



**United Nations Human Rights Committee  
Consideration of the 6<sup>th</sup> Periodic Report of Sweden**

**Submission of the International Commission of Jurists**

*January 2009*

The International Commission of Jurists (ICJ) wishes to provide its views to the Human Rights Committee for the consideration of the 6<sup>th</sup> Periodic Report of Sweden. In this submission, the ICJ highlights several issues which it considers should be of particular concern to the Committee in its consideration of the Swedish report.

In particular, the ICJ is concerned at the new Law on Signals Intelligence in Defence Operations, which will provide the Executive with wide powers of surveillance in respect of electronic communications and which could adversely impact on human rights, in particular under Article 17 of the International Covenant on Civil and Political Rights (ICCPR), when it enters into operation. The ICJ is also deeply concerned at the absence of investigation and prosecution in the *refoulement* cases of Mohammed Alzery and Ahmed Agiza. Finally, while the ICJ welcomes some good practices in Swedish legislation on expulsion and deportation of aliens on security grounds, it also has concerns regarding its implications for rights contained in Articles 7, 9 and 14 ICCPR.

**The new Law on Signals Intelligence in Defence Operations (Article 17 ICCPR)**

On 18 June 2008, the Swedish Parliament approved the Law on Signals Intelligence in Defence Operations (2008:717), which entered into force on 1 January 2009. The operations authorised under the Law will not be undertaken before 1 October 2009.

The Law on Signals Intelligence in Defence Operations (2008:717) provides for an agency appointed by the Government (hereinafter “Signals Agency”),<sup>1</sup> (which in practice may be the National Defence Radio Establishment (“FRA” in Swedish)) to conduct the acquisition of signals in electronic form for defence intelligence operations,<sup>2</sup> and, in addition, to acquire signals intelligence in order to “monitor changes in the signals environment [...], the technical development and the signals protection, and continuously develop the technique and methods necessary to conduct activities according to this law.”<sup>3</sup>

Under the law, signals data can only be acquired where the signals cross Sweden’s borders,<sup>4</sup> and where they match identified search terms.<sup>5</sup> These search terms are to be

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<sup>1</sup> The names inserted are not official names, but are decided and included in the text for the sake of clarity, since that Law introduces several agencies.

<sup>2</sup> Defence Intelligence Operations can include operations of foreign, defence and security policy and identification of external threats. See, Law on Defence Intelligence Operations (2000:130), §1, referred to by Law on Signals Intelligence in Defence Operations (2008:717), § 1.

<sup>3</sup> Law on Signals Intelligence in Defence Operations (2008:717), § 1 (unofficial translation).

<sup>4</sup> *Ibidem*, § 2.

designed in a way that ensures as limited intrusion as possible on persons' integrity.<sup>6</sup> The search terms cannot directly target a natural person unless that person is of paramount importance to the activity being monitored<sup>7</sup>; neither can the acquisition of signals itself target a specific individual person.<sup>8</sup> The Government decides the focus of the signals' acquisition activity. Where the Signals Agency wishes to collect data through narrower and more detailed search terms, an authorisation of six months, extendable periodically for another six months, is required.<sup>9</sup> The authorisations are issued by an independent, Government-appointed agency ("Authorisations Agency"). The Chairperson and the Vice-chairperson of the Agency must be permanent judges while the other members are selected from the parliamentary groups.<sup>10</sup> The Authorisations Agency must be consulted by the Government when deciding the focus of the signals' acquisition activity.<sup>11</sup>

Operators of electronic signals must transmit the threads of their signals to interaction points and communicate these interaction points to the Government. Moreover, they must transmit information on their signals to the Signals Agency if their signals cross Sweden's borders.<sup>12</sup>

The Law provides for the immediate destruction of recorded or registered information that relates to a natural person and is not relevant to the purposes of the Law;<sup>13</sup> or if the information is protected by freedom of expression or freedom of press statutes; or if the information relates to the privilege of confidentiality between a lawyer and his or her client.<sup>14</sup> Information acquired under the law may be circulated among governmental defence intelligence organisations and the Signals Agency may establish cooperation with other countries and international organisations.<sup>15</sup>

Finally, the Law sets up an agency mandated to review the search terms and to supervise the destruction of information ("Supervisory Agency"). In case of a breach of this law or of unreasonable infringement of individuals' rights, a unit of this agency may order the destruction of the information.<sup>16</sup> Paragraph 11 of the Law sets up an internal council to the Signal Intelligence Agency to supervise the integrity of signal intelligence operations.

The Government is presently drafting a number of amendments to the Law to be approved by the Swedish Parliament before its entry into operation in order to address certain concerns of the statute.<sup>17</sup>

The ICJ considers that conduct of the operations authorised under the Law on Signals Intelligence in Defence Operations (2008:717) could constitute an unlawful or arbitrary interference with the right to privacy (Article 17 ICCPR). The ICJ recalls that for an interference to be lawful, it must not only find a basis in the domestic law

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<sup>5</sup> Ibidem, § 3.

<sup>6</sup> Ibidem, §3.

<sup>7</sup> Ibidem, § 3.

<sup>8</sup> Ibidem, § 4(1).

<sup>9</sup> Ibidem, § 5.

<sup>10</sup> Ibidem, § 6.

<sup>11</sup> Ibidem, § 4.

<sup>12</sup> Ibidem, § 12, which refers to the Law on Electronic Communications (2003:389), and in particular to its Ch. 6 § 19a, introduced under the same reform which enacted the Law on Signals Intelligence in Defence Operations (2008:717).

<sup>13</sup> See, ibidem, § 7(1).

<sup>14</sup> Ibidem, § 7.

<sup>15</sup> Ibidem, §§ 8 and 9.

<sup>16</sup> Ibidem, § 10.

<sup>17</sup> See Swedish Government website: <http://www.sweden.gov.se/sb/d/10941/a/110679#item110686>.

of the State party, but must also “comply with the provisions, aims and objectives of the Covenant” as a whole.<sup>18</sup> In addition, even if provided under law, it may not be arbitrary, and therefore must be “reasonable in the particular circumstances.”<sup>19</sup> The Committee has made it clear that a presumption of an interference with the right to privacy arises in respect of “[s]urveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations.”<sup>20</sup> Any interference must be specific in details as to the circumstances when such interference is allowed and the procedures to be followed. The extent to which the search or surveillance activities are authorised must not be arbitrary or left to discretionary authority.<sup>21</sup>

In particular, the ICJ recalls that in the gathering of information from electronic sources, such as computers and the internet, the State party must put in place effective measures aimed to avoid access to this information by unauthorised persons and to guarantee that it is not used for purposes contrary to international human rights law. Moreover, “every individual should have the right to ascertain in an intelligible form, whether, and if so, what, personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.”<sup>22</sup>

Finally, processing and gathering of electronic information must be subject to effective control by the judiciary or by a body with strong guarantees of independence, impartiality and effectiveness.<sup>23</sup> The ICJ considers that protection of international human rights law needs to be ensured through supervision by both the

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<sup>18</sup> Human Rights Committee, *General Comment 16*, paragraph 3.

<sup>19</sup> Human Rights Committee, *General Comment 16*, paragraph 4.

<sup>20</sup> Human Rights Committee, *General Comment 16*, paragraph 8.

<sup>21</sup> *Ibidem*, paragraph 8 (underlined in original version). See also, Human Rights Committee, Views of 15 November 2004, *Antonious Cornelis Van Hulst vs. The Netherlands*, UN Doc. CCPR/C/82/D/903/1999, paragraphs 7.3 and 7.6. See also, ECtHR, *Klass and Others vs Germany*, Application no. 5029/71, 6 September 1978, Court (Plenary), paragraph 50; *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 804<sup>th</sup> meeting of the Ministers’ Deputies, Articles V and VI(1).

<sup>22</sup> *Ibidem*, paragraph 10. See also, Human Rights Committee, Views of 15 November 2004, *Antonious Cornelis Van Hulst vs. The Netherlands*, UN Doc. CCPR/C/82/D/903/1999, paragraphs 7.7 and 7.9; HRC, Concluding Observations of the Human Rights Committee: USA, 87<sup>th</sup> session, 10-28 July 2006, 18 December 2006, UN Doc. CCPR/C/USA/CO/3/Rev.1, paragraph 21; ECtHR, *Malone vs UK*, Application no. 8691/79, 2 August 1984, paragraph 67. See also, paragraph 68; *Leander vs. Sweden*, Application no. 9248/81, 26 March 1987, paragraphs 50-51; *Segerstedt-Wiberg and Others vs Sweden*, Application no. 62332/00, 6 June 2006, paragraphs 74-80; *Amann vs Switzerland*, Application no. 27798/95, 16 February 2000, paragraphs 55-62, 68-70, 75-76. See also, IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paragraphs 289, 292 and 295.

<sup>23</sup> ECtHR, *Klass and Others vs Germany*, Application no. 5029/71, 6 September 1978, Court (Plenary), paragraphs 55-56. See also, ECtHR, *Malone vs UK*, Application no. 8691/79, 2 August 1984, paragraph 81; *Segerstedt-Wiberg and Others vs Sweden*, Application no. 62332/00, 6 June 2006, paragraph 117. On general principles in the Inter-american system, see also *X and Y vs. Argentina*, IACHR, Case 10.506, Report no. 38/96, 15 October 1996. See, *Convention on Cybercrime*, Council of Europe, Budapest, 23 November 2001, Article 15 (2). See ECtHR, *Weber and Saravia vs Germany*, Application no. 54934/00, Admissibility Decision of 29 June 2006, paragraph 95. See also, IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paragraph 371.

judiciary and an independent agency or a parliamentary committee characterised by the requirements of independence, impartiality and effectiveness.<sup>24</sup>

The ICJ welcomes the Government's initiative to reform the Law on Signals Intelligence in Defence Operations (2008:717) before the beginning of its entry into operation to the extent that the reforms will aim at bringing the Law into full conformity with Sweden's human rights obligations.

**The ICJ requests the Human Rights Committee:**

- **to ask to the Swedish delegation for detailed information on the content of the amendments planned to be introduced to the Parliament by the Government, and on the procedure they will have to follow for approval;**
- **to recommend that the legislation be amended so as to ensure that the scope for acquisition of signals data is narrowly tailored so as to prohibit any interference with privacy that is not strictly necessary for a compelling and legitimate purpose and proportionate to that purpose. To that extent, in consonance with the principle of legality, the legislation should be precise in its prescriptions and limitations and subject to necessary procedural safeguards.**
- **to recommend to the State party to provide for access to the ordinary courts by concerned persons in order to obtain binding orders requiring disclosure as to whether such persons have been or are being subject to surveillance; and to ensure that the courts have jurisdiction to order the rectification or deletion of such information that was unlawfully acquired or retained in contravention of international human rights law.**
- **to recommend that an independent Parliamentary authority supervise activities under this Law.**

**The Cases of Mohammed Alzery and Ahmed Agiza (Articles 2(3) and 7 ICCPR)**

The removal of Mohammed Alzery from Sweden to Egypt by CIA agents with the co-operation of Swedish officials, and failure to investigate and provide for an effective remedy, was found by this Committee to have constituted three distinct violations of article 7 of the ICCPR, two of these in conjunction with article 2. The removal of Ahmed Agiza under similar circumstances was determined by the Committee Against Torture to breach articles 3 and 22 of the Convention against Torture.<sup>25</sup>

At the time of writing, no criminal investigation or prosecutions have been instituted concerning the rendition from Sweden to Egypt of Mohamed Alzery and Ahmed Agiza, despite authoritative conclusions that the rendition involved and led to treatment in breach of the ICCPR and of the Convention against Torture. Following a private criminal complaint of May 2004, the Stockholm district prosecutor decided not to initiate a preliminary investigation as to whether a criminal offence had been committed in connection with the enforcement of the decision to expel the two men; the Parliamentary Standing Committee on the Constitution similarly decided that no criminal investigation should be instituted against members of the government. The decision of the district prosecutor was confirmed by the Prosecutor Director in April

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<sup>24</sup> UN High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/HRC/8/13, 2 June 2008, 8<sup>th</sup> session of the Human Rights Council, paragraphs 24 and 31.

<sup>25</sup> *Agiza v Sweden*, CAT/C.34/D.233/2003 (2005); *Alzery v Sweden* CCPR/C/88/D/1416/2005; See also the Report of the Parliamentary Ombudsman, Mats Melin, Reg. No.2169-2004, *A review of the enforcement by the Security Police of a Government Decision to expel two Egyptian citizens*.

2004,<sup>26</sup> and the Prosecutor General declined to reopen the investigation in April 2005.<sup>27</sup> Reasons for the failure to prosecute appear to have included the junior status of the officials involved, the fact that they were acting pursuant to a political decision, and the importance of the Security Police's national security and counter-terrorism role.<sup>28</sup>

The Parliamentary Ombudsman, who investigated the actions of Swedish Security Police involved in the rendition, decided not to conduct a criminal investigation, but rather an "informational" inquiry through which he could compel testimony from officials. The Ombudsman's investigation did not examine the issue of the command responsibilities of senior officials, or hear from any foreign agents, as this was beyond his mandate.<sup>29</sup>

The Human Rights Committee in *Alzery v Sweden* found that the failure to institute criminal prosecutions in respect of the conduct of either Swedish or foreign officials involved in the rendition of Mr Alzery violated Article 7 ICCPR read in conjunction with Article 2 ICCPR, noting that "as a result of the combined investigations of the Parliamentary Ombudsman and the prosecutorial authorities, neither Swedish officials nor foreign agents were the subject of a full criminal investigation, much less the initiation of formal charges [...]"<sup>30</sup>

In addition, the Committee against Torture in its *Concluding Observations* on Sweden regretted the lack of "an in-depth investigation and prosecution of those responsible, as appropriate."<sup>31</sup> The Committee recommended the grant of compensation, the institution of in-depth investigations into the reasons for their expulsion and the prosecution of those responsible. Moreover it recommended the Swedish Government take effective measures to ensure that it complies fully with obligations under Article 3 of the Convention Against Torture in order to prevent similar incidents from occurring in the future.<sup>32</sup>

The ICJ welcomes that fact that in July 2008 the Swedish Chancellor of Justice ruled that Mohammed Alzery be awarded 3 million SEK<sup>33</sup> in damages in a settlement and that, in September 2008, Ahmed Agiza was awarded the same sum.<sup>34</sup> The ICJ is concerned, however, that Sweden has failed to provide full reparation to the two victims, which should include not only compensation, but also rehabilitation, satisfaction, including restitution and satisfaction and guarantees of non-repetition.<sup>35</sup> In this respect, the State party has yet to issue an apology to either victim or to take measures aimed at their restitution or rehabilitation. It has declined to act with a view to bringing Ahmed Agiza back to Sweden to be reunified with his family and receive necessary medical rehabilitation. Ahmed Agiza remains imprisoned in Egypt following an allegedly unfair trial.

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<sup>26</sup> *ibid*, para.3.22

<sup>27</sup> *ibid*, para.3.27

<sup>28</sup> *ibid* para.3.22, 3.253.27

<sup>29</sup> *ibid*, Para.4.15; Report of the Ombudsman, *op cit*.

<sup>30</sup> *Alzery v Sweden*, *op cit*, Para.11.7

<sup>31</sup> CAT, *Concluding Observation of the Committee against Torture: Sweden*, 4 June 2008, CAT/C/SWE/CO/2, paragraph 13.

<sup>32</sup> *Ibidem*.

<sup>33</sup> See Press Article at <http://www.iht.com/articles/2008/07/03/europe/sweden.5-297821.php>.

<sup>34</sup> See Press Article at <http://www.shc.se/en/4/110/1324/>; <http://www.thelocal.se/14456/20080919/>.

<sup>35</sup> See, *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly in resolution 60/147 of 16 December 2005, paragraphs 15-24.

The ICJ also recalls that the rendition of Mohammed Alzery and Ahmed Agiza from Sweden involved acts by both Swedish and foreign officials which engage Swedish obligations under Article 2(3) of the ICCPR to investigate and to institute criminal proceedings against those involved.

Finally, the disclosure of Swedish involvement in the rendition of Mohammed Alzery and Ahmed Agiza, apparently at both political and operational levels, also places an obligation on the Swedish authorities to take preventative measures to guard against future involvement in operations which involve treatment in breach of the Covenant, or which lead to *refoulement* to face torture in violation of Article 7 ICCPR. These preventive measures should include effective, independent and impartial judicial review of all decisions on removal.<sup>36</sup>

**The ICJ urges the Human Rights Committee:**

- to recommend to the Government of Sweden that the prosecuting authorities institute criminal investigations in this case, in respect of both Swedish and foreign officials involved in the renditions, and that the capacity of the criminal justice system to ensure prosecutions for crimes of torture in appropriate cases be reviewed.
- To ensure that full reparation is provided to both Mohammed Alzery and Ahmed Agiza, including compensation, restitution, satisfaction, rehabilitation and guarantees of non-repetition in accordance with article 2 of the ICCPR and the *UN Basic Principles on the Right to a Remedy and Reparation*.
- to ask the Swedish delegation what additional safeguards have been put in place to protect against similar violations of the Convention in the future; and what guidelines are available to government, immigration and law enforcement officials, including intelligence services, regarding involvement in security or intelligence operations by intelligence services of other states.

**Expulsion and Deportation of Aliens (Articles 7, 9 and 14 ICCPR)**

Expulsion procedure and the principle of *non-refoulement*

In security-related cases, Swedish legislation provides for a particular regime on expulsions, contained in the Swedish Act on Special Control of Aliens (1991:572)<sup>37</sup> According to this law, an alien may be expelled or deported, the Aliens Act notwithstanding, whether it is necessary for reasons of public security or whether, taking into account what is known about the alien's previous activities and other circumstances, it can be expected that he or she will commit or participate in terrorist

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<sup>36</sup> *Agiza v Sweden*, *op cit*.

<sup>37</sup> This regime constitutes *lex specialis* in relation to the general immigration and refugee law contained in the Aliens Act (2005:716) and prevails on its norms. See, Aliens Act (2005:716), Ch. 8 § 15; and, Swedish Act on Special Control of Aliens (1991:572), §1, which says the act is applicable to "an alien who is not turned back or deported under the Aliens Act (2005:716)". See also, CODEXTER, *Profiles on Counter-terrorist Capacity: Sweden*, December 2006, available at [www.coe.int/gmt](http://www.coe.int/gmt), p. 5; Report by Sweden to the Counter-Terrorism Committee established under paragraph 6 of resolution 1373(2001), 24 December 2001, UN Doc. S/2001/1233, p. 5 and 6; Fourth Report on implementation of counter-terrorism measures in Sweden, 24 January 2005, UN Doc. S/2005/43, paragraph 1.3. A clear illustration of the Swedish expulsion procedure is also provided for in *Case of A.J. vs Sweden*, European Court of Human Rights, Application no. 13508/07, Decision on Admissibility, 8 July 2008, paragraphs 24-30.

crimes as contained in the Act on Criminal Responsibility for Terrorist Offences (2003:148).<sup>38</sup>

However, the Act on Special Control of Aliens (1991:572) also provides that an expulsion order "may never be enforced to a country where there is fair reason to assume that the alien would be in danger there of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, or the alien is not protected in the country from being sent on to a country in which the alien would be in such a danger."<sup>39</sup>

Decisions on expulsions under the Act are made by the Migration Board,<sup>40</sup> and can be appealed, by the alien or by the Security Police, to the Government, including in cases where a *non-refoulement* impediment is raised.<sup>41</sup> The Migration Board, as soon as the application for appeal is filed, must transmit the dossier promptly to the Migration Court of Appeal.<sup>42</sup> The Court transmits to the Government its opinion on the appeal. If the Court finds an impediment to the expulsion on grounds of *non-refoulement*, its opinion is binding on the Government and the expulsion must be suspended.<sup>43</sup>

This Committee in its General Comment 31 has affirmed that "the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."<sup>44</sup> The right to *non-refoulement* cannot be overridden by considerations of national security or on grounds of the offences committed by the concerned person.<sup>45</sup> The ICJ recalls that all States must respect the obligation of *non-refoulement* as provided in international human rights law, as well as in international refugee law. Under international human rights law, the obligation of *non-refoulement* applies where there are substantial grounds for believing that an individual faces a real risk, following removal, of torture and cruel, inhuman or degrading treatment or punishment or other violations of the most fundamental human rights, including arbitrary detention and flagrant denial of the right to a fair trial.<sup>46</sup>

### The ICJ urges the Committee:

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<sup>38</sup> See for the offences concerned, Act on Criminal Responsibility for Terrorist Offences (2003:148), §§ 2 and 3.

<sup>39</sup> Swedish Act on Special Control of Aliens (1991:572), § 3 referring to Aliens Act (2005:716), Ch. 12 § 1 (unofficial translation).

<sup>40</sup> Swedish Act on Special Control of Aliens (1991:572), § 2.

<sup>41</sup> Swedish Act on Special Control of Aliens (1991:572), § 2a.

<sup>42</sup> The Migration Court of Appeal is located at the Administrative Court of Appeal in Stockholm. The Administrative Court of Appeal is a general administrative court which follows, as applicable, the Administrative Court Procedure Act (1971:291).

<sup>43</sup> Swedish Act on Special Control of Aliens (1991:572), § 3.

<sup>44</sup> Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), paragraph 12.

<sup>45</sup> See, *inter alia*, *Soering v. UK*, Judgment of 7 July 1989; *Chahal v. UK*, Judgment of 25 October 1996.

<sup>46</sup> Human Rights Committee, *Kindler v. Canada*, UN Doc. CCPR/C/48/D/470/1991 (1993), § 13.2; HRC, *General Comment No. 31*, cit., § 12. ECHR Article 6: *ECtHR, Soering v. UK*, Judgment of 7 July 1989, § 113, *Drozdz and Janousek v. France and Spain*, Judgment of 26 June 1992, § 110; Article 5 and Article 6: *MAR v. UK*, Judgment of 19 September 1997; *Tomic v. UK*, Admissibility decision of 14 October 2003, §3. On the wider application of *non-refoulement*, see *R v. Special Adjudicator, ex parte Ullah*, [2004] UKHL 26, per Lord Bingham, § 21.

- to ask the Swedish delegation what procedures and sanctions exist, if any, against public institutions or officials who intentionally, recklessly or negligently disobey, disrespect or ignore an order of refusal of *refoulement*, or who do not follow the procedure prescribed by law;
- to recommend that the State Party ensure that its domestic law concerning grounds for prohibition of *refoulement*, specifically the Aliens Act (2005:716), Chapter 12 paragraph 1, cover situations where there are substantial grounds for believing that an individual faces a real risk, following removal, of torture and cruel, inhuman or degrading treatment or punishment or other violations of the most fundamental human rights, including arbitrary detention and flagrant denial of the right to a fair trial

#### Detention of aliens pending expulsion

While the expulsion is pending, an alien who has attained the age of 18 may be detained in custody for a maximum period of two weeks or two months as a general rule. However, the custody can last for a longer period on exceptional grounds.<sup>47</sup> The detention of the alien must be reviewed periodically and the final responsibility for the review in security cases lies with the Migration Court of Appeal.<sup>48</sup> Other decisions concerning detention in security cases can be taken by the Migration Board and they are subject to appeal to the Migration Court of Appeal by the alien and by the Security Police.<sup>49</sup>

The ICJ recalls that the length of administrative detention for migrants or asylum seekers must be provided for in primary legislation,<sup>50</sup> be proportional to the purposes of the individual case,<sup>51</sup> and subject to periodical review of its grounds by the ordinary courts.<sup>52</sup> In particular, “justification for the detention [based on the country’s] general experience that asylum seekers abscond if not retained in custody”<sup>53</sup> is not sufficient.

#### **The ICJ calls on the Human Rights Committee to:**

- ask the Swedish delegation to define the content of “exceptional grounds” under which the maximum limits to the length of detention can be extended;
- ask the Swedish delegation if there exists a mandatory maximum length of administrative detention in these cases, and if not, recommend that one be established that is consonant with international standards, including Sweden’s obligations under the ICCPR.

#### Access to information and evidence in expulsion proceedings

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<sup>47</sup> Aliens Act (2005:716), Ch. 10 § 4(2).

<sup>48</sup> Swedish Act on Special Control of Aliens (1991:572), § 5 referring to Aliens Act (2005:716), Ch. 10 §§ 1 and 16.

<sup>49</sup> Swedish Act on Special Control of Aliens (1991:572), § 5 referring to Aliens Act (2005:716), Ch. 14 §§ 9 and 13. On the issue of administrative detention, see also *Sixth Periodic Report of Sweden to the Human Rights Committee*, UN Doc. CCPR/C/SWE/6, 5 December 2007, paragraphs 82-85.

<sup>50</sup> ECtHR, *Amuur vs. France*, Case no. 17/1995/523/609, 20 May 1996, para. 50. UN Working Group on Arbitrary Detention (WGAD), *Annual Report*, E/CN.4/1999/69, 18 December 1998, para. 69, guarantee 10.

<sup>51</sup> See fn no. 57; ECtHR, *Saadi vs. United Kingdom*, Application no. 13229/03, 29 January 2008, para. 72, 74; Resolution 1521(2006) on Mass Arrival of Irregular Migrants on Europe’s Southern Shores, Parliamentary Assembly of the Council of Europe, 5 October 2006, para. 16.4.

<sup>52</sup> HRC, *A vs. Australia*, CCPR/C/59/D/560/1993, 30 April 1997, para. 9.4.

<sup>53</sup> HRC, *Danyal Shafiq vs. Australia*, CCPR/C/88/D/1234/2004, para. 7.3.

The Administrative Court Procedure Act (1971:291) provides for *in camera* hearings before administrative courts including the Migration Court of Appeal<sup>54</sup> where information protected by the Secrecy Act (1981:100) is to be presented in court.<sup>55</sup> The Council of Europe's Commissioner for Human Rights in 2007 reported on these issues in Sweden that "[a] party's right to access to information in asylum cases is guaranteed by law, but can be restricted with regard to sensitive information. Decisions in security cases can be based on documents or information that are not revealed to the individual concerned, due to reasons of national security, activities of the National Police Board or protection of an informant."<sup>56</sup>

In this regard, the ICJ recalls that the principle of equality of arms applies to both criminal and civil proceedings,<sup>57</sup> and that it requires access to documentation and "opportunity to contest all the arguments and evidence adduced."<sup>58</sup> The breach of this principle constitutes a violation of the right to a fair trial (Article 14 ICCPR).<sup>59</sup> In particular, the party to the proceeding must have access to all material adduced against him/her and "also other evidence that could assist the defence".<sup>60</sup> This Committee has previously found that "the non-disclosure of information in connection with or during the course of proceedings [...] which could cause injury to international relations, national defence or national security, do not fully abide by the requirements of article 14 of the Covenant."<sup>61</sup>

#### **The ICJ asks the Human Rights Committee:**

- **to ascertain whether and to what extent, in asylum proceedings before the Migration Court of Appeal, evidence is withheld from the applicant on national security grounds;**
- **if necessary, to recommend changes to practice before the Court, to ensure that the right to equality of arms is protected.**

#### Implementation of international bodies' decisions on *non-refoulement*

The ICJ welcomes the existence of provisions in the Alien Act (2005:716) according to which "[i]f an international body that is competent to examine complaints from individuals has found that a refusal-of-entry or expulsion order in a particular case is contrary to a Swedish commitment under a Convention, a residence permit shall be granted to the person covered by the order, unless there are exceptional grounds

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<sup>54</sup> Aliens Act (2005:716) "[t]he general provisions on county administrative courts and administrative courts of appeal and their administration of justice apply to the migration courts and the Migration Court of Appeal and to the procedure in these courts unless otherwise provided in this Act." Aliens Act (2005:716), Ch. 16 §1(2) (unofficial translation).

<sup>55</sup> Administrative Court Procedure Act (1971:291), § 16 (unofficial translation).

<sup>56</sup> Council of Europe's Commissioner for Human Rights, *Memorandum to the Swedish Government: Assessment of the progress made in implementing the 2004 recommendations of the Council of Europe Commissioner for Human Rights*, 16 May 2007, CommDH(2007)10, paragraph 31.

<sup>57</sup> The system of administrative courts of Sweden can be included in these categories, switching from one to the other according to the right or interest they are competent to adjudicate. Nevertheless, the principle of equality of arms and its corollary on access to documentation are transversal.

<sup>58</sup> Human Rights Committee, *General Comment no. 16*, paragraph 13.

<sup>59</sup> Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.

<sup>60</sup> Human Rights Committee, *General Comment no. 16*, paragraph 33.

<sup>61</sup> Concluding observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13. 20 April 2006 Eighty-fifth session HRC. See also, ECtHR, *Rowe and Davis vs UK*, 28901/95, paragraphs 60-67; and *Jasper vs UK*, 27052/95, paragraphs 51-58. See also, IACHR, *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, Doc. 40 rev., February 28, 2000, paragraph 157.

against granting the permit.”<sup>62</sup> As well, the Aliens Act (2005:716) provides for the legal enforcement of interim measures by international bodies.<sup>63</sup> Nevertheless, the presence of an exception in both cases for “exceptional grounds” leaves space for concern, particularly considering the fact that this gives to the Swedish Government a certain degree of discretion for not following the decisions or interim measures of the international bodies.

**The ICJ recommends that the Human Rights Committee:**

- **ask the Swedish delegation to define the content of “exceptional grounds” under which a residence permit cannot be released;**
- **to recommend the deletion of the exception “unless there are exceptional grounds against granting the permit” from Chapter 5 paragraph 4 and Chapter 12 paragraph 12 of the Aliens Act (2005:719).**

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<sup>62</sup> Aliens Act (2005:716), Ch.5 §4.

<sup>63</sup> Aliens Act (2005:716), Ch.12 §12. The Committee against Torture also welcomed the introduction of these measures in its *Concluding Observations of the Committee against Torture: Sweden*, UN Doc. CAT/C/SWE/CO/2, 40<sup>th</sup> session, 28 April- 16 May 2008, 4 June 2008, paragraph 13