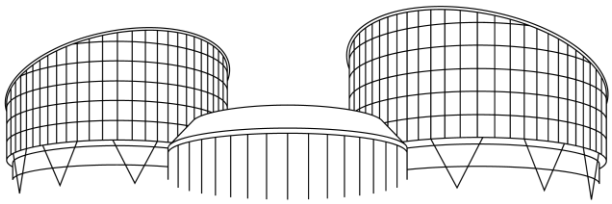

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF MORK v. GERMANY

(Applications nos. 31047/04 and 43386/08)

JUDGMENT

STRASBOURG

9 June 2011

FINAL

09/09/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mork v. Germany,

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

Dean Spielmann, *President*,
Elisabet Fura,
Boštjan M. Zupančič,
Isabelle Berro-Lefèvre,
Ann Power,
Ganna Yudkivska,
Angelika Nußberger, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 10 May 2011,

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

PROCEDURE

1. The case originated in two applications (nos. 31047/04 and 43386/08) 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 Hermann Walter Mork ("the applicant"), on 18 August 2004 and 3 September 2008 respectively.

2. The applicant was represented by Ms M. Bürger-Frings, a lawyer practising in Aachen. 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, in particular, that the execution of his preventive detention violated his right to liberty under Article 5 § 1 of the Convention.

4. On 13 March 2007 a Chamber of the Fifth Section decided to adjourn the examination of application no. 31047/04 pending the outcome of the proceedings in the case of *M. v. Germany*, no. 19359/04. On 22 January 2009 the President of the Fifth Section decided to give notice of the applications no. 31047/04 and no. 43386/08 to the Government, requested them to submit information on changes in the applicant's detention regime and adjourned the examination of the applications until the judgment in the case of *M. v. Germany* (cited above) has become final. It was also decided to rule on the admissibility and merits of the applications 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 applications at issue be

resumed and granted priority to the applications (Rule 41 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1955 and is currently detained in Aachen Prison.

A. Background to the case

6. Between 1978 and 1981 the applicant was convicted, among other offences, of numerous counts of joint burglary committed in companies and shops and was imprisoned from March 1980 until February 1985.

7. In 1986 the Dortmund Regional Court convicted the applicant of trafficking in drugs (hashish and cocaine) and sentenced him to eight years' imprisonment. The applicant was in pre-trial detention and served his sentence from August 1985 until June 1993.

8. In December 1996 the applicant was arrested and placed in pre-trial detention on suspicion of drug trafficking; he has remained in prison since then.

B. The proceedings before the sentencing courts (application no. 31047/04)

1. The proceedings before the Regional Court and the Federal Court of Justice

9. In a judgment dated 9 February 1998 the Aachen Regional Court convicted the applicant of unauthorised importing of drugs and of drug trafficking committed in 1996 and involving some 280 kilos of hashish. It sentenced him to eight years and six months' imprisonment. It decided not to order the applicant's preventive detention under Article 66 of the Criminal Code (see paragraphs 22-23 below) as it was not convinced that the applicant was dangerous to the public owing to a disposition to commit serious offences. In this assessment, the court took into consideration that the applicant had not attempted to avert his punishment by lodging numerous procedural motions and had agreed to the forfeiture of money stemming from drug trafficking. The applicant claimed that he had struck a deal with the Regional Court on the latter's proposal that the court would

impose a sentence of less than ten years and would not order his preventive detention if he ceased to contest the court's finding of fact. The Government submitted that there was no indication in the case-file that such an agreement had been made.

10. In a judgment dated 7 April 1999 the Federal Court of Justice dismissed an appeal by the applicant on points of law. It allowed an appeal by the prosecution regarding the Regional Court's decision not to order the applicant's preventive detention and quashed the judgment in this respect as the Regional Court had not given valid reasons for considering the applicant not to be dangerous to the public.

11. In a judgment dated 14 November 2001 a different chamber of the Aachen Regional Court ordered the applicant's (first) indefinite preventive detention pursuant to Article 66 § 1 of the Criminal Code. Having consulted a psychiatric expert and having regard to the applicant's personality and his previous convictions, the court considered that the applicant had a disposition to commit serious offences, was likely to commit further serious drug offences and was thus dangerous to the public.

12. In a decision dated 31 May 2002 the Federal Court of Justice dismissed as ill-founded an appeal by the applicant on points of law, in which the latter had complained that provisions of substantive law had not been complied with (*allgemeine Sachrüge*).

2. The proceedings before the Federal Constitutional Court

13. On 24 June 2002 the applicant, without being represented by counsel, lodged a constitutional complaint with the Federal Constitutional Court against the two judgments of the Regional Court and the judgment and the decision of the Federal Court of Justice. He complained, in particular, that preventive detention was incompatible with his right to liberty under Article 5 § 1 of the Convention, which did not cover such a preventive measure. It further violated the prohibition of retrospective punishment under the Basic Law and Article 7 of the Convention because it was incompatible with the principle of legal certainty and because his preventive detention had been ordered without a maximum duration of ten years, which had been the maximum penalty at the time he committed his offences. Furthermore, his right to a fair trial had been breached in that the domestic courts had not subsequently respected the deal struck with the Regional Court that he would not further contest the court's finding of facts in exchange for the court not ordering his preventive detention.

14. On 11 March 2004 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 1046/02). The Federal Constitutional Court found that in so far as the applicant complained about the judgment of the Regional Court of 9 February 1998 and that of the Federal Court of Justice of 7 April 1999, he had lodged his constitutional complaint out of time. In so far as the applicant complained

that the Regional Court's order for his preventive detention in its judgment of 14 November 2001 lacked a valid legal basis and was arbitrary, his complaint was inadmissible for non-exhaustion of domestic remedies. The court found that the applicant had failed to submit his statement of the grounds of his appeal on points of law nor had he claimed before it that he had complained about the unconstitutionality of the amended provisions on preventive detention and about their application by the Regional Court to him before the Federal Court of Justice, at least by complaining that provisions of substantive law had not been complied with.

C. The proceedings before the courts dealing with the execution of sentences (application no. 43386/08)

1. The proceedings before the Regional Court

15. On 13 July 2007 the Bochum Regional Court, acting as the court dealing with the execution of sentences, having heard the applicant in person, ordered the applicant's placement in preventive detention as of 25 July 2007 (Article 67c § 1 of the Criminal Code; see paragraph 24 below), that is, as from the day on which the applicant would have served his full prison sentence. The court fully agreed with the findings of a psychiatric and psychotherapeutic expert it had consulted on the applicant's dangerousness. In his report dated 7 May 2007 the expert, having examined the applicant, had considered that, if released, the applicant was very likely to commit further serious offences similar to those he had previously committed. He was still dangerous to the public as he had to date failed to reflect sufficiently on his numerous offences. Even assuming that the security measures taken against him by the prison authorities had not been justified, this did not alter the fact that there had not been a consistent treatment limiting the risk that he would reoffend after his release.

2. The proceedings before the Court of Appeal

16. On 6 September 2007 the Hamm Court of Appeal, endorsing the reasons given by the Regional Court, dismissed the applicant's appeal.

17. On 24 January 2008 the Hamm Court of Appeal rejected an objection (*Gegenvorstellung*) by the applicant.

3. The proceedings before the Federal Constitutional Court

18. On 17 October 2007 the applicant lodged a constitutional complaint with the Federal Constitutional Court against the Regional Court's decision of 13 July 2007 and the Court of Appeal's decision of 6 September 2007. By submissions dated 3 March 2008 he extended his complaint to the Hamm Court of Appeal's decision of 24 January 2008. He claimed, in

particular, that the order to place him in preventive detention disproportionately interfered with his right to liberty. He argued that the expert report on which the courts dealing with the execution of sentences had relied had not been drawn up in due form, that the courts had failed to give convincing reasons, in view of his mostly less serious previous convictions, why he was likely to commit further serious offences if released and that he had been refused relaxations in the conditions of his detention without convincing reasons.

19. On 14 July 2008 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 2356/07). It found, in particular, that the decisions of the courts dealing with the execution of sentences to order the applicant's placement in preventive detention had not violated the applicant's right to liberty. The Federal Constitutional Court found that the Regional Court's assessment that the applicant had repeatedly committed serious offences was not arbitrary as the latter had been sentenced to one term of eight years' imprisonment and another of eight years and six months. The expert report, which was of recent date, was sufficiently substantiated. In so far as the applicant had been refused relaxations in the conditions of his detention, the Constitutional Court noted that the courts dealing with the execution of sentences had not based their decision to order preventive detention globally on the fact that the applicant had failed to prove that he was no longer dangerous in the course of such relaxations. If the prison authorities refused to grant the applicant relaxations in the conditions of his detention in the future, the applicant had to raise this issue with the competent lower courts first. In view of the courts' assessment that the applicant was likely to commit further serious offences if released, their finding that the interest in public safety prevailed over the applicant's right to liberty had been proportionate.

D. Subsequent developments

20. On 12 August 2009 the Aachen Regional Court, acting as the court dealing with the execution of sentences, refused to suspend the execution of the preventive detention order against the applicant on probation. That decision was confirmed on appeal.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW AND PRACTICE

A. Provisions concerning preventive detention

21. 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:

1. The order of preventive detention by the sentencing court

22. 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 dangerous to the public (Article 66 of the Criminal Code).

23. 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).

2. The duration of preventive detention

24. Article 67c § 1 of the Criminal Code provides that if a term of imprisonment is executed prior to a simultaneously ordered placement in preventive detention, the court responsible for the execution of sentences (that is, a special Chamber of the Regional Court composed of three professional judges, see sections 78a and 78b(1)(1) of the Court Organisation Act) must review, before completion of the prison term, whether the person's preventive detention is still necessary in view of its

objective. If that is not the case, it suspends on probation the execution of the preventive detention order; supervision of the person's conduct commences with suspension.

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

26. 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, provided 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 conduct of the offender. 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*.

B. Relevant case-law of the Federal Constitutional Court

1. Case-law on lodging a constitutional complaint

27. Under the well-established case-law of the Federal Constitutional Court, a complainant is obliged to submit to that court, within the one-month time-limit running from the notification of the impugned court decision, either a copy of the impugned decisions and of all documents necessary for their understanding or at least to set out their content in a manner allowing for a control of their constitutionality (see, *inter alia*, the decisions of the Federal Constitutional Court of 16 December 1992, file no. 1 BvR 167/87, Collection of the decisions of the Federal Constitutional Court (*BVerfGE*), vol. 88 (1993), pp. 40 ss., 45; of 10 October 1995, file nos. 1 BvR 1476, 1980/91 and 102, 221/92, Collection of the decisions of the Federal Constitutional Court, vol. 93 (1996), pp. 266 ss., 288; confirmed, for instance, by a decision of 18 March 2009, file no. 2 BvR 1350/08). No distinction was made in these decisions between complainants who were and those who were not represented by counsel.

2. Recent case-law on preventive detention

28. 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 (compare the provisions in paragraphs 25-26 above) 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.

29. 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 because 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.

30. 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 most. 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. 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 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.

31. 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*). 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).

THE LAW

I. JOINDER OF THE APPLICATIONS

32. Given that the present two applications concern two sets of proceedings in both of which a similar subject-matter, namely the applicant's preventive detention, was at issue, the Court decides that the applications shall be joined (Rule 42 § 1 of the Rules of Court).

II. COMPLAINTS CONCERNING THE ORDER OF THE APPLICANT'S PREVENTIVE DETENTION BY THE SENTENCING COURT

33. The applicant complained in application no. 31047/04 that the order for his indefinite preventive detention, being a penalty, was incompatible with Article 7 § 1 of the Convention. In particular, at the time when he committed his offences a first order of preventive detention could not be made for an unlimited period, but only for a maximum duration of ten years. He further argued that his deprivation of liberty also failed to comply with Article 5 § 1 of the Convention because the order for his preventive detention was in breach of Article 7 § 1. Moreover, in the applicant's submission, his right to a fair trial under Article 6 § 1 of the Convention had been infringed in that the deal struck with the Regional Court that he would not further contest the facts in exchange for the court not ordering his preventive detention had not been honoured by the Federal Court of Justice, although he had not been informed by the Regional Court that the Federal Court of Justice was not bound by that agreement.

A. The parties' submissions

34. The Government argued that the applicant's complaints concerning the order for his preventive detention by the sentencing courts were inadmissible as the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. They underlined that in its decision of 11 March 2004, the Federal Constitutional Court had dismissed the applicant's constitutional complaint as he had partly lodged it out of time, partly failed to demonstrate that he had exhausted domestic remedies in the proceedings before the lower courts. The Federal Constitutional Court

had not been obliged to request the applicant to submit further documents before taking its decision and had not applied procedural provisions in an arbitrary manner to the applicant's detriment.

35. The applicant contested that view. He argued that, given that he had not been represented by counsel in the proceedings before the Federal Constitutional Court, that court had been obliged to request him to submit further information and documents it considered necessary for deciding on the merits of his case. He submitted that he had in fact complained before the Federal Court of Justice that provisions of substantive law had not been complied with.

B. The Court's assessment

36. The Court reiterates that, whereas Article 35 § 1 of the Convention must be applied with some degree of flexibility and without excessive formalism, it does not require merely that applications should be made to the appropriate domestic courts and that use should be made of effective remedies designed to challenge decisions already given. It normally requires also that the complaints intended to be brought subsequently before the Court should have been made to those same courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see, among other authorities, *Cardot v. France*, 19 March 1991, § 34, Series A no. 200; *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I; and *Elçi and Others v. Turkey*, nos. 23145/93 and 25091/94, § 604, 13 November 2003). Consequently, domestic remedies have not been exhausted when an appeal is not admitted because of a procedural mistake by the applicant (see, *inter alia*, *Skałka v. Poland* (dec.), no. 43425/98, 3 October 2002).

37. The Court further reiterates that it is in the first place for the national authorities, and notably the courts, to interpret domestic law – in particular rules of a procedural nature such as time-limits governing the filing of documents or the lodging of appeals – and that the Court will not substitute its own interpretation for theirs in the absence of arbitrariness (compare, *inter alia*, *Fáber v. the Czech Republic*, no. 35883/02, §§ 55-56, 17 May 2005; and *Agbovi v. Germany* (dec.), no. 71759/01, 25 September 2006).

38. The Court, even assuming that this part of the case is compatible *ratione personae* with the provisions of the Convention in all respects (compare in this respect, in particular, *Meyer-Falk v. Germany* (dec.), no. 47678/99, 30 March 2000), notes that in the present case, the Federal Constitutional Court considered that the applicant's complaint about the Regional Court's order of 14 November 2001 for his preventive detention was inadmissible for non-exhaustion of domestic remedies. The Federal Constitutional Court found that the applicant had failed to demonstrate that he had previously submitted that complaint to the Federal Court of Justice.

He should either have submitted a copy of his statement of the grounds of his appeal on points of law to the Federal Constitutional Court or at least have argued before that latter court that he had complained before the Federal Court of Justice that provisions of substantive law had not been complied with. The applicant was thus found not to have complied with a purely formal requirement for lodging a constitutional compliant.

39. The Court further observes that under its well-established case-law, the Federal Constitutional Court requires complainants, irrespective of whether they are represented by counsel, to submit all information and documents necessary for the consideration of their constitutional complaint on their own motion within the prescribed time-limit (see paragraph 27 above). It does not discern any arbitrariness in the domestic court's application of its procedural rules to the applicant in the present case. Consequently, the applicant failed to exhaust domestic remedies in compliance with the formal requirements laid down in domestic law in so far as he complained before the Court that the order for his preventive detention failed to comply with Articles 5 and 7 of the Convention.

40. In so far as the applicant further complained under Article 6 § 1 of the Convention that he had not had a fair trial in that the deal struck with the Regional Court that he would not further contest the facts in exchange for the court not ordering his preventive detention had not been honoured by the Federal Court of Justice, the same considerations apply. Moreover, assuming that this complaint related (also) to the judgments of the Aachen Regional Court of 9 February 1998 and of the Federal Court of Justice of 7 April 1999, the applicant equally failed to exhaust domestic remedies. The Federal Constitutional Court's finding that he lodged his constitutional complaint of 24 June 2002 outside the (one-month) time-limit does not disclose any arbitrary application of the national procedural rules either.

41. It follows that the Government's objection must be allowed and this part of the case be dismissed for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

III. COMPLAINT CONCERNING THE EXECUTION OF THE PREVENTIVE DETENTION ORDER AGAINST THE APPLICANT

42. The applicant complained in application no. 43386/08 that the execution of his preventive detention had infringed his right to liberty as provided in Article 5 § 1 of the Convention, which 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; ..."

43. The Government contested that argument.

A. Admissibility

44. 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

45. The applicant argued that his actual placement in preventive detention failed to comply with Article 5 § 1 of the Convention. He submitted that his detention, a preventive measure aimed at protecting the public, was not covered by any of the sub-paragraphs (a) to (f) of Article 5 § 1. In particular, his preventive detention was not "lawful" within the meaning of sub-paragraph (a) of Article 5 § 1 because, having been classified as a penalty by the Court in its judgment in the case of *M. v. Germany* (cited above), it amounted to an illegal double punishment for the same offence. Moreover, his preventive detention did not occur after a "conviction" because it was not imposed following a finding of guilt of an actual offence – this applied to the prison sentence alone – but to prevent potential future offences.

46. The applicant further argued that the Court's findings in the case of *M. v. Germany* (cited above) obliged the domestic courts to apply a strict standard as regards the proportionality of long deprivations of liberty. His preventive detention was therefore disproportionate in view of the fact that he had not committed violent or sexual offences and had wrongly been considered dangerous both by the psychiatric expert and by the domestic courts.

47. The Government took the view that the applicant's preventive detention complied with Article 5 § 1. It was true that the Aachen Regional Court's order for the applicant's preventive detention made in its judgment of 14 November 2001, following the change in the law in 1998, could be executed for more than ten years, even though the applicant had committed the offences in question at a time when the execution of a first preventive detention order could not exceed ten years (see paragraphs 25-26 above). However, the applicant had been in preventive detention only for some three years at present. Referring to the Court's findings in the case of *M. v. Germany* (cited above, § 96), they considered that the preventive detention of the applicant here at issue was covered by sub-paragraph (a) of Article 5 § 1 as being detention after his conviction by the Aachen Regional Court on 14 November 2001.

2. The Court's assessment

(a) Recapitulation of the relevant principles

48. The Court refers to the fundamental principles laid down in its case-law on Article 5 § 1 of the Convention, which have been summarised in relation to applications concerning preventive detention in its judgment of 17 December 2009 in the case of *M. v. Germany*, no. 19359/04 (§§ 86-91) and in its judgment of 21 October 2010 in the case of *Grosskopf v. Germany*, no. 24478/03 (§§ 42-44).

49. It reiterates, in particular, that for the purposes of sub-paragraph (a) of Article 5 § 1, the word "conviction" 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 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; and *M. v. Germany*, cited above, § 87). Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the "detention" must follow the "conviction" in point of time: There must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV; *Kafkaris v. Cyprus* [GC], no. 21906/04, § 117, ECHR 2008-...; and *M. v. Germany*, cited above, § 88). However, with the passage of time, the causal link between the initial conviction and a further deprivation of liberty gradually becomes less strong and might eventually be broken if a position were reached in which a decision not to release 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 (see *M. v. Germany*, cited above, § 88, with further references).

(b) Application of these principles to the present case

50. The Court notes at the outset that in the present application no. 43386/08, the applicant contested the compliance with Article 5 § 1 of the decision of the domestic courts to order his actual placement in preventive detention in 2007/2008 after he had fully served his prison sentence.

51. In determining whether the applicant was deprived of his liberty in compliance with Article 5 § 1 during that preventive detention, the Court refers to its findings in its recent judgment of 17 December 2009 in the case of *M. v. Germany* (cited above). In that judgment, it found that Mr *M.*'s preventive detention, which, as in the present case, was ordered by the sentencing court under Article 66 § 1 of the Criminal Code, was covered by sub-paragraph (a) of Article 5 § 1 in so far as it had not been prolonged beyond the statutory ten-year maximum period applicable at the time of that

applicant's offence and conviction (see *ibid.*, §§ 96 and 97-105). The Court was satisfied that Mr *M.*'s initial preventive detention within that maximum period occurred "after conviction" by the sentencing court for the purposes of Article 5 § 1 (a).

52. Having regard to these findings in its judgment in the application of *M. v. Germany*, from which it sees no reason to depart, the Court considers that the preventive detention under Article 66 of the Criminal Code of the applicant in the present case was based on his "conviction", for the purposes of Article 5 § 1 (a), by the Aachen Regional Court on 14 November 2001. However, the Court emphasises that unlike the applicant in the *M. v. Germany* case, the applicant in the present case was not in preventive detention for a period beyond the statutory ten-year maximum period, applicable at the time of his offence, at the time of the domestic court decisions here at issue.

53. Moreover, the applicant's preventive detention at issue occurred "after" conviction. Thus, there has been a sufficient causal connection between his conviction and the deprivation of liberty. Both the order for the applicant's preventive detention by the sentencing Aachen Regional Court in November 2001 and the decision of the Bochum Regional Court, responsible for the execution of sentences, of July 2007, confirmed on appeal, not to release the applicant, were based on the same grounds, namely to prevent the applicant from committing further serious drug offences, similar to those he had previously committed, on release. There is nothing to indicate that the assessment, that the applicant was likely to reoffend in that manner, which the domestic courts had reached after having consulted a psychiatric and psychotherapeutic expert on that point, was unreasonable in terms of the objectives of the initial preventive detention order by the sentencing court.

54. The applicant's preventive detention was also lawful in that it was based on a foreseeable application of Article 66 § 1 and Article 67c § 1 of the Criminal Code. The Court takes note, in this connection, of the reversal of the Federal Constitutional Court's case-law concerning preventive detention in its leading judgment of 4 May 2011 (see paragraphs 28–31 above). 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.

55. The Court further observes that the Federal Constitutional Court, in its said judgment, considered, *inter alia*, Article 66 of the Criminal Code in its version in force since 27 December 2003 not to comply with the right to liberty of the persons concerned. It understands that the applicant's preventive detention, when reviewed in the future, will be prolonged only subject to the strict test of proportionality as set out in the Federal

Constitutional Court's judgment (see paragraph 30 above). It notes, however, that the applicant's preventive detention here at issue was ordered and executed on the basis of a previous version of Article 66 of the Criminal Code. In any event, Article 66 of the Criminal Code in its version in force since 27 December 2003 was not declared void with retrospective effect, but remained applicable and thus a valid legal basis under domestic law, in particular, for the time preceding the Federal Constitutional Court's judgment. Therefore, the lawfulness of the applicant's preventive detention at issue for the purposes of Article 5 § 1 (a) is not called into question.

56. There has accordingly been no violation of Article 5 § 1 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the complaint under Article 5 § 1 of the Convention concerning the execution of the applicant's preventive detention admissible and the remainder of the applications inadmissible;

3. *Holds* that there has been no violation of Article 5 § 1 of the Convention.

Done in English, and notified in writing on 9 June 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President