EUROPEAN COMMISSION OF HUMAN RIGHTS

SECOND CHAMBER

Application No. 17391/90

E (No. 2)

against

Norway

REPORT OF THE COMMISSION

(adopted on 18 October 1995)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a Norwegian citizen, born in 1948. In the proceedings before the Commission the applicant is represented by Mr. Knut Rognlien, a lawyer practising in Oslo.

3. The application is directed against Norway. The respondent Government are represented by their Acting Agent, Mr. Sven Ole Fagernæs of the Solicitor General's Office.

4. From 1978 until 1990 the applicant was almost constantly in prison or in another correctional facility, most of the time not serving an actual prison sentence but in preventive detention (sikring) authorised by the Norwegian courts. One such authorisation expired on 25 February 1990. The application, as declared admissible, concerns the applicant's detention from 25 February 1990 until 15 May 1990. The applicant considers that his detention during this period did not comply with the requirements of Article 5 of the Convention.

B. The proceedings

5. The application was introduced on 17 September 1990 and registered on 5 November 1990.

6. On 2 December 1992 the Commission (Second Chamber) decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits in so far as it concerned the issues under Article 5 of the Convention. The remainder of the application under Articles 3 and 6 of the Convention and Article 4 of Protocol No. 7 to the Convention was

declared inadmissible.

7. Following an extension of the time-limit fixed for that purpose the Government's observations were submitted on 15 March 1993. The applicant's observations in reply were submitted on 6 May 1993.

8. On 31 August 1994 the Commission declared the application admissible.

9. The text of the Commission's final decision on admissibility was sent to the parties on 27 September 1994 and they were invited to submit further information or observations on the merits as they wished. The applicant and the Government submitted further observations on 11 November 1994 and 3 February 1995 respectively.

10. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

11. The present Report has been drawn up by the Commission (Second Chamber) in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

Mr. H. DANELIUS, President
Mrs. G.H. THUNE
MM. G. JÖRUNDSSON
J.-C. SOYER
H.G. SCHERMERS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN

12. The text of this Report was adopted on 18 October 1995 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

13. The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

14. The Commission's decisions on the admissibility of the application are attached as Appendices I and II. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

a. The background

15. In 1965 the applicant was involved in a traffic accident in which he suffered serious brain damage. He subsequently showed a distinct tendency to become aggressive.

16. In 1967 he was convicted of offences under sections 227, 228 and 292 of the Norwegian Penal Code (assault and inflicting bodily harm) and sentenced to preventive detention for a maximum period of five years in accordance with section 39 para. 1 (e) of the Penal Code. In an expert psychiatric opinion obtained at that time, he was declared mentally ill (sinnssyk) and he spent the period from May 1967 to July 1972 in mental hospitals.

17. From 1973 to 1978 the applicant was detained for a period of approximately four years at either Telemark Central Hospital or Reitgjerdet Mental Hospital in accordance with the provisions of the Mental Health Act (lov om psykisk helsevern).

18. In 1978 the applicant was placed under "judicial observation" (judisiell observasjon) after having assaulted his father. The expert psychiatric opinion obtained at that time concluded that he was not mentally ill but had an underdeveloped and permanently impaired mental capacity (mangelfullt utviklede og varig svekkede sjelsevner) and that there was a clear risk of his committing further criminal offences.

19. By a judgment of 26 June 1978 the District Court (herredsrett) of Kragerø convicted the applicant of an offence under section 228 of the Penal Code. It sentenced him to sixty days in prison and authorised the use of security measures under section 39 para. 1 (a) to (f) of the Penal Code for a maximum period of five years.

20. On 3 July 1978 the prosecuting authority decided to detain the applicant in accordance with section 39 para. 1 (e) in a security ward at Ila National Penal and Preventive Detention Institution ("Ila").

21. On 21 January 1980 the Ministry of Justice decided, pursuant to section 39 para. 1 (a) to (c), to release the applicant on the condition, inter alia, that he resided at his parents' home. Owing to a number of violent incidents, the applicant was however rearrested, and by a judgment of 15 June 1980 the District Court of Kragerø sentenced him to ninety days' imprisonment, which sentence was deemed to have been served in detention on remand.

22. On 24 July 1980 the Ministry of Justice decided to place the applicant in preventive detention once more at Ila in accordance with section 39 para. 1 (e). On 2 June 1981 he was released to his parents' home under preventive supervision in accordance with section 39 para. 1 (a) to (c).

23. A number of unfortunate episodes led the Ministry of Justice to decide under section 39 para. 1 (e) to detain the applicant again. He returned to Ila on 17 July 1981.

24. On 5 February 1982 the Ministry of Justice decided to apply section 39 para. 1 (f) of the Penal Code and on 16 February the applicant was sent to Oslo District Prison. On 4 November 1982 he was transferred to Ullersmo National Prison ("Ullersmo").

25. Whilst so detained, the applicant was convicted by the District Court of Asker and Baerum on 18 March 1983 and sentenced to six months' imprisonment for assaulting prison staff at Ila and Ullersmo on three occasions. The expert psychiatric opinion obtained for the trial concluded, as before, that the applicant was not mentally ill but suffered from an underdeveloped and permanently impaired mental capacity.

26. With regard to the question of security measures, the court pointed out that the information available showed that detention in a

prison or similar institution was inappropriate and had a destructive influence on the applicant. The court found that he clearly needed psychiatric care and concluded that everything should be done to give him adequate treatment. It accordingly authorised the prosecuting authority to impose security measures under section 39 para. 1 except, however, detention in a security ward or in a prison under subsections (e) and (f).

27. Having served his sentence the applicant was released on 18 November 1983 and placed in a flat at Kragerø under the surveillance of the local police. However, on 19 December 1983 he was arrested and detained on remand, again charged with offences under sections 227 and 228 of the Penal Code. A further expert psychiatric opinion was obtained. It reached the same conclusion as the two earlier ones.

28. By judgment of 20 September 1984 the District Court of Kragerø found the applicant guilty on most of the charges brought against him and sentenced him to 120 days' imprisonment. Furthermore, the court authorised the prosecuting authority to use any of the security measures mentioned in section 39 para. 1 of the Penal Code for a maximum period of five years. It found that, having regard to the applicant's almost total lack of self-control in certain situations and to his physical strength, it could not rule out the use by the competent authorities of preventive detention in a prison or in a security ward under section 39 para. 1 (e) and (f), should this prove necessary. Apparently there was such a need, since the applicant remained at Ila.

29. The applicant appealed to the Supreme Court (Høyesterett) against the decision as regards preventive detention. In a judgment of 12 January 1985 Justice Røstad stated inter alia on behalf of the unanimous court:

(translation)

> "I consider it beyond doubt that the scope of the security measures should be extended as set out in the judgment now appealed against. Like the District Court I find that the requirements for imposing preventive detention are fulfilled. (The applicant), who must be considered to have, as required by section 39 (of the Penal Code), a deviant character, presents a serious danger regarding new offences, including threats - section 227. I may add that it cannot be considered disproportionate to impose security measures on such a clearly dangerous offender. In my view, the protection of society requires that the authorities should be able to impose security measures considered necessary in order to prevent (the applicant) from committing further serious offences.
>
> In view of the summing-up of counsel for the defence, I would point out that I find no basis for arguing that the decision of a Norwegian court concerning the authorisation to use security measures in a case like the present one would violate (Article 3) of the ... Convention. It is for the implementing authorities to ensure that the security measure takes a form which in practice not only protects the interests of society but also tries to promote those of (the applicant), including his need for psychiatric treatment."

30. On 7 November 1985 the applicant was transferred from Ila to Ullersmo pursuant to a decision of the Ministry of Justice under section 39 para. 1 (f) of the Penal Code.

31. On 29 October 1986 he was convicted by the District Court of

Asker and Baerum of having attacked a prison officer and was given a suspended sentence of 45 days' imprisonment. On 12 January 1987 he was transferred from Ullersmo to Sunnås Rehabilitation Centre near Oslo in order to receive treatment from a psychologist for fourteen days. Certain examinations were carried out, but the applicant was sent back to Ullersmo after attacking one of the nurses.

32. On 24 February 1987 the applicant was sent to Reitgjerdet Mental Hospital, where it was established that he was now psychotic. As he thus met the requirements for compulsory placement, he was kept there until 4 December 1987 on which date the hospital concluded that he was no longer psychotic.

33. The applicant nevertheless stayed at the hospital on a voluntary basis, but after some weeks he became aggressive towards other patients and staff. As he refused to be placed in the ward for difficult patients, he was sent back to Ullersmo, still under the authorisation of the Ministry of Justice in accordance with section 39 para. 1 (f) of the Penal Code.

34. With effect from 8 February 1988 the preventive measures were changed. Under section 39 para. 1 (a) to (c) the Ministry of Justice decided that the applicant should be released from Ullersmo, on condition that he lived in a house at Skien under the supervision of the Probation and After Care Service (kriminalomsorg i frihet).

35. On 19 April 1988 the applicant assaulted the social workers supervising him and the Ministry of Justice decided on the same day to replace preventive supervision under section 39 para. 1 (a) to (c) by detention in a secure institution, at least for a short time, in accordance with section 39 para. 1 (f). The applicant was transferred to Arendal District Prison.

36. On 19 May 1988 he was released from Arendal District Prison and moved to the house at Skien.

37. Following several violent incidents the Ministry of Justice decided on 21 July 1988, in accordance with a recommendation from the Probation and After Care Service, that preventive supervision at Skien should cease and that the applicant was to be transferred to Ila under section 39 para. 1 (e).

38. On 21 October 1988 the Ministry of Justice decided that the applicant should be released and placed under preventive supervision pursuant to section 39 para. 1 (a) to (c) of the Penal Code and he was brought back to the house at Skien. However, as on several occasions he violated the restrictions imposed on him the Ministry decided, in December 1988, to detain him at Ila again in accordance with section 39 para. 1 (e).

39. On 11 January 1989 the applicant was convicted by the District Court of Kragerø of offences under section 227 and section 228 in conjunction with section 230 of the Penal Code (threats and assault). He was sentenced to 120 days' imprisonment, which sentence was deemed to have been served in detention on remand. However, he continued to be detained at Ila under section 39 para. 1 (e) as authorised by the Supreme Court on 12 January 1985 (see para. 28 above).

b. The expiry of the security measure authorisation

40. While detained again at Ila the authorities continued their efforts to solve the problems of the applicant's placement. On 22 June 1989 an expert opinion was submitted to the Director of Ila concerning the use of security measures. The expert, psychiatrist H, recommended a project whereby the applicant, under proper surveillance, could remain at liberty. In September 1989 a meeting was arranged at Ila with representatives from the Telemark Mental Hospital, the

Telemark County physician (fylkeslegen), the Telemark Probation and After Care Service, the applicant's lawyer, social workers and psychiatrist H. No concrete proposals were adopted as certain points needed further clarification.

41. On 26 October 1989 the Institution Board (anstaltrådet) at Ila discussed the question of continuing preventive detention in the light of the fact that the court authorisation to that effect would expire on 25 February 1990. Following this meeting the majority of the Board decided to recommend to the Vestfold and Telemark State Prosecutor (Statsadvokaten i Vestfold og Telemark) to request the prolongation of the authorisation to use security measures under section 39 para. 1 (a) - (f) of the Penal Code.

The recommendation was forwarded to the State Prosecutor by letter of 11 January 1990 in which the acting director of Ila inter alia stated as follows:

(translation)

> "(The applicant) has now been placed, for approximately one year, in closed preventive detention (lukket sikring) at Ila. During this period he has on several occasions acted aggressively towards the prison officers. During previous stays in the institution he has attacked employees and shown that his threats may be serious. Since 23 December 1988 (the applicant) has been placed in a cell of his own in section G since, for security reasons, it could not be justified to offer him a place in the open ward. Furthermore, (the applicant) has not been granted leave of absence since I fear that due to (his) behaviour in prison similar incidents might occur during such leave. I refer to the fact that he has been convicted several times for assault and threats, most recently by judgment of (11) January 1989 when he was convicted of similar offences committed while he was on leave in 1988.
> ...
> (The applicant) has disclosed a deviant character from a very young age. His behaviour and conduct do not appear to have changed essentially since 1965 when he suffered brain damage. In 1988 he was on three occasions transferred to Skien under preventive supervision but every time it was discontinued due to circumstances relating to (the applicant). Therefore I consider it probable - or rather very likely - that he will commit new offences involving violence if he were to be released when the security measure authorisation expires. The possibility also exists that he would then commit far more serious offences than those of which he has previously been convicted.
>
> It has turned out to be impossible to make other arrangements which also (the applicant) can accept. As recently as 9 March and 23 May 1989 the Ministry of Justice refused (the applicant's) requests to replace the detention with preventive supervision. The arrangement proposed by psychiatrist (H) appears to be more secure, but considerably more expensive than the previous ill-fated arrangements. ...
>
> However, today there is no adequate alternative to continuing preventive detention at Ila. Accordingly, I would recommend renewed preventive detention upon expiry of the security measure authorisation on (25) February 1990.
> ..."

42. On the basis of the above recommendation the Vestfold and Telemark State Prosecutor "filed charges" (sette under tiltale) against

the applicant by "indictment" (tiltalebeslutning) of 2 February 1990 in order to obtain the Kragerø District Court's authorisation, pursuant to section 39, para. 3, second sentence, of the Penal Code, to prolong by three years the period during which security measures of the Penal Code could be used.

43. On 7 February 1990 the Chief of Police requested the District Court to detain the applicant on remand for a period of four weeks in accordance with section 171 of the Code of Criminal Procedure (Straffe-prosessloven) in order to obtain a medical opinion to be used during the forthcoming hearing concerning the question of further authorisation to use security measures. It was noted that the previous authorisation would expire on 25 February 1990.

44. On 12 February 1990 the District Court considered the question of detention on remand. The applicant maintained that a detention on remand beyond 25 February 1990 would be illegal, and that such detention would mean that he would be punished for the same offences twice. He furthermore alleged that the only reason why the authorities requested his detention on remand was because they had failed to proceed with the case although they had known for five years when the authorisation to use security measures would expire.

45. In its decision of 12 February 1990 to detain the applicant on remand for a period of four weeks beyond 25 February 1990 the District Court stated:

(translation)

> "In accordance with Norwegian law the prosecuting authority shall consider and, where appropriate, determine the question of prolonging the period during which security measures can be used, even if the person in question has not committed new criminal offences, cf. section 39, para. 3, of the Penal Code.
> ...
> In addition section 171, para. 2 in fine, of the Code of Criminal Procedure authorises the use of detention on remand in cases were there is a need for such detention before a new decision on security measures can be taken. The requirements are that continuing use of preventive measures is the most likely outcome of the case and that one of the specific detention requirements of section 171, para. 1, is fulfilled. In this case it is the requirement no. 3 in section 171, para. 1, which is relevant - the risk of new criminal offences which carry more than 6 months' imprisonment.
> ...
> The security measure issues cannot be examined before 25 February 1990. This is due to the fact that a necessary expert opinion will not be ready before that date.
> ...
> The Court finds that there is reason to grant the prosecutor's request, cf. (the above-mentioned provisions of the Code of Criminal Procedure).
>
> The Court finds it very likely that (the applicant) - if released in two weeks - will commit criminal offences such as threats (section 227 of the Penal Code) and assault (section 228). He has without doubt strong character deviations, little tolerance and easily threatens people's life and health, and also attacks them. Today he rejects any form of supervision proposals. The Court refers in its evaluation first of all to what has happened earlier. In the Supreme Court's decision of 1985 there is a thorough account regarding the previous period. Since 1985 he has been convicted twice for violations of sections 227

and 228. Psychiatrist (H) must be understood as also considering that (the applicant), due to his weak impulse control and impaired capacity to control himself, will find himself in situations where he reacts with verbal threats if he is released and that things will - despite his good intentions - go wrong.

Furthermore, it is likely that the case will end with the use of security measures against (the applicant) - for one or more years and with one or more of the measures mentioned in section 39, para. 1 (a) to (f), of the Penal Code. It suffices here to refer to the fact that the Ila prison authorities recommend this and to the fact that psychiatrist (H) has drawn up a new plan for security measures.

In the present circumstances the Court cannot see that the detention is a disproportionate step. (The applicant's) case is sad and tragic. The Court cannot consider only what is in his interest but must also consider the risk of the applicant exposing others to fear and danger. As far as the Court can see from the documents now, it appears that the outcome will be the use of security measures to be implemented at Skien which should work better than the last programme and which will provide him a much better life than during the last 14 months."

46. The applicant appealed against this decision to the Agder High Court (Agder Lagmannsrett). On 23 February 1990 the High Court upheld the decision of the lower court and added:

(translation)

"It is clear that according to Norwegian law it has been assumed until now that it is possible to prolong the period of detention even if the person concerned has not committed any crimes during that period. The High Court does not find that such an arrangement violates Article 4 of Protocol No. 7 to the Convention concerning a new conviction of a crime of which he has already been convicted. The requirement in law that the court shall fix a maximum period for security measures is based, inter alia, on concern for the convicted person, i.e. to secure that he will have a judicial review after a certain period of time of the necessity of the continuation of security measures.

...

The High Court has no doubt that there is a very obvious risk that (the applicant) will commit new criminal offences if he is released at the end of the period of preventive detention without the prison or the prosecuting authorities having any control over him. ... In order to prevent new acts of violence it is necessary that he is taken care of also after the security measure period has expired. Accordingly, there is a need for detention on remand and a very considerable probability of an authorisation of further security measures.

...

The High Court notes that detention on remand does not appear to be a disproportionate measure. Considerations for the protection of society must have priority over (the applicant's) interest in being released.

The fact that the request for detention on remand of 7 February 1990 ... is based on the ground that time is needed in order to obtain an additional expert opinion is, in the High Court's view, of no relevance to the question

of detention. The hearing concerning the question of continuing security measures cannot be held until an opinion has been submitted also by another expert in psychiatry. ... Until the hearing can be held it is necessary to take care of (the applicant) due to the danger of a relapse into crime.

The High Court understands the hopelessness expressed by (the applicant's) counsel concerning the fact that a programme for (the applicant) has still not been made. However, it cannot be maintained that detention on remand - having regard to the circumstances of the case - even considering the treatment (the applicant) has previously received, would amount to a violation of Article 3 of the Convention."

47. The applicant appealed against this decision to the Supreme Court. On 16 March 1990 the Appeals Selection Committee of the Supreme Court (Høyesteretts kjæremålsutvalg) rejected the appeal. In its decision the Court stated:

(translation)

"In accordance with section 39, para. 3, second sentence, (of the Penal Code) the court must in cases involving security measures fix a maximum period beyond which no measures can be taken without the court's permission. A decision concerning the prolongation of this authorisation does not mean that the person in question is convicted or punished again for those offences which constituted the basis for the judgment allowing the use of security measures. That these offences constitute the basis for using security measures has already been decided through this judgment. What is relevant for the question whether the use of security measures should be prolonged beyond the initial maximum period fixed is an evaluation of the other circumstances which provide the reasons for using security measures; the person's mental capacity and the risk of further criminal offences being committed. That the period of security measures may be prolonged, if there is reason to do so after such an evaluation, follows from the judgment allowing the use of security measures read in conjunction with section 39, para. 3, second sentence.

It follows from this that the High Court did not base its decision on an incorrect interpretation of Article 4 para. 1 of Protocol No. 7 to the Convention when it assumed that a prolongation of the period of preventive measures in accordance with section 39, para. 3, second sentence, of the Penal Code was not contrary to the Convention provision.

The Court does not find either that the High Court's decision is based on an incorrect interpretation of Articles 3 or 6 of the Convention."

48. The applicant accordingly remained at Ila, in detention on remand, after the Supreme Court's authorisation of 12 January 1985 expired on 25 February 1990.

49. On 20 March 1990 the District Court prolonged the detention until 23 April 1990 stating as follows:

(translation)

"The basis for the continuing detention - both factual and legal - is the same as when the Court examined the

detention question on 12 February 1990, cf. also the decisions of the High Court and the Appeals Selection Committee of the Supreme Court.

The Court does not consider the extension to be disproportionate either. With reference, among others, to the recommendation of the IIa Institution Board and psychiatrist (H's) submissions during the court session of 12 February 1990, it is likely that the case will result in a prolongation of the authorisation to use security measures against (the applicant). The fact that the question of the prolonged use of security measures ought to have been decided before the expiry of the period authorised cannot constitute a reason for release. ..."

50. The applicant appealed against this decision to the Agder High Court.

51. On 22 March 1990 the expert opinion was submitted to the Kragerø District Court. It concluded as follows:

(translation)

"1. It is questionable whether (the applicant) can be regarded as a person with an underdeveloped mental capacity.
2. (The applicant) suffers from a permanently impaired mental capacity.
3. (The applicant) is not in a state of insanity during the examination and there is no sign of reduced consciousness.
4. Prolonged authorisation to use security measures ought not to be granted and in case it is, it ought to exclude detention in a prison or in a security ward."

52. On 30 March 1990 the Agder High Court upheld the District Court's decision of 20 March 1990. The High Court stated as follows:

(translation)

"The Court finds that there is a great risk that (the applicant) will commit criminal acts which are punishable by imprisonment for a term exceeding six months if he were to be released now and that, therefore, continued detention on remand is necessary until the question of prolonging the authorisation to use security measures can be examined in court. The Court disagrees with counsel for (the applicant) that it is unlikely that such prolongation will be granted. A release without having examined the question of authorising the use of security measures appears to be so questionable, in the light of the risk of new criminal acts, that detention on remand until the case may be examined does not appear to be a disproportionate measure. Nor does it appear to be contrary to Article 5 para. 3 of the European Convention on Human Rights. The Court also refers to the fact that the prolongation of the detention on remand is based on the need to re-schedule the case as it will be necessary to replace the judge ..."

53. On 19 April 1990 the Appeals Selection Committee of the Supreme Court rejected the applicant's appeal against the above decision of the High Court.

54. On 20 April 1990 the Kragerø District Court extended the period of detention on remand by four weeks, until 21 May 1990. The Court referred in substance to its previous decisions of 12 February and 20 March 1990.

55. On 25 April 1990 the Medico-Legal Council (Den rettsmedisinske Kommission) rejected the medical expert opinion of 22 March 1990 and requested the submission of a revised opinion in the case.

56. On 14 May 1990 the Prosecutor General (Riksadvokaten) withdrew the request for a prolongation of the authorisation to use security measures against the applicant. He was accordingly released on 15 May 1990.

c. Subsequent developments

57. During the months of July, August and September 1990 the applicant committed several criminal acts of threats and assault. As a consequence he was arrested on 24 September 1990 and detained on remand until 15 November 1990. By judgment of 13 February 1991 the applicant was convicted inter alia of violations of sections 227 and 228, illegal threats and assault, and sentenced to seven months' imprisonment. Furthermore, the District Court authorised the use of security measures pursuant to section 39 para. 1 (a) to (f) of the Penal Code for a period of three years. This judgment was upheld by the Supreme Court on 1 November 1991, excluding only the security measure set out in section 39 para. 1 (c).

58. In the meantime the applicant had been arrested again, on 16 May 1991, and detained on remand. By judgment of 11 July 1991 he was sentenced to an additional ninety days' imprisonment for further violations of inter alia sections 227 and 228 of the Penal Code. He was released on 13 July 1991. He served the remaining part of the sentence from 14 January until 16 April 1993.

59. By judgment of 29 June 1994 the applicant was sentenced by the Kragerø District Court to ten months' imprisonment having been found guilty on 32 counts of assault and threats from December 1991 until April 1994. It does not appear that the applicant appealed against this judgment. Whereas the applicant has been called to serve the prison sentence imposed, the authorities have not made use of the Supreme Court authorisation of 1 November 1991 to use security measures.

B. Relevant domestic law

60. Section 39 of the Penal Code in its relevant parts reads as follows:

(translation)

"Section 39

1. If an otherwise punishable act is committed in a state of insanity or unconsciousness or if a punishable act is committed in a state of unconsciousness due to self-inflicted intoxication, or in a state of temporarily reduced consciousness, or by someone with an underdeveloped or permanently impaired mental capacity, and there is a danger that the offender, because of his condition, will repeat such an act, the court may decide that the prosecuting authority, as a security measure, shall

a. assign or forbid him a particular place of residence,

b. place him under surveillance by the police or a specially appointed probation officer and order him to report to the police or the probation officer at designated intervals,

c. forbid him to consume alcoholic beverages,

d. place him in secure private care,

e. place him in a mental hospital, sanatorium, nursing home or security ward, where possible, in accordance with the general provisions promulgated by the King,

f. keep him in preventive detention.

2. If such condition involves a danger of acts of the kind covered by sections 148, 149, 152, subsection 2, 153, subsections 1, 2 or 3, 154, 155, 159, 160, 161, 192 - 198, 200, 206, 212, 217, 224, 225, 227, 230, 231, 233, 245, subsection 1, 258, 266, 267, 268 or 292, the court shall decide to apply such security measures as are mentioned above.

3. These measures are terminated when they are no longer regarded as necessary, but may be resumed if there is reason to do so. The security measures listed under (a)-(d) may be employed concurrently.

The court shall determine the maximum period for which security measures may be imposed without its further consent.

4. Unless the court has decided otherwise, the prosecution may choose between the above-mentioned security measures.

The decision to terminate, resume or alter a security measure is made by the ministry.

Before a decision about security measures or their termination is made, the opinion of a medical specialist must normally be obtained. The same procedure should be followed at regular intervals during the period in which security measures are in force."

61. Section 171 of the Code of Criminal Procedure reads as follows:

(translation)

"Section 171

Any person who with just cause is suspected of one or more acts punishable by law with imprisonment for a term exceeding six months may be arrested when:

1) there is reason to fear that he will evade prosecution or the execution of a sentence or other precautions;

2) there is an immediate risk that he will interfere with any evidence in the case, e.g. by removing clues or influencing witnesses or accomplices;

3) it is deemed to be necessary in order to prevent him from again committing a criminal act punishable by imprisonment for a term exceeding six months; and

4) he himself requests it for reasons that are found to be satisfactory.

When proceedings relating to security measures have been instituted, or it is probable that such proceedings will be instituted, an arrest may be made regardless of whether a penalty may be imposed, as long as the conditions in para. 1 are otherwise fulfilled. The same applies when a

judgment in favour of security measures has been pronounced or it is a question of extending the maximum period for using security measures."

62. Sections 227 and 228 of the Penal Code read as follows:

(translation)

"Section 227

Any person who in words or deeds threatens to commit a criminal act, punishable by law with simple imprisonment exceeding one year or imprisonment exceeding six months, in such a way that the threat is likely to inspire in some other person serious fear, or any person who contributes to the execution of such a threat, shall be liable to a fine or to imprisonment for any term not exceeding three years. In aggravating circumstances cf. section 232, third sentence, any term of imprisonment not exceeding six years may be imposed.

Without a request from the injured party public prosecution shall not be instituted unless the threat is directed against an indefinite plurality or it is required by other general interests."

"Section 228

Any person who commits violence against, or in other ways offends the person of others, or contributes to the execution of such an act, is liable to a fine or to any term of imprisonment not exceeding six months.

If the offence results in damage to the person or his health, or causes considerable pain, any term of imprisonment not exceeding three years may be imposed, or any term of imprisonment not exceeding five years where it causes death or grievous bodily harm.

Where the offence has been reciprocated by a similar offence, or where the offence reciprocates a previous offence or defamation, the penalty may be remitted.

Public prosecution shall not be instituted except where requested by the injured party unless

a) the offence caused death, or
b) the offence is committed against the accused's previous or present spouse, or
c) the offence is committed against the accused's children or the children of the accused's spouse, or
d) the offence is committed against the accused's kin in lineal ascent, or
e) where the general interest so requires."

63. Chapter 2, sections 3 and 5 of the Mental Health Act read as follows:

(translation)

"Section 3

When on account of his mental state an individual cannot himself ensure that he receives the medical supervision and psychiatric health care he needs and his nearest relatives also fail to ensure that he does so, the public authority shall see to it that he is examined by a medical

practitioner and otherwise do what is required to get him into care.

If after a personal examination a medical practitioner finds it necessary, and his nearest relative or a public authority so requests, the patient may be admitted to a hospital or kept in another place where proper care can be provided, but not for more than three weeks without his own express consent, unless the conditions set out in section 5 are met.

The medical practitioner shall inform the patient of his right to appeal against the decision before the supervisory board. The appeal does not have suspensive effect unless the medical practitioner decides otherwise."

"Section 5

Persons suffering from serious mental illness may be admitted to hospital without their own consent if their nearest relatives or a public authority so desire, and if the senior physician at the hospital considers that admission on the basis of the patient's state of health is necessary in order to prevent him from suffering harm or that the prospect for recovery or substantial improvement is jeopardised or that the patient presents a serious danger to himself or others.

The senior physician may, through the supervisory board, request the presentation and registration of such testimony as is considered to be of importance for assessing whether the conditions of the Act pertaining to admission have been met. The rules set out in section 9 para. 2 second sentence and para. 10 third sentence shall similarly apply.

Persons admitted to hospital may be detained in the hospital without their own consent if the conditions stipulated in the first paragraph, or second paragraph, are met. However, this does not apply if the admission has been effected under section 4.

The patient, his nearest relative or the authority who has requested the admission, may appeal against the decision of the senior physician to the supervisory board. This also applies if the senior physician has refused to admit or detain the patient. The appeal does not have suspensive effect unless the supervisory board rules otherwise.

When a person is admitted to or detained in a hospital in accordance with this section, the senior physician shall immediately inform the supervisory board accordingly. If the patient is admitted or detained at the request of the authorities, the senior physician shall also inform the patient's nearest relatives. The patient and his nearest relatives shall always be informed of their right to bring the matter of the patient's admission or discharge, as well as complaints about the medical treatment, before the supervisory board."

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

64. The Commission has declared admissible the applicant's complaints that his detention from 25 February 1990 until 15 May 1990 did not fulfil any of the conditions set out in Article 5 para. 1 a - f (Art. 5-1-a-f) and, assuming Article 5 para. 1 c (Art. 5-1-c) were to

apply, that the length of the detention did not comply with the requirements of Article 5 para. 3 (Art. 5-3) of the Convention.

B. Points at issue

65. Accordingly, the issues to be determined are:

- whether there has been a violation of Article 5 para. 1 (Art. 5-1) of the Convention;

- whether there has been a violation of Article 5 para. 3 (Art. 5-3) of the Convention.

C. As regards Article 5 para. 1 (Art. 5-1) of the Convention

66. The applicant has alleged a violation of Article 5 para. 1 (Art. 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;
>
> b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> 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;
>
> d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

67. The applicant maintains that his detention from 25 February 1990 until 15 May 1990, following the expiry of the Supreme Court's authorisation to use security measures, does not comply with any of the requirements for depriving a person of his liberty set out in the above provision. In particular the applicant maintains that in respect of Article 5 para. 1 c (Art. 5-1-c) he was at the relevant moment in time not charged with having committed any criminal offences, and the fact that he subsequently committed new offences is of no relevance as the Norwegian courts were called upon to decide in the matter on the basis of the facts at the time of the decisions taken. Furthermore, the applicant maintains that the real reason for his detention as from 25 February 1990 had nothing to do with any criminal activity or other matter relevant under Article 5 para. 1 (Art. 5-1) of the Convention, but was solely the fact that the Norwegian authorities had not managed to have the question of prolonging the authorisation to use security

measures determined before the end of the initial period authorised by the court.

68. As regards Article 5 para. 1 e (Art. 5-1-e) the applicant submits that different rules apply in Norway if a person should be deprived of his liberty due to the fact that he is of "unsound mind". However, under Norwegian law the applicant was not, during the period of time in question, considered to be of "unsound mind" to the extent that he would fall under the Norwegian Mental Health Act. Furthermore, the expression "lawful detention of a person of unsound mind" refers also to matters relating to the execution of the detention in that it should, according to the case-law of the European Court of Human Rights, be effected in a hospital, clinic or other appropriate institution authorised for that purpose. Otherwise the detention would not be in conformity with Article 18 (Art. 18) of the Convention. In the present case, however, the applicant was not detained for any treatment purposes whatsoever but received the same "treatment" as any other prison inmate in solitary confinement.

69. The Government submit that the applicant was remanded in custody in accordance with a procedure prescribed by law in that the detention was in conformity with the domestic procedural provisions of the Code of Criminal Procedure. Furthermore, the Government maintain that the detention was lawful under Norwegian law, having been confirmed on two occasions by the High Court and the Supreme Court. Consequently, the Government conclude that the general conditions for depriving the applicant of his liberty under Article 5 para. 1 (Art. 5-1) of the Convention were complied with.

70. The Government contend that the applicant's detention beyond 25 February 1990 was in accordance with Article 5 para. 1 c (Art. 5-1-c) of the Convention which they consider contains three alternative circumstances in which detention may be effected, including detention when it is reasonably considered necessary to prevent someone from committing an offence. The legal basis for the arrest and the remand in custody was section 171 of the Code of Criminal Procedure which corresponds to Article 5 para. 1 c (Art. 5-1-c) in that it likewise permits detention if deemed necessary in order to prevent someone from committing a criminal act. Moreover, in the present case it was beyond doubt that the applicant would commit new criminal offences if released when the court authorisation to use security measures expired.

71. The Government also contend that the applicant's detention beyond 25 February 1990 was covered by Article 5 para. 1 e (Art. 5-1-e) of the Convention. Over the years the applicant was subjected to several medical examinations which all concluded that he has a mental disorder characterised as an underdeveloped or permanently impaired mental capacity. Furthermore the applicant's history amply illustrates why it was necessary to remand him in custody.

72. The Commission recalls that if punishable acts are committed in Norway by someone with an underdeveloped or permanently impaired mental capacity and there is a danger that the offender, because of his, or her, condition, will repeat such an act, the sentencing court, in addition to imposing a fixed term of imprisonment, may, pursuant to section 39 para. 1 of the Penal Code, authorise the prosecuting authority - and subsequently the Ministry of Justice - to impose security measures, including deprivation of liberty in a security ward or preventive detention in prison, for a specified maximum period of time. The principal objective is to protect society against further offences by the person concerned, whose interests must nevertheless not be disregarded. Thus although the authorities have, under section 39 of the Penal Code, a wide discretion in deciding which security measure is to be imposed, this is to be terminated when it is no longer regarded as necessary, but may be resumed, albeit only during the authorised period of time, if there is reason to do so.

73. It follows from the applicant's previous application that whenever the administrative authorities decide to implement security measures involving the deprivation of a person's liberty (cf. section 39 para. 1 (e) and (f)) this person has, despite the initial authorisation fixed by the sentencing court, a right to a court review of this measure in accordance with Article 5 para. 4 (Art. 5-4) of the Convention. This is so in particular since, with the passage of time, the link between the authorities' decision not to release or to re-detain a person and the initial judgment may gradually become less strong and a detention which was lawful at the outset might be transformed into a deprivation of liberty which is arbitrary and, hence, incompatible with Article 5 (Art. 5) of the Convention (Eur. Court H.R., E. v. Norway judgment of 29 April 1990, Series A no. 181).

74. From section 30 para. 3, last sentence of the Penal Code it is clear, however, that the authorisation to implement security measures does not in any circumstances go beyond the maximum period initially fixed by the sentencing court without a court having granted express permission to do so.

75. In the present case the relevant initial authorisation to implement security measures was granted by the Supreme Court on 12 January 1985 and it expired on 25 February 1990.

76. By "indictment" of 2 February 1990, i.e. within the authorised period of time, the prosecuting authority instituted proceedings in the Kragerø District Court in order to obtain a prolongation of the authorisation to use security measures. However, as no court authorisation pursuant to section 39 para. 3, last sentence of the Penal Code was obtained before 25 February 1990, the prosecuting authority requested the applicant's detention on remand pursuant to section 171 of the Code of Criminal Procedure for the period beyond that date in order to secure his continuing detention pending the outcome of the proceedings instituted on 2 February 1990. The applicant was so detained until 15 May 1990, i.e. 2 months and 20 days, when he was released as the Prosecutor General had then decided not to pursue the request for a prolongation of the authorisation to use security measures.

77. The Commission recalls that in order to comply with Article 5 para. 1 (Art. 5-1) of the Convention such deprivation of liberty must be covered by one of the cases exhaustively listed there. Four of these cases, those in sub-paragraphs a, b, d and f obviously do not apply to the deprivation of liberty complained of. It must therefore now be examined whether sub-paragraphs c and e could be applied.

a) Article 5 para. 1 c (Art. 5-1-c)

78. The Commission considers that whether the applicant's detention was ordered "in accordance with a procedure prescribed by law", is a question which essentially refers back to domestic law, i.e. the need for compliance with the relevant procedure under that law. The Commission finds no reason to doubt that the procedural requirements of Norwegian law were observed in the applicant's case. Furthermore, the Commission considers that the applicant's detention was "lawful" in the sense that it was examined and accepted by the Supreme Court which found it to be in conformity with the substantive and the procedural rules of domestic law.

79. However, in addition it is required that any deprivation of liberty should be consistent with the purpose of Article 5 (Art. 5) of the Convention, i.e. to protect individuals from arbitrariness (cf. for example Eur. Court H.R., Wassink judgment of 27 September 1990, Series A no. 185-A, p. 11, para. 24). The Commission recalls here that the exhaustive list of permissible exceptions in paragraph 1 of Article 5

(Art. 5-1) of the Convention must be interpreted strictly (cf. Eur. Court H.R., Ciulla judgment of 22 February 1989, Series A no. 148, p. 18, para. 41).

80. The Commission also recalls that according to the case-law of the European Court of Human Rights Article 5 para. 1 c (Art. 5-1-c) permits deprivation of liberty only in connection with criminal proceedings. This is apparent from its wording, which must be read in conjunction both with sub-paragraph a and with paragraph 3, which form a whole with it (cf. above mentioned Ciulla judgment, p. 16, para. 38 and Eur. Court H.R., Lawless judgment of 1 July 1961, Series A no. 3, para. 14, p. 52).

81. The facts of this case disclose that the authorities' fear that the applicant, if released, might commit new criminal acts was well-founded. Furthermore, Article 5 para. 1 c (Art. 5-1-c) of the Convention sets out three alternative circumstances in which detention may be effected, among which is included the situation "when it is reasonably considered necessary to prevent his committing an offence" (cf. Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1994, Series A no. 77, p. 21, para. 44). However, the Commission finds that the applicant's detention beyond 25 February 1990 pursuant to section 171 of the Code of Criminal Procedure, was not based on, or related to, any criminal act he had committed and the detention orders had no connection in law with any investigations which might have been pursued in this respect.

82. Moreover, the alternative in Article 5 para. 1 c (Art. 5-1-c) of the Convention upon which the Government rely is not adapted to a policy of general prevention directed against individuals who may present a danger on account of their continuing propensity to crime. This alternative for detention, in connection with criminal proceedings only, does no more than afford the Contracting States a means of preventing a concrete and specific offence. This can be seen both from the use of the singular "an offence" and from the object of Article 5 (Art. 5), namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (cf. Eur. Court H.R., Guzzardi judgment of 6 November 1990, Series A no. 39, p. 38, para. 102).

83. As already stated above the Commission considers that the detention orders pursuant to section 171 of the Code of Criminal Procedure were not made in the context of criminal proceedings instituted against the applicant. His detention beyond 25 February 1990 was rather designed to keep him in prison while the authorities obtained the necessary evidence for the forthcoming hearing regarding the question of prolonging the authorisation to use security measures. As evidence thereof the Commission refers to the prosecuting authority's request for detention of 7 February 1990 which merely relied on a need to obtain a medical opinion. Furthermore, the courts did not mention any concrete and specific offence which the applicant had to be prevented from committing, but referred to the general risk of the applicant committing offences contrary to sections 227 and 228 of the Penal Code due to his alleged mental disorder. In respect of the latter the Commission also notes that the question of the existence of a mental disorder actually requiring a prolongation of the authorisation to use security measures, was an issue which was to be determined at a later stage. It does not therefore correspond to a narrow interpretation of Article 5 para. 1 c (Art. 5-1-c) to rely thereon in order to justify depriving an individual of his or her liberty.

84. The Commission has not overlooked that the applicant's case, seen as a whole, is very special and that the developments provided justification for the courts' assumption that the applicant, once released, would commit new offences. This does not, however, affect the underlying principle which constitutes the basis for a strict interpretation of the fundamental guarantees secured by Article 5

(Art. 5) of the Convention. Thus having regard to the above the Commission finds that Article 5 para. 1 c (Art. 5-1-c) of the Convention cannot be relied upon as a basis for the applicant's detention from 25 February until 15 May 1990.

b) Article 5 para. 1 e (Art. 5-1-e)

85. The Government also maintain that Article 5 para. 1 e (Art. 5-1-e) could be applied in the instant case.

86. The Commission recalls (cf. para. 63) that under the Norwegian Mental Health Act persons suffering from serious mental illness may be admitted to hospital without their own consent if their nearest relatives or a public authority so desire, and if the senior physician at the hospital considers that admission on the basis of the patient's state of health is necessary inter alia in order to prevent him from suffering harm or if he presents a serious danger to himself or others. Whereas the Commission considers that the requirements of the Norwegian Mental Health Act do not appear to be incompatible with the meaning that the expression "persons of unsound mind" is to be given in the context of the Convention, it is undisputed that the provisions of this Act did not constitute the basis for the applicant's detention beyond 25 February 1990.

87. However, just as the Convention does not give any definition of "a person of unsound mind" Norwegian legislation in this field does not contain an exhaustive definition either and the Commission therefore finds it necessary to examine whether, as the Government contend, the applicant was in the circumstances of "unsound mind" to the extent that Article 5 para. 1 e (Art. 5-1-e) could constitute a reason for his detention.

88. In its Winterwerp judgment of 24 October 1979, the European Court of Human Rights stated three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" within the meaning of Article 5 para. 1 e (Art. 5-1-e) : except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder (Series A no. 33, p. 18, para. 39).

89. As regards the question of a true mental disorder the Commission recalls that since 1978 the applicant has been diagnosed as having a permanently impaired mental capacity and there has apparently not been any significant improvement in that respect. However, whether this mental disorder at the time in question in this case was of a kind warranting continued compulsory confinement and whether the validity of continued confinement depended upon the persistence thereof were matters which the courts were in fact called upon to determine when proceedings commenced in the Kragerø District Court on 2 February 1990. Thus, it cannot be concluded that these two requirements were fulfilled when the applicant was detained on remand on 25 February 1990 pending the outcome of the court's examination of the prolongation issue on its merits.

90. Furthermore, the lawfulness of any detention is required in respect of both the ordering and the execution of the measure depriving the individual of his liberty. It not only presupposes conformity with domestic law but also, as confirmed by Article 18 (Art. 18) of the Convention, conformity with the purposes of the restrictions permitted by Article 5 para. 1 (Art. 5-1). In this respect it follows from the very aim of Article 5 para. 1 (Art. 5-1) that no detention which is arbitrary can be regarded as lawful. The Commission also considers that there must be some relationship between the ground of permitted

deprivation of liberty relied on and the place and conditions of detention. Thus, although Article 5 para. 1 e (Art. 5-1-e) is not in principle concerned with suitable treatment or conditions, the Commission finds that the detention of a person of "unsound mind" will only be lawful for the purposes of Article 5 para. 1 e (Art. 5-1-e) if effected in a hospital, clinic or other appropriate institution authorised for that purpose (cf. Eur. Court H.R., Ashingdane judgment of 28 May 1985, series A no. 93, p. 21, para. 44).

91. As stated above (para. 78) the Commission has no cause for finding that the applicant's deprivation of liberty during the contested period was unlawful in the sense of not being in accordance with the relevant domestic law. It thus remains to be ascertained in the light of the above principles whether it was "lawful" in the autonomous sense of the Convention.

92. The Commission recalls that the applicant was the subject of security measures, as authorised by the Supreme Court, until 25 February 1990 in the interest of public safety. Under this authorisation the applicant could be detained, if necessary, in a mental hospital, sanatorium, nursing home or security ward (cf. section 39 para. 1 (e) of the Penal Code) or in preventive detention (cf. section 39 para. 1 (f)). At the time of the expiry of the above court authorisation the applicant was detained in a security ward at Ila National Penal and Preventive Detention Institution pursuant to section 39 para. 1 (e) of the Penal Code. It is undisputed that he did not receive any particular treatment there.

93. It is likewise undisputed that the authorisation to keep the applicant detained at Ila expired on 25 February 1990 and that section 39 of the Penal Code could thereafter no longer constitute the basis for the applicant's detention. Thus, the applicant was subsequently detained pursuant to section 171, last sentence of the Code of Criminal Procedure. The Commission finds, however, that this detention was not related to the applicant's mental illness but effected on the ground that the prosecuting authority and the courts had not managed to prepare and decide on the question of prolonging the authorisation to use security measures, although it had been known for five years when it would expire. Thus the conditions for detention of a person of unsound mind were not fulfilled and the courts' reference to the possibility of the applicant committing new criminal acts does not suffice to detain him under Article 5 para. 1 e (Art. 5-1-e) which calls for a narrow interpretation.

94. Consequently, the Commission finds that the applicant's continued detention from 25 February until 15 May 1990 was not effected for a purpose envisaged by Article 5 para. 1 e (Art. 5-1-e) of the Convention.

95. To sum up the Commission finds that none of the permissible exceptions enumerated in Article 5 para. 1 a - f (Art. 5-1-a) can be relied upon in order to justify the applicant's detention from 25 February until 15 May 1990.

CONCLUSION

96. The Commission concludes, by twelve votes to one, that there has been a violation of Article 5 para. 1 (Art. 5-1) of the Convention.

D. As regards Article 5 para. 3 (Art. 5-3) of the Convention

97. The applicant alleges that, in so far Article 5 para. 1 c (Art. 5-1-c) of the Convention applies, the length of his detention did not comply with the requirements of Article 5 para. 3 (Art. 5-3) of the Convention which reads:

"Everyone arrested or detained in accordance with the

provisions of paragraph 1 c of this Article (Art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

98. The Commission recalls (cf. paras. 78 - 84) that in the circumstances of the present case Article 5 para. 1 c (Art. 5-1-c) does not apply. Consequently, there is no room for the application of Article 5 para. 3 (Art. 5-3) of the Convention either.

CONCLUSION

99. The Commission concludes, unanimously, that there has been no violation of Article 5 para. 3 (Art. 5-3) of the Convention.

E. Recapitulation

100. The Commission concludes that there has been a violation of Article 5 para. 1 (Art. 5-3) of the Convention (para. 96).

101. The Commission concludes that there has been no violation of Article 5 para. 3 (Art. 5-3) of the Convention (para. 99).

Secretary to the Second Chamber — President of the Second Chamber

(M.-T. SCHOEPFER) — (H. DANELIUS)

(Or. English)

DISSENTING OPINION OF MR. H.G. SCHERMERS

Though I agree with much of the Commission's Report, I do not share the final conclusion that Article 5 of the Convention has been violated. Section 171, last sentence of the Norwegian Code of Criminal Procedure may be interpreted as being concerned with a possible discharge from detention of persons representing a danger to society. In the Winterwerp judgment the Court accepted that in emergency cases there may be exceptions to the rule that an individual should not be deprived of his liberty unless he has been reliably shown to be of unsound mind (Eur. Court H.R., Winterwerp judgment of 24 October 1979, Series A no. 33, p. 18, para. 39). It cannot be inferred from the Winterwerp judgment that the objective medical expertise must in all conceivable cases be obtained before, rather than after, confinement of a person on the ground of being of unsound mind. Where a provision of domestic law is designed, amongst other things, to authorise emergency confinement of persons capable of presenting a danger to others, it would be impracticable to require thorough medical examination prior to any arrest or detention (cf. also Eur. Court H.R., X v. the United Kingdom, Series A no. 46, p. 18-19, para. 41).

It is true that the Norwegian authorities should have taken their decisions earlier. It cannot be true, however, that a really dangerous mental patient must be released whenever procedural mistakes have been made. Article 2 of the Convention obliges the Government to protect the life of all citizens. Whether the applicant was so dangerous that his release would threaten the lives of others is a question of fact to be decided by the national courts. The task of the Strasbourg institutions is to verify whether these courts acted fairly and reasonably when so deciding.

In my opinion a detention on remand pursuant to section 171, last sentence of the Code of Criminal Procedure, pending the outcome of a request for the prolongation of the authorisation to use security measures, is not incompatible with Article 5 para. 1 of the Convention. The applicant is a man with a history of mental problems. He suffered

serious brain damage in 1965 following which he showed a distinct tendency to become aggressive. Since 1967 he has been convicted on numerous occasions of offences involving threats, assault and bodily harm and no particular improvement in his state of mental health has been found over the years. During the period when security measures were authorised the applicant's stays outside institutions were made conditional upon his being subject to strict surveillance and medical supervision but all attempts nevertheless failed due to his aggressive behaviour.

Regard must also be had to the specific system of detention. In situations like the present it may only be implemented when it is a question of extending the maximum period for using security measures and in addition - as here - when necessary to protect the public. In such circumstances the interest of the public may prevail over the applicant's right to liberty to the extent of justifying an emergency confinement in the absence of the usual guarantees implied in paragraph 1 e of Article 5. On the facts of the present case, I think the Norwegian courts had sufficient reason for considering that the applicant's imminent liberty without any form of supervision constituted, in view of his mental deficiencies, a danger to the public. Accordingly, his detention beyond 25 February 1990 until 15 May 1990 was effected in accordance with Article 5 para. 1 e of the Convention.