

Application No. 15576/89

Hector CRUZ VARAS, Magaly Maritza BUSTAMENTO LAZO

and Richard CRUZ

against

SWEDEN

REPORT OF THE COMMISSION

(adopted on 7 June 1990)

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I. INTRODUCTION

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

A. The application

2. The applicants are Hector Cruz Varas born in 1948 (the first applicant), his wife Magaly Maritza Bustamento Lazo born in 1965 (the second applicant) and their son Richard Cruz born in 1985 (the third applicant). They are Chilean citizens. The first applicant has been deported to Chile and the second and third applicants are in hiding in Sweden. The applicants are represented before the Commission by Mr. Peter Bergquist, a lawyer practising in Stockholm.

2. The application is directed against Sweden. The Government are represented by their Agent, Mr. Hans Corell, Ambassador, Under-Secretary at the Ministry for Foreign Affairs, Stockholm.

4. The case relates to the expulsion of the first applicant to Chile and the threat of expulsion of the second and third applicants, as well as Sweden's failure to comply with the Commission's indications under Rule 36 of its Rules of Procedure that it should not expel the first applicant before the Commission had examined the application. The applicants allege violations of Articles 3, 6, 8, 13 and 25 of the Convention.

B. The proceedings

5. The application was introduced on 5 October 1989 and registered on the same day. The Commission decided on 6 October 1989, in accordance with Rule 42 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite them to submit written observations on the admissibility and merits of the application limited to the issue under Article 3 of the Convention.

6. The Commission also decided, in accordance with Rule 36 of the Commission's Rules of Procedure, to indicate to the Government 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 further. 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.

7. By letter of 16 October 1989 the Government informed the Commission that the first applicant had been expelled to Chile at 16.40 hours on 6 October 1989. The second and third applicants remained in Sweden.

8. The Government's further observations were received by letter dated 27 October 1989 and the applicants' observations were dated 3 November 1989.

9. On 9 November 1989 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application. The Commission further decided, in accordance with Rule 36 of its Rules of Procedure, to indicate to the Government 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 should take measures which would enable the first applicant to return to Sweden as soon as possible.

10. At the hearing, which was held on 7 December 1989, the applicants were represented by Mr. Peter Bergquist.

The Government were represented by their Agent, Mr. Hans Corell, and as advisers Mr. Erik Lempert, Permanent Under-Secretary at the Ministry of Labour, and Mr. Pär Boquist, legal adviser at the Ministry for Foreign Affairs.

11. Following the hearing the Commission, on 7 December 1989, declared the application inadmissible as regards the applicants' complaints under Articles 6 and 13 of the Convention and declared admissible the remainder of the application. The Commission also decided to retain for further examination the issues arising from Sweden's failure to comply with the indications under Rule 36 of the Rules of Procedure.

12. On 7 December 1989 the Commission heard Dr. Sten W. Jacobsson as a witness in the case.

13. On 15 December 1989 the Commission granted legal aid to the applicants.

14. On 21 December 1989 the text of the decision on admissibility was communicated to the parties who were invited to submit certain additional observations and information. The applicants' additional observations were dated 21 January 1990 and the Government's observations were dated 24 January 1990. Further observations were received from the Government on 2 and 23 February 1990. The parties were then invited to make final written submissions by 3 April 1990. The applicants' observations were dated 5 April 1990 and the Government's observations were dated 30 March 1990.

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

C. The present Report

16. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. C.A. NØRGAARD, President
S. TRECHSEL
G. SPERDUTI
E. BUSUTTI
G. JÖRUNDSSON
A. WEITZEL
H.G. SCHERMERS
H. DANIELIUS
G. BATLINER
Mrs. G.H. THUNE
Sir Basil HALL
MM. C.L. ROZAKIS
L. LOUCAIDES

The text of the Report was adopted by the Commission on 7 June 1990 and is now transmitted to the Committee of Ministers in accordance with Article 31 para. 2 of the Convention.

17. The purpose of the Report, pursuant to Article 31 para. 1 of the Convention, is

- (1) to establish the facts, and

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

18. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application forms Appendix II.

19. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

20. On 28 January 1987 the first applicant entered Sweden. He applied for political asylum. On 5 June 1987 the second and third applicants came to Sweden.

21. On 22 June 1987, the Police Authority (polismyndigheten) of Växjö interrogated the first applicant with particular regard to his reasons for requesting political asylum. The minutes from the interrogation contain inter alia the following:

"The applicant stated that, concerning his religious beliefs, he belonged to the mormons. His father had been the secretary of the local branch of the Socialist Party. The applicant had not been the object of any persecution for that reason. The applicant's sister sympathised with the Socialist Party, whereas one of his brothers was an active member of the Radical Party. His second brother was an active member of MIR, as a result of which he had been suspended from university. The applicant has two cousins who have fled to Australia for political reasons.

The applicant engaged in politics in 1968 when he became a member of the Radical Party's Youth Federation. The applicant became a member of the Socialist Party in 1970 and remained so after the coup d'état in 1973. In 1971 the applicant had also become a member of the FDR Party - the Revolutionary Workers' Front - where he was the Secretary until 1973. The applicant worked in a group of five persons to create opposition against the Pinochet regime. In 1976 they were arrested and brought to a military camp where they were held for two days and thereafter released. In 1976 the applicant joined the mormons. From 1976 to 1982 he remained passive politically but devoted his time to religious issues. In 1982 the applicant moved to Alemana and started political activities together with a friend who was a member of the Socialist Party. Apart from distributing leaflets he was active by distributing invitations for the Democratic Front in connection with demonstrations. He has participated in demonstrations - one every second month - and in two general strikes (August 1985 and on 4 June 1986). In December 1973 and in March 1974 he was arrested for transgressing the curfew. In August 1985 he was arrested by CNI (Centro Nacional de Investigaciones de Chile) for having entered a prohibited area on a bicycle. He was released after four hours. Apart from this he has not been the object of any intervention from the Chilean police or military. On 4 or 5 January 1987 the applicant joined the Radical Party's local branch in a neighbouring town. He did not engage in any political activities for this party. The reasons for his leaving Chile were that he could not keep his house in Alemana where he lived with his family and his poor financial

situation resulting from lengthy periods of unemployment. The applicant could not meet the mortgage costs for the house and facing the threat of an enforced sale the applicant chose to sell the house."

22. In a memorial to the National Immigration Board (statens invandrarverk) dated 27 July 1987 the first applicant, through his legal counsel, commented upon the above interrogation. He submitted that, when he had been arrested in the beginning of 1976 together with four friends, they had been ill-treated. They were not allowed to sleep and were obliged to stand up naked. One friend was beaten.

23. On 21 April 1988 the National Immigration Board decided to expel the applicants and prohibited them from returning to Sweden before 1 May 1990 without the permission of the Immigration Board. The Board also rejected the applicants' requests for declarations of refugee status and travel documents. In the decision of the National Immigration Board the following is stated:

"Cruz Varas has invoked political reasons for staying in Sweden. Cruz Varas has not invoked sufficiently strong political reasons to be considered as a refugee under Section 3 of the Aliens Act. The circumstances of the case are further assessed not to be sufficient for granting a residence permit under Section 6 of the Aliens Act. In the case none of the conditions are at hand which, under Section 33 of the Aliens Ordinance, can lead to the granting of a residence permit after entry into Sweden. Cruz Varas' application for a residence and a work permit as well as a declaration of refugee status is rejected. So is his application for an alien's passport. Cruz Varas is not a refugee under the 1951 Geneva Convention on the legal status of refugees. Cruz Varas' applications for travel documents is rejected. As Cruz Varas is staying in Sweden without a residence permit he is ordered to be expelled under Section 38 of the Aliens Act. He is prohibited, in accordance with Section 39 of the same Act, from returning to Sweden before 1 May 1990 without the permission of the National Immigration Board."

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

25. In an opinion of 27 June 1988 the National Immigration Board proposed that the appeal be rejected.

26. The applicants' appeal was rejected by the Government on 29 September 1988.

27. Before the Police Authority at Varberg the applicants alleged that there were obstacles against the enforcement of the expulsion order and requested that their case be transferred to the Immigration Board. The first applicant was interrogated by the Police Authority of Varberg on 19 October 1988. He said that he had new reasons to invoke in support of his application for asylum. He had continued to work in Sweden for Frente Patriótico Manuel Rodriguez (FPMR). He had sold leaflets to support political prisoners in Chile. CNI operated in Sweden and certainly had knowledge of the applicant's activities. The applicant therefore ran the risk of political persecution, torture and possibly death, if he returned to Chile. FPMR is a radical organisation which has actively tried to kill Pinochet. The applicant explained that he had not worked for FPMR in Chile, but only after he arrived in Sweden. His activities, which started in February 1988, had taken place in Varberg. The group had started to sell a magazine called El Rodriguista.

28. The applicants' request that their case be transferred to the Immigration Board was refused on 21 October 1988. The applicants' appeal was rejected by the Immigration Board on 26 October 1988. On 27 October 1988 the applicants again requested that their case be transferred to the Immigration Board. On 28 October 1988 the Police Authority refused this request, and the applicants' appeal was rejected by the Board on 28 October 1988. In his letter of appeal Mr. Cruz Varas, through a new legal counsel, submitted that he had contributed to signed articles in the paper El Rodriguista and featured in other articles and expressed himself critically about the regime in Chile. Mr. Cruz Varas had hidden a person in his house in Villa Alemana. This person was sought by the police. This piece of information had been published in Swedish newspapers, a fact which implied a risk of political persecution of Mr. Cruz Varas if he were returned to Chile. In support of his appeal Mr. Cruz Varas submitted a certificate by Juan Marchant dated 23 October 1988 in which it is said that he and his family were politically active in Grupo de Apoyo al Movimiento Frente Patriotico Manuel Rodriguez in Varberg. 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 the articles it is said inter alia that Mr. Cruz Varas had hidden friends sought by the police in his house in Chile and that in Sweden he was active for FPMR.

29. By a decision of 21 October 1988, the Police Authority of Varberg decided that the applicants should be expelled to Chile on 28 October 1988 at 16.00 hours by plane from Landvetter Airport in Gothenburg. However, the applicants did not appear in time for the departure and the expulsion could therefore not be enforced.

30. By letter dated 30 December 1988 the applicants again alleged that there were obstacles against the enforcement of the expulsion order. The allegations were submitted to the Police Authority at Varberg.

31. On 13 January 1989 the Police Authority interrogated the applicant, his new counsel being present. The minutes of the interrogation contain the following:

"Cruz wishes to add to his statements the following information especially with regard to the punishment 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 in the head. He was hung up by his feet and in this position he was also photographed. He was asked where Luis Herrera was, and this Cruz 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 other than saying that they were going to shoot him later the same day. He was blindfolded and after that Cruz 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 Cruz was a communist, which Cruz 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 at the same place. 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 in the morning Cruz was driven away and was released after being held in arrest 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 on his person had been submitted to the authorities, Cruz said that he had been betrayed many times earlier and he could therefore not trust anyone.

In August 1986, 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 Vina del Mar. Four men came in a car, threatened him with a knife against his throat and captured him. They were civilians in a civilian vehicle. They travelled in the direction of Vina 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 Vina del Mar before he was set free on the named 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 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, Cruz 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 Cruz's 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. Cruz 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 Cruz 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, Chairman of the Cultural Centre for Freedom in Belloto, one from Ricardo Poblete Munoz, co-ordinator in the organisation of neighbourhood committees, as well as a certificate from the Commission for Human Rights for Youths.

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.

Counsel Peter Bergquist wishes to point out that Cruz cried (tears in his eyes) when he talked about the torture of January 1987. Cruz also had emotional difficulties in talking about the incident when he was photographed naked hanging upside down. Bergquist also wishes the minutes to include that the interrogator asked Cruz if the dog had been found poisoned and in answer to this Cruz related what he said above. The reason for this comment is that Bergquist wishes in this way to illustrate the reliability of Cruz's statement. From a witness psychology point of view it is otherwise easy just to answer yes to a question of this type.

In addition Bergquist wished to say that he has placed Cruz on the waiting list at the Red Cross Documentation Centre for Tortured Refugees in Stockholm. The reason for this is to obtain thereby a credibility judgment on the statements about torture that Cruz has made. Bergquist cannot say at present how long this will take but says that since Cruz is at the expulsion stage he will be given priority. Bergquist's opinion is that Cruz ought to be able to be examined within a few months."

32. The certificates mentioned in the minutes are a certificate dated 1 November 1988 by the President of the Centro Cultural "Libertad" in El Belloto stating that Mr. Cruz Varas took part in the activities of that institution until he left Chile. It is said that his psychological and physical integrity is threatened if he were to stay in his home country. A second certificate dated 23 November 1988 by the

Comision de Derechos Poblacionales Valparaiso states that Mr. Cruz Varas was persecuted by the dictatorship from November 1983 to August 1986. He was active in the socialist youth department where he was the representative and leader of the revolutionary society for Libres Pensadores Humanistas "Artesanos de las Letras" in Villa Alemana. The certificate also indicates that he had been arrested in Santiago and twice in La Serena - in November 1974 and September 1977. He was threatened with death in Vina del Mar in 1983. In 1986 and January 1987 he was arrested by civilians and severely beaten. A third certificate dated 20 November 1988 by the Comision de Derechos Juveniles Quilpue contains similar statements.

33. On 13 January 1989 the Police Authority transferred the issue of the enforcement of the expulsion order to the Immigration Board.

34. On 13 January 1989 the Police Authority decided that Mr. Cruz Varas should be placed under supervision which implied that he should report to the police twice a week. As reasons for the decision it was indicated that Mr. Cruz Varas could be expected to evade the enforcement of the expulsion as he had been in hiding for more than two months and his wife and son were also in hiding. By letter of 2 March 1989 Mr. Cruz Varas submitted to the National Immigration Board a medical certificate dated 20 February 1989 and issued by 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 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.

35. In an opinion dated 8 March 1989, the National Immigration Board, while transferring the case to the Government, expressed the opinion that there were no obstacles against the enforcement of the expulsion order. In its letter to the Government the Board stated inter alia as follows:

"Cruz Varas has had the opportunity on several occasions of presenting his case to the Police Authority and the National Immigration Board. On these occasions he has given contradictory information and radically changed his story. As to its contents certain information is remarkable. This applies in particular to the couple's B investigation but also later. Even if a victim has difficulties to describe what he has been subjected to the Board finds, making an overall assessment and in the light of what has been submitted in the course of the handling of the case, that there is no reason to believe what has now been alleged.

The National Immigration Board maintains that such circumstances as referred to in Sections 3 or 6 of the Aliens Act are not at hand in the case. In view of this the Board considers that there are no obstacles under Sections 77 or 80 of the Aliens Act against enforcing the expulsion order in relation to Cruz Varas."

36. By letter dated 11 August 1989 the applicants submitted further documents to the Government. Mr. Cruz Varas invoked in particular two medical certificates: one by Mr. Sten W. Jacobsson and one by Mr. Hans-Peter Søndergaard. The medical certificate issued by Mr. Jacobsson, who is a doctor of forensic medicine (rättsmedicin), is dated 9 May 1989 and reads as follows:

"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 accounted for 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 accounted for in the examination protocol. Due to lack of time no photographs have been taken

but can be taken if requested.

In view of the above I make the following statement:

That the patient has said that he has been subjected to assault, that he has, as objective signs, shown, on the one hand, rest status after a collar-bone fracture as after blunt-ended violence, and, on the other hand, a typically rounded 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 metal 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."

The annex to the certificate reads as follows:

"The patient presents himself first and then his father who was the secretary in the Partido Socialista. They lived in the town 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 Lazalena. The patient was also a member of Partido Socialista which was 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 brought to a security house 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 UNIDADES DE FORMENTEO, 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 several times which caused him to faint. He was sodomised. 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 E vitamins against these problems. In November 1987 his dog was found dead, hanged on an iron fence which surrounded his house. There was a paper stating that this would happen to all communists. It was signed HACHA which would be the same as it having been conducted by 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."

37. The certificate issued by Mr. Søndergaard, who is a specialist in psychiatric diseases and deputy chief doctor at the psychiatric clinic of the Karolinska Hospital, is dated 28 June 1989 and states the following under the heading 'Assessment':

"Thus a 41 year-old father from Chile who on several occasions has had his application for political asylum rejected. From the investigation by the lawyer it appears that there are a number of events which indicate that he has for a long period of time been under strong pressure on account of his political activity. He has further stated that he has been arrested on several occasions and in that connection been subjected to ill-treatment or assault. From the manner in which the patient presents his story and the reactions which are partly described and partly revealed during the examination there are strong indications that it is a typical case of post-traumatic stress syndrome. In the present situation these symptoms appear with a rather resourceful person who, irrespective of this, appears to be considerably shaken and where it is obvious that he is on the border of what he can compensate with his different resources. From the lawyer's examination it also appears that the family has suffered from his state, for instance the description of the behaviour of the son is typical of a so-called second generation phenomenon where the parents' psychiatric damage gives rise to problems in the family."

38. In the letter to the Government of 11 August 1989, Mr. Cruz Varas' legal counsel gave inter alia the following description of Mr. Cruz Varas' background:

"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. During the seventies he was active primarily in the Socialist Party. About 1983 he came into contact with people he believes belong to Frente Patriotico Manuel Rodriguez. He has taken part along with these persons in certain military activities.

As a result of his political work he was tortured in 1973, 1976, 1982, 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. 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. Hector was at the meeting because his brother's children attended the school, but his brother could not attend the meeting. When asked why his brother's wife did not attend instead, Hector replied that both parents thought he was good at attending meetings.

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 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 number 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 Patriotico Manuel Rodriguez by name, but Hector has 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 they 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 other two friends 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 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 presented 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."

39. Mr. Cruz Varas also invoked medical certificates dated 21 June 1989 and 5 October 1989 which had been issued by the hospital of Varberg concerning the third applicant. Further, he invoked a document by Luis Nunez and by Juan Rocas, and a letter from UNHCR's Regional Office for the Nordic Countries dated 16 August 1989 stating as follows:

"We wish to inform that UNHCR strongly believe that any victim of torture should be protected against return to a country where, bound on previous experience, he/she would have a well-founded fear of being subject to similar treatment.

Furthermore, 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."

40. In a letter of 5 October 1989, the same Office clarified that:

"Therefore we would like to point out that we believe that Mr. Hector Cruz Varas ... should be protected against return to 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."

41. 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.

42. On 5 October 1989 the Government (Ministry of Labour) found that there were no obstacles under Sections 77 and 80 of the Aliens Act against the enforcement of the expulsion of Mr. Cruz Varas and his family.

43. On 6 October 1989 the National Immigration Board decided not to stop the enforcement of the expulsion and on the same day Mr. Cruz Varas was expelled to Chile. His wife and son went into hiding in Sweden.

Facts relating to the time after the expulsion

44. On 7 October 1989 Mr. Cruz Varas arrived at the airport in Rio de Janeiro, where he applied for asylum but it was refused. He was then put on a plane to Santiago, where he arrived on 8 October.

45. He did not have any identity documents and when he came to the passport control he was taken aside and was photographed. Mr. Cruz Varas states that he was forced to sign a declaration in which he declared that he had been in Sweden for financial reasons and that he promised not to engage in any political activities in Chile.

46. Mr. Cruz Varas first went to stay with a brother and sister-in-law for about a week and then he went to stay with his parents in La Serena for a week. Thereafter he returned to his home in Villa Alemana. He remained in Chile from 8 to 29 October.

47. On 26 and 27 October he participated in political meetings, the latter in favour of the presidential candidate Mr. Aylwin. Mr. Cruz Varas alleges that on that occasion an unknown person approached him and

threatened him, inter alia, by saying that "although your wife and child in Sweden are safe, you also have a family in Chile". Furthermore, during the period that Mr. Cruz Varas was in Chile, his brother-in-law was attacked in the street and badly injured by unknown persons. Two other brothers-in-law were stopped, searched and registered by officials who also asked them questions about Mr. Cruz Varas.

48. On 29 October 1989 Mr. Cruz Varas left Chile for Argentina. He arrived in Mendoza where he stayed two months in three different hotels. On 10 January 1990 he went to Buenos Aires, where he visited the Swedish Embassy. He is now staying in a hotel in Buenos Aires.

Oral evidence before the Commission

49. Dr. Sten W. Jacobsson was heard as a witness by the Commission on 7 December 1989. He made the following statement. He is an associate professor (docent) at the Karolinska Institute in the subject forensic medicine (rättsmedicin). He also works on a voluntary basis for the Red Cross to help persons who claim to have been tortured. The Voluntary Red Cross Group is composed of three doctors, one psychiatrist and other persons assisting the patients. Mr. Jacobsson has 20 years' experience in assessing scars and wounds in patients. The routine in examining alleged victims of torture is that the first time Mr. Jacobsson presents himself and they talk about the victim's background, education and maybe touch upon the alleged torture. The second time the victim is asked to write his story, if possible. The third time they discuss the torture and then Mr. Jacobsson makes his statement. In some cases there are one or two further meetings. Normally an interpreter and a nurse are present.

50. Mr. Cruz Varas was on the group's waiting list from November 1988. Mr. Jacobsson met Mr. Cruz Varas for the first time at the end of January or the beginning of February 1989 for about half an hour. He then met Mr. Cruz Varas in April for 45 minutes to one hour and then on 9 May for 45 minutes to one hour. The meetings took place with a Spanish interpreter. Mr. Jacobsson describes the examination of Mr. Cruz Varas as difficult because he had great problems in talking about the treatment which he said he had been subjected to in Chile. Mr. Cruz Varas was very pressed when asked about what he called his "private" torture. He said he had once been tortured sexually by some group or the police in Chile. They pressed an electric instrument in his anus and also raped him sexually by the anus. When Mr. Cruz Varas told Mr. Jacobsson about this he was sweating and beads of sweat were dripping from his lips and his forehead. In Mr. Jacobsson's view this reaction very much suggests that he has lived through this situation. It is real for him.

51. With respect to the damage to his collar bone it can be said that the collar bone fracture could have been caused by any blunt force but if the blunt force happens by accident, the patient usually seeks a doctor. It is easy to heal a wound like this, but apparently his collar bone fracture has not been treated properly.

52. As regards the burn marks, Mr. Cruz Varas claimed that the police put a hot iron wire against his upper arm which resulted in a burn. The burn mark is elongated, and very much consistent with a burn scar. It could also be an electric burn.

53. Mr. Jacobsson's general impression is that Mr. Cruz Varas was credible. The wounds are well consistent with his story. In the field of forensic medicine the strongest term used is about 80% probability. But in view of the wounds combined with his story there is a very high probability that this is true. Mr. Jacobsson handed in two photographs, one of the collar bone and one of the forearm. He further explained that Mr. Cruz Varas was so scared that he had refused to have his face photographed. In Mr. Jacobsson's experience, victims of sexual torture are often so damaged that they do not talk about it, not even to their husband or wife.

54. Mr. Jacobsson could not indicate the age of the wounds. They could be from six months to several years old. Mr. Cruz Varas told Mr. Jacobsson that the wounds had been caused in 1986.

55. Mr. Jacobsson said that Mr. Cruz Varas had mentioned the sexual abuse only on the last occasion they met. The physical examination did not however provide any evidence of sexual abuse. Mr. Jacobsson said that it is impossible to find evidence in the anus.

56. The statement in the present case was made after Mr. Jacobsson had discussed the case with his colleagues Dr. Håkan Eriksson and Dr. Katarina Svinhufvud who had also met Mr. Cruz Varas.

57. Dr. Jacobsson has been working with allegations of torture from Chile since the end of 1984 and the beginning of 1985. The type of torture used in Chile is one of blunt force caused by rifles and by batons - not so very often blunt force to the soles of the feet as in other countries. The third one is submersion - submersion in mud-water. Then there is the sexual abuse, sexual abuse against women and men. For women this means rape, vaginally and rectally, and electric torture on the labia and the clitoris. For men it involves electric torture against the testes and blunt force against the testes. Very often it is combined with a threat. They say, "now we will torture you on your sexual organs so that you can never make love again, so that you can never have children again". That is what the victims tell Mr. Jacobsson - this combination of threat and physical torture. Mr. Cruz Varas' picture is clear-cut, typical for Chile - blunt force and sexual abuse.

Further written evidence

58. After the expulsion of Mr. Cruz Varas from Sweden, the parties have submitted a number of documents.

59. The applicants have submitted a certificate indicating that Mr. Cruz Varas has been active in a local branch at Varberg of FPMR (Frente Patriótico Manuel Rodríguez).

60. The applicants have further submitted a medical certificate dated 31 October 1989 by Mr. Erling Skoglund, Chief Doctor at the Children's and Juveniles' Care of the Stockholm County Council concerning the second and third applicants.

61. The Government have submitted a memorandum from the Swedish Embassy in Santiago dated 2 January 1990 which contains a report following an inquiry undertaken in accordance with the Ministry's request for information regarding possible political activities of Mr. Cruz Varas, and political persecution to which he may have been exposed. The inquiry had been made by Ms. Jenny Malmqvist, Second Secretary at the Embassy, during a visit to Villa Alemana, in the company of the President of the Commission of Human Rights at Valparaiso (with general responsibility for the fifth region), the lawyer Luis Bork, on 20 December 1989. The report is supplemented by affidavits by political parties and by the Commission of Human Rights at Villa Alemana. The report concludes that, as regards political activities, all representatives of political parties who have been questioned have said that they do not know of Mr. Cruz Varas. Those neighbours in Villa Marconi, who have been questioned, say that they know of Mr. Cruz Varas as a person, but that they are not aware that he has been carrying out any political activity.

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

62. As regards possible political persecution, the Government have

submitted an affidavit by the President of the Human Rights Commission at Villa Alemana, Maria Teresa Ovalle, obtained by the Swedish Embassy in Santiago. It appears from that certificate that Mr. Cruz Varas is not known to the Commission and that consequently no persecution directed against him is known. It also appears from that certificate 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.

63. The applicants have submitted, inter alia, a medical certificate issued by Professor Mariano Castex of Buenos Aires and dated January or February 1990. This certificate includes the following statement:

"As a conclusion one may state that Mr. Hector Cruz Varas suffers a serious 'post-traumatic stress disorder' installed 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 birth land, has incremented the pathological dimension of his sufferings, and if conditions are not given for an adequate psychological and psychiatric treatment, he might suffer from a worsening of his mental disorder with imprevisible 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 kid."

64. The applicants have also submitted a report dated 18 January 1990 of a former Professor of Psychology at the Chile University, Marcello Ferrada-Noli, currently researcher at the Karolinska Institute, Stockholm, which concludes that:

"My opinion is that Hector Cruz is in the risk zone for the formation of a suicidal crisis that can be resolved in a suicide attempt. If this occurs, the lethality implied in the attempt could be high."

B. The indications under Rule 36

65. On 6 October 1989, at 09.00 hours, the Commission decided to apply Rule 36 of its Rules of Procedure.

66. The Commission's indication under Rule 36 had 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."

67. 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.

68. On 6 October 1989, i.e. the same day, at 09.20 hours, the Secretariat of the Permanent Under-Secretary of the competent Ministry, i.e. the Ministry of Labour, was informed of the Commission's indication. 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 another authority.

69. On the same day, i.e. on 6 October 1989, following a request from Mr. Cruz Varas, the National Immigration 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.

70. 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.

71. 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."

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

73. 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.

74. On 2 December 1989 and 7 March 1990 the National Immigration Board rejected requests from Mr. Cruz Varas to be allowed to return to Sweden.

C. Relevant domestic law

75. The 1980 Aliens Act was in force until 1 July 1989 when the 1989 Aliens Act entered into force. Most decisions in the present case have been taken under the 1980 Act.

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 when directed against the life or liberty of the alien or otherwise of a severe nature (political persecution)."

Section 6 reads:

"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 reads:

"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 reads:

"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 reads:

"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 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."

III. OPINION OF THE COMMISSION

A. Points at issue

76. The principal issues to be determined are:

- whether there has been a violation of Article 3 (Art. 3) of the Convention;
- whether there has been a violation of Article 8 (Art. 8) of the Convention;
- whether Sweden failed to comply with its obligations under Article 25 para. 1 (Art. 25-1) of the Convention when it did not act in accordance with the Commission's indications under Rule 36 of the Commission's Rules of Procedure.

B. Article 3 (Art. 3) of the Convention

77. The applicants allege a violation of Article 3 (Art. 3) of the Convention on the ground that Mr. Cruz Varas' expulsion to Chile exposed him to a real risk of being tortured in the way he had been tortured before; in any case the torture to which he had been subjected in the past constituted such a trauma that his forced return to Chile amounted to inhuman treatment. The applicants also allege that Article 3 (Art. 3) of the Convention would be violated if the third applicant were to be expelled to Chile.

Article 3 (Art. 3) of the Convention reads as follows:

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

78. The applicants submit that they have shown beyond every reasonable doubt that Mr. Cruz Varas has been tortured in Chile before he came to Sweden. It is impossible to obtain stronger evidence. Furthermore, they have shown that he has been a member of FPMR, whose members still risk being tortured in Chile. The applicants also contend that they have presented proof to the effect that Mr. Cruz Varas and his relatives have, after his return to Chile, been subjected to such persecution as may lead to torture. As regards the information obtained by the Swedish Embassy in Santiago (paras. 61 and 62 above), the applicants state that Mr. Cruz Varas has never claimed that his contacts with the Communist Party and the Radical Party were of such character that they would be known to the Parties' leadership. As regards the Socialist Party, the Government have submitted an affidavit from a branch to which Mr. Cruz Varas did not belong. The applicants state that MIR and FPMR were illegal organisations formed so as to ensure that all those involved should know as little as possible about each other's situation. In respect of the political persecution, the Human Rights Commission at Villa Alemana bases its view on the hypothetical assumption that all cases of torture are known, which is incorrect since it is a well-known fact that many victims of torture never report what they have been subjected to.

79. The Government submit that Mr. Cruz Varas' description of his background and the alleged torture is not credible. They point out that Mr. Cruz Varas raised the alleged torture before the Swedish authorities at a very late stage. Further, Mr. Cruz Varas' story is contradictory and is not compatible with the information obtained by the Swedish Embassy in Santiago. In fact, none of the spokesmen of the human rights organisations in Chile which have been contacted has ever heard that Mr. Cruz Varas had been subjected to imprisonment, even less torture, by the Chilean authorities or that he had participated in any

political activities. If that had been the case, it would have been known in such a small place as Villa Alemana. As regards the findings by Dr. Jacobsson, the Government do not contest the objective physical findings. However, although Dr. Jacobsson has a long experience, the Government point out that he is not an expert in psychiatry and that his assessment should not be given the same weight as if it had been made by a specialist. Moreover, Dr. Jacobsson stated that it could not be established with certainty that his findings stemmed from torture. His opinion that the injuries came from torture was due to his assessment of Mr. Cruz Varas' behaviour when telling his story in combination with the fact that the story was compatible with the injuries. The Government submit that the lacking credibility of the story told by Mr. Cruz Varas casts a shadow on the evidence given by Dr. Jacobsson. Furthermore, the Government submit that the fact that Mr. Cruz Varas has not been given any particular attention by the Chilean authorities upon his return to Chile confirms that, at the time of the expulsion, there was no risk that he would be exposed to treatment contrary to Article 3 (Art. 3) of the Convention in Chile. The fact that Mr. Cruz Varas may have moved around and then left Chile after a short period does not contradict this view. Consequently, the Government consider that there has been no breach of Article 3 (Art. 3) of the Convention.

80. In the Soering case, the Court stated as follows (Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, pp. 35-36, para. 91):

"In sum, 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. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (Art. 3) of the Convention."

81. In the Commission's view, this test also applies to cases of expulsion. Consequently, it must be examined whether, at the time of the expulsion, there were substantial grounds for believing that Mr. Cruz Varas faced a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention, if deported to Chile.

82. This examination involves, on the one hand, an establishment of the facts as regards Mr. Cruz Varas' personal background and, on the other hand, an assessment of the general situation in Chile. The Commission considers that the general situation in Chile at the relevant time was not such that an expulsion to Chile would generally be a violation of Article 3 (Art. 3) of the Convention. In order to raise an issue under Article 3 (Art. 3) there must be some substantiation that there existed a specific risk of treatment contrary to Article 3 (Art. 3) for the first applicant in the particular circumstances of the case.

83. The Commission considers that the evidence submitted by the applicants suggests that Mr. Cruz Varas has in the past been subjected in Chile to treatment contrary to Article 3 (Art. 3) of the Convention. The medical certificate established by Dr. Jacobsson and the evidence given by him before the Commission support the affirmation that Mr. Cruz Varas has been so treated. Although there are, as the Government suggest, certain elements which reduce the credibility of Mr. Cruz Varas' story, the Commission accepts, on the basis of the material before it, that Mr. Cruz Varas has been subjected in the past in Chile to treatment contrary to Article 3 (Art. 3) of the Convention and that the only plausible explanation is that this treatment has been carried out by persons for which the then Chilean regime was responsible.

84. In order to assess the risk that Mr. Cruz Varas would again be subjected to such treatment upon his return to Chile, regard must be had to Mr. Cruz Varas' political activities in the past and in Sweden as well as to the general situation in Chile.

85. With regard to Mr. Cruz Varas' political activities, the Commission recalls that the applicant has submitted certain evidence in support of his affirmation that he has been involved in political activities in Chile (cf. paras. 31 and 32), and in Sweden (para. 59). However, even if it is accepted that Mr. Cruz Varas has been engaged in these political activities, the material available to the Commission does not show that his political activities in Chile prior to coming to Sweden were so important or of such a nature as to make him a particular subject of possible persecution by the Chilean authorities if he returned to Chile. This latter consideration must be weighed against the political situation in Chile at the time of the expulsion. In this respect, the Commission observes that the political situation, including the human rights situation, had changed considerably between the time when Mr. Cruz Varas left Chile in January 1987 and the time of the expulsion, i.e. October 1989. In October 1989, important steps had in fact been taken to restore democracy and respect for human rights. The Commission notes that the political changes in Chile, which had taken place up to October 1989, have been confirmed thereafter.

86. As the Commission has accepted, on the basis of the material before it, that Mr. Cruz Varas was ill-treated during a period ending in January 1987 (para. 83 above) and as the political situation in Chile had substantially improved between that time and the time of his expulsion in October 1989, it cannot be said that at the time of the expulsion there existed a real risk that Mr. Cruz Varas would again be exposed to treatment contrary to Article 3 (Art. 3) of the Convention in Chile.

87. In this context, the Commission has also examined Mr. Cruz Varas' contention that the expulsion involved such a trauma for him that in itself it constituted a breach of Article 3 (Art. 3).

88. The Commission accepts that a return to a country where a person has been ill-treated may involve hardship for the person concerned. The Commission however recalls that ill-treatment or punishment must reach a certain level of severity if it is to fall within the scope of Article 3 (Art. 3) of the Convention. The assessment of this level depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration as well as its physical or mental effects (cf. Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, p. 39, para. 100 with further references).

89. The Commission finds it established that at the time of his expulsion Mr. Cruz Varas was in a bad state of health (para. 37) and that his health appears to have deteriorated thereafter (paras. 63-64).

90. The Commission considers that, although the expulsion of Mr. Cruz Varas must have involved serious hardship for him, it nevertheless did not reach the level of severity necessary for Article 3 (Art. 3) to be applicable.

91. The applicants also allege that the possible expulsion of the third applicant would involve a violation of Article 3 (Art. 3).

92. The Commission considers that, although the expulsion of the son would involve serious problems for him, the circumstances are not such as to indicate a violation of Article 3 (Art. 3) of the Convention.

Conclusion

93. The Commission concludes, by 8 votes to 5, that there has been no violation of Article 3 (Art. 3) of the Convention.

C. Article 8 (Art. 8) of the Convention

94. The applicants allege a violation of Article 8 (Art. 8) of the Convention on the ground that they have been separated as a result of the expulsion to Chile of Mr. Cruz Varas whereas the other applicants remained in Sweden and are now in hiding.

Article 8 (Art. 8) of the Convention 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."

95. The Government submit that the splitting up of the family was the result of the applicants' own actions for which the Government cannot be held responsible. The authorities' intention was to expel all the applicants at the same time. In any event, the Convention does not protect the right of an alien to enter a certain country and be granted asylum there, nor the right for a family to be united in a State where no member of the family has a permit to remain.

96. The Commission considers that the issue which arises under Article 8 (Art. 8) of the Convention is whether, in the circumstances, the expulsion of only Mr. Cruz Varas, leaving his family behind, constituted a lack of "respect" for the applicants' family life.

97. The Commission recalls that there is no general right under the Convention to enter, reside in and not to be expelled from a given country. However, the exclusion of a person from a country where his close relatives reside may raise an issue under Article 8 (Art. 8) of the Convention (see e.g. No. 9285/81, Dec. 6.7.82, D.R. 29 p. 205). In such a situation, it is incumbent on the applicants to show that there are obstacles to establishing family life in their home countries or that there are special reasons why that could not be expected of them (Eur. Court H.R., Abdulaziz, Cabales and Balkandali judgment of 28 May 1988, Series A no. 94, p. 34, para. 68).

98. The Commission recalls that the first applicant arrived in Sweden on 28 January 1987 and that the other applicants arrived on 5 June 1987. They did not obtain a permit to remain in Sweden and on 21 April 1988 the first decision to expel the applicants was taken. After further proceedings, the expulsion order was enforced in respect of Mr. Cruz Varas on 6 October 1989, whereas the other applicants evaded the expulsion and went into hiding in Sweden.

99. The Commission is satisfied that Mr. Cruz Varas' expulsion, based on the provisions of the Aliens Act, was lawful and formed part of the enforcement of the policy of immigration control.

100. The Commission also observes that the Swedish authorities planned to expel all the applicants together but that they were prevented from doing so, as the second and third applicants evaded the expulsion by going into hiding. It is also recalled that Mr. Cruz Varas had been taken into custody on 4 October 1989 in order to ensure the enforcement of the expulsion order. The fact that the second and third

applicants evaded the expulsion is as such outside the responsibility of the respondent State. The question is whether it was nevertheless acceptable to expel Mr. Cruz Varas alone, thereby splitting up the family.

101. The Commission considers that in general the options open to the authorities would either be to take the whole family into custody in advance to ensure the expulsion or not to enforce the expulsion of Mr. Cruz Varas. None of these options is free from reproaches. If in cases of this kind whole families were taken into custody, this would mean a considerable increase of individuals deprived of their liberty and notably children. If, on the other hand, one member of the family was not expelled when other members of the family had gone into hiding, this would seriously impede the effectiveness of the immigration control. It should also be recalled that in the present case the Swedish authorities had first planned to enforce the expulsion order on 28 October 1988. However, none of the applicants appeared in time for the departure and the expulsion was therefore cancelled.

102. The Commission is therefore of the opinion that the splitting up of the family, as a result of the family members' failure to comply with lawful orders, does not show lack of respect for the applicants' family life.

103. In view of the above, the Commission finds that, in the circumstances, the separation of the family was not a violation of Article 8 (Art. 8) of the Convention.

Conclusion

104. The Commission concludes, by a unanimous vote, that there has been no violation of Article 8 (Art. 8) of the Convention.

D. Article 25 para. 1 (Art. 25-1) of the Convention

105. The Commission has examined whether Sweden failed to comply with its obligations under Article 25 para. 1 (Art. 25-1) of the Convention when it expelled Mr. Cruz Varas despite the Commission's indication under Rule 36 of the Rules of Procedure that it was desirable not to expel him to Chile until the Commission had had an opportunity to further examine the application at its session held from 6 to 10 November 1989. The Commission has limited its examination to this first indication. It finds it unnecessary also to examine the Government's failure to act in accordance with the Commission's subsequent indications under Rule 36 in regard to the first applicant.

Article 25 para. 1 (Art. 25-1) of the Convention reads:

"The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this 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 of the Commission's Rules of Procedure reads:

"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."

106. The Government submit that the indication under Rule 36 is a non-binding recommendation; the Convention does not oblige the

respondent State to follow such an indication given by the Commission. Further, the language of the indication shows that it is not binding. The fact that such indications have been complied with in the past does not make the indication mandatory. Finally, the Government were unable under Swedish law to act in accordance with the indication.

107. Article 36 (Art. 36) of the Convention authorises the Commission to draw up its rules of procedure. In the Rules of Procedure which have been adopted on the basis of this Article, a provision dealing with interim measures was included in Rule 36. It has not been alleged that the Commission, when including this provision, acted outside its competence under Article 36 (Art. 36) of the Convention. Moreover, it should be noted that the European Court of Human Rights has acted in a similar way by including in Rule 36 of the Rules of Court a provision which gives the Court and its President competence to indicate to a party or an applicant any interim measure which it is advisable for them to adopt.

108. In these circumstances, there is no doubt that the Commission has power to indicate interim measures under Rule 36. This view also finds support in the Court's judgment in the Soering case (Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, paras. 4 and 111 in fine).

109. The Government refer to the language of the indication and submit that it is a recommendation which is not binding. They rely on a statement by the Court in the Soering judgment (para. 111 in fine) which reads as follows:

"This finding (that the implementation of the extradition order would give rise to a breach of Article 3) (Art. 3) in no way puts in question the good faith of the United Kingdom Government, who have from the outset of the present proceedings demonstrated their desire to abide by their Convention obligations, firstly by staying the applicant's surrender to the United States authorities in accord with the interim measures indicated by the Convention institutions and secondly by themselves referring the case to the Court for a judicial ruling."

110. In the Government's view, this statement by the Court implied that it was an act of good faith to follow the indications given by the Convention institutions, but not an obligation under the Convention to abide by the indications.

111. The Commission finds that the quoted statement by the Court can equally be read as supporting the opposite view, since the Court refers to the Government abiding by their Convention obligations in connection with staying the applicant's surrender in accord with the interim measures.

112. The Commission considers that the indication given must be seen in the light of the nature of the proceedings before the Convention organs and of the Commission's role in these proceedings.

113. As provided for in Article 19 (Art. 19) of the Convention the Commission is one of the two organs, set up by the Convention "to ensure the observance of the engagements undertaken by the High Contracting Parties in the ... Convention ...".

114. The machinery set up by the Convention must be seen as a whole. The proceedings before the Convention organs, will terminate either with a decision declaring the application inadmissible or with a friendly settlement, or with a binding decision by the Court or the Committee of Ministers. The purpose of an indication under Rule 36 is to preserve the rights of the parties, and to safeguard the general interest, until a final decision has been taken by the Strasbourg organs.

115. As the Government rightly submit the proceedings before the Convention organs are of a declaratory nature. The Commission cannot issue a binding decision that a High Contracting Party has violated the Convention, whereas the Court and the Committee of Ministers have that power. The Commission's task is of a preliminary nature as regards the merits of the case, and its opinion as to whether there is a violation is not binding. The terms of the Commission's indication under Rule 36 must be read against this background.

116. The Commission has noted that the question whether interim measures indicated by international tribunals are binding or not is the subject of controversy in international law and that no uniform legal view exists. The Commission is however not required in the present case to decide whether in general an indication under Rule 36 is binding on the respondent State. Its examination can be limited to the question whether in the circumstances of the present case, the fact that Sweden did not act in accordance with the Commission's indication under Rule 36 of its Rules of Procedure constituted a failure by Sweden to comply with its obligations under Article 25 (Art. 25) of the Convention.

117. Under Article 25 para. 1 (Art. 25-1) in fine, the High Contracting Parties, who have recognised the right of individual petition, have undertaken not to hinder the effective exercise of this right. This undertaking does not imply a general duty on the State to suspend measures at the domestic level or not to enforce domestic decisions when an individual has lodged an application with the Commission.

118. However, the Commission is of the opinion that there are special circumstances where the enforcement of a national decision would be in conflict with the effective exercise of the right to petition. That is the case, in particular, when enforcement of the decision would lead to serious and irreparable damage to the applicant and the Commission has given an indication under Rule 36 of its Rules of Procedure that it is desirable not to enforce that decision.

119. The Court has stated as follows in the *Soering* case (*Soering* judgment, loc. cit., pp. 34-35, paras. 87 and 90):

"87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 90, para. 239). Thus, 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, inter alia, the *Artico* judgment of 13 May 1980, Series A no. 37, p. 16, para. 33). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' (see the *Kjeldsen, Busk Madsen and Pedersen* judgment of 7 December 1976, Series A no. 213, p. 27, para. 53)."

...

"90. It is not normally for the Convention institutions to pronounce on the existence or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3 (Art. 3) by reason of its foreseeable consequences in the requesting country, a departure from this principle is necessary in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the

safeguard provided by that Article (see paragraph 87 above)."

120. In the Commission's view it follows from Article 25 para. 1 (Art. 25-1) and the above statement by the Court that, on the one hand, an applicant is entitled to the "effective exercise" of his right to petition the Commission, within the meaning of Article 25 para. 1 (Art. 25-1) in fine, i.e. a Contracting State shall not prevent the Commission from making an effective examination of the application and, on the other hand, an applicant who claims a violation of Article 3 (Art. 3) of the Convention is entitled to an effective examination of whether an intended extradition or expulsion would be a violation of Article 3 (Art. 3). An indication under Rule 36 of the kind at issue here serves the purpose of enabling the Commission, and subsequently the Court or Committee of Ministers, to examine effectively an application and to ensure the effectiveness of the safeguard provided by Article 3 (Art. 3).

121. The Commission also notes that, before the present case, no Contracting State had ever failed to comply with an indication given by the Commission in expulsion cases. The Commission observes that, according to its own statistics, the Commission or its President had, at the time of Mr. Cruz Varas' expulsion, been seised with 182 cases in which the question arose of giving an indication under Rule 36 of its Rules of Procedure that an expulsion order should not be enforced, and that in 31 of these cases an indication was given by the Commission or its President.

122. Turning to the present case, the Commission therefore considers that to deport Mr. Cruz Varas, although an indication under Rule 36 had been given frustrated its examination and thereby rendered his right of petition ineffective. Such an action is, in the Commission's opinion, contrary to the spirit of the Convention and is incompatible with the effective exercise of the right to petition guaranteed by Article 25 para. 1 (Art. 25-1) of the Convention. These considerations apply notwithstanding the fact that the Commission has, after a full examination of the merits of the complaint under Article 3 (Art. 3) of the Convention, concluded that there has been no violation of that provision.

123. Finally, the Government maintain that they were unable, as a matter of Swedish law, to comply with the Commission's indication under Rule 36.

124. The Commission recalls that Article 27 of the Vienna Convention on the Law of Treaties, to which Sweden is a Contracting Party, provides that a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule also applies in the examination of cases under the European Convention on Human Rights.

125. Consequently, the Commission cannot accept the Government's defence that domestic law prevented them from complying with their obligations under the Convention.

126. The Government's arguments further prompt the Commission to clarify that the Convention does not leave the Contracting Parties with a choice between, on the one hand, complying with their obligations under the Convention and, on the other hand, failing to comply with their obligations under the Convention and instead trying to provide a remedy for the violation once it has been established. Their primary obligation must always be not to commit a breach of the Convention. This follows from the text of Article 1 (Art. 1) of the Convention, which provides that the High Contracting Parties "shall secure" the rights and freedoms in the Convention, and from the Court's statements quoted above.

127. For these reasons, the Commission finds that Sweden failed to comply with its obligations under Article 25 para. 1 (Art. 25-1) of the Convention when it did not act in accordance with the Commission's indication under Rule 36 of the Rules of Procedure.

Conclusion

128. The Commission concludes, by 12 votes to 1, that Sweden has failed to comply with its obligations under Article 25 para. 1 (Art. 25-1) of the Convention.

E. Recapitulation

129. The Commission concludes, by 8 votes to 5, that there has been no violation of Article 3 (Art. 3) of the Convention (para. 93).

- The Commission concludes, by a unanimous vote, that there has been no violation of Article 8 (Art. 8) of the Convention (para. 104).

- The Commission concludes, by 12 votes to 1, that Sweden has failed to comply with its obligations under Article 25 para. 1 (Art. 25-1) of the Convention (para. 128).

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)

Dissenting opinion of MM. TRECHSEL, WEITZEL, Mrs. THUNE,
MM. ROZAKIS and LOUCAIDES

We find ourselves unable to agree with the finding of the majority that there has been no violation of Article 3 in this case. Our opinion is based on the following:

In view of the fact that the Commission has found that Mr. Cruz Varas has been subjected to treatment contrary to Article 3 of the Convention in the past in Chile and in view of the particular circumstances of this case including the situation in Chile, it was for the Government to show that, at the time of the expulsion, there was no longer any risk that Mr. Cruz Varas would be treated contrary to Article 3 if sent back to Chile. In this respect we take into account that the respondent Government have proved to be in a position to carry out quickly an extensive investigation in Chile but that this investigation was carried out only after the expulsion.

Mr. Cruz Varas has submitted evidence in support of his affirmation that he has been involved in political activities in the past in Chile (cf. paras. 31 and 32), and in Sweden (para. 59). These political activities are of such a nature that they imply a risk of treatment contrary to Article 3 of the Convention in Chile in particular since Mr. Cruz Varas had been subjected to such treatment in the past because of those activities. As regards the political situation in Chile it is correct that at the relevant time, in October 1989, certain steps had been taken to restore democracy and respect for human rights. However, the change which had taken place at the relevant time was unstable and the country was still in a transitional stage towards democracy and in fact the political regime had not changed. It is recalled that no democratic election had taken place at that time. The subsequent development in Chile cannot be taken into account when examining Mr. Cruz Varas' complaints in the present case.

For these reasons, we are of the opinion that in October 1989 there were grounds to believe that there existed a real risk that Mr. Cruz Varas would again be subjected to treatment contrary to

Article 3 of the Convention in Chile.

III-treatment or punishment must reach a certain level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this level depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration as well as its physical or mental effects (cf. Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, p. 39, para. 100 with further references).

At the time of his expulsion Mr. Cruz Varas was, as a consequence of the severe torture he had suffered in Chile, in a bad state of health (para. 37) and he had strong personal fears of being subjected to treatment contrary to Article 3 if returned to Chile (paras. 53 and 63). In this context we have taken into account Mr. Cruz Varas' contention that the expulsion involved such a trauma for him that in itself it constituted a breach of Article 3.

We are of the opinion that, having regard to the real risk of treatment contrary to Article 3 which existed at the relevant time, Mr. Cruz Varas' personal and reasonable fears and anxiety for such treatment if expelled, and his bad state of health, his expulsion involved such serious hardship that it attained the level of severity which made Article 3 applicable. There has accordingly been a violation of Article 3 of the Convention on this count.

OPINION DISSIDENTE DE M. SPERDUTI

Je me dois d'expliquer, ne fût-ce que brièvement, la raison qui, à regret, m'a amené à me dissocier des autres membres de la Commission dans le vote sur l'article 25 de la Convention.

Je partage l'avis de la Commission pour affirmer qu'il faut tenir compte des enseignements de la Cour sur la spécificité du système de garantie collective des droits de l'homme et des libertés fondamentales instauré par la Convention européenne. Voici des énoncés récents de la Cour dans son jugement du 7 juillet dans l'affaire Soering, reproduits dans le Rapport de la Commission au paragraphe 119 :

"87. In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 90, para. 239). Thus, 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, inter alia, the Artico judgment of 13 May 1980, Series A no. 37, p. 16, para. 33). In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society' (see the Kjeldsen, Busk Madsen and Pedersen judgment of 7 December 1967, Series A no. 23, p. 27, para. 53)."

J'estime toutefois que tout développement ultérieur de ces notions demande une attention particulière aux exigences de la logique juridique. Or, je dois dire : ce n'est qu'en allant au-delà de telles exigences que le Rapport de la Commission aboutit à envisager une violation de la Convention par le Gouvernement mis en cause, violation qui se concrétiserait dans le fait de ne pas s'être conformé à l'indication donnée par la Commission, en vertu de l'article 36 de son Règlement intérieur, de ne pas expulser. La question directe de

l'incidence sur le plan juridique de cette disposition réglementaire a été laissée ouverte ; la Commission s'est tournée vers l'article 25 de la Convention et a conclu à la violation de cet article en raison du comportement du Gouvernement suédois.

Certes, l'engagement pris par les Etats, par la déclaration sur le droit de recours prévue à l'article 25, de "n'entraver par aucune mesure l'exercice efficace de ce droit" est l'un des facteurs importants de l'efficacité même du système de garantie instauré par la Convention. Mais ces termes "exercice efficace" - en anglais, "effective exercise" - ont dans l'article 25 la signification qui se dégage compte tenu de l'objet propre à cet article : d'abord, l'indication du procédé de reconnaissance du droit de recours à la Commission ; ensuite, l'assurance de la liberté d'exercice de ce droit dans ses différentes manifestations.

Somme toute, mes remarques peuvent se réduire à une seule critique : l'interprétation correcte de l'article 25 de la Convention ne permet pas de partager la solution de la majorité de la Commission, dont l'hardiesse est évidente, d'élever l'article 36 du Règlement en norme de droit donnant pouvoir à la Commission, - et si elle ne siège pas à son Président -, d'imposer aux Etats mis en cause des obligations additionnelles à celles découlant directement de la Convention.

Une dernière observation. L'article 36 a bien une pertinence juridique, mais dans un sens qu'il convient de préciser ainsi : la responsabilité d'un Etat, qui a procédé à l'expulsion d'une personne vers un Etat où celle-ci risque sérieusement d'être soumise à des traitements contraires à l'article 3 de la Convention, doit être considérée comme plus grave lorsque la décision d'expulsion a été exécutée en dépit de la mise en garde de l'Etat formulée par la Commission en application de l'article 36 de son Règlement.

APPENDIX I

HISTORY OF THE PROCEEDINGS

Date	Item
5 October 1989	Introduction of the application.
5 October 1989	Registration of the application.
Examination of the admissibility	
6 October 1989	Commission's decision to invite the Government to submit observations on the admissibility and merits of the application, and to indicate to the Government, pursuant to Rule 36 of the Commission's 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 applicants to Chile until the Commission had had an opportunity to examine the application further.
16 October 1989	Government's first observations and information that Mr. Cruz Varas had been deported on 6 October 1989.
27 October 1989	Government's further observations.
3 November 1989	Applicants' observations in reply.

9 November 1989 Commission's decision to invite the parties to a hearing on the admissibility and merits, and decision to indicate to the Government 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 should take measures which would enable the first applicant to return to Sweden as soon as possible.

7 December 1989 Hearing on admissibility and merits. The parties were represented as follows:

Government: MM. Hans Corell
 Erik Lempert
 Pär Boquist

Applicants: Mr. Peter Bergquist

Decision to declare the application inadmissible as regards the complaints under Articles 6 and 13 of the Convention and admissible the remainder of the application. Decision to retain for further examination the issues arising from the failure to comply with the indication under Rule 36 of the Rules of Procedure. Decision to maintain the indication under Rule 36.

Examination of the merits

7 December 1989 Hearing of Dr. Sten W. Jacobsson as a witness.

7 December 1989 Commission's deliberations on the merits.

15 December 1989 Decision to grant legal aid to the applicants.

21 December 1989 Transmission of decision on admissibility and invitation to parties to present further written observations on the merits.

21 January 1990 Applicants' observations on the merits.

24 January 1990 Government's observations on the merits.

10 February 1990 Commission's consideration of the state of proceedings.

2 and 23 February 1990 Government's further observations.

30 March 1990 Government's further observations.

5 April 1990 Applicants' further observations.

9 and 10 May 1990 Commission's deliberations on the merits.

6 June 1990 Commission's further deliberations on the merits.

7 June 1990 Commission's deliberations on the merits, final votes and adoption of the Report.