with immediate effect at a time when he was already in preventive detention and that he might be held in preventive detention for a period exceeding ten years. His right to lawful detention could not be balanced against public safety concerns.

Judgement ECHR 17.12.2009 M. v. Germany

2. The Government

83. In the Government's view, the applicant's continued preventive detention complied with Article 5 § 1 (a) of the Convention. The applicant's preventive detention after the completion of ten years of detention had occurred "after conviction", as there was still a sufficient causal connection between his initial conviction and the deprivation of liberty. In its judgment of 17 November 1986, the Marburg Regional Court had convicted and sentenced the applicant to five years' imprisonment and had ordered his preventive detention without reference to any maximum duration. Under the provisions of the Criminal Code, it was for the Marburg Regional Court, giving sentence, to decide whether or not to order a measure of prevention, but for the Regional Court responsible for the execution of sentences to decide on the execution of that measure, in particular on the duration of a convicted person's preventive detention. Thus, both the sentencing court and the court responsible for the execution of sentences had participated in the applicant's "conviction by a competent court". Under Article 2 § 6 of the Criminal Code (see paragraph 48 above), it had always been open to the legislator to reintroduce preventive detention without a maximum duration with immediate effect. In view of this, the subsequent abolition of the maximum duration of a first period of preventive detention had not broken the causal link between the applicant's initial conviction in 1986 and his continued preventive detention.

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

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

B. The Court's assessment

1. Recapitulation of the relevant principles

a. Grounds for deprivation of liberty

86. Article 5 § 1 sub-paragraphs (a) to (f) contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see, *inter alia*, *Guzzardi v. Italy*, 6 November 1980, § 96, Series A no. 39; *Witold Litwa v. Poland*, no. 26629/95, § 49, ECHR 2000-III; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008-...). However, the applicability of one ground does not necessarily preclude that of

another; a deprivation of liberty may, depending on the circumstances, be justified under one or more sub-paragraphs (see, among other authorities, *Eriksen v. Norway*, 27 May 1997, § 76, *Reports of Judgments and Decisions* 1997-III; *Erkalo v. the Netherlands*, 2 September 1998, § 50, *Reports* 1998-VI; and *Witold Litwa*, cited above, § 49).

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

88. Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the "detention" must follow the "conviction" in point of time: in addition, the "detention" must result from, follow and depend upon or occur by virtue of the "conviction" (see *Van Droogenbroeck*, cited above, § 35). In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see *Weeks v. the United Kingdom*, 2 March 1987, § 42, Series A no. 114; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV; *Waite v. the United Kingdom*, no. 53236/99, § 65, 10 December 2002; and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 117, ECHR 2008-...). However, with the passage of time, the link between the initial conviction and a further deprivation of liberty gradually becomes less strong (compare *Van Droogenbroeck*, cited above, § 40, and *Eriksen*, cited above, § 78). The causal link required by sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision (by a sentencing court) or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5 (compare *Van Droogenbroeck*, cited above, § 40; *Eriksen*, cited above, § 78; and *Weeks*, cited above, § 49).

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

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

90. It is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Erkalo*, cited above, § 52; *Saadi v. the United Kingdom*, cited above, § 67; and *Kafkaris*, cited above, § 116).

This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Stafford*, cited above, § 63, and *Kafkaris*, cited above, § 116). "Quality of the law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III; *Nasrulloyev v. Russia*, no. 656/06, § 71, 11 October 2007; and *Mooren v. Germany* [GC], no. 11364/03, § 76, 9 July 2009). The standard of "lawfulness" set by the Convention thus requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports* 1998-VII, and *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III).

91. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33; *Saadi v. the United Kingdom*, cited above, § 67; and *Mooren*, cited above, § 72).

2. Application of these principles to the present case

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

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

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

95. The Court reiterates that "conviction" under sub-paragraph (a) of Article 5 § 1 signifies a finding of guilt of an offence and the imposition of a penalty or other measure involving deprivation of liberty (see paragraph 87 above). It observes that the applicant's preventive detention was ordered by judgment of the Marburg Regional Court of
17 November 1986 (the sentencing court), which found him guilty of, *inter alia*, attempted murder (see paragraph 12 above). Since August 1991 the applicant, having served his prison sentence, has been in preventive detention as the courts responsible for the execution of sentences refused to suspend the preventive detention order on probation (see paragraphs 13 et seq.).

96. The Court is satisfied that the applicant's initial preventive detention resulted from his "conviction" by the sentencing court in 1986. The latter found him guilty of attempted murder and ordered his preventive detention, a penalty or other measure involving deprivation of liberty. It notes that in the Government's view, preventive detention is not fixed with regard to an offender's personal guilt, but with regard to the danger he presents to the public (see paragraph 113 below). It considers that pursuant to Article 66 § 1 of the Criminal Code, an order of preventive detention is nevertheless always dependent on and ordered together with a court's finding that the person concerned is guilty of an offence (see paragraphs 49-50 above).
The applicant's placement in preventive detention was thus initially covered by sub-paragraph (a) of Article 5 § 1. The Court would add, however, that, contrary to the Government's submission, the

decisions of the courts responsible for the execution of sentences to retain the applicant in detention do not satisfy the requirement of "conviction" for the purposes of Article 5 § 1 (a) as they no longer involve a finding of guilt of an offence.

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

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

99. The Court is not convinced by that argument. It is true that the sentencing court ordered the applicant's preventive detention in 1986 without fixing its duration. However, the sentencing courts never fix the duration, by virtue of the applicable provisions of the Criminal Code (Articles 66 and 67c-e of the Criminal Code, see paragraphs 49 et seq. above); as the Government themselves submitted, the sentencing courts have jurisdiction only to determine whether or not to order preventive detention as such in respect of an offender. The courts responsible for the execution of sentences are subsequently called upon to decide on the detailed arrangements for execution of the order, including the exact duration of the offender's preventive detention. However, the courts responsible for the execution of sentences were competent only to fix the duration of the applicant's preventive detention within the framework established by the order of the sentencing court, read in the light of the law applicable at the relevant time.

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

101. The Court considers that the present case must be distinguished in that respect from that of *Kafkaris* (cited above). In *Kafkaris* it found that there was a sufficient causal connection between the applicant's conviction and his continuing detention after twenty years' imprisonment.
Mr Kafkaris' continuing detention beyond the twenty-year term was in conformity with the judgment of the sentencing court, which had passed a sentence of life imprisonment and had expressly stated that the applicant had been sentenced to imprisonment for the remainder of his life as provided by the Criminal Code, and not for a period of twenty years as set out in the Prison Regulations, subordinate legislation in force at the time (ibid., §§ 118-21). By contrast, the preventive detention of the applicant in the present case beyond the ten-year point was not ordered in the judgment of the sentencing court read in conjunction with the provisions of the Criminal Code applicable at the time of that judgment.

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

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

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

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

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

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

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

107. The Government contested this allegation.

A. The parties' submissions

1. The applicant

108. In the applicant's submission, a heavier penalty had been imposed on him retrospectively, contrary to the second sentence of Article 7 § 1 of the Convention, by virtue of the order made for his continued preventive detention after he had been in preventive detention for ten years. Preventive detention constituted a "penalty" within the meaning of that Article.

He claimed that the domestic courts' view that, since its introduction into German criminal law, preventive detention had not been considered as a "penalty" and could thus be applied retrospectively, should be given less weight in the light of the fact that preventive detention had been introduced by the Habitual Offenders Act of 24 November 1933, that is, during the Nazi regime. According to section 129 of the Execution of Sentences Act (see paragraph 64 above), the sanction in question, imposed following an offence and administered by the criminal courts, pursued exactly the same aims as the execution of a prison sentence (see section 2 of the Execution of Sentences Act, paragraph 63 above), namely both to protect the public from the detainee (prevention) and to help the latter to readjust to life outside prison (reintegration into society).

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

110. The applicant further stressed that there were no special facilities in Germany for persons being held in preventive detention. Persons held in preventive detention in ordinary prisons were granted some minor privileges compared to persons serving their sentence in the same prisons (see sections 131-135 of the Execution of Sentences Act; paragraphs 64-65 above), such as the right to wear their own clothes. However, even if put into practice, these privileges did not alter the fact that the execution of a preventive detention order did not differ significantly from that of a prison sentence. As a person in preventive detention, the applicant was in fact granted fewer relaxations of the conditions of his sentence than ordinary prisoners. Moreover, no special measures in addition to those taken for ordinary prisoners were taken for persons held in preventive detention to help them prepare for a responsible life outside prison. The applicant's conditions in preventive detention in Schwalmstadt Prison did not differ from those he had encountered when serving the major part of his sentence there. He was working as he had already worked when serving his sentence and, apart from occasional short periods of leave under escort, no efforts were made to prepare him for life outside prison, nor was there any therapy available.

If one looked at the realities of detainees' situation rather than the wording of the Criminal Code, there was therefore no substantial difference between the execution of prison sentences and of preventive detention orders.

111. Moreover, the severity of a measure of indefinite preventive detention, which was executed after and in addition to his prison sentence of only five years, was illustrated by the fact that it had led to the applicant being deprived of his liberty – on the basis of the order for his preventive detention alone – for approximately eighteen years already. He claimed that, as a result, he had been detained for a considerably longer period of time than the period generally served by convicted offenders who unlike him had actually killed someone and had been ordered to serve just a prison sentence, without an additional order for their preventive detention. Given that he had been detained for more than twenty-two years already following his conviction in 1986, the fact that there had been only two incidents, which had occurred many years previously in a high-security prison setting, proved that he had learned to control his emotions and that his continued imprisonment was not justified.

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

2. The Government

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

114. According to the Government, the execution of preventive detention orders differed significantly from the enforcement of prison sentences, as regards both the legislative provisions (see, in particular, sections 129-135 of the Execution of Sentences Act; paragraphs 64-65 above) and practice. It was true that there were no separate preventive detention facilities in the German *Länder* for economic reasons and in view of the range of treatment facilities required. Creating one central facility in Germany for all persons kept in preventive detention would render impossible visits by relatives or persons helping in the detainee's social reintegration, both of which were desirable. Persons in preventive detention were therefore kept in separate wings of prisons. However, compared to ordinary prisoners, persons in preventive detention had a number of privileges: unlike the former, they had the right to wear their own clothes and to receive longer visits of at least two hours per month. They also had more pocket money and the right to receive more parcels than ordinary prisoners. Moreover, if they so wished, they could have an individual cell which was not locked during the day, which they could furnish and equip in a personal manner. As regards the applicant's preventive detention in particular, the Government stressed that he no longer received any therapy as the psychologist he had consulted had considered his treatment to be completed. The applicant had almost daily discussions with the social worker and the psychologist in charge at his own initiative and participated in a discussion group which met every fortnight. In line with a psychiatric expert's recommendation, the applicant was benefiting from measures to relax the conditions of his preventive detention, such as short periods of leave under escort (see paragraphs 43-44 above).

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

116. The Government stressed that the twin-track system of penalties and measures of correction and prevention made it possible to limit penalties for all offenders to what was strictly necessary to compensate the perpetrator's guilt. As shown by the penal statistics published by the Council of Europe (see paragraph 68 above), Germany had a low rate of enforced prison sentences as a result

and its courts imposed short prison sentences compared to other Council of Europe member States. This proved that the twin-track system led to a restrictive and responsible sanctioning practice. However, the principle enshrined in the Basic Law that punishment should not exceed a person's guilt prevented German criminal courts from imposing longer prison sentences instead of ordering preventive detention to serve the preventive aim of the protection of society. Other Convention States, in particular Austria, Denmark, Italy, Liechtenstein, San Marino, Slovakia and Switzerland, also applied systems of preventive detention.

B. The Court's assessment

1. Recapitulation of the relevant principles

117. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *S.W. v. the United Kingdom*, 22 November 1995, § 34, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, § 32, Series A no. 335-C; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; and *Kafkaris*, cited above, § 137).

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

119. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which implies qualitative requirements, including those of accessibility and foreseeability (see *Cantoni v. France*, 15 November 1996, § 29, *Reports* 1996-V; *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; and *Achour*, cited above, § 42). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (see *Achour*, cited above, § 41, and *Kafkaris*, cited above, § 140). An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission (compare *Cantoni*, cited above, § 29; *Uttley*, cited above; and *Kafkaris*, cited above, § 140).

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

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

2. Application of these principles to the present case

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

123. The Court observes that at the time the applicant committed the attempted murder in 1985, a preventive detention order made by a sentencing court for the first time, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force, meant that the applicant could be kept in preventive detention for ten years at the most (see also paragraphs 99-100 above). Based on the subsequent amendment in 1998 of Article 67d of the Criminal Code, read in conjunction with section 1a (3) of the Introductory Act to the Criminal Code, which abolished that maximum duration with immediate effect, the courts responsible for the execution of sentences then ordered, in 2001, the applicant's continued preventive detention beyond the ten-year point. Thus, the applicant's preventive detention was prolonged with retrospective effect, under a law enacted after the applicant had committed his offence – and at a time when he had already served more than six years in preventive detention.

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

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

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

offenders in Belgium, for instance, which is in many ways similar to preventive detention under German law, has been considered as a penalty under Belgian law (see *Van Droogenbroeck*, cited above, § 19). The French Constitutional Council, for its part, found in its decision of 21 February 2008 (no. 2008-562 DC) that the preventive detention recently introduced into French law could not be qualified as a penalty, but could nevertheless not be ordered retrospectively, notably in view of its indefinite duration (see paragraph 75 above; see, for a further example, paragraph 74 above).

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

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

129. The Court agrees with the findings of both the Council of Europe's Commissioner for Human Rights (see § 206 of his report, paragraph 76 above) and the CPT (see § 100 of its report, paragraph 77 above) that persons subject to preventive detention, in view of its potentially indefinite duration, are in particular need of psychological care and support.

The achievement of the objective of crime prevention would require, as stated convincingly by the CPT (ibid.), "a high level of care involving a team of multi-disciplinary staff, intensive work with inmates on an individual basis (via promptly-prepared individualised plans), within a coherent framework for progression towards release, which should be a real option." The Court considers that persons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible. The Court does not lose sight of the fact that "[w]orking with this group of inmates is bound to be one of the hardest challenges facing prison staff" (see § 100 of the CPT's report, paragraph 77 above). However, in view of the indefinite duration of preventive detention, particular endeavours are necessary in order to support these detainees who, as a rule, will be unable to make progress towards release by their own efforts. It finds that there is currently an absence of additional and substantial measures – other than those available to all long-term ordinary prisoners serving their sentence for punitive purposes – to secure the prevention of offences by the persons concerned.

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

also be consistent with a punitive purpose and may be seen as a constituent element of the very notion of punishment (see *Welch*, cited above, § 30).

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

132. Finally, as to the severity of preventive detention – which is not in itself decisive (see paragraph 120 above) – the Court observes that this measure entails detention which, following the change in the law in 1998, no longer has any maximum duration. Moreover, the suspension of preventive detention on probation is subject to a court's finding that there is no danger that the detainee will commit further (serious) offences (see Article 67d of the Criminal Code, paragraph 53 above), a condition which may be difficult to fulfil (see to that effect also the Commissioner for Human Rights' finding that it was "impossible to predict with full certainty whether a person will actually re-offend"; § 203 of his report, cited in paragraph 76 above). Therefore, the Court cannot but find that this measure appears to be among the most severe – if not the most severe – which may be imposed under the German Criminal Code. It notes in this connection that the applicant faced more far-reaching detriment as a result of his continued preventive detention – which to date has been more than three times the length of his prison sentence – than as a result of the prison sentence itself.

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

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

135. The Court observes that in the Government's submission the sentencing court had ordered the applicant's preventive detention without stating a time-limit. They argued that the prolongation of that measure therefore merely concerned the execution of the penalty imposed on the applicant by the sentencing court. The Court is not convinced by that argument. As it has found above (see paragraphs 99-101 and 123), at the time the applicant committed his offence, the sentencing court's order for his preventive detention, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force, meant that the applicant could be kept in preventive detention for a maximum period of ten years.

The prolongation of the applicant's preventive detention by the courts responsible for the execution of sentences following the change in

Article 67d of the Criminal Code therefore concerns not just the execution of the penalty (preventive detention for up to ten years) imposed on the applicant in accordance with the law applicable when he committed his offences. It constitutes an additional penalty which was imposed on the applicant retrospectively, under a law enacted after the applicant had committed his offence.

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

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION