In the case of Silva Rocha v. Portugal (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr L.-E. Pettiti,
Mr C. Russo,
Mr J. De Meyer,
Mr N. Valticos,
Mr S.K. Martens,
Mr I. Foighel,
Mr M.A. Lopes Rocha,
Mr P. Kuris,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 29 June and on 26 October 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

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Notes by the Registrar

1. The case is numbered 82/1995/588/674. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

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PROCEDURE

1. The case was referred to the Court by the Government of the Portuguese Republic ("the Government") on 15 September 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 18165/91) against Portugal lodged with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) by a Portuguese national, Mr Serafim da Silva Rocha on 28 June 1990.

The Government's application referred to Articles 44 and 48 (art. 44, art. 48). The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 para. 4 of the Convention (art. 5-4).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would

represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mr M.A. Lopes Rocha, the elected judge of Portuguese nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 29 September 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr C. Russo, Mr J. De Meyer, Mr N. Valticos, Mr S.K. Martens, Mr I. Foighel and Mr P. Kuris (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 18 March 1996 and the applicant's memorial on 29 March 1996. On 10 April 1996 the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 7 May 1996 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 June 1996. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr A. Henriques Gaspar, Deputy Attorney-General, Agent,
Mrs M.J. Antunes, Professor, Coimbra Law Faculty, Counsel;

(b) for the Commission

Mr I. Cabral Barreto, Delegate;

(c) for the applicant

Mr M. Figueiredo, of the Coimbra Bar, Counsel.

The Court heard addresses by the above-mentioned representatives and Mrs Antunes's reply to the question put by one of its members.

AS TO THE FACTS

I. Particular circumstances of the case

7. Mr Serafim da Silva Rocha, who is a Portuguese national, lives at Rio Tinto (Oporto).

8. On 21 July 1989, after a dispute with a neighbour following which the latter died, the applicant was remanded in custody.

9. In his submissions of 9 March 1990, the public prosecutor expressed the view that the applicant had acted voluntarily and consciously. Finding that the facts gave rise to the offences of aggravated homicide and illegal possession of weapons, he called for

the applicant's continued detention and his committal for trial.

10. On 13 July 1990 the Oporto Criminal Court (tribunal criminal da comarca do Porto) held that, on account of his mentally disturbed state, the applicant was not criminally responsible and was dangerous. It accordingly ordered that he be detained for a minimum of three years. It stated as follows:

> "The established facts in respect of which the accused is charged constitute the offences of intentional homicide and unlawful possession of weapons.
>
> However, in the light of the expert report, ..., as confirmed by the medical expert at the hearing, the accused is not criminally responsible [inimputável] on account of his mental disorder [anomalia psiquica]. In view of the seriousness of the offences and the mental illness from which he is suffering, the court finds that he is a dangerous person who cannot be held responsible for his actions and, given the risk of his reoffending, a security measure [medida de segurança] must be taken against him.
>
> Having regard to Articles 20 and 91 of the Criminal Code, the court finds that the accused Serafim da Silva Rocha is a dangerous person who cannot be held responsible for his actions and orders his detention in a psychiatric asylum. This security measure will remain in force, in accordance with Article 91 para. 2 of the Criminal Code, for a minimum period of three years."

The applicant maintains that he instructed his lawyer to appeal against this judgment, but no appeal was filed.

11. On 20 September 1990 the applicant was transferred to the annex for the criminally insane of the Sobral Cid psychiatric hospital.

12. On 29 October 1990 the Coimbra Sentence Supervision Court decided that the applicant's detention should be deemed to have begun on 21 July 1989, when he was first remanded in custody, and that the procedure for the automatic review of that detention should commence on 21 March 1992. The same day it assigned a lawyer to act for the applicant as he had not designated one. It appointed another lawyer on 21 March 1992.

13. On 29 June 1992, on the basis of a medical report of 14 May 1992 and the opinion of the social services of 5 June 1992, the first of which concluded that the applicant remained dangerous and the second that he lacked a family structure that might assist his social reintegration, the court extended the detention for a period of nine months.

14. On 11 February 1993 the applicant submitted an application for conditional discharge. At a date that has not been specified the court dismissed this application on the ground that "the defendant's discharge may be ordered only on a trial basis and not conditionally".

15. On 19 March 1993 the court made enquiries about the applicant's state of health and the prospects for his reintegration in society. The medical report drawn up on 13 April 1993 noted that, although the detainee was no longer dangerous in a hospital environment, there were some signs that he would still be dangerous if released into the outside world. This information was passed on to Mr Silva Rocha's officially assigned lawyer, who did not respond.

16. On 3 May 1993 the court heard from senior officials of the hospital and decided to extend the detention for a period of two months to see how the applicant's state of health evolved.

17. At the court's request the psychiatric hospital submitted on 17 September 1993 a report expressing the view that there had been a general improvement in the applicant's state of health, that he had ceased to be dangerous and that the conditions now existed for his successful reintegration into society.

18. Having heard the applicant, his officially appointed lawyer and the public prosecutor, the court decided, on 9 February 1994, to order that he be discharged on a trial basis (libertação a título de ensaio) subject to a number of conditions including a compulsory residence order, the obligation to undergo prescribed medical treatment, a prohibition on the consumption of alcohol and his agreement to submit to supervision by the social reintegration service.

The applicant left hospital on 8 March 1994 and since then has remained at liberty on a trial basis.

II. Relevant domestic law

19. The relevant provisions of the Criminal Code are as follows:

Article 20 para. 1

> "Persons suffering from a mental disorder who are incapable at the material time of appreciating the unlawful nature or the consequences of their actions shall not be held criminally responsible for those actions."

Article 91

> "1. A person who commits a punishable offence and who is found not to be criminally responsible within the meaning of Article 20 shall be ordered to be detained in an asylum, hospital or secure unit, if there is reason to believe, in view of his mental illness and the nature and seriousness of his offence, that he may commit further serious offences.
>
> 2. Where a person found not to be criminally responsible has committed homicide, grievous bodily harm [ofensas corporais graves] or other violent crimes punishable by more than three years' imprisonment and there is reason to believe that he will commit further similar offences of the same degree of seriousness, he shall be ordered to be detained for a minimum period of three years."

As amended by Legislative Decree no. 48/95 of 15 March 1995, paragraph 2 now reads:

> "Where the offence committed by a person found not to be criminally responsible is an offence against the person or a crime punishable by more than five years' imprisonment, he shall be ordered to be detained for a minimum period of three years, save where his release is not incompatible with the protection of the legal system and public order."

Article 92

"1. Detention shall cease when the court finds that the justification for the detention no longer exists because the detainee is no longer criminally dangerous.

2. A first detention shall not exceed by more than four years the maximum sentence prescribed for the type of offence committed by the person found not to be criminally responsible ..."

The above-mentioned Legislative Decree no. 48/95 added a third paragraph to this Article, worded as follows:

"Where the offence committed by the person found not to be criminally responsible is punishable by more than eight years' imprisonment and the danger that he will commit similar offences is so serious that his release is considered inadvisable, his detention may be extended for successive periods of two years until it has been established that the situation referred to in paragraph 1 exists."

Article 93

"1. The court may at any time hear an application invoking a ground for the cessation of the detention measure.

2. The court shall, of its own motion, regardless of whether any application has been made, review the detention three years after it began and two years after the decision extending it.

3. These provisions shall apply, in any event, subject to the minimum period of detention stipulated in Article 91 para. 2."

As amended by Decree no. 48/95, paragraphs 1 and 2 now provide:

"1. The court shall at any time hear an application invoking a ground for the cessation of the detention measure.

2. The court shall, of its own motion, regardless of whether any application has been made, review the detention two years after it began or after the decision extending it."

Article 94 para. 1

"On the expiry of the minimum period of detention the person found not to be criminally responsible may be discharged on a trial basis for a minimum period of two years where there are serious reasons for believing that he will not commit any further illegal acts."

PROCEEDINGS BEFORE THE COMMISSION

20. Mr Silva Rocha applied to the Commission on 28 June 1990. Relying on Article 5 para. 4 of the Convention (art. 5-4), he complained of the lack of a judicial review of the measure under which he was detained. He also lodged complaints concerning the lawfulness of his detention (Article 5 para. 1 (e) (art. 5-1-e)) and the medical treatment that he had received during that detention (Article 3) (art. 3).

21. On 10 January 1995 the Commission declared the complaint concerning Article 5 para. 4 (art. 5-4) admissible and the rest of the

application (no. 18165/91) inadmissible. In its report of 16 May 1995 (Article 31) (art. 31), it expressed the view, by twenty-five votes to three, that there had been a violation of that provision (art. 5-4).

The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment (1).

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Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-V), but a copy of the Commission's report is obtainable from the registry.

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FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

22. In their memorial the Government asked the Court to hold that in this instance "there [had] been no violation of Article 5 para. 4 of the Convention (art. 5-4)".

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 5 PARA. 4 OF THE CONVENTION (art. 5-4)

23. Mr Silva Rocha complained that he was unable to have the lawfulness of his continued detention reviewed at reasonable intervals. He relied on Article 5 para. 4 of the Convention (art. 5-4), which is worded as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

He submitted in substance that the effect of Article 91 para. 2 of the Portuguese Criminal Code, taken in conjunction with Articles 92, 93 and 94 of that Code, was to create a situation that was incompatible with the Convention.

He observed that the Oporto Criminal Court had found that he was not criminally responsible (see paragraph 10 above). It followed, in his view, that the only justification for his detention could be the danger that he represented for society. That danger was capable of evolving with the passing of time and consequently, in accordance with Article 5 para. 4 (art. 5-4), judicial review of the extent to which it persisted had to be available at reasonable intervals.

The applicant complained that in any event he could be discharged only after three years even if it was established before the expiry of that period that he was no longer dangerous. Under the rules in issue there was therefore, he argued, no judicial review of the lawfulness of the detention before the expiry of the period, and that could not be regarded as reasonable under the Court's case-law.

The amendments to the legislation introduced by Legislative Decree no. 48/95 of 15 March 1995 (see paragraph 19 above) showed that the respondent State had recognised that the rules applied in the applicant's case were not compatible with Article 5 para. 4 of the Convention (art. 5-4).

24. The Government contended that the review of the lawfulness of the detention was incorporated in the initial judicial decision, given

at the conclusion of judicial proceedings. The question whether the review required by Article 5 para. 4 (art. 5-4) had been available could only apply to later decisions on the continuation of the detention. The law provided for automatic review of the lawfulness of the detention three years after its beginning.

By laying down a minimum period of three years, the Criminal Code attributed to the security measure provided for in Article 91 a separate purpose of general prevention. In the instant case, the court had imposed a period of that length because special reasons relating to the protection of public order and the legal system so required. The applicant had taken away a human life and there was a risk of his reoffending. The aim of general prevention explained the deduction by the court of the period of detention on remand from the three-year period. In addition, the security measure imposed on Mr Silva Rocha had been proportionate to the seriousness of the offence committed.

There could be no question of a review for the purposes of Article 5 para. 4 of the Convention (art. 5-4) until the expiry of the minimum period, at which point only specific grounds of prevention were in issue.

Furthermore it had been open to the applicant at any time to bring habeas corpus proceedings for the review of the lawfulness of his deprivation of liberty, even if he could not have been discharged during the three-year minimum period.

25. The Commission took the view that the Court's reasoning in the cases of Winterwerp v. the Netherlands (judgment of 24 October 1979, Series A no. 33) and X v. the United Kingdom (judgment of 5 November 1981, Series A no. 46) applied to Mr Silva Rocha's situation. Even though a minimum period of three years had been imposed, his detention was a deprivation of liberty on grounds which by definition were capable of evolving with the passing of time. The review of the lawfulness of such a measure could not be incorporated in the initial judicial decision. During a period of nearly two years - between the initial decision of 13 July 1990 and the first review decision of 29 June 1992 -, the applicant, who had been detained within the meaning of Article 5 para. 1 (e) (art. 5-1-e), had had no possibility of being discharged and any application for release had been bound to fail. The Commission accordingly concluded that such a lapse of time was "manifestly excessive" (see the Luberti v. Italy judgment of 23 February 1984, Series A no. 75, p. 16, para. 34, and the Herczegfalvy v. Austria judgment of 24 September 1992, Series A no. 244, p. 24, para. 77).

26. The Court notes that the Oporto Criminal Court found that the established facts constituted the offences of which the applicant had been accused, namely aggravated homicide and unlawful possession of arms. It also found that, on account of the mental disturbance from which he suffered, he could not be held criminally responsible and was at the same time dangerous. It was for these reasons that it ordered, in accordance with Articles 20 para. 1 and 91 para. 2 of the Criminal Code, his detention in a psychiatric institution for a minimum period of three years (see paragraphs 10 and 19 above).

27. The applicant was accordingly lawfully detained pursuant to a decision which, in the circumstances of the case, was both a "conviction by a competent Court" within the meaning of Article 5 para. 1 (a) of the Convention (art. 5-1-a) and a security measure taken in relation to a "person of unsound mind" within the meaning of Article 5 para. 1 (e) (art. 5-1-e).

In the present case these two situations, which are not necessarily mutually exclusive, coexisted.

28. The case involved a homicide committed by a person who could not be held responsible for his actions and who was at the same time dangerous. The seriousness of the offences together with the risk that he represented for himself as well as for others could reasonably justify his being removed from society for at least three years.

29. For that period the review required by Article 5 para. 4 of the Convention (art. 5-4) was incorporated in the detention decision taken in this instance by the Oporto Criminal Court.

30. It was therefore not until those three years had elapsed that the applicant's right to "take proceedings by which the lawfulness of his detention shall be decided ... by a court" at reasonable intervals took effect.

In this respect the Court notes that the legislation applied to Mr Silva Rocha (Article 93 of the Criminal Code, see paragraph 19 above) provided for a periodic and automatic judicial review after two years and made it possible for the person detained to apply to the court at any moment to have the detention measure lifted (see, mutatis mutandis, the X v. the United Kingdom judgment cited above, p. 23, para. 52).

31. In the present case, after the judgment of 13 July 1990 (see paragraph 10 above) judicial reviews took place between 21 March and 29 June 1992 (see paragraphs 12 and 13 above), in February 1993 (see paragraph 14 above), between 19 March and 3 May 1993 (see paragraphs 15 and 16 above) and over a period from the summer of 1993 to 9 February 1994 (see paragraphs 17 and 18 above).

The Court considers that the intervals between the different reviews were not excessive. It notes that Mr Silva Rocha was discharged as soon as he had ceased to be regarded as dangerous.

32. In conclusion, the Court finds that the applicant had the possibility of having the lawfulness of his detention reviewed at reasonable intervals and that there has therefore been no violation of Article 5 para. 4 of the Convention (art. 5-4).

FOR THESE REASONS, THE COURT

Holds by six votes to three that there has been no violation of Article 5 para. 4 of the Convention (art. 5-4).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 November 1996.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 of the Convention (art. 51-2) and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Ryssdal, joined by Mr Foighel;

(b) concurring opinion of Mr Lopes Rocha;

(c) dissenting opinion of Mr Pettiti, joined by Mr Russo and Mr Valticos.

Initialled: R. R.

Initialled: H. P.

CONCURRING OPINION OF JUDGE RYSSDAL,
JOINED BY JUDGE FOIGHEL

I do not agree with the Commission that this case cannot be distinguished from the Winterwerp v. the Netherlands case (judgment of 24 October 1979, Series A no. 33) and the case of X v. the United Kingdom (judgment of 5 November 1981, Series A no. 46), where the Court concluded that Article 5 para. 4 (art. 5-4) had been violated.

The applicant was remanded in custody on 21 July 1989. On 9 March 1990 he was charged with homicide and carrying an illegal weapon. On 13 July 1990 the Oporto Criminal Court found that he had committed the offences with which he was charged, but that he was not criminally responsible on account of his mental disorder. The court further held that he was dangerous, having little control over his actions, and that there was a risk that he would reoffend. In accordance with Articles 20 and 91 para. 2 of the Portuguese Criminal Code the court made a hospital order committing the applicant for a minimum period of three years to a psychiatric hospital.

On 29 October 1990 the Coimbra court decided that the applicant's detention should be deemed to have begun on 21 July 1989, when he was first remanded in custody.

On 29 June 1992 the Coimbra court extended the hospital order for nine months, referring to a medical report stating that the applicant was still dangerous. Further, at a date not specified the court dismissed the applicant's request of 11 February 1993 to be released; and, following a medical report of 13 April 1993 that the applicant would still be dangerous if released, the court on 3 May 1993 extended the detention for a period of two months to see how the applicant's state of health evolved.

It follows from the facts as assessed by the competent domestic courts that the applicant's mental disorder and his danger to society persisted throughout the period of three years.

Finally, on 9 February 1994, when the court was satisfied that the applicant was no longer dangerous to society, it ordered that he be discharged on a trial basis subject to a number of conditions including the obligation to undergo prescribed medical treatment.

On the facts of this case there has in my opinion been no violation of Article 5 para. 4 (art. 5-4), and I do not consider it necessary to determine whether a detention order for a minimum period of three years in accordance with Articles 20 and 91 para. 2 of the Portuguese Criminal Code would in all circumstances be compatible with Article 5 para. 4 of the Convention (art. 5-4).

CONCURRING OPINION OF JUDGE LOPES ROCHA

(Translation)

I have joined the majority in finding that there has been no violation of Article 5 para. 4 of the Convention (art. 5-4), but I would like to add a few thoughts on the interpretation of Articles 91 para. 2, 92 para. 1 and 93 para. 3 of the Portuguese Criminal Code in force at the material time.

1. In the first place, I would refer to the underlying reasons for the minimum three-year period provided for in Article 91 para. 2.

According to the analysis of criminal lawyers, the lack of a review of the detainee's situation (Article 93 para. 3) is justified not by the mere presumption that his dangerousness will persist over a certain time, but rather by the existence of specific reasons relating to preventing social disquiet and preserving public confidence in the law in cases of serious offences against the person or serious acts of violence.

In other words, both for security measures, although not predominantly so, and for criminal sentences, a general aim of prevention is pursued and indeed is autonomous in character.

As regards the purpose of criminal sanctions, there are no fundamental differences between custodial criminal sentences and security measures of detention.

The distinction lies solely in the relationship between the aims of general prevention and specific prevention. As regards criminal sentences, aims of general prevention (reintegration) play the principal role, whereas the aims of specific prevention operate solely within the framework of punishment provided for by law, but with reference to guilt. For security measures, on the other hand, aims of specific prevention (social integration and security) are paramount, but not to the exclusion of considerations of general prevention (reintegration) in a form which comes close to (or is identified with) the minimum requirements of supervision of the legal system.

The justification of security measures as a punitive instrument covered by penal policy is as undeniable as that of a criminal sentence.

The fundamental principle underlying the imposition of security measures has always been that of the dangerousness, in other words the sine qua non of the imposition of such a measure is the danger that new offences of the same type will be committed in the future.

2. In regard to a different situation - the review of security measures, provided for in Article 102 of the Criminal Code, according to which a detention order cannot be executed if three years or more have elapsed since the relevant decision without a new assessment being made by the court, that is without the court verifying whether the dangerousness persists -, a very interesting question has already arisen, namely that of whether the reassessment requirement also applies to security measures imposed under Article 91 para. 2.

A negative reply to this question could be justified by arguing that the minimum of the detention must always be accomplished to satisfy the requirements of general prevention.

However, this argument is not persuasive. In essence, although the scheme of Article 91 para. 2 embraces aims of positive general prevention, it remains the case that the principal purpose and

justification relate to the dangerousness of the person concerned and the need to protect society from that danger. To take a different view would amount to replacing arbitrarily a security measure by a criminal sentence, which is not possible once a person has been found not to be criminally responsible.

The conclusion that Article 93 para. 3 (see paragraph 19 of the judgment) requires that the minimum three-year period of detention must be complied with in all circumstances is unacceptable.

Legal writers have found that solution not to be justified from whatever point of view (textual or teleological interpretation or from that of penal policy). Moreover it is a solution which is based on a serious misunderstanding: Article 93 para. 2 implies a presumption not of the duration of the dangerousness, but of the dangerousness itself.

On the contrary, according to Article 91 para. 2 such a measure is imposed only if there is reason to believe that the person will commit further similar offences of the same degree of seriousness.

It follows that even in this situation there is room for an separate verification of the persistence of dangerousness, which proves that, even here, the review is fully justified as for every other type of detention.

In conclusion, even for detention measures imposed under Article 91 para. 2, the review is wholly justified.

What has just been said is the opinion of Professor Figueiredo Dias of Coimbra University, a law professor of international repute who was member and then president of the commissions for the revision of the Portuguese Criminal Code, including the most recent commission whose recommendations formed the basis for the amendments introduced by Legislative Decree no. 48/95 of 15 March 1995 (see his recent work, Portuguese criminal law - The legal consequences of crime (pp. 414-90). I fully and unreservedly share this opinion.

3. Clearly the new wording of Article 91 of the Code introduced by Legislative Decree no. 48/95 of 15 March 1995 has merely confirmed the view that reasons of proportionality and necessity explain the imposition of the three-year minimum period for serious offences, such as homicide, which is punishable by a criminal sentence of from eight to sixteen years.

Moreover, the Sentence Supervision Court, by deciding, when it assessed the applicant's situation after the expiry of the three-year period (in which the period of detention on remand was included), to prolong the measure until a later review, confirmed that the initial period was fully justified on the facts and not only on technical grounds.

Finally, in regard to the wording of Article 5 para. 4 of the Convention (art. 5-4) and as the Government pointed out in their memorial and at the hearing, the applicant was not totally deprived of the right to take proceedings before a court - here the Supreme Court - by which the lawfulness of his detention could be decided speedily and his release ordered if the detention was not lawful.

He had available to him the special habeas corpus procedure, provided for and governed by the Code of Criminal Procedure.

It cannot be assumed in advance that such a step would have no

chance of success.

Let us adopt, for example, a reasoning based on the coherence of the system, taking into account what has been said above in connection with the review procedure provided for in Article 102 of the Criminal Code, as interpreted by legal writers. The conclusion must be that the review covers even the case of a measure imposed under Article 91 para. 2 (minimum three-year period).

DISSENTING OPINION OF JUDGE PETTITI,
JOINED BY JUDGES RUSSO AND VALTICOS
(Translation)

I voted for a violation of Article 5 para. 4 of the Convention (art. 5-4) for the following reasons:

The applicant's complaint called into question the legislation concerning the detention of persons declared not to be criminally responsible (Articles 20, 91 et seq. of the Criminal Code).

At the hearing before the European Court, counsel for the Government expressly stated:

> "If the offender is no longer dangerous within the period of three years, the judge cannot release the offender. He must remain in detention for a minimum of three years.
>
> That is the answer, and because of that you have paragraph 3 of Article 93. So, he must be detained, and as I have explained, this is because of general deterrence reasons."

The minimum period of detention is therefore indeed three years. There is consequently in the Portuguese system a punitive element and aim of general prevention which, in my view, cannot be applied to a person who is found by the courts not to be criminally responsible.

Under the terms of Article 5 para. 4 (art. 5-4) it is accordingly necessary that during the period of detention it should be possible to have the lawfulness of that detention actually determined by a court.

Current thinking in criminology and the work of the United Nations and the Council of Europe follow this approach. The problems engendered by legislation based on dangerousness and which makes an abusive use of detention are well known. It is for that reason that the judicial review within the three-year period is necessary when the person has been acknowledged to be cured and the cause of his detention ceases. The review procedures followed in this case were limited by the provisions of Article 93 para. 3 of the Criminal Code. The date of release is not therefore a relevant argument. The case of Silva Rocha is different from that of X v. the United Kingdom (judgment of 5 November 1981, Series A no. 46). The cases of Hussain v. the United Kingdom (judgment of 21 February 1996, Reports of Judgments and Decisions 1996-I) and Singh v. the United Kingdom (judgment of 21 February 1996, Reports 1996-I) do not concern persons found not to be criminally responsible. The review of the lawfulness of detention on grounds of mental disorder is a separate matter and cannot be regarded as being incorporated in the initial decision for the purposes of Article 5 (art. 5). The preventive element cannot be incorporated where the non-criminally responsible person is cured.

European legal writing in this field generally criticises legislation which makes provision for fixed periods during which no judicial review is available (see G. Williams, Text Book of Criminal Law, 1983; B. Bouloc, Pénologie, 1991; P. Murphy (Ed.), Blackstone's Criminal Practice, 1994).

These considerations led me to vote for a violation of Article 5 para. 4 (art. 5-4) in the present state of the legislation, even if in practice the courts seek to provide a solution to this problem.