Jahre Europäische Menschenrechtskonvention*, Tübingen, Mohr Siebeck, 2013, p.97-108; Juliane Kokott, "Zusammenwirken der Gerichte in Europa", in von Hanno Kube (ed.), *Leitgedanken des Rechts : Festschrift für Paul Kirchhof*, volume 1, Heidelberg, Müller, 2013, p. 1097-1106; Hans-Jürgen Papier, "Das Bundesverfassungsgericht im Kräftefeld zwischen Karlsruhe, Luxemburg und Straßburg", in Holger P. Hestermeyer (ed.), *Coexistence, cooperation and solidarity*, volume 2, 2012, p. 2041-2056; Christian Tomuschat, "The effects of the judgments of the European Court of Human Rights according to the German Constitutional Court" (2010) 11 *German Law Journal* 513-526; Andreas Vosskuhle, "Multilevel cooperation of the European constitutional courts: der Europäische Verfassungsgerichtsverbund" (2010) 6 *European*

hierarchical ranking, the Convention is not a direct constitutional standard of review, and a complainant therefore may not directly challenge the violation of a human right enshrined in the Convention by means of a constitutional complaint before the Constitutional Court. Nevertheless, the provisions of the Basic Law must be interpreted in an international-law-friendly manner. The Convention guarantees and the Court's judgments serve as helpful interpretative instruments for the determination of the scope and content of fundamental rights of the Basic Law as long as they do not limit or diminish the level of fundamental rights' protection of the Basic Law.[158]

But unlike other international treaties, the Convention bestows on a court the power to deliver a "declaratory judgment" (*Feststellungsurteil*)[159], which has *res judicata* force between the parties, but no cassation force. The State involved in the case has an obligation to restore, if possible, the situation that would have prevailed without the Convention violation found, to guarantee that domestic legal order accords with the Convention and to eliminate any domestic-law obstacle to the redress of the applicant's situation. For the States not involved, the court's judgment provides an "incentive" (*Anlass*)[160] to test the national legal order and orient it in the sense of Strasbourg case-law.

57. All State organs are required to have regard to the Convention and the Court's judgments, which means that both the failure to engage with the Court's judgments and their "schematic execution" (*schematische* "*Vollstreckung*")[161] or "unthinking enforcement" (*unreflektierten Vollzug*)[162] against prevailing domestic law may breach fundamental rights. The duty to have regard to the Convention and to the Court's judgments means, as a minimum, that the latter should be known and included in the decision-making process of the legislature, the competent administrative bodies and the judiciary. The aspects considered by the Court in its balancing exercise must be taken on board when the matter is considered from the point of view of constitutional law, in particular in the proportionality test, and a comparison must be carried out with the results of that balancing exercise.

Constitutional Law Review 175-198; Oliver Klein, "Strassburger Wolken am Karlsruher Himmel: zum geänderten Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrechte seit 1998" (2010) 29 *Neue Zeitschrift für Verwaltungsrecht* 221-225; Gertrude Lübbe-Wolf, "Der Grundrechtsschutz nach der Europäischen Menschenrechtskonvention bei konfligierenden Individualrechten : Plädoyer für eine Korridor-Lösung" in Martin Hochhuth (ed.), *Nachdenken über Staat und Recht : Kolloquium zum 60. Geburtstag von Dietrich Murswiek*, Berlin, Duncker & Humblot, 2010, p. 193-209.

[158] *Ibid*., § 32.

[159] *Ibid*., § 40.

[160] *Ibid*., § 39.

[161] *Ibid*., § 48.

[162] *Ibid*., § 68.

This is an objective obligation, which does not depend on the date of entry into force of a national law. Thus the latter is subject to Convention standards set after its entry into force.

58. In case of a Court finding of a violation, which still obtain at the moment the domestic authorities are confronted with the judgment, they should take it into account and possibly provide clear reasons for the failure to follow it. There are three possible scenarios here. Where a provision of national law has been found incompatible with the Convention, it may still be interpreted in conformity with public international law when applied in practice or be changed by the legislator.[163] Where an administrative act has been found incompatible with the Convention, the competent administrative authority has the "possibility" (*Möglichkeit*),[164] but not the obligation, to quash it in accordance with the provisions of administrative procedural law. Where a judicial decision has been found incompatible with the Convention, the Court's judgments do not have the effect of eliminating the *res judicata* of the domestic judicial decision.

59. State organs must consider the legal consequences of the Court's judgments in the domestic legal order, bearing in mind that Strasbourg jurisprudence decides concrete individual cases argued between the applicant and the Convention party. These judgments may encounter partial national systems of law shaped by a complex system of case-law, in which conflicting human rights positions were harmonised by the construction of groups of cases and a set of ordained legal consequences.[165] Such systems include family law, aliens' law and personality rights. It is the task of the domestic courts to integrate a decision of the Court into the relevant partial legal area of the national legal system, because the Court's judgments cannot undertake directly any necessary adjustments within a domestic partial legal system.

(ii) The caveat of multipolar human rights' relations (§§ 60-61)

60. In the Karlsruhe judges' opinion, the limits of international-law-friendly interpretation result from the Basic Law and the general principles of legal interpretation. Such international-law-friendly interpretation is not possible where it is not defensible in the light of "the recognised methods of legal interpretation" (*methodisch vertretbaren Gesetzauslegung*).[166] The judges give examples of where observing the Court's judgment would not be a suitable interpretation, such as when it "violates statutory law established clearly to the contrary" (*gegen eindeutig entgegenstehendes Gesetzesrecht ... verstößt*) or German Constitutional provisions, in particular the fundamental rights of third parties.[167]

---

[163] *Ibid*., § 51.
[164] *Ibid*.
[165] *Ibid*., § 58.
[166] *Ibid*., § 47.

61. This latter limitation to the reception of the Convention can be relevant particularly in "multipolar fundamental rights relations" (*mehrpolige Grundrechtsverhältnisse*), when the plus of freedom of one fundamental rights' subject means a minus for another fundamental rights' subject.[168] There are three main reasons for the domestic authorities to refrain from observing the Court's case-law in this type of relations: first, they often relate to a sensitive balancing exercise between different individual subjective legal positions whose result may change when there is a change of subjects or in the legal and factual circumstances; second, in a multipolar relation a Court decision may interfere with the subjective rights of several parties which have to be harmonised but where only one of them was able to represent him- or herself before the Court; and third, the possibility for third parties to take part in the Court proceedings is not an institutional equivalent to the rights and duties as a party to proceedings or another person involved in the original national proceedings. The specificity of multipolar human rights' relations also means that they cannot be generalised but must be examined on a case-by-case basis.[169]

(iii) The Convention-unfriendly interpretation of preventive detention (§§ 62-74)

62. The international-law-friendly interpretation includes the duty to consider Convention guarantees and the Court's judgments as having "at least a *de facto* effect as precedents" (*zumindest faktischen Präzedenzwirkung*),[170] even beyond the scope of Article 46 of the Convention. Furthermore, Court judgments which contain new aspects relevant to the interpretation of the Basic Law are "equated to legally relevant changes" (*rechtserheblichen Änderung gleichstehen*)[171] which may prevail over the final judgments of the Constitutional Court. That is why the Constitutional Court agreed to review the issue of the constitutionality of Article 67d § 3 of the Criminal Code in its judgment of 4 May 2011, even though it had already been decided by its judgment of 5 February 2004.[172]

---

167 *Ibid*., § 62.
168 *Ibid*., § 50, and BVerfGE 128, 326, § 93.
169 BVerfGE 120, 180, § 82.
170 BVerfGE 128, 326, § 89. In the same decision, however, the Court denied that the Convention provisions had an effect of "strong precedent, extending beyond the individual case" (über den Einzellfall hinausgehende, strenge Präjudizienbindung).
171 *Ibid*., § 82.
172. Meanwhile Strasbourg had delivered the *M. v. Germany* judgment. On the constitutional law discussion triggered by this case, Christoph Grabenwarter, "Die deutsche Sicherungsverwahrung als Treffpunkt grundrechtlicher Parallelwelten" (2012) 39 *Europäische Grundrechte Zeitschrift* 507-514, and "Wirkungen eines Urteils des Europäischen Gerichtshofs für Menschenrechte - am Beispiel des Falls M gegen Deutschland" (2010) 65 *Juristenzeitung* 857-912; Mehrdad Payandeh and Heiko Sauer, "Menschenrechtskonforme Auslegung als Verfassungsmehrwert: Konvergenzen von

63. Article 1 (2) of the Basic Law is not a gateway towards giving the Convention "direct constitutional status" (*unmittelbaren Verfassungsrang*), but is simply a "non-binding programmatic statement" (*unverbindlicher Programmsatz*) that Basic Law fundamental rights have incorporated human rights as a minimum.[173] According to the Karlsruhe court, the role of the Court's decisions as an auxiliary instrument for interpretation of the Basic Law does not mean that the Basic Law and the Convention guarantees are automatically parallel.[174] It is sufficient to adopt the standards that are expressed in the Court's case-law to the extent that would seem methodically acceptable and consistent with the standards set out in the German Constitution.[175] Hence, a schematic alignment of the meaning of the constitutional notion of penalty with that under the Convention is not mandatory if, in substance, the minimum standards set by the Convention are complied with.[176]

64. In its judgment of 4 May 2011, the Constitutional Court confirmed its constant case-law to the effect that the absolute ban on the retrospective application of lex gravior does not apply to preventive detention and therefore this measure of correction prevention can be applied retrospectively to convicted offenders. The interpretation of what is considered to be a punishment in Germany could not be determined by following the case-law of the Convention, but was to be decided solely in accordance with the German Constitution.[177] This argument led *inter alia* to the maintenance of Article 2 § 6 of the Criminal Code,[178] which allows for the retrospective imposition of measures of correction and prevention.

65. In practice, the Constitutional Court distorted the meaning and purpose of *M. v. Germany*[179] insofar as *M.* considered the manner of execution of the preventive detention in order to reach a detainee-friendly

---

Grundgesetz und EMRK im Urteil des Bundesverfassungsgerichts zur Sicherungsverwahrung" (2012) *Jura* 289-298; Birgit Peters, "Germany's dialogue with Strasbourg: extrapolating the Bundesverfassungsgericht's relationship with the European Court of Human Rights in the preventive detention decision" (2012) 13 *German Law Journal* 757-772; Bertram Schmitt, "Der Einfluss der strafrechtlichen Rechtsprechung des EGMR auf den BGH und das BVerfG : Kommentar" in Nack Jahn (ed.), *Gegenwartsfragen des europäischen und deutschen Strafrechts : Referate und Diskussionen auf dem 3. Karlsruher Strafrechtsdialog am 27.Mai 2011*, Köln, Carl Heymann, 2012, p. 47-51.

[173] *Ibid*., § 90.

[174] *Ibid*., § 86.

[175] BVerfGE 111, 307, § 32.

[176] BVerfGE 128, 326, § 91.

[177] "*Für die gewachsene Verfassungsordnung des Grundgesetzes ist dagegen an dem Begriff der Strafe in Art. 103 GG, wie er in der Entscheidung vom 5. Februar 2004 (BVerfGE 109, 133 <167 ff.>) zum Ausdruck gekommen ist, festzuhalten.*" (BVerfGE 128, 326, § 142).

[178] BVerfGE 109, 133, § 15.

[179] *M. v. Germany*, cited above.

result, namely, to enlarge the scope of application of Article 7 of the Convention and submit this measure to the fully-fledged principle of legality, including the principle of *nulla poena sine lege praevia*. However, the Karlsruhe court reversed the argument in order to reach a detainee-unfriendly result, namely to narrow down the scope of Article 7 and deprive the *Sicherungsverwahrten* of the benefit of that precise principle. This is obviously the result of the non-alignment of the Strasbourg and Karlsruhe courts on the applicability of the principle of *nulla poena sine lege praevia* to preventive detention.

66. At this juncture it is important to note that, one month before the Constitutional Court's judgment of May 2011, the Court delivered an enlightening judgment in the case of *Jendrowiak v. Germany*,[180] which made crystal-clear that the road taken by the domestic authorities after *M. v. Germany* was wrong. In *Jendrowiak*, the Court held that the preventive detention of the applicant, who had committed numerous sexual offences and suffered from a personality disorder, "did not fall within any of the exhaustively listed permissible grounds for a deprivation of liberty under sub-paragraphs (a) to (f) of Article 5 § 1" of the Convention.[181] The language from Strasbourg could not be clearer, and yet the Constitutional Court carried on with its "result-oriented" (*ergebnisorientierten*)[182] interpretation of the Court's judgments.

67. Contrary to the Constitutional Court's assumption, its consideration of the Court's value judgments in a "result-oriented" manner is not sufficient. There must be a Convention-oriented fundamental rights theory, which is something different and more demanding.[183] The Court's judgments do not have a mere "*de facto* function of orientation and guidance for the interpretation of the Convention" (*faktische Orientierungs- und Leitfunktion*),[184] as the Constitutional Court claims. All the Court's judgments have the same legal value, binding nature and interpretative authority, which value, nature and authority are the same for all Contracting Parties to the Convention.[185] The fact that the Convention leaves it to them to decide how they should comply with the duty to observe the provisions of the Convention[186] does not empower States to nullify or circumvent the effect of the Court's judgments. The content of the Court's judgments must not be "rethought" (*umgedacht*)[187] in the receiving constitutional system to such an extent that it deprives them of their meaning and purpose.

---

180 *Jendrowiak v. Germany*, no. 30060/04, 14 April 2011.

181 *Ibid*., §§ 36-38 and 48.

182 BVerfGE 128, 326, § 91.

183. See my separate opinion in *G.I.E.M. S.r.l. and Others v. Italy (GC)*, nos. 1828/06 and 2 others, 28 July 2018, § 85.

184 BVerfGE 128, 326, § 89.

185 *G.I.E.M. and Others*, cited above, § 252, and my separate opinion, paras. 72-86.

186 BVerfGE 128, 326, § 91.

187 *Ibid*., § 92.

68. If the interpretation of the Basic Law fundamental rights in accordance with the Court's judgments cannot result in the protection of the former being restricted, the Basic Law cannot be misused either to lower the level of Convention protection afforded the applicant. In their domestic systems, the Contracting Parties can go beyond the human rights protection afforded by the Court to the applicant, but they cannot, under Article 53 of the Convention, lag behind that level of protection. Such possibility would constitute a blatant distortion of Article 53 of the Convention, which in itself would cause a grave structural crisis in the Convention system. It is certainly not admissible to invoke "other constitutional interests", such as the "safety needs of the community" (*Sicherungsbedürfnis der Allgemeinheit*)[188], *in malam partem*, in order to downgrade the level of protection afforded the applicant by a final judgment of the Court.

69. Nor can the argument of possibly neglected "multi-polar fundamental rights"[189] be invoked here as an obstacle to the full reception of *M.*[190] in the German constitutional order, because the interests of public safety were already thoroughly debated by the parties and duly considered by the Court's case-law on preventive detention[191]. The Court concluded as follows:

> "The Court would further note that its above observations on the scope of the State authorities' positive obligation to protect potential victims from inhuman or degrading treatment which might be caused by the applicant ... apply, *a fortiori*, in the context of the prohibition of retrospective penalties under Article 7 § 1, provision from which no derogation is allowed even in time of public emergency threatening the life of the nation (Article 15 §§ 1 and 2 of the Convention). The Convention thus does not oblige State authorities to protect individuals from criminal acts of the applicant by such measures which are in breach of his right under Article 7 § 1 not to have imposed upon him a heavier penalty than the one applicable at the time he committed his criminal offence."[192]

70. In spite of the serious misrepresentation of the meaning and purpose of *M.*[193] and the systemic risk put by Constitutional Court's reasoning, the

[188]. Other than public safety, the Constitutional Court refers, very discreetly, to "constitutional identity" as an "absolute limit" (BVerfGE 128, 326, § 93), but does not use this argument in the specific case of preventive detention. It seems that preventive detention in itself does not belong to the "constitutional identity" of the Basic Law.

[189] *Ibid*., § 93.

[190] *M.*, cited above.

[191] For example, in *M.*, cited above, § 82, the applicant argued precisely that "His right to lawful detention could not be balanced against public safety concerns." and the Government rebutted the argument, by invoking the "prevention of dangers to the public" and the "preventive aim of the protection of society" (*M.*, cited above, §§ 113 and 116). See also *Jendrowiak*, cited above, §§ 36-38; *S. v. Germany*, no. 3300/10, § 103, 28 June 2012; *G. v. Germany*, no. 65210/09, §79, 7 June 2012; *B. v. Germany*, no. 61272/09, § 88, 19 April 2012; *Kronfeldner v. Germany*, no. 21906/09, §§ 86 and 87, 19 January 2012; and *O.H. v. Germany*, no. 4646/08, §§ 93-94, 24 November 2011.

[192] *Jendrowiack*, cited above, § 48.

majority in the present judgment follow suit, by aligning their interpretation of Article 7 notion of "penalty" with the "minimum standards" of the domestic courts. States are narrowing down the scope of the principle of legality, and the Court is playing along, outsourcing punishment to other sanctions not covered by Article 7 such as administrative confiscation in Italy and preventive detention in Germany.

71. In Italy, the Constitutional Court still views confiscation of property connected to unlawful site development as an administrative measure, which it can then apply to statute-barred offences.[194] In Germany, the Constitutional Court still views preventive detention as a "custodial measure of correction and prevention" (*freiheitsentziehende Maßregel der Besserung und Sicherung*) which is not limited by the *nulla poena sine lege praevia* principle.

72. In both cases, the constitutional courts' acceptance of the Court's principled critique of core features of their systems of criminal sanctions is only apparent. The Court's principled critique of confiscation as an administrative measure in *Sud Fondi*[195] in 2009 and *Varvara*[196] in 2013 was circumvented by the Italian Constitutional Court in its judgment 49/2015, exactly in the same way as the Court's principled critique of preventive detention in *M.* in 2009[197] and its jurisprudential progeny[198] was circumvented by the German Constitutional Court in its May 2011 judgment. Paragraph 151 of the Karlsruhe judgment of 5 February 2004 is still considered as good law today, in spite of its total incompatibility with *M.*[199]

73. Both constitutional courts adhered to their initial positions of principle on the nature of confiscation (as being an administrative sanction) and preventive detention (as not being a *Strafe*) and conceded nothing substantial to Strasbourg. The same happened with the Court's principled critique of *de facto* irreducible whole life in *Vinter*[200] in 2013, which was

---

193 *M.*, cited above.

194 *G.I.E.M. and Others*, cited above.

195 *Sud Fondi S.r.l. and Others v. Italy*, no. 75909/01, 20 January 2009.

196 *Varvara v. Italy*, no. 17475/09, 29 October 2013.

197. *M. v. Germany*, cited above, was about the retrospective prolongation of preventive detention beyond the 10 year limit (Article 67 d § 3 StGB).

198. *Haidn v. Germany*, no. 6587/04, 13 January 2011, *B. v. Germany*, no. 61272/09, 19 April 2012, and *S. v. Germany*, no. 3300/10, 28 June 2012. This group of cases concerned retrospective preventive detention (*Nachträgliche Sicherungsverwahrung*) (Article 66b of the Criminal Code), where the sentencing court's judgment was in fact subsequently corrected by a retrospective preventive detention order.

199. "*Für die gewachsene Verfassungsordnung des Grundgesetzes ist dagegen an dem Begriff der Strafe in Art. 103 GG, wie er in der Entscheidung vom 5. Februar 2004 (BVerfGE 109, 133 <167 ff.>) zum Ausdruck gekommen ist, festzuhalten*." (BVerfGE 128, 326, § 142).

200 *Vinter and Others v. the United Kingdom (GC)*, nos. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts).

circumvented by the Court of Appeal of England and Wales in its *McLoughlin*[201] judgment in 2014. In *McLoughlin*, the Court of Appeal did not budge an inch from its previous position regarding the issue of the compatibility of a whole life order with the Convention, which had been reproached by the Grand Chamber in *Vinter*.

74. In all three cases the Court resignedly swallowed the pill. *Hutchinson*[202] backtracked from *Vinter and Others*, *GIEM and Others*[203] backtracked recently from *Varvara*, and now *Ilnseher* backtracks from *M*. It is sad to see the beacon of human rights and of criminal law reform in Europe failing to uphold the basic principle of the rule of law and abandoning the most fundamental principles of modern criminal law. Illiberal times call for a strong, counter-majoritarian Court, not an illiberal Court. This is particularly so in the light of the teachings of international and comparative law, as it will be subsequently demonstrated.

B. The international and comparative law context (§§ 75-85)

(i) The United Nations standards (§§ 75-79)

75. The principle of legality in the field of criminal law, both in its positive (retrospectivity of *lex mitior*) and negative versions (prohibition on retrospectivity of *lex gravior*), is customary international law, binding on all States, and peremptory law with the effect that no other rule of international or national law may derogate from them.[204] This principle of *ius cogens* applies fully to preventive detention.

76. As a matter of principle, it has already been decided that the imposition of preventive detention on a convicted offender after the service of a prison sentence, even when it was feared that he might be a danger to the community in the future and for purposes of his rehabilitation, violates Article 9 § 1 of the International Covenant on Civil and Political Rights.[205] The retrospective application of such penalty, even when nominally characterised as "civil proceedings", falls within the prohibition of Article 15 of the Covenant.[206] Furthermore, the United Nations has on several occasions voiced its concern about the number of persons in preventive

---

[201] *R v. McLoughlin, R v. Newell*, Court of Appeal, Criminal Division, 18 February 2014 [2014] EWCA Crim 188.

[202] *Hutchinson v. the United Kingdom (GC)*, no. 57592/08, 17 January 2017. See my separate opinion joined to this judgment.

[203] *G.I.E.M. S.r.l. and Others*, cited above. See my separate opinion joined to this judgment, particularly in paras. 61-63, on the Court's current efficiency-interests-oriented approach to criminal law.

[204] See my separate opinion in *Maktouf and Damjanovic v. Bosnia and Herzegovina (GC)*, nos. 2312/08 and 34179/08, 18 July 2013, §§ 2-9.

[205] United Nations Human Rights Committee, *Fardon v. Australia* (CCPR/C/98/D/1629/2007 10 May 2010).

[206] *Ibid*.

detention in Germany and the duration of such detention, as well as the fact that conditions of detention have not been in line with human rights requirements in the past[207].

77. In the UNHRC's view, the State Party should take the necessary steps to use the post-conviction preventive detention as a measure of last resort and create detention conditions for detainees, which are distinct from the treatment of convicted prisoners serving their sentence and only aimed at their rehabilitation and reintegration into society. The State Party should provide all legal guarantees to protect the rights of those detained, including periodic psychological assessment of their situation which can result in their release or the shortening of their period of detention.

78. The CAT considers that the State Party should take all the requisite steps to release persons in preventive detention, to reduce its duration and to limit the cases in which it is imposed, and also to take into account the provisions of the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) when devising alternative measures to preventive detention.[208]

79. Most importantly, the United Nations Working Group on Arbitrary Detention concluded that:

> "27. If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 of the International Covenant on Civil and Political Rights and customary international law prohibit a retrospective increase in sentence. States may not circumvent this prohibition by imposing a detention that is equivalent to penal imprisonment under any other label. Articles 9 and 15 of the Covenant and customary international law, as restated by the Human Rights Committee in its general comment No. 35 (2014) on article 9 (liberty and security of person) and in the practice of the Working Group, clearly prohibit the imposition of the new preventive detention regime of 1998, including the provisions which would allow the extension of detention after the completion of penalties (and other restrictions under domestic law).
>
> 28. The Working Group notes that it is still unsatisfactory that certain detention regimes and restrictions on personal liberty that, under international law, are considered punishment are not so considered under German law, and that consequently there are different guarantees against retroactivity, including less effective remedies."[209]

(ii) The Council of Europe standards (§§ 80-83)

80. The CPT has been very critical of the discrepancy between the theory and the practice of preventive detention in Germany.[210] When

[207] United Nations Human Rights Committee concluding observations on the sixth periodic report of Germany, CCPR/C/DEU/CO/6, 2 November 2012.

[208] United Nations Committee against Torture concluding observations, CAT/C/DEU/CO/5, 12 December 2011.

[209] Report of the Working Group on Arbitrary Detention, Addendum, Follow-up mission to Germany, A/HRC/30/36/Add.1, 10 July 2015.

[210] It is particularly regrettable that the majority do not give the CPT reports the same weight they were accorded in *M.*, cited above, § 129.

visiting the "Unit for Secure Placement" (*Sicherungsverwahrung*) in Berlin-Tegel Prison in 2005, the CPT concluded that "[i]n theory, at least, the unit offered opportunities for a positive custodial living environment."[211] However, the delegation got the impression 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."[212] According to the prison administration, staff worked according to special treatment criteria, the aim being the individual's release from placement in *Sicherungsverwahrung*. 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.[213] ... The delegation gained the distinct impression that the staff themselves were not clear as to how to approach their work with these inmates. ... Psychological care and support appeared to be seriously inadequate."[214]

81. In a visit to the Freiburg Prison's separate unit for preventive detention in 2010, "the delegation observed that the conditions of detention of persons in preventive detention were scarcely better than those of sentenced prisoners ... it would appear that the general obligation to differentiate between these two groups of inmates (*Abstandsgebot*) was not effectively implemented".[215]

82. After visiting the new Freiburg detention unit for preventive detention in 2013, the CPT stated that "it is somewhat regrettable that the entire detention unit remained rather prison-like and that the freedom of movement of inmates within the establishment and access to the outdoor exercise yard was more restricted than at Diez Prison (in particular, at weekends)."[216] In the Hohenasperg Socio-therapeutic Institution, the delegation received many complaints from inmates about the generally cramped conditions and the lack of privacy in the establishment. In the Freiburg prison, the head of the psychology service indicated that, due to the limited staff resources, it was not possible to organise individual therapy on a weekly basis, that it was not possible to reach out to those who were lacking any motivation and were unwilling to engage themselves in

---

[211] 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, § 96).

[212] *Ibid*.

[213] *Ibid*.

[214] *Ibid*., § 99.

[215] Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 November to 7 December 2010 (CPT/Inf (2012) 6), § 107.

[216] Report to the German Government on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 November to 2 December 2013, CPT/Inf (2014) 23, § 15.

therapeutic measures and that it was not possible to organise milieu therapy in an effective manner[217]. The situation appeared to be even more worrying at Diez Prison. The conclusion was telling: “the visit revealed a striking discrepancy between theory and practice. Out of 40 inmates, only 24 were receiving individual therapy and only eight were participating in group therapy. ... There can be no doubt that the existing resources for treatment measures for persons in preventive detention in Baden-Württemberg and Rhineland-Palatinate were insufficient to meet the requirements of the relevant Federal and *Länder* legislation, namely to have a system of programmes focused on therapeutic needs and promoting individual liberty and motivation.” At both Diez and Freiburg Prisons, the delegation observed that “a significant number of inmates were not at all motivated to engage themselves in any kind of therapeutic or recreational activity, remained idle in their rooms and refused to go into the open air for months on end.”[218]

83. Regarding the issue of what he referred to as “secured custody” (*Sicherungsverwahrung*)[219], the Council of Europe’s Commissioner for Human Rights called for “an extremely considerate application of secured custody. Alternative measures should also be considered before recourse to secured custody is taken.” He was concerned about the rising number of people deprived of their liberty under secured custody. 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.

(iii) The comparative law standards (§§ 84-86)

84. The majority invoke the existence and legal classification of “comparable measures in other Contracting Parties to the Convention”,[220] in an implicit reference to the States’ discretion in the determination of this issue. Yet the majority do not go so far as to argue that the respondent State had a margin of appreciation in regard to the classification of the preventive detention as a penalty. As a matter of principle, there is no margin of appreciation in this field of law (classification of criminal offences and penalties), given that no derogation is allowed from Article 7 of the Convention.[221]

[217] *Ibid.*, § 17.
[218] *Ibid.*, § 19.
[219] Mr Thomas Hammarberg’s report on his visit to Germany from 9 to 11 and from 15 to 20 October 2006 (CommDH(2007)14 of 11 July 2007)
[220] Paragraph 210 of the judgment.
[221] I have made this point in other separate opinions, such as the one joined to *Khamtokhu and Aksenchik v. Russia*, nos. 60367/08 and 961/11, 24 January 2017, § 31 of my opinion.

85. The majority divide the States surveyed into three groups. The first group of ten States[222] permits courts to issue protective measures to detain individuals who have some degree of mental disorder, albeit not to such a degree as to exclude their criminal responsibility, have been convicted of a serious offence and are found by the authorities to pose a risk to themselves or others. Under such systems, protective measures can be imposed in addition to the penalty assigned for the committed crime. The second group comprises sixteen States[223] which, while sentencing such offenders, nevertheless impose measures that permit the sentence to be served in a specialised psychiatric institution. A third group includes five States[224] where individuals who commit a crime while suffering from a mental disorder which requires compulsory mental health treatment must be treated under the ordinary civil regime for the mentally ill. The focus of the research study is on the first group. Of the ten countries that make up the first category, six[225] require the sentencing court's judgment to comprise either an order for the preventive measure itself or the possibility of adopting the measure by the end of the prison sentence, three[226] allow the measure to be imposed after the sentence and before the termination of the execution of the sentence, and one allows both, depending on the applicable regime.[227]

86. Apart from the fact that it lacks a detailed analysis of the legal and jurisprudential context of the specific domestic norms investigated, the obvious methodological problem with the majority's survey is that the research question – "measures ... to protect the public from convicted offenders of unsound mind who risk committing further serious offences on their release"[228] – was too broad. As a result, the report covered many measures that seem to be comparable, but at closer look are not. In sum, in the thirty-two States surveyed only three (Belgium[229], the United Kingdom[230]

222. Belgium, France, the Former Yugoslav Republic of Macedonia, the Netherlands, Norway, Poland, Serbia, Slovakia, Switzerland, and the United Kingdom.

223. Albania, Austria, Azerbaijan, Bulgaria, Croatia, Finland, Hungary, Latvia, Liechtenstein, Luxembourg, Montenegro, Portugal, Russia, San Marino, Slovenia, and Turkey.

224. Armenia, Estonia, Greece, Moldova, and Sweden.

225. See Article 93 of the Polish Criminal Code, Article 706-53-13 of the French Code on Criminal Procedure, Article 81 of the Serbian Criminal Code, Article 43 of the Norwegian Criminal Code, Article 37 of the Dutch Criminal Code, and Articles 63-65 of the Macedonian Criminal Code.

226. The three countries that permit the imposition of protective measures even when the sentencing court's judgment did not provide for that possibility are also those in which the protective regime does not change according to whether the offender's mental condition was known at the time of sentencing or only discovered thereafter (Belgium, the United Kingdom, and Switzerland).

227. Section 73 and 81 § 3 of the Slovak Criminal Code.

228 Paragraph 98 of the judgment.

229 Act of 5 May 2014. In Belgium, the measure may be imposed after the sentence

and Switzerland[231]) have measures with some degree of similarity to the German one. In any event, the European consensus is certainly not in favour of retrospective preventive detention, and most certainly not in favour of such measure for juveniles.[232] A very telling fact is that in France the Constitutional Council prohibited the retrospective application of a measure of preventive detention, in view of its "liberty-restricting nature".[233]

C. Preliminary conclusion (§§ 87-89)

87. In the 21st century Karlsruhe judges still favour the classical dualist model of relationship between international and domestic law. If the model is tempered by a principle of public-international-law-friendliness (*Völkerrechtsfreundlichkeit*) in the domestic legal system, that friendliness has effect within the limits set by the "fundamental principles of the constitution" (*tragende Grundsätze der Verfassung*).[234] The Convention, like any other international treaty, will only be valid domestically when it is incorporated into the domestic legal system in the proper form and in conformity with substantive constitutional law and even infra-constitutional law.

88. Despite the fact that the conception of multipolar relations derives from the area of civil law, with this construction, the Constitutional Court has empowered itself to weigh in other delicate areas, like criminal law, the consequences of observing the Court's judgments against the expected infringements of the fundamental rights of the public or potential victims. Hence, even in areas in which absolute rights on the part of the offender are to be respected, such as criminal law, human rights are subjected to a balancing exercise, which may result in the opposite of what the

through a special procedure that requires a two-month observation period before passing to the stage at which a court may order detention (Art. 6 of the Act of 5 May 2014). According to the Belgian Constitutional Court, such detention may take place after the completion of the sentence, provided three conditions are met: the existence of a real and permanent mental disorder must be demonstrated, the disorder must be of such a nature as to justify detention, and detention must last only as long as the disorder persists, so that the detained person has the possibility of release as soon as they are healthy (Decision no. 22/2016, B.3 and B.68.3, 18 February 2016).

[230] The "hybrid order" introduced by the Crime (Sentences) Act of 1997.

[231] Articles 59 and 64 of the Swiss Penal Code.

[232] Christian Bochmann, "Freiheitsentzug bei jugendlichen Straftätern in Europa" (2008) *Zeitschrift für Jugendkriminalrecht und Jugendhilfe* 324-329; Heribert Ostendorf and Christian Bochmann, "Nachträgliche Sicherungsverwahrung bei jungen Menschen auf dem internationalen und verfassungsrechtlichen Prüfstand" (2007) *Zeitschrift für Rechtspolitik* 146-149.

[233] French Constitutional Court, Decision No. 2008-562 DC, 21 February 2008, §§ 9-10; and United Nations Human Rights Committee Concluding Observations on the report submitted by France (CCPR/C/FRA/CO/4), of 31 July 2008, § 16.

[234] BVerfG 2 BvR 1481/04, § 35.

Constitutional Court originally set out to achieve – namely that the application of the Basic Law could only lead to a stronger protection of Convention rights, not to their weakening. This weakening is exactly what did happen after *M. v. Germany*. The Constitutional Court's claim that it is competent to recalibrate, in the light of the Basic Law, the different rights and interests at stake after the Court delivered its final judgment deprived offenders in preventive detention of their Convention right to the observance of the principle of *nulla poena sine lege praevia*.

The United Nations and Council of Europe expert bodies have voiced strong criticism of the German solution, even after the epistemic turn-around effected in the judgment of 4 May 2011. Two years after that constitutional judgment, which severely reproached the "shortcomings" and "considerable defects"[235] of the execution of preventive detention in Germany, the CPT still concluded that the reality had not changed much. Regardless of any changes on the ground, the imposition of preventive detention, including its primary (Article 66 of the Criminal Code), deferred (Article 66a of the Criminal Code) and retrospective (Article 66b of the Criminal Code) versions, after the service of a prison sentence violates both customary international law and treaty law. Hence, the abolition of preventive detention, including its primary, deferred and retrospective versions, is the path to be taken by the German legislator in order to be in line with international law. Two risks are usually mentioned with a view to rejecting such a path. The alleged risk that it could end up aggravating the length of prison sentences is no excuse, because it could be countered with a combination of alternative penal and social therapy measures. The alleged risk that abolition would cause an increase of serious offences is nothing but scientifically unfounded, political scaremongering.

89. In comparative-law terms, the isolation of Germany is patent. No State in Europe provides for retrospective post-sentence preventive detention for adults, let alone for juveniles, held responsible for their offences by the trial court, but considered to be of unsound mind during the execution of the prison term and therefore dangerous. The majority misunderstand this fact. But their findings of the case must also be seen against the background of the Court's minimalist understanding of the principle of legality and the current slippery slope in which the Court has embarked regarding criminal law.

---

[235] BVerfGE 128, 326, §§ 122-128: "The persons affected are as it were subjected to an unconstitutional deprivation of liberty in full awareness of the situation" (*Die Betroffenen werden gleichsam "sehenden Auges" einer verfassungswidrigen Freiheitsentziehung unterworfen*.)

V. The Strasbourg Court on a slippery slope (§§ 90-129)

A. The new illiberal criminal-law standards (§§ 90-110)

(i) The minimalist understanding of the principle of legality (§§ 90-94)

90. The Court's case-law enshrines a common-law understanding of the legality principle protected only in a minimal fashion, in the sense that criminal law is not interpreted in an arbitrary fashion.[236] The case-law is still distant from the higher level of protection provided by the civil-law conception of the principle of legality, which includes the guarantees of *lex scripta* (*Gesetzlichkeitsprinzip*), *lex certa* (*Bestimmtheitsgebot*), *lex stricta* (*Analogieverbot*) and *lex praevia* (*Rückwirkungsverbot*).

91. Under the heading of *lex certa*, the Court deals with the clarity, foreseeability and accessibility requirements of criminal law. As can be seen for example in *Kokkinakis,*[237] *Grigoriades* [238] and *Flinkkilä and Others*,[239] the clarity standard is often assessed at the time of conviction, under the lawfulness test of Articles 8 to 11 of the Convention, and not at the time of commission of the offence.[240] The accessibility requirement is only examined thoroughly when there are clear signs to the contrary, accessibility being assumed when the offence is included in a criminal code.[241] Furthermore, case-law has been rather undemanding on the review of the wording of the statutory provision for the purpose of assessing its foreseeability, often accepting vaguely worded offences, because the impugned statutory concepts are "matters of common knowledge and widely understood".[242] The Court's limited standard of protection is further loosened by the consideration of sufficiently consistent interpretative case-law at the time of the offence, which can satisfy the foreseeability requirement in case of vaguely worded offences[243] or even of common-law

---

[236] Mikhel Timmerman, *Legality in Europe. On the principle "nullum crimen, nulla poena sine lege" in EU law and under the ECHR*, 2018; Susana Sanz-Caballero, "The principle nulla poena sine lege revisited: the retrospective application of criminal law" (2017) 28 *European Journal of International Law* 787; C. Peristeridou, *The Principle of Legality in European Criminal Law*, Cambridge: Intersentia, 2015; and K. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge: Cambridge University Press, 2009.

[237] *Kokkinakis v. Greece,* no. 14307/88, 25 May 1993.

[238] *Grigoriades v. Greece*, no. 24348/94, 25 November 1997.

[239] *Flinkkilä and Others v. Finland*, no. 25576/04, 6 April 2010.

[240] *Baskaya and Okçuoglu v. Turkey*, nos. 23536/94 and 24408/94, § 50, 8 July 1999.

[241] *Korbely v. Hungary,* no. 9174/02, §§ 60, 63 and 75, 19 September 2008.

[242] See already the separate opinion of Judge Martens in *Kokkinakis*, cited above, see also *Ashlarba v. Georgia*, no. 45554/08, §§ 37 and 40, 15 July 2014; *Kuolelis, Bartosevicius and Burokevicius v. Lithuania*, no. 74357/01 and others, § 121, 19 February 2008; and *Grigoriades*, cited above, §§ 37 and 38.

[243] *Kokkinakis*, cited above, § 40; and *Cantoni v. France*, no. 17862/91, § 35, 11 November 1996.

offences, which breach the *lex scripta* requirement.[244] The same philosophy had been applied to the increase of penalties consistent with a certain line of case-law on the effects of recidivism.[245] In sum, the acceptance of multiple sources of law and case-law for the purposes of the *lex certa* requirement leads to legal uncertainty.

92. Under the heading of *lex stricta*, the Court merely rules out unreasonable interpretations. Normally, two requirements are put forward in this regard: the interpretation must be aligned with the essence of the offence and must be reasonably foreseeable.[246] Ultimately, the two requirements overlap insofar that they end up testing the reasonableness of the domestic courts' interpretation.[247] Hence, there is no added value in distinguishing between the two requirements. The severity of the offence is also invoked as an element of foreseeability, considering the criminalisation of certain serious offences as "obvious".[248] At the end of the day, the level of protection is case-dependent and individually assessed, depending on possible legal advice and the defendant's professional status and technical capacity.[249] In other words, the *lex stricta* and the *lex certa* requirements conflate in the same kind of subjective foreseeability test. Worse still, this standard lends itself to theoretical and practical dogmatic confusion, since it mingles issues of different nature, namely the principle of legality and the principle of guilt (*ignorantia legis non excusat*, mistake of law, *Verbotsirrtum*). This confusion is aggravated in the case of a blanket legal norm, which makes the punishability of the criminal offence dependent on non-criminal laws and regulations.[250]

93. With regard to the jurisprudential development of criminal law, the Court uses the same twofold test (the essence of the offence test and the foreseeability test), but normally does not allow for an overly extensive interpretation.[251] Yet in some other instances,[252] the Court has proposed a much stricter criterion, namely the strict interpretation of criminal law.[253] Between the two criteria, the Court has accepted gradual interpretative

---

244 *Dallas v. the United Kingdom*, no. 38395/12, 11 February 2016.

245 *Achour v. France*, no. 67335/01, §52, 29 March 2006.

246 For example, *C.R. v. the United Kingdom*, no. 20190/92, § 41, 22 November 1995; *S. W. v. the United Kingdom*, no. 20166/92, 22 November 1995; and *Radio France and Others v. France*, no. 53984/00, § 20, 30 March 2004.

247 *Ibid*.

248 *Ibid*. Sometimes the Court refers to offences which lack social stigma (see my separate opinion in *A and B v. Norway*, nos. 24130/11 and 29758/11, 15 November 2016, § 29).

249 *Cantoni*, cited above, § 35.

250 *Flinkkilä and Others*, cited above, § 67. See my opinion in *Matytsina v. Russia,* no. 58428/10, 27 March 2014.

251 *Kononov v. Latvia*, no. 36376/04, § 185, 17 May 2010, and *Baskaya and Okçuoglu*, cited above, §§ 42-43.

252 *Dragotoniu and Militaru-Pidhorni v. Romania*, nos.77193/01 and 77196/01, § 40, 24 May 2007.

253 *Koprivnikar v. Slovenia*, no. 67503/13, § 56, 24 January 2017.

expansion of the offence[254] and of the penalty.[255] The same inconsistency can be found with regard to the Court's standard of assessment of facts and national law in the field of criminal law. If *Kononov*[256] shows a higher power of review that seems to arise because no derogation is allowed to the provision at issue, in some other instances, like *Khodorkovskiy*,[257] a much weaker standard for the Court's assessment is assumed.

94. The core of the Court's protection of the principle of legality is the *nullum crimen sine lege praevia*. As long as the conviction and the penalty are formally based on the rules applicable at the material time, no violation of Article 7 of the Convention will be found. This also applies to continuous offences.[258] With regard to the *nulla poena sine lege praevia*, *Maktouf and Damjanovic*[259] ensured an enhanced protective approach, since the mere possibility of any heavier penalty suffices to prohibit the retrospective applicability of the law, on the basis of a concrete and global determination of the *lex gravior*.[260] The public interest in the protection of victims and society does not justify the retrospective application of the *lex gravior*.[261]

(ii) The "erasure" of the autonomous meaning of "penalty" (§§ 95-107)

95. The applicant claims that his retrospectively ordered preventive detention, executed on the basis of the Regensburg Regional Court's judgment of 3 August 2012 from 20 June 2013 onwards in the Straubing Prison preventive detention centre, breached and still breaches his right not to have a heavier penalty imposed than the one applicable at the time of his offence in June 1997.

96. In line with the Government, the majority set themselves the difficult task of arguing that jailing a person in a preventive detention centre after the commission of a criminal offence is nevertheless not a "penalty" for the purposes of Article 7 of the Convention. The majority do not differentiate between "nature" and "purpose" of the measure, nor they provide any methodological hint on how to differentiate the two, but they acknowledge three "purposes" pursued by the applicant's preventive detention: a "punitive" one[262], a "preventive" one[263] and a "therapeutic" one[264].

---

[254] *C.R.*, cited above, *S.W.*, cited above, and *Soros v. France*, no. 50425/06, § 58, 6 October 2011, and the separate opinion of Judges Villiger, Yudkivska and Nussberger.

[255] *Del Rio Prada v. Spain (GC)*, no. 2750/09, § 112 and 117, 21 October 2013.

[256] *Kononov*, cited above, § 198.

[257] *Khodokorsky and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 781, 25 July 2013.

[258] *Veeber v. Estonia (no. 2)*, no. 45771/99, ECHR 2003‑I, and *Rohlena v. the Czech Republic (GC)*, no. 59552/08, 27 January 2015.

[259] *Maktouf and Damjanovic*, cited above.

[260] *Ibid.*, my separate opinion, § 8. See also *Rohlena*, cited above, § 56.

[261] *Jendrowiak*, cited above, § 48.

[262] In paragraph 236 of the judgment, the majority's recognition of some degree of erasure of the punitive element of the detention undoubtedly reveals the persistence, in their view, of at least some punitive purpose.

However, their focus on the conditions of detention reveals the implicit premise that the "nature" or "purpose" of the measure is determined by how the measure is implemented. In fact, they invoke the material and living conditions provided to those interned in the Straubing detention centre, how they can choose their own clothes, have larger cells, specialised treatment, and so on. According to the majority, the "preventive" and "therapeutic" purposes "erase" the "punitive element" of the measure to such an extent that it is no longer a penalty. [265] However, this reasoning omits some crucial legal considerations.

97. Firstly, a "preventive" purpose is not foreign to penalties, but closely linked to them. Prevention is at the core of many theories of punishment: punishment is usually said to prevent the convicted person from committing more offences while he or she is locked up (through incapacitation or negative special prevention) and afterwards (through resocialisation or positive special prevention). Similarly, punishment is said to prevent crime generally, through deterrence of would-be offenders (negative general prevention) and the signalling of norm enforcement (general positive prevention).[266] Therefore, the "preventive" purpose of a measure by no means rules out its punitive character. As the Court long ago put it in *Welch*, "the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment"[267].

98. Secondly, the "nature" and the "purpose" of preventive detention are not to be predicated on the detention conditions, but on the legal act that provided for that detention. In this regard, the majority's understanding of preventive detention ignores the fact that in the German system, as demonstrated above, preventive detention was, in essence, a measure to incapacitate the "bad" and not a measure to treat the "mad", and therefore lacked any specific therapeutic purpose, as Article 66b of the Criminal Code today still shows.

99. It cannot be maintained that the "nature" or "purpose" of a penalty can be changed retrospectively when the material conditions of detention improve. The misleading nature of this construction becomes very apparent if one asks about the exact time when the detention changed "nature" or

---

263 Paragraph 226 of the judgment: "For persons detained as medical health patients, the preventive purpose pursued by the amended preventive detention regime carries decisive weight".

264. Paragraph 222 of the judgment: "However, having regard to the setting in which preventive detention orders are executed under the new regime, the Court is satisfied that the focus of the measure now lies on the medical and therapeutic treatment of the person concerned …".

265. Paragraph 236 of the judgment.

266. See my opinion with Judge Turkovic in *Khoroshenko v. Russia (GC)*, no. 41418/04, 30 June 2015, § 3.

267. *Welch*, cited above, § 30.

"purpose": under the majority's reasoning, after the addition of exactly how many square meters does preventive detention cease to be punishment, according to *M. v. Germany,*[268] to become an acceptable therapy placement? Of course, this rhetorical question could be further complicated: how many kitchen units, how many separate bathrooms, how many TV sets or body-building machines, how many doctors and nurses, how many visiting hours or phone calls should there be for a preventive detention unit to change nature and for detention therein to change its "purpose"? Since the detention conditions vary greatly from one preventive detention centre to another[269], how can the preventive detention order change nature according to the part of the country and the specific centre where is it going to be implemented? Can the same preventive detention order change nature multiple times when the detained person changes from a "friendlier" centre to another less "friendly" centre and back again to the first one?

100. As regards the procedures leading to the measure, the majority acknowledge that the preventive detention was imposed by courts belonging to the "criminal justice system".[270] However, the majority play down the importance of this very telling circumstance, having regard to "the Government's argument that the courts belonging to the criminal justice system were particularly experienced in assessing the necessity of confining mental-health patients who have committed criminal acts" and observing that "the criteria for the imposition of preventive detention would have been the same" irrespective of whether the measure was imposed by a civil or criminal court.[271]

As the majority note, the fact that criminal courts are responsible for applying preventive detention is a strong indicator of its criminal character. However, I would just point out that I fail to see how the Government's argument concerning the expertise of criminal courts would do anything in their favour. Precisely, criminal courts have experience of assessing accused persons' mental capacity for the purpose of adjudicating criminal responsibility, and not for the purpose of providing treatment. If anything, criminal courts' expertise should add to the qualification of preventive detention as a criminal penalty rather than the contrary.

101. The final criterion which the majority use to assess the criminal character of the measure is its severity. From the outset the majority note that there is no maximum length of preventive detention, but they water down its punitive character by stressing that it has no minimum duration either, is subject to judicial review at relatively short intervals and depends to some extent on the applicant's "cooperation in necessary therapeutic measures".[272]

---

[268]4 *M. v. Germany*, cited above.

[269] BVerfGE 109, 133, § 34.

[270] Paragraph 229 of the judgment.

[271] Paragraph 231 of the judgment.

102. It is telling that the majority consider the fact that the measure is subject to periodic judicial review as some sort of "alleviating"[273] circumstance. If preventive detention were a therapeutic measure primarily aimed at the rehabilitation of inmates, judicial review would not be a graceful concession to them, but a part of the very functionality of the detention. The fact that they recognise this feature of the detention as part of the effort to reduce its severity shows to what extent even the majority cannot overlook its obvious punitive character. In addition, even assuming that the degree of adhesion of the convicted persons to a measure determines its rate of success, this rate has nothing to do with its nature, purpose or severity, for the simple reason that there may be multiple, contingently determined reasons why the individuals in question do not adhere to the measure.

103. In practice, courts regularly conclude that the institution has offered adequate treatment but the detained person has not accepted the offer. The detained person in total institutions[274] is not on an equal footing in terms of proving whether it was due to the institution and not him or her that therapy had been insufficient. According to empirical evidence from the time before the introduction of Article 66c of the Criminal Code, the institutions regularly shifted responsibility towards the prisoners. Since no safeguard exists with regard to the burden of proof, it cannot be ruled out that this is still often the case today. In any event, the lack of credible statistical evidence cannot be used against the prisoners.[275]

104. In sum, the majority abandon the autonomous meaning of the word "penalty" in Article 7 of the Convention, indeed they abandon the principle of autonomous interpretation of the Convention, which was crafted to avoid the Court being trapped in the intricacies of domestic law and allow it to go behind appearances. Interestingly, the majority do not recall the considerations to that respect that the Court made in *M. v. Germany*.[276] There, the Court said that, even though the "preventive detention" was considered a security measure in German law, 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.

105. It is the exact opposite that has prevailed in the present case. Following the spirit, and even the letter, of the Constitutional Court's May 2011 judgment the majority do not classify as a "penalty" preventive detention applicable to convicted offenders, ordered by criminal courts,

---

[272] Paragraphs 234 and 235 of the judgment.

[273] The word used at the end of paragraph 235 of the judgment is "alleviated".

[274] I have referred already to this concept in my opinion in *Lopes de Souza Fernandes v. Portugal (GC)*, no. 56080/13, judgment of 19 December 2017.

[275] BVerfGE 109, 133, § 93.

[276] *M. v. Germany*, cited above.

aimed at prolonging the detention after the service of the prison sentence, in the same prison, on the basis of evidence obtained prior to the end of the prison term, and whose subsequent implementation was to be determined by the courts responsible for the execution of sentences, as happened in the applicant's case.

106. As in *Bergmann*,[277] the majority are "transubstantiating" preventive detention by erasing the autonomous meaning of the "penalty" concept. As in *Bergmann*, the majority are accepting a trade-off between the underrogable principle of legality of penalties and the quality of prison conditions and thus downgrading the level of protection of Article 7 to a mere bargaining exercise on the conditions of execution.[278]

107. The measure of confusion of the majority's reasoning can be perceived in the way they mix law and facts and equate sentencing and enforcement of penalties, in the pivotal paragraph 207 of the judgment. It is true that the interpretation of Article 7 § 1 of the Convention proposed in the most unfortunate paragraph 207 of the judgment is limited to the "some rare cases" mentioned in the previous paragraph. There is only one, very unsatisfactory justification for the "rarity argument" to be used here by the majority: they know that they are entering uncharted, dangerous territory in paragraph 207 and want as far as possible to limit the scope of the proposed interpretation and the ensuing collateral damage caused to the basic foundational principles of modern criminal law and the principle of legality as we have known it since Anselm von Feuerbach coined in § 24 of his *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts* of 1801 the Latin expression *nulla poena sine lege*. The limited scope of applicability of the interpretation proposed in paragraph 207 does not detract from the fact that it constitutes a heresy in criminal law.

(iii) The catch-all construction of "person of unsound mind" (§§ 108-110)

108. The Court's case-law is not consistent on the scope of the concept of "person of unsound mind" under Article 5 § 1 (e) of the Convention. It is telling that the draft Therapy Placement Act explicitly refers to the case-law of the Court and the Commission, such as *X. v. Germany*,[279] in order to argue that the concept of person of unsound mind includes people with abnormal personality features not equated to a mental illness[280]. The draft law also referred to *Hutchison Reid v. the United Kingdom*[281] and *Morsink*

---

[277] *Bergmann*, cited above.

[278] Corrado perceives the distance requirement as a "terrible way out of the dilemma, making the difference .. depend upon a gradation of conditions: a little more money, a bit longer visiting hours and it will be acceptable regulation under German law; a bit less and it will be unacceptable punishment." (Corrado, cited above, p. 68).

[279] *X. v. Germany*, 12 July 1976, Nr. 7493/76, D.R. Volume 6, 182.

[280] For example, *Kallweit v. Germany*, no. 17792/07, 13 January 2011, and *Hutchison Reid v. the United Kingdom*, no. 50272/99, 20 February 2003.

v. the Netherlands [282] to make the point that the criminal liability of an offender does not exclude the possibility of confinement under Article 5 § 1 (e) of the Convention, which would allow for systematic and unlimited confinement of offenders independent from the question of their criminal liability and, even more, regardless of the impossibility of clinical treatment.[283]

109. Taking advantage of this impossibility, the domestic courts decided that "mental disorder" did not have to be so serious as to exclude criminal liability (Article 20 of the Criminal Code) or diminish it (Article 21 of the same Code).[284] The applicant argues that the domestic courts' concept of "mental disorder" is wider than the notion of "unsound mind" enshrined in Article 5 § 1 (e) of the Convention. The majority in the present judgment are undecided: on the one hand, they say that the notion of "unsound mind" "might be more restrictive" than that of "mental disorder",[285] but on the other hand they say that the notion of "unsound mind" does not warrant a mental condition that excludes or even diminishes criminal responsibility.[286] With this convenient ambiguity, the door is wide open to establish "a disorder which can be said to amount to a true mental disorder"[287] and "treat" dangerous offenders as "mentally ill" or "mentally disordered" persons and keep them detained for the rest of their lives, even on the basis of a detention regime that did not exist at the time of the commission of the offence.

110. In sum, although the list of grounds of detention in Article 5 § 1 must be interpreted narrowly, the majority do just the opposite: they embark on an expansive interpretation of its sub-paragraph (e), which becomes a convenient catch-all. The way to keep the "bad" behind bars until they die is

---

[281] *Hutchinson Reid v. the United Kingdom,* no. 50272/ 99, 20 February 2003.

[282] *Morsink v. the Netherlands*, no. 48865/99, 11 Mai 2004.

[283] The relevant text of the draft law is: "*Schon die Menschenrechtskommission hatte unter diesen Begriff auch abnorme Persönlichkeitszüge gefasst, die nicht einer Geisteskrankheit gleichkommen (X./. Bundesrepublik Deutschland, Entscheidung der Europäischen Menschenrechtskommission vom 12. Juli 1976, Nr. 7493/76, D.R. Band 6, Seite 182). In einem Urteil aus dem Jahre 2003 stellte der EGMR klar, dass auch ein weiterhin abnorm aggressives und ernsthaft unverantwortliches Verhalten eines verurteilten Straftäters ausreichen kann und betonte, dass eine fehlende Behandelbarkeit im klinischen Sinne nicht zu einer Freilassung zwinge, wenn eine Gefahr für die Allgemeinheit bestehe (Hutchinson Reid ./. UK, Urteil des EGMR vom 20. Februar 2003, Nr. 50272/ 99). 2004 gelangte der EGMR zu der Feststellung, dass die strafrechtliche Verantwortlichkeit eines Straftäters eine (auch) auf Artikel 5 Absatz 1 Satz 2 Buchstabe e EMRK gestützte Unterbringung nicht ausschließe (Morsink ./. NL, Urteil des EGMR vom 11. Mai 2004, Nr. 48865/99).*" (Draft law of 26 October 2010 by the parliamentary groups of the governing parties Bundestags-Drucksache 17/3403, p. 53 f.). This same case law was cited in BVerfGE 128, 326, § 152.

[284] Paragraphs 34 and 88 of the judgment.

[285] Paragraph 150 of the judgment , as in *Glien v. Germany*, no. 7345/12, § 87.

[286] Paragraph 149 of the judgment.

[287] Paragraph 150 of the judgment.

to mislabel them as "mad". This is the price to be paid to get rid of the Article 7 protection.

B. The overly repressive approach to the present case (§§ 111-127)

(i) The biased determination of the applicant's "mental illness" (§§ 111-115)

111. The trial court decided that the applicant had had full criminal responsibility at the time of commission of the offence, in spite of the fact that there were certain elements indicating the beginning of a sexual deviation.[288] The Regensburg Regional Court found that the applicant at the relevant time was still suffering from a sexual preference disorder, namely sexual sadism, as defined by the ICD-10. The applicant's condition amounted to a mental disorder for the purposes of Article 1 § 1 of the Therapy Detention Act.

112. The applicant argues that he did not suffer from a mental disorder.[289] The majority state that the domestic courts have "certain discretion in particular on the merits of clinical diagnosis".[290] But there are limits to this hands-off approach.[291] In the present case, more than half of the experts are of the view that it was not established that the defendant suffers from a mental illness: experts S (20 April 1999), Z (6 October 1999), R (8 October 2003), F (24 November 2011)[292] and MK (27 September 2016) concluded this way, while experts O (16 January 2006), M (6 January 2006), B (15 January 2009) and K (12 December 2011)[293] concluded the opposite. Furthermore, the fact that contacts with psychologist MK were discontinued by the centre in May 2017, because MK saw no sign of any "hidden sadistic undercurrent" (*larvierte sadistische Grundströmung*)[294] in the applicant, raises serious doubts as to how independent the domestic authorities' diagnosis is. These doubts are compounded by the fact that none of the experts heard was properly qualified for the specific case of a young adult offender. Neither expert K nor expert F nor any other expert was qualified to examine young people, as required by domestic law[295] and constitutional case-law.[296]

---

288. BVerfGE 128, 326, § 51.
289. Paragraph 143 of the judgment.
290. Paragraph 155 of the judgment.
291. The Constitutional Court itself states that the benefit of the doubt should, however, be given to the detainee when there is no clear evidence of his or her dangerousness (BVerfGE 109, 133, § 111).
292. In page 77 to 79 of the expert report affirmed that it was doubtful whether the applicant still suffers from sexual sadism. In page 79, the expert concluded that the applicant posed a medium risk of future offences.
293 This report was solely based on the file, because the applicant refused to be examined by the expert.
294 Enclosures 10 and 11 joined to the applicant's observations of 10 August 2017.
295. See Article 43 § 2 of the Juvenile Courts Act, in conjunction with Article 109 § 1 of the

113. As regards the scientific quality of the diagnosis itself, it should be noted that the soundness of such diagnosis was manifestly hindered by the fact that the alleged mental illness (sexual sadism) was established fifteen years after the criminal facts took place. In fact, the criminal division of the regional court delivered its decision on 2 August 2012[297] while the facts occurred in 1997.[298] To complicate things even further, the applicant was a first offender. This fact is simply ignored by the majority, who wrongly assume that the applicant had a "history of offences".[299]

114. The clinical finding by persons lacking the requisite specific expertise of a mental illness in a 19-year-old first offender fifteen years after the commission of the offence is a purely divinatory exercise of personality second-guessing. But the present case goes beyond this. The case of Mr. Ilnseher is not only a masterpiece of scientific mumbo-jumbo, it is a case of biased State exercise of punitive power. A wrong is unredressed when retribution overtakes the redresser. That is what happened with judge P.

115. The finding of the regional court that the applicant had "hidden"[300] the sadistic motives for his offence at his trial in 1999 and only admitted to them in "2005/2006" adds an even more worrying note to this case. The regional court did not consider the possibility that, in view of the diverging motives the applicant had given for his conduct, the alleged sadistic motives, which had not been established at the time of the conviction, might have been a rhetoric developed his time in prison, in view of the negative effects of the environment where the applicant had been kept and the avowedly inadequate care he had endured during his ten-year prison term (up until July 2008) and beyond that term. Instead the regional court not only assumed that the applicant had fooled the two medical experts who had examined him at that time, but also presupposed that the applicant had a duty to cooperate with the prosecution. In other words, the domestic judges ignored the sacrosanct principle *nemo tenetur se ipsum accusare* ("no one is bound to incriminate himself") and drew negative inferences from his supposedly uncooperative behaviour.

---

same Act.

296. The Constitutional Court itself has demanded a "specially experienced expert" for this kind of long preventive detention (BVerfGE 109, 133, § 114). See also BVerfGE 128, 326, § 99, again stressing the need for a "specially qualified medical report" precisely in the applicant's constitutional appeal case.

297. Paragraph 34 of the judgment.

298. Paragraph 155 of the judgment.

299. Paragraph 157 of the judgment. Insisting on the applicant's "criminal history" see paragraph 236. This is sufficient reason to consider the present judgment null and void for being based on false factual representations with a decisive influence on the findings. Rule 80 of the Rules of Court is designed precisely for these types of serious errors.

300 Paragraph 157 of the judgment.

In this scenario, which is already hostile to the defendant, the mounting serious doubts about the independence of the first instance court become a certainty if one considers the unfortunate, unprofessional misconduct of Judge P. The biased position of Judge P. not only weakened an already scientifically shaky case against the applicant, but it definitively tainted the lawfulness of the applicant's detention order. The subsequent considerations will elaborate further on this issue.

(ii) The unlawfulness of the applicant's detention order (§§ 116-121)

116. The Government accept that the preventive detention order was unlawful with regard to the period until 20 June 2013, but argue that that same order is lawful with regard to the subsequent detention. The Government defend that a measure can lose its previously punitive character during the execution of the measure on the basis of the same court order, because it would be "overly formalistic" to require a new judicial decision.[301] Criminal law is about strict formality, but the Government invite the Court to forget this axiomatic truth. Regrettably, that is exactly what the majority choose to do.

117. In spite of the fact that the Regional Court did not order, in its judgment of 3 August 2012, the execution of the applicant's preventive detention in a particular facility, he was moved on 20 June 2013 to another prison facility. The majority are faced with an awkward question: on the one hand they have to detach the preventive detention order from the applicant's criminal conviction for the commission of an offence with full criminal responsibility in order to justify its alleged non-punitive nature, but on the other they have to attach that same detention order to the offence, because the conviction for an offence was a precondition for the preventive detention, according to domestic law (Article 7 § 2 of the Juvenile Courts Act).

Like the domestic authorities, the majority square the circle, by achieving the miracle of "transubstantiating" the nature of the preventive detention order. The preventive detention order against the applicant is described, for the purposes of Article 5 of the Convention, as "linked to the conviction – and thus "following" the latter as it was a precondition for the preventive detention order under that provision."[302] For the purposes of Article 7 of the Convention, the link between the preventive detention order and the offence is "not completely severed".[303] Yet at the same time the majority conclude that the "punitive element of preventive detention and its connection with the criminal offence committed by the applicant was erased to such an extent in these circumstances that the measure was no longer a penalty."[304]

301 Paragraph 190 of the judgment.
302 Paragraph 215 of the judgment.
303 Paragraph 227 of the judgment.
304. Paragraph 236 of the judgment, which copies the statement of the Government, see

118. The one-thousand-dollar question is this one: how can a “link” (or a “connection”) be “erased”, but “not completely severed”? The linguistically awkward way in which the majority express themselves is the best evidence of the fallacious nature of this line of reasoning. In *Bergmann*, the talk was about the “eclipse”[305] of the punitive element, now it is about the “erasure”[306] of that element. Surprisingly, the majority even acknowledge that the “improved material conditions and care” do not change the nature of “ordinary” preventive detention, since they do not “erase the factors indicative of a penalty”.[307]

The choice of this language is an enigma for me. I am puzzled with this language which finds support neither in present day German criminal law, nor in any other domestic criminal law nor in international criminal law, but in the worst Nazi prototype of *Täterstrafrecht*, the draft of a *Gemeinschaftsfremdengesetz*,[308] which was supposed to eclipse the connection between the criminal offence and punishment for the protection of the community, since “the means of criminal law were not sufficient, because penalties and measures of correction and prevention, including preventive detention, are always connected to concrete criminal offences.”[309]

The linguistic scrabbling does not end here. The majority make an effort to get rid of the well-established term “retrospective” for the translation of the German term *nachträglich*, in order to give the impression that the prospective element of the preventive detention order prevails over the retrospective one.[310] The choice of the expression “subsequent prevention detention” to translate the expression *nachträgliche Sicherungsverwahrung* is particularly problematic because the former expression evidently overlaps with the other modality of the *Sicherungsverwahrung,* namely the *vorbehaltene Sicherungsverwahrung* (deferred preventive detention), which is also applied on the basis of a subsequent assessment of the preventive needs of the detainee. The majority do not care to distinguish and contrast the two concepts.[311] One thing is certain, however. Whatever the babble, it

---

paragraph 195.

[305] *Bergmann*, cited above, §§ 175, 181 and 182. See also the *Ilnseher* chamber judgment, § 81.

[306] Paragraph 236 of the judgment.

[307] Paragraph 228 of the judgment.

[308] The draft law, which distinguished five groups of “*Gemeinschaftfremden*”, namely the “*Versager*”, the “*Tunichtgute und Schmarotzer*”, the “*Taugenichtse*”, the “*Störenfriede*” and the “*gemeinschaftfeindliche Verbrecher und Neigungsverbrecher*”, never came into effect. The *Hang- und Neigungsverbrecher* were precisely those that were already targeted by preventive detention.

[309]. See “Begründung des Entwurfs eines Gemeinschaftsfremdengesetzes”, in Schumann and Wapler, *Erziehen und Strafen, Bessern und Bewahren, Entwicklungen und Diskussionen im Jugendrecht im 20. Jahrhundert*, 2017, p. 113, footnote 164.

[310] Paragraph 157 of the judgment.

[311] *Müller v. Germany (dec.)*, no. 264/13, §§ 20, 40, 60 and 61, 10 February 2015, where the Court differentiates between retrospective and subsequent preventive detention. By

cannot obscure the fact that *nachträgliche Sicherungsverwahrung* is a *post festum* attack on the foundations of criminal law as it has been known and practiced for the last two hundred years, at least in democratic regimes.

119. In spite of the apparent terminological change, the majority cannot turn a blind eye to the fact that the assessment of the applicant's dangerousness and preventive needs is "retrospective".[312] Preventive detention cannot be judged in isolation from the legal provision which was the basis of the court decision. According to German law, a deprivation of liberty may only be ordered on the basis of a written law and only by a judge (Article 104 of the Basic Law). Thus the reasons given in the deprivation of liberty order are paramount. Furthermore, the lawfulness of the imposed measure may not be judged in isolation from the time previously spent in custody. As set out in Article 66c § 2 of the Criminal Code, there is no strict separation between the services of a prison term and of preventive detention, and hence any prior periods of detention of a convicted person are an inseparable part of the subsequent measure. The Court itself, in *M.*, found a link between the 10-year long detention and the conviction.[313]

120. The commission of an offence for which the applicant was found guilty is the legal basis for his punishment and for the retrospective assessment of his dangerousness, and to that extent the preventive detention order is a punitive measure, the exact same legal measure that the Government considered unlawful. I think the majority are understating the importance of this single finding.

Had there not been a criminal conviction in this case, the Court would most likely have declared the application inadmissible concerning Article 7 and the analysis would have been confined to Article 5. The retrospective preventive detention at issue in this case is only applicable to persons who have committed a criminal offence and who were found to be criminally responsible for it – a "precondition", in the majority's own terminology. But a State coercive measure that has the commission of a criminal offence as a "precondition" can only be a penalty. Not only is preventive detention subject to the requirement of a criminal conviction, but also the criminal offence or offences committed must be of a certain kind and gravity. According to the Juvenile Courts Act, these orders can only be directed against people sentenced to at least seven years' imprisonment for crimes against life, physical integrity or sexual self-determination, or some other specific offences[314]. Indeed, it is telling that the majority did find Article 7 applicable to this case, and therefore the application admissible. If the

---

using the same word, "subsequent", for the *nachträgliche* preventive detention, the majority put an end to that linguistic distinction.

[312] Paragraph 105 of the judgment.

[313] *M. v. Germany*, cited above, § 100.

[314] Article 7(2) of the Juvenile Courts Act (Judgment, §§ 54-60).

applicant's preventive detention were not a penalty under Article 7, its retroactivity would not be an Article 7 issue and the application would have been found inadmissible in this regard. Had they been consistent, the majority would have had to find the Article 7 complaint inadmissible. Once the Court acknowledges that the applicant's preventive detention is a penalty, the retroactivity becomes simply too obvious and impossible to ignore. The majority's reasoning is an awkward middle way: they find the Article 7 complaint admissible, but nevertheless conclude that the applicant's preventive detention is not a penalty. More than denouncing this patent logical mistake which could arguably have impacted on the assessment of the Article 7 complaint's admissibility, I would like to state the obvious: in a case like this, a finding of a violation of Article 7 of the Convention inexorably follows a finding of admissibility.

121. The preventive detention order is further tainted by the continuing unlawfulness resulting from the lack of independence of Judge P. No question of a lack of judicial impartiality arises when a judge has already delivered purely formal and procedural decisions in other stages of the proceedings.[315] However, serious problems with impartiality may emerge if in other phases of the proceedings a judge has already expressed an opinion on the defendant's conduct, guilt or dangerousness[316]. In the present case, the minimum that Judge P. should have done in 2012 was to withdraw from the bench, in view of the fact that he had expressed himself both as member of the Regional Court and, to make things worse, in an unfortunate aside to the applicant's lawyers on 22 June 2009 after delivery of the preventive detention order and before it became final. The content of this remark was not neutral: it referred to the applicant's personality and dangerousness. To my mind, it is simply unconceivable that the same judge who had made such an inappropriate, unprofessional, biased remark on the applicant's personality and future conduct could have become a member of the bench ordering the applicant's retrospective detention anew on 3 August 2012. This conduct taints the lawfulness of the detention order and therefore of the entire preventive detention.

---

[315]. The mere fact that a trial judge has made previous decisions concerning the same offence cannot be held as in itself justifying fears as to his or her impartiality (for example, *Romero Martin v. Spain (dec.)*, no. 32045/03, 12 June 2006 concerning pre-trial decisions; *Ringeisen v. Austria*, judgment of 16 July 1971, Series A no. 13, p. 40, § 97, concerning the situation of judges to whom a case was remitted after a decision had been set aside or quashed by a higher court; *Thomann v. Switzerland*, judgment of 10 June 1996, Reports 1996-III, pp. 815-816, §§ 35-36 concerning the retrial of an accused convicted in absentia; and *Craxi III v. Italy (dec.)*, no. 63226/00, 14 June 2001, concerning the situation of judges having participated in proceedings against co-offenders).

[316] *Mutatis mutandis*, *Gómez de Liaño y Botella v. Spain*, no. 21369/04, §§ 67-72, 22 July 2008.

(iii) The "special sacrifice" of the applicant's preventive detention (§§ 122-126)

122. The applicant was sentenced to a 10-year prison term on 29 October 1999, and he finished serving his penalty on 17 July 2008.[317] After being remanded in provisional preventive detention on that day, he was given a retrospective preventive detention order under Article 7 § 2 (1) of the Juvenile Courts Act on 22 June 2009. On 6 May 2011 he was again placed in provisional preventive detention, following the quashing of the previous retrospective preventive order. On 3 August 2012, a retrospective preventive detention order was imposed on him, which is still in force today.[318]

123. The applicant complains not only about the quality of the treatment provided in the new detention centre, the availability of therapeutic staff, the separation in terms of organisation between the Straubing prison and its preventive detention centre, but also about the fact that this latter facility was occupied by a majority of people not suffering from a mental disorder.[319] Without any consideration of the CPT's critical assessments of similar detention centres mentioned above and any impartial evaluation of the Straubing preventive detention centre, the majority piously believe the Government. They side with them in the assessment of the situation on the ground. In other words, the Court dilutes the autonomous meaning of the Article 7 concept of "penalty" on the basis of untested governmental information on the functioning of the national system of preventive detention and the particular centre where the applicant is confined.[320] This choice is all the more unacceptable in the light of the international and European consensus contrary to retrospective preventive detention, as shown above.

124. The facts of this particular case are telling in this regard, because during the first period of his preventive detention the applicant received no therapeutic care whatsoever.[321] Indeed, the majority recognise that "the Regional Court... had only *generally* ordered his preventive detention" (my emphasis) and therefore the same detention order covered the applicant's

---

[317] Paragraph 13 of the judgment.
[318] Paragraphs 32 and 42 of the judgment.
[319] Paragraphs 166 and 181 of the judgment.
[320] It would have been useful to consider the remarkable empirical work done by Axel Dessecker, "Empirische Erkentnisse zur Entwicklung der Sicherungsverwahrung: Bestandaufnahme und neue Daten", in Johannes Kaspar (ed.), *Sicherungsverwahrung 2.0*, Baden-Baden: Nomos, 2017, 11-34; Nicole Ansorge, *Bericht über die 5. Erhebung zur länderübergreifenden Bestandsaufnahme der Situation des Vollzugs der Sicherungsverwahrung*, Hannover, Niedersächsisches Justizministerium, 2014; Jutta Elz, *Rückwirkungsverbot und Sicherungsverwahrung. Rechtliche und praktische Konsequenzen aus dem Kammerurteil des Europäischen Gerichtshofs für Menschenrechte im Fall M./.Deutschland*, Wiesbaden, 2014; Tillmann Bartsch, *Sicherungsverwahrung: Recht, Vollzug, aktuelle Probleme*, Baden-Baden, 2010.
[321] Paragraphs 44 and 45 of the judgment.

preventive detention in the Straubing prison first and in the Straubing detention centre later.[322] This "generality" should have appalled the majority rather than moved them to show indulgence towards the Regional Court. That the Regional Court ordered the preventive detention in general terms shows that the therapeutic purpose of such detention was ultimately irrelevant: as long as the applicant was indeed locked up, therapeutic measures were ornamental.

In this regard, there is a huge difference between the present case and *Bergmann*. In the latter, the applicant was a recidivist who had been diagnosed by the trial court with a mental illness already at the time of the offence and had already been transferred into the newly-built institutions appropriate for offenders with a mental-health condition when the continuation of preventive detention was ordered under the conditions laid down in the second sentence of section 316f (2) of the Introductory Act to the Criminal Code.[323] In contrast, in the present case, the applicant was a first offender, acted with full responsibility at the time of the offence, was detained at the time of delivery of judgment by the Regional Court (3 August 2012) in conditions not complying with the Convention and was only transferred to the new centre for preventive detention two years later.

125. To prove the transubstantiation of *Sicherungsverwahrung* in the applicant's case into something other than a "penalty", the majority invoke the existence of individualised medical and therapeutic treatment in accordance with an individual treatment plan, even if he did not accept this offer.[324] The majority's core argument is that treatment is now "at the heart of that form of detention"[325]. To be crystal-clear: this argument cannot be used to distinguish preventive detention orders from prison sentences for the simple and prosaic reason, already mentioned above, that the latter should also aim at treatment on the basis of an individualised treatment plan, according to the European Prison Rules[326] and the international prison standards[327] which have already been incorporated into the Court's case-law on Article 3 of the Convention.[328]

---

[322] Paragraph 216 of the judgment.
[323] *Bergmann*, cited above, §§ 14 and 34.
[324] Paragraphs 47, 81 and 221 of the judgment.
[325] Paragraph 223 of the judgment.
[326] *Vinter and Others v. the United Kingdom*, nos. 66069/09, 130/10 and 3896/10, § 77, 9 July 2013, referring to "sentence plans" in Rule 103 of the European Prison Rules.
[327] *Ibid*., § 79, referring to Rules 24 and 62 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (1957) on treating any physical or mental defects which might hamper rehabilitation.
[328] *Murray v. the Netherlands (GC)*, no. 10511/10, 26 April 2016. See also my separate opinion joined in this case, as well as the one in *Tautkus v. Lithuania*, no. 29474/09, 27 November 2011, and my joint opinion with Judge Turkovic, in *Khoroshenko v. Russia (GC)*, no. 41418/04, 30 June 2015.

126. Ultimately, the majority disregard the severity of the imposed measure as being decisive in itself,[329] contradicting their facts-oriented evaluation of the detention conditions. It is notable that in a judgment that is intended to defend the "therapeutic" nature of a coercive measure there is no mention of the concrete benefits that the applicant has received and is receiving in the Straubing detention centre. If the majority truly believe that the preventive detention in the present case is indeed primarily a therapeutic measure, one would expect them to comment, at least to some extent, on how its benefits compensate its drawbacks.

For the majority, the fact that a 19-year-old first offender is still imprisoned today, having completed the service of his penalty on 17 July 2008, seems not much of a sacrifice. Nor are they much impressed by the circumstance that the applicant was 35 years old at the time of the preventive detention order and that therefore this potentially life-long imprisonment could be longer than for other offenders under the same kind of detention. But this is nothing new: the Constitutional Court itself confessed, in the applicant's own constitutional appeal, that preventive detention was an "extremely serious" (*äußerst schwerwiegend*) encroachment upon the fundamental right to liberty which imposed on those targeted a "special sacrifice" (*Sonderopfer*)[330] in the interests of the community. Indeed, the applicant has been under retrospective preventive detention (and previously under provisional preventive detention) for ten years now as a "scapegoat" to quench the punitive needs of the community.

C. Preliminary conclusion (§§ 127-128)

127. The Court's understanding of the principle of legality has been minimalist, based on a test of subjective foreseeability. *Lex certa* and *lex stricta* requirements under Article 7 of the Convention have provided limited protection to accused persons. The deferential approach towards domestic criminal courts leaves extensive leeway for repressive, case-dependent application of the principle of legality. The only effective realm of protection was until now the requirement of *lex praevia*. This no longer seems to be the case.

The retrospective conversion of a time-limited punitive security measure into a potentially life-long pseudo-medical confinement measure imposed on convicted offenders with *ex nunc* established "mental disorders" is an historically and dogmatically unreasonable, let us say it, abusive interpretation that not only goes beyond the nature and purpose of the measure of preventive detention, but circumvents the prohibition of *nulla poena sine lege praevia* guaranteed in a State governed by the rule of law.

---

[329] Paragraph 234 of the judgment.
[330] BVerfGE 128, 326, § 101.

By putting its uncontested moral authority behind the political choice made by the legislator in the "Act on Therapy and Detention of Mentally Disturbed Violent Offenders",[331] the Constitutional Court acted as a facilitator of the political majority,[332] not as a guarantor of the fundamental rights of the Basic Law read in a public-international-law-friendly manner.[333] By acquiescing to a strategy of apparent compliance with the Convention guarantees, while in substance departing from the core message of the Court that *Sicherungsverwahrte* have a Convention guarantee to *nulla poena sine lege praevia*, the Karlsruhe court chose to align itself schematically with Berlin, and not with Strasbourg.

128. The Constitutional Court decided to adapt domestic law to some extent to Article 5 § 1 (e) of the Convention, by means of a construction of detention of convicted offenders with alleged "mental disorders". But this construction was applied only to historic cases of preventive detention, resulting for those cases in the intended result of keeping the targeted detainees in custody. The Karlsruhe judges did not apply this construction to future preventive detention cases. For the latter, the Constitutional Court only imposed the requirement of a distinction to be respected, but did not draw any connection with the necessity of a mental disorder. This is the reason why, as the applicant claimed, only a minority of the persons in preventive detention in the new Straubing centre were detained as mental health patients. Since the criteria for categorising these institutions as being institutions for mental health patients follow legal categories, and not medical ones, it is more than comprehensible to ask whether these institutions are in fact also psychiatric. The same institution cannot simultaneously be a psychiatric institution for some detainees and not for others. If for the majority of those detained in such an institution it is not reasonable to operate it as institution for mental-health patients, it would have to be ascertained whether it can be and actually is a psychiatric institution for the minority. On the contrary, if such an institution were a psychiatric institution, there would be a pressing need to justify the confinement of non-mental-health-patients (the "regular" *Sicherungsverwahrten*) in this environment, because it is inappropriate to treat such detainees as if they were mental health patients. The Government failed to meet this need in the present case.

---

331 BverfGE 128, 326, §§ 130 and 173. Going admittedly beyond the *petita* of this case, the Constitutional Court gave its "green light" to the political choice made by the legislator in the 2011 Therapy Placement Act. Later on, this anticipated approval of the said Act was confirmed by decision of 11 July 2013 (BVerfG 2 BvR 2302/11, 2 BvR 1279/12 (*Zweiter Senat*)).

332 The image comes from Michael Bock and Sebastian Sobota, "Sicherungsverwahrung: Das Bundesverfassungsgericht als Erfüllungsgehilfe eines gehetzten Gesetzgebers?" (2012) *Neue Kriminalpolitik* 106.

333 BVerfGE 111, 307, § 33.

VI. Final conclusion (§§ 129-130)

129. The present case brought to my memory one afternoon of August 1995 in Freiburg-im-Breisgau. While talking with Hans-Heinrich Jescheck on the renaissance of the *Feindstrafrecht*,[334] he confessed that what he feared most in Europe was the misuse of criminal law by unthinking political majorities without objection by complicit courts. He regretted that Europe had not learned from History.

130. It is unsurprising that politicians play at the very edge of respect for the Convention, or even beyond this limit, and resist the Convention values and the Court's judgments in polemic, if not plainly demagogic, moves to gain political support from this or that constituency. If human rights have a basic purpose, it is precisely to be "trump cards" that protect individuals' fundamental rights against the oppressive actions of ill-advised majorities. This is particularly true in the case of easily disposable minorities, such as prisoners or migrants. Politicians that emerge from these majorities should comply with international human rights in general and with the Convention in particular, since every State official is bound by human rights law and the Convention contributes to promoting a "joint European development of fundamental rights" (*gemeineuropäische Grundrechtsentwicklung*).[335] This includes, of course, the members of Parliament who enacted the provisions that allow for retrospective preventive detention and approved a shameful *intuitu persona* law to keep Mr Ilnseher detained forever.

What is truly disheartening is that constitutional and supreme courts all over Europe are also resisting the application of the Convention values and the Court's judgments, shifting their role from guarantors of the rule of law to facilitators of the exercise of power by politicians.[336]We have seen this happening in other countries of Europe, where docile judges make jurisprudence amenable to political majorities. Sadly, now it is the turn of the German Federal Constitutional Court and its unapologetically faithless reading of *M.* and its progeny in the sense of the inapplicability of the principle *nulla poena sine lege praevia* to preventive detention. By rubber-stamping the Karlsruhe court's stance, against the crystal-clear and longstanding standards of customary international and treaty law and the consensus reigning in comparative law, the Court is taking one step more towards the legal periphery in Europe. While finding that the imposed preventive detention was a retrospective "penalty" in breach of Articles 7 and 5 § 1 of the Convention, I plead for the central role of the Court in the

---

[334] See my text "Ein unausrottbares Missverständnis...", cited above.

[335] BVerfG 111, 307, § 62.

[336] Michael Bock and Sebastian Sobota, "Sicherungsverwahrung: Das Bundesverfassungsgericht als Erfüllungsgehilfe eines gehetzten Gesetzgebers?", cited above.

defence of modern criminal law principles and the safeguard of human rights in Europe.