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Comment: Legal Certainty and Human Rights in the European Legal Order – The Treatment of Preventive Detention in the German Federal Constitutional Court and the European Court of Human Rights

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I. Introduction

In their contribution, *Roux* and *Hassen*[1] set out the foundational principles of what is referred to in Germany as the "*Rechtsstaat*" (the rule of law) with regard to public international law, and focus specifically on the principle of legal certainty and international crimes.

Among the most important guarantees of the rule of law in criminal law is the requirement of legal certainty that all branches of power must ensure: the legislature must draft legal provisions in a sufficiently clear and precise manner, while the judiciary is responsible for applying and interpreting the law within the boundaries set by the legislature. In criminal law, the principle entails the well-known maxims, *nulla poena sine lege* and *nullum crimen sine lege*, meaning that the punishable conduct and any sanction must be explicitly laid down by law before the crime is committed. Referring to the Nuremburg Trials, the authors show that, in international criminal law, exceptions to the principles of *nulla poena* and *nullum crimen* have been made, as neither crimes against humanity nor war crimes were codified as punishable acts at the time the Nazi regime committed them. Apparently, the Judges of the Nuremburg Tribunal did not apply the principle of legal certainty, opining that not punishing the Nazi war criminals for their abhorrent acts would be "unjust". Today, these principles are defined in Articles 22 and 23 of the Statute of the International Criminal Court ("ICC") as "general principles of criminal law". The authors state that, in most major international criminal and human rights instruments, the *nullum crimen* and *nulla poena* maxims are not laid down explicitly, but are rather incorporated implicitly. They further show how international tribunals have developed these principles in their jurisprudence.

Finally, *Roux* and *Hassen* deal with the recently-adopted Malabo Protocol amending the Statute of the African Court on Human and Peoples' Rights ("ACHR") of the African Union ("AU"). According to the Malabo Protocol, the subject-matter jurisdiction of the Court will be extended to international crimes. Consequently, the former ACHR will be renamed the "African Court of Justice and Human and Peoples' Rights" ("ACJHPR"). The Court will have a Human Rights Section, hearing individual human rights cases, and a General Affairs Section with the authority to hear all other cases. However, of the 15 required ratifications (of a total of 55 AU Member States), the Malabo Protocol has not managed even one to date (April 2020). As the ACHR Statute introduces a range of international

1 *Roux* and *Hassen*, in this book, 103 et seqq.

crimes that are not included in the ICC Statute and in part defines them differently, the question of legal certainty in international crimes arises.

In the following response to *Roux* and *Hassen*, I would like to focus on two core issues raised in their contribution and illustrate their relevance to the German, and a wider European, context: First, this response will illustrate how the tension between legal certainty and the retroactive punishment of crimes was resolved by courts in the young Federal German Republic that had to deal with the heritage of two "*Unrechtsstaaten*" in the space of only half a century (II.). Secondly, this comment will focus on how a supranational human rights body can shape and influence domestic criminal law (III.). Again, the German example provides valuable insights into the functioning of supranational human rights courts and their relationship to national constitutional courts. Germany is a member state of the Council of Europe and party to its European Convention on Human Rights (the "Convention"), an international convention on the protection of human rights. I will therefore consider the complex relationship between the court that was established by the Convention, the European Court of Human Rights ("ECtHR") and the German Federal Constitutional Court (*Bundesverfassungsgericht* – "BVerfG") to show how it influences domestic criminal law in a positive way and reinforces the constitutional guarantee of *nulla poena* (IV.). In my concluding remarks, I will apply the findings to the newly-established ACJHPR (V.).

II. The "lively tension" between legal certainty and substantive justice

As *Roux* and *Hassen* establish in their contribution, when the Nuremburg Tribunal convicted functionaries of the Nazi regime, it favoured substantive justice over a strict interpretation of the *nullum crimen* maxim. This clash between justice (a substantive principle) and legal certainty (a formal principle) was described by the legal philosopher, *Gustav Radbruch*, as a "lively tension".[2] He stated in his oft-cited essay, that "legal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: purposiveness [the German *Zweckmäßigkeit*] and justice".[3] He suggested resolving the conflict

2 *Radbruch*, in: Kaufmann (ed.), Gustav Radbruch: Gesamtausgabe, vol. 3 (1990), 39, 50.

3 *Radbruch*, 26 Oxf. J. Leg. Stud. 2006, 1, 6; *Radbruch*, in: Kaufmann (ed.), Gustav Radbruch: Gesamtausgabe, vol. 3 (1990), 83, 89.

between justice and legal certainty using the famous formula that came to be known as the "*Radbruch* formula": "The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice."[4] A law, that does not even attempt to serve justice, that deliberately betrays "equality, the core value of justice" is, according to *Radbruch*, "not merely 'flawed law', it lacks completely the very nature of law" (i.e. "statutory *Unrecht*").[5] He nevertheless did not question the necessity of legal statutes in a *Rechtsstaat*, a form of government "that serves as well as possible the ideas of both justice and legal certainty".[6] A government of law, he concludes, "is like our daily bread, like water to drink and air to breathe."[7] While opposing a strict legal positivism, *Radbruch* at the same time acknowledges the need for legal realism which, however, must always enable individual justice. Following this critical stance towards a rigorous legal positivism, *Robert Alexy* pointed out that there is "an intrinsic connection between the principle of legal certainty and positivity"[8]; legal certainty is even "the ground of positivity".[9] Exceptions to the principle of legal certainty are thus also a statement against the rigorous legal positivism that prevailed in the German Reich at the time the war crimes were committed. According to *Alexy's* concept of the dual nature of law, law comprises not only a factual dimension (i.e. the defined authoritative issuance) but also an ideal dimension that requires the correctness of content.[10] Correctness is understood as "justice" or "moral correctness". This leads to a non-positivistic concept of law.

The term *Unrecht* cannot be fully captured by the English term "injustice"; it constitutes in fact a gross and utter disregard for the most basic common principles of a just society, a system in which "law" no longer deserves to be labelled as such. *Unrecht* is, as one commentator once put it, "the opposite of law".[11] The German Courts applied the *Radbruch* formula in civil- and public-law cases that dealt with National Socialist *Unrecht*,

4 *Radbruch*, 26 Oxf. J. Leg. Stud. 2006, 1, 7.
5 Ibid.
6 Ibid., 11.
7 Ibid.
8 *Alexy*, 28 Ratio Juris 2015, 441.
9 Ibid., 444.
10 Ibid.
11 *Steinbeis, "Editorial: Ranks and Titles" (11 May 2019)*, https://verfassungsblog.de/ranks-and-titles/ (last visited 31 May 2019).

especially in the fields of inheritance, family law, civil service and citizenship laws. The BVerfG explicitly referred to the *Radbruch* formula to justify the inapplicability of National Socialist statutes.[12] It differentiated between *Unrecht,* which lacked the very nature of law, and merely unjust National Socialist statutes which, while not amounting to "obvious *Unrecht*", nevertheless had to be considered illegitimate, but legally in force due to their "sociological validity".[13] In its decision on the killing of fugitives at the border between the two former German states, the BVerfG also applied the *Radbruch* formula in a criminal-law context for the first time.[14] The law justifying the killing of fugitives had to be considered non-existent at the time the act was committed because it legalised the intentional killing of other human beings for merely crossing the border inside Germany.[15] Thus, the *nulla poena* guarantee of Article 103, para. 2 of the German Constitution, which is referred to as the Basic Law (*Grundgesetz* – GG), is not absolute if the overriding needs of justice demand that those who commit unjust acts be held accountable. In this situation, the principle of substantive justice, which also encompasses internationally-acknowledged human rights, demands that the protection of legitimate expectations ("*Vertrauensschutz*") guaranteed by Article 103, para. 2 GG yield in favour of substantive justice. However, if there is an applicable criminal statute in place that prescribes certain sanctions, the prohibition of retroactive criminal laws in Article 103, para. 2 GG is absolute.

III. The nulla poena and nullum crimen principles in the European legal order

In Europe, the principles of *nulla poena* and *nullum crimen* are explicitly enshrined in various legal and constitutional documents at multiple levels. There are norms to ensure coherence and consistency in the application of these human rights instruments, as each falls under the jurisdiction of different courts. If the various courts demand that they have the final say, tensions may arise in the application and interpretation of these principles. In this section, I will first outline the various legal foundations in the

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12 See e.g. BGH, Judgment of 11 Feb 1953, II ZR 51/52, NJW 1953, 542, 544.

13 BVerfG, Order of 19 Feb 1957, BvR 357/52, BVerfGE 6, 132, 199 – Gestapo.

14 BVerfG, Judgment of 24 Oct 1996, 2 BvR 1851, 1853, 1875, 1852/94, BVerfGE 95, 96 – Mauerschützen; *Alexy*, in: Alexy, Koch, Kuhlen and Rüßmann (eds.), Elemente einer juristischen Begründungslehre (2003), 469.

15 BVerfG, Judgment of 24 Oct 1996, 2 BvR 1851, 1853, 1875, 1852/94, BVerfGE 95, 135, para. 143 – Mauerschützen.

national, supranational and international legal orders (1.). I will then elaborate on the divergent understanding of the BVerfG and the ECtHR as to which sanctions qualify as "*poena*", i.e. penalty or punishment within the meaning of the relevant guarantees (2.). This will lead me to some general remarks on the role of the Convention in the German constitutional order (3.).

1. Legal foundations of the principles

a) The German Constitution

In the German Constitution, the *nulla poena* and *nullum crimen* maxims are equivalent to a fundamental right and are enshrined in Article 103, para. 2, which provides that an "act may be punished only if it was defined by a law as a criminal offence before the act was committed". This prohibits the retroactive application of criminal laws. Not only must a crime be strictly defined at the time of the relevant criminal conduct, but the punishment must also be foreseeably laid down in the statute in advance. This is further concretised in Section 2, para. 1 of the German Criminal Code (*Strafgesetzbuch* – StGB), according to which the "penalty and any ancillary measures shall be determined by the law which is in force at the time of the act." This means that lawful conduct may not be turned into a punishable crime retroactively. The principle is also part of the general rule-of-law guarantee, albeit not laid down there explicitly: from Article 20, para. 3 GG as well as the fundamental rights follows a general prohibition against retrospective legislation as an element of the rule-of-law principle, which is not absolute, but subject to the balancing of interests in each case.[16]

b) The European Convention on Human Rights

This essential rule-of-law principle is also enshrined in the European Convention on Human Rights. According to Article 7, para. 1, sentence 1 of the Convention, "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence

16 See on the dogmatic foundations in detail *Werndl*, Zweispurigkeit und Vertrauensschutz (2019), 266 et seqq.

under national or international law at the time when it was committed", thus codifying the *nullum crimen* maxim. Article 7, para. 1, sentence 2 of the Convention contains the *nulla poena* maxim, stating: "Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed." "Criminal offence" is understood to include offences under national and international law, ensuring that conduct that was legal under domestic law can be punished retrospectively if it constituted an international crime. Article 7, para. 2 of the Convention is a direct response to the Nuremburg Trials and reads as follows: "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations." The Federal Republic of Germany initially made a reservation in respect of this provision when it ratified the Convention to ensure that Article 7, para. 2 of the Convention would only be applied within the boundaries of Article 103, para. 2 GG. This reservation was later withdrawn[17] so that Article 7, para. 2 of the Convention has since been fully applicable in Germany. However, as the ECtHR has made clear, this provision is not of a constitutive nature, but is "only a contextual clarification of the liability limb of that rule, included so as to ensure that there was no doubt about the validity of prosecutions after the Second World War in respect of the crimes committed during that war".[18] The ECtHR also clarified that this did not allow a general exception to the rule of non-retroactivity. Both Article 7, para. 1 and para. 2 of the Convention are, according to the ECtHR, "interlinked and are to be interpreted in a concordant manner".[19] The provision contains the principles of legality and legal certainty, as well as the prohibition against detrimental analogy.[20] The Convention does not allow any exception or derogation from this provision (see Article 15, para. 3 of the Convention), not even in the case of emergency or war.

c) The European Charter of Fundamental Rights

In addition, these principles are secured in the Charter of Fundamental Rights of the European Union (the "Charter"). According to Article 49,

17 Federal Law Gazette (BGBl.) of 7 Nov 2003, part II, 1580.

18 ECtHR, Judgment of 18 Jul 2013, 2312/08 and 34179/08, para. 72 – Maktouf and Damjanović v. Bosnia and Herzegovina.

19 Ibid.

20 *Sanz-Caballero,* 28 E. J. I. L. 2017, 787, 789.

para. 1, sentences 1 and 2 of the Charter, "[n]o 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 law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed". Parallel to Article 7, para. 2 of the Convention, Article 49, para. 2 of the Charter makes an exception for the trial and punishment of acts that were criminal "according to the general principles recognised by the community of nations". The Nuremburg exception has thus been fully incorporated into the European Human Rights Instruments.

d) Difference in scope and content

While at first glance the principles of *nulla poena* and *nullum crimen* are guaranteed almost identically in the various human rights instruments that are binding on Germany, there is room for argument as to the scope and content of the guarantees. There are supranational and various national constitutional courts in Europe that claim to have the final say in human rights issues, so tensions and jurisdictional conflicts are therefore inevitable. As Germany is an EU member state, Article 49, para. 2 of the Charter is not only directly applicable in the domestic legal order, but even takes precedence in its application over conflicting national (including constitutional) law, being part of EU primary law according to Article 6, para. 1 of the Treaty of the European Union (TEU). The European Court of Justice (ECJ), whose judgments are of relevance in the German legal order, is charged with interpreting the Charter. As a Member to the Council of Europe, Germany is also bound by the Convention's guarantees. However, as the EU has not yet acceded to the Convention (which it should according to Article 6, para. 2 of the TEU), the Convention's guarantees do not hold primacy over the law of its Member States, whereas the Charter does enjoy primacy over the national constitutions of the EU Member States. Instead, the Convention only indirectly influences the fundamental-rights provisions of the Basic Law. The complex interplay between the Convention and the Basic Law will be outlined on the basis of the case concerning the legality of the retroactive prolongation of preventive detention. The BVerfG and the ECtHR do not define what kind of penalties are included by Article 7, para. 1 sentence 2 of the Convention and Article, 103 para. 2 GG, both containing the *nulla poena* principle.

2. Legal certainty caught in judicial dialogue

a) The German twin-track system of sanctions

The StGB distinguishes between penalties or punishments ("*Strafen*"), and measures of correction and prevention ("*Maßregeln der Besserung und Sicherung*"). This so-called "twin-track system of sanctions" goes back to the "Law on dealing with dangerous habitual offenders and on measures of correction and prevention" of 1933.[21] Whereas penalties (i.e. prison sentences and fines) are repressive in nature and determined in relation to an offender's guilt, measures of correction and prevention are independent of guilt and preventively aim at rehabilitating the offender or protecting the public from the danger posed by a convicted criminal.[22] Penalties and measures of correction and prevention are not mutually exclusive, but can be imposed simultaneously. This distinction due to the twin-track system of sanctions is upheld as it relates to the question of legal certainty. Whereas a penalty must be determined by the law that is in force at the time of the act, the measure of correction and prevention is based on the law in force at the time of the court's decision (see Article 2 para. 1 and para. 6 StGB). Measures of correction and prevention are laid down in Section 61 et seq. StGB. They include for example confinement in a psychiatric hospital, and placement in custodial addiction treatment or preventive detention. The latter – "the most disputed of all measures"[23] – will be discussed here in more detail.

b) Preventive detention as a measure of correction and prevention

If a convicted person, after having served his or her full prison sentence, is still considered dangerous to the public and likely to commit offences as a result of his or her propensity to reoffend, the sentencing criminal

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21 "Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Besserung und Sicherung" of 24 Nov 1933, Law Gazette of the German Reich (RGBl.) of 27 Nov 1933, part I, 995; on the history see *Stisser,* Die Sicherungsverwahrung (2019), 21 et seqq.

22 The landmark judgment of the Federal Constitutional Court on preventive detention begins with this sentence: "Every social order depends on protecting itself from dangerous criminals", Judgment of 5 Feb 2004, 2 BvR 2029/01, BVerfGE 109, 133, 134, para. 2.

23 *Kaspar,* 4 Peking Univ. L. J. 2016, 80, 95.

court can, under certain circumstances laid down in law, order placement in additional preventive detention according to Section 66 StGB to protect society from the offender. Until 1998, the maximum duration of preventive detention was ten years.[24] The law was amended in 1998 by the "Act to Combat Sexual Offences and Other Dangerous Offences",[25] loosening the formal requirements for imposing the measure and allowing for its indefinite prolongation in Section 67d, para. 3 StGB. The newly amended law provided: "(3) If a person has spent ten years in preventive detention, the court shall declare the termination of the measure if there is no danger that the detainee will, due to his criminal tendencies, commit serious offences resulting in considerable psychological or physical harm to the victims. […]". The Introductory Act to the Criminal Code was also amended, so that the newly-altered provision applied without restriction *ratione temporis*, i.e. even retroactively, by stating: "Section 67d of the Criminal Code, as amended by the Act to Combat Sexual Offences and Other Dangerous Offences of 26 January 1998, shall apply without restriction."[26] This meant that the newly amended Section 67d, para. 3 StGB was also applicable to detainees whose preventive detention had been ordered prior to the change in law and who, until then, had had the legitimate expectation of at least being released after ten years in detention. This raised questions about legal certainty and the prohibition against the retroactive application of criminal laws. Due to the twin-track system of sanctions, the prohibition against retroactive application of the law does not apply to the measure of preventive detention. The relevant law reads as follows: "Unless otherwise provided by law, measures of rehabilitation and incapacitation shall be determined according to the law in force at the time of the decision" (Section 2, para. 6 StGB). Thus, the amended provision of 1998 was applicable to prisoners whose preventive detention had been ordered prior to the law's amendment. The rules on preventive detention have been expanded even further with time, for example to

24 Section 67d para. 1–3 of the German Criminal Code as in force in 1998 states: "(1) […] the first period of preventive detention may not exceed ten years. […] (3) If the maximum duration has expired, the detainee shall be released […]".

25 "Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten", Federal Law Gazette (BGBl.) of 26 Jan 1998, part I, 160; on this see *von Harbou*, Das neue Recht der Sicherungsverwahrung (1999), passim.

26 Article 1a para. 3 of the Introductory Act to the Criminal Code (Einführungsgesetz zum Strafgesetzbuch – EGStGB).

include even juveniles or to enable subsequent preventive detention,[27] all giving rise to the question of validity with a view to the prohibition of retroactivity.[28] Given its limited scope, this contribution will focus on the case concerning the retrospective prolongation of the maximum period of preventive detention.

c) Qualifying preventive detention: the BVerfG's view

A convicted criminal who had been serving his prison sentence since 1986, and was subsequently placed in preventive detention in 1991, was affected by this change in law that had occurred at the time he was in preventive detention. According to the law at the time of his conviction, his preventive detention would have ended in 2001 at the latest. However, according to the amended law in place in 1998, the maximum ten-year period no longer applied. Instead, his detention could be extended retrospectively for an unlimited period as long as he showed the propensity to commit serious criminal acts. The detainee launched a constitutional complaint with the BVerfG, which was dismissed in 2004. He argued that the retroactive abolition of the maximum period of preventive detention in Section 66, para. 3 StGB, read with Article 1a, para. 3 of the Introductory Act to the Criminal Code, violated the prohibition against retroactive punishment under Article 103, para. 2 GG.[29] The BVerfG held that Article 103, para. 2 GG did not cover measures of correction and prevention, but only applied to penalties. Preventive detention however, did not qualify as a penalty or punishable act within the meaning of Article 103, para. 2 GG, as it was not a measure expressing the sovereign censure of illegal and culpable conduct, and was not imposed to compensate for or punish guilt.[30] Article 103, para. 2 GG did not apply to other measures interfering with a person's

27 See BVerfG, Order of 23 Aug 2006, 2 BvR 226/06, NJW 2006, 3483, declaring subsequent detention to be compatible with the Basic Law. In contrast, the ECtHR found it to be in violation of the Convention in the Judgment of 19 Apr 2012, 61272/09 – B. v. Germany; see also ECtHR, Judgment of 12 Jan 2011, 6587/04, NJW 2011, 3423 – Haidn v. Germany and BVerfG, Judgment of 10 Feb 2004, 2 BvR 834/02, BVerfGE 109, 190 (lack of competence) on the retrospective order of preventive detention in Bavarian Law.

28 For a recent concise overview see *Stisser*, Die Sicherungsverwahrung (2019), 31–33.

29 BVerfG, Judgment of 5 Feb 2004, 2 BvR 2029/01, BVerfGE 109, 133, 145 et seq. – Langfristige Sicherungsverwahrung.

30 Ibid., 173, para. 146 et seqq.

rights, in particular not measures of correction and prevention, which differed from penalties under the Criminal Code's twin-track system. According to the BVerfG, preventive detention was a purely preventive measure aimed at protecting the public from a dangerous offender and was therefore not covered by the strict and absolute prohibition against retroactivity in Article 103, para. 2 GG.

The legality test was thus reduced to the general rule-of-law provision in Article 20, para. 3 GG read with the right to liberty under Article 2, para. 2 GG, which requires the balancing of interests.[31] The application of the amended Criminal Code provision to criminals who had been placed in preventive detention prior to its enactment, and who were still serving their sentences, was declared to conform with the principle of *Vertrauensschutz* (protection of legitimate expectations guaranteed in a State governed by the rule of law). Concerning Section 2, para. 6 StGB on measures of correction and prevention, a detainee could from the very outset expect changes in law. The BVerfG found that the legislature's interest in protecting the public against interference with their life, health and sexual integrity outweighed the detainee's right to liberty and reliance on the law not to change.[32]

d) Strasbourg's divergent view on the definition of "penalty"

The detainee, M., finally lodged an individual complaint (under Article 34 of the Convention) against this decision. He argued that continued preventive detention beyond the ten-year period that had been the maximum under the law applicable at the time of his offence and conviction violated Article 5, para. 1 of the Convention and the principle of *nulla poena* in Article 7, para. 1 of the Convention. This was because the retroactive prolongation of his preventive detention after having served the ten-year period amounted to the imposition of a "heavier penalty" than the one that had been applicable at the time the criminal offence was committed.

In its landmark decision, the ECtHR found that Germany had violated these provisions because national criminal law lacked foreseeability in its application, as the detainee could not, at the time of his conviction, have foreseen that his offence would lead to preventive detention for an

31 Ibid., 180, para. 170 et seqq.
32 Ibid., 186, para. 187 et seqq.

unlimited period.[33] The ECtHR noted that there was no uniform approach to preventive detention in the Convention States: whereas some qualified it as an additional penalty, others treated it as a merely preventive measure, like Germany. Referring to the German criminal law, according to which preventive detention is not considered a penalty and thus not protected by the absolute ban on retrospective punishment, the ECtHR stressed that "the concept of 'penalty' in Article 7 is autonomous in scope and it is thus for the Court to determine whether a particular measure should be qualified as a penalty, without being bound by the measure's qualification under domestic law."[34]

The term "penalty", within the meaning of the provision, generally refers to a measure that is imposed following conviction for a criminal offence. The ECtHR further examined the nature and purpose of a measure, its intensity and categorisation under national law.[35] When applying these criteria, the ECtHR did not take a purely formal point of view; instead, it compared preventive detention and prison sentences in practice. It noted that "[m]inor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, cannot mask the fact that there is no substantial difference between the execution of a prison sentence and that of a preventive detention order."[36] Given the fact that preventive detention is ordered by criminal courts, the real circumstances of the individuals affected and the indefinite prolongation of preventive detention, the ECtHR concluded that preventive detention did not merely serve a preventive purpose, but was instead punitive in nature. This was because preventive detention is ordered against individuals who have been found guilty of a grave criminal offence and they are treated like ordinary long-term prisoners who are not provided with special treatment.[37] From the fact that people in preventive detention are not given psychological care and special support within a coherent framework to reduce the risk that they will reoffend, the Court concluded that the measure had to be categorised as a "penalty"

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33 ECtHR, Judgment of 17 Dec 2009, 19359/04, NJW 2010, 2495, 2497, para. 104 – M. v. Germany.
34 Ibid., 2498, para. 126.
35 *Sanz-Caballero,* 28 E. J. I. L. 2017, 787, 791.
36 ECtHR, Judgment of 17 Dec 2009, 19359/04, NJW 2010, 2495, 2497, para. 127 – M. v. Germany.
37 Ibid., 2499, para. 128.

for the purposes of Article 7, para. 1 of the Convention.[38] Therefore, the subsequent prolongation of the applicant's preventive detention was considered to be a heavier additional punishment that was imposed retrospectively and thus violated Article 7 of the Convention. The ECtHR did not contest the twin-track system of sanctions as such. However, it did challenge the purely formal approach adopted by the German courts to defining the term "penalty" and indicated that even a preventive measure could amount to a penalty within the meaning of Article 7, para. 1 of the Convention, thus giving rise to the absolute prohibition against the retroactive application of criminal law.[39]

e) The implementation of the ECtHR's judgment in German law

In reaction to the ECtHR's decision, the German legislature adopted the "Act to Reform the Law of Preventive Detention" in December 2010, reducing the number of offences justifying preventive detention, as well as the "Act on Therapeutic Confinement" (*Therapieunterbringungsgesetz* – ThUG).[40] This was to comply with the requirements laid down by the ECtHR and to provide a therapeutically-oriented, special detention for individuals falling under Article 5, para. 1 lit. e of the Convention (persons "of unsound mind"). In particular, Article 1a of the Introductory Act to the Criminal Code, which allowed the unlimited retroactive prolongation of preventive detention, was repealed.

3. The role of the Convention in the German legal order

When, in 2011, the BVerfG was again called to decide (this time on the legality of the retrospective extension as well as on the subsequent imposition of preventive detention) it had to implement the ECtHR's decision.

38 Ibid., paras. 129–133.

39 What followed were subsequent convictions of Germany by the ECtHR in its Judgments of 13 Jan 2011, 17792/07 – Kallweit v. Germany; 20008/07 – Mautes v. Germany and 27360/04, 42225/07 – Schummer v. Germany.

40 "Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung" and "Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter", Federal Law Gazette (BGBl.) of 22 Dec 2010, part I, 2300. For the constitutionality of the Therapeutic Confinement Act see BVerfG, Order of 11 Jul 2013, 2 BvR 2302/11, 2 BvR 1279/12, NJW 2013, 3151.

From a procedural point of view, judicial review was possible because the judgments of the ECtHR were treated as legally-relevant changes to the factual and legal circumstances.[41] As an agreement under public international law, the Convention had the status of a federal statute when it became German law according to Article 59, para. 2 GG. It thus ranked below the Basic law in the legal hierarchy of norms. The Convention guarantees "are not a direct constitutional standard of review in the German legal system", but they do have "constitutional significance", as "they influence the interpretation of the fundamental rights and rule-of-law principles of the Basic Law".[42] As the BVerfG had earlier established, the Convention and the ECtHR's jurisprudence serve "as guides to interpretation in determining the content and scope of fundamental rights and the constitutional principles of the Basic Law",[43] as long as this does not reduce the level of protection guaranteed under the German Constitution. The openness of the Basic Law to international law requires it not to conflict with international and supranational agreements. Going beyond its *Görgülü* decision, where it only required the indirect consideration of the Convention's provisions, the BVerfG further propagates an active dialogue, concluding that "even the 'last word' of the German Constitution is not opposed to an international and European dialogue between courts, but is the normative basis for this."[44]

Given the contradicting judgment of the ECtHR, the BVerfG therefore had to correct its previous decision on preventive detention. It could have agreed to categorise preventive detention as a "penalty" and thus consider the retroactive extension to be in violation of Article 103, para. 2 GG. However, it chose not to do so. Instead, it showed the limits of international integration when it refused "a schematic parallelisation of individual constitutional concepts" and stressed that the human rights content of international agreements "must be 'reconceived' in an active process (of reception)".[45] The Convention had to be integrated carefully into the "dog-

41 BVerfG, Judgment of 4 May 2011, 2 BvR 2365/09, 740/10, 2333/08, 1152/10, 571/10, BVerfGE 128, 326, 367, para. 82 – EGMR Sicherungsverwahrung.

42 Ibid., para. 88.

43 BVerfG, Order of 14 Oct 2004, 2 BvR 1481/04, BVerfGE 111, 307, 316 et seq., paras. 31–32 – Görgülü.

44 BVerfG, Judgment of 4 May 2011, 2 BvR 2365/09, 740/10, 2333/08, 1152/10, 571/10, BVerfGE 128, 326, 369, para. 89 – EGMR Sicherungsverwahrung.

45 Ibid., 370, para. 91, citing *Häberle*, Europäische Verfassungslehre (7th ed. 2011), 255 et seq.

matically differentiated national legal system".[46] It therefore saw no need to completely adapt to the interpretation of the term "penalty" in Article 7, para. 1 of the Convention, but instead upheld its qualification of preventive detention as a measure of prevention and correction, and not as a punishment within the meaning of Article 103, para. 2 GG due to the formal distinction in the Criminal Code.[47] An independent definition in national law was possible due to the Convention's flexibility and lack of precision that has to take into account the legal, linguistic and cultural variety of the Member States.[48] The BVerfG instead applied Article 2, para. 2 GG (the right to liberty) together with Article 20 para. 3 GG (the rule of law) as "the requirement of the protection of legitimate expectations is closely related and structurally similar to the 'nulla poena' principle".[49] Thus, the guarantees in Articles 5 and 7, para. 1 of the Convention had to be taken into account in relation to the detainee, as they reinforced the weight of the relevant concerns regarding the protection of legitimate expectations. Preventive detention was subject to a strict review of proportionality and could only be justified to protect the highest constitutional interests. This meant that not only the measure as such, but also its practical realisation had to be subjected to a strict proportionality review. While *de jure* preventive detention did not qualify as a penalty, it was *de facto* executed like a criminal sentence.

On the facts, the BVerfG held that the retrospective extension of preventive detention beyond the previous ten year-period constituted a serious encroachment on the affected detainee's reliance and on the fundamental right to liberty.[50] It not only considered the execution, but even the legislation to be deficient and thus unconstitutional.[51] Only if certain criteria were met, could it be ensured that preventive detention would remain fundamentally different from prison sentences. These were, in particular, the distance requirement, imposing preventive detention as a measure of last resort, offering detainees individual treatment, therapy and support, and certain objective parameters of confinement (the separation rule, i.e.

46 Ibid., 371, para. 93.
47 Ibid., 392, para. 141.
48 Ibid., 393, para. 142.
49 Ibid., 392, para. 141.
50 Ibid., 4th guiding sentence.
51 Ibid., 387, para. 128: "lack of an overall statutory concept".

distance from regular imprisonment or the rule of minimization).[52] While the BVerfG did not formally incorporate the ECtHR's interpretation of "penalty", it declared that if preventive detention was not executed with sufficient distance from regular imprisonment, the weight of the affected detainee's reliance amounted to "absolute protection of legitimate expectations"[53], which is in effect similar to the definition in Article 103, para. 2 GG. However, it is considered paradoxical that the BVerfG, while refusing to take Article 103, para. 2 GG as the standard of review, chose to apply the identical guarantee in Article 7, para. 1 of the Convention indirectly to reinforce the detainee's interests, thereby contradicting the fact that, according to its interpretation of the term "penalty", the provision would not be applicable at all.[54]

To circumvent the immediate release of all dangerous individuals from preventive detention, the BVerfG did not declare the provisions null and void immediately, but that they remain in force until the legislature reformed the current law, which had to take place by 31 May 2013 at the latest. The legislature codified the detailed provisions of the BVerfG in the "Act on the Implementation of the Distance-requirement in the Law on Preventive Detention" of December 2012.[55] Only under exceptional circumstances is the retrospective extension beyond the ten-year period now permitted and, even then, only if preventive detention is clearly distinguished from prison sentences.

In follow-up cases, the ECtHR explicitly welcomed the BVerfG's approach to interpreting the Basic Law in the light of the Convention and considered that, through this judgment, Germany had sufficiently implemented the ECtHR's findings in the domestic legal order.[56] In several decisions since 2016, the ECtHR has also not had any general objections

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52 Ibid., 378, paras. 109–118; for a brief summary see *Kaspar*, 4 Peking Univ. L. J. 2016, 80, 92 et seqq.; critical with regard to the very detailed judgment leaving no discretion to the legislature: *Vollkmann*, JZ 2011, 835, 841.

53 BVerfG, Judgment of 4 May 2011, 2 BvR 2365/09, 740/10, 2333/08, 1152/10, 571/10, BVerfGE 128, 326, 391, para. 139 – EGMR Sicherungsverwahrung.

54 *Werndl*, Zweispurigkeit und Vertrauensschutz (2019), 374, also with regard to the lack of differentiation between Articles 5 and 7 of the Convention.

55 Federal Law Gazette (BGBl.) of 5 Dec 2012, part I, 2425, the law amended the German Criminal Code, the ThUG and other laws concerning preventive detention.

56 ECtHR, Judgment of 9 June 2011, 30493/04, para. 41 – Schmitz v. Germany; Judgment of 24 Nov 2011, 4646/08, paras. 68 and 118 – O. H. v. Germany, although it found a violation of Article 5 para. 1 and Article 7 para. 1 of the Convention in this case.

to the new legal framework. While it still maintained that preventive detention generally qualified as a penalty under Article 7, para. 1 of the Convention, it did not consider the specific confinement of a complainant under the new Therapeutic Detention Act to amount to a penalty.[57] It thus acknowledged that the German legislature codified the requirements of the BVerfG, and thereby strengthened the preventive and therapeutic aspect of preventive detention to actually reduce the danger posed by offenders.[58]

IV. Reciprocal influences

This Comment does not aim to evaluate the law on preventive detention or the legal requirements under criminal law in detail. Nor does it aspire to cover thoroughly the controversy around preventive detention in Germany. Instead, the relevant cases should serve as an example of how basic rule-of-law principles, like legal certainty and the prohibition against the retroactive application of criminal sanctions, are developed in the dialogue between judges. In an increasingly integrated global order, legal certainty can only be ensured if there is a certain common understanding of key human rights provisions amongst the relevant courts. To avoid open defiance, the BVerfG in this case chose to implement the ECtHR decisions gently into the German legal order, thereby reversing its 2004 judgment without breaking with German legal tradition. However, it reserved its authority to have the final say in constitutional matters in relation to the ECtHR, and thereby left room for legal uncertainty. While the legal framework of preventive detention would never have been reformed had it not been for the stringent judgments of the ECtHR, it must also be recognised that conformity with the Convention was a gradual and long process that left many of the affected detainees in legal limbo.[59] Nevertheless, the influence of the Convention (as interpreted by the ECtHR) on the Basic Law is obvious. As the example of Germany and its relationship with

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57 ECtHR, Judgment of 7 Jan 2016, 23279/14, NJW 2017, 1007 – Bergmann v. Germany.

58 ECtHR, Judgment of 7 Jan 2016, 23279/14, NJW 2017, 1007, para. 173 – Bergmann v. Germany.

59 For details see the critique of *Kaspar,* 4 Peking Univ. L. J. 2016, 80, 95 et seqq.; *Vollkmann*, JZ 2011, 835, 838; sceptical with regard to the harmony between the national and supranational human rights frameworks *Michaelsen,* 12 Hum. Rts. L. Rev. 2012, 148, 166, criticizing the "retrospective academic romanticism".

the European Council shows, supranational courts influence the domestic legal order and may even have a considerable impact on areas that fall within the sovereign power of nation states. With criminal law being part of the highly- sensitive "*domaine réservé*" and therefore less open to international influence, changes arise only if a state allows the integration into, and openness towards, the international legal order. International criminal courts are a huge step towards the general acceptance and enforcement of uniform rule-of-law principles. The significance of international courts and human rights bodies can therefore for the most part be seen in their transformative influence on national legal systems. When judging (international) crimes, national courts should not be viewed only as state organs, but beyond that as agents of the international community as a whole charged with safeguarding fundamental human rights and thus taking a "quasi-independent role in the international legal order".[60]

V. Conclusion

Neither the members of the AU nor the European Council form a supranational body comparable to the EU. Instead, the AU is distinguished by the central principle of sovereign equality and interdependence among its Member States (Article 4 lit. a of the Constitutive Act of the African Union), as is the Council of Europe. The challenging question is how to reconcile national sovereignty with integration into an international human rights system. The AU Member States will have to share their sovereignty when they implement the ACJHPR's judgments without at the same time having to compromise their respective legal traditions and maintaining the necessary degree of legitimacy. The flexible approach of the BVerfG could be seen as a model in this respect. However, the vague incorporation of the ECtHR's jurisprudence turns out to be detrimental to legal certainty. Apart from these jurisdictional uncertainties, the ACJHPR could be an opportunity to foster respect for fundamental human rights and the effective prosecution of international crimes within the legal orders of its Member States. It could learn from the example of the ECtHR, which has considerable influence on powerful Member States from vastly different regions across Europe.

The global development of international criminal law is also an important marker of the gradual shift from a state- to an individual-centric

60 *Nollkaemper*, 101 Am. J. Int'l L. 2007, 760, 799.

understanding of international law. As international law increasingly enshrines directly-enforceable individual rights, constitutional courts are caught between obligations deriving from the international legal order on the one hand, and possibly-conflicting national constitutional requirements on the other. While there might be an effective judicial remedy on the international level, there is often a lack of readiness to comply with international court decisions at state level. The controversy around preventive detention discussed in this Comment exemplifies the individual's dilemma in terms of legal protection: while the EU (in a wider sense) has one of the highest densities of regional human rights instruments and complementary effective national constitutions, the enshrined rights must also prove to be effective in practice. If we apply *Alexy*'s concept of the dual nature of law, we might say that, in the European legal order (in the wider sense), the second dimension of law (the factual or real dimension) falls prey to uncertainty, as effective application essentially depends on the readiness of national courts and legislators to comply with the ECtHR's case law, while the ideal dimension is ambitious and aspiring. However, a law that is ideal, but inefficient might soon be perceived as an empty promise, thus losing general acceptance and legitimacy.

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