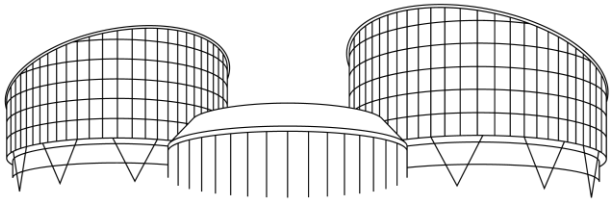

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF O.H. v. GERMANY

(Application no. 4646/08)

JUDGMENT

STRASBOURG

24 November 2011

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of O.H. v. Germany,

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

Dean Spielmann, *President,*
Karel Jungwiert,
Boštjan M. Zupančič,
Mark Villiger,
Ann Power-Forde,
Ganna Yudkivska,
Angelika Nußberger, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 3 November 2011,

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

PROCEDURE

1. The case originated in an application (no. 4646/08) 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 O.H. ("the applicant"), on 20 January 2008. The President of the Chamber acceded to the applicant's request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant, who had been granted legal aid, was represented by Mr A. Ahmed, a lawyer practising in Munich. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, and by their permanent Deputy Agent, Mr H.-J. Behrens, *Ministerialrat*, of the Federal Ministry of Justice.

3. The applicant alleged that the retrospective extension of his first preventive detention from a period of ten years, which had been the maximum for such detention under the legal provisions applicable at the time of his offence, to an unlimited period of time violated his Convention rights as he continued to be deprived of his liberty.

4. On 22 January 2009 the President of the Fifth Section decided to give notice of the application to the Government, requested them to submit information on alterations to the applicant's detention regime and adjourned the examination of the application until the judgment in the case of *M. v. Germany* (no. 19359/04, 17 December 2009) had become final. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). In view of the fact that the judgment of 17 December 2009 in the case of *M. v. Germany* became final on 10 May 2010, the President decided on 20 May 2010 that the proceedings in the

present application be resumed and granted it priority (Rule 41 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1952 and is currently in Straubing Prison.

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

1. The applicant's previous convictions and the preventive detention order against him

6. Between 1970 and 1987 the applicant was convicted in eight judgments of offences including theft, robbery, extortion, assault and dangerous assault and spent some fourteen years in prison.

7. On 9 April 1987 the Munich I Regional Court convicted the applicant of two counts of attempted murder. It sentenced him to nine years' imprisonment and ordered his preventive detention (Article 66 § 1 of the Criminal Code, see paragraphs 41-42 below).

8. The Regional Court found that in 1986 the applicant and an accomplice had shot at two policemen several times in order to escape arrest and criminal prosecution following the discovery of their plans to carry out an armed bank robbery using a stolen car. A psychological expert and a neurological expert consulted by the court, who had both examined the applicant in person, confirmed that the applicant was suffering from a personality disorder characterised, in particular, by antisocial conduct, which was, however, not serious enough to be classified as pathological. The court therefore considered that he had acted with full criminal responsibility. The applicant's preventive detention was necessary as, owing to his criminal tendencies, there was a risk that he might commit similar serious offences in the future and he was thus a danger to the public.

2. The execution of the order for the applicant's preventive detention

9. On 21 August 1996 the Regensburg Regional Court ordered that the applicant's preventive detention, imposed by the judgment of 9 April 1987 of the Munich I Regional Court, take place in a psychiatric hospital (Article 67c § 1 and Article 67a § 2 of the Criminal Code, see paragraphs 43

and 47 below) from 5 November 1996, when the applicant would have fully served his prison sentence. According to the report drawn up at the court's request by an external psychiatric expert, L., the findings of whom the court endorsed, the applicant suffered from schizophrenia simplex characterised by autistic behaviour and from a serious personality disorder. The expert took the view that the applicant had not been diagnosed with that illness before 1990 because it was characterised mostly by disorders concerning the affectivity, thinking or personality and less by hallucinations or delusional ideas. He should therefore be transferred to a psychiatric hospital as soon as possible for socio-therapeutic treatment and medication. Without such treatment, the applicant, owing to his tendency to commit serious offences, was a danger to the public.

10. On 5 November 1996 the applicant, having fully served his prison sentence, was placed for the first time in preventive detention, in psychiatric hospitals in Haar and Straubing.

11. On 29 July 1999 the Regensburg Regional Court ordered that the applicant's preventive detention should take place in prison instead of in a psychiatric hospital (Article 67a § 3 of the Criminal Code, see paragraph 47 below). It considered that the applicant's preventive detention in a psychiatric hospital was not helping to rehabilitate him.

12. The Regional Court noted that the psychiatric expert, L., whom it had consulted in 1996, had taken the view that the applicant's chronic schizophrenia could be better treated and his rehabilitation better furthered in a psychiatric hospital. A doctor at Haar Psychiatric Hospital had considered that the applicant suffered from an antisocial personality disorder and, possibly, from psychosis of a schizophrenic nature. The treating doctors at Straubing Psychiatric Hospital had, however, taken the view that the applicant's rehabilitation could not be furthered in that clinic as the applicant, who suffered from a schizophrenic-type disorder and antisocial conduct, had persistently refused any of the therapies offered. The Straubing prison authorities had opposed the applicant's transfer back to prison, arguing that the applicant's illness could only be treated in a psychiatric hospital. The court, having heard the applicant in person, endorsed the hospital's findings.

13. Since 26 August 1999 the applicant has been detained in a separate wing of Straubing Prison for persons in preventive detention.

14. The continuation of the applicant's preventive detention in prison was ordered by the Regensburg Regional Court on 21 June 2001.

15. On 13 May 2004 the Regensburg Regional Court ordered that the applicant's preventive detention was to take place in a psychiatric hospital (Article 67a §§ 1 and 2 of the Criminal Code, see paragraph 47 below). On 25 June 2004 the Nuremberg Court of Appeal quashed that decision for lack of sufficient findings as to the illnesses or disorders from which the

applicant suffered and as to the need to treat these in a psychiatric hospital and remitted the case to the Regional Court.

16. On 17 March 2005 the Regensburg Regional Court ordered that the measure of the applicant's preventive detention be further enforced in prison. It underlined that for the applicant to be transferred to a psychiatric hospital under Articles 67a and 63 of the Criminal Code, it was only decisive whether the applicant's rehabilitation could be better furthered thereby; the preconditions of Article 63 of the Criminal Code (see paragraph 48 below) did not have to be met.

17. The Regensburg Regional Court endorsed the findings of a psychiatric expert, W., it had consulted. The expert had considered that the applicant most probably suffered from a serious personality disorder with antisocial and schizoid elements, but not from schizophrenia simplex. As he refused therapy and his conduct had not changed substantially since 1986 he was liable to reoffend if released. The expert held that he should not be transferred to a psychiatric hospital under Article 67a §§ 1 and 2 of the Criminal Code. His rehabilitation could not be better furthered by such a transfer, as required by the said provision, because the disorder from which he suffered could not be treated primarily by medication and he refused therapy. Expert W.'s findings were contested by the medical director of the psychiatric wing of Straubing Prison, who maintained that the applicant suffered from an illness, schizophrenia simplex, which could be adequately treated only in a psychiatric hospital.

B. The proceedings at issue

1. The decision of the Regensburg Regional Court

18. On 5 October 2006 the Regensburg Regional Court, sitting as a chamber responsible for the execution of sentences, ordered the applicant's preventive detention to continue even after completion of ten years in such detention (Article 67d § 3 of the Criminal Code, see paragraph 46 below).

19. The Regional Court found that the applicant was liable to commit further offences, in particular assaults and robberies, if released. It further considered that the applicant was not to be transferred to a psychiatric hospital under Article 67a § 2 of the Criminal Code because his rehabilitation could not be better furthered thereby. It referred in this respect to the findings of the psychiatric expert it had consulted, P., who had found that the applicant refused treatment in a psychiatric hospital. The court noted that the fact that the applicant suffered from a mental illness and the particular nature of that illness was not decisive for its finding under Article 67a § 2 of the Criminal Code that the applicant's rehabilitation could not be better furthered in a psychiatric hospital. Its view that the applicant's preventive detention should take place in prison was confirmed by the fact

that the applicant's previous transfer to a psychiatric hospital had not yielded any success.

20. In reaching its decision, the Regional Court had regard to the report dated 25 May 2006 submitted by expert P. The latter, who had examined the applicant in person, had taken the view that the applicant, an antisocial personality, suffered from a schizophrenic-type disorder characterised by noticeable problems in the person's conduct, thinking and mood, which gave the impression of schizophrenia, but without any symptoms indicating actual schizophrenia. He had considered that the applicant did not suffer from schizophrenia, a diagnosis made following several previous examinations and as maintained by the medical director of the psychiatric wing of Straubing Prison, L., who still considered that the applicant could be adequately treated only in a psychiatric hospital. Expert P. noted that since 2002 the applicant was no longer being treated in the psychiatric wing of Straubing Prison.

21. The psychiatric expert had further considered that the applicant was likely to reoffend in view of his numerous previous convictions and the fact that he had committed his offences in 1986 shortly after having been released from prison. Moreover, he had subsequently been convicted of assault (in 1995) and of a drug offence committed in prison (in 1989). He hardly had any social contact outside prison. His personality disorder had not been treated as he had refused psychiatric therapy. He had also refused to apply for relaxations in the conditions of his detention and had announced that he would abscond if granted leave under escort. Measures would need to be taken to prepare his conditional release, such as finding contact persons outside prison, social training and relaxations in the conditions of his detention as soon as this appeared justifiable.

22. By 4 November 2006 the applicant had served ten years in preventive detention.

2. The decision of the Nuremberg Court of Appeal

23. On 27 December 2006 the Nuremberg Court of Appeal dismissed the applicant's appeal. Endorsing the reasons given by the Regional Court, it found that there was still a risk that, if released, the applicant, owing to his criminal tendencies, might commit serious offences, in particular assaults, robberies or thefts, resulting in considerable psychological or physical harm to the victims (Article 67d § 3 of the Criminal Code). His continued preventive detention was therefore still proportionate.

24. The Court of Appeal endorsed expert P.'s finding that the applicant's rehabilitation would not have been better furthered by his transfer to a psychiatric hospital as he refused treatment.

3. The decision of the Federal Constitutional Court

25. On 25 January 2007 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He argued that his continued preventive detention after completion of ten years on the basis of the amended Article 67d § 3 of the Criminal Code, which had entered into force after he had committed his offence, violated his human dignity, his right to liberty, the prohibition of retrospective punishment and the right not to be punished twice for the same offence under the Basic Law.

26. On 23 July 2007 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 241/07). It found that the applicant's complaint had no prospects of success. The criminal courts had verified the continued danger posed by the applicant in accordance with the standards set by the Basic Law. Article 67d § 3 of the Criminal Code, as amended in 1998, permitted the continued preventive detention, for several decades if necessary, of incorrigible offenders who persisted in refusing any treatment and remained a danger despite their advancing age.

C. The conditions of the applicant's detention during the execution of the preventive detention order in prison

27. Since 26 August 1999 the preventive detention order against the applicant has been executed in a separate wing of Straubing Prison for persons in preventive detention. Persons in preventive detention have certain privileges compared with convicted offenders serving their sentence.

28. In particular, at the relevant time, persons in preventive detention had more wide-ranging possibilities to occupy themselves in their spare time (one extra hour could be spent outside on non-working days; use of a well-equipped sports room; additional private telephone calls). They had shorter lock-up hours (some five hours less per day), more generous visiting times (up to seven hours extra per month) and more wide-ranging opportunities to purchase goods (four extra opportunities to buy a larger variety of goods). They further had the right to wear their own underwear, use their own bed linen and bath robes, and have more pocket money. They had bigger cells (the applicant's cell measures approximately 8.75 sq. m) which they could equip with bigger TV sets and additional furniture.

29. The applicant is considered by the Straubing prison authorities to be a nervous choleric person filled with hatred. Numerous disciplinary measures have had to be imposed on him, in particular for assaults on fellow prisoners and insults directed at the prison staff. He neither has contact with his fellow prisoners nor does he receive any visits from outside the prison. Since 1991 it has no longer been possible to assign him suitable work in prison.

30. As regards the therapy offered to the applicant, he stopped taking medication shortly after having started treatment for schizophrenia simplex with which he was diagnosed in 1990. This led to disturbances in his thinking, insufficient energy and a risk of occasional hallucinations. The legal preconditions for the forced administration of medication have never been met.

31. Between November 1996 and August 1999 the applicant was offered psychiatric treatment for schizophrenia simplex with which he had been diagnosed in Haar and Straubing psychiatric hospitals but he was unwilling to undergo treatment.

32. In Straubing Prison the applicant consistently refuses to accept the treatment offered or to meet the psychiatric experts who come to examine him in person.

D. Subsequent developments

33. On 19 February 2009 the Regensburg Regional Court, sitting as a chamber responsible for the execution of sentences, ordered the applicant's preventive detention to continue under Article 67d § 3 of the Criminal Code. Endorsing the findings made by the psychiatric expert it had consulted, N., the court found that there was still a risk that the applicant, owing to his criminal tendencies, might commit serious offences if released. There was a risk, in particular, that he might commit assaults and robberies, resulting in considerable psychological or physical harm to the victims. The court further considered that the applicant's preventive detention should not take place in a psychiatric hospital under Articles 67a § 2 and 63 of the Criminal Code because, as had been convincingly shown by the expert, the applicant's rehabilitation could not be better furthered thereby. The fact that the applicant suffered from a psychiatric illness was not decisive for the decision to be taken under the said provisions.

34. The expert consulted by the court, who had to draw up his report on the basis of the case file as the applicant had refused to submit himself for examination, found that the applicant suffered from an antisocial personality disorder, characterised by a lack of empathy, disregard for social rules, aggressive behaviour and a lack of feelings of guilt. He further suffered from a schizophrenic-type disorder, which was generally characterised by eccentric behaviour and abnormalities in the person's thinking and mood, which gave the impression of schizophrenia without any symptoms indicating actual schizophrenia: the applicant displayed eccentric and mistrustful behaviour, lacked social contact and experienced occasional hallucinations. It was, however, very unlikely that he suffered from schizophrenia simplex. The disorders from which the applicant suffered had still not been treated successfully and he continued to refuse therapy and medication. Therefore, the applicant's rehabilitation could not be better

furthered in a psychiatric hospital, where a lack of disciplinary measures could lead to him displaying even more antisocial conduct. He considered that the applicant should be transferred to a psychiatric hospital under Article 67a § 2 of the Criminal Code if he no longer refused to take the necessary medication.

35. On 17 March 2009 the Nuremberg Court of Appeal, endorsing the reasons given by the Regional Court, dismissed the applicant's appeal.

36. On 13 December 2010 the Nuremberg Court of Appeal dismissed the applicant's appeal against the Regensburg Regional Court's decision of 4 November 2010 not to order his immediate release in view of the Court's judgment of 17 December 2009 in the case of *M. v. Germany* (cited above). It found that the applicant's objections had to be examined in different proceedings to be instituted *ex officio* under Article 67e § 1 of the Criminal Code (see paragraph 44 below).

37. The city of Straubing did not subsequently apply for the applicant to be placed in a psychiatric hospital under section 1 of the Bavarian (Mentally Ill Persons') Placement Act (see paragraph 49 below). The psychiatric expert it had consulted, who had examined the applicant in person, had considered that the applicant suffered from a personality disorder with antisocial and schizoid elements, but not from a schizophrenic psychosis. The applicant's free will was not impaired by that personality disorder so that the requirements for a placement in a psychiatric hospital under the said Act were not met.

38. Following the leading judgment of 4 May 2011 of the Federal Constitutional Court on preventive detention (see paragraphs 51-55 below), the Regensburg Regional Court initiated proceedings for a fresh review of whether the applicant's preventive detention was to be terminated in the light of the principles established in the said judgment. The psychiatric expert consulted in the proceedings had to draw up her report on the basis of the case-file as the applicant refused to have himself examined by her. She took the view that the applicant suffered from a mental disorder (a schizophrenic-type personality disorder and a dissocial personality) within the meaning of section 1 of the Therapy Detention Act (see paragraph 50 below). It was his dissocial personality which contributed considerably to his dangerousness. In the expert's view, it was highly likely that the applicant would commit further violent offences if released. On 25 August 2011 the Regensburg Regional Court, endorsing the findings of the psychiatric expert, decided not to declare the execution of the preventive detention order against the applicant terminated. The proceedings are currently pending before the Court of Appeal.

39. The applicant is currently still in preventive detention, imposed by the Munich I Regional Court on 9 April 1987 and taking place in a separate wing of Straubing Prison for persons in preventive detention.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW AND PRACTICE

40. A comprehensive summary of the provisions of the Criminal Code and of the Code of Criminal Procedure governing the distinction between penalties and measures of correction and prevention, in particular preventive detention, and the making, review and execution in practice of preventive detention orders, is contained in the Court's judgment in the case of *M. v. Germany* (no. 19359/04, §§ 45-78, 17 December 2009). The provisions referred to in the present case provide as follows:

A. The order of preventive detention by the sentencing court

41. The sentencing court may, at the time of the offender's conviction, order his preventive detention (a so-called measure of correction and prevention) under certain circumstances in addition to his prison sentence (a penalty), if the offender has been shown to be a danger to the public (Article 66 of the Criminal Code).

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

B. The order for enforcement of the preventive detention measure

43. Article 67c of the Criminal Code governs orders for the preventive detention of convicted persons which has not taken place immediately after the judgment ordering it becomes final. Paragraph 1 of the Article provides that if a term of imprisonment is served prior to a simultaneously ordered placement in preventive detention, the court responsible for the execution of sentences (that is, a special chamber of the Regional Court composed of three professional judges, see sections 78a and 78b(1)(1) of the Court Organisation Act) must review, before completion of the prison term, whether the person's preventive detention is still necessary in view of its

objective. If that is not the case, it suspends the execution of the preventive detention order and applies a measure of probation; supervision of the person's conduct (*Führungsaufsicht*) commences with the suspension.

C. Judicial review and duration of preventive detention

44. Pursuant to Article 67e of the Criminal Code, the court (that is, the chamber responsible for the execution of sentences) may review at any time whether the further execution of the preventive detention order should be suspended and a measure of probation applied. It is obliged to do so within fixed time-limits (paragraph 1 of Article 67e). For persons in preventive detention, this time-limit is two years (paragraph 2 of Article 67e).

45. Under Article 67d § 1 of the Criminal Code, in its version in force prior to 31 January 1998, the first period of preventive detention may not exceed ten years. If the maximum duration has expired, the detainee shall be released (Article 67d § 3).

46. Article 67d of the Criminal Code was amended by the Combating of Sexual Offences and Other Dangerous Offences Act of 26 January 1998, which entered into force on 31 January 1998. Article 67d § 3, in its amended version, provides that if a person has spent ten years in preventive detention, the court shall declare the measure terminated (only) if there is no danger that the detainee will, owing to his criminal tendencies, commit serious offences resulting in considerable psychological or physical harm to the victims. Termination shall automatically entail supervision of the offender's conduct. The former maximum duration of a first period of preventive detention was abolished. Pursuant to section 1a(3) of the Introductory Act to the Criminal Code, the amended version of Article 67d § 3 of the Criminal Code was to be applied without any restriction *ratione temporis*.

D. Transfer for enforcement of a different measure of correction and prevention

47. Article 67a of the Criminal Code contains provisions on the transfer of detainees for the execution of a different measure of correction and prevention than the measure ordered in the judgment against them. Under Article 67a § 2, read in conjunction with § 1, of the Criminal Code, the court may subsequently transfer a perpetrator against whom preventive detention was ordered to a psychiatric hospital if the perpetrator's reintegration into society can be better promoted thereby. The court may quash that decision if it later emerges that no success can be achieved by placing the perpetrator in a psychiatric hospital (Article 67a § 3). The duration of the placement is determined by the provisions which apply to the measure ordered in the judgment (Article 67a § 4).

E. The detention of mentally ill persons

48. The detention of mentally ill persons is provided for, first of all, 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 or with diminished criminal responsibility, the court will order his placement – without any maximum duration – in a psychiatric hospital if a comprehensive assessment of the defendant and his acts reveals that, as a result of his condition, he can be expected to commit serious unlawful acts and that he is therefore a danger to the general public.

49. Secondly, pursuant to sections 1 § 1, 5 and 7 of the Bavarian Act on the Placement in an Institution of Mentally Ill Persons and Their Care of 5 April 1992 (Bavarian (Mentally Ill Persons') Placement Act – *Bayerisches Gesetz über die Unterbringung psychisch Kranker und deren Betreuung*) a court 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 and thereby poses a severe threat to public security and order. Such an order may only be executed as long as no measure under Article 63 of the Criminal Code has been taken (section 1 § 2 of the said Act).

50. 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 (Therapy Detention Act – *Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter*) 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 of retrospective aggravations in relation to preventive detention. Such a therapy detention 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 further suffer from a mental disorder owing to which it is highly likely that he will considerably impair the life, physical integrity, personal liberty or sexual self-determination of another person. The person's detention must be necessary for the protection of the public.

F. Recent case-law of the Federal Constitutional Court on preventive detention

51. On 4 May 2011 the Federal Constitutional Court delivered a leading judgment concerning the retrospective prolongation of the complainants' preventive detention beyond the former ten-year maximum period and about the retrospective order of the complainants' preventive detention

respectively (file nos. 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10 and 2 BvR 571/10). The Federal Constitutional Court held that all provisions on the retrospective prolongation of preventive detention and on the retrospective order 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.

52. The Federal Constitutional Court further held that all provisions of the Criminal Code on the imposition and duration of preventive detention at issue were incompatible with the fundamental right to liberty of the persons in preventive detention. It found that those provisions did not satisfy the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment (*Abstandsgebot*). These provisions included, in particular, Article 66 of the Criminal Code in its version in force since 27 December 2003.

53. The Federal Constitutional Court ordered 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. In relation to detainees whose preventive detention had been prolonged or ordered retrospectively, the courts dealing with the execution of sentences had to examine without delay whether the persons concerned, owing to specific circumstances relating to their person or their conduct, were highly likely to commit the most serious crimes of violence or sexual offences and if, additionally, they suffered from a mental disorder within the meaning of section 1 § 1 of the Therapy Detention Act (see paragraph 50 above). 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 143-156 of the Federal Constitutional Court's judgment). If the above pre-conditions 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 further applied in the transitional period subject to a strict review of proportionality; as a general rule, proportionality was only respected where there was a danger of the person concerned committing serious crimes of violence or sexual offences if released.

54. In its judgment, the Federal Constitutional Court stressed that the fact that the Constitution stood above the Convention in the domestic hierarchy of norms was not an obstacle to an international and European dialogue between the courts, but was, on the contrary, its normative basis in view of the fact that the Constitution was to be interpreted in a manner that was open to public international law (*völkerrechtsfreundliche Auslegung*; see § 89 of the Federal Constitutional Court's judgment). It stressed that, in line with that openness of the Constitution to public international law, it

attempted to avoid breaches of the Convention in the interpretation of the Constitution (see §§ 82 and 89 of the Federal Constitutional Court's judgment).

55. 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 ss. of the Federal Constitutional Court's judgment). It stressed, in particular, that the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment and the principles laid down in Article 7 of the Convention required an individualised and intensified offer of therapy and care to 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 offer the detainees an individualised therapy if the standard therapies available in the institution did not have prospects of success (see § 113 of the Federal Constitutional Court's judgment).

THE LAW

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

56. Without invoking any specific Article of the Convention, the applicant complained that the retrospective extension of his first preventive detention from the maximum period of ten years to an unlimited period of time violated his human rights as he continued to be deprived of his liberty. His complaint falls to be examined first under Article 5 § 1 of the Convention, which, 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 of unsound mind ...;"

57. The Government contested that argument.

A. Admissibility

1. The parties' submissions

58. The Government submitted that following the Court's judgment in the case of *M. v. Germany* (cited above), the applicant could have lodged a request with the courts responsible for the execution of sentences for his preventive detention to be terminated. As he failed to do so, he did not exhaust domestic remedies in accordance with Article 35 § 1 of the Convention.

59. In their further observations dated 14 June 2011 the Government objected that the applicant had failed to exhaust domestic remedies also for another reason. They argued that in its leading judgment of 4 May 2011 on preventive detention (see paragraphs 51-55 above), the Federal Constitutional Court had introduced a new domestic remedy for review of the ongoing preventive detention of persons concerned by that judgment. In particular, in parallel cases to the *M. v. Germany* case (cited above), in which preventive detention had been extended beyond the former ten-year maximum duration, the courts dealing with the execution of sentences could only order the continuation of that detention under restrictive conditions. The preventive detention of the persons concerned could only be prolonged if, owing to specific circumstances relating to their person or their conduct, they were highly likely to commit the most serious crimes of violence or sexual offences and if, additionally, they suffered from a mental disorder within the meaning of sub-paragraph (e) of Article 5 § 1. If that was not the case, the detainees had to be released no later than 31 December 2011. The applicant had been obliged to exhaust that new domestic remedy.

60. The Government further took the view that the applicant could no longer claim to be the victim of a violation of his Convention rights. In its above-mentioned judgment, the Federal Constitutional Court had implemented the findings the Court had made in its judgments on German preventive detention. The Convention violations found have thus partly been remedied by the Federal Constitutional Court in its transitional rules, and will partly be remedied as soon as possible.

61. The applicant did not comment on these points.

2. The Court's assessment

(a) Exhaustion of domestic remedies

62. The Court reiterates that under Article 35 § 1 of the Convention, recourse should be had to remedies which are available and sufficient to afford redress in respect of the breach of the Convention alleged (see,

among many others, *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV).

63. According to Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its observations on the admissibility of the application submitted as provided in Rule 54 (compare also *Sejdovic v. Italy* [GC], no. 56581/00, § 41, ECHR 2006-II; *Mooren v. Germany* [GC], no. 11364/03, § 57, ECHR 2009-...; and *Medvedyev and Others v. France* [GC], no. 3394/03, § 69, ECHR 2010-...). It observes that the Government objected that the applicant had failed to exhaust the domestic remedies made available by the Federal Constitutional Court only in further observations lodged after the exchange of observations between the parties had been completed in compliance with Rule 54 § 2 (b). Therefore, an issue arises in relation to whether the Government must be considered to have been prevented from raising that objection at this stage of the proceedings (compare also *Stanev v. Bulgaria* (dec.), no. 36760/06, § 114, 29 June 2010).

64. The Court further reiterates that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it. However, as it has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, § 87, 1 March 2010 with many further references) This was notably the case if the remedies under consideration were enacted to redress at a domestic level the Convention grievances of persons whose applications pending before the Court concerned similar issues (see *Demopoulos*, cited above, § 87).

65. The Court observes that in the proceedings at issue in the application before it the applicant appealed against the decision of the Regensburg Regional Court dated 5 October 2006 and obtained decisions on the merits from the Nuremberg Court of Appeal (27 December 2006) and from the Federal Constitutional Court (23 July 2007). He had therefore exhausted domestic remedies as required by Article 35 § 1 of the Convention at the date on which he lodged his application with the Court.

66. The Court further takes note of the Government's argument that the applicant should also have exhausted the new remedies available following this Court's judgment in the case of *M. v. Germany* (cited above) and the Federal Constitutional Court's judgment dated 4 May 2011. The Court considers that it can leave open the question whether the Government were (partly) estopped from raising these objections at this stage of the proceedings. It may further leave open whether it should make an exception from the rule that the assessment of whether domestic remedies have been exhausted is carried out with reference to the date on which the application

was lodged with it. The applicant in the present case complained about his preventive detention as ordered by the decision of the Regensburg Regional Court dated 5 October 2006, confirmed on appeal. Any remedies introduced subsequently, after the Court's judgment of 17 December 2009 in the *M. v. Germany* case (cited above), for review of his continued preventive detention are not, therefore, capable of affording redress to the applicant in relation to the prior period of preventive detention here at issue. In particular, it has not been shown that by exhausting these remedies, the applicant could obtain adequate compensation in relation to his preventive detention starting on 5 November 2006. The applicant thus did not have to exhaust these remedies for the purposes of Article 35 § 1 of the Convention. Consequently, the Government's objections of non-exhaustion of domestic remedies must be rejected.

(b) Loss of victim status

67. The Court observes that the Government also objected that the applicant could no longer claim to be the victim of a violation of his Convention rights as the Federal Constitutional Court remedied the alleged Convention violations by its judgment of 4 May 2011 and, in particular, by the transitional rules it contains. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" of a violation of a Convention right within the meaning of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, *inter alia*, *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; *Amuur v. France*, 25 June 1996, § 36, *Reports* 1996-III; and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

68. The Court notes that in its leading judgment of 4 May 2011, the Federal Constitutional Court relied on the interpretation of Article 5 and Article 7 of the Convention adopted by this Court in its judgment in *M. v. Germany* (cited above) and the follow-up cases thereto. It welcomes the Federal Constitutional Court's approach of interpreting the provisions of the Basic Law also in the light of the Convention and this Court's case-law, which demonstrates that court's continuing commitment to the protection of fundamental rights not only on national, but also on European level. It agrees with the Government that by its judgment, the Federal Constitutional Court implemented this Court's findings in its above-mentioned judgments on German preventive detention in the domestic legal order. It gave clear guidelines both to the domestic criminal courts and to the legislator on the consequences to be drawn in the future from the fact that numerous provisions of the Criminal Code on preventive detention were incompatible with the Basic Law, interpreted, *inter alia*, in the light of the Convention. Its

judgment thus reflects and assumes the joint responsibility of the State Parties and this Court in securing the rights set forth in the Convention.

69. Having regard to the scope of the Federal Constitutional Court's judgment, the Court, referring to its findings above (see paragraph 66), considers, however, that that judgment cannot be considered as having granted redress for the alleged breach of Article 5 § 1 by the applicant's preventive detention as from 5 November 2006 at issue in the impugned decisions of the domestic courts. The Government's objection that the applicant lost his victim status must therefore equally be rejected.

70. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

71. The applicant took the view that his case was a parallel case to that of *M. v. Germany* (cited above) and that, accordingly, his continued preventive detention beyond a period of ten years violated Article 5 § 1 of the Convention.

72. As regards the compliance of the applicant's continued detention with Article 5 § 1, the Government referred to their observations made on that issue in the case of *M. v. Germany* (cited above). They took the view that in terms of the temporal course of events, the present application was a parallel case to that of *M. v. Germany*.

73. The Government generally expressed doubts whether a narrow interpretation of sub-paragraphs (a) to (e) of Article 5 § 1 was necessary to protect individuals from arbitrary detention. That interpretation had to take into account the States' duty, originating in human rights and, in particular, in Articles 2 and 3 of the Convention, to protect victims from further offences. They took the view that "conviction" under sub-paragraph (a) of Article 5 § 1, contrary to the Court's case-law, should not only comprise a finding of guilt in respect of an offence and the imposition of a measure involving deprivation of liberty by the sentencing court, but that it should also comprise the decisions of the courts responsible for the execution of sentences to extend a person's detention depending on the danger he or she presented. There was also a causal connection between the order for the applicant's preventive detention by the sentencing court and his continued preventive detention after the ten-year point because the latter complied with the aim of the initial decision of the sentencing court to protect the public from crime.

74. In the Government's submission, the present application could, in any event, be distinguished from the case of *M. v. Germany*. In that case, the applicant, Mr M., had no longer suffered from a serious mental disorder and had not been detained for being of unsound mind under sub-paragraph (e) of Article 5 § 1. In contrast, the preventive detention of the applicant in the present case was justified under sub-paragraph (e) of the said provision. The sentencing Regional Court had found that the applicant suffered from a personality disorder but had acted with full criminal responsibility (see paragraph 8 above). In the Government's view, that personality disorder had to be qualified as a "true mental disorder" for the purposes of the Court's case-law as established, in particular, in *Winterwerp v. the Netherlands* (24 October 1979, Series A no. 33), and the applicant thus had to be considered as being of unsound mind. They stressed that the fact that a person had committed an offence with full criminal responsibility did not warrant the conclusion that the person did not suffer from a mental disorder for the purposes of sub-paragraph (e) of Article 5 § 1 and section 1 of the Therapy Detention Act (see paragraph 50 above). A person may have been fully capable of appreciating the wrongfulness of his act and of acting accordingly at the time of his offence and thus have been criminally responsible. This did not, however, exclude that owing to a serious mental disorder, that person was very liable to commit serious violent or sexual offences in the future.

75. The Government further referred to the findings of the psychiatric experts heard throughout the proceedings for review of the applicant's preventive detention to the effect that the applicant was suffering from a chronic schizophrenic disorder with autistic behaviour (see paragraph 9 above) and from a serious personality disorder with antisocial and schizoid elements (see paragraphs 12, 17, 20 and 34 above). They argued that the courts responsible for the execution of sentences had also based their view that the applicant was liable to reoffend on these elements. Therefore, the applicant's preventive detention had taken place in a psychiatric hospital from 6 November 1996 to 26 August 1999. Moreover, for persons who were unwilling to undergo therapy, psychiatric hospitals were not a suitable institution for the purposes of the said provision. Those persons would disturb the proper working of those institutions to the detriment of other patients.

2. The Court's assessment

(a) Recapitulation of the relevant principles

76. The Court reiterates the fundamental principles laid down in its case-law on Article 5 § 1 of the Convention, which have been summarised in its judgment of 17 December 2009 relating to preventive detention in the case of *M. v. Germany*, no. 19359/04, as follows:

"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-...). ...

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-...). ...

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.)."

77. The Court further reiterates that the term "persons of unsound mind" in sub-paragraph (e) of Article 5 § 1 does not lend itself to precise definition since its meaning is continually evolving as research in psychiatry progresses (see *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33, 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; *Varbanov v. Bulgaria*, no. 31365/96, §§ 45 and 47, ECHR 2000-X; *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 48, ECHR 2003-IV; *Shtukaturov v. Russia*, no. 44009/05,

§ 114, 27 March 2008; and *Kallweit v. Germany*, no. 17792/07, § 45, 13 January 2011).

78. 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 *H.L. v. the United Kingdom*, no. 45508/99, § 98, ECHR 2004-IX). 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 (compare *Luberti v. Italy*, 23 February 1984, § 28, Series A no. 75).

79. Furthermore, there must be some relationship between the ground 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 paragraph 1 if effected in a hospital, clinic or other appropriate institution (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 44, Series A no. 93; *Aerts v. Belgium*, 30 July 1998, § 46, *Reports* 1998-V; *Hutchison Reid*, cited above, § 49; *Brand v. the Netherlands*, no. 49902/99, § 62, 11 May 2004; and *Haidn v. Germany*, no. 6587/04, § 78, 13 January 2011).

(b) Application of these principles to the present case

80. The Court must first determine whether the applicant's preventive detention at issue was justified under sub-paragraph (a) of Article 5 § 1 as occurring "after conviction", in other words whether there was still a sufficient causal connection between the applicant's conviction and his deprivation of liberty.

81. The Court notes that at the time of the applicant's criminal conviction by the Munich I Regional Court in 1987, which alone entailed a finding of guilt (compare, *mutatis mutandis*, *M. v. Germany*, cited above, §§ 95-96), the order for his preventive detention, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force (see paragraph 45 above), meant that the applicant, against whom preventive detention had been 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 46 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 46 above), the applicant would have been released when ten years of preventive detention had elapsed, irrespective of whether he was still considered a danger to the public.

82. The present application is therefore a follow-up case, in terms of the temporal course of events, to the application of *M. v. Germany* (cited above), and the Court, having also had regard to the Government's submissions relating to its well-established case-law (see paragraph 73 above), sees no reason to depart from its findings in that judgment. The Court thus considers, as it did in the case of *M. v. Germany* (cited above, §§ 92-101), that there was not a sufficient causal connection between the applicant's conviction by the sentencing court and his continued deprivation of liberty beyond the period of ten years in preventive detention. His continued detention was therefore not justified under sub-paragraph (a) of Article 5 § 1.

83. The Court further considers that the applicant's preventive detention beyond the ten-year point was also not justified under sub-paragraph (c) of Article 5 § 1 as detention "reasonably considered necessary to prevent his committing an offence". The applicant's potential further offences were not sufficiently concrete and specific, as required by the Court's case-law, 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) (compare, *mutatis mutandis*, *M. v. Germany*, cited above, § 102).

84. The Court shall further examine whether, as submitted by the Government, the applicant's detention was justified under sub-paragraph (e) of Article 5 § 1 as detention of a person "of unsound mind". Under the Court's well-established case-law (see paragraph 77 above), this requires, in the first place, that 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.

85. The Court notes in this connection that in the proceedings here at issue, the domestic courts based their decision to extend the applicant's preventive detention on the report of a psychiatric expert, P. (see paragraphs 19-21 above). The expert, who had examined the applicant in person, had found that the applicant displayed antisocial behaviour and suffered from a schizophrenic-type disorder. He had further considered that the applicant did not suffer from schizophrenia. That latter diagnosis had been made in previous examinations, notably in 1996, prior to the applicant's transfer to a psychiatric hospital (see paragraph 9 above). It had subsequently been maintained by the medical director of the psychiatric wing of Straubing Prison (see paragraphs 17 and 20 above), but had already been contested previously by another external psychiatric expert, W., in 2005 (see paragraph 17 above). The Court notes that it appears from these findings that the applicant developed a schizophrenic-type disorder after his conviction in 1987, when he had been found to suffer only from a personality disorder characterised, in particular, by antisocial conduct, which was not such as to be classified as pathological (see paragraph 8 above).

86. The Court's task to determine whether the courts responsible for the execution of sentences can be said to have established that the applicant suffered from a true mental disorder within the meaning of sub-paragraph (e) of Article 5 § 1 on the basis of the said objective medical expertise before them is, however, difficult. As the Regensburg Regional Court itself stressed (see paragraph 19 above), it was not decisive for their decision whether the applicant's preventive detention should take place in a psychiatric hospital, and even less so for the extension of his preventive detention as such, whether the applicant suffered from a mental illness and the particular nature of that illness. The question before them was whether the applicant was liable to reoffend if released (Article 67d § 3 of the Criminal Code, see paragraphs 18-19 and 46 above), be it because of his mental condition or not (compare in this respect also *Kallweit*, cited above, § 56). The courts further had to determine under Article 67a §§ 1 and 2 of the Criminal Code (see paragraph 47 above) whether the applicant's reintegration into society could be better promoted if his necessary preventive detention took place in a psychiatric hospital. Again, this finding could, however, be made without the applicant suffering from a pathological mental disorder diminishing his criminal responsibility (Article 63 of the Criminal Code, see paragraphs 16, 19 and 48 above).

87. However, even assuming that the courts responsible for the execution of sentences could be said to have established, as a competent authority, that the applicant suffered from a "true mental disorder" warranting his compulsory confinement, the Court cannot but note that at the time of the proceedings at issue the applicant was detained in a separate wing of Straubing Prison for persons in preventive detention. It refers in this connection to its above case-law that, 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 paragraph 79 above).

88. Having regard to the applicant's conditions of detention in Straubing Prison (see paragraphs 27-32 above), the Court is not convinced that the applicant has been offered the therapeutic environment appropriate for a person detained as being of unsound mind. This has indeed been confirmed by the Straubing prison authorities themselves and, in particular, by the medical director of the psychiatric department of Straubing Prison. Since 1999 and notably also in the proceedings here at issue, he has maintained that the applicant's condition, which he considered as a mental illness, could be adequately treated only in a psychiatric hospital, and not in the psychiatric department of Straubing Prison – where the applicant has not received treatment since 2002 (see paragraphs 12, 17 and 20 above).

89. The Court does not overlook the fact that the domestic courts, in the proceedings at issue, considered that the applicant should not be transferred to a psychiatric hospital – where persons considered as mentally ill under

German law were placed at the relevant time – notably because he refused treatment in such an institution. However, the applicant's conduct or attitude does not exempt the domestic authorities from providing persons detained (solely) as mental health patients with a medical and therapeutic environment appropriate for their condition. The Court cannot but subscribe in this context to the reasoning of the Federal Constitutional Court in its judgment of 4 May 2011 in respect of the suitable institutions for persons in preventive detention. That court stressed that both the German Constitution and the Convention required a high level of individualised and intensified offer of therapy and care by a team of multi-disciplinary staff to persons in preventive detention. It further found that detainees had to be offered an individualised therapy if the standard therapies available in the institution did not have prospects of success (see paragraph 55 above).

90. The Court further has regard, in this respect, to the general observations made by both the Council of Europe's Commissioner for Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the situation of persons in preventive detention (for a summary and further references see *M. v. Germany*, cited above, §§ 76-77). It is thus aware that long-term detainees suffering from disorders such as the applicant, who appears unable to make any effort to improve the prospects of his own release, must be a considerable challenge to the staff working with them. It takes the view that the applicant nevertheless had to be provided with a therapeutic environment appropriate for his mental condition.

91. Having regard to the foregoing, the Court considers that in the circumstances of the present case, the applicant has not been detained in an institution suitable for the detention of mental health patients.

92. Consequently, the continuation of the applicant's detention was not covered by sub-paragraph (e) of Article 5 § 1 either. The Court further takes the view – and this is uncontested by the parties – that none of the other sub-paragraphs of Article 5 § 1 can serve to justify the applicant's detention at issue.

93. Furthermore, the Court, having regard to the Government's submission that its interpretation of Article 5 § 1 had to take into account the States' duty under Articles 2 and 3 of the Convention to protect victims from further offences (see paragraph 73 above), refers to its findings in the case of *Jendrowiak v. Germany* (no. 30060/04, §§ 36-38, 14 April 2011). It is aware of the fact that the domestic courts ordered the applicant's preventive detention beyond a period of ten years because they considered that there was still a risk that the applicant might commit serious offences, such as robberies and assaults, if released. They thus acted in order to protect potential victims from physical and psychological harm which might be caused by the applicant.

94. However, while the Convention, and in particular its Articles 2 and 3, obliges State authorities to take reasonable steps within the scope of their powers to prevent offences of which they had or ought to have had knowledge, it does not permit a State to protect individuals from criminal acts of a person by measures which are in breach of that person's Convention rights, in particular the right to liberty as guaranteed by Article 5 § 1 (see, *mutatis mutandis*, *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports* 1998-VIII; and *Opuz v. Turkey*, no. 33401/02, § 129, ECHR 2009-...), as interpreted in the Court's well-established case-law. Consequently, the State authorities cannot, in the present case, rely on their positive obligations under the Convention in order to justify the applicant's deprivation of liberty which, as has been shown above (see paragraphs 80-92 above), did not fall within any of the permissible grounds for deprivation of liberty exhaustively listed under sub-paragraphs (a) to (f) of Article 5 § 1.

95. There has accordingly been a violation of Article 5 § 1 of the Convention.

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

96. The applicant's complaint that the retrospective extension of his first preventive detention from a maximum of ten years to an unlimited period of time – which became possible owing to the amendment in 1998 of Article 67d §§ 1 and 3 of the Criminal Code, read in conjunction with section 1a (3) of the Introductory Act to the Criminal Code – violated his human rights also falls to be examined under Article 7 § 1 of the Convention, which provides:

> "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."

97. The Government contested that allegation.

A. Admissibility

98. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes, also having regard to its findings above (see paragraphs 62-69), that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

99. The applicant considered that his case was a parallel case to that of *M. v. Germany* (no. 19359/04) and that, therefore, his continued preventive detention beyond the ten-year point violated Article 7 § 1 of the Convention.

100. The Government referred to their observations made in relation to Article 7 in the application of *M. v. Germany* (cited above) to which, in terms of the temporal course of events, the present application was comparable.

101. The Government submitted that the preventive detention of the applicant in the present case could not, however, be classified as a "penalty" within the meaning of Article 7 § 1 because the execution of his preventive detention order had differed substantially from that of the applicant in the case of *M. v. Germany*. The applicant in the present case had been detained in a psychiatric hospital from 5 November 1996 to 26 August 1999 in accordance with Article 67a § 2 of the Criminal Code (see paragraphs 9-13 and 47 above) where the enforcement of his preventive detention was completely different from the execution of a sentence in prison. He had been transferred to Straubing Prison in 1999 because he had refused therapy.

102. Moreover, from September 2010 onwards, the conditions of detention for persons in preventive detention in Straubing Prison had been further improved. In particular, all detainees had separate cells measuring between 10.3 and 12.1 sq. m and had other privileges in addition to ordinary prisoners serving their sentence as regards remuneration for work, visiting hours (up to ten extra hours) and shopping (six extra opportunities).

2. The Court's assessment

a. Recapitulation of the relevant principles

103. The Court reiterates the relevant principles laid down in its case-law on Article 7 of the Convention, which have been summarised in its judgment in the case of *M. v. Germany* (cited above) as follows:

> "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). ...

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)."

(b) Application of these principles to the present case

104. In determining whether the applicant's preventive detention beyond the initial ten-year point violated the prohibition of retrospective penalties under Article 7 § 1, second sentence, the Court notes that the applicant committed the two counts of attempted murder for which his preventive detention was ordered in 1986. At that time, 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 (see paragraph 45 above), meant that the applicant could be kept in preventive detention for ten years at the most. 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 (see paragraph 46 above), which abolished that maximum duration with immediate effect, the courts responsible for the execution of sentences then ordered, in the proceedings here at issue, the applicant's continued preventive detention beyond the ten-year point. Thus, the applicant's preventive detention – as that of the applicant in the case of *M. v. Germany* – was extended with retrospective effect, under a law enacted after the applicant had committed his offence.

105. The Court further refers to its conclusion in the case of *M. v. Germany* (cited above, §§ 124-133) that preventive detention under the German Criminal Code, having regard to the fact that it is ordered by the criminal courts following a conviction for a criminal offence and that it entails a deprivation of liberty which, following the change in the law in 1998, no longer has any maximum duration, is to be qualified as a "penalty"

for the purposes of the second sentence of Article 7 § 1 of the Convention. It again sees no reason to depart from that finding in the present case.

106. In particular, it is not convinced that the conditions of the applicant's preventive detention beyond the ten-year point (4 November 2006) differed substantially from the situation of the applicant in the case of *M. v. Germany* (cited above), in which it concluded that preventive detention was to be qualified as a "penalty" for the purposes of Article 7 § 1 of the Convention. The applicant's preventive detention as ordered by the courts responsible for the execution of sentences in 2006 has taken place in a separate wing of Straubing Prison for persons in preventive detention. Minor alterations to the detention regime compared with that of an ordinary prisoner serving his sentence, including privileges such as those listed above (see paragraphs 27-28), cannot, in the Court's view, mask the fact that there has been no substantial difference between the execution of a prison sentence and that of the preventive detention order against the applicant. The Court refers in this connection also to the findings of the Federal Constitutional Court in its leading judgment of 4 May 2011 on preventive detention. In that judgment, the Federal Constitutional Court equally found that the provisions of the German Criminal Code on preventive detention – on the basis of which the applicant's preventive detention in prison was executed – did not satisfy the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment (see paragraph 52 above).

107. The Court would further note that its above observations on the scope of the State authorities' positive obligation to protect potential victims from physical and psychological harm which might be caused by the applicant (see paragraphs 93-94 above) apply, *a fortiori*, in the context of the prohibition of retrospective penalties under Article 7 § 1, from which provision 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 the 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 (compare also *Jendrowiak*, cited above, § 48).

108. 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 46 OF THE CONVENTION

109. The Court notes that in several previous judgments concerning German preventive detention (see, in particular, *Mautes v. Germany*, no. 20008/07, §§ 57 ss., 13 January 2011; and *Kallweit*, cited above, §§ 74 ss.) it addressed the issue of the execution of its final judgments. Having

regard to the circumstances of the case and the recent developments in the domestic legal order, it considers it adequate to determine what consequences may be drawn from Article 46 of the Convention for the respondent State also in the present case.

110. Article 46 of the Convention, in so far as relevant, provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

A. The parties' submissions

111. The applicant did not comment on issues relating to Article 46.

112. The Government took the view that by its leading judgment of 4 May 2011 (see paragraphs 51-55 above), the Federal Constitutional Court had implemented this Court's judgments on German preventive detention. It had *de facto* anticipated a pilot judgment procedure by this Court, addressing the structural deficits of the legislation on preventive detention. The Government argued that, therefore, the present case should be adjourned until the fresh proceedings before the domestic courts which were made necessary by the Federal Constitutional Court's leading judgment were terminated. The case should only be resumed after the domestic courts had determined whether the applicant's current preventive detention was to continue in the light of the criteria set up in the Federal Constitutional Court's judgment.

B. The Court's assessment

113. The Court reiterates that, in accordance with Article 46 of the Convention, the finding of a violation imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see, *inter alia*, *Broniowski v. Poland* [GC], no. 31443/96, § 192, ECHR 2004-V; and *Sürmeli v. Germany* [GC], no. 75529/01, § 137, ECHR 2006-VII).

114. Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately

redressed (see *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; and *Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II).

115. The Court further reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV; and *Fatullayev v. Azerbaijan*, no. 40984/07, § 173, 22 April 2010).

116. However, exceptionally, with a view to helping a respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a violation it has found to exist. In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure, such as, for instance, securing an applicant's immediate release (see, in particular, *Assanidze*, cited above, §§ 202-203; and *Fatullayev*, cited above, §§ 174-177).

117. The Court observes in the present case that following its judgment in the case of *M. v. Germany* (cited above) and several follow-up cases, the Federal Constitutional Court, in a leading judgment of 4 May 2011, held that all provisions on the retrospective prolongation of preventive detention were incompatible with the Basic Law. That court further ordered that the courts dealing with the execution of sentences had to review without delay the detention of persons – as the applicant in the present case – whose preventive detention had been prolonged retrospectively. These courts have to examine whether, owing to specific circumstances relating to his person or his conduct, the applicant was highly likely to commit the most serious crimes of violence or sexual offences and if, additionally, he suffered from a mental disorder within the meaning of section 1 § 1 of the Therapy Detention Act (compare paragraphs 50 and 53 above). 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. If the above pre-conditions are not met, a detainee in the applicant's position will have to be released no later than 31 December 2011 (see paragraph 53 above). The Court further observes that such review proceedings are currently pending before the domestic courts (see paragraph 38 above).

118. The Court would recall that the subsidiary nature of the supervisory mechanism of complaint to the Court articulated in Articles 1, 35 § 1 and 13 of the Convention and reiterated in the Interlaken Declaration of

19 February 2010 (PP 6 and part B., § 4 of the Action Plan) lays the primary responsibility for implementing and enforcing the rights and freedoms of the Convention on the national authorities. As it found above (see paragraph 68), the Court considers, as does the Government, that by its judgment, the Federal Constitutional Court implemented this Court's findings in its above-mentioned judgments on German preventive detention in the domestic legal order. It thereby fully assumed that responsibility. By setting a relatively short time-frame of less than eight months for the domestic courts to reconsider the continuing preventive detention of the persons concerned in the light of the requirements of the Basic Law and Articles 5 and 7 of the Convention, it proposed an adequate solution to put an end to ongoing Convention violations.

119. In the light of the foregoing, the Court does not consider it necessary to indicate any specific or general measures to the respondent State which are called for in the execution of this judgment. It understands that the above-mentioned judgment of the Federal Constitutional Court will be executed and the new review proceedings be concluded in the light of that court's and this Court's case-law and within the time-limit prescribed in the Federal Constitutional Court's judgment. It further notes that the Convention compliance of the applicant's preventive detention as ordered by the Regensburg Regional Court on 5 October 2006 and as confirmed by the Nuremberg Court of Appeal (27 December 2006) and the Federal Constitutional Court (23 July 2007) here at issue was not the subject-matter of the said leading judgment of the Federal Constitutional Court. The new judicial review ordered by the latter court, consequently, does not cover the applicant's past preventive detention during that period. The Court did not, therefore, consider it appropriate to further adjourn the examination of the case before it.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

120. Article 41 of the Convention provides:

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

A. Damage

121. The applicant, referring to the Court's award in *M. v. Germany* (cited above), claimed 50,000 euros (EUR) in respect of non-pecuniary damage, arguing that his detention in breach of the Convention caused him distress and frustration. Having regard to the compensation of EUR 25 per

day of illegal detention under the current version of section 7(3) of the Act on Compensation for Criminal Prosecution Measures, he considered his claim to be adequate. He applied for the award to be paid into his lawyer's fiduciary bank account.

122. The Government, having regard to the awards made by the Court in previous cases concerning preventive detention in breach of the Convention and to the fact that until 4 November 2006 the applicant's preventive detention had not been in breach of the Convention, considered the applicant's claim to be excessive.

123. The Court takes into consideration that the applicant has been detained in breach of the Convention since 5 November 2006. This must have caused him non-pecuniary damage such as distress and frustration, which cannot be compensated solely by the finding of a Convention violation. Having regard to all the circumstances of the case and making its assessment on an equitable basis, it awards the applicant EUR 20,000, plus any tax that may be chargeable, to be paid to the applicant into his lawyer's fiduciary bank account.

B. Costs and expenses

124. The applicant, who was granted legal aid in the proceedings before the Court, did not submit a claim for costs and expenses. Accordingly, the Court does not make an award under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by six votes to one that there has been a violation of Article 5 § 1 of the Convention;

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

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be paid into his lawyer's fiduciary bank account;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 24 November 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Zupančič is annexed to this judgment.

D.S.
C.W.

DISSENTING OPINION OF JUDGE ZUPANČIČ

1. It is to my regret that I cannot agree with my colleagues on one particular point in this judgment against Germany, which is why I dissented concerning point 2 of the operative part (violation of Article 5 § 1).

2. The essence of the disagreement concerns paragraph 88 of the judgment. The majority seems to maintain that a person of "unsound mind" must be offered the appropriate therapeutic environment. In the case at hand there has indeed been a disagreement between the medical director of the psychiatric department of Straubing Prison and some other experts engaged concerning the proper diagnosis, prognosis and treatment of Mr O.H.

3. The key question is not whether a person diagnosed as having personality disturbances (psychopathy) is either sane or insane according to the usual rules of substantive criminal law. However, the problem of their placement in a psychiatric hospital is at least 30 years old. As a constitutional question it arose in the D.C. Circuit in American law in the late 60s and early 70s. At that time, the general staff of the St. Elizabeth Hospital in the District of Columbia has taken the position that people with personality disturbances (psychopaths) are not treatable and are not for the purposes of criminal responsibility insane. We shall not here entertain the question of insanity defence although it is not completely detachable from the question of placement of an inmate with a personality disturbance.

4. The question is whether a person with such a diagnosis, given the *communis opinio doctorum* is treatable at all and whether he does or does not belong in the psychiatric hospital in the first place. Let us emphasise that this is not a question of principle or inherent (in)justice. It is a question of policy deriving from the established empirical fact that people with personality disorders tend to create problems which psychiatric hospitals are ill-equipped to deal with.

5. The problem is neither new nor undecided. The constitutional issues deriving from the right to treatment referred to in the last sentence of paragraph 90 of the judgment have already been confronted and in fact decided. This would be one case in which the resulting comparisons with other legal systems that have already dealt with the problem ought to be taken seriously.

6. If the implication of the judgment is that psychopaths ought to be transferred to psychiatric hospitals and offered the (non-existent) treatment for their personality disorders, then this kind of decision with consequences not only for Germany but also for the rest of the 47 countries of the Council of Europe, is a subject for the Grand Chamber.

7. The issue there would not be a question whether the person with a personality disturbance is or is not of "unsound mind": it would be much more specific.

8. A categorical position would have to be taken concerning the criminal responsibility of people with personality disturbances on the one hand and their right to treatment, should they be committed as criminally insane on the other hand.

9. The way things stand in jurisdictions that have already dealt with the problem is that people with personality disturbances (psychopaths) are criminally responsible and they do belong in prison, not in a psychiatric hospital. More specifically the problem with the judgment of the majority is simply the assumption, elaborated in paragraphs 88, 89, 90 and 91, to the effect that people of "unsound mind" belong in psychiatric hospitals and have a right to treatment. To put it differently, the category of persons of "unsound mind" is far too broad and insufficiently *nuancé* to cover the problem that we are dealing with here.