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**Alternative report to “Comments by the  
Government of Sweden on the Concluding  
Observations of the Human Rights Committee”  
(CCPR/CO/74/SWE)**

**By The Swedish NGO Foundation for Human Rights  
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## **Introduction:**

In its concluding observations concerning Sweden in March 2002, the Human Rights Committee expressed concern for the respect for human rights after the attack on World Trade Centre and Pentagon in September 2001 and the subsequent war on terrorism. Especially for persons of foreign extradition. The Government was asked to report back in one year, presenting relevant information on the implementation of the Committee's recommendations on the subject.

In May 2003 the Government of Sweden filed its follow-up report, this report is a comment to it which we hope will be helpful in examining the governmental report.

The Swedish NGO Foundation for Human Rights and the Swedish Helsinki Committee for Human Rights presented an alternative report to the original State Report by Sweden in 2002. Thus, we brought attention to most of the issues in this report already in the spring of last year. However this reports brings an up-date to the problems and concerns expressed in our previous comments. We would like to bring the Committees attention to, in particular, the following questions:

### **Legislation concerning fighting or combating terrorist crimes**

Some pieces of legislation has been put in place since our last report, two of which we have had the opportunity to comment on to the government; the Arrest Warrant and the Act on criminal Responsibility for Terrorist Crimes (2003:418). Unfortunately our concerns regarding the impact on human rights, the rule of law and the principles of legality or foreseeability have not been responded to by. As these laws mentioned above were implemented through a Framework Decision from the EU council of ministers, it gave little room for alteration or improvement when the actual bills were presented. This has not only been criticized by Human Rights NGO:s but has been a concern for many parliamentarians as well as the Council on Legislation. **(Paragraphs 20-46 of the report)**

### **The expulsion of Ahmed Agiza and Mohammed Alzery**

For the last year and a half we have tried to monitor and bring attention to the destiny of the two Egyptian asylum-seekers that were deported from Sweden December 18 2001. These cases are troublesome and the conduct of the Swedish Government is in almost every single way distressing. In this report we concentrate on the expulsion of the two men and to what extent their rights have been violated. One should however bear in mind that ever since July 2000 Ahmed Agiza's wife Hanan and five children have been living under extreme pressure and almost unbearable conditions. Since December 18 2001 when Agiza was suddenly deported the situations deteriorated. The government included Hanan and the children in its decision of not granting permanent residency in Sweden and order her to be expelled as soon as possible, Although Hanan was not suspected of terrorist activities, or any other crimes for that matter, she was thus excluded, along with her husband, from refugee status and denied asylum. Her case was not considered through a proper procedure, making it possible for her to submit her reasons against the expulsion or to have her case reviewed as is provided for in article 13. Hanan however did have the opportunity to submit a complaint to the CAT before the expulsion order was carried out. Something that was denied her husband. **(Paragraphs 48-112 of the report)**

### **Freezing of funds and human rights**

The lack of transparency that signifies decisions by the different Sanctions Committees or the EU Commission are well known. These resolutions or regulations however have an enormous impact on the individuals that are targeted – and the possibility for them to clear themselves from a suspicion of supporting terrorists is in many ways non-existent. The decisions by the above mentioned international bodies cannot be questioned even if they violate human rights such as the right to a fair trial, the right to an effective remedy, the right to work or even an adequate standard of living. **(Paragraphs 1-19 of the report)**

## Freezing of funds and human rights issues

### Paragraph 4 of the Governmental Report

1. In the Follow-up report to the Human Rights Committee, the government refers to the law that was enacted in 2002 after ratifying the International Convention for the Suppression of the Financing of terrorism. This is a law which, at least on the surface, seems to be in accordance with human rights standards. In our opinion, however, it is not clear how this law will function in relation to the different resolutions or regulations from the EU and the UN containing lists of individuals or entities suspected of being associated with terrorists. The convention and the law as such do not exclude the use of sanctions against individuals suspected of being associated with terrorists decided by e.g. the UN Security Council or the EC/EU. There is, however, no doubt that these lists have violated human rights when implemented. The decisions in the Security Council as well as in the EU leading up to the lists lack transparency and they are implemented in disregard of the rights to a fair trial/right to have ones civil rights determined by a court of law.

2. According to the Swedish Constitution, 2:23 Instrument of Government, no law can be enacted if it is in contradiction with the European Convention for the protection of Human Rights and Fundamental Freedoms. The Constitution also prohibits the delegation of power to an international organization such as the EU/EC if its decisions or actions violate Human Rights. (Instrument of Government 10:5).

3. However, this did not prevent the government from paving the way for a delegation of powers to the EU that it ought to have known would be in violation of human rights when executed.

4. On 9 November 2001, the UN Sanctions Committee on Afghanistan announced a decision that was to have momentous and lasting implications for three Swedish citizens. The Committee presented one of its lists of persons and organisations believed to be associated with Usama Bin Laden or the Al-Qaida terrorist network. The Swedes were included in the list and within a few days all their assets were frozen.

5. The issuing of the list was not preceded by any negotiations with the Swedish Government, the Swedish police or the Security Police or with the three individuals concerned. No information was presented outside the UN Security Council, which meant there was no opportunity to dispute it. (The Sanctions Committee based its decision on information received from the US government.)

6. It is worth mentioning that decisions of this kind are not taken in what is more or less a vacuum. The UN Security Council is bound by the norms of the UN Charter, not least by article 55(c), i.e. to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". According to article 56 member states pledge themselves to take action for the achievement of these purposes.

7. According to chapter seven of the Charter the UN Security Council can decide to apply sanctions on states that threaten international peace and security. Through the resolution

1267 and later 1333<sup>1</sup>, the Security Council applied its decisions to organisations and individuals, something not originally envisioned by the UN Charter.

When the UN Sanctions Committee on Afghanistan was established by Security Council Resolution 1267 in 1999, the Committee was to monitor member state compliance with the various measures outlined in Section 4 of the Resolution. This included the following:

All states shall:

b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee /.../ and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian needs.

8. In Resolution 1333 (2000), the Security Council broadened the scope of its sanctions against Afghanistan by also demanding that action be taken against persons or organisations associated with Usama Bin Laden. All states were to take further measures “to freeze without delay funds and other financial assets of Usama bin Laden and individuals and entities associated with him as designated by the Committee, including those in the Al-Qaida organisation, and including funds derived or generated from property owned or controlled directly or indirectly by Usama bin Laden and individuals and entities associated with him, and to ensure that neither they nor any other funds or financial resources are made available, by their nationals or by any persons within their territory, directly or indirectly for the benefit of Usama bin Laden, his associates or any entities owned or controlled, directly or indirectly, by Usama bin Laden or individuals and entities associated with him including the Al-Qaida organisation.”

9. The Sanctions Committee was instructed to establish and maintain updated lists, based on information provided by governments and regional organisations, of individuals and entities designated as being associated with Usama bin Laden and Al-Qaida. The list that includes the three Swedes is called SC/7206 and was submitted on 9 November.

10. As the list of names from the Sanctions Committee was based on Security Council Resolution 1333 (2000) adopted under Chapter VII of the UN Charter, it was to apply with immediate effect under international law. It is not intended to have direct horizontal impact however, each member state is to ensure compliance with the UN resolution via its own national legislation.

11. In Sweden’s case, legislative authority concerning sanctions in response to threats to international peace and security has been transferred to the European Union. Sanctions relating to EU security are also a matter for the Council of Ministers. Decisions in this respect take the form of Regulations that apply in EU states with immediate effect. (As of 1999, a Recommendation may be enough to enforce compliance on the part of Member States – see Swedish Govt Bill 1998/99:27). A Regulation is usually taken by the Council of Ministers. In the case of the list of suspected Taliban associates the EU’s Council of Ministers gave officials of the European Commission the right to renew and change the lists in accordance with the decision of the UN Security Council. The Regulation that delegated power to the Commission was passed during Sweden’s presidency and is signed by Lena Hjelm Wallén.

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<sup>1</sup> Resolutions from the Sanctions Committee on Afghanistan, the Taliban and Usama Bin Laden.

12. The EU Regulation adopted for the implementation of the UN resolution encompassed little more than the list of names from the Sanctions Committee on Afghanistan. The EU thereby adopted a Regulation that had an immediate effect in law, legislation that was not general in character but was specifically directed at a number of persons identified by name.<sup>2</sup> This type of legislation runs contrary to Swedish legal tradition, as may be seen in the Instrument of Government 11:8.

13. The fact that private individuals in Sweden, including Swedish citizens, can be punished via a UN Security Council resolution, a Sanctions Committee edict and an EU regulation appears to have come as a shock to Sweden. Still, as mentioned it was during Sweden's EU presidency that a resolution from the Council of Ministers delegated powers to the Commission in order to amend and implement the list of names from the UN Sanctions committee. It ought to have been clear to the government that this kind of lawmaking could affect the rights of individual's in the EU – including Swedish citizens. Nevertheless, the Government did not ensure the rights of the three Swedes whose assets were frozen – neither the rules in the international agreements that it has undertaken to observe, nor those incorporated into Swedish law or enshrined in the Constitution. The Swedes who were punished because of their alleged association with a terrorist organisation were “sentenced” without a hearing and without a chance to defend themselves. They were accused of a crime they in fact never were charged for and actually did not exist: ‘possible association with a terrorist organisation’. In fact, criminal investigations were initiated but no evidence could be found to support allegations of terrorism and no charges were brought against the three men.

14. Irrespective of whether the Swedish Government or the Ministry for Foreign Affairs assisted the Swedes in trying to obtain information from the UN Security Council or the US administration, the Government could, in our opinion, have enforced the UN and EU resolutions in a way that protected the legal rights of the individual. The laws and international conventions that regulate the right of individuals to a fair trial, etc, apply in Sweden. The obligations that a state has towards the individual include a duty to protect him or her from abuse by a third party – this applies unconditionally, in our opinion, regardless of whether the party responsible for abuse is another state, an international organisation or a regional organisation.

15. The Decisions of the Committee on Sanctions and the Commission did not provide the accused with any opportunity of proving their innocence or with any other way of having their civil rights and duties tried in an impartial and public trial. They also deprived the Swedish Citizens of their living and freedom of movement. The Regulation is undoubtedly in violation of human rights, something that the Foreign Ministry's own investigator, Iain Cameron, affirms in the report ”Targeted Sanctions and Legal Safeguards”.

16. In our opinion, the Government should have taken action to ensure minimum guarantees for the rights of individuals in the EU Regulation, e.g. that the execution of the Regulation at least must be preceded by some form of trial or hearing that lives up to the rights enshrined in article 14. According to democratic principles, the State is duty bound to protect the rights of Swedish Citizens from the consequences of decisions taken at the international level. If the shortcomings from the point of view of the rule of law could not be discerned when the Regulation was passed, the Government should have had the courage to call attention to the fact that basic human rights must always be respected. We are convinced that the member states of the EU would have respected such a position if it had been brought onto the agenda when the decision was taken. If not, it indicates that neither the EU nor the UN are de facto guarantors of

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<sup>2</sup> The Regulations subsequently adopted by the Council of Ministers in this area (incl L 344/71) refer to “specific restrictive measures directed against certain persons and entities with a view to combating terrorism”.

human rights. If this became a lasting position it would undermine the credibility of both organisations.

17. The Swedish law supplementing the EU resolution in this area is the 1996 Act on Certain International Sanctions, which is a form of implemental legislation. It includes provisions concerning the criminal responsibility of individuals who fail to comply with the sanctions regulations. It also contains provisions describing the types of prohibitions that may be issued against a state. The law specifies for instance that a prohibition may not be applied to property that is intended exclusively for the personal use of the owner. However, it is uncertain if this guarantee of a minimum level of standard of living applies when a decision is taken by the EU – in our opinion the law needs to be reviewed in order to secure that those individuals who are targeted in resolutions or regulations from UN or EU will at least be allowed to have access to sufficient means to support themselves. One should bare in mind that the freezing of funds, decided on and implemented in a discretionary manner not only violates civil and political rights but also rights according to other human rights instruments such as the right to work, the right to an adequate standard of living (i.e the right to support oneself) and of course the right to property.

18. The three Swedes on the list strongly denied any connection with Al-Qaida and the issue has for some time now been the subject of proceedings in the EC Court of Justice focusing primarily on the EU's actions in the matter. Via their lawyers, the three men also approached the US government to have the sanctions withdrawn. In the summer of 2002, after negotiating with US authorities, two of the men were taken off the list. As mentioned before criminal investigations against the men commenced but no evidence could be found in order to support the allegations made by the US about supporting any terrorist organization.

19. In our view, however, Sweden's actions – or rather lack of action – are in breach of the most fundamental principles of a law-based society, the ones we are supposed to be upholding at a time when we are threatened by terrorist acts, etc. The Swedish Government's actions are in violation of a number of basic human rights, in the case of the ICCPR primarily Articles 14.1, 14.2, 14:3 a, b, c, d, e, 14:5, 15.1 and 17. But of course also the right to an effective remedy for violations or their human rights.

## **New legislation on combating terrorist crimes**

### **Paragraph 5 of the Governmental report**

20. On the 1st July 2003 the Act on Criminal Responsibility for Terrorist Crimes (2003:148) enters into force in Sweden. The Act is based upon the European Union Framework for Combating Terrorism that was adopted in June 2002. The framework decision was passed quickly by the council of ministers after being adopted at equal speed by the parliaments of member states. From the framework itself, however, it was impossible to discern how the Swedish law implementing the framework decision would be formulated. And when the bill landed on the tables of the members of parliament and the Council on Legislation, it was too late to propose material changes. The Council on Legislation concluded that they were obliged to agree to the proposal despite having deemed it questionable from the perspective of legality and the rule of law.

21. The Act on Criminal Responsibility for Terrorist Crimes (Act on Terrorism) is a special criminal law that includes criminal acts that are already defined as offences according to

primarily the Penal Code. The boundary between “normal” but serious crimes such as murder, kidnapping, grievous bodily harm, criminal damage, unlawful detention, etc. and those crimes that are included in the catalogue of crimes in the Act on Terrorism do not lie in the offence per se, but in the intent, the direct purpose of the offence.

The motives, both subjective and objective, are defined in § 2:

Those that have committed a crime that is listed in § 3 shall be condemned for terrorist offences if the act can seriously harm a state or a multilateral organisation and if the aim of the act is:

1. to induce serious fear in a population or a section of the population,
2. to unduly force a public authority or a multilateral organisation to take, or omit from taking, action, or
3. to seriously destabilise or destroy basic political, constitutional, economic or social structures within a state or multilateral organisation.

The punishment is imprisonment for a period of at least four years and at most ten years to life.

22. It is primarily the elements of qualified direct intention, motive for the crime, that distinguish “terrorist crimes” from other serious criminal offences. The three definitions of intention are both broad and yet detailed but still do not provide the clarity that is required by the principle of foreseeability. In the preparatory work the Government attempted to clarify what distinguishes terrorist crimes from normal crimes and thus return often to the objective prerequisites in §2: “if the act can seriously harm a state or a multilateral organisation”. The problem with this is, on the one hand, that this is almost the same as the third subjective prerequisites and, on the other hand, that both the objective and the following three subjective prerequisites are already included in Swedish legislation – above all through the rules on how to choose the right penalty and punishment for a crime, the objective and subjective motives can be taken into consideration as aggravating circumstances. It thus becomes very hard to distinguish “normal” crimes (that can also be politically motivated) and crimes with undesirable motives – i.e. terrorist crimes. In this context it is also difficult to ignore the signals from other EU member states of what should be regarded as a terrorist crime, especially as it is a matter of harmonisation of criminal law within the EU.

23. The statements made during the previous presidency do not exclude the possibility that stone throwing youths at a EU summit could, in future, be classified as, at least quasi-terrorists. That such actions can be included in the legislation is beyond all doubt. The existing background for interpretation of this act is the EU framework and the Council statements that were made in connection with the adoption of the framework. In a specific Council statement it was claimed that opposition movements such as the opposition during the Second World War, can not be seen to constitute terrorist movements. The mere fact that it was necessary to clarify this signifies that the legislation is applicable to opposition movements.

24. The definition of terrorism has been discussed in international forums for decades without a consensus being reached. The EU framework is the first of its kind in which States have agreed on what constitutes terrorism. In our opinion the definition does not live up to the demands on legality and foreseeability. Crimes should of course be punished and violence can never be accepted, but the question is what the European Union and Sweden stand to gain from defining certain criminal offences as terrorism? Can we, with legal access to such a broad definition of terrorism, be sure that not the wrong person is labelled “terrorist”? Which consequences will this have for the individual? Is it enough that we believe that our legal system holds a high regard for human rights even in the fight against terrorism and therefore will be able to make the necessary distinctions? The law that will now be used in courts will be extremely difficult to apply in a manner that is in accordance with the rule of law. The difficulties in

choosing an applicable law and in proving intent are just a couple of the foreseen problems – but do the prosecutor, the judge and the lay assessors know enough about human rights to be able to make the correct decisions? The new legislation will put unreasonably high demands on the legal system in which the same crime can now be investigated according to two different laws of which one leads to a higher penalty, greater possibilities of using means of compulsion and registration, as well as a probable greater possibility of referring to secrecy in order to keep information from the suspect and thus not granting a fair trial. We also know that it is always difficult to prove direct intention on the part of the perpetrator and that this, if possible, is even harder when it comes to acts of aiding, assisting or abetting a crime.

25. One reason for making a separate law on terrorist acts is the demand for more severe punishment and sanctions for certain crimes. But as mentioned above, this can be taken care of when choosing the penalty and punishment for the crime, without it being necessary to characterise the crime as terrorism. Alternatives such as adding more precise prerequisite of guilt in the description of the offence and changing rules for minimum and maximum punishment for a certain crime, has obviously been rejected by the Government – without however being investigated. A solution such as this was obviously not politically possible.

26. The need and demand has instead been to label some intentions, i.e. not the action, as unacceptable in a democratic society. This is a criminalisation that can be severely questioned from the point of view of the rule of law as well as the political rights of the individual. We will hardly know the breadth of the consequences until the Act is put into practice.

27. In the preparatory work for the Act the matter of how the secrecy rules in the Act of Secrecy (1980:100) are to be applied in the case of suspected acts of terrorism is not mentioned in the preparatory works. We know that when dealing with public safety or national security for example, whether it is a matter for a court or public authority, there is a possibility for authorities and judges to keep information from even the individual and their representative (Act of Secrecy 14:5). This can lead to a person who is, for example, to be deported according to the Act concerning Special Controls in Respect of Aliens, not receiving, to a great enough extent, information about what he or she is suspected of and thus not being able to defend themselves against the allegations. One of the legislative changes proposed in conjunction with the new terrorist act is the possibility for the Security Police to withhold information at the stage of the preliminary investigation (Act of Secrecy 5:1, 2) To what extent this possibility will exist even during a trial is not examined. We are, however, not convinced that this means that secrecy, according to the Act on Secrecy 14:5, will not be invoked. The main distinction between a terrorist crime and a “normal” crime is the objective prerequisite that is included in the proposed §2 – i.e. an act that can seriously harm a state or a multilateral organisation which ought to be seen as a threat to public or national security.

28. We have, on several occasions, conveyed demands that the possibility for redress for individuals that have been wrongly subjected to secret means of compulsion be introduced in Sweden. This demand obviously becomes all the more important in the light of the new law on terrorism and the amendment it brings to other laws, i.e. the law with special provisions on the use of coercive measures for certain criminal cases (1952:98)

29. In Sweden we have a relatively weak system of control of how basic human rights are respected. Probably because we put our trust in a system we believe to be perfect. But it isn't perfect. We believe that the application of the new Act on Terrorism must be monitored by an expert organ which is independent from the Government. Above all, the right to a fair trial must be insured even for those suspected of terrorist crimes. To withhold information from the

suspect and their representative must be limited to extreme exceptions and must be possible to review. In general we believe that there should be extra-parliamentary monitoring of what information is disseminated and what is withheld in cases and decisions by authorities in which secrecy is invoked for the purpose of general or national security.

**30. According to the Instrument of Government 2:23 no law may be legislated that is in conflict with Sweden's commitments according to the European Convention. This should, of course, apply equally to the application of the law. Thus, the least one can demand is that the bill should have included an explicit prohibition of an application that violates the full enjoyment of human rights.**

## **The European arrest warrant**

### **Paragraph 5 continuing**

31. From some time now there has been a drive within the EU to harmonize rules in the area of criminal law. An early purpose was to get at crimes against community (fiscal) interests. Later this campaign also included organized, international and particularly serious crime. This cooperation in matters relating to criminal law has gradually been incorporated in the EU treaty, although it still lies mainly under the third pillar and is based on decisions taken in consensus. Article 29 talks about a harmonized body of regulations to prevent and combat crime with the objective of ensuring freedom, security and justice for the Union's citizens. The approximation that has been discussed has, however, been aimed both at combating crime and at the same time protecting the rights of the individual suspected of crime. The attack on the World Trade Center and the Pentagon in September 2001 hastened the process, however. In addition to the framework decision to combat terrorism mentioned above/below, a decision was taken to simplify and improve procedures and rules for the extradition of suspected or convicted criminals for prosecution or serving of sentences. Both of these framework decisions were, in our opinion, taken too quickly and too early. They are more reactions to individual, albeit extremely serious, events than the result of in-depth analyses. They have compelled the acceptance of solutions that are highly questionable from the viewpoint of individual rights.

32. In our opinion, it is very unfortunate that the arrest warrant precedes a harmonization within the EU of rules safeguarding individual rights in a criminal proceeding. Cooperation in criminal matters is a relatively new and untried area for the Union. The introduction of simplified methods for prosecution and execution of judgements has come too early, long before fundamental guarantees of individual rights are in place. The European Commission's Green paper on "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union", which was presented in February 2003, makes this clear. The Commission finds that there are areas that are in immediate need of improvement.<sup>3</sup>

**33. It is our absolute opinion that harmonization in the area of criminal law, and above all as regards safeguarding of individual rights, should have preceded a decision adopting such a simplified extradition system as the European arrest warrant. Naturally, suspected criminals should not be able to avoid prosecution for crimes which they have committed in another EU country. But that doesn't happen today either; the EU states already have mutual extradition treaties.**

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<sup>3</sup> Green Paper pages 13 ff.

34. The biggest difference between the current extradition procedures in the EU and the surrender procedures pursuant to the arrest warrant is that the requirement of double criminality has been partially abandoned. The reasons that lay behind the requirement of double criminality – i.e. predictability and thereby protection of the individual's rights – is, according to the Government, not of importance in connection with surrender pursuant to the arrest warrant. Different principles underlie the arrest warrant and the old extradition treaties, says the Government. The arrest warrant is based on the principle of mutual recognition of each other's legal systems within the EU; extradition was based on the principle that a person could only be prosecuted for a crime in another country if the crime was also considered to be a reprehensible act in Sweden, i.e. the principle of individual rights. It is important to point out in this connection that the criminal justice systems of the European states are not based on the same legal tradition – both civil law and common law are applied. Even though there are naturally similarities, there are also penal and procedural differences. Letting the principle of mutuality supersede the principle of protection of individual rights would have been easier to accept if we in Europe were in consensus regarding what constitutes a reprehensible act, and if at least minimum levels of rights for the suspect were respected everywhere. But this is not the case. Certain offences that could be interpreted into the list, such as concealing a refugee or having an abortion performed, are crimes in certain EU states and unthinkable to criminalize in others. Nor is the fact that all states in the EU – as well as those applying for membership – have acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) any guarantee that no violations occur. In particular, Article 6 of the ECHR, concerning the right to a fair trial, is by far the most violated article in Europe and the right which most countries, not least Sweden, have the biggest problem with. The European Court of Human Rights is also constantly creating new law within the framework of Article 6 which also applies to Sweden. Among the 844 cases considered by the European Court of Human Rights during 2002, the vast majority were concerned with Article 6. Often, but far from always, they have concerned violations of criminal procedure; other violations concerned Articles 13 or 5 – both intimately associated with individual rights in criminal proceedings.

35. It might also have been possible to accept the idea of mutuality if there had been a definition of which offences were included in national legislation or possibly if the list had been limited to a few very serious acts. But the Government says in the *travaux préparatoires* to the proposed legislation that the list is in principle unnecessary. It is, in other words, merely a pedagogical tool in an introductory phase. The principle of mutuality must embrace all offences. This means that it may be abandoned and replaced by a total recognition of all the criminal justice systems of all the EU states, current and future.

**36. It is a fundamental principle in state governed by the rule of law that the individual should be able to predict whether he is committing a criminal act. In our opinion, individual rights are already severely compromised by the list, and naturally even more so if the list is no longer needed in the future.**

37. The options which an executing state has to challenge a demand for surrender are in principle limited to purely formal obstacles. On the individual plane, the courts have to make sure they are surrendering the right person. The arrest warrant does not provide any ground for refusal by the courts to surrender a person because his rights will not be respected in the receiving country, nor does the Swedish bill.

**38. We believe that an individual subject to surrender must have an opportunity to challenge the arrest warrant if there is reason to believe that his human rights will not be respected in the receiving state.**

**Prohibition against transferring someone to a country where he risks persecution, torture, etc.**

39. It is worth noting that the Framework Decision reiterates in its introduction the well-established principle of *non-refoulement*. The Ministry of Justice, which has drafted the Swedish bill, does not however seem to think the principle is so important that it needs to be expressly put into print. This is both unacceptable and incomprehensible. The principle of non-refoulement entails that a person may never be transferred (extradited, surrendered), expelled or deported to a state where he risks persecution, the death penalty, torture or other degrading treatment or punishment. This principle should also include the risk of being tried before a partial court, something which both human rights organizations and international oversight bodies for human rights are increasingly stressing<sup>4</sup>. The non-refoulement principle is already embodied in the legislation governing extradition, expulsion and deportation of non-Swedish citizens (the Aliens Act, the Act concerning Special Controls in Respect of Aliens, the Act on Extradition of Offenders). It is thus difficult to find an acceptable explanation of why the prohibition should not be explicitly written into the text of the Swedish law for the arrest warrant, which also covers Swedish citizens, especially as the rule is also mentioned as an absolute prohibition in the introduction to the Framework Decision (point 13: “No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”).

**40. We believe the principle of non-refoulement is much too important to be completely excluded from the text of the Swedish law on the arrest warrant. It cannot be taken for granted that it is always and will always be respected in the EU. It would have been desirable if it had been explicitly stipulated that the principle of non-refoulement also applies in connection with surrender under the arrest warrant.**

**The rights of the accused**

41. The Framework Decision contains a special section where some rules are described for protection of the rights of the requested person. Among other things, the requested person shall be informed of the contents of the arrest warrant and of what consenting to surrender entails. Unfortunately, there is no equivalent section in the Swedish bill.

**42. It is extremely important that the person who is the subject of surrender be informed in a language that he understands, both regarding the contents of the arrest warrant and regarding how the matter is to be processed.** Since consent greatly simplifies the execution of surrender but also the acceptance of further surrender within the EU and furthermore eliminates the possibility of appealing the surrender decision to the court of appeal, a requirement for informed/qualified consent must be clearly formulated. Since it is furthermore a question of serious offences, i.e. offences that entail detention or imprisonment, the requested person should always be given a public defender, not just if he requests this. Naturally, the requested person must also be given access to an interpreter if Swedish is not his native tongue, unless it is established by very thorough examination that the requested person has such a good command of Swedish that the language cannot be an obstacle to a fair handling of the matter.

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<sup>4</sup> At present it is quite simply impossible to say whether some offences on the list are ones that a state could choose to have tried in e.g. a military tribunal, perhaps particularly in the case of “terrorism”.

### **Children between 15 and 18 years of age**

43. It is deplorable that the Framework Decision and the Arrest Warrant Act make it possible to surrender children and young people between the ages of 15 and 18 for prosecution or execution of the sentence. It should be pointed out here that the trend in international criminal law has been against allowing children under 18 years to be surrendered for prosecution by international courts.<sup>5</sup> Under the rules that apply today to extradition of children for prosecution of crimes, the Government rejects a request for extradition for humanitarian reasons if the suspect is under 18 years, something which the Ministry of Justice also emphasizes in its memorandum. This practice should however be codified in existing and proposed legislation.

44. However, the Ministry says that the Framework Decision does not provide for any humanitarian grounds for refusal to surrender children to another EU state. Instead, it says that the courts can avoid surrendering children by invoking the investigation rules in the Framework Decision, i.e. the rules that examine whether a demand for surrender has, for example, been made in a proper manner. Following such an investigation, the court should propose that prosecution take place in the young person's homeland.

**45. However, we do not think this regulation or interpretation of the arrest warrant is sufficient in order to protect children from being surrendered to a state where they are not nationals. We find it highly doubtful whether surrender for prosecution of an act that is not doubly criminalized should take place at all for children and young people under the age of 18. We find it remarkable that the Framework Decision has not taken this into consideration.**

### **The Council on Legislation**

#### **Paragraph 8 of the Governmental Report**

46. In the follow-up report the Government responds that an investigation in accordance with the human rights conventions that Sweden has ratified will obviously be carried out by the Council on Legislation. When it comes to both the European Arrest warrant and the EU Framework decision on combating terrorism – two pieces of legislation that were created after the 11<sup>th</sup> September 2001 - the Council of Legislation did not have the opportunity to make a statement about the Acts before they had, effectively, been passed by Government through the passing of the framework decisions. The use of framework decisions, negotiated between ministers in the EU, puts aside the regular process in lawmaking. The decisions are specific but yet general as to what must be regulated. However when they pass parliament a proposition for a national bill is not attached. When answering the Government's proposal for a law on Criminal Responsibility for terrorist Crimes (2003:418) , the Council states: "The Council of Legislation believes that certain objections can be raised against the proposal from the perspective of legality. Bearing in mind that the framework decision has already been passed and is binding on Sweden and that there is no basis for an alternative regulation, the Council of Legislation does not, however, oppose the proposal that will form the basis of the legislation."

47. It must also be added that we are not as convinced as the Government seems to be that the human rights framework is always taken into account in the comments of the Council of Legislation. Furthermore, it is not obligatory for the legislative body to follow these comments. References to human rights conventions are extremely uncommon in the comments of the

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<sup>5</sup> An exception is the International Court for Sierra Leone, but its prosecutor has instead taken a decision in principle not to prosecute children or young people under the age of 18.

Council of Legislation and if they exist they usually refer primarily to the European Convention. The European Convention and the Swedish Constitution do not cover all the human rights legislation that Sweden has accepted itself duty bound to follow – not even when implemented in conjunction with other legislation. Furthermore, conventions are not applicable law in Sweden, instead the principle of principle of Treaty-Conform Construction” is followed. This means that while international conventions may not enjoy the same status as Swedish law, they should be interpreted so as to confirm as closely as possible with Swedish law. This method did however lead to quite a few rulings against Sweden in the European Court before the European Convention was incorporated.

The Instrument of Government 8:18 decides on the form of the Council of Legislation’s examinations:

The Council of Legislation’s examinations shall cover:

1. how the proposal relates to the Constitution and to the legal system as a whole,
2. how the proposal’s regulations relate to each other,
3. how the proposal relates to the demands of the rule of law,
4. if the proposal is formulated in a manner which can be assumed to fulfil the stated purpose,
5. which problems could manifest themselves in the application of the proposed law.

## **Observance of the Principle on non-refoulement**

### **Paragraph 9-17 of the Governmental Report**

#### **Expulsion decisions for Ahmed Agiza and Mohammed El Zari (Alzery) and execution thereof.**

##### *Background in brief:*

48. Ahmed Agiza and Mohammed El Zari (Alzery) applied for asylum upon their arrival at Arlanda Airport in September 2000 and July 1999, respectively. Ahmed Agiza arrived in Sweden together with his pregnant wife and four children. Their applications for asylum and for permanent residency in Sweden were preliminarily considered by the Migration Board. During the process of establishing their status as refugees or otherwise in need of protection, a request for a statement from Säpo (the Swedish Security Service) was made in January 2001. The mission of the Security Service is to see whether asylum cases are of such a nature that consideration must be given to national security before a residence permit is granted.

49. The Security Service (Säpo) did not start their investigation until several months after the request had been made by the Migration Board. Säpo then submitted their report on 30 October 2000 and recommends that Agiza’s and Alzery’s applications for permanent residence permits be rejected “for security reasons”. The reasons for this recommendation are classified, however. Not even the asylum seekers themselves and their attorneys have access to the report.

50. In the middle of November, the Migration Board referred the matters to the Government for a decision, pursuant to Chapter 7, Section 11, paragraph 2, point 2 of the Aliens Act. About a month later, on 18 December 2001, the Government decided for security reasons that the two men, as well as Agiza’s wife Hanan and their five children, should not be granted residence permits in Sweden. Although Agiza’s and Alzery’s fear of persecution was considered to be well-founded, entitling them to protection in Sweden, they could according to the Government be excluded from such protection due to security reasons. This decision was made under Chapter 3, Section 4 of the Aliens Act and with reference to Article 1F of the UN Convention relating to the Status of Refugees (the Refugee Convention).

51. The Government's decision suggests that the initial judgement was made that the two men would, if returned to Egypt, risk the death penalty or corporal punishment. The Government therefore obtained a guarantee, a diplomatic assurance; from the Egyptian government according to which the rights of Agiza and Alzery, as well as Hanan, would be respected if they were returned to Egypt. In its oral discussions with representatives of the Egyptian government, the Swedish Government asked for guarantees that Agiza and Alzery would be given fair trials and that the embassy would be allowed to visit the men in prison and attend their trials. (At this point in time it was unclear what judgements or charges existed against the two men, but it was clear that if a judgement had been rendered it was after in absentia trials in military tribunals.) The Swedish Government also pointed out in the oral discussions that it was important that Hanan and the children should not be harassed in the event of their return.

52. The aide mémoire that was issued from Egypt in response to Sweden's request is, however, not quite so precise: "We herewith assert our full understanding to all items of this memoire, concerning the way of treatment upon repatriate from your government, with full respect to their personal and human rights. This will be done according to what the Egyptian constitution and law stipulates."

53. There is nothing in the agreements describing how the visits were to take place or how the Egyptian government was to guarantee that Hanan would be protected from harassment or torture. It is worth noting in this context that Hanan was never suspected of any crime and was not considered to constitute a security risk in Sweden either.

54. The Government decision to reject the eight persons' request for asylum also included a decision that the expulsion of the two men, Agiza and Alzery, should be executed immediately, and that the repatriation of Hanan and the children should be executed as soon as possible. The decision does not mention the absolute prohibition against the execution of an expulsion if there are reasonable grounds to believe that this would entail a risk of torture or other cruel and inhuman treatment or the death penalty. This non-refoulement principle has been derived from Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the UN Convention against Torture (CAT), and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as well as from the principle of the obligation of states to not only respect but also protect individuals against human rights violations. In Sweden, the non-refoulement principle is incorporated in e.g. Chapter 8, Section 1 of the Aliens Act.

55. Despite the fact that the Government decision does not contain an assessment of the risk of torture in the event of execution of the expulsion, the Government now says that this assessment was made. In paragraph 11 of "Comments by the government of Sweden on the concluding observations of the Human Rights Committee (CCPR/CO/74/SWE)", the Government refers to this non-refoulement principle. In paragraph 13 it is also said that "Without these guarantees expulsion to the country in question would not have been an alternative".

56. We will return to the absolute character of this non-refoulement principle and why we believe that this principle was not respected in the Agiza and Alzery cases.

### **Security matters**

57. According to Chapter 7, Section 11, paragraph 2, point 2 of the Aliens Act, an asylum matter may be referred to the Government if it is judged to be a matter of public or

national security or if the matter may be of importance for the nation's relationship with a foreign power or an intergovernmental organization. This rule gives the Government complete power and control over the matter. The security question is not adjudged by any court of law or other independent body before the Government's decision. The Government is the first and last tribunal – its decision cannot be appealed.

Since the matters dealt with under the above-mentioned section are classified, the information on which the decision is based is normally withheld from both the public and the asylum seeker and his attorney. Instead, selected parts of the contents of the decisions can be revealed to the asylum seeker and his attorney, under strict non-disclosure orders. The grounds for the decision are, however, often only described in generalities and are not revealed to such an extent that they can be challenged by the individual.

58. Letting a state's highest political body decide in matters of concern to national security is, in our view, highly inappropriate. Such a procedure would in principle mean that the Government is adjudicating in a matter in which it is a party. That fact that the individual asylum seeker's insight is greatly restricted is a serious infringement of his legal rights. Nor, as a rule, does the individual have any right to present his case to the state secretary who makes the decision, further curtailing his opportunities to submit any reasons against expulsion.

**59. In our opinion, the decision procedure in Chapter 7 Section 11 paragraph 2, point 2 is in conflict with Article 13 of the International Covenant on Civil and Political Rights, in particular if such a decision only is justified in reference to international relations or public security and not compelling for national security reasons.**

60. In this context we would like to call to mind the Human Rights Committee's criticism of Sweden in 1995: "The Committee is concerned that the Board of Immigration and the Aliens Appeal Board may in certain cases yield their jurisdiction to the Government resulting in decisions of expulsion or denial of immigration or asylum status without the affected individuals having been given an appropriate hearing. In the Committee's view, this practice may, in certain circumstances, raise questions under article 13 of the Covenant."

61. The law was in place long before 11 September 2001, but proved to be a useful rule in the fight against terrorism due to the closed and partial decision procedure laid down therein.

### **Compelling reasons of national security**

62. Article 13 of ICCPR gives the States Parties to the Convention a possibility to expel an asylum seeker without the latter having had an opportunity to submit the reasons against his expulsion and without having an opportunity to have his case reviewed if there are "compelling reasons of national security". In our judgement, this exception must be interpreted very narrowly and respect the purpose and spirit of the Convention.

63. The rule primarily governs how the process of review of an asylum application is to take place – ICCPR does not contain any rule regarding the right to protection, except for cases where it can be interpreted from Article 7 and the principle of non-refoulement. (Cf. Article 14 of the UN's Universal Declaration of Human Rights.) Rules governing who is to decide in an asylum matter that concerns national security are contained, as mentioned above, in Chapter 7, Section 11, paragraph 2, point 2 of the Aliens Act. It is a discretionary rule that permits but does not compel the Migration Board to forward a case to the Government but also gives the Government the right to refer the case back to the Board.

## **“Compelling reasons of national security” in the Agiza and Alzery cases**

*Background:*

64. The Migration Board referred the asylum cases to the Government after the Security Police made the assessment that the two men could, each individually, be considered to constitute a security risk in Sweden. However, this information was long withheld from the asylum seekers and their attorneys. The information that was given to them suggested rather that there was a risk that both men would be expelled because Egypt had sought them as suspected terrorists.

65. The judgement that was made by the Security Service regarding the risk posed by the men is difficult to refute because it is classified in its entirety and therefore not available for review by an independent body. What can be concluded, however, is that neither of the two men seems to have been considered a security risk in Sweden prior to 11 September 2001 and perhaps not even until they were deported. According to Alzery's Swedish lawyer, Alzery was interrogated on one occasion during the summer of 2001. According to his wife Hanan, Agiza was interrogated on one occasion in October 2001. At the end of October, the Security Service's statement of opinion was submitted to the Migration Board, who in turn referred the matter to the Government in November. On 18 December, the Government denied the men along with Agiza's wife and their five children, residence permit and then ordered that the two men be expelled and that they be removed immediately by Säpo.

66. Up until the time the Security Service suddenly arrested the two men on 18 December, they had never been detained for security reasons.<sup>6</sup> Nor, during the period the two men were in Sweden prior to the expulsion decision, were the broad surveillance options provided for in the Act concerning Special Controls in Respect of Aliens exercised.<sup>7</sup> (These options enable the police and the Security Service to detain persons and keep them under surveillance solely due to their background if they can be suspected of constituting a risk to national security or if they may at some time in the future commit or participate in criminal actions for a political purpose.) They had working permits and could in principle live a free and normal life in Sweden.

67. As mentioned above, the men had little or no access to the information on which the Government's expulsion decision was based. Since the two men knew that they were being sought by the government in Cairo, it was presumed that this information contained accusations of illegal activities in their former homeland that were labelled terrorism there. But the exact nature of these accusations was never revealed. This made it very difficult for the men to refute the accusations. At the time the expulsion was executed, the men still did not know that they were considered to constitute a security risk in Sweden.

68. It is also of particular importance that the Government did not, at the time of the expulsion, know for certain the legal status of the men. Not until 14 months after the expulsion was executed did the picture clear. In March 2003, the embassy claimed to know for sure that Agiza had been sentenced in absentia to life imprisonment (20 to 25 years) by a military tribunal,

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<sup>6</sup> Alzery was, however, detained during his first two weeks in Sweden due to the fact that his identity could not be established.

<sup>7</sup> The Government regularly reports to the parliament on the use of the Special Control of Aliens Act. These reports say nothing about the use of secret surveillance on anyone during this period. Since the men were not suspected of any crime, surveillance according to the Code of judicial Procedure should not be possible to use. But as mentioned below, unless used as evidence in a court of law, a suspect is never informed about the use of these measures.

and that Alzery had merely been arrested, not convicted of any crime. However, the Swedish embassy's report to the Ministry for Foreign Affairs a few days before the execution of the expulsion states that Alzery has been sentenced to seven years' imprisonment, also *in absentia* and by a military tribunal. According to information from relatives of Alzery, the district attorney has now discontinued the preliminary investigation against him, but he is still in prison. Nor will Agiza, according to the Government's own report, obtain a new and fair trial as intended. If he is granted the opportunity, his sentence may however be reviewed and reduced but he will not be able to claim his innocence before an impartial tribunal. This, in our view already constitutes a violation of the promise made by the Egyptian government and thus also of the diplomatic assurance.

69. In our opinion, it is unclear whether the two men were really expelled because they constituted a security risk in Sweden, or whether the decision was occasioned by the recently launched "war on terrorism". The Government refers liberally to Security Council resolution 1373, to the exception clauses in the UN Convention relating to the Status of Refugees, and to the combat against terrorism. There also seems to be a perception that resolution 1373 required measures against asylum seekers suspected of being terrorists without considering or respecting their human rights.

**70. However, the resolution does not absolve Sweden of its obligations under the human rights conventions it has ratified, including Article 13 of ICCPR. We allege that such compelling reasons of national security as could exempt Sweden from following the procedure described in Article 13 did not exist.**

71. The option of referring the matter to the Government is, as mentioned above, discretionary. In view of the fact that there was a risk of torture, the matter could have been referred back to the Migration Board for a decision, which could then have been revised by the Aliens Appeals Board. There was also the possibility of handling the matters as extradition matters, which would have meant that the wife Hanan and the children would probably have been granted residence permits in Sweden (in accordance with the principle of family unity when the family provider has been judged to have refugee status, which was the case regarding the husband Agiza), and that the legality of the extradition of Agiza and Alzery would have been tried by a court of law.

### **The immediate expulsion and the purpose of the Covenant**

72. Agiza and Alzery were removed from the country the same day the expulsion decision was taken. As mentioned above, the expulsion was executed so quickly and that the men's attorneys were not informed until after the deportation. Naturally, it is difficult not to suspect that the precipitate speed of the proceeding was aimed at impeding or preventing the cases from reaching an international or regional human rights body such as the Human Rights Committee before the men had been removed from the country. The Swedish Government must have been fully aware of the fact that the expulsion of the two men would be criticized or at least questioned. Swedish refugee lawyers are well acquainted with the international avenues of complaint that are available, so there is no doubt that the Government realized that the two men would immediately appeal to an international or regional tribunal if they had had an opportunity to do so.<sup>8</sup> From experience the Government also knows that such an application could very well

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<sup>8</sup> Letter to the Government, the Government Offices and the Ministry for Foreign Affairs from lawyer Kjell Jönsson dated 21 December 2001, registered at the Ministry on 27 December: "Let it be recorded that the Government has been notified by me that Alzery would file a complaint against Sweden with the European Court of Human Rights, the UN Committee Against Torture etc. in the event the Government should decide to expel Alzery to Egypt."

have led to a request by the international tribunal that the expulsion be postponed pending its decision. So far the Government has always complied with such an interimistic decision and would have found it very difficult not to do so in the Agiza and Alzery cases as well. It cannot be completely ruled out that the immediate execution of the expulsion was intended to avoid someone challenging the expulsion order before it was executed.

73. Sweden has accepted the individual complaint procedures that exist according to the ICCPR, CERD, CAT and, of course, the European Convention. It can be questioned whether immediate expulsion in such controversial matters as Agiza's and Alzery's – which has occasioned a handling that, as the Government itself points out, is exceptional – does not conflict with international treaty law and the obligation to interpret a treaty according to its purpose and meaning.<sup>9</sup> In view of the nature of the matters and the danger to the men's life and health that did in fact exist, the Government's actions are in any case highly dubious in the light of articles 13 and 2:3a.<sup>10</sup>

**74. It is our position that the Government by immediately executing its expulsion ruling, hindered the men's only option to have their case reviewed by an independent tribunal, and that this was not justified by compelling reasons of national security. According to us, these actions constitute a violation of Article 13. (see below on article 41.)**

#### **Right to deny asylum due to crime or national security**

75. At paragraph **9 to 13** in its follow-up report to the Human Rights committee, the Government describes the options provided under Swedish law – which are in agreement with Article 1F of the UN Convention relating to the Status of Refugees – for excluding refugees from protection under certain circumstances.

76. Such an exclusion requires that there is a serious charge against the asylum seeker of a very serious non-political crime and that "special reasons" exist. If the committed crime does not stand in reasonable proportion to the stated political purpose, the crime should not be regarded as political, particularly not if it is a serious or heinous crime. Activities in the homeland for an organization that has been guilty of repeated serious abuses there have, with reference to Article 1 F (a) of the Refugee Convention, been considered to constitute special reasons for denying refugee status.<sup>11</sup>

77. Agiza and Alzery were sought by their home state of Egypt, a country which has a broad definition of terrorism, often criticized not only by the HR Committee, but also in reports

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<sup>9</sup> Article 31 Vienna Law of Treaties.

<sup>10</sup> The case of Mamatkulov and Abdurasulovic v. Turkey (appl no 46827/99 and 46951/99) bears resemblances to the cases of Agiza and Alzerys. The men were suspected terrorists and their extradition was requested to Uzbekistan, where they were subsequently sentenced to imprisonment for many years. There was considered to be a risk of torture if the extradition were to be executed, and the men's attorney therefore appealed to the European Court of Human Rights to obtain an interimistic ruling that the extradition should be postponed pending the judgement of the Court. The ruling was made, but Turkey nevertheless chose to execute the extradition. Besides the fact that the Court observes that this entailed great difficulties for the complainants to prove their case in court, this was also a violation of Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the obligation of the states not to hinder in any way individuals from the effective exercise of their rights under the Convention. What the judgement also shows is that despite the fact that the persons whose extradition was requested were suspected of serious crimes, the European Court of Human Rights nevertheless found that execution of extradition could await until the Court had made its ruling.

<sup>11</sup> Wikrén, Sandesjö "Commentaries to the Aliens Act", 7th Edition, p 182.

from other states and human rights organizations. In a similar manner, criticism has been levelled at the government's hard line in dealing with what they define as terrorism: "The Emergency Law, which has been in effect since 1981 and was renewed for another 3 years in June 2000, continues to restrict many basic rights. The security forces continued to arrest and detain suspected members of terrorist groups. In combating terrorism, the security forces continued to mistreat and torture prisoners, arbitrarily arrest and detain persons, hold detainees in prolonged pretrial detention, and occasionally engage in mass arrests." (US state department report, Egypt 2002).

Agiza was said to have been sentenced to 25 years for association with or involvement in terrorist actions. The judgement had been rendered in a military tribunal in Agiza's absence. However, neither Agiza nor his attorney was informed of this judgement. The use of military tribunals in cases involving civilians can be seriously questioned. Military tribunals are partial. Their judgements cannot be appealed and the use of them against civilians is in many other aspects as well, in violation of Article 14 of the International Covenant on Civil and Political Rights. Agiza was transferred to Egypt against a guarantee of a fair trial. After 18 months in prison he had only met his lawyer one single time, the trial will not be repeated, the judgement that convicted him *in absentia* still applies, he will not be given an opportunity to prove his innocence. He has not yet been given a date for negotiations regarding a mitigation of his sentence.

78. At the time of his expulsion, El Zari was suspected or convicted (once again by a military tribunal) of a crime that had given or could give him seven years' imprisonment. In El Zari's case it is not merely unclear whether charges had actually been brought against him or whether there were merely general suspicions; it is furthermore not completely clear that he is the man sought by the Egyptian government. According to information from his family, the district attorney discontinued the preliminary investigation against him in the early summer of 2003, after he had been kept imprisoned, in part by the infamous security service, for one and a half years. When the accusations ceased, however, he was not released but is still in detention.

79. It can be very strongly questioned whether the *in absentia* judgements of a military tribunal under the terrorist legislation that exists in Egypt are sufficient reason to exclude refugees from protection under Article 1 F of the Refugee Convention. Furthermore, we do not believe that such a judgement would have been made if international pressure had not been brought to bear. Egypt has in various contexts claimed that they had requested the extradition of the two men previously but not been heeded.<sup>12</sup> No changes in laws or conventions had occurred when the men were transferred to Egypt which would entail a different legal situation following 11 September compared with before. Furthermore, it is our opinion that the possibility cannot be ruled out that the men were sought for political reasons, and especially in Alzery's case the accusations are not sufficient to meet the requirements made by 1F regarding the seriousness of the crime "for a crime to be considered serious, it is necessary that the death penalty, or at least a very severe punishment, has been legislated".<sup>13</sup>

80. Quite regardless of the men's alleged criminality, this is not reason to prevent them from submitting their case to an independent tribunal and being given an opportunity to have the decision of exclusion from refugee status reviewed.

### **Effective remedy in Security matters where there is a risk of torture**

81. There is today no exception for the Government's one-sided competence in matters of national security in connection with an application for asylum, even if the individual faces a risk of torture or other cruel or inhuman punishment, the death penalty or other persecution. In the drafting history (*travaux préparatoires*) of the current Aliens Act, as well as in the Government commission report presented in 1999 proposing a change in the jurisdiction and

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<sup>12</sup> This was, e.g. mentioned by the representatives of Egypt during the 2048<sup>th</sup> meeting with the Human Rights Committee October 23 2002 but also in various Egyptian newspapers such as Al Hayat.

<sup>13</sup> Ibid

rules of procedure in asylum matters<sup>14</sup>, the investigators warn of this type of decision procedure. “If /.../ a person can present an arguable claim of a violation of the covenant rights, and if the Government has then made the decision as the first and only tribunal, the individual has been deprived of the right to an effective remedy prescribed in Article 13 (of the European Convention).

82. The Committee of Ministers of the European Council has described Article 13 in relation to Article 3 (prohibition against torture) in the following terms in recommendation no. (98) 13:

1. An effective remedy before a national authority should be provided for any asylum seeker, whose request for refugee status is rejected and who is subject to expulsion to a country about which that person presents an arguable claim that he or she would be subjected to torture or inhuman or degrading treatment or punishment.

2. In applying paragraph 1 of this recommendation, a remedy before a national authority is considered effective when:

2.1. that authority is judicial; or, if it is a quasi-judicial or administrative authority, it is clearly identified and composed of members who are impartial and who enjoy safeguards of independence;

2.2. that authority has competence both to decide on the existence of the conditions provided for by Article 3 of the Convention and to grant appropriate relief;

2.3. the remedy is accessible for the rejected asylum seeker; and

2.4. the execution of the expulsion order is suspended until a decision under 2.2 is taken.

83. In our opinion, the fact that Sweden insists on keeping the Government as the first and last tribunal in security matters in general, but in particular in ones where there is a risk of torture, conflicts with Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The equivalent of Article 13 in the ECHR is Article 2:3a in ICCPR. In General Comment 20 paragraph 14, the Human Rights Committee says that Article 7 (the prohibition against torture) should be read in conjunction with article 2:3, and that “Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.” In the same comment, the Human Rights Committee notes that the prohibition against torture also entails a prohibition for the States Parties to the Convention to “expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”.

84. Article 2:3a notes that the individual should have an effective remedy to have a violation reviewed – which can also mean a violation of Article 13, i.e. the opportunity for an alien, before being expelled from a State Party to the Convention, to present reasons against his expulsion and to have his case reviewed by a national authority. Such an opportunity must be “accessible, effective and enforceable”. “Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. “The nature of the legal obligation imposed on state parties to the covenant”

**85. We believe that the decision procedure laid down in Chapter 7, Section 11, paragraph 2, point 2 of the Aliens Act generally conflicts with ICCPR’s requirement of an**

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<sup>14</sup> SOU 1999:16 Ökad rättssäkerhet i asylärenden (“Protection of individual rights in asylum matters”). Final report of committee on new jurisdiction and rules of procedure in alien matters (NIPU), in Swedish only, pages 330-331

**effective remedy in cases when there is a risk that an expulsion will violate the absolute prohibition against torture, and with this the principle of non-refoulement. Consequently, it is our opinion that the Government violated Alzery's, Agiza's and Hanan Attia's right to an effective remedy in accordance with 2:3a in relation to article 7.**

### **The principle of non-refoulement and national security**

86. It is questionable, in our opinion, if the men constituted a security risk in Sweden. Instead they might very well have been expelled due to international pressure. Even if they were a security risk, national security may never take precedence over the right to asylum if expulsion could entail a risk of torture. There is an absolute prohibition against violating the non-refoulement principle, something which is also established in Chapter 8 Section 1 of the Aliens Act.

87. The judgement that most clearly demonstrates what is involved in cases of expulsion due to security risk is *Chahal v. United Kingdom*. Some principles that can be derived from this judgement are:

- The principle of non-refoulement is absolute, i.e.:
- The risk of torture due to execution of expulsion can never and must never be set aside for reasons of national security.
- The non-refoulement rule applies regardless of what the individual is suspected of, i.e. even terrorism (the exemption clause in Article 33 (2) of the UN Convention relating to the Status of Refugees was thereby rendered obsolete).
- An independent body must review whether there are sufficient reasons to fear a real risk of torture – the Government as the first and last tribunal is thereby unsatisfactory.
- Even if the case concerns national security or terrorism, it must be possible to verify these claims to some degree.

88. International law does not currently prohibit states from using agreements with the receiving state (diplomatic assurances) to eliminate the risk of torture. But the agreement must then not only be sincerely intended on the part of the receiving state, it must be able to be enforced and monitored by the extraditing state. In the *Chahal* case, it is clear that the European Court of Human Rights finds difficulties with such agreements. The good will of the receiving state in honouring the agreement is not enough. The fact that torture occurs and cannot be controlled or that the crime is not prosecuted gives a clear indication that such a guarantee cannot be adequate.

89. The Swedish Government appears to think that the guarantee in itself was sufficient for Sweden not to be accused of violating international law (end of paragraph 14). In paragraph 17, the Government then refers to the UN's special rapporteur on the question of torture, Professor Theo van Boven, and his report A/57/173 from 2 July 2002: "to ensure that in all appropriate circumstances the persons they intend to extradite, under terrorist or other charges, will not be surrendered unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity."

90. The Government makes use of Professor van Boven's statement to defend its actions in the cases of Agiza, Alzery and Hanan Attia. We believe this is an abuse and a misinterpretation of the purpose behind the rapporteur's report. Van Boven does not give a go-ahead for the extradition of suspected terrorists if they risk torture; guarantees are a very special

exception from the main rule, which is not to expel if there is a risk of torture. His assignment is instead to hold the expelling states responsible for violations of the principle of non-refoulement. Nor has Theo van Boven approved the Swedish-Egyptian agreement, even if one is deluded to believe this when reading the governmental report.

91. Swedish Government negotiated with Egypt fulfils the minimum requirements which Professor van Boven makes, nor the principles that can be derived from the Chahal case. We would also like to repeat the conclusions of the HR Committee CCPR/CO/74/SWE, paragraph 12: “When a State party expels a person to another State on the basis of assurances as to that person’s treatment by the receiving State, it must institute credible mechanisms for ensuring compliance of the receiving State with these assurances from the moment of expulsion.”

91. In this context we do not have to give an account to the HR Committee of conditions in Egypt or of the existence of torture there, since this is something the Committee is very well acquainted with. Suffice it to note that the police and security service practice torture of detainees with virtually complete immunity<sup>15</sup> and that suspected terrorists run a particularly great risk of being subjected to torture or cruel or inhuman treatment or punishment. Detentions also occur due to ill-founded suspicions and for a long time. As the Committee knows, the UN’s special rapporteur on the question of torture has never been allowed to visit Egypt or look into conditions there.

92. Agiza and Alzery were not extradited – they were expelled and returned to their former homeland. But this nevertheless entailed that the men were handed over from the Swedish security service to the Egyptian one. The men complained of the treatment to which the Swedish National security service subjected them in connection with their arrest in Sweden and during the flight to Cairo: “That on December 18, 2001, Ahmed was arrest in Sweden while he was attempting to return. He found a car approaching and three men came out and arrested him and took him directly to the airport. During that time he was beaten and tortured and laid [prostrate] on the ground and one officer continuing jumped on his back and his back is still injured as a result. He was then shackled in chains. His hands were put behind his back and then chained to his feet. He was taken directly to the airport.”

93. Inside the plane he was suspended by his wrist while still shackled and remained in this position for the next eight hours until his arrival at Cairo airport. He was accompanied during the flight with Muhammad Muhammad Suleiman Ibrahim El-Zari.”<sup>16</sup>

94. We have not received any answers to our questions if these claims regarding the Swedish security service’s treatment of Agiza ever were investigated.<sup>17</sup>

95. Even though the Government was of the opinion that the written guarantee is in itself sufficient for Sweden not to be accused of a breach of international law, mechanisms were set up to verify that the agreement was respected by the Egyptian authorities. But they never bothered to discuss with the Egyptian authorities the detailed nature of these mechanisms.

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<sup>15</sup> According to reports in the past year there has been some improvement and more and more police are being charged with torture offences. However, no significant change has been reported regarding the behaviour of the security service.

<sup>16</sup> Governmental Deportation: Egyptian Nationals as Islamic Fundamentalists, report from the Human Rights Center for the assistance of prisoners 1 April 2003.

<sup>17</sup> It can be added in this context that torture is not an explicit crime according to the Swedish Penal Code, but instead falls under the crime of assault.

According to the Government's own documentation, access to the men was demanded, but without specifying how often, for how long or in what manner. After the expulsion, the ambassador agreed with the commandant at Tora Prison that he would be allowed to visit the men once a month and that he would give notice of these meetings several days in advance "so that all technical arrangements could be made". No other details concerning the visits were agreed on.

96. It took nearly five weeks before the Swedish embassy visited the men for the first time. The visit took place in Mazraat Tora Prison, even though they until the middle of February were imprisoned by SSI, State Security Intelligence, at an interrogation centre outside Cairo. They were then transferred to Estqbal Tora Prison, which is a part of the large Tora prison complex outside Cairo. However, most of the visits by the embassy during 2002 took place at Mazraat (Tora Prison).

97. The Swedish follow-up has great shortcomings, which have entailed that the men have been exposed to a serious risk of being treated in violation of international human rights law:

- The two men did not receive any visits at all for the first five weeks. The embassy has agreed with the prison commandant in advance when the visits should take place – even if there has sometimes only been a few days' notice. The visits have been less frequent during the summer vacation months and Christmas when there were intervals of two months.
- None of the visits have taken place in private. The men have been taken to the commandant's office, where there have sometimes been up to ten officials present. Nor, reportedly, has the Ambassador asked to meet the men in private.
- The embassy has not had the men examined by a physician, little less one with experience of torture victims. Nor have they asked for permission to bring a doctor to the prison to perform a medical examination.
- The men are forced to speak with the embassy staff through an interpreter (who is, however, reported to be employed by the embassy), despite the fact that they speak Swedish.
- The embassy staff have not been allowed to visit the men in the cells where they are being held.

98. From the embassy reports it is also clear that the staff lack experience and knowledge of how a torture victim behaves and speaks, what questions should be asked, overall of how to get as true a picture as possible. Indications of ill treatment have been ignored, as well as accusations of ill treatment made by the prisoners. These allegations have however been disclosed to the Egyptian authorities to get their assessment of the veracity of the statements. The Egyptian authorities have denied the accusations, which has been accepted by Sweden.

99. Besides the Swedish ambassador, relatives have also been given an opportunity to visit the men. Agiza met his family for the first time in January 2002, then in April and July, and thereafter every fourteen days. The mother of Ahmed Agiza in particular has provided detailed information on what her son had to endure during his imprisonment. These accusations have also been submitted to the Government:

100. "They were transported from Cairo Airport to the State Security Department directly where he was kept in a room under the ground with a microphone. He is told to "write what you are dictated". There is someone from behind him and when he objected to write something, he was beaten and electrocuted. He had to write what they wanted. He told

us [reports to family] that “if they asked me to write that I killed prophet Mohamed, I would write.”

101. He [Ahmed Agiza] said that he suffered all types of torture sometimes he was laid naked on a mattress made of sponge while his hands and feet were tied. They applied electricity to his body which made him raise and fall. During that process a doctor was carrying cream to apply to the areas of burn resulting from the electricity. [to minimize scaring]”<sup>18</sup>

102. “[Ahmed Agiza reports to his mother] that during one torture session he [Ahmed Agiza] was blind folded with hands tied together and the guard gave him a loaf of bread filled with rice. Because he was blind folded the sandwich fell down. The officer order him to pick up every piece of rice from the floor with his tongue. He does.”<sup>19</sup>

103. “After the transfer to Estqbal Tora the author’s husband (*Agiza, our ref.*) was detained in a very small cell without light, bed or mattress. The cell was so cold, most likely artificially cooled down. Mr Agiza’s hands were initially for a long period of time handcuffed and he was not allowed to visit a toilet. Later he has been released from the handcuffs and allowed to visit a toilet but only once every 24 hours.”<sup>20</sup>

104. According to the families, the men were threatened with further torture if they told anyone what they had been subjected to. After the first visit when Agiza had complained of his treatment to the Swedish ambassador, he was subjected to cruel and inhuman treatment as soon as the ambassador had left the prison. As a consequence of this, he has subsequently chosen not to tell anything, according to his family.

105. During the winter of 2002/2003, the Ministry for Foreign Affairs appointed Ulla Ström the Government’s special representative and put her in charge of the follow-up. Ahmed Agiza then made the same accusations to Ström and Ambassador Linder as he had previously made to his mother.<sup>21</sup>

106. In our opinion, the Swedish Government has lacked not only the competence to conduct professional interrogations or examinations of the men’s condition, but also the will to do so. Since the winter and early spring of 2002, several national and international NGOs and experts have pointed out the shortcomings in their monitoring. But the Government has not heeded this criticism and improved its monitoring. Instead, it is claimed that the monitoring is working and that there is nothing to suggest that Egypt has breached the agreement. In the follow-up report that is now being subjected to review by the Human Rights Committee, the Government even writes: “It is the opinion of the Swedish Government that the assurances obtained from the receiving State are satisfactory and irrevocable and that they are and will be respected in their full content. The Government has not received any information which would cast doubt at this conclusion.”(Paragraph 16).

107. It is very disheartening that the Government finds that the information it has been given, both in direct conversations with the two men and via the reports of relatives and organizations, has not even aroused the shadow of a doubt that the men may

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<sup>18</sup> Note 5, page 6.

<sup>19</sup> Ibid.

<sup>20</sup> Petition to CAT from Ahmed Agiza’s wife, Hanan Attia.

<sup>21</sup> Embassy report “Egypt matter. Conversation with the ministries of justice and home affairs and the tenth prison visit with the two expelled Egyptians” 2003.

have been treated in a manner not consistent with international law. It is also serious that the accusations have not on any occasion led the Government to improve its monitoring or strengthen it with specialist competence in the field.

**108. There is not doubt in our minds that the Swedish Government did not provide for a sufficient follow-up mechanism to the assurances given by Egypt and that it has violated article 7.**

#### **The future of the principle of non-refoulement and article 41**

109. It is our opinion that the Swedish case is of great importance for general compliance with the non-refoulement principle. The case of Mamatkulov v. Turkey shows that there was a serious risk that more and more states are choosing to execute expulsions, even when an international or regional tribunal has requested that the execution be postponed pending its ruling. However, in an attempt to prevent an overly negative trend in this area, the court finds that interimistic rulings are binding and that acting in contravention of such a ruling is a violation of Article 34 of the ECHR. The HR Committee has previously established a similar principle in the case of Glen Ashby v. Trinidad and Tobago of 26 July 1994.

110. These clarifications concerning international law must also apply to cases where individuals are hindered from filing individual applications e.g according to article 41 of ICCPR. The case of Mamatkulov v Turkey shows how easily a state can avoid getting a negative judgement from an international human rights body, simply by quickly executing an extradition, expulsion or deportation and thereafter, together with the receiving state, exclude all possibilities of independent verification of whether a diplomatic assurance is being lived up to, and whether an individual is being treated according to human rights standards. As well as having made sure that it is almost impossible for the complainant to gather any kind of evidence in order to prove that his or her rights are being violated. One just has to take the governments' word for it.

111. It is our opinion that so-called diplomatic assurances can never constitute an alternative to expulsion, deportation or extradition to a country where torture occurs without control. No follow-up mechanism, no matter how effective, can overcome the diplomatic difficulties involved when one state has to monitor another state's respect for human rights – good international relations may well be an obstacle. In these cases, criticism of the receiving state also entails a risk of criticism of the expelling state – in other words, the state ends up monitoring itself. The actions of the Swedish Government indicate that it distrusts reports from NGOs, relatives etc., which are dismissed as not being credible. The government dismisses too easily accusations even from the prisoners themselves about torture and relies too much on the denials from the Egyptian government.

112. If a follow-up is to have any value at least one independent body must be brought in, such as ICRC or the Special Rapporteur. At the same time independent bodies cannot take the place of the Governments. It is vital that the extraditing/expelling and receiving states not be permitted to act in a way that violates the most fundamental human rights, such as the prohibition against torture. States must not be allowed to shirk their obligations. It can therefore not be emphasized enough how essential the Human Rights Committee's increased attention to non-refoulement cases is in the shadow of the fight against terrorism.