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

COURT (PLENARY)

CASE OF CRUZ VARAS AND OTHERS v. SWEDEN

(Application no. 15576/89)

JUDGMENT

STRASBOURG

20 March 1991

In the case of Cruz Varas and Others[*],

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court[**] and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr S. K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr A. N. LOIZOU,
Mr J. M. MORENILLA,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 25 October 1990 and 20 February 1991,

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

PROCEDURE

1. The case was referred to the Court on 11 July 1990 by the European Commission of Human Rights ("the Commission") and on 31 August 1990 by the Government of Sweden ("the Government"), within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms

[*] The case is numbered 46/1990/237/307. 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.

[**] The amended Rules of Court which entered into force on 1 April 1989 are applicable to the present case.

("the Convention"). It originated in an application (no. 15576/89) against Sweden lodged with the Commission under Article 25 (art. 25) by Mr Hector Cruz Varas, his wife Mrs Magaly Maritza Bustamento Lazo and their son Richard Cruz, Chilean citizens, on 5 October 1989.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and the declaration whereby Sweden recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and the Government's application to Article 48 (art. 48). The object of the request and of the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Articles 3 and 25 § 1 (art. 3, art. 25-1) and also, in the case of the request, Article 8 (art. 8) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mrs E. Palm, the elected judge of Swedish nationality (Article 43[*] of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 27 August 1990 the President drew by lot, in the presence of the Registrar, the names of the seven other members, namely Mr J. Cremona, Mr F. Matscher, Mr L.-E. Pettiti, Mr R. Macdonald, Mr J. De Meyer, Mr N. Valticos and Mr J.M. Morenilla (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the representative of the applicants on the need for a written procedure (Rule 37 § 1). In accordance with the order made in consequence, the Registrar received, on 18 September 1990, the Government's memorial and, on 19 September 1990, the memorial of the applicants. The Delegate of the Commission subsequently informed the Registrar that he would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 26 July 1990 that the oral proceedings should open on 22 October 1990 (Rule 38).

6. On 29 August 1990 the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court.

7. On 25 September 1990 the President invited the Commission to produce to the Court all the written and oral pleadings submitted before the Commission. The Commission made these documents available on 28 September 1990.

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[*] Note by the Registrar. As amended by Article 11 of Protocol No. 8 (P8-11) to the Convention which came into force on 1 January 1990.

8. On 27 September 1990 the President decided, notwithstanding requests by the Government and the applicants, that it was not necessary to hear any witnesses and that any further written evidence should be filed one week before the hearing. Further evidence was filed by both the Government and the applicants on 15 October 1990.

9. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr Hans CORELL, Ambassador,
Under-Secretary for Legal and Consular Affairs, Ministry of Foreign Affairs, *Agent*,
Mr Erik LEMPERT, Permanent Under-Secretary,
Ministry of Labour, *Counsel*,
Mrs Britt-Louise GUNNAR, First Secretary,
Ministry of Labour,
Mr Pär BOQVIST, Legal Adviser,
Ministry of Transport and Communications, *Advisers*;

- for the Commission

Mr Gaukur JÖRUNDSSON, *Delegate*;

- for the applicants

Mr Peter BERGQUIST, *Counsel*,
Mr Percy BRATT, *Adviser*.

10. The Court heard addresses by Mr Corell for the Government, by Mr Gaukur Jörundsson for the Commission and by Mr Bergquist and Mr Bratt for the applicants, as well as replies to questions put by the Court and by three of its members individually.

11. Various documents were filed by the applicants on 22 and 31 October 1990 and by the Government on 7 December 1990, including further particulars of the applicants' claim under Article 50 (art. 50) and the Government's comments thereon.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

12. The applicants are Mr Hector Cruz Varas (the first applicant), his wife Mrs Magaly Maritza Bustamento Lazo (the second applicant) and their son Richard Cruz, born in 1985 (the third applicant). All of the applicants are Chilean citizens.

13. The first applicant came to Sweden on 28 January 1987 and applied the following day for political asylum. He was joined there by the second and third applicants on 5 June 1987.

A. The decision to expel the applicants

14. On 22 June 1987 the first applicant was interrogated by the Police Authority (polismyndigheten) of Växjö as to his reasons for requesting political asylum. As regards his background in Chile he provided the following information. In 1968 he became a member of the Radical Party's Youth Federation. He joined the Socialist Party in 1970 and remained a member after the coup d'état in 1973 as a result of which the coalition Government of President Allende was replaced by the regime under the Presidency of General Pinochet. In 1971 he also became a member of the FDR Party (the Revolutionary Workers Front) of which he was the secretary until 1973 and worked to create opposition against the Pinochet régime. In 1976 he was arrested and taken to a military camp where he was detained for two days. He joined the Mormons in 1976. From 1976 to 1982 he remained passive politically. In 1982 he moved to Villa Alemana and became involved in distributing leaflets for the Democratic Front. He participated in many demonstrations and two general strikes (August 1985 and 4 June 1986). He was arrested in 1973 and 1974 for breaking a curfew. He was also arrested in August 1985 by agents of the CNI (Central Nacional de Investigaciones de Chile) for having entered a prohibited area on a bicycle. He was released after four hours. Apart from these incidents he had been left alone by the Chilean police and military. He gave as his reasons for leaving Chile the fact that he could not keep his house in Villa Alemana where he lived with his family and his poor financial situation resulting from lengthy periods of unemployment. He was not able to pay his mortgage and chose to sell the house to avoid an enforced sale.

15. In a memorial to the National Immigration Board (statens invandrarverk - "the Board") dated 27 July 1987 the first applicant, through his legal counsel, commented upon the above interrogation. He stated that in 1976 he had been arrested with four friends and ill-treated. They were not allowed to sleep and were obliged to stand naked. One of his friends was beaten on this occasion.

16. On 21 April 1988 the Board decided to expel the applicants and prohibited them from returning to Sweden before 1 May 1990 without the Board's permission. It also rejected the applicants' requests for declarations of refugee status and travel documents. The Board considered that the applicants had not invoked sufficiently strong political reasons to be considered as refugees under Section 3 of the Aliens Act (utlänningslagen, 1980 : 376) or the 1951 Geneva Convention relating to the Status of Refugees.

17. The applicants appealed to the Government. The first applicant did not invoke any new circumstances. He pointed out that he did not receive all of the letters sent to him from Chile and could not therefore submit any documents from Chile in support of the appeal.

18. The appeal was rejected by the Government (Ministry of Labour) on 29 September 1988.

19.The applicants then alleged to the Police Authority of Varberg that there were impediments to the enforcement of the expulsion order and requested that their case be referred to the Board. The first applicant was interrogated by the Police Authority of Varberg on 19 October 1988. He stated that he had new reasons to invoke in support of his application for asylum. He considered that he ran the risk of political persecution, torture and possibly death, if he returned to Chile, because of his continued involvement in Sweden with a political group known as the Frente Patriótico Manuel Rodriguez (FPMR) - a radical organisation that had tried to kill General Pinochet. He had started to work for this group after his arrival in Sweden. He feared that his activities in Sweden which began in February 1988 and included the distribution of leaflets to support political prisoners in Chile would be known to the CNI.

20. The Police Authority of Varberg decided on 21 October 1988 to reject the applicants' request and to enforce the expulsion decision by sending them by plane to Chile on 28 October 1988 at 16.00 hours from Landvetter Airport in Gothenburg. An appeal against this decision was rejected by the Board on 26 October 1988. On 27 October 1988 the applicants again requested that their case be transferred to the Board. On 28 October 1988 the Police Authority refused this request, and the applicants' appeal against refusal was rejected by the Board on the same day. In his letter of appeal Mr Cruz Varas, through a new legal counsel, stated that he had contributed signed articles in the FPMR newspaper (El Rodriguista) and had expressed himself critically about the regime in Chile. He also submitted a certificate by Juan Marchant of the Varberg FPMR support group dated 23 October 1988 in which it was said that he and his family were politically active in the group. He further submitted copies of two newspaper articles dated 21 and 24 October 1988 concerning a demonstration in Varberg against the expulsion of the applicants. In these articles it was stated that Mr Cruz Varas had hidden friends sought by the police in his house in Chile and that he was active for FPMR in Sweden.

21. The expulsion decision could not be enforced as planned since the applicants did not appear in time for the scheduled departure.

22. In a letter dated 30 December 1988 to the Police Authority of Varberg the applicants again alleged that there were impediments to the enforcement of the expulsion order. On 13 January 1989 Mr Cruz Varas was interrogated by the Police Authority of Varberg in the presence of a

new counsel. The official record of the interrogation contains the following passage (translation from Swedish):

"Cruz wishes especially to add to his statements the following information with regard to the punishments he has been subjected to in connection with his being held prisoner in Chile. Asked about the times and places of these imprisonments Cruz states that he was imprisoned the first time in Santiago in 1973. He was arrested with all the others who were at the Codelco office (a large mining company) on an occasion soon after the coup. They were taken to a military centre and badly treated. Cruz has not talked about this earlier because he was of the opinion that the police in Sweden co-operate with the Chilean police. He no longer holds this view.

Since the above-mentioned event lies far back in time Cruz was encouraged to begin his account by relating the most recent occasion on which he was subjected to persecution. He then stated that in January 1987 he was stopped when he was walking along a street called Calle Troncal. It was then that two men stepped out of a car and pulled him into a car which then drove to some sort of security building. During the journey he was hit in the ribs. He was taken down a long stairway and into some kind of investigation room. He was photographed after he had removed his clothes. He was hit, mainly on the head. He was hung up by his feet and photographed in this position. He was asked the whereabouts of Luis Herrera but was unable to answer. Luis Herrera was chairman of the free humanist thinkers. Cruz did not wish to relate more about the treatment on this occasion. He did however add that they told him that they were going to shoot him later the same day. He was blindfolded and after that he felt that someone was pressing the barrel of a weapon against his body but no shot was fired. Asked why they did this Cruz said that they gave as a reason that he was a communist, which he has never been. After Cruz had been scared by the incident with the weapon he was released and after that was treated kindly by a man who was also present. The man told Cruz that things would be much better if he co-operated with the police. When asked if they were in a police station Cruz said that they were in a security building. They also mentioned to Cruz the names of the members of his family. At 4 a.m. he was driven away and was released after being held in custody for about 14 hours. Cruz has not mentioned this incident earlier. Asked why he had not done so in spite of a number of police interrogations, numerous contacts with counsel and in spite of the fact that many documents with information about him had been submitted to the authorities, he replied that he had been betrayed many times earlier and he could not therefore trust anyone.

In August 1986, he was somewhat uncertain about the exact date, Cruz was walking along a street in Valparaiso after having attended a neighbourhood committee meeting. Cruz was on his way to catch a bus to Viña del Mar. Four men came in a car, threatened him with a knife against his throat and apprehended him. They were civilians in a civilian vehicle. They travelled in the direction of Viña del Mar. A black blindfold was placed over his eyes and then they took him out of the car and kicked him. Cruz protected himself as well as he could by putting his hands over his head and crotch. They insulted him too. They told him he should give up struggling against the Government. They said they knew of Cruz and that he ought to stop; otherwise this could be the last day of his life. Even his family was threatened. These events took place in a building Cruz was taken to but he knows nothing about it because he was blindfolded. On this occasion he was subjected to torture through electric shocks against his testicles. He was even subjected to shocks by electrodes in the anus and testicles. After having been subjected to the above Cruz was driven a bit along the road between Valparaiso and Viña del Mar before he was set free on this road. He was also near to being knocked down by a bus in connection with his being released from

the car. The whole sequence of events took place within a period of 15 hours. About a month later Cruz found his dog, three years old, dead under such circumstances that he suspected that it was the CNI or ACHA [Accíon Chilena Anticomunista] that lay behind it. The dog had been impaled on a metal fence that surrounded the house where Cruz lived. The conclusion Cruz drew was that he was subjected to this as a result of his activity in youth groups and friendship committees. Cruz had worked for a democratic development of Chile. Every time Cruz was arrested the 'police' knew what he had been working for. The interrogation so far has been translated to Cruz who subsequently wished to point out that the committees were neighbourhood committees and not friendship committees and he also wanted to say that the reason why he did not trust anyone was just because the police knew so much about him when they held him in custody.

Without the presence of the interpreter or counsel, in accordance with Cruz's wishes, he stated that on the occasion when he was arrested by persons he thought were from the CNI in 1986 he was also subjected to something else that he tried to suppress and which he finds very painful to talk about. After he had been tortured among other ways by electrodes in his anus and testicles, he was placed on a bed lying face down and his hands and feet were tied to bedposts. In this position one or more men attacked him sexually. Cruz was at that point dazed from the previous treatment and cannot therefore say with certainty if there was more than one person. (This section without the presence of the interpreter or counsel. Cruz can make himself understood in Swedish.)

In addition Cruz has not been able to express the problems he has had as a probable result of the treatment he was subjected to. He has difficulties eating with cutlery made of metal. These problems manifest themselves with pains in his teeth on every occasion that his teeth come in contact with a metal object. This problem has become less intense but has been very intense earlier. It has thus been a question of two different types of complaints. Firstly Cruz has experienced general pain in his teeth and secondly he has had problems with metal objects. Cruz first experienced the problem with his teeth after electric shock torture in 1973. He was subjected to this form of torture on a total of 4 or 5 occasions. After the torture in 1973 Cruz also had many headaches. He has also noticed that since then he has had lapses of memory.

Otherwise Cruz has nothing more that he personally wishes to relate other than the above. When asked if he had anything to add on his political involvement he stated that he had already accounted for it but that he could now present new documents which support the previous statements. Three certificates were handed over. One from Nicolas Reyes Armijo, President of the Cultural Centre for Freedom in Belloto, one from Ricardo Poblete Muñoz, co-ordinator in the organisation of neighbourhood committees, as well as a certificate from the Commission on the Rights of Young People.

The above was translated to Cruz who thereafter had no wish to refer to further details in the case. He has no objection to the above description ... ."

23. The first certificate referred to in the record was dated 1 November 1988 and consisted of a statement by the President of the Centro Cultural "Libertad" (Cultural Centre for Freedom) in El Belloto. It stated that Mr Cruz Varas took part in the activities of that institution until he left Chile and that his psychological and physical integrity would be threatened if he were to stay in his home country. It further indicated that he was obliged to leave the country for political reasons. A second certificate of 23 November

1988 by an official of the Comisión de Derechos Poblacionales (Peoples' Rights Commission) in Valparaiso stated that he was persecuted by the dictatorship from November 1983 to August 1986. He was active in the socialist youth group where he was the representative and leader of the revolutionary society for Libres Pensadores Humanistas "Artesanos de las Letras" (Writers and Humanist Free Thinkers) in Villa Alemana. The certificate also stated that he had been arrested in Santiago in 1973 and twice in La Serena in November 1974 and September 1977; that he was threatened with death in Viña del Mar in 1983; that in 1986 and January 1987 he was arrested by civilians and severely beaten. A third certificate dated 20 November 1988 by the Comisión de Derechos Juveniles (Commission on the Rights of Young People) in Quilpue contained similar statements.

24. On 13 January 1989 the Police Authority referred the question of the enforcement of the expulsion order to the Immigration Board. On the same day the Police Authority decided that Mr Cruz Varas should report to the police twice a week because of the danger that he would evade enforcement of the expulsion. By letter of 2 March 1989 he submitted a medical opinion dated 20 February 1989 to the Board issued by Mr Håkan Ericsson, an assistant researcher at the Institute of Forensic Medicine at the Karolinska Hospital. Mr Ericsson stated that Mr Cruz Varas had declared that he had been ill-treated in prisons in Chile and that he had shown a deformation of his upper left collar-bone, a scar on his left upper arm and a scar on the left of his chest.

25. The Board referred the case to the Government on 8 March 1989, expressing the opinion that there was no impediment to the enforcement of the expulsion order. The Board found that Mr Cruz Varas had the opportunity on several occasions to present his case to the Police Authority and to it. However, on these occasions he had given contradictory information and had now radically changed his story. It concluded that even if it took into account the difficulties that a victim might have to describe what he had been subjected to there was no reason to believe his allegations.

26. On 11 August 1989 Mr Cruz Varas submitted a medical report to the Government which had been prepared by a doctor of forensic medicine, Dr Sten W. Jacobsson. The report dated 9 May 1989 stated, inter alia, as follows (translation from Swedish):

> "The patient Cruz Varas Hector born on 9 December 1948 has seen me on account of alleged torture in his home country. He has told a story which has been simultaneously interpreted and which is recorded in Annex I. When examining the patient I have observed marks on the left collar-bone area and on the left upper arm which are referred to in the examination protocol ... .
>
> In view of the above I make the following statement:
>
> That the patient has said that he has been assaulted; that he has, as objective evidence, shown, firstly, the marks of a collar-bone fracture following violence with a

blunt instrument and, secondly, a typically rounded and colourless burn-mark on the inside of the left upper arm (the wound has, according to forensic medical practice, the typical appearance of a burn caused by a hot pipe); that he has subjective symptoms of troubles following genital torture, anal torture and sexual abuse in the anus; that, when he describes this, he reacts, in my experience, in such a way (crying, shaking) that it has to be assumed that he has experienced this; that, to summarise, nothing has been established which contradicts the assumption that Hector Cruz Varas has been subjected to such torture and sexual abuse as he alleges."

Annex I gave the following information:

"The patient speaks about himself first and then about his father who was the secretary of the Partido Socialista. They lived in the town of El Salvador in Chile. His father was arrested during the military coup in 1973 and was brutally tortured and released after two months. The patient was then 24 years old. He was also arrested and hit but, as he himself states, he was not directly tortured. They moved to the town of Lazalena. The patient was also a member of the Partido Socialista which is a party prohibited in Chile. The patient was persecuted during the seventies and eighties. His own home was subject to a search in 1981. He was hit by the police and taken to a security building where his eyes were bandaged and he was hit by hands and was burnt on his left arm with a red-hot pipe. He participated in a demonstration against ... a coin which the Government had introduced. He was arrested later and was tortured by electrification. In 1986 he was subjected to such torture on his genitals. He was sodomised with an electrified rod which caused him great pain and one can see on the patient's face when he speaks of this torture that he was clearly in pain, he is near to tears. He was raped and sodomised several times which caused him to faint. He is very pained by telling this and his upper lip shakes and he perspires profusely. He has never told this to his wife and he now says 'I cannot take it any more'. The reaction is very typical of self-experienced humiliating sexual torture. Following a question the patient says that he has for a long time after this event had great problems of impotence. He thinks that it has been better in Sweden. He takes vitamin E against these problems.

In November 1987 his dog was found dead, hanged on an iron fence which surrounded his house. There was a note stating that this would happen to all communists. It was signed by ACHA which was the same as if it had been CNI. In 1987 he therefore left Chile. I ask what would happen if he had to return to Chile. The patient is then very upset and says that he cannot return and starts to cry; he is convinced that they will arrest him at the airport and continue persecuting and torturing him."

27. A further medical opinion was produced in evidence prepared by Dr Søndergaard, a specialist in psychiatric diseases at the Karolinska Hospital. That opinion, dated 28 June 1989, stated that, from the manner in which he presented his story and his reactions while telling it, there were strong indications that he suffered from a post-traumatic stress syndrome. Dr Søndergaard found him to be considerably shaken and on the borderline of what he could tolerate.

28. The following description of the political activities of Mr Cruz Varas was given by his lawyer in a letter to the Government of 11 August 1989:

"The appellant has been politically interested and active in different left-wing organisations ever since the sixties and by the end of the sixties he was involved with MIR (Movimiento de la Izquierda Revolucionaria). During the seventies he was active

primarily in the Socialist Party. About 1983 he came into contact with people whom he believes belong to Frente Patriótico Manuel Rodriguez. Together with these persons he has taken part in certain military activities.

As a result of his political work he was tortured in 1973, 1976, 1981, 1983, 1986 and 1987. The reason why all these details are not found in the police interrogation is that the interrogation concentrated on events during the eighties. However at the end of the interrogation it is mentioned that he had been tortured four or five times.

When asked to account for his activity with the 'Front' he stated the following: some time during 1983 he made contact by chance with a person who was nicknamed the 'Gorilla' because of his heavy build and hair growth. Hector knew the Gorilla from the seventies when both of them were active in MIR. When they met again they had not seen each other for more than a decade but they immediately recognised each other. They met at a parents' meeting in a school in Villa Alemana which the Gorilla's daughters attended.

...

After a while his acquaintance with the Gorilla led to clear sabotage activities. The Gorilla held a senior post at the town's Electricity Board. Hector has a knowledge of explosives after having worked in mining. Together they used explosive devices to destroy power lines around the town. They complemented each other well: the Gorilla indicated the targets and planned the operations, Hector acquired the dynamite by travelling to the town of San Salvador where he has many childhood friends. He was able to buy dynamite from his friends who work in the mine. The dynamite was smuggled out by the workers. This activity continued until some time in 1986.

After this Hector did not participate in any further sabotage operations since he felt he was under too much observation. However he believes that the Gorilla continued the activities since they had a fairly large stock of dynamite. He has also read in the newspapers about power lines being sabotaged after he had discontinued the activity himself.

The Gorilla has tried in different ways to get him to participate in more advanced military projects. They have often discussed the possibility of trying to arm the populace and start a school for military training. They have drawn up detailed plans of how they would obtain weapons. These plans began as a discussion about 'how one could do even more ...'. Among other things concrete plans were drawn up on how to attack a carabineer barracks. The purpose of the attack would be to get hold of weapons which could later be used in other kinds of attacks. Nothing came of these plans because Hector was arrested in 1983. During this arrest the police asked a wide range of questions; inter alia, questions were asked about places which were to be meeting points for the participants in the attack. The attack against the carabineer barracks never took place. Hector found out instead that another attack had been carried out against another carabineer barracks.

When asked to describe more details about the plan to attack, Hector said that he and the Gorilla were to carry the stolen weapons to the churchyard and bury them there. When the time was right, the weapons were to be fetched from the churchyard by other persons.

The Gorilla never mentioned Frente Patriótico Manuel Rodriguez by name, but Hector understood that the Gorilla had a relatively central position in the organisation. The Gorilla himself only mentioned that he was now active in the Communist Party. As an example of the Gorilla's central position Hector mentioned that a short time before the assassination attempt against Pinochet the Gorilla asked Hector if he would

consider driving a lorry on a very important occasion. Hector gave a hesitant reply and the suggestion was dropped. In retrospect Hector has realised that it could possibly have been the vehicle that would be used on the occasion of the assassination attempt.

Hector has not taken part in any direct military operations. On one occasion however he was instructed to drive a lorry to a particular spot. He was to park the lorry there and then fetch another lorry. He was given no more information on that occasion. However this plan was cancelled for security reasons. Shortly thereafter Hector read in a newspaper that an arms cache had been discovered right next to the place where he was to park the lorry.

A few months after he had met the Gorilla by chance, an old friend turned up with whom he had worked in a resistance cell in 1973-74 in the town of La Serena. The friend immediately said that he was in trouble with the police and that he needed a place to hide. Hector offered to give him shelter and they went straight back to Hector's home. Later in the evening two other friends joined them, all three armed with pistols. Hector also thought he saw sub-machine guns of the kind used by the Chilean police.

Hector never found out why the friend was on the run; as he said, 'it was better not to know anything'. One day, on leaving Hector's house, the friend was arrested. Hector was informed of the arrest by an acquaintance who had previously seen Hector with the friend who was in hiding. The two other men fled from Hector's house immediately.

After this Hector moved to Santiago and supported himself as a construction worker. He remained in Santiago between roughly September 1984 and December 1985. He rented out his house through a fake owner and was informed that, shortly after, the house was searched and as a result of the search the tenants moved. The fake owner found new tenants to live in the house for the rest of the time. Since no further searches were carried out Hector did not think it was dangerous to move back to Villa Alemana. Thus, in December 1985, he returned there.

When asked about the numerous 'chance' occasions when he met people who can be assumed to belong to the 'Front', Hector replied that he had also wondered about this. With regard to the Gorilla he felt it was pure chance that he met him. Hector is more hesitant about the second friend. Hector said that it could have been a chance encounter but that it could also have been a conscious attempt to bind him more firmly to the activities of the Front. Hector stated himself that because of his knowledge of explosives and as the owner of a remotely situated house he could be of interest to such an organisation as the 'Front'.

When Hector returned to Villa Alemana he felt he was being observed in different ways. He stated that he quite frequently encountered different types of salesmen who got in touch with him.

...

During one of our conversations Hector said suddenly 'there is something I have never talked about and something which I shall never tell'. I insisted that he tell me. A psychological struggle took place which lasted at least an hour. I tried to maintain the initiative all the time and to motivate Hector to tell his secret. Hector defended his position and said 'I'll never say it, not even if I am expelled will I tell it. I'll only say it at the airport'.

Finally Hector said that he had been in a poor state of mind for a long time in Chile and had taken large amounts of anti-depressants. After the torture of 1986 his nerves

have been strained to the point of breaking and because of the internal confession tradition in the Mormon Church he sought out the highest ranking leader in the Mormon Church with the rank of Grand President and told him everything.

He told him of his contacts with the Gorilla and also about the two other members of the Mormon Church whom he had introduced to the Gorilla. The conversations took place on several occasions. On the first occasion Hector took the initiative and therefore related relatively little, then the Grand President took the initiative and obtained more details.

In January 1987 Hector was arrested and tortured. When he left the torture chamber he tried to get in contact with the two other members of the Mormon Church but they had both disappeared. He also tried to make contact with the Gorilla but he had also disappeared. Hector is subjectively convinced that all three are dead. He is also convinced that they have been killed as a result of his mistake in talking to the Grand President. Hector believes that the Mormon Church leader used his weak position and informed the Government about him and his friends.

Hector cannot say with certainty when the three disappeared but says that the last time he met them was in December 1986. The torture in January 1987 in combination with self-accusation at having caused the death of the Gorilla and the two Mormons was a contributing factor to his leaving Chile a short while after that."

29. Medical reports drawn up by doctors in Varberg hospital dated 21 June 1989 and 5 October 1989 concerning the welfare of Richard Cruz Varas (the third applicant) were also submitted to the Government. These reports stated that Richard had personality problems and would in all probability suffer serious psychological harm if expelled from Sweden.

30. The first applicant also submitted a letter from the United Nations High Commissioner for Refugees' Regional Office for the Nordic Countries dated 16 August 1989 stating, inter alia, that:

"... a person who has been exposed to torture will in most cases have lasting effects of both a physical and psychological/somatic nature. For this reason, we should operate neither with time limits nor with degrees of torture when assessing a torture victim's claim for refugee status."

31. In a letter of 5 October 1989, the same Office wrote:

"Therefore we would like to point out that we believe that Mr Hector Cruz Varas ... should be protected against return to his home country; apart from the many mental/traumatic/humanitarian aspects involved, we are of the opinion that not only the 1951 Refugee Convention, but in particular the 1984 Torture Convention should be emphasised."

32. On 4 October 1989 Mr Cruz Varas was taken into custody by the Police Authority of Varberg following a decision by the Minister of Labour. The following day the Government (Ministry of Labour) found that there was no impediment under Sections 77 and 80 of the Aliens Act to the enforcement of the expulsion order against the applicants.

33. On 6 October 1989 the Board decided not to stop the expulsion and on the same day Mr Cruz Varas was expelled to Chile. His wife and son,

however, went into hiding in Sweden. Their present whereabouts is not known to the Court.

B. Political developments in Chile

In August 1988 the state of emergency was lifted and in September 1988 exiles were allowed to return to Chile. On 5 October 1988 the Chilean people voted in a plebiscite to reject the candidacy of General Pinochet as President of the country. Presidential and congressional elections were then scheduled for December 1989. Following negotiations between the Government and opposition groups a referendum was held on 30 July 1989 resulting in the adoption of various constitutional amendments designed, inter alia, to render the presidential and congressional elections more democratic and reduce the continued influence of the armed forces in civilian life.

The presidential election took place on 14 December 1989 resulting in the election of Mr Patricio Aylwin, a member of the former opposition Christian Democratic Party and leader of a 17-party alliance entitled "Coalition of Parties for Democracy".

35. In April 1989 the International Covenant on Civil and Political Rights (1966) was published in the Diario Oficial, the official gazette, thereby incorporating it into Chilean law. The State also ratified in 1988 the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Inter-American Convention to Prevent and Punish Torture (1985) although with reservations in both cases.

An Amnesty International report of October 1989, however, provides details of various cases of torture reported to Amnesty which allegedly occurred in 1989.

C. Facts subsequent to the expulsion

36. On 7 October 1989 Mr Cruz Varas arrived at the airport in Rio de Janeiro (Brazil), where he applied unsuccessfully for asylum. He was then put on a plane for Santiago where he arrived on 8 October. He did not have any identity documents and when he came to passport control he was taken aside and photographed. He was required to sign a declaration to the effect that he had been in Sweden for financial reasons and that he promised not to engage in any political activities in Chile.

37. He remained in Chile from 8 to 29 October 1989 and returned to his home in Villa Alemana. On 26 and 27 October he participated in political meetings, the latter in favour of the presidential candidate, Mr Aylwin. He alleges that on that occasion an unknown person approached him and threatened his family in Chile. During this period he claims that his brother-

in-law was attacked in the street and badly injured by unknown persons. Two other brothers-in-law were stopped and searched by officials who asked them questions about him.

38. On 29 October 1989 he left Chile for Argentina and lived for a time in Buenos Aires. On 2 December 1989 and 7 March 1990 the Board rejected requests from Mr Cruz Varas to be allowed to return to Sweden. Although he was able to attend the hearing before the Court, his present whereabouts are unknown to it.

D. Dr Jacobsson's evidence before the Commission

39. The Commission heard Dr Sten W. Jacobsson as a witness on 7 December 1989. His evidence is summarised in detail in paragraphs 49-57 of the Commission's report. He is an associate professor (docent) of forensic medicine (rättsmedicin) at the Karolinska Institute and also works with the Red Cross assisting torture victims. He has twenty years' experience in assessing scars and wounds and has been working with allegations of torture from Chile since 1985.

40. Dr Jacobsson testified that there was a very high probability that the first applicant's story was true having regard to his wounds (injury to collar bone and burn mark) and his reactions when recounting his story. He spoke with considerable reluctance of the sexual torture he had experienced and sweated profusely. Dr Jacobsson considered that such a reaction indicated that he had really experienced such treatment. He also exhibited great fear at the prospect of returning to Chile. Dr Jacobsson pointed out that victims of sexual torture are often so damaged that they are not prepared to talk about it even to their husbands or wives.

E. Further documentary evidence

41. Following the expulsion of Mr Cruz Varas the Government submitted a memorandum from the Swedish Embassy in Santiago dated 2 January 1990 which contains a report of an inquiry undertaken in accordance with a request from the Ministry of Labour for information regarding possible political activities of Mr Cruz Varas, and any political persecution to which he may have been exposed. The inquiry had been made on 20 December 1989 by Ms Jenny Malmqvist, Second Secretary at the Embassy, during a visit to Villa Alemana, accompanied by, inter alia, the President of the Commission of Human Rights at Valparaiso. The report concludes that, as regards political activities, all the representatives of political parties who had been questioned had said that they do not know Mr Cruz Varas. Neighbours who were questioned know him but were unaware of his involvement in any political activity.

In support of the above the Government have also submitted affidavits from the Partido Radical, the Partido Socialista and the Partido Comunista.

42. As regards possible political persecution, the Government have submitted an affidavit by the President of the Human Rights Commission in Villa Alemana, Mrs Maria Teresa Ovalle, obtained by the Swedish Embassy in Santiago. It appears from the affidavit that Mr Cruz Varas is not known to the Commission and that consequently no persecution directed against him is known. The affidavit further states that the Commission has at its disposal complete registers of those who have disappeared, who have been tortured and who have been imprisoned in the fifth region of Chile since 1982.

43. In the proceedings before the Court the Government submitted a further affidavit from Mrs Ovalle dated 8 October 1990 in which she declared, inter alia, that Mr Cruz Varas has no connections with any political party or with any trade union; that there is no declaration registered at the Human Rights Commission in Villa Alemana regarding the detention of Mr Cruz Varas; that according to everyone who has been asked in the district where he lived he has never been politically active; that in all the inquiries made directly with persons who have participated in clandestine activities, he is not known; nor is he known by persons in prison in Valparaiso for their role in similar activities; that she was not aware of any explosions in Villa Alemana directed at railway lines and electric power lines which occurred in the period 1983-86 as alleged by the first applicant; that, following inquiries, he is not known by the various human rights bodies in Quilpue.

The Government also submitted an affidavit dated 8 October 1990 by the National Board of the FPMR which declared that Mr Cruz Varas is not a representative of the organisation abroad and is not and never has been a combatant member of FPMR. They further disclaimed all responsibility for any action he may have taken in the name of the FPMR.

44. The applicants have submitted a medical report drawn up by Dr Mariano Castex (Professor of Psychiatry, University of Buenos Aires) following an examination of the first applicant in February 1990. The report includes the following statement:

> "As a conclusion one may state that Mr Hector Cruz Varas suffers a serious 'post-traumatic stress disorder' instilled in him as a consequence of the torture and ill-treatment suffered in Chile in the past years. The exposure to high insecurity, and the return to his native land, has increased the pathological dimension of his sufferings, and if arrangements are not made for an adequate psychological and psychiatric treatment, he might suffer from a worsening of his mental disorder with unforeseeable consequences not only for him, but for his wife and child, the latter badly needing a father if one reads carefully the report on the child."

45. A further psychiatric report dated 9 October 1990 was drawn up by Dr Søndergaard following a detailed examination of the applicant in

September 1990. The report stated that the first applicant must have experienced "a stressful event of catastrophic proportions". It concluded that he showed the "obvious stigmata of a post-traumatic stress disorder".

46. The applicants have also submitted the following documents:

- a report dated 18 January 1990 from a former Professor of Psychology at the University of Chile, Marcello Ferrada-Noli, currently researcher at the Karolinska Institute, Stockholm, which suggested that the first applicant might seek to resolve his problems by committing suicide;
- a letter dated 20 October 1990 from Mr Sergio Bushman (European spokesman for the FPMR) which stated that it was not only the members of the FPMR who risked their lives in Chile but also those who collaborated with the organisation. He further stated that the risk of torture, imprisonment or assassination still existed for FPMR members during the present regime;
- a Chilean newspaper cutting of 17 October 1984 describing an attempt to blow up a power line in a town ten kilometres outside Villa Alemana;
- a letter dated 26 September 1990 from staff at the third applicant's nursery school expressing the fear that his removal from Sweden may cause him permanent harm.

II. RELEVANT LAW AND PRACTICE

A. Domestic law

47. The Aliens Act of 1980 and Aliens Ordinance were in force until 1 July 1989 when the Aliens Act of 1989 entered into force. A new Aliens Ordinance was made under the 1989 Act.

Under the 1980 Act, a decision of expulsion by the Board could be appealed to the Government whose decision was not subject to appeal. The Government's decision was then transferred to a Police Authority for execution. If the alien contended, inter alia, that he would be exposed to political persecution or be sent to a theatre of war, the matter would be referred to the Board (Sections 85 and 86) unless the claims were manifestly ill-founded or did not merit consideration. If the Police Authority decided not to refer this question to the Board, an appeal lay to the Board. If the Board decided against the alien, the decision could be appealed to the Government.

48. Under the 1989 Act the competent authorities have a duty when deciding the question of expulsion to consider at the same time whether there is any impediment to the enforcement of the expulsion order.

49. The 1989 Act contains transitional rules to be applied in cases submitted before 1 July 1989. In such cases the procedures applicable under the 1980 Act still apply. Most of the decisions in the present case have therefore been taken under the 1980 Act.

50. Section 3 of the 1980 Aliens Act reads:

"A refugee shall not without grave reasons be refused asylum in Sweden when he has need of such protection.

For the purposes of this Act, a refugee is a person who is outside the country of his nationality owing to a well-founded fear of being persecuted for reasons of race, nationality, membership of a particular social group, or religious or political opinion, and who is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. A stateless person who for the same reason is outside the country of his former habitual residence and who is unable or, owing to such fear, is unwilling to return to that country, shall also be deemed a refugee.

For the purposes of this Act, persecution is defined as indicated in subsection two of this Section as being directed against the life or liberty of the alien or as being otherwise of a severe nature (political persecution)."

Other relevant provisions of the 1980 Act provide as follows:

Section 6:

"An alien who, although not a refugee, is unwilling to return to his home country on account of the political situation there, and is able to plead very strong grounds in support of this reluctance, shall not be refused permission to stay in this country if he is in need of protection here, unless there are special reasons for such denial."

Section 38:

"An alien may be expelled if he is residing here without possessing the passport or permit required for residence in Sweden.

Expulsion orders as provided in subsection one are to be issued by the National Immigration Board. If an application for a residence permit is rejected, the National Immigration Board shall at the same time make an expulsion order unless there are very strong grounds to the contrary."

Section 77:

"When a refusal-of-entry order or an expulsion order is put into effect, the alien may not be sent to a country where he risks political persecution. Nor may the alien be sent to a country where he is not safeguarded against being sent on to a country where he risks such persecution."

Section 80:

"An alien referred to in Section 6 and pleading grave reasons for not being sent to his home country, may not in the enforcement of a refusal-of-entry order or an expulsion order be sent to that country or to a country from which he risks being sent on to his home country."

Section 33 of the 1980 Aliens Ordinance reads:

"An alien intending to settle in this country or for any other reason to remain here in excess of the period referred to in Section 30, subsection one, may not enter Sweden until he has obtained a residence permit, unless:

1. he is exempted, by virtue of Section 30, subsection two, from the requirement of a residence permit,

2. he is an alien as referred to in Section 3, 5 or 6 of the Aliens Act (1980:376),

3. he intends joining a close relative who is permanently domiciled in Sweden and with whom he has previously lived abroad, or,

4. there is some other particularly important reason why he should be allowed to enter the country.

An alien, who has entered Sweden without a residence permit or with a residence permit for a temporary stay only, may not be granted such a permit as long as he is present in this country or on account of an application made here, except in the cases specified in subsection one, paragraphs 2-4 of this section. The aforesaid notwithstanding, an alien who has entered Sweden as a visitor and has substantial reasons for prolonging his visit may be granted a residence permit for a specified period."

51. Since 1973 Sweden has received about 30,000 Chilean citizens, a large proportion of whom have been granted asylum. Visas have been required for travellers from Chile as of 1 January 1989. In view of political developments in Chile in 1988 and 1989 some refugees have returned voluntarily to take up political activities.

B. The practice of the Commission under Rule 36 of its Rules of Procedure

52. Rule 36 of the Commission's Rules of Procedure reads:

"The Commission, or when it is not in session, the President may indicate to the parties any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it."

53. An indication under Rule 36 is only given where it appears that irreparable damage would result from the implementation of the measure complained of. This might be the case where expulsion or extradition is imminent and the applicant alleges that he is likely to be treated contrary to Articles 2 and/or 3 (art. 2, art. 3) of the Convention in the receiving State. Normally Rule 36 would only apply to cases involving allegations of this nature. Further there must exist a certain degree of probability that a person would be subjected to treatment in breach of these provisions if sent to the country concerned. Evidence must thus be presented to the Commission which reveals the existence of such a risk.

54. When an application for interim measures is made it is brought immediately before the Commission or the President or Acting President if the Commission is not in session. A Rule 36 indication is always limited in time. If the decision is taken by the President or Acting President, the indication will be limited until the Commission next sits. If it is taken by the Commission, it is normally limited until its next session.

55. When the Commission or the President has applied Rule 36, the Secretary to the Commission will inform all the parties by telephone of the decision and confirm it by post or telefax. At the time of the first applicant's

expulsion the Commission had been seised of 182 requests for interim measures in expulsion (as opposed to extradition) cases. In 31 of these cases an indication under Rule 36 was given and complied with by the Contracting Parties concerned. In several cases concerning extradition the State has failed to comply with a Rule 36 indication.

III. PROCEEDINGS BEFORE THE COMMISSION

A. The Commission's indications under Rule 36 in the present case

56. The application to the Commission was introduced on 5 October 1989 and registered on the same day. On 6 October 1989, at 09.00 hours, the Commission decided to apply Rule 36 of its Rules of Procedure in the following terms:

> "The Commission ... decided ... to indicate to the Government of Sweden ... that it was desirable in the interest of the Parties and the proper conduct of the proceedings before the Commission not to deport the applicants to Chile until the Commission had had an opportunity to examine the application during its forthcoming session from 6 to 10 November 1989."

57. The Agent of the Government was informed by telephone on the same day, at 09.10 hours, of the Commission's decision. At 12.00 hours the Commission confirmed the said indication by telefax.

58. Officials at the Ministry of Labour were informed of the Commission's indication at 09.20 hours on 6 October. The matter was presented to the competent Minister at 12.45 hours. However, according to information given by the Government, the Minister could not take any action since the matter had already been decided by the Government and was pending before the Board.

59. On the same day, following a request from Mr Cruz Varas, the Board decided not to stay the enforcement of the expulsion. At that time the Board was aware of the present application to the Commission and of the Commission's indication under Rule 36.

60. Mr Cruz Varas was deported to Chile on 6 October 1989 at 16.40 hours. His wife and their son went into hiding in Sweden.

61. On 9 November 1989 the Commission took the following decision under Rule 36 of its Rules of Procedure:

> "Having examined the parties' submissions the Commission decided to indicate to the Government, in accordance with Rule 36 of its Rules of Procedure, that it is desirable in the interest of the parties and the proper conduct of the proceedings before the Commission not to deport to Chile any of the applicants, who are still in Sweden, until the Commission has had an opportunity to examine the application further during its forthcoming session 4-15 December 1989. In respect of Mr Cruz Varas the Commission, given the failure of the Government to comply with its earlier indication not to deport him to Chile, now indicates that it is desirable in the interest of the parties and the proper conduct of the proceedings before the Commission, that the

Government take measures which will enable this applicant's return to Sweden as soon as possible."

62. By letter of 22 November 1989 the Government informed the Commission that a request from the first applicant for permission to enter and remain in Sweden was to be examined by the Board and that the question of the execution of the expulsion order in respect of Mrs Bustamento Lazo and Richard Cruz was pending before it. Consequently, the Government had, on 16 November 1989, decided to communicate the Commission's indication under Rule 36 to the Board.

63. Following the hearing on 7 December 1989, the Commission decided to maintain its indication under Rule 36 of its Rules of Procedure that it was desirable in the interest of the parties and the proper conduct of the proceedings before the Commission not to deport the second and third applicants to Chile and that the Government take measures which would enable the first applicant to return to Sweden as soon as possible.

64. On 7 June 1990 the Commission decided, following the adoption of its report, not to prolong the Rule 36 indication.

B. The Commission's examination of the application

65. The applicants complained that the first applicant's expulsion amounted to a breach of Article 3 (art. 3) because of the risk that he would be tortured by the authorities. They also claimed that the expulsion of the third applicant would be in breach of Article 3 (art. 3). In addition they complained that the separation of the family constituted a breach of Article 8 (art. 8) of the Convention. They further invoked Articles 6 and 13 (art. 6, art. 13) of the Convention.

66. The application was declared admissible on 7 December 1989 as regards the applicants' complaints under Articles 3 and 8 (art. 3, art. 8) and inadmissible as regards the complaints under Articles 6 and 13 (art. 6, art. 13). The Commission also retained for further examination the issues arising from the Government's failure to comply with the Rule 36 indications.

In its report adopted on 7 June 1990 (Article 31) (art. 31) the Commission expressed the opinion that there had been no violation of Article 3 (art. 3) (eight votes to five) or Article 8 (art. 8) (unanimously) but that there had been a failure to comply with Article 25 § 1 (art. 25-1) in fine (twelve votes to one) by not following the Commission's Rule 36 request not to expel the first applicant. The full text of the Commission's opinion

and of the separate opinions contained in the report is reproduced as an annex to the judgment[*].

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

67. At the public hearing on 22 October 1990 the Government maintained in substance the concluding submissions set out in their memorial, whereby they invited the Court "to hold that there has been no violation of the Convention in the present case".

AS TO THE LAW

I. THE ALLEGED BREACH OF ARTICLE 3 (art. 3)

68. The applicants alleged that the expulsion of Mr Cruz Varas to Chile constituted inhuman treatment in breach of Article 3 (art. 3) of the Convention because of the risk that he would be tortured by the Chilean authorities and because of the trauma involved in being sent back to a country where he had previously been tortured. They further claimed that the expulsion of the third applicant (Richard) would give rise to such suffering as to amount to a breach of this provision which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Applicability of Article 3 (art. 3) in expulsion cases

69. In its Soering judgment of 7 July 1989 the Court held that the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country (Series A no. 161, p. 35, § 91).

Although the establishment of such responsibility involves an assessment of conditions in the requesting country against the standards of Article 3

[*] Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 201 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

(art. 3), there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment (ibid., p. 36, § 91).

70. Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above principle also applies to expulsion decisions and a fortiori to cases of actual expulsion.

B. Application of Article 3 (art. 3) in the circumstances of the case

1. Arguments presented by those appearing before the Court

71. The first applicant stated that he had taken part in various clandestine and subversive political activities in Chile in collaboration with, but not as a representative of, the FPMR. As a result he had been arrested on various occasions and tortured by the Chilean police. He claimed that on account of his previous activities his expulsion exposed him to the risk that he would be arrested and tortured once more on his return to Chile where torture was still prevalent.

In addition he maintained that medical evidence substantiated his claims to have been tortured in the past and that he suffers from a post-traumatic stress disorder linked to these experiences. He submitted that in assessing the allegations concerning his political and clandestine activities the Court should take into account the fact that asylum-seekers can rarely provide documentary proof of such matters. Indeed his activities were of such a nature that they could not be supported by documentary evidence. The Court should also have regard to the fact that those who have been tortured may feel apprehensive towards any authorities and be afraid to give a full and accurate account of their case. He contended that against this background he should be entitled to a "relaxation" of the burden of proof and given the benefit of the doubt, particularly in view of the medical evidence he had adduced.

72. The Government stated that they were very well informed about the situation in Chile in view of the large number of Chilean refugees they have had to deal with over the years and their contacts through the Swedish Embassy in Santiago with opposition groups. They pointed out that at the time the expulsion decision was taken there had been important improvements in the political and human rights situation there and many persons who had sought refuge in Sweden were returning to Chile to take up political activities. Furthermore they had carried out a thorough examination of the first applicant’s allegations and had considered that his version of

events was not credible. In this respect they emphasised the fact that he had said nothing to the authorities about having been tortured until his interrogation by the Police Authority on 13 January 1989 (see paragraph 22 above). Moreover, the contents of his story were found to be contradictory and also lacking in credibility in various respects.

The Government further contended that the evidence they have gathered since his expulsion supports their belief that he had not been politically active or a member of the FPMR or persecuted by the police.

Finally the Government maintained that the medical evidence submitted by the first applicant only shows that he had at some time in the past been subjected to maltreatment. It does not show that he was tortured by the Chilean authorities or by persons for whom the Chilean Government could be held responsible.

73. The Commission, on the other hand, accepted that Mr Cruz Varas had been subjected in the past to treatment contrary to Article 3 (art. 3) by persons for whom the Chilean State was responsible. However, in view of the political evolution which had taken place in Chile, the Commission did not consider that there existed a real risk that he would again be exposed to such treatment.

2. The Court's examination of the issues

a. The determination of the facts

74. The Court recalls that under the Convention system, the establishment and verification of the facts is primarily a matter for the Commission (Articles 28 § 1 and 31) (art. 28-1, art. 31). Accordingly it is only in exceptional circumstances that the Court will use its powers in this area. The Court is not, however, bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it.

75. In determining whether substantial grounds have been shown for believing in the existence of a real risk of treatment contrary to Article 3 (art. 3) the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained proprio motu (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 64, § 160).

76. Since the nature of the Contracting States' responsibility under Article 3 (art. 3) in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the

Contracting Party or the well-foundedness or otherwise of an applicant's fears.

b. Whether the first applicant's expulsion exposed him to a real risk of inhuman treatment

77. The Court takes note of the medical evidence submitted by the applicants and, in particular, the evidence of Dr Jacobsson who found that the first applicant's physical injuries and demeanour while recounting his experiences were consistent with his allegations (see paragraphs 26 and 39-40 above). Having regard to Dr Jacobsson's experience in examining victims of torture, this evidence supports the view that the applicant has, at some stage in the past, been subjected to inhuman or degrading treatment. According to the Commission the only plausible explanation for this treatment is that it was carried out by persons for whom "the then Chilean regime" was responsible. There is no element in the material before the Court, however, apart from the first applicant's allegations, which provides direct evidence for this conclusion.

78. Moreover, even if allowances are made for the apprehension that asylum-seekers may have towards the authorities and the difficulties of substantiating their claims with documentary evidence, the first applicant's complete silence as to his alleged clandestine activities and torture by the Chilean police until more than eighteen months after his first interrogation by the Växjö Police Authority casts considerable doubt on his credibility in this respect (see paragraphs 14-22 above).

As the Government have pointed out, there was no reference to these allegations during the police interrogations that took place in June 1987 and October 1988 and the many written submissions made in the course of the immigration proceedings up to January 1989 (see paragraph 22 above). These doubts are reinforced by the fact that he was legally represented at all stages throughout these proceedings and that he must have been aware of the importance of bringing to the attention of the authorities any element which supported his asylum claim. His credibility is further called into question by the continuous changes in his story following each police interrogation and by the fact that no material has been presented to the Court which substantiates his claims of clandestine political activity on behalf of or in collaboration with members of the FPMR (ibid.). On the contrary the evidence points in the opposite direction (see paragraphs 41-43 above).

79. The Court also notes that in the course of his stay in Chile subsequent to his expulsion the applicant was apparently unable to locate any witnesses or adduce any other evidence which might have corroborated to some degree his claims of clandestine political activity.

80. In any event, a democratic evolution was in the process of taking place in Chile which had led to improvements in the political situation and,

indeed, to the voluntary return of refugees from Sweden and elsewhere (see paragraphs 34 and 51 above).

81. The Court also attaches importance to the fact that the Swedish authorities had particular knowledge and experience in evaluating claims of the present nature by virtue of the large number of Chilean asylum-seekers who had arrived in Sweden since 1973. The final decision to expel the applicant was taken after thorough examinations of his case by the National Immigration Board and by the Government (see paragraphs 14-33 above).

82. In the light of these considerations the Court finds that substantial grounds have not been shown for believing that the first applicant's expulsion would expose him to a real risk of being subjected to inhuman or degrading treatment on his return to Chile in October 1989. Accordingly there has been no breach of Article 3 (art. 3) in this respect.

c. Whether the first applicant's expulsion involved such trauma that it amounted to a breach of Article 3 (art. 3)

83. It is recalled that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see the above-mentioned Soering judgment, Series A no. 161, p. 39, § 100, and the authorities cited therein).

84. In the present case the first applicant was considered to be suffering from a post-traumatic stress disorder prior to his expulsion and his mental health appeared to deteriorate following his return to Chile (see paragraphs 27 and 44 above). However, it results from the finding in paragraph 82 that no substantial basis has been shown for his fears. Accordingly the Court does not consider that the first applicant's expulsion exceeded the threshold set by Article 3 (art. 3).

d. Whether the possible expulsion of the third applicant could amount to a breach of Article 3 (art. 3)

85. Before the Court the applicants do not appear to have maintained their complaint that the expulsion of the third applicant would amount to a breach of Article 3 (art. 3). In any event the facts do not reveal a breach in this respect either.

C. Recapitulation

86. In sum, there has been no breach of Article 3 (art. 3).

II. THE ALLEGED BREACH OF ARTICLE 8 (art. 8)

87. All three applicants alleged that the expulsion of the first applicant led to a separation of the family and amounted to a violation of their right to respect for family life contrary to Article 8 (art. 8), which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In their view, in assessing whether there had been a breach of Article 8 (art. 8), it should be borne in mind that the Commission had requested the Government under Rule 36 of its Rules of Procedure not to proceed with the expulsion. They contended that the expulsion of the first applicant confronted the other members of his family with the choice of remaining in hiding and exercising the right of petition under Article 25 (art. 25) or returning to Chile with him.

88. As noted by both the Government and the Commission, the expulsion of all three applicants was ordered by the Swedish Government but the second and third applicants went into hiding and have so remained in order to evade enforcement of the order (see paragraph 33 above). Moreover, the evidence adduced does not show that there were obstacles to establishing family life in their home country (see, mutatis mutandis, the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 34, § 68). The Court refers in this respect to its finding concerning the applicants' complaints under Article 3 (art. 3) (see paragraph 86 above). In these circumstances responsibility for the resulting separation of the family cannot be imputed to Sweden.

89. Accordingly there has been no "lack of respect" for the applicants' family life in breach of Article 8 (art. 8).

III. THE ALLEGED BREACH OF ARTICLE 25 § 1 (art. 25-1)

90. It remains to be determined whether the failure by the Swedish Government to comply with the Commission's request under Rule 36 of its Rules of Procedure not to expel the applicants amounted to a breach of their obligation under Article 25 § 1 (art. 25-1) not to hinder the effective exercise of the right of petition. This provision reads:

> "The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting

Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

Rule 36 provides:

"The Commission, or where it is not in session, the President may indicate to the parties any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it."

A. Arguments presented by those appearing before the Court

91. The applicants submitted that the effective exercise of the right of petition presupposed that success in the proceedings before the Convention organs would be meaningful for them. This would not be the case if by the time their claims had been adjudicated the first applicant had already suffered the harm sought to be avoided by the application. In addition they contended that for the exercise of the right of petition to be effective the principles of equality of arms and the right to have adequate time and facilities to prepare their defence - both fundamental principles of a fair trial protected under Article 6 (art. 6) - should be respected in the proceedings. The fact that counsel did not have direct access to the first applicant meant that the applicants were deprived of the possibility of instigating certain inquiries relating to the evidential issues in the case which would have supported their claims under Articles 3 and 8 (art. 3, art. 8). Further the first applicant was prevented from participating in the proceedings before the Commission. Accordingly they did not enjoy a fair procedure on a basis of equality with the respondent Government and were thus hindered in the effective presentation of their case.

92. The Government maintained that no obligation exists under the Convention to comply with a Commission indication under Rule 36. The Commission's opinion on the merits of a claim was not binding on a Contracting Party and the very language of the request made in the present case confirmed its non-binding character. Furthermore the fact that Rule 36 requests have been complied with in the past could not render them binding under the Convention.

In the Government's view had they considered that such requests were binding Sweden could not have ratified the Convention without changing domestic law since, in cases such as the present, compliance was not possible for constitutional reasons.

As to Article 25 (art. 25) of the Convention, it had so far been interpreted as protecting exclusively the procedural right of making a petition and the facilities for exercising that right. The Commission's interpretation that it protected applicants from irreparable harm found no support in the wording of the provision or in legal writing. In any event the implementation of the

expulsion order did not in fact prevent the first applicant from presenting his case to the Commission.

93. For the Commission the fact that Sweden did not abide by the first indication under Rule 36 constituted a failure to comply with its obligations under Article 25 § 1 (art. 25-1). While the undertaking in this provision did not imply a general duty on Contracting Parties to suspend measures or decisions at the domestic level, there were special circumstances where the enforcement of a decision might conflict with the effective exercise of the right of petition. Such a case arose where serious and irreparable damage was likely to occur to an applicant by enforcing an expulsion decision in circumstances where the Commission had requested a Contracting Party under Rule 36 not to do so. The effectiveness of the petition system would be impaired if Parties were not obliged to follow indications given by the Commission or the Court or refrain from taking steps which could jeopardise the life of an applicant. In the present case the Government had frustrated the examination of the alleged violation and had put into question the practicality and effectiveness of the findings of the Convention organs.

B. The Court's examination of the issues

1. General considerations

94. As has been noted on previous occasions the Convention must be interpreted in the light of its special character as a treaty for the protection of individual human beings and its safeguards must be construed in a manner which makes them practical and effective (see, inter alia, the above-mentioned Soering judgment, Series A no. 161, p. 34, § 87). While this approach argues in favour of a power of the Commission and Court to order interim measures to preserve the rights of parties in pending proceedings, the Court cannot but note that unlike other international treaties or instruments the Convention does not contain a specific provision with regard to such measures (see, inter alia, Article 41 of the Statute of the International Court of Justice; Article 63 of the 1969 American Convention on Human Rights; Articles 185 and 186 of the 1957 Treaty establishing the European Economic Community).

95. The European Movement, which first proposed the drafting of a European Convention on Human Rights, originally included in a draft Statute of the European Court of Human Rights an interim measures provision (Article 35) based in substance on Article 41 of the Statute of the International Court of Justice (see Collected Edition of the travaux préparatoires, Vol. I, p. 314). The travaux préparatoires of the Convention are, however, silent as to any discussion which may have taken place on this question.

96. The absence of a specific interim measures provision in the Convention gave rise to a Recommendation by the Consultative Assembly of the Council of Europe calling on the Committee of Ministers to draft an additional Protocol to the Convention which would empower the Convention organs to order interim measures in appropriate cases (see Recommendation 623 (1971), Yearbook of the Convention, Vol. 14, pp. 68-71). The Committee of Ministers subsequently decided that the conclusion of such a protocol was not expedient on the ground, inter alia, that the existing practice of the Commission in requesting governments to postpone the measure complained of worked satisfactorily (see Doc. 3325, pp 4-6, Working Papers of Consultative Assembly, 25th Ordinary Session, 25 September - 2 October 1973). The Assembly later recommended that the Committee of Ministers call on member States to "suspend extradition or expulsion to a non-Contracting State" where the Commission or the Court was called on to take a decision on, inter alia, allegations under Article 3 (art. 3) (see Recommendation 817 (1977) on Certain Aspects of the Right to Asylum, Yearbook of the Convention, Vol. 20, pp. 82-85). Finally the Committee of Ministers on 27 June 1980 adopted a similar recommendation to governments of member States in cases concerning extradition to a non-Contracting State (see Recommendation No. R (80) 9, Yearbook of the Convention, Vol. 23, pp. 78-79).

2. Can a power to order interim measures be derived from Article 25 § 1 (art. 25-1) or other sources?

97. The question arises for consideration in this case whether, notwithstanding the absence of a specific provision in the Convention, a power for the Commission to order interim measures can nevertheless be derived from Article 25 § 1 (art. 25-1) considered separately or in conjunction with Rule 36 of the Commission's Rules of Procedure or from other sources.

98. Firstly it must be observed that Rule 36 has only the status of a rule of procedure drawn up by the Commission under Article 36 (art. 36) of the Convention. In the absence of a provision in the Convention for interim measures an indication given under Rule 36 cannot be considered to give rise to a binding obligation on Contracting Parties. Indeed this is reflected in the wording both of Rule 36 itself ("may indicate any interim measure the adoption of which seems desirable") and of the indications made under it in the present case ("to indicate to the Government of Sweden that it was desirable ... not to deport the applicants to Chile") (see paragraph 56 and similar wording in paragraph 61 above).

99. As to the Contracting Parties' obligation not to hinder the effective exercise of the right of petition it must first be noted that Article 25 § 1 (art. 25-1) is limited to proceedings before the Commission and to individual

applications. It does not apply to inter-State cases where the interest in respecting an indication made under Rule 36 is essentially the same.

In its ordinary meaning Article 25 § 1 (art. 25-1) imposes an obligation not to interfere with the right of the individual effectively to present and pursue his complaint with the Commission. Such an obligation confers upon an applicant a right of a procedural nature distinguishable from the substantive rights set out under Section I of the Convention or its Protocols. However it flows from the very essence of this procedural right that it must be open to individuals to complain of alleged infringements of it in Convention proceedings. In this respect also the Convention must be interpreted as guaranteeing rights which are practical and effective as opposed to theoretical and illusory (see the above-mentioned Soering judgment, Series A no. 161, p. 34, § 87, and the authorities cited therein).

Nevertheless, as seen above, no specific provision in the Convention empowers the Commission to order interim measures. It would strain the language of Article 25 (art. 25) to infer from the words "undertake not to hinder in any way the effective exercise of this right" an obligation to comply with a Commission indication under Rule 36. This conclusion is not altered by considering Article 25 § 1 (art. 25-1) in conjunction with Rule 36 or - as submitted by the Delegate of the Commission - in conjunction with Articles 1 and 19 (art. 1, art. 19) of the Convention.

100. The practice of Contracting Parties in this area shows that there has been almost total compliance with Rule 36 indications. Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision (see, mutatis mutandis, the above-mentioned Soering judgment, Series A no. 161, pp. 40-41, § 103, and Article 31 § 3 (b) of the Vienna Convention of 23 May 1969 on the Law of Treaties) but not to create new rights and obligations which were not included in the Convention at the outset (see, mutatis mutandis, the Johnston and Others judgment of 18 December 1986, Series A no. 112, p. 25, § 53). In any event, as reflected in the various recommendations of the Council of Europe bodies referred to above, the practice of complying with Rule 36 indications cannot have been based on a belief that these indications gave rise to a binding obligation (see paragraph 96 above). It was rather a matter of good faith co-operation with the Commission in cases where this was considered reasonable and practicable.

101. Finally, no assistance can be derived from general principles of international law since, as observed by the Commission, the question whether interim measures indicated by international tribunals are binding is a controversial one and no uniform legal rule exists.

102. Accordingly, the Court considers that the power to order binding interim measures cannot be inferred from either Article 25 § 1 (art. 25-1) in fine, or from other sources. It lies within the appreciation of the Contracting Parties to decide whether it is expedient to remedy this situation by adopting

a new provision notwithstanding the wide practice of good faith compliance.

103. In this connection, it must be borne in mind that Rule 36 indications are given by the Commission or its President only in exceptional circumstances. They serve the purpose in expulsion (or extradition) cases of putting the Contracting States on notice that, in the Commission's view, irreversible harm may be done to the applicant if he is expelled and, further, that there is good reason to believe that his expulsion may give rise to a breach of Article 3 (art. 3) of the Convention. Where the State decides not to comply with the indication it knowingly assumes the risk of being found in breach of Article 3 (art. 3) following adjudication of the dispute by the Convention organs. In the opinion of the Court where the State has had its attention drawn in this way to the dangers of prejudicing the outcome of the issue then pending before the Commission any subsequent breach of Article 3 (art. 3) found by the Convention organs would have to be seen as aggravated by the failure to comply with the indication.

3. Did the expulsion actually hinder the effective exercise of the right of petition?

104. The applicants claimed that the expulsion of the first applicant actually hindered the effective presentation of the application to the Commission.

Compliance with the Rule 36 indication would no doubt have facilitated the presentation of the applicants' case before the Commission. However, there is no evidence that they were hindered in the exercise of the right of petition to any significant degree. The first applicant remained at liberty following his return to Chile and was free to leave the country (see paragraphs 36-38 above). Their counsel was in fact able to represent them fully before the Commission notwithstanding the first applicant's absence during the Commission's hearing.

Nor is it established that his inability to confer with his lawyer hampered the gathering of evidence additional to that already adduced during the lengthy immigration proceedings in Sweden or the countering of the Government's submissions on questions of fact.

4. Recapitulation

105. In sum, there has been no breach of Article 25 § 1 (art. 25-1) in fine.

FOR THESE REASONS, THE COURT

1. Holds by eighteen votes to one that there has been no violation of Article 3 (art. 3);

2. Holds unanimously that there has been no violation of Article 8 (art. 8);

3. Holds by ten votes to nine that there has been no violation of Article 25 § 1 (art. 25-1) in fine.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 March 1991.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

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

(a) the dissenting opinion of Mr Cremona, Mr Thór Vilhjálmsson, Mr Walsh, Mr Macdonald, Mr Bernhardt, Mr De Meyer, Mr Martens, Mr Foighel and Mr Morenilla;

(b) the separate opinion of Mr De Meyer.

R.R.
M.-A.E.

JOINT DISSENTING OPINION OF JUDGES CREMONA, THÓR VILHJÁLMSSON, WALSH, MACDONALD, BERNHARDT, DE MEYER, MARTENS, FOIGHEL AND MORENILLA

In our view there has been a violation of Article 25 (art. 25) insofar as the first applicant was expelled to Chile on 6 October 1989, that is, one day after the application was lodged with the European Commission of Human Rights and a few hours after the Commission had asked the Government "not to deport the applicants to Chile ..."

1. The present judgment confirms the view expressed in the Soering judgment that extradition and expulsion may contravene the Convention. It cannot be otherwise since the Convention provides for a real and effective protection of human rights for all persons present in the member States; their governments cannot be permitted to expose such persons to serious violations of human rights in other countries. This should be beyond doubt in cases where torture or violations of other basic human rights are to be feared.

The protection under the Convention would be meaningless if a State had the right to extradite or expel a person without any prior possibility of clarification - as far and as soon as possible - of the consequences of the expulsion. The Court has repeatedly underlined that "the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective" (see the Soering judgment of 7 July 1989, Series A no. 161, p. 34, § 87). This basic principle must be kept in mind when we consider the procedural guarantees contained in the Convention.

2. It is true that Article 25 § 1 (art. 25-1), second sentence, of the Convention seems, according to its wording, to protect only the effective exercise of the right to lodge a complaint. However, this does not imply that States are permitted to make the possible result of an application devoid of any practical relevance. Otherwise States would be obliged to allow a person to lodge a petition with the Commission but would be able to expel him immediately thereafter irrespective of the consequences however serious they might be. We cannot accept such an interpretation. In our view, the procedural guarantee contained in Article 25 (art. 25) presupposes and includes the right of the individual to be afforded, at the least, an opportunity to have the application considered more closely by the Convention organs and to have his basic rights finally protected if need be.

3. These principles do not lead to the result that every application under Article 25 (art. 25) automatically inhibits extradition or expulsion to another country. The mere fact that a complaint under Article 25 (art. 25) has been

lodged concerning a decision to extradite or expel should not restrict the power of governments to consider and to weigh the available evidence and to decide whether the decision should, nevertheless, be enforced. In reaching this decision they can take into account that applications are often obviously unfounded. Considerations of State security and public policy and other facts (including the length of the procedure before the Convention organs) may also be relevant. But at this stage - and only at this stage - the indication of provisional measures under Rule 36 of the Commission's Rules of Procedure comes into play. Such an indication gives the respondent State the assurance that the Commission considers the application to be of great importance under the Convention and that it will investigate the matter speedily (see paragraphs 52-55 above). Seen in this perspective, measures indicated under Rule 36 bind the State concerned since this is the only means to protect the applicant against a possible violation of his or her rights causing irreparable harm. Furthermore, it is, in our view, implicit in the Convention that in cases such as the present the Convention organs have the power to require the parties to abstain from a measure which might not only give rise to serious harm but which might also nullify the result of the entire procedure under the Convention.

In the final analysis, it is incompatible with Article 25 (art. 25) of the Convention that the first applicant in this case was expelled immediately after he had lodged his complaint contrary to the indication made under Rule 36 of the Commission's Rules of Procedure.

4. It cannot be of any relevance in the present case that in the event the applicant was not tortured on his return to Chile and that he was able to take the necessary steps in the procedure before the Convention organs. The critical date is 6 October 1989. At that date a grave violation of human rights following deportation could not have been excluded and the Commission had clearly indicated that closer investigation appeared necessary and would be conducted speedily.

5. It is true that, unlike some other international instruments, the Convention does not contain any express provision as to the indication of provisional measures. But this does not exclude an autonomous interpretation of the European Convention with special emphasis placed on its object and purpose and the effectiveness of its control machinery. In this context too, present-day conditions are of importance. Today the right of individual petition and the compulsory jurisdiction of the Court have been accepted by nearly all the member States of the Council of Europe. It is of the essence that the Convention organs should be able to secure the effectiveness of the protection they are called on to ensure.

SEPARATE OPINION OF JUDGE DE MEYER

Having regard to the circumstances of the case, as described in detail in the judgment[1], and to the fact that in October 1989 the situation in Chile was still not wholly reassuring[2], there were, in my view, grounds for believing that the first applicant's expulsion to that country was likely to expose him there to "a real risk of being subjected to torture or to inhuman or degrading treatment or punishment"[3]. I am therefore of the opinion that there has been a violation of his rights under Article 3 (art. 3) of the Convention.

[1] See paragraphs 12-33 above. See also the statement of Dr Jacobsson, summarised in paragraphs 49-57 of the Commission's report and at paragraphs 39 and 40 of the judgment, and the findings of Prof. Mariano Castex and of Dr Søndergaard referred to at paragraphs 44 and 45 of the judgment.

[2] General Pinochet was still President. See, further, paragraph 35, in fine, of the judgment, and paragraph 4 of the joint dissenting opinion.

[3] Soering judgment of 7 July 1989, Series A no. 161, p. 35, § 91.