



FACULTY OF LAW  
University of Lund

Amelie Sällfors

*Exclusion, removal and the  
risk of torture.*

The 2001 expulsion of two Egyptian asylum  
seekers from Sweden in the light of international  
law.

Master thesis  
20 points

Supervisor  
Gregor Noll

Public International Law

Fall 2002

# Contents

<b>SUMMARY</b>	<b>2</b>
<b>ABBREVIATIONS</b>	<b>5</b>
<b>PREFACE</b>	<b>6</b>
<b>1 INTRODUCTION</b>	<b>7</b>
1.1 Subject and aim of the thesis	7
1.2 Limitations	8
1.3 Methods and sources	8
1.4 Outline	9
<b>2 THE CASE OF AHMED AGIZA AND MUHAMMED EL ZARY</b>	<b>10</b>
<b>3 CONVENTION RELATING TO THE STATUS OF REFUGEES</b>	<b>11</b>
3.1 The development of the refugee concept	12
3.2 Who is a refugee?	13
3.3 Exceptions to the Convention Relating to the Status of Refugees	14
3.4 Exclusion from refugee status	17
3.4.1 Agiza and El Zary's alleged terrorist activities	18
3.4.2 Crime against peace, war crime or crime against humanity	18
3.4.3 Serious non-political crime	20
3.4.4 Acts contrary to the purposes and principles of the United Nations	21
<b>4 QUESTIONS OF PROOF AND INDIVIDUAL RESPONSIBILITY IN REFUGEE CLAIMS</b>	<b>23</b>
4.1 The law of evidence	23
4.1.1 Refugee status determination in general	23
4.1.1.1 Burden of proof	24
4.1.1.2 Standard of proof	24
4.1.2 Determination of the exceptions according to articles 32.1 and 33.2 of the Refugee Convention	25
4.1.3 Determination of exclusion	26
4.1.3.1 Burden of proof	27
4.1.3.2 Standard of proof	27
4.2 Individual criminal responsibility for excludable crimes	30
4.2.1 Complicity in the commission of the crime	30
4.2.2 Membership in an organization	32

4.2.3	Agiza's and El Zary's responsibility for excludable crimes	32
<b>5</b>	<b>THE FORCED RETURN TO EGYPT</b>	<b>34</b>
<b>5.1</b>	<b>Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms</b>	<b>35</b>
5.1.1	Standard of proof under article 3 European Convention for the Protection of Human Rights and Fundamental Freedoms	35
5.1.2	Soering v. United Kingdom	36
5.1.2.1	The relevance of a guarantee	39
5.1.3	Chahal v. United Kingdom	40
5.1.3.1	The relevance of a guarantee	41
5.1.4	Soering and Chahal applied to the case of Agiza and El Zary	41
5.1.4.1	Real risk of torture?	41
5.1.4.2	An effective guarantee?	43
5.1.4.3	Violation of article 3 European Convention for the Protection of Human Rights and Fundamental Freedoms?	46
<b>5.2</b>	<b>Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms</b>	<b>46</b>
5.2.1	Agiza's and El Zary's access to an effective remedy	48
<b>5.3</b>	<b>Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</b>	<b>50</b>
<b>6</b>	<b>CONCLUSIONS</b>	<b>53</b>
6.1	Considerations relevant for further research	55
	<b>BIBLIOGRAPHY</b>	<b>57</b>
	<b>TABLE OF CASES</b>	<b>63</b>

# Summary

Ahmed Agiza and Muhammed El Zary (hereinafter referred to as Agiza and El Zary) are two Egyptian nationals that were expelled from Sweden in December 2001. The decision was taken by the Swedish government. They had in 1999 and 2000 separately, applied for asylum in Sweden since they claimed a fear of serious human rights violations in Egypt based on their political opinion. The Swedish Migration Board tried their applications, but decided to refer the matter to the Swedish government, since information was given to them by the Swedish Security Police about Agiza's and El Zary's suspected involvement in terrorist activity. On basis of the evidence given by the Swedish Security Police, the Swedish government found that there were serious reasons for considering that Agiza and El Zary had committed terrorist acts and therefore should be excluded under article 1.F of the Convention Relating to the Status of Refugees.

After the exclusion decision was taken, the Swedish government also decided to return Agiza and El Zary back to Egypt. The government did, however, admit that the two men could face persecution in Egypt, so to assure their safety, the Swedish government requested and received a guarantee from the Egyptian government. With reference to this guarantee, the Swedish government claimed that the expulsion decision was in accordance with the international human rights law.

The decision by the Swedish government first to exclude Agiza and El Zary from refugee status and second to return them back to Egypt, gives rise to issues under international law. These areas concern mainly refugee law and international human rights law in general. The aim of the thesis is to analyze these areas of law and how they apply on the expulsion decision. The specific questions that is looked into under refugee law are what standard of proof must be applied in order to exclude a person from refugee status and what individual responsibility must be in question for connecting a suspect to the committed crime. Concerning the issues of international human rights law in general, the compliance of the expulsion decision as such to international obligations is analyzed as well as the legal significance of the guarantee given in the case.

The crimes Agiza and El Zary were suspected of having committed concerned the bombing of the Egyptian Embassy in Islamabad, Pakistan, in 1995 and the explosion of a bus full of tourists in Luxor, Egypt in 1997. The Swedish government considered these acts as terrorist acts and therefore concluded that they fell under the crimes enumerated under the exclusion clause of the Convention Relating to the Status of Refugees. However, the Swedish government made no referral to what specific excludable crime that was in question. Considering the classified nature of the evidence used, an entire assessment of the applicable crime is difficult. Still, it is of great importance that the Swedish government applied the standard of proof

relevant in exclusion cases, i.e. that there are serious reasons for considering that Agiza and El Zary had committed excludable acts. However, it must also be assured that Agiza and El Zary separately could be found individually responsible for the excludable crimes in question. They must both have been personally involved in the crime, be it through ordering its commission or in fact committing the crime, and also fulfil the mental element by having known or ought to have known that they were part of the commission of an excludable crime and without taking any steps to prevent or repress the commission of the crime. Since the deliberations of the Swedish government and the evidence used to exclude Agiza and El Zary are classified, it is again difficult to determine if the required standard of proof was reached and sufficient individual responsibility was determined. However, it is still of great importance to point out the legal obligations of Sweden in this regard, and still hope, that they were sufficiently applied.

After the Swedish government excluded Agiza and El Zary from refugee status, the government did not find any other reason for letting them stay in Sweden. The government therefore decided to remove Agiza and El Zary back to Egypt. In this regard, Sweden has obligations under international human rights law not to expel a person to a country where there is a real risk that s/he would be subjected to torture or inhuman or degrading treatment or punishment. These rights of the individual are protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the CAT). In a provision of the CAT and as a principle evolved through the case law of article 3 ECHR, contracting states have an obligation not to expel a person to a country where there are substantial grounds for believing that s/he would face torture or inhuman or degrading treatment or punishment in the receiving country.<sup>1</sup> The question therefore arises if the Swedish government violated its international obligations by expelling the two men to Egypt. Decisive in the decision of the government was the guarantee given by the Egyptian government. However the effectiveness of the guarantee can be questioned. The practice of torture and ill-treatment in Egypt is a consisting problem. Especially is this the case in the custodies of the State Security Intelligence, where it was feared that Agiza and El Zary would end up upon return. Amnesty International has pointed out this practice of torture and further has the UN Committee Against Torture in its concluding observations of Egypt's fourth state report, concluded that the measures taken by the Egyptian government to try to prevent the torture and the ill-treatment has been insufficient. Also, in the jurisprudence of the European Court of Human Rights, it is stated that a guarantee, such as the one given in the case of Agiza and El Zary, is inadequate if the body giving the guarantee cannot effectively control the perpetrator of the ill-treatment. In the case of Agiza and El Zary, it can therefore be argued that the Egyptian government had no sufficient control over the perpetrators of the ill-treatment why the guarantee should not have

---

<sup>1</sup> Concerning the provision of the CAT, expulsion is only prohibited if the feared ill-treatment in the receiving country amounts to torture according to article 1 CAT.

been relied upon. Again turning to the reports of Amnesty International and UN bodies it can also be stated that there were substantial grounds for believing that Agiza and El Zary would face torture or inhuman or degrading treatment or punishment if returned to Egypt. Therefore, since the guarantee could be considered as inadequate and the requirements under article 3 CAT and article 3 ECHR could be considered as fulfilled, it can be argued that Sweden violated its international obligations under these conventions when they expelled Agiza and El Zary to Egypt.

When an individual has a claim that his/her rights have been violated, s/he has the right to an effective remedy. This right is protected under article 13 of the ECHR. When it comes to providing an applicant with an effective remedy when claims have been raised of violations of article 3 ECHR, the demands are fairly high on the remedy that shall be available. In the jurisprudence of the European Court of Human Rights, it is stated that there must be an impartial body that can independently scrutinize the case and again examine it to see if there is a real risk of treatment contrary to the article if expulsion was to take place. In the case of Agiza and El Zary the Swedish government took the decision of expulsion and there was no room for appeal either to a national or international body. Also the government as such had interests of its own in the decision, why they cannot be considered as impartial. Referring to the absolute nature of the prohibition under article 3 ECHR, it therefore can be argued that the remedy given to Agiza and El Zary was not efficient enough and hence Sweden violated article 13 of the ECHR.

In conclusion, it can be stated that due to the classified information, difficulties arise in assessing the evidence and the procedure preceding the exclusion decision. However, it is of utmost importance that the Swedish government found both Agiza and El Zary individually criminal responsible for the attacks in Islamabad, Pakistan, and Luxor, Egypt, and that it was determined that these crimes fall under the exclusion clause of the Convention Relating to the Status of Refugees. It is also important that the applicable standard of proof was reached, i.e. that there were serious reasons for considering that they have committed excludable crimes. Further since it cannot be ruled out that the guarantee provided inadequate protection and that there was a real risk of ill-treatment contrary to CAT and ECHR, it can be argued that the expulsion decision was in violation of Sweden's obligations under international human rights law. Finally it can be argued that Sweden also violated its obligation of providing Agiza and El Zary with an effective remedy according to article 13 of the ECHR.

# Abbreviations

CAT	Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
European Court	European Court of Human Rights
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ILC	International Law Commission
Refugee Convention	Convention Relating to the Status of Refugees
SSI	State Security Intelligence (Egypt)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

# Preface

First of all I would like to express my sincere appreciation to my supervisor, Dr. Gregor Noll, Assistant Professor in International Law at the Faculty of Law, Lund. Throughout the work on my thesis, his expertise and support has been of great help.

Then I would like to thank Madelaine Seidlitz, Refugee Coordinator at the Swedish Section of the Amnesty International, for letting me take part of information relevant for my thesis.

I would also like to thank Nils Eliasson, Deputy Director-General of the Department for Migration and Asylum Policy at the Swedish Foreign Ministry, Stockholm and Bo Johansson, lawyer at the Swedish Refugee Advice Centre, Stockholm.

Finally I would like to extend my gratitude to my friends and classmates who took interest in my work and for valuable discussions throughout the thesis.

Lund, February 2003  
Amelie Sällfors



# 1 Introduction

On 11 September 2001 two American Airlines airplanes crashed into the World Trade Center in New York, USA. The scenes filled the TV screens all over the world. Repeatedly could it be seen how they deliberately were steered into the two towers of the skyscraper. After this atrocious incident the war against terror started. Measures were taken all over the world to fight terrorism. But are all measures acceptable? Can the actions in the fight against terrorism be taken on the expense of human rights?

Three months after the attacks in the USA, two men of Egyptian nationality, Ahmed Agiza and Muhammed El Zary, were expelled from Sweden. In 1999 and 2000 they had separately sought asylum. At first the Swedish Migration Board examined their applications of asylum, but since a suspicion of their involvement in terrorist activity evolved during the refugee status determination procedure, the matter was referred to the Swedish government. With help of secret evidence from the Swedish Security Police and interviews with the two men, the government decided to exclude them from refugee status and also to return them back to Egypt. Decisive in the removal decision was a guarantee that the Swedish government requested and received from the Egyptian government, aiming at assuring the safety of the two Egyptians upon return to Egypt. The expulsion decision was enforced immediately and Ahmed Agiza and Muhammed El Zary were returned even before their legal representatives knew about it.

In the decision of returning the two men, concerns were raised by, for example, the legal representatives of the two men, non-governmental organizations and representatives from the Swedish parliament, claiming that Ahmed Agiza and Muhammed El Zary would be subjected to torture upon return to Egypt.

## 1.1 Subject and aim of the thesis

The action taken by the Swedish government in the case of Ahmed Agiza and Muhammed El Zary gives rise to a number of issues of international law. First, refugee law since the two men were considered as refugees, but were excluded from such status because of their suspected terrorist activity and second, human rights standards in general, since the question was raised whether the expulsion would contravene international human rights law, provided that the two expellees would be subjected to serious human rights violations upon return to Egypt.

The aim of the thesis is to examine and analyze these different areas of international human rights law and how they apply on the expulsion

decision taken by the Swedish government.<sup>2</sup> In carrying out this analysis, the case of the two Egyptians imbues the thesis and relevant referral to the case is made continuously.

Concerning the exclusion decision the main issue is to point out what requirements must be fulfilled in order to exclude a person from refugee status. An analysis is made of both the standard of proof applicable and the individual responsibility required to connect an alleged offender to the excludable act. As to the removal decision, the international obligations of Sweden in expulsion cases are determined and specifically what the legal significance is of a guarantee, such as the one the Swedish government received from the Egyptian government, saying that the two men would not be subjected to torture upon return.

## **1.2 Limitations**

The essence of the thesis is the legal issues in international human rights law that is brought up through the case of the two expelled Egyptians. Regarding the refugee law issues, only a brief overview is given of the refugee definition, different forms of losing the protection of non-refoulement and the exclusion clause. The reason for this is to put the questions concerning the decision by the Swedish government to exclude the two Egyptians into a context. Further, since the analysis is limited to the case of the two Egyptians, a broader and more general discussion on what terrorism is and how it can be applied under the exclusion clause is not looked into.

The international conventions referred to in the thesis are the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR) and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (hereinafter referred to as the CAT). This limitation is based on the fact that the Swedish government applied the ECHR in its decision and that the CAT is a related convention, since it contains a similar provision on expulsion as the one developed through the case law of the European Court of Human Rights. The UN Committee Against Torture has also given its views in similar cases. No other regional or international instruments are dealt with.

## **1.3 Methods and sources**

This thesis is structured as a case study. It employs the expulsion case quoted earlier to identify legal issues and to discuss the significance of relevant norms in international human rights law in their context. The sources used have mainly been doctrinal texts, international instruments and

---

<sup>2</sup> The Swedish government did take two separate and individual decisions to exclude and return Muhammed El Zary and Ahmed Agiza to Egypt. However, these decisions were almost identical, why they, in this thesis, are referred to as only one case.

internet web sites. Interviews with representatives of the Swedish government and of non-governmental organizations have also been made.

## **1.4 Outline**

After this first introductory chapter, the second chapter will follow, giving a description of the case of Ahmed Agiza and Muhammed El Zary. The third chapter will give a brief overview of the relevant provisions in the Convention Relating to the Status of Refugees. The fourth chapter examines the relevant questions of proof and individual responsibility that are required in the procedure to determine exclusion from refugee status. The fifth chapter deals with the guarantee given by the Egyptian government and the issues it raises under the ECHR and the CAT. In a last and final chapter the matters raised in the thesis are summarized and analyzed.

## 2 The case of Ahmed Agiza and Muhammed El Zary

Ahmed Agiza and Muhammed El Zary (hereinafter referred to as Agiza and El Zary) are two men of Egyptian nationality that were sent back to Egypt by a decision of the Swedish government on 18 December 2001. In 1999 and 2000 Agiza and El Zary had separately applied for asylum in Sweden. The Swedish Migration Board, who examined their application, stated that the two men had reasons for achieving refugee status, but decided to refer the matter to the government, since it related to issues of concern to the national security. The Migration Board had received opinions from the Swedish Security Police with information that the two men should not be afforded protection as refugees because of alleged terrorist activity. The Swedish Aliens Appeals Board agreed with the decision of the Migration Board to refer the matter to the government.

The charges against Agiza and El Zary concerned mainly two attacks, one in Luxor, Egypt, in 1997, where 58 tourists were killed and one, in 1995, on the Egyptian Embassy in Pakistan. The Swedish government was of the opinion that Agiza and El Zary had leading positions in an organization committing terrorist acts. By this position, the government stated that the two men could be held responsible for the actions of that organization. Both Agiza and El Zary denied the allegations against them. The alleged responsibility of terrorist activity was based on information that the Swedish government had received from the Swedish Security Police. After considering all information available in the case, the government decided to refuse Agiza and El Zary protection from refugee status on basis of Chapter 3, paragraph 4, second section, first point of the Swedish Aliens Act.

After the decision of exclusion was taken, the Swedish government also decided to return Agiza and El Zary back to Egypt. However, the safety of the two men had to be assured, why the Swedish government requested and received a guarantee from the Egyptian government where it was stated that the two men would not be subject to torture or inhuman or degrading treatment or punishment, have the right to a fair trial and if convicted, not be sentenced to death in Egypt. The Swedish government stated that the guarantee was a prerequisite for the decision to expel Agiza and El Zary. To provide additional protection to the two men, the Swedish government also decided that the Swedish Ambassador in Cairo, Egypt, should visit Agiza and El Zary in prison and also attend coming trials in their individual cases. The decision by the Swedish government to expel Agiza and El Zary was enforced by the Swedish Security Police according to Chapter 8, paragraph 11, second section, third point of the Swedish Aliens Act.<sup>3</sup>

---

<sup>3</sup> Decision of the Swedish government 1:1 and 1:2, 2001-12-18.

# 3 Convention Relating to the Status of Refugees

Agiza and El Zary were excluded from refugee status by decision of the Swedish government. However, at first the government did believe that the two men separately had grounds for receiving refugee status.

The circumstances of the case, principally based on his own statements concerning his activities in his home country and what he has been subject to there, are of such nature that Ahmed Agiza in fact can be considered as a refugee according to chapter 3, paragraph 2 of the Swedish Aliens Act.<sup>4</sup>

Even if the Swedish government did state that the circumstances for inclusion were fulfilled, it decided that the activities of both Agiza and El Zary were of such nature that the two men should be denied protection as refugees and they were therefore excluded from such status.<sup>5</sup> Hence, in the decision, the Swedish government assessed the facts related to inclusion before those related to exclusion. This method used is also recommended by the UNHCR in its guidelines on the application of the exclusion clause. Here it is stated that the exclusion clause will only apply when it has been determined that the criteria for refugee status is fulfilled.<sup>6</sup>

In view of the fact that the Swedish government used the method of inclusion before exclusion, the following chapter in the thesis will give an overview over relevant provisions under the Convention Relating to the Status of Refugees (hereinafter referred to as the Refugee Convention) to put the exclusion decision into a context. First, a brief overview of the refugee concept is given and then, the inclusion provision in article 1.A.2 of the Refugee Convention is referred to. After this, the provisions concerning expulsion of refugees is analyzed and finally the actual exclusion clause and

---

<sup>4</sup> Decision of the Swedish government 1:1 and 1:2, 2001-12-18. Translation is made by author. Only Agiza's decision is quoted, but the wording in El Zary's decision is identical in this part. The paragraph referred to in the Swedish Aliens Act is similar to article 1.A.2 in the Convention Relating to the Status of Refugees.

<sup>5</sup> Decision of the Swedish government 1:1 and 1:2, 2001-12-18.

<sup>6</sup> Gilbert, *Current Issues in the Application of the Exclusion Clauses*, 2001, para. 9, available at [www.unhcr.ch](http://www.unhcr.ch) Searchpath: Global Consultations > Documents > Second track.; However, this method is not undisputed, see for example Bliss, "Serious Reasons for Considering: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses", in *International Journal of Refugee Law*, p. 106-108, where he considers that inclusion determination shall be made before exclusion. See also Hathaway and Harvey, "Framing Refugee Protection in the New World Disorder", in *Cornell International Law Journal*, 2001, where they on the contrary consider that exclusion can be made before relevant considerations are made under the inclusion proceedings.

its application to the crimes the two Egyptians allegedly were considered as having committed are given.

### 3.1 The development of the refugee concept

When the Refugee Convention was drafted in 1951 it was a landmark in refugee law. It became “the wall behind which refugees could shelter.”<sup>7</sup> Originally the Convention was aimed at protecting refugees who were victims of the Second World War, but in the years to come, refugee issues turned out to be a more long lasting international problem. Crises emerged all over the world creating flows of refugees.<sup>8</sup> The causes of the refugee flows were mainly the decolonization process in the former colonies in Africa and Asia in the 1970s and 1980s and then in the 1990s, the fall of the Soviet Union.<sup>9</sup>

Today, 50 years after the drafting, there are around 19 million refugees all over the world.<sup>10</sup> The refugees have also become more mobile, moving across continents.<sup>11</sup> This has resulted in that more western states have become countries of asylum, something that has not always been met with enthusiasm. These states have then tried to control the flow of asylum seekers and consequently tended to close their doors for them.<sup>12</sup> Today it is especially Europe that faces the greatest challenges in the area of asylum law. Governments of these countries, especially the western European states, are anxious to protect their borders against unwanted immigration.<sup>13</sup> A state has the right and power to control the entry of foreigners through their borders, but just as important do they also have international legal obligations to give protection for those in need.<sup>14</sup> Important to keep in mind is that the aim of the Refugee Convention is to protect the refugee. The

---

<sup>7</sup> Headline in UNHCR, Refugee Magazine “1951 Geneva Convention, 50<sup>th</sup> Anniversary”, Refugees Magazine vol.2, no 123 (2001), available at [www.unhcr.ch](http://www.unhcr.ch) Searchpath: publications > 2 July 2001 Refugees Magazine Issue 123: 1951 Geneva Convention 50th Anniversary.

<sup>8</sup> When the Convention was drafted it contained a time limit restricting its application only to events occurring before 1951. As time passed, conflicts and situations arose all over the world creating new refugee flows and the need for a solution without time limit emerged. There was also a geographical limit, with a requirement that only refugees from Europe deserved protection. However, these two limitations have been taken away through the Protocol Relating to the Status of Refugees. As of today it is only Turkey who still has the geographical limit. Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267.

<sup>9</sup> UNCHR, *The State of the World's Refugees – Fifty Years of Humanitarian Action*, 2000, Oxford University Press, New York, p. 37.

<sup>10</sup> As of 1 January 2002 the refugee population of concern to the UNHCR was 19 783 100 persons, numbers available at [www.unhcr.ch](http://www.unhcr.ch) Searchpath: >statistics, last visited 2002-12-28.

<sup>11</sup> Refugees Magazine p. 6.

<sup>12</sup> Refugees Magazine p. 14.

<sup>13</sup> The State of the World's Refugees p. 155.

<sup>14</sup> The State of the World's Refugees p. 156.

Convention was never intended to be a migration control instrument, that is an issue of domestic law and interpretation.<sup>15</sup>

### 3.2 Who is a refugee?

To qualify for refugee status the following criteria in article 1.A.2 of the Refugee Convention must be fulfilled. A refugee is therefore a person who

...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of protection of that country or who, not having a nationality and being outside the country of his former habitual residence...is unable or, owing to such fear, is unwilling to return to it.<sup>16</sup>

A method of describing the elements embedded in this definition is to determine if the applicant has been subjected to *serious harm* being so grave that it amounts to persecution. Guidance can be taken from the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (hereinafter referred to as the UNHCR Handbook), where referral is made to article 33 of the Refugee Convention. The UNCHR Handbook derives from this article that if there is a *threat to life or freedom* on account of the persons race, religion, nationality, membership of a particular social group or political opinion, this is always persecution.<sup>17</sup>

Also other violations of human rights can give rise to persecution.<sup>18</sup> To analyze what these other violations are, guidance can be taken from international instruments such as the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR) and the ECHR. These Conventions includes so called non-derogable rights, such as the right to life, prohibition of torture and prohibition of slavery and servitude.<sup>19</sup> However, the violations do not have to be limited to non-derogable rights, but can also include rights, such as freedom of expression, freedom from arbitrary arrest and various forms of discrimination.<sup>20</sup> Where to draw the line on what can be considered as serious harm and what cannot, must be determined in each individual case.

---

<sup>15</sup> Refugees Magazine p. 21.

<sup>16</sup> Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S 137 article 1.A.2.

<sup>17</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees*, 1992, UNHCR, Geneva, para 51.

<sup>18</sup> UNHCR Handbook para 51.

<sup>19</sup> Goodwin-Gill G. S., *The Refugee in International law*, 2<sup>nd</sup> edition, 1996, Clarendon Press, Oxford., p. 69; International Covenant of Civil and Political Rights, 16 December 1966, 999 U.N.T.S 71, article 4; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221, article 15.

<sup>20</sup> Goodwin-Gill G. S., p. 68.

When it has been determined that a violation is serious enough to amount to persecution, it also has to be decided if there is a lack of effective state protection.<sup>21</sup> This is true if the State is *unable* to protect because of factors like civil war or other grave disturbances, or that the State is *unwilling* to protect the applicant because it is, itself, the persecutor or it is, for example, loyal to the persecutor.<sup>22</sup> Hence the State can be responsible both directly and indirectly. If it is decided that a State can provide protection, it also has to be settled that the protection given is effective enough.

When the violation of human rights is serious enough and the State has failed to protect the applicant, s/he is being persecuted.

An applicant for refugee status must base his/her persecution on one or more of the stated grounds in the Convention, i.e. race, religion, nationality, membership of a particular social group, or political opinion. At least one ground must be fulfilled.<sup>23</sup>

To qualify as a refugee according to the Refugee Convention the applicant must have a *well-founded fear* of persecution. This entails both a subjective and an objective criterion, where the fear is the subjective criterion. In the subjective part, the applicant is the central figure. It is his/her story and experiences that shall be reasonable and credible, taking into account circumstances like his/her personality, family background and membership of certain groups.<sup>24</sup> The objective criterion, on the other hand, is more focused on the situation in the country of origin. The situation of the applicant must be viewed with a relevant background situation based on objective facts.<sup>25</sup>

Finally the applicant must be outside his/her country of nationality.<sup>26</sup> In this regard, nationality is to be translated as citizenship.<sup>27</sup>

### **3.3 Exceptions to the Convention Relating to the Status of Refugees**

When a person has been recognized as a refugee according to the Refugee Convention s/he is not under absolute protection. If s/he in one way or the other poses a danger to the country of refuge s/he can be expelled or even lose the protection against non-refoulement. These exceptions are recognized in articles 33.2 and 32.1 of the Refugee Convention.

---

<sup>21</sup> Refugee Convention article 1.A.2.

<sup>22</sup> UNHCR Handbook paras. 98, 100.

<sup>23</sup> UNHCR Handbook paras. 66-67.

<sup>24</sup> UNHCR Handbook paras. 40,37,38.

<sup>25</sup> UNHCR Handbook para. 42.

<sup>26</sup> Refugee Convention article 1.A.2. Concerning stateless persons the country in question is instead where he/she had his/her habitual residence. For further reading see UNHCR Handbook paras. 101-105.

<sup>27</sup> UNHCR Handbook para 88.



In article 33.2 it is stated that:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country of which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.<sup>28</sup>

In order to fully understand this provision, the precedent paragraph in the same article must be explained. In article 33.1 it is stated that:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of the territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>29</sup>

When a state has granted refugee status to a person it also has the obligation and duty not to send back the refugee to a country where s/he risks persecution.<sup>30</sup> This is one of the fundamental guarantees that are connected with refugee protection. Refugee status is given to persons because they shall not risk being object of human rights violations. However, in paragraph 2 of this article, this obligation of the state can come to an end. Either there are reasonable grounds for regarding a refugee as a danger to the security of the country *or* that the refugee is convicted by a final judgment of a particularly serious crime and constitutes a danger to the community of the country. Hence there are two ways in which a refugee can lose his/her protection of non-refoulement. The threshold of what danger a person must cause to the country or community is pegged at a very high level. Considering the first case, the refugee must be a danger to the “security of the country”, meaning that s/he must be a serious threat to the foundations of the state. Supporting facts of the required level of security can also be found in the second part of the sentence in article 33.2, since the refugee must have committed a particularly serious crime *and* constitute a danger to the community.

It has been noted by the UNHCR that using article 33.2 is the last resort when no other means are available to keep the refugee in question from endangering the state. Concerning the crime in question UNHCR further states that it must normally be a capital crime like for example murder, arson or rape, even if every case has to be examined according to its own circumstances.<sup>31</sup> This can be seen against the background that article 33.1 is meant to protect an individual from risks of persecution that often are serious human rights violations. The interests of the state that therefore shall prevail must be of very serious nature to outweigh the protection interests

---

<sup>28</sup> Refugee Convention article 33.2.

<sup>29</sup> Refugee Convention article 33.1.

<sup>30</sup> This protection is referred to as non-refoulement.

<sup>31</sup> Quoted in Melander G., *Flyktingar och asyl*, P.A. Norstedt & Söners Förlag, Stockholm, 1972, p. 181, n. 25.

of the individual.<sup>32</sup> Depriving a person from this protection is a very serious act and it therefore needs to be interpreted restrictively. If the refugee is expelled according to this article s/he still keeps his/her status as a refugee, but s/he loses his/her protection against refoulement.

Even if countries have international obligations towards refugees it all comes down to the interests of the state. Cases specifically included in this article is when refugees commit crimes in the country of refuge or crimes they have committed prior to entry in country of refuge, become visible after refugee status has been granted. The key issue here is that the refugee must pose a danger *to the country of refuge*. If the refugee is engaged in illicit trade selling weapons in his home country to subvert the government and this does in no way affect the country of refuge, then article 33.2 does not apply.<sup>33</sup>

When it is to be determined if a refugee should lose his/her protection against refoulement, the question is whether or not there shall be any form of balancing between the act constituting the danger to the country and the actual persecution the refugee would face upon return. There is nothing in the Refugee Convention demanding that there must be a balance between the persecution feared and the nature of the crime. However, it has been stated that the principle of non-refoulement needs strong arguments to be put aside, and therefore a balancing of interests might be needed.<sup>34</sup>

The other article in the Refugee Convention making it possible for the country of refuge to expel the refugee is found in article 32.1:

The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.<sup>35</sup>

The differences between article 33.2 and 32.1 is that 32.1 comprises a wider concept. It is not only that the refugee poses a danger to the security or community of the country of refuge, but also the country of refuge can expel on grounds of *national security*. This is much wider than danger to the security or community of a country. The other difference compared to article 33.2, is that a refugee that is expelled according to article 32.1 is still protected against refoulement. This means that s/he cannot be expelled to a country where his/her life or freedom will be threatened. However, if the reasons for expulsion are such that can give rise to exclusion from non-refoulement, in that the refugee is, in one way or the other, a danger to the country of refuge, then the expulsion can be made even if it violates the principle of non-refoulement. In principle this means that the refugee is still protected against refoulement, even if expelled under article 32.1, as long as

---

<sup>32</sup> Stenberg G., *Non-expulsion and non-refoulement- The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees*, 1989, Iustus förlag, Uppsala, p. 220.

<sup>33</sup> Gilbert G., *Current Issues in the Application of the Exclusion Clauses*, UNHCR Note, (2001) p. 23-25.

<sup>34</sup> Gilbert p. 27-28.

<sup>35</sup> Refugee Convention article 32.1.

the criteria given in article 33.2 do not apply. A third difference between the two articles is that article 32.1 contains procedural safeguards that must be fulfilled in order to expel a refugee. These are contained in article 32.2 and 32.3. Such explicit safeguards do not exist in article 33.2. However, since the deprivation of the protection against refoulement is more far-reaching than to be expelled, the safeguards in article 32.1 ought to be applied also in article 33.2 cases.<sup>36</sup>

### 3.4 Exclusion from refugee status

At the time of the drafting of the Refugee Convention, the terrible crimes committed under the Second World War were still in fresh memory. According to the travaux préparatoires of the Refugee Convention, the exclusion clause was meant to satisfy two aims. First, refugee protection should not be afforded to those who do not deserve it because they have committed atrocious crimes and second, those who had committed grave crimes during the Second World War and other excludable acts should not escape prosecution.<sup>37</sup>

The exclusion clause under the Refugee Convention is included under article 1.F where it is stated that:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that.

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations.<sup>38</sup>

Excluding a person from refugee status has serious consequences for the person affected. The exclusion clause is an exception to the status as a refugee and shall also be applied restrictively.<sup>39</sup> As a result of this, a person can be excluded *only* when there are clear and compelling evidence of individual criminal responsibility for a crime specified under art. 1 F.<sup>40</sup>

---

<sup>36</sup> Gilbert p. 25-26.

<sup>37</sup> Gilbert p. 2 and note 4.

<sup>38</sup> Refugee Convention article 1.F.

<sup>39</sup> UNHCR Handbook para 149; Beyani C., Fitzpatrick J., Kalin W., and Zärd M., "Introduction – the Editorial Group", in *International Journal of Refugee Law*, vol. 12 supplement winter: 2000; p.3; Gilbert p. 2; UNHCR, *The Exclusion Clauses: Guidelines on Their Application*, 1 December 1996, para. 8.

<sup>40</sup> Beyani C., Fitzpatrick J., Kalin W., and Zärd M., p.3.

### **3.4.1 Agiza and El Zary's alleged terrorist activities**

The Swedish government labeled the crimes Agiza and El Zary were suspected of having committed, i.e. the attacks in Luxor and on the Egyptian Embassy in Pakistan, as terrorist crimes. However, they stated that even if terrorist activities as such are not explicitly mentioned under the exclusion clause in the Refugee Convention, they are still included under that article.<sup>41</sup>

The problem with acts of terrorism is that it has no internationally agreed definition.<sup>42</sup> As its meaning is not clear, problem arises when such acts are claimed as grounds for exclusion. This dilemma can be compared with the legal principle stating that no crime shall be imposed without referral to law.<sup>43</sup> In exclusion matters this legal principle is not totally disregarded, since states base their decision of exclusion on article 1.F of the Refugee Convention. But the aim of the principle is that punishable crimes shall be foreseeable and the same purpose should apply for the excludable crimes as well. The latter means that it should be clear which crimes could be regarded as excludable under article 1.F of the Refugee Convention.

Regarding the crime of terrorism, this is not the case, since its definition is not determined which, in turn, can open the doors for states to apply it to their own discretion. It can result in it being used by a government to, for example, single out dissenting groups or other unwanted persons. It can therefore more be based on political will than on legal grounds.<sup>44</sup> What has happened is that states have wanted to control their borders against unwanted asylum seekers, i.e. people who in some way can pose a threat to the states' own security, and in this they might use the exclusion clause to disguise a political decision.

Since the information available concerning the massacre in Luxor and the bombing in Pakistan are to a considerable extent classified, only a limited analysis of the acts application under the exclusion clause can be made. However a brief overview will be given of the excludable crimes under the Refugee Convention in general, just for the purpose to give background knowledge on how severe a crime must be to level up to exclusion and to raise the issue of what happens when the excludable crime is not clearly defined.

### **3.4.2 Crime against peace, war crime or crime against humanity**

To find out more about the crimes included under article 1.F(a) and to determine their definition the method to use is to look into the different

---

<sup>41</sup> Memorandum by the Swedish Foreign Ministry, 2002-02-28, attached as a supplement to KU 2001/02:38 and 40.

<sup>42</sup> Gilbert p. 13.

<sup>43</sup> Nullum crime sine lege, see for example ICCPR article 15 and ECHR article 7.

<sup>44</sup> Gilbert p. 11.

international instruments where such crimes are included. The most comprehensive definition lies in art. 6 of the Charter of the International Military Tribunal.<sup>45</sup> Other conventions of relevance are the four Geneva Conventions of 1949<sup>46</sup>, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>47</sup> The two Additional Protocols of 1977 and more recently the Statute of the International Criminal Tribunal for Former Yugoslavia,<sup>48</sup> the Statute of the International Tribunal for Rwanda<sup>49</sup> and the Rome Statute of the International Criminal Court<sup>50</sup>. Also non-binding sources such as the ILC Draft Code on Crimes Against the Peace and Security of Mankind are of interest.<sup>51</sup>

Crime against peace, war crime and crime against humanity are to their nature, effects and motive of the perpetrator very serious crimes. In the Rome Statute of the International Criminal Court, which has jurisdiction over all three crimes, it is stated that these are the most serious crimes to the international community as a whole.<sup>52</sup>

The term crime against peace (or crime of aggression) is applied in cases when one state attacks another state. An example taken from a General Assembly resolution is bombardment by the armed forces of a State, blockade of ports or coasts of a State and an attack by armed forces of a State by air, land or sea.<sup>53</sup> War crimes are violations of the laws and customs of international humanitarian law applicable in armed conflict.<sup>54</sup> They can be committed both in an international and a non-international armed conflict.<sup>55</sup> How serious the crime must be to qualify as a war crime differs in the various instruments. Recent developments can be seen in the Rome Statute and the ILC Draft Code on Crimes Against the Peace and Security of Mankind where an additional criterion is added to the serious crimes as such. The crimes must also have been committed as a part of a

---

<sup>45</sup> Constitution of the International Military Tribunal, 8 August 1945, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>, last visited 2003-01-17.

<sup>46</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 970, Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 971, Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 972, Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 973.

<sup>47</sup> The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85.

<sup>48</sup> Statute of the International Criminal Tribunal for Former Yugoslavia, S/RES/827 (1993), Annex.

<sup>49</sup> Statute of the International Tribunal for Rwanda, S/RES/955, (1994), Annex.

<sup>50</sup> Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9.

<sup>51</sup> UNHCR Guidelines para 19; ILC Draft Code of Crimes Against the Peace and Security of Mankind (Part II), A/51/332 (1996).

<sup>52</sup> Rome Statute article 5(1).

<sup>53</sup> United Nations General Assembly Resolution 3314 (XXIX) Definition of Aggression, 14 December 1974, A/RES/3314 article 3.

<sup>54</sup> ILC Draft Code article 20(1).

<sup>55</sup> Standing Committee, UNHCR, Note on exclusion clauses, 30 May 1997, EC/47/SC/CPR.29, para. 9; Gilbert p. 9.

plan or policy *or* as a part of a large-scale commission of acts to be categorized as war crimes.<sup>56</sup> Concerning crime against humanity the Rome Statute of the International Criminal Court has implied a big step forward in giving a definition of the crime. It is the first international instrument that codifies the crime and it has also been said that it is a good codification of the views of the international community.<sup>57</sup> In the Rome Statute it is stated that crimes against humanity are crimes “directed against any civilian population, with knowledge of the attack”.<sup>58</sup> Examples of such acts given in the Statute are “murder”, “extermination” and “enslavement”.<sup>59</sup> In contrast to crime against peace and war crimes, crime against humanity does not have to be committed in time of an armed conflict, i.e. commission in peacetime is enough.<sup>60</sup> It is not enough that the crime shall affect the civilian population, but the Rome Statute does also state that the attack must be “widespread or systematic”.<sup>61</sup> What is positive when subparagraph (a) is used is that there are several instruments that deal with and try to identify the crimes. Therefore the state has to apply these instruments to the person in question. This makes it more difficult for the state to arbitrarily exclude a person under the clause.

Considering the acts Agiza and El Zary were suspected of having committed in Luxor and in Pakistan, it can be discussed if they fell in under article 1.F (a). However, that the crime of aggression would be in place is hardly probable. Neither is it likely that the crimes were committed in time of war, why war crimes are excluded. The offence left is the crime against humanity. Of the three crimes included under the subparagraph (c), it is the crime against humanity that is most probable to be applied to the incidents in Luxor and Pakistan. However, even the crime against humanity as applicable is doubtful since it requires very serious act/acts that must be widespread or systematic and the question is if the Luxor and Pakistan incidents level up to such severity.

### 3.4.3 Serious non-political crime

For the crime to fall under article 1.F (b), the crime has to be *serious* enough. A certain barrier is therefore set and all crimes can consequently not give rise to exclusion. A serious crime is, according to the UNHCR Handbook, a capital crime or a very grave crime.<sup>62</sup> Examples of such are murder, arson, armed robbery and homicide. However, identifying certain crimes is not enough, but other factors such as the severity of the crime, the

---

<sup>56</sup> ILC Draft Code art. 20 para. 4-7, Rome Statute article. 8.1.

<sup>57</sup> Pejic J., “Article 1.F(a): The Notion of International Crimes” in *International Journal of Refugee Law*, vol. 12 supplement winter: 2000, p. 31.

<sup>58</sup> Rome Statute article 7(1).

<sup>59</sup> Rome Statute article 7(1) a,b,c.

<sup>60</sup> Prosecutor v. Dusko Tadic a/k/a “Dule”, Decision on the Defense motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of ICTY, Case No.IT-94-1-AR72 (1995).

<sup>61</sup> Rome Statute art. 7.1.

<sup>62</sup> UNHCR Handbook para. 155.

intention of the perpetrator, injury caused to persons and the use of deadly weapon play an important role.<sup>63</sup> The crime also has to be *non-political* in order to amount to exclusion. In assessing this, the motive and purpose of the crime is of great relevance.<sup>64</sup> Personal motives without political connections are non-political crimes. Hence there must be a direct causal link between the crime committed and its political motives.<sup>65</sup> The political element must also outweigh the common law character of the crime. However even if the political character does outweigh the common law character, the crime can still be a non-political crime if the crime is so atrocious in its nature that this takes over the political nature of the crime. A genuinely political crime can therefore, *prima facie*, fall outside the exclusion clause, but can, in the end, be considered to be included under the clause because of its serious nature.<sup>66</sup>

Unlike the crimes under article 1.F (a) the crimes under subparagraph (b) have not so many international instruments to refer the definition of the crime to. When the interpretation of the crime is more open and wide, the country of refuge could more easily use the clause to regulate who can stay in the country and who cannot, according to their own interests.

As to the applicability of the Luxor/Pakistan incidents, it cannot be ruled out that they fall under article 1.F(b). Of course, assessments shall be made of, for example, the severity of the crime and the intention of the perpetrator. At a first glance, it is therefore not excluded that a serious crime is in question, since several people were killed. However, it is not impossible that the acts had political aims, since the organization responsible for the crimes, opposed the Egyptian government. Yet, it must be kept in mind that the common law character of the crime can outweigh the political character. When the consequences of the attacks in Luxor and Pakistan were the deaths of more than 50 people, it cannot be ruled out that they can be considered as serious enough and therefore fall under article 1.F(b), despite whatever underlying political intention there was.

### **3.4.4 Acts contrary to the purposes and principles of the United Nations**

To understand the scope of acts contrary to the purposes and principles of the United Nations (UN), it firstly has to be determined what the purposes and principles of the UN are. This can be found in the Charter of the United Nations (hereinafter referred to as the UN Charter) under article 1 and 2.<sup>67</sup> The paragraphs concern how States shall act towards each other for the

---

<sup>63</sup> UNHCR Guidelines para. 51; Goodwin-Gil p. 107.

<sup>64</sup> Amarasingha Daya, S., and Isenbecker M., "Terrorism and the Right to Asylum under the 1951 Convention and the 1967 Protocol Relating to the Status of refugees – A Contradiction in Terms or Do Opposites Attract?" in *Nordic Journal of International Law*, 1996, p. 229; Goodwin-Gil p. 105

<sup>65</sup> Goodwin-Gil p. 105; UNHCR Handbook para. 152; UNCHR Guidelines para. 54.

<sup>66</sup> UNHCR Handbook para. 152, UNHCR Guidelines para. 54; Goodwin-Gil p. 105.

<sup>67</sup> Charter of the United Nations, 26 June 1945, 1 U.N.T.S. XVI.

purpose of achieving peaceful relations and cooperation. These acts are attributed to States in their relation to other States and to States in their relation to the international community as a whole.

Given that the purposes and principles of the UN are worded in a broad manner it is difficult to see exactly what they include. Hence, what then constitutes acts that are *contrary* to these principles is not easy to define.<sup>68</sup> The key issue is that there must be a *clear* indication that the international community recognizes the act in question as contrary to the purposes and principles of the UN. It has been stated in a Canadian case that several acts can be labeled as contrary to the purposes and principles of the UN, under the condition that the international community in consensus consider them as prohibited.<sup>69</sup> Some types of acts represent this consensus, for example, if there is an international agreement or a UN resolution explicitly stating that a certain act is contrary to the UN purposes and principles. If so, this is a strong indication that those acts are prohibited.<sup>70</sup>

In a declaration issued by the UN General Assembly concerning measures to eliminate international terrorism, it is stated that terrorism is an act contrary to the purposes and principles of the UN.<sup>71</sup> Being stated so in a resolution it can be argued that this reflects the view of the international community. If that can be the case, terrorism could be labeled as a prohibited act according to article 1.F(c) of the Refugee Convention. This is however unfortunate. If a state wants to exclude a person because of his/her terrorist activities the state could easily use article 1.F (c) as grounds for justification. What then the state actually categorizes as a terrorist act does not have to be motivated and it can therefore be used arbitrarily.

Regarding the attacks in Luxor/Pakistan, it cannot be excluded that the Swedish government used this ground to deny refugee status to Agiza and El Zary. By referring to this excludable act, the Swedish government is left with a considerable margin of discretion, since terrorism, as such, is not internationally defined. By referring to the General Assembly resolution and also later UN Security Council resolutions, where terrorism has been labeled as an act contrary to the purposes and principles of the UN, Sweden does not have to motivate in what way the crimes in Luxor and in Pakistan as such were contrary to the purposes and principles of the UN.

---

<sup>68</sup> Gilbert p. 23.

<sup>69</sup> Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982, paras. 65-66.

<sup>70</sup> Pushpanathan, at para. 66.

<sup>71</sup> UN General Assembly Resolution 51/210 on measures to eliminate international terrorism, of 17 December 1996, A/RES/51/210.



# 4 Questions of proof and individual responsibility in refugee claims

When excluding a person from refugee status it is not only enough to identify a crime relevant for excludability, this crime must also be linked to the perpetrator. The person in question must be found individually criminal responsible for the crime and there must be enough evidence to tie him/her to the committed crime. In such an exclusion process where these steps are applied also certain procedural safeguards become applicable that give rights to the individual. Examples of such rights are the right to an individual determination of the case, the right to have evidence on which the decision maker intends to rely presented to him/her and to be given the opportunity to comment on it, and the right to appeal a first instance decision to exclude.<sup>72</sup> Procedural safeguards are issues of great relevance, but due to the scope of this thesis those questions will not be considered here.<sup>73</sup> What will be dealt with are instead the law of evidence and the identification of who is individually responsible for the committed crime. These are two separate, but connected, aspects in the exclusion proceedings that have to be settled before a person can be excluded under article 1.F Refugee Convention. First the law of evidence will be dealt with against the background of the refugee status determination process in general and then how it is applied in the exclusion process. Then the individual criminal responsibility and the issues related to that will be dealt with separately since it is only in question concerning the exclusion proceedings.

## 4.1 The law of evidence

### 4.1.1 Refugee status determination in general

The Refugee Convention gives no guidance on how the procedures of refugee status determination should be outlined. This has been left to each individual state to decide.<sup>74</sup> What can be concluded is that every individual must be given a fair and efficient procedure where they can have their individual claims determined.<sup>75</sup> The problem with the determination process

---

<sup>72</sup> Bliss M., “ ‘Serious Reasons for Considering’: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses”, in *International Journal of Refugee Law*, vol 12 supplement winter: 2000, p. 99-100.

<sup>73</sup> The reason is because the procedural rules and guarantees are very comprehensive and dealing with all of them could result in a discussion too much leaving the area of refugee law; For further reading on the procedural safeguards see Bliss, p. 92-132.

<sup>74</sup> Goodwin-Gill p. 34; RWI Report number 33, Gorlick Brian, ” Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status” in *Asylum in Europe: Strategies, Problems and Solutions*, 2001, p. 15.

<sup>75</sup> Bliss p. 95 note 14.

in refugee law is that there is often little evidence in the case. The oral statements of the applicant play an important role since s/he may not have the documents needed to prove his/her fear. Also, the issue in determining if a person qualifies as a refugee is to decide if there is a *future* risk of persecution, a decision that is not always done without difficulties.<sup>76</sup>

In dealing with the law of evidence, certain terms are used such as *burden of proof* and *standard of proof*. These are employed in common law countries, but they have also been used more broadly by other countries and by UNHCR. In this thesis, as UNHCR has done, they are used concerning refugee claims anywhere.<sup>77</sup>

#### **4.1.1.1 Burden of proof**

The burden of proof in refugee claims lies initially on the applicant. S/he must put forward arguments giving the reliability and truthfulness of her/his claims and also the correctness of the facts given. This is also in line with general principles of the law of evidence that the person who puts forward a claim also has the burden of proof.<sup>78</sup> It is then up to the decision maker to evaluate the arguments and facts given and decide upon the case. The decision maker often also has a supplementary role of providing evidence. For example by supporting the claim with possible objective facts about a certain country or the human rights situation there.<sup>79</sup> However, caution must be applied if evidence that emanates from security intelligence services or internal reports is used and the applicant has no possibility to rebut the evidence.<sup>80</sup>

#### **4.1.1.2 Standard of proof**

For the applicant to get refugee status s/he must persuade the decision-maker that s/he has valuable grounds for protection. In trying to prove this, the applicant has to give grounds and facts up to a certain threshold. This threshold is called, in general terms, standard of proof.<sup>81</sup> The required standard of proof in refugee law is different both from that of criminal law and that of civil law. In criminal law the threshold is high, since it has to be proven *beyond reasonable doubt* that a person is guilty of a certain crime. The threshold is lower in civil law, since the facts of the case is determined after a *balance of probabilities*, i.e. that it is more likely than not that a certain situation is in question.<sup>82</sup> In the refugee status determination procedure in refugee law, the threshold is even lower than in civil law.<sup>83</sup> As mentioned above, refugee law cases can be difficult to deal with since the

---

<sup>76</sup> Bliss p. 96-97.

<sup>77</sup> Note on Burden and Standard of Proof in Refugee Claims, UNHCR, 16 December 1998, para. 3; Gorlick p. 19.

<sup>78</sup> Note on Burden and Standard of Proof in Refugee Claims para. 2; Goodwin-Gil p. 34-35; Gorlick p. 20.

<sup>79</sup> UNHCR Handbook para. 196.

<sup>80</sup> Gorlick p. 21.

<sup>81</sup> Gorlick p. 26.

<sup>82</sup> Note on Burden and Standard of Proof in Refugee Claims para. 8; Goodwin-Gil p. 35.

<sup>83</sup> Gorlick p. 30.

sources of evidence are limited. In this area of law it concerns the matter of finding the applicant *credible* in the story s/he tells.<sup>84</sup> In evaluating this, it is the overall credibility that has to be established. The facts given have to be reasonable, the given situation of the applicant should correspond to the known situation in the country and the story has to be coherent and plausible.<sup>85</sup> It must not be shown that the applicant probably will be persecuted, but it is enough that it is reasonably possible that such persecution can occur. However, it must be kept in mind that the applicant's case must be dealt with individually, taking into account personal experiences and qualities. The applicant can, for example, be skeptic against authorities in his/her own country and therefore be reluctant to give all information to the authorities of the country of refuge or s/he can have experienced traumas affecting the story s/he tells.<sup>86</sup>

With background of the evidence in the refugee case, the decision-maker needs to decide if there is "reasonable likelihood", "good reason" or "serious possibility" that the applicant has well-founded fear of persecution.<sup>87</sup> Considering this standard of proof in light of the humanitarian nature of refugee law, it is also logic that not a too high evidentiary burden is put on the refugee applicant.<sup>88</sup>

#### **4.1.2 Determination of the exceptions according to articles 32.1 and 33.2 of the Refugee Convention**

As noted above under chapter 3.3, a refugee can be expelled from the country of refuge under certain conditions. Since expulsion according to articles 32.1 and 33.2 results in removal of the refugee from his/her country of refuge, these provisions shall be applied restrictively and they should only be used if no other means are available to remove the threat posed.

The threshold to be met in order for expulsion to be in question is set high. Especially when it concerns the loss of protection of non-refoulement. As stated above a refugee must pose a danger to the state or community of the country of refuge to be returned to a country where s/he risks persecution. The standard of proof to be met here is either that there are "reasonable grounds" for regarding him/her as a danger or that s/he has been convicted of a particularly serious crime in a final judgment and posing a danger to the community. Firstly considering "reasonable grounds", there is no guidance in the Refugee Convention to what standard of proof is required. It is up to each state to decide when there are such grounds.<sup>89</sup> However, guidance can

---

<sup>84</sup> Note on Burden and Standard of Proof in Refugee Claims para. 8.

<sup>85</sup> Note on Burden and Standard of Proof in Refugee Claims para. 11; Gorlick p. 30; there are more circumstances that is included in evaluating the credibility of the applicant. For further reading please see Gorlick p. 30.

<sup>86</sup> Note on Burden and Standard of Proof in Refugee Claims para. 9; UNHCR Handbook para. 198.

<sup>87</sup> Gorlick p. 28-29, see this article also for further terms of the standard of proof.

<sup>88</sup> Gorlick p. 29.

<sup>89</sup> Stenberg p. 221.

be taken from the other part of the same article requiring the conviction of a serious crime. Such serious crimes have been noted by the UNHCR as being a capital crime such as arson, murder, rape and armed robbery. Important to remark is that a comprehensive list of certain crimes cannot be given, since the circumstances of each case differ. What can be discussed is, however, that the crimes must be *particularly serious*, a notion that has to be fulfilled, but that, as such, cannot be separated from the nature of the actual crime. In the Conference of Plenipotentiaries, the degree of seriousness required was compared with the exclusion clause in the Refugee Convention.<sup>90</sup> Even if there are differences between article 33.2 and article 1.F of the Refugee Convention, there are still certain similarities. Even if article 1.F excludes a person from refugee status and article 33.2 does not, they both open up for the possibility of returning the applicant/refugee to a country where s/he risks persecution. Also there are in both articles high thresholds that have to be reached in the sense that the person in question must have committed a very serious crime or that there are serious reasons for considering a commission of such crimes. In my opinion, a possible conclusion of this is that the standard of proof for depriving a refugee from his/her protection of non-refoulement must be at least the same as that of the exclusion clause.

Concerning the expulsion in article 32.1, the Refugee Convention gives no guidance on the applicable standard of proof. In my opinion, it must be a high threshold since removal of the refugee from his/her country of refuge is in question and also since this provision shall be applied when there is no other measure applicable to safeguard the country against a certain threat or danger. However, it must be lower than in cases of expulsion in article 33.2, since the refugee here is still protected of non-refoulement and the consequences of expulsion is therefore not as severe as in the case of article 33.2.

To determine the standard of proof of a provision, it as such must be seen with background of the aim of the provision. If the aim is to protect the individual against serious human rights violations, exceptions of such provisions needs a high standard of proof to be applicable. When there are such possible serious human rights violations at stake, high proof must be demanded in order to deprive the individual of his/her rights since serious consequences may be in question if the individual is wrongly expelled. Therefore, in my opinion, the more serious the consequences are if expulsion is decided, the higher the standard of proof must be set. However, all circumstances in the case must be examined and assessed.

### **4.1.3 Determination of exclusion**

In deciding who shall be excluded, careful procedures must be used, since an incorrect decision may result in serious violations of human rights that cannot be justified. Hence all the procedural safeguards applicable in the refugee status determination are applicable in the determination of

---

<sup>90</sup> Stenberg p. 224.

exclusion. However this is not enough, but even stricter safeguards must be applied. This is also the case in the area of the law of evidence.

#### **4.1.3.1 Burden of proof**

In the exclusion procedure it is the decision-maker that has the burden to prove that there are 'serious reasons for considering' that the applicant for refugee status has committed an excludable crime. The applicant has no burden to prove that s/he is not excludable.<sup>91</sup> This is also in line with the principle applicable in criminal law i.e. the principle of *presumption of innocence*.<sup>92</sup> The fact that the criminal is presumed innocent until proven guilty can be compared with that the applicant should be considered as a refugee until the decision-maker proves him/her guilty of an excludable act.

#### **4.1.3.2 Standard of proof**

The threshold applicable in refugee law is that there has to be *serious reasons for considering* that a person has committed an excludable crime. What this actually means is not clear. One way to understand the level of this threshold is to compare it with other thresholds applicable in law. What can be stated as clear is that this standard of proof does not level up to the threshold applicable in criminal law, i.e. it does not have to be proven beyond reasonable doubt that the applicant has committed an excludable crime. This also means that the decision-maker does not have to prove that the applicant is guilty of an excludable crime.<sup>93</sup> Where on the scale of thresholds it then shall be put can be seen with background of the aim of having procedural safeguards. The aim is to minimize the possibility of asylum seekers to be wrongly excluded. To put the threshold lower than the balance of probabilities applicable in civil law cases would therefore be contrary to this aim.<sup>94</sup> This also comes from the severe consequences that exclusion would be for the individual and the general protection purpose of the Refugee Convention.<sup>95</sup> Even if it is hard to identify the meaning of the threshold, it still has great importance to try to approximately place where on the level of standard of proof it can be found. The procedure must as much as possible be a fair procedure where the discretion of the decision-maker is as little as possible.<sup>96</sup> If the threshold were to be translated into another term it could be said that there should be *clear and convincing* evidence that the asylum seeker has committed the excludable crime.<sup>97</sup>

---

<sup>91</sup> Bliss p. 112.

<sup>92</sup> This principle can also be found in many international instruments such as the ICCPR article 14(2) and the ECHR article 6(2).

<sup>93</sup> Bliss p. 115; UNHCR Handbook para. 149.

<sup>94</sup> Bliss p. 116; However, this statement cannot be made without stating opposite views. Hathaway and Harvey have stated that the standard of proof required for exclusion is "more than mere suspicion or conjecture, yet less than proof on a balance of probabilities." See Hathaway J. C. and Harvey C.J., "Framing Refugee Protection in the New World Disorder", in *Cornell International Law Journal*, vol. 32, no.2, 2001, note 19.

<sup>95</sup> Bliss p. 116.

<sup>96</sup> Bliss p. 116.

<sup>97</sup> Bliss p. 120.

The base for deciding if the standard of proof applicable is reached is the evaluation of facts.<sup>98</sup> With this basis the decision-maker decides if there are serious reasons for considering that the applicant has committed the excludable act. In deciding the case of exclusion the decision-maker can use various forms of information and evidence. In short it can be said that the following evidence can be used to determine the case of the applicant, that is, credible confession by the asylum seeker of the involvement in crime, verified conviction of an excludable crime and other clear and convincing evidence. Certain evidence shall not be used, or used with caution, that is, anonymous evidence and secret evidence.<sup>99</sup>

The evidence used in the case of Agiza and El Zary were mainly oral statements by the two men and secret evidence provided by the Swedish Security Police.<sup>100</sup> What the information from the latter concerned was mostly classified in its entirety. Only some information followed by restrictions was given to the parties. Part of the disclosed information was a summary of some of the other classified information. Also this information was given with restrictions.<sup>101</sup>

Oral evidence can be enough to conclude that the threshold of serious reasons for considering is reached. This is true if, for example, the asylum seeker confesses responsibility of the crime.<sup>102</sup> In Agiza's and El Zary's case this was not in question since they both denied responsibility in the alleged crime and no confession of complicity was made.<sup>103</sup> If there was information that the two men had previously confessed excludable crimes before coming to Sweden, caution must be used since such confessions can be coerced or result from disguised persecution.<sup>104</sup>

Agiza and El Zary had both been convicted in trials in Egypt for terrorist activity. Such convictions must be thoroughly examined before it can be used as evidence in an exclusion determination.<sup>105</sup> In taking into account such convictions it must be determined that the judgment is reliable and legitimate. Important to keep in mind is that it can be a disguised persecution and that the procedure might have lacked important procedural safeguards. The entire conviction and the proceedings before it must be viewed from all the facts of that case.<sup>106</sup> Both Agiza and El Zary had been

---

<sup>98</sup> Bliss p. 116 note 107.

<sup>99</sup> Bliss p. 120-123.

<sup>100</sup> Decision of the Swedish government 1:1 and 1:2, 2001-12-18.

<sup>101</sup> Memorandum by the Swedish Foreign Ministry, 2002-02-28.

<sup>102</sup> Grahl-Madsen A., *The Status of Refugees in International Law*, 1966, Vol I, A.W Sijthoff, Leiden, p. 289.

<sup>103</sup> Telephone interview with Bo Johansson, The Swedish Refugee Advice Centre, Stockholm. Bo Johansson is a lawyer representing Agiza's wife in front of the UN Committee Against Torture. The wife is still in Sweden and has filed a complaint against the Swedish government and of their decision to return her to Egypt.

<sup>104</sup> Bliss p. 118.

<sup>105</sup> It is not clear if the convictions in Egypt were used as evidence in the case since the information is classified, but it is of relevance to at least point out this information, since it could be used in the examination of evidence.

<sup>106</sup> Bliss p. 118.

convicted of terrorist collaboration and in a military trial where neither of them was present.<sup>107</sup> The association concerned armed Islamic groups. Considering the fact that the trial was military and therefore lacking important procedural guarantees, the conviction can only be used as an indicative evidence of exclusion with caution.

As stated above the evidence provided by the Swedish Security Police was mostly classified. When the decision-maker uses secret evidence, difficult issues come into play. It is mainly when the possible excludable act concerns terrorist activity and threats to the national security that the evidence is kept secret. On the one hand the authorities of the country of refuge is afraid of making information public that is of interest of or can threaten the national security or that they do not want the identity of a source to be exposed. On the other hand stands the interest of the individual and his/her right of a fair procedure and resulting in the need to get hold of secret evidence in order to fully defend their case.<sup>108</sup> When a decision-maker uses secret evidence there is a risk of incorrect and arbitrary decisions. Procedural safeguards such as the right to be informed of evidence against him/her, to be given reasons for decisions against him/her and to be able to seek review of a decision, are put aside. Hence secret evidence shall not be used in an exclusion procedure if there is not a possibility for the applicant to take part of the evidence against him/her.<sup>109</sup> According to the UNHCR Guidelines a person shall not be excluded if s/he gives a plausible explanation to non-involvement in certain acts taken together with the fact that there is no serious evidence talking against the accused.<sup>110</sup> However, in the case of Agiza and El Zary serious evidence, i.e. evidence from the Swedish Security Police, was in fact talking against their case, why this principle cannot be entirely applied.

In Agiza's and El Zary's case secret evidence was used against them. Concerning the classified information Agiza and El Zary had only limited possibilities to take part of and rebut the evidence used against them and the response they gave was that they denied the allegations put forward.

The basis of the Swedish government's decision was classified information stating that it "has been established"<sup>111</sup> that the two men had leading positions in a certain organization that was responsible for acts of terror.<sup>112</sup> It is difficult to argue the information the Swedish security police had, since it is classified, but the denial of involvement stated by the two Egyptian men in question shall not be disregarded taken together with the severe consequences that exclusion are to them.

---

<sup>107</sup> "Utvisningsfall anmäls till KU idag", in *Sydsvenska Dagbladet*, 2002-02-04.

<sup>108</sup> Bliss p. 123.

<sup>109</sup> Bliss p. 123.

<sup>110</sup> UNCHR Guidelines para. 46.

<sup>111</sup> Translation made by author of the Swedish word "utrett".

<sup>112</sup> Decision of the Swedish government 1:1 and 1:2, 2001-12-18.

The evidence available in the exclusion procedure in the case of Agiza and El Zary was limited. With reference to that it can therefore be questioned if they were given as fair procedure as possible. Since the case concerned terrorist activity it is understandable that a lot of the evidence were kept secret, but with this fact stands also the risk of the decision being incorrect or arbitrary. The best would be if there were a form of an outsider control, preferably judicial, that could see to it so procedural safeguards are applied.<sup>113</sup>

## **4.2 Individual criminal responsibility for excludable crimes**

In order to exclude a person from refugee status there must be serious reasons for considering that an individual is personally responsible for the crime in question. In this regard refugee law is very similar to international criminal law, since it is only individuals who can be held responsible for international crimes.<sup>114</sup> The complicity required can involve several levels. It can concern the complicity in the commission of the excludable crime, for example actual commission of the crime or only the order of committing the crime. It can also concern the membership of an organization that has taken responsibility of a crime committed. Finally it can concern what position of an organization or regime the possible offender has.

### **4.2.1 Complicity in the commission of the crime**

In order for a person to be responsible for an excludable crime two requirements must be fulfilled. Firstly s/he has to have to be personally involved in one way or the other of the commission or the attempt to commit the crime. Secondly the perpetrator must have known, or ought to have known, about the crime without taking any steps in trying to repress or prevent its commission.<sup>115</sup> In assessing this, all facts of the case have to be examined and the role of the individual has to be determined. Even if the crime in question is very severe, this must not affect the decision-maker in examining the case thoroughly.<sup>116</sup>

A person can be personally responsible for an excludable crime based on a wide scale of complicity, from the idea of committing the crime till the actual accomplishment of the crime. In determining what kind of

---

<sup>113</sup> See further under 5.2 concerning the Special Commission established after the *Chahal v. the United Kingdom*, Judgment of 15 November 1996, E.C.H.R. Reports 1996-V; See also *Chahal* para. 131.

<sup>114</sup> Rome Statute art. 25; Sherryn Aiken, "Manufacturing ' Terrorists': Refugees, National Security, and Canadian Law" in *Refuge – Canadas Periodical on Refugees*, vol. 19, no 3, December 2000, p. 60; Of the subparagraphs in article 1.F it is only 1.F (a) that correspond to international crimes, the two others have no such international similarity. However, they can be compared with international criminal law anyway, see Bliss p. 125 note 134.

<sup>115</sup> UNHCR Guidelines para. 39; Aiken p. 60; *Ramirez v. Canada (MEI)* [1992] 2 F.C. 306.

<sup>116</sup> UNHCR Guidelines para. 37.



participation is required for responsibility, guidance can be sought from the Rome Statute of the International Criminal Court. In article 25.3 of this Statute it is dealt with individual criminal responsibility. It is there stated that an individual is responsible in the following circumstances; if s/he commits a crime by his/herself, together with others or through others; “orders, solicits or induces the commission of the crime”; “aids, abets or otherwise assists” in the commission of the crime for the purpose of facilitating it; intentionally contributes in another way to the commission of the crime; or attempts to commit a crime but it is not accomplished due to circumstances not related to the intentions of the perpetrator. This is a very comprehensive list of individual complicity, resulting in that *if* it can be proven that a person was connected to a certain crime, s/he will probably also be found individually responsible for it, since the scale of when personal involvement occurs is very wide. Article 25.3 deals explicitly with crimes that only fall under article 1.F (a) of the Refugee Convention. This means that the standard of complicity in the Rome Statute strictly only refers to crimes against peace, war crimes and crimes against humanity. However, it can be said that individual criminal responsibility is required also for crimes under article 1.F (b) and (c).<sup>117</sup>

The requirement of personal involvement is in line with criminal law since a person cannot be held responsible for an act s/he did not participate in.<sup>118</sup> The fact that also other forms of complicity levels up to responsibility is, connected with that it is often the persons in high positions that *de facto* are involved in the commission of the crimes. It is as serious to encourage excludable crimes as participating in the actual commission of them. The requirement of personal involvement can also be derived from the actual wordings of article 1.F where it is stated that the person must either have committed such acts or be guilty of such acts.<sup>119</sup> This last statement is in line with stating that individual criminal responsibility is demanded also for article 1.F (b) and (c) crimes.

The second element required for individual criminal responsibility is the mental element. A person must have known or ought to have known what the commission of the crime was about. In this regard it is to be determined if the individual had a moral choice. If s/he knew about the crime but still did not do anything to prevent it from happening, s/he shall be excluded. The only way a person needs not to be excluded on this ground is if preventing the crime would endanger his/her life or the life of his/her family members.<sup>120</sup>

---

<sup>117</sup> Bliss p. 125 note 134.

<sup>118</sup> Amarasinha Daya, S., and Isenbecker M., “Terrorism and the Right to Asylum under the 1951 Convention and the 1967 Protocol Relating to the Status of refugees – A Contradiction in Terms or Do Opposites Attract?” in *Nordic Journal of International Law*, 1996, p. 229; Goodwin-Gil p. 228-229.

<sup>119</sup> Refugee Convention article 1.F.

<sup>120</sup> UNHCR Guidelines para. 42.

## **4.2.2 Membership in an organization**

Considering the fact that personal and knowing participation in an excludable crime is a requirement for individual responsibility, mere membership in an organization committing excludable crimes is not enough.<sup>121</sup> However, this cannot be said with full certainty, since the role of the member in the organization and the nature of the organization as such can be decisive elements. To determine the exclusion of a person from refugee status, his/her activities within the organization must be examined. If a committed crime is referred to a certain organization, a member of this organization does not have to have actively participated in the crime, but can have been part of a conspiracy of the crime, in order to still be held responsible. If s/he had a leading role and therefore close and direct responsibility for the excludable crimes, it is possible that s/he will be excluded.<sup>122</sup> If s/he does not have such a role within the organization, the membership as such must be looked into. If the person in question is a voluntary member, it is more likely that s/he agrees with the aims and the actions of the organization than if s/he has been forced to join the organization.<sup>123</sup> Important to take into account is also at what time the excludable crime was committed. If it was committed after the person in question was not any longer active or linked to the organization it can be questioned if this person actually can be held individually responsible.<sup>124</sup>

Excluding a person from refugee status on the basis of membership in an organization as such runs counter to the requirement of individual criminal responsibility. However, some organizations are to their nature very violent ones and their goals consists mainly of committing crimes just as those excludable under article 1.F Refugee Convention.<sup>125</sup> When a person voluntary engages in such a violent organization, the membership as such can amount to exclusion. Since the person is a member of that organization, s/he must know the aims and activities of it and by voluntary engaging in it, probably also takes part actively in the commission of the crimes.<sup>126</sup> However, such conclusions must be made with caution.

## **4.2.3 Agiza's and El Zary's responsibility for excludable crimes**

Agiza and El Zary were excluded from refugee status by the Swedish government based on information from the Swedish Security Police. The information held that both men had leading positions in an armed terrorist

---

<sup>121</sup> Aiken p. 60; UNHCR Guidellines para. 45; Bliss p. 123; Lisbon Expert Roundtable, Global Consultations on International Protection, Summary Conclusions – Exclusion from Refugee Status, EC/GC/01/2Track/1, 30 May 2001.para. 18.

<sup>122</sup> UNHCR Guidelines para. 45; Bliss p. 125.

<sup>123</sup> Bliss p. 126.

<sup>124</sup> Bliss p. 126.

<sup>125</sup> Bliss p. 125; Lisbon Roundtable para. 18.

<sup>126</sup> UNHCR Guidelines para. 47.

organization and that they could be considered responsible for the activities of that organization.<sup>127</sup> Both men deny their activities in the armed organization and the connection to the excludable crimes committed.<sup>128</sup> They state that they had no leading positions in the given organization, but instead they are Muslim oppositionists to the Egyptian government and they do not use force.<sup>129</sup> Agiza did state that he has been a member of the organization in question, but only in an early stage. He was not even living in Egypt when the crime connected to the organization was committed.<sup>130</sup> Even if they are convicted of membership in an Islamic organization in the military court in Egypt, this cannot be the only basis of proof for their involvement. This trial was taken without their presence violating many crucial procedural guarantees preventing Agiza and El Zary to be able to rebut the evidence brought against them. It must also be kept in mind that Agiza and El Zary were convicted of belonging to an organization that had the motives that ran counter to the Egyptian government, which can possibly affect the willingness of the military court to give a fair procedure.

---

<sup>127</sup> Decision of Swedish government 1:1 and 1:2, 2001-12-18.

<sup>128</sup> Renvois forcés/ Craintes de torture, Action Urgente, Amnesty International, Document Public AU 324/01, MDE 12/035/01.

<sup>129</sup> Finn, P., "L'Europe renvoie en Egypte des dissidents et des personnes accusées de terrorisme" (en anglais), in *Washington Post*, January 29, 2002, available at <http://moise.sefarad.org/belsef.php/id/251/>, last visited 2002-10-08 (articles from the Washington Post cannot be viewed without subscribing to the newspaper, why this French web site was used instead); Decision of Swedish government 1:1 and 1:2, 2001-12-18.

<sup>130</sup> Finn, P., "L'Europe renvoie en Egypte des dissidents et des personnes accusées de terrorisme" (en anglais), in *Washington Post*, January 29, 2002, available at <http://moise.sefarad.org/belsef.php/id/251/>, last visited 2002-10-08.

## 5 The forced return to Egypt

Sweden has obligations under international law to ensure that individuals under its jurisdiction are not subjected to human rights violations. These obligations include direct duties, for example abstaining from using torture against individuals under its jurisdiction, as well as indirect duties, for example not removing a person from its territory to another country where s/he would be subjected to serious human rights violations. The indirect responsibilities of a state means that the state as such does not violate human rights, but its action exposes the individual to a situation where s/he there can be subjected to such violations.

The Swedish government admitted that Agiza and El Zary would be subjected to serious human rights violations if they were returned to Egypt.<sup>131</sup> To ensure that these violations would not occur and thus to take action in accordance with international obligations, the Swedish government requested and received a so called “guarantee” from the Egyptian government.<sup>132</sup> The guarantee played a decisive role in the decision to expel Agiza and El Zary to Egypt. The Swedish government stated that the guarantee gave protection to Agiza and El Zary and thus removal could take place without violating international obligations. Even if this statement was done in a clear manner, several voices were raised questioning if the guarantee would in fact provide Agiza and El Zary with sufficient protection.

Two international instruments, the ECHR and the CAT, are relevant in this case concerning expulsion and possible human rights violations. The CAT has an explicit provision prohibiting expulsion if there is a real risk of torture and under the ECHR, a similar provision has evolved through the case law of the European Court of Human Rights. However, the prohibition under the ECHR/case law of European Court of Human Rights, extends also to inhuman or degrading treatment or punishment unlike the CAT, that only concerns torture.<sup>133</sup>

---

<sup>131</sup> Decision of the Swedish government 1:1 and 1:2. The Swedish government admitted that Agiza and El Zary had grounds for attaining refugee status. By stating such, the government also said that the two men could be subjected to persecution if returned.

<sup>132</sup> Aide-Mémoire, 12 December 2001. This request can be obtained from the Swedish Foreign Ministry, Stockholm.

<sup>133</sup> Decision by the Swedish government 1:1 och 1:2, 2001-12-18 .

<sup>133</sup> CAT article 3; Cruz Varas v. Sweden, Judgment of 20 March 1991, E.C.H.R. Ser. A 201 para. 69; Soering v. United Kingdom, Judgment of 7 July 1989, E.C.H.R. Ser. A No. 161, para. 91

## 5.1 Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

The state parties to the ECHR shall secure to everyone under its jurisdiction the rights and freedoms under the Convention.<sup>134</sup> One of these articles is article 3 and there it is stated as follows:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.<sup>135</sup>

This is a human right that admits no exceptions or derogation, even in state of war or other public emergency.<sup>136</sup> The prohibition of torture and inhuman or degrading treatment or punishment generates both the state's direct and indirect responsibilities. Concerning the indirect responsibilities, the application of article 3 in extradition and expulsion cases, as evolved through the case law of the European Court of Human Rights (hereinafter referred to as the European Court or the Court), differs from the other situations of violations under the ECHR.<sup>137</sup> First, there is a violation of the article if the extradition/expulsion to the other country might lead to an treatment contrary to article 3. This means that the prohibited act actually has not occurred yet, but if it did, it would be a violation. Second, another state than the expelling state is the possible violator of the ill-treatment.<sup>138</sup>

### 5.1.1 Standard of proof under article 3 European Convention for the Protection of Human Rights and Fundamental Freedoms

The standard of proof applicable in cases of expulsion in violation of article 3 ECHR is that a state cannot expel a person when there are *substantial grounds* for believing that s/he would face a *real risk* of being subjected to torture or inhuman or degrading treatment or punishment.<sup>139</sup> What this means is not clear, but guidance can be sought in several sources.

Since the applicable standard of proof has evolved through the case law of the European Court, it is therefore logic to look into those judgments and see how the Court has applied this threshold.<sup>140</sup> The core issue is to

---

<sup>134</sup> ECHR article 1.

<sup>135</sup> ECHR article 3.

<sup>136</sup> ECHR article 15.

<sup>137</sup> Soering; Chahal v. the United Kingdom, Judgment of 15 November 1996, E.C.H.R. Reports 1996-V; Cruz Varas, Vilvarajah v. United Kingdom, Judgment of 30 October 1991, E.C.H.R Ser. A. 215; Danelius, H., *Mänskliga rättigheter i europeisk praxis – en kommentar till Europakonventionen*, 2000, Norstedts Juridik AB, Stockholm, p. 79;

<sup>138</sup> Danelius p. 79-80.

<sup>139</sup> Cruz Varas, para. 69; Soering para. 91.

<sup>140</sup> See for example the following judgments where the European Court has dealt with the violation of article 3 ECHR; Soering, Chahal, Cruz Varas, Vilvarajah.

determine what evidence there is in the case, and then decide if there is a real risk of ill-treatment on basis of the facts given. Reliable evidence in such assessments can be, for example, reports from non-governmental organizations and UN organs. When several objective sources reports of ill-treatment in a certain country, this can give grounds for determining that there exists ill-treatment.<sup>141</sup>

To determine what substantial grounds are on a scale of applicable standards of proof is difficult to decide. Trying to examine the meaning of this threshold, guidance can be sought from article 31.1 of the Vienna Convention on the Law of Treaties.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>142</sup>

Nothing can be found in the text of article 3 ECHR that can explain the applicable standard of proof. Neither can the article be interpreted in its context, without going into a too deep analysis that falls outside the scope of this thesis. However, by looking at the object and purpose of article 3, the doors can open up for a teleological interpretation. The aim of article 3 ECHR is to protect the individual against ill-treatment. Since the object of protection is the individual, the standard of proof can therefore not be set too high. A comparison can be made to the standard of proof applicable under article 1.A.2 of the Refugee Convention. The threshold applicable is that it to a reasonable likelihood shall be determined that the claimant has grounds for attaining refugee status. This threshold is fairly low. It does not even have to be more likely than not that a person has grounds for receiving refugee status. Since the aim of the Refugee Convention also is to protect the individual and a lower standard of proof is applicable, a conclusion might be drawn that this should be the case also concerning the standard of proof of article 3 ECHR.

### **5.1.2 Soering v. United Kingdom**

One of the cases where the European Court dealt with extradition in violation of article 3 was in *Soering v. United Kingdom* (hereinafter referred to as *Soering*). This case concerned a German, Jens Soering, who was held responsible, together with his girlfriend, for murder of her parents in Virginia, USA, 1985. After the murder the two youngsters fled the country and ended up in the United Kingdom. In connection with a check fraud they were arrested, and their involvement in the murder was discovered. The government of the USA wanted both of them extradited for criminal proceedings in Virginia.<sup>143</sup> The girlfriend surrendered for extradition while

---

<sup>141</sup> See for example Chahal paras. 103 (with further reference to previous paragraphs in the case) and 104.

<sup>142</sup> Vienna Convention on the Law of Treaties, 24 May 1969, 1155 U.N.T.S. 331, article 31(1).

<sup>143</sup> *Soering* paras. 11, 12, 14.

Soering remained in the United Kingdom.<sup>144</sup> The United Kingdom had doubts in extraditing Soering to the USA since he there might face the death penalty considering the severity of the crime he was charged with. If sentenced to death, he would also be placed in the ‘death row’. In order to prevent this from happening the United Kingdom government requested a guarantee from the state of Virginia. The governor of Virginia certified thereby that “a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out”<sup>145</sup>.

The United Kingdom wanted to extradite Soering, but he filed a complaint under the ECHR claiming a violation of article 3, if extradited. The European Court found that the United Kingdom had violated article 3. By extraditing Soering, the United Kingdom would expose him to a real risk of being subjected to inhuman or degrading treatment or punishment. The actual inhuman or degrading treatment or punishment, was the placement in the death row in Virginia, USA, but the violation of the ECHR, was the extradition of Soering by the United Kingdom.

Placement in the death row was signified by extreme conditions amounting to anguish for the person in question. Considering this in combination with Soering’s age at the time of the offence, only 18, and that he was mentally unstable, amounted in sum to that the placement in the death row as such, was an inhuman or degrading treatment or punishment.<sup>146</sup> The Court also concluded that there was a “real risk” that Soering would be sentenced to the death penalty and subsequently be placed in the death row. The prosecutor of the case in Virginia, USA, had independently expressed his decision to seek the death penalty in the case, since he believed that the evidence was in support of his claim. In connection to this statement the European Court concluded that there must be substantial grounds for believing that there is a real risk for a death sentence and therefore also a real risk of placement in the death row, when a national authority makes such a firm statement.<sup>147</sup> Considering both that the death row placement as such would be an inhuman or degrading treatment or punishment and that there was a real risk for such placement, the Court concluded that the United Kingdom would breach article 3 if they extradited Soering.

By this judgement the European Court opened the door for applying article 3 on extradition cases.<sup>148</sup> Even if it is up to each state to decide who can enter and stay in its territory, such decisions shall still be made in accordance with international law. Following the judgments of the Court, the state parties to the ECHR can violate the same convention, i.e. article 3,

---

<sup>144</sup> Soering para 18.

<sup>145</sup> Soering para. 19, 20; further discussions concerning this guarantee will follow below.

<sup>146</sup> Soering para 111.

<sup>147</sup> Soering para. 98, 99.

<sup>148</sup> Article 3 ECHR is also applicable in expulsion cases. See for example Cruz Varas.

if they do not take due regard to the consequences that an extradition may be for the individual concerned.

The European Court found a violation of article 3 even if the actual inhuman or degrading treatment or punishment as such did not occur in a Convention State. To come to this conclusion the Court referred to earlier case law and stated that the ECHR is an instrument to protect human rights. In order to fulfil this aim, the ECHR must be interpreted in a way so as to make its provisions effective.<sup>149</sup> Even if a possible violation of the provisions of the Convention does not occur in a contracting state the ECHR as such becomes ineffective if a contracting state exposes the individual to a risk of being subjected to treatment contrary to the Convention. For the responsibility of the contracting state to be in question the possible violation must be foreseeable to the state and a direct link must be established between the extradition<sup>150</sup> and the possible violation in the other state. When the extradition makes the human rights in the ECHR ineffective, the interests of the state shall not be protected.<sup>151</sup>

When it comes to deciding a violation of article 3 in expulsion cases, each case must be examined individually and all circumstances must be brought up and evaluated. When it has been established that there is a real risk of ill-treatment contrary to article 3, then no expulsion can take place. It does not matter what arguments the expelling state may have, be it national security concerns or disruption of public order, the established risk of ill-treatment “overtrumps” all interests of the state. In the *Soering* judgment the Court also came to this conclusion. This absolute character of article 3, has since been emphasized i.a. in the case of *Chahal v. the United Kingdom*, where the European Court stated that:

It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition [...] that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 (art. 3) is engaged.<sup>152</sup>

Article 3 is an absolute right, in that it does not give any room for exceptions or derogation. The Court also refers to the article as enshrining one of the fundamental values of the democratic societies building up the Council of Europe.<sup>153</sup> This taken together shows the strong meaning of article 3. The Court also compares article 3 to other similar treaties<sup>154</sup> where

---

<sup>149</sup> *Soering* para. 87.

<sup>150</sup> Only extradition will be referred to in this regard, since the *Soering* case dealt with extradition, even if the European Court stated that violations of this kind also can be applied to expulsion cases.

<sup>151</sup> Zühlke S. and Pastille J-C., “Extradition and the European Convention – *Soering* revisited”, in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, volume 59, 1999, p. 768.

<sup>152</sup> *Chahal* para. 81.

<sup>153</sup> *Soering* para 88.

<sup>154</sup> CAT article 3.



there are explicit prohibitions of expulsion in case of risks of torture.<sup>155</sup> In stating this, the Court concludes that also article 3 has such a prohibition embedded in the article, even if it is not explicit. Taking all the above stated into account, the Court comes to the conclusion that an extradition that can result in actions taken by another state in violation of article 3 is contrary to the spirit and intendment of article 3 itself.<sup>156</sup>

The reasoning in the Soering judgment raised the question if also other human rights can be applicable in extradition cases. Concerning article 6 ECHR, the Court did actually express that this article could be applicable in extradition cases.

The Court does not exclude that an issue might exceptionally be raised under Article (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.<sup>157</sup>

Further, it has also been argued that even other rights can be applicable in extradition matters, as for example the right to respect to private and family life, as protected under article 8 of the ECHR.<sup>158</sup> The matter of what rights shall or shall not apply in extradition cases is complicated. Where to draw the line between applicable rights and non-applicable rights is difficult to do. It is a relevant and interesting analysis, but it is beyond the scope of this thesis.<sup>159</sup>

#### **5.1.2.1 The relevance of a guarantee**

In the case of Soering, the United Kingdom government requested a guarantee from the Governor of Virginia wishing that Soering, if extradited, would not face the death penalty. According to the European Court, this guarantee did not count for much. The judicial system in the USA is federal and state divided. In this case the offence fell under state jurisdiction. This being the case, no direction from a state authority can give a guarantee that the courts of Virginia will not sentence Soering to the death penalty. Also, the courts are independent judicial bodies they cannot bind themselves of a future judgment. In the view of the Court, the guarantee could therefore not justify extradition. Speaking against the guarantee is also that the Governor does not promise that he will later use his power to commute a death penalty, a possibility he actually had.<sup>160</sup>

---

<sup>155</sup> Soering para 88.

<sup>156</sup> Soering para. 88.

<sup>157</sup> Soering para. 113.

<sup>158</sup> See for example Zühlke S. and Pastille J-C p. 758.

<sup>159</sup> For further reading on these issues, see Zühlke S. and Pastille J-C; see also Noll, G. *Negotiating Asylum: the EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, 2000, Martinus Nijhoff Publishers, The Hague.

<sup>160</sup> Soering para. 97, for the text of the guarantee see above under 5.1.2.

### 5.1.3 Chahal v. United Kingdom

Mr. Chahal, an Indian citizen and also a leader of a Sikh separatist movement, had lived in the United Kingdom for some time. Because of alleged terrorist activity, the United Kingdom decided to expel Chahal from the country.

The case of Chahal v. United Kingdom (hereinafter referred to as Chahal) concerned similar issues as the Soering case. The ill-treatment that Chahal could be subject to upon return to India actualized the question of a violation of article 3 ECHR. If the United Kingdom were to expel Chahal to India, the question of responsibility of the United Kingdom for violation of the ECHR would come into question just as it did in the Soering case.<sup>161</sup>

The ill-treatment that Chahal feared if returned to India emanated from the security police in the region of Punjab. Considering reports from Amnesty International showing that Sikh separatists faced serious risks of torture, detention without trial, “disappearances” and extra judicial executions, the Court did not dispute that the feared ill-treatment amounted to treatment contrary to article 3.<sup>162</sup> The Court also found that there was a “real risk” of ill-treatment since the Punjab police kept on violating human rights both inside and outside their area, without the control of lawful authorities. Indian authorities, national human rights committees and Indian courts had tried to end the abuse, but the violations went on without enough actions of prevention being made from the side of the government.<sup>163</sup>

The United Kingdom wanted to expel Chahal because they considered that his presence in the country threatened their national security. They also believed that expelling him was in line with the fight against international terrorism.<sup>164</sup> The United Kingdom based their assertion on the assumption that there is a limitation on article 3 permitting expulsion if there is compelling national interest over weighing individual interests. By this they said that a balance can be struck between the interests involved, even if a real risk of ill-treatment is established.<sup>165</sup>

The European Court opposed the United Kingdom’s argument of implied limitations of article 3, stating that, when there is a real risk for ill-treatment contrary to article 3 ECHR, actions of the individual however dangerous or undesirable it is, has no role to play in the case of expulsion.<sup>166</sup>

---

<sup>161</sup> Chahal para. 74.

<sup>162</sup> Chahal para. 89.

<sup>163</sup> Chahal paras. 99, 102, 104, 105, 107.

<sup>164</sup> Chahal para. 25.

<sup>165</sup> Chahal para. 76.

<sup>166</sup> Soering para 80-81.

### **5.1.3.1 The relevance of a guarantee**

In the case of Chahal, the United Kingdom government requested and received a guarantee that Chahal would enjoy the same legal protection as an Indian citizen and that he would not receive any mistreatment of any kind from the Indian authorities.<sup>167</sup> However, the European Court did not find this guarantee sufficient enough. The Indian government and Indian courts have tried to come around the human rights violations that the Punjab police have been responsible for, but their efforts had not been enough, since the violations still occurred. The assurance would not lead to effective protection of Chahal by the Indian authorities. Against this background the Court believed that Chahal would not be protected from ill-treatment caused by the Punjab police if reliance was made upon the guarantee.<sup>168</sup>

### **5.1.4 Soering and Chahal applied to the case of Agiza and El Zary**

In the expulsion decision, the Swedish government discussed the matter of possible violation of article 3 ECHR. It had to be resolved if the treatment awaiting Agiza and El Zary in Egypt, amounted to ill-treatment under article 3, and then if there were substantial grounds for believing that there was a real risk of such treatment upon return to Egypt. The Swedish government also had to assess the relevance of the guarantee given in the case.

#### **5.1.4.1 Real risk of torture?**

According to reports from Amnesty International, torture in prisons and custodies in Egypt occurs often.<sup>169</sup> Especially are persons that are suspected of involvement in armed Islamic groups tortured. It is also common that persons are convicted for connections to armed Islamic organizations in military tribunals or so called emergency courts. Some of the persons that were convicted in absentia in the same trial as Agiza, were upon return to Egypt reported of having been subject to torture according to own statements. The most likely torturer of persons suspected of affiliations with these organizations is the State Security Intelligence in Egypt (hereinafter referred to as SSI). The methods often used are electric shocks, beatings, suspension by the wrists or ankles, burning with cigarettes and various form of psychological torture.<sup>170</sup> The fact that Egypt still has a state of emergency

---

<sup>167</sup> The guarantee read as follows: "We have noted your request to have a formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities. I have the honour to confirm the above." Chahal para. 37.

<sup>168</sup> Chahal para. 105.

<sup>169</sup> Amnesty International Annual Report on Egypt 2000, [www.amnesty.org](http://www.amnesty.org) Searchpath: library > Egypt > Annual report 2000, last visited 2002-11-20.

<sup>170</sup> Amnesty International report, "Sweden: Deportation leave men at risk of torture in Egypt", 20 December 2001, [www.amnesty.org](http://www.amnesty.org) searchpath: library > Egypt, last visited 2002-11-20; Amnesty International Annual Report on Egypt 2000; Concluding observations: Egypt 20/11/2002, CAT/C/XXIX/Misc. 4, non-edited version, 11-22 November 2002.

in force is of concern too, since the rule of law in Egypt may be insufficiently applied.<sup>171</sup> This state of emergency makes it possible for the authorities to establish special Emergency courts where persons suspected of affiliations with terrorists can be tried. In having these courts procedural safeguards as the ones embedded in the right to a fair trial can legally be deviated from.

When Agiza and El Zary were sent back to Egypt they were taken in custody. After more than a month the Swedish Ambassador in Cairo visited Agiza and El Zary. The visit took place in the Mazra'at Tora prison. However, it was made clear that Agiza and El Zary first spent 30 days in custody for interrogation somewhere else and were after that brought to the Mazra'at Tora prison.<sup>172</sup> Where they were held in custody is not clear, but it cannot be ruled out that they were held by the SSI.<sup>173</sup> This can be supported also by the fact that Amnesty International reports show that other suspected members of armed Islamic groups have ended up in SSI custody for questioning concerning suspected terrorist activity.<sup>174</sup> Agiza and El Zary were also extradited to Egypt because of their suspected links to terrorist organizations, why probably the SSI was involved since it concerned terrorist issues. According to the report from the Swedish Ambassador the two Egyptians were in good shape and showed no signs of torture.<sup>175</sup> Contrary to this statement is the information given by the family of Agiza and El Zary who visited them just before the Ambassador did. Unlike the Ambassador they claim that the two men had been tortured.<sup>176</sup>

Reports from Amnesty International as well as from the UN Committee Against Torture, have stated that alleged terrorists in Egypt are and have been subjected to ill-treatment and torture in Egypt especially in the custodies of the SSI. Considering the descriptions given of the ill-treatment and that several objective reports gave similar observations, it must be decided that the treatment in question is contrary to article 3 ECHR.

Further, concerning the standard of proof that must be met for a violation to be in question, it must be established that there are substantial grounds for believing that Agiza and El Zary would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment if returned to Egypt.<sup>177</sup> The situation of Agiza and El Zary were similar to that of other

---

<sup>171</sup> Concluding observations: Egypt 20/11/2002, CAT/C/XXIX/Misc. 4.

<sup>172</sup> Report from Sven G Linder from the Swedish Embassy in Cairo, Egypt, 23 January 2002, distributed by the Swedish Foreign Ministry.

<sup>173</sup> Telephone interview with Bo Johansson, The Swedish Refugee Advice Centre, Stockholm. Bo Johansson is a lawyer representing Agiza's wife in front of the Committee against Torture. The wife is still in Sweden and has filed a complaint against the Swedish government and of their decision to return her to Egypt.

<sup>174</sup> Amnesty International Annual Report on Egypt 2000.

<sup>175</sup> Memorandum by the Swedish Ambassador Sven Linder written after his visit to the Masra'at Tora prison, 18 January 2002.

<sup>176</sup> "De två egyptierna riskerar fortfarande tortyr", Pressnotis, Amnesty International, 5 February 2002. Can be obtained from the press secretary at Amnesty International Stockholm office.

<sup>177</sup> Cruz Varas, para. 69; Soering, para. 91.

alleged terrorists in custody or prison in Egypt. They have both been convicted of terrorist association as members of armed Islamic groups. When persons being in similar situations as Agiza and El Zary, reportedly have been subjected to ill-treatment contrary to article 3 ECHR and the fact that the required standard of proof is fairly low, it cannot be other than stated that the prerequisite of a real risk was fulfilled.

#### **5.1.4.2 An effective guarantee?**

The Swedish government requested a guarantee from the Egyptian government by stating the following:

“It is the understanding of the Government of the Kingdom of Sweden that the above-mentioned persons will be awarded a fair trial in the Arab Republic of Egypt. It is further the understanding of the Government of the Kingdom of Sweden that these persons will not be subjected to inhuman treatment or punishment of any kind by any authority of the Arab Republic of Egypt and further that they will not be sentenced to death or if such a sentence has been imposed that it will not be executed by any competent authority of the Arab Republic of Egypt.”<sup>178</sup>

The Egyptian government answered in the same diplomatic language.

“With reference to your aide-mémoire dated 12 December 2001, concerning repatriation of the following Egyptian citizens: [...] 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.”<sup>179</sup>

The Swedish government clearly stated that this guarantee was a sufficient assurance for Agiza’s and El Zary’s protection against violations of human rights in Egypt.<sup>180</sup> However, unlike the statements by the government, several other parties have expressed their concern over the guarantee as not being enough to secure protection of the two Egyptians.<sup>181</sup> The core of the criticism concerned the implementation of the guarantee, i.e. if it would give effective protection against human rights violations in Egypt.

In the cases of Soering and Chahal, the expelling government requested and received a guarantee that assured that there would be no violation of

---

<sup>178</sup> Aide-Mémoire, 12 December 2001. This request can be obtained from the Swedish Foreign Ministry, Stockholm.

<sup>179</sup> Aide-Mémoire given by the Arab Republic of Egypt. This guarantee can be obtained from the Swedish Foreign Ministry, Stockholm. The brackets in the quotation represent approximately a paragraph of 4-5 lines that has been omitted due to its classified content. In the public version of the guarantee distributed by the Swedish government, these sentences were deleted.

<sup>180</sup> Telephone interview with Nils Eliasson, Deputy Director-General of the Department for Migration and Asylum Policy at the Swedish Foreign Ministry, Stockholm; Memorandum by the Swedish Ministry of Foreign Affairs, 2002-02-28.

<sup>181</sup> See for example “Sverige fick inga garantier från Egypten”, Pressnotis, Amnesty International, 17 January 2002. Can be obtained from the press secretary at Amnesty International Stockholm office; “Väst på väg att acceptera tortyr”, Svenska Dagbladet, 18 January 2002.

treatment contrary to article 3 ECHR. Even if those were not the exact words, the meaning of the guarantees was such. The European Court rejected the guarantees given in both cases, stating that it would not provide the applicant with adequate safety. Common for the guarantees in the two cases were that they were given by an authority that actually did not control the “perpetrators”<sup>182</sup> of the ill-treatment. The lack of control consisted in the incompetence to decide over another body or an unsuccessful effort to prevent torture by certain bodies. Having said this, it can be concluded that a guarantee can only be efficient if the body giving the guarantee also effectively has control over what the possible perpetrator does.

Through Soering important principles were evolved, but in fact, it is the case of Chahal that is of most interest concerning the removal decision of Agiza and El Zary. The Swedish government stated that the guarantee given in the case of Agiza and El Zary was different compared to that of Chahal. They meant that the guarantee from Egypt was stronger and that the fact that it was issued by a high representative from the Egyptian government was of significance. Aside from the guarantee was also the fact that the two governments agreed to let the Swedish ambassador in Cairo visit Agiza and El Zary in prison and to accompany the men at coming trials, which would provide the two men with additional protection.<sup>183</sup>

Even if the Swedish government argued that there were differences between the cases of Agiza and El Zary and that of Chahal, it cannot be other than stated that these cases are still similar to a considerable extent.<sup>184</sup> In the two cases, the guarantee was given by a government assuring protection from torture or ill-treatment, where the actual perpetrators were security forces or police. The guarantees also stated that treatment should be in accordance with the law of the country in question, i.e. India and Egypt respectively.

The European Court concluded in the Chahal case that the guarantee given did not give sufficient protection to Chahal. The question therefore stands if Agiza and El Zary would receive enough protection by the guarantee given in their case?

The good faith of the Egyptian government to give the guarantee in the case shall not be doubted. However, the effectiveness of such a guarantee can be distrusted. According to reports from Amnesty International, the possible torturers in the case of Agiza and El Zary would probably be the agents of the SSI.<sup>185</sup> As stated in the conclusion given by the UN Committee Against Torture on Egypt’s fourth state report, it was recommended that Egypt must

---

<sup>182</sup> Perpetrators are put in citation marks, since the judges of the court in Virginia cannot be seen as perpetrators. The essence is that they still were the authority that would impose the death penalty on Soering and therefore also the ill treatment of placing him in the death row.

<sup>183</sup> Memorandum by the Swedish Foreign Ministry, 2002-02-28.

<sup>184</sup> Memorandum by the Swedish Foreign Ministry, 2002-02-28.

<sup>185</sup> Amnesty International report, ”Sweden: Deportation leave men at risk of torture in Egypt”, 20 December 2001; Amnesty International Annual Report on Egypt 2000.

<sup>185</sup> Report from Swedish Ambassador in Cairo Sven G Linder, 23 January 2002.

take effective measures to prevent torture in police custody and at the SSI and that the perpetrators must be brought to justice.<sup>186</sup> Not only must the Egyptian government prevent the torture, but they must also investigate all allegations of torture, effectively inspect places of detention including the premises of the SSI, ensure full effect of the rights in the CAT and ensure the remedies for enjoying such rights and reconsider the maintenance of state of emergency.<sup>187</sup> Concluding from these reports, it cannot be other than stated that torture and ill-treatment in police and SSI custody is an enduring problem in Egypt and the measures taken by the Egyptian government to end the use of ill-treatment has been inadequate. Therefore, if the government cannot control the already existing ill-treatment, it is doubtful that it effectively can prevent the ill-treatment of Agiza and El Zary. When it comes to securing sufficient protection, the guarantee is not only about the written words of a paper or who issues it, but mostly about how *efficient* the words are in reality.

The Swedish government further argued that an additional protection would be provided by the visits of the Swedish ambassador. The idea of having the ambassador there as a controlling body is good, but the question is if he really had any power to put pressure on the Egyptian government. His visits did not start until after 30 days after Agiza and El Zary had arrived in Egypt and the reason for that remains untold. However it cannot be ruled out that the largest risk of subjection to torture is during the questioning at the SSI and this often takes place during the first weeks after return. During this time the ambassador did not visit Agiza and El Zary. The intended protection by the ambassador has also been criticized by the UN Human Rights Committee as an “absence of sufficiently serious efforts to monitor the implementation of those guarantees”<sup>188</sup>.

When the Swedish government was to decide if the guarantee that they had received was enough, they should have more thoroughly investigated the situation awaiting Agiza and El Zary upon return in Egypt. After considering that Egypt had laws preventing torture, they should have gone one step further and looked into the effectiveness of these laws. According to the report by the UN Committee Against Torture and Amnesty International, it has not been shown that the Egyptian government had sufficient control over the practice of ill-treatment and torture in its own country. The Swedish government admitted that for a guarantee to be of value, the government giving the guarantee must have control over the perpetrators, but in fact, the Swedish government accepted a guarantee where the Egyptian government had no such control.

---

<sup>186</sup> CAT/C/CR/XXIX/Misc.4, Non-edited version, 11-22 November 2002 [www.unhchr.ch](http://www.unhchr.ch)  
Searchpath: Treaty Monitoring Bodies > Committee Against Torture > Treaty Body  
Database > CAT > Concluding Observations > 20/11/2002 Egypt.

<sup>187</sup> Concluding observations: Egypt 20/11/2002, CAT/C/XXIX/Misc. 4.

<sup>188</sup> Human Rights Committee, Concluding Observations, Sweden 24/04/02, CCPR/CO/74/SWE.

Taking all the above stated into account, the guarantee that was given to the Swedish government did not adequately guarantee the safety of Agiza and El Zary, why it should not have been relied upon.

#### **5.1.4.3 Violation of article 3 European Convention for the Protection of Human Rights and Fundamental Freedoms?**

With basis on the facts given in the case as referred to above, it must be substantiated that there is a real risk of Agiza and El Zary being subjected to treatment contrary to article 3 ECHR. When the existence of such a real risk has been established, no other interests of the Swedish government can prevail. The prohibition of expulsion in this case is therefore absolute. The guarantee given by the Egyptian government does not provide for sufficient protection either to justify an expulsion of Agiza and El Zary to Egypt. The conclusion is therefore that Sweden violated its obligations under article 3 of the ECHR when they expelled Agiza and El Zary to Egypt.

### **5.2 Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms**

When a person argues that his/her rights have been violated, s/he shall have the right to try the case in his/her state. However, the recourse to a remedy must be effective in order to be acceptable. The ECHR includes a right to an effective remedy under article 13.

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.<sup>189</sup>

As is stated in the article, the right to an effective remedy is only in question when a right in the ECHR has been violated. This does not mean that there actually has to have been a proven violation, but that the applicant must present an “arguable claim” that his/her rights have been violated.<sup>190</sup> To have access to an effective remedy means that the applicant can put forward his/her claim to a body that can try his/her case. It does not necessarily have to be a judicial body, but can be an administrative or another kind of body. It is up to each state to decide the remedy available. If the latter is in question, it must be assured that certain procedural guarantees are applied and that the body has sufficient competence to deal with the case.<sup>191</sup> That the ruling turns out to be against the applicant does not as such matter.<sup>192</sup>

---

<sup>189</sup> ECHR art. 13.

<sup>190</sup> Leander v. Sweden, Judgment of 26 March 1987, E.C.H.R., , Ser.A 116, para. 77; Danelius p. 300.

<sup>191</sup> Danelius p. 300; Klass and Others v. Germany, Judgment of 6 September 1978, E.C.H.R., Ser. A. 28, para. 30.

<sup>192</sup> Danelius p. 300-301.



It is not enough that a remedy actually is available, but it does also have to be effective. The Council of Europe has issued a recommendation in this regard, which concerns the access to an effective remedy under article 3 ECHR. In these recommendations it is stated that the body providing the remedy must be composed of impartial members and be independent as such, have competence to examine the requirements of article 3, being accessible to the applicant, and finally that the expulsion order can be suspended until the new decision is taken.<sup>193</sup>

When it concerns claims of violations of article 3 ECHR, the access to an effective remedy can in some situations be limited in the state party to the ECHR. This is the case when a state has taken the decision to expel a person to another country because s/he poses a threat to the national security of the country. The evidence in the case is then often classified which makes it difficult for another body to effectively review the case.

In two judgments under the ECHR concerning national security issues, *Leander v. Sweden* and *Klass and Others v. Germany*, the Court stated that the remedy required does only have to be "as effective as it can be", when classified information is involved.<sup>194</sup> According to the Court, the demands of an effective remedy were lower, since this kind of information has limited possibilities to be disclosed and therefore being reviewed by another body.

However, the European Court modified its ruling in the later *Chahal* case. There it stated that it is not enough to let a remedy be "as effective as it can be" when it concerns violation of article 3 ECHR. The risks that an applicant can be subjected to are serious and therefore there must be an effective remedy available for the applicant when s/he wants to file a complaint against his/her removal from a state.<sup>195</sup> Considering what the Court has stated previously, that security interests are immaterial when it has been established that there is a real risk of ill-treatment if expulsion would take place, this enforces the fact that violations of article 3 are very serious issues.

There must be an impartial body that can independently scrutinize the case and again examine it to see if there is a real risk of treatment contrary to the article if expulsion was to take place.<sup>196</sup> In the *Chahal* case the applicant had his case reviewed by an advisory panel and a court, but the European Court did not find this remedy effective enough since these instances did not examine the case independently and again assessing the presence of a real risk of ill-treatment. The review concerned instead the confirmation that the Home Secretary, who took the decision of expulsion, had balanced the risk

---

<sup>193</sup> Council of Europe Recommendation No. R (98) 13 on the right to an effective remedy against decisions on expulsion in the context of article 3 of the European Convention on Human Rights.

<sup>194</sup> *Klass and Others* para 69; *Leander*, para 84.

<sup>195</sup> *Chahal* para.150.

<sup>196</sup> *Chahal* para. 151.

Chahal would face if returned against the danger to national security the United Kingdom feared if Chahal would stay in the country.<sup>197</sup>

Considering the case of Chahal the remedies available in immigration matters in the United Kingdom was proven not being effective enough. The previous system was known as "the three wise men", a non-judicial body which acted as a review of the Home Secretary's decisions of expulsions. The applicant had no right to appear in front of this body to argue his/her case.<sup>198</sup> To cope with this, the United Kingdom established an independent body for dealing with immigration appeals called the Special Immigration Appeals Commission.<sup>199</sup> The Commission consists of three members. Two that have been members of the judiciary, and the third, a lay member who has a good knowledge of security work. The Commission is to be compared with a court and it also gives binding decisions. It is completely independent of the Government. The Commission is an appellate body examining cases for those who are subject to deportation and/or refusals of leave to remain. Since information in cases concerning national security issues involves classified information, parts of the proceedings are still held behind closed doors. However, a special appointed senior barrister, who attends the closed sessions and acts in the interests of the applicant, secures the interests of the applicant.<sup>200</sup>

### **5.2.1 Agiza's and El Zary's access to an effective remedy**

The decision taken by the Swedish government to expel Agiza and El Zary was executed immediately. The day after the decision, the Swedish Security Police confirmed that the two Egyptians landed on Egypt territory during the night.<sup>201</sup> It was not until after the Egyptians had left Sweden that their legal representatives was told about the expulsion.<sup>202</sup> Since it was only the Swedish government that took the decision in the case, the question of the existence of an effective remedy can be raised.

The Swedish Migration Board first considered the separate asylum claims of Agiza and El Zary. When it turned out that the two cases concerned national security issues, and after the opinions of the Swedish Security Police had been given to the Board, they referred the matter to the Aliens Appeals Board, that in turn, referred it to the government according to Chapter 7, paragraph 11, second section, second point of the Swedish Aliens Act.

---

<sup>197</sup> Chahal para 150-151, 153.

<sup>198</sup> Appendix 16, United Kingdom Parliament, <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmhaff/351/351ap20.htm>, last visited 2002-12-05

<sup>199</sup> Special Immigration Appeals Commission Act 1997, <http://www.hmsso.gov.uk/acts/acts1997/1997068.htm>, last visited 2002-12-, last visited 2002-12-04.

<sup>200</sup> Appendix 16, United Kingdom Parliament, <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmhaff/351/351ap20.htm>, last visited 2002-12-05.

<sup>201</sup> Memorandum by the Swedish Foreign Ministry, 2002-02-28.

<sup>202</sup> "Väst på väg acceptera tortyr", in *Svenska Dagbladet*, 2002-01-18

The Swedish government is the only instance that decides on matters like the one in the case of Agiza and El Zary, when it concerns issues of national security. From the perspective of offering individuals under its jurisdiction an effective remedy, this procedure is unfortunate. The government as such is not impartial since it has interests of its own in the case and there is no redress to another impartial body for a review of the case. Since the expulsion decision was executed immediately, even before notifying the legal representatives of Agiza and El Zary, it was also too late to file a complaint to either the UN Committee Against Torture or the European Court to ask for inhibition, so the expulsion order could be suspended until the conformity with international law was assessed at either of the two bodies.

Agiza and El Zary was not given an effective remedy as they have the right to according to article 13 of the ECHR. First, they had an arguable claim, since there was basis for a violation of article 3, considering the ill-treatment they would risk being subjected to if returned to Egypt. Second, the procedure under Swedish law in expulsion decisions where national security issues are at stake, does not provide the applicant with a sufficiently impartial and effective remedy.

In a memorandum written by the government concerning the case of Agiza and El Zary, the matter of article 13 was touched upon. However, it was not dealt with, since it was considered that the guarantee received from the Egyptian government resulted in no violation of article 3 and consequently the applicants would then not have an arguable claim and hence there could be no violation of article 13 ECHR.<sup>203</sup> By analyzing this argument by the government, the conclusion is that it has no basis. A claimant has a right to an effective remedy and thus also to have his/her case reviewed by an independent body. All facts and evidence must be examined and analyzed again. It is unfortunate that the government refers to the guarantee and claims that Agiza and El Zary has no ground for arguing a violation of article 13 ECHR and thus arguing that the guarantee makes it impossible for a ECHR violation to be at stake. However, the guarantee is just one part of the evidence and facts related to the case. The point of having access to a remedy is that these facts and evidence shall be reviewed again and the new body shall on basis of this, determine if there is a violation of the ECHR.

A proposal for a new bill on procedures for determining asylum cases is under development in Sweden.<sup>204</sup> The key issue in the proposal is that there will be a possibility for the applicant to appeal a negative decision to an administrative court. In cases concerning security issues, like the present one with Agiza and El Zary, this possibility of appeal is proposed not to apply. In these cases no impartial body that can independently examine an expulsion decision on appeal has been proposed. Therefore the government keeps its power to be the last instance to decide in expulsion cases. Voices

---

<sup>203</sup> Memorandum by the Swedish Foreign Ministry, 2002-02-28.

<sup>204</sup> Lagrådsremiss, ny instans -och processordning i utlänningsärenden, available at [http://www.utrikes.regeringen.se/pdf/lagrad\\_map.pdf](http://www.utrikes.regeringen.se/pdf/lagrad_map.pdf), last visited 2003-01-17.

have been raised in this regard, that the new procedure still does not comply with article 13 ECHR or the recommendations given by the Council of Ministers.<sup>205</sup> Among the critics is also the parliamentary committee that wrote the report preceding the governmental proposal. In this report it was stated that sufficient remedy was not given in expulsion cases where national security were at stake.<sup>206</sup>

To comply with the requirements under article 13 of the ECHR, an impartial body needs to be established that can review the decisions of the government independently with the competence to examine the requirements of article 3 ECHR. Maybe if Sweden would establish a commission like the English Special Immigration Appeals Commission, these kinds of procedures could be in conformity with article 13 ECHR. In the Leander case, referred to above, it concerned recourse to an effective remedy in matters involving classified security information. However, this case was different compared to the case of Agiza and El Zary, since the latter concerns possible violations of the prohibition of torture or inhuman or degrading treatment or punishment. When an absolute right is in question, the demands also are higher on which remedies shall be available. Having only the government as the decisive body cannot be enough. Drawing parallels to the Chahal case, it is of weight that a decision of expulsion is examined again on the material basis of the article in question and not taking into regard what the applicant may have done to be considered as expelled. In the case of possible violation of article 3 ECHR, the review should concern the assessment of the risk of the treatment contrary to article 3.<sup>207</sup>

### **5.3 Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

The protection against being sent back to a country where there is a risk of ill-treatment, is included regionally under the ECHR. Internationally this right is protected under the CAT. The right not to be sent back according to CAT also includes asylum seekers when the country of refuge decides to return them to their country of origin or another country.<sup>208</sup>

---

<sup>205</sup> ”Uttalande med anledning av lagrådsremissen om handläggningen av säkerhetsärenden”, joint statement from representatives of several non-governmental organizations in Sweden, available at [www.humanrights.se/svenska/uttalande0206.pdf](http://www.humanrights.se/svenska/uttalande0206.pdf), last visited 2003-01-13;

”Väst på väg acceptera tortyr”, in *Svenska Dagbladet*, 2002-01-18.

<sup>206</sup> SOU 1999:16, “Ökad rättssäkerhet i asylärenden – Slutbetänkande av Kommittéen om ny instans –och process ordning i utlänningsärenden (NIPU) p. 344.

<sup>207</sup> SOU 1999:16, “Ökad rättssäkerhet i asylärenden – Slutbetänkande av Kommittéen om ny instans –och process ordning i utlänningsärenden (NIPU) p. 331; Chahal para 151.

<sup>208</sup> Communication No. 204/2002: Sweden. 28 November 2002, CAT/C/29/D/204/2002 (Jurisprudence); Communication No. 39/1996: Sweden. 28 April 1997, CAT/C/18/D/39/199 (Jurisprudence).

In article 3 of the same convention the following is stated.

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>209</sup>

Unlike the similar provision in article 3 ECHR, article 3 CAT does only prohibit removal if the alleged ill-treatment in the other country amounts to *torture*.<sup>210</sup> To decide if there is a violation of the article the claimant must put forward an arguable case and consequently provide sufficient facts. In presenting the case the claimant must show that s/he would be subjected to torture if returned and that the grounds for that are considerable.<sup>211</sup> When s/he has presented reliable information, the burden of proof shifts to the state party.<sup>212</sup> In determining if there is a violation all evidence of the case must be assessed and from that the state, and the Committee against Torture if the case is under its determination, must decide if there are *substantial grounds* for believing that the claimant would be in danger of being subjected to torture if removed.<sup>213</sup>

In assessing the evidence in the case it must be determined that the claimant is personally at risk of being subjected to torture. It is stated under article 3.2 CAT that the existence of gross, flagrant or mass violations in the state concerned can be taken into account. However, this is no prerequisite for a violation to be at stake. The crucial requirement is the *personal* risk of subjection of torture. Other central factors that must be in place for a violation is that the risk of torture must be foreseeable and real.<sup>214</sup>

To determine if there is a real risk the grounds for such a decision must be more than just suspicion or theory. Yet it does not have to reach the threshold of being ‘highly probable’.<sup>215</sup> Different evidence can be used in the case, such as for example medical reports of previous torture, evidence of gross, flagrant or mass violations in the country concerned, reports of the claimants involvement in political or other activities that could make him/her especially vulnerable of being subjected to torture if returned or evidence confirming the credibility of the claimant.<sup>216</sup> The state, or the UN

---

<sup>209</sup> CAT article 3.

<sup>210</sup> The provision in ECHR also prohibits removal in case of inhuman or degrading treatment or punishment. See further under 5.1.

<sup>211</sup> Implementation of article 3 of the Convention in the context of article 22:21/11/97, CAT General Comment 1, UN Doc. A/53/44, paras. 5 and 6.

<sup>212</sup> Communication No. 185/2001: Sweden 25 May 2002, CAT/C/28/D/185 (Jurisprudence), para. 10.

<sup>213</sup> CAT General Comment 1, para. 6.

<sup>214</sup> CAT General Comment 1, para. 7; Communication No. 204/2002: Sweden 28 November 2002. CAT/C/28/D/204. (Jurisprudence)

<sup>215</sup> CAT General Comment 1, para. 6.

<sup>216</sup> CAT General Comment 1, para. 8.

Committee Against Torture, must assess all the evidence before it. The case has to be logical and to the point without larger inconsistencies. If there are any inconsistencies or contradictions in the case it can still be acceptable if the claimant gives a reliable explanation of why there are such lack of clarity.<sup>217</sup>

When it is decided that there are substantial grounds for believing that a claimant would be in danger of being subjected to torture if returned to another country, the expelling state cannot under any circumstances return the claimant. The application of article 3 CAT is absolute in this regard. The expelling state cannot claim interests of its own that would justify a removal of the claimant to another state. No matter how much the claimant may be a threat to the expelling state, this can be of no material consideration.<sup>218</sup> This conclusion can be compared with the case law of the European Court where it has stated that the application of article 3 ECHR is also absolute and no balance of interests between the state and the individual involved can be in question.

Several cases have been ruled upon under the UN Committee Against Torture where expulsion decisions by states have been found contrary to article 3 CAT. Sweden is not an exception in this matter. When it is substantiated that an individual is personally at risk for being subjected to torture and this risk is foreseeable, then a violation is at stake.

If Agiza and El Zary would have had time to file a complaint to the UN Committee Against Torture, it cannot be ruled out that the Committee would have found a violation of article 3 CAT. The assessments to be made are similar to those under article 3 ECHR and if it can be said that article 3 ECHR can be violated, it is not impossible that also article 3 CAT is violated. However, derived from article 3 ECHR, is the prohibition to return a person to a country where s/he risks torture *or* inhuman or degrading treatment or punishment. To be kept in mind is that article 3 CAT is violated only if the feared ill-treatment constitutes torture. However, considering the information given by, for example, Amnesty International, it cannot be other than stated that the ill-treatment feared also can be labeled as torture according to the CAT.

---

<sup>217</sup> Communication No. 185/2001: Sweden 25 May 2002, CAT/C/28/D/185 (Jurisprudence), para 10.

<sup>218</sup> Communication No. 39/1996: Sweden. 28 April 1997, CAT/C/18/D/39/199 (Jurisprudence), para. 14.5.

## 6 Conclusions

After 11 September 2001, countries all over the world started to take measures to fight terrorism. Laws were issued and security measures were taken to prevent further threat. However, these actions have not always been in accordance with human rights law. Especially asylum seekers have become a targeted group, whose safety against being returned to a country where they risk serious human rights violations can be jeopardized.

Agiza and El Zary were applicants for asylum in Sweden. They both claimed that they feared persecution if they were returned to Egypt. The Swedish government acknowledged their status as refugees, but considered them as unworthy of refugee status because of alleged terrorist activity. The basis was secret evidence of their involvement in two attacks, one in Luxor in 1997 and one in Pakistan in 1995, resulting in the death of over 50 people. The Swedish government did not specify what excludable act under the Refugee Convention that was in question. The most probable conclusion, however, is that a serious non-political crime or an act contrary to the purposes and principles of the UN was in question. The organization responsible for the acts in Luxor and in Pakistan probably committed them with an underlying political aim and since it is probable that the seriousness of killing several people overweighs the political aims of the attack, it can also fall in under the exclusion clause. If the crimes in Luxor and Pakistan would not be considered as serious enough, the Swedish government could still refer to the crimes as being acts contrary to the purposes and principles of the UN. Both a UN General Assembly resolution and several UN Security Council Resolutions explicitly states that terrorism are such prohibited acts. Since terrorism as such is not yet internationally defined, the Swedish government can easily argue that the acts in Luxor and in Pakistan were acts of terror and therefore also excludable under the Refugee Convention. To identify what excludable crime is in question is crucial, but the key issue is yet that the Swedish government must prove that there are serious reasons for considering that Agiza and El Zary individually and separately can be found responsible for the crimes in Luxor and in Pakistan. Exactly this individual element is important to establish, since a mere membership in a certain organization cannot as an only basis amount to exclusion from refugee status, even if this organization commits terrorist crimes. The Swedish government did find it established on basis of secret evidence, that the two men were responsible for the crimes in question and the basis for these facts, since they were classified, are difficult to contest. Hopefully the government still used their critical glasses when assessing the evidence of Agiza's and El Zary's guilt, so they did not let themselves be too influenced by the growing tendency in the world to fight terrorism and therefore deprive the two men of a fair procedure. It shall not be forgotten that excluding someone from refugee status can expose them to a risk of being sent back to a state where they have a well-founded fear of

persecution, why only those who are unworthy of refugee protection shall lose such protection.

The Swedish government did not stop at excluding Agiza and El Zary from refugee status, but they did also decide to return them back to Egypt. This was a decision coming from a country that has a history of sheltering political refugees, even those accused of terrorist acts. Despite reports showing that Agiza and El Zary could be subjected to torture or inhuman or degrading treatment or punishment, the Swedish government decided to return them back to Egypt. The basis for the decision was a guarantee aiming at assuring the safety of the two men upon return to Egypt. However, this guarantee cannot be considered as sufficient enough. It included diplomatic words giving rights to Agiza and El Zary in Egypt, but the fact still remains that it was not effective. Torture and ill-treatment is a consistent problem in Egypt and the Egyptian government cannot effectively control it. That a guarantee then suddenly would protect Agiza and El Zary seems highly unlikely. Giving weight to the argument is also that the European Court has come to this conclusion in its jurisprudence. The problem with Sweden using a guarantee to assure an expellee's safety in another country, is that it opens the door for a method that can be used by other countries. The Interior Minister of Germany stated in the beginning of January 2002, that he could return terrorist suspects to countries like Egypt, Algeria and Turkey, if there was a guarantee assuring that the death penalty would not be imposed.<sup>219</sup> An unfortunate tendency can here be discovered. There is a risk that a practice can evolve of using guarantees without taking due regard to the actual protection it provides.

In my opinion the guarantee was insufficient and should therefore not have been used. Since the safety of Agiza and El Zary could not be assured, the Swedish government should not have expelled them either. In my view, there were substantial grounds for believing that it was a real risk that they both, individually and separately, would be in danger of being subjected to torture or inhuman or degrading treatment or punishment in Egypt. By expelling the two men, Sweden violated both article 3 ECHR and article 3 CAT. The prohibition of torture or inhuman and degrading treatment or punishment is an absolute right. So have also the European Court and the UN Committee Against Torture stated. In expulsion/extradition cases, no interests of a state of removing a person can be taken into regard as soon as a real risk of ill-treatment is established. This is the case, and so it must continue to be. How important the fight to suppress terrorism may be, absolute human rights such as the prohibition of torture and inhuman and degrading treatment or punishment cannot be violated. If we were to consider that national interests could weigh heavier than the risk of a person being subject to ill-treatment, we are undermining the corner stones of democracy and human rights, building up our own society.

---

<sup>219</sup> Finn, P., "New Willingness to Expel Terrorism Suspects", in *Washington Post*, 29 January 2002.



The Swedish government did also violate article 13 ECHR, since they did not provide neither of the men an effective remedy. The government, as the last instance taking the decision, was not impartial since it had interests of its own in the case. Neither was there any possibility of having the case tried in front of an appellate body, which independently from the government could try the case assessing all the evidence again and deciding on its merits. National security issues are sensitive for disclosure, but just as important is that basic principles of due process are applied. Sweden must reform their proposal of a new procedure for dealing with asylum cases, and an independent body trying cases on appeal from the government must be established. The members of this body must be impartial. To secure a sufficient knowledge of security issues, one or two members can be experts in these areas, but without being connected to the government.

It is questionable why the Swedish government executed their expulsion decision immediately, even before alerting the legal representatives of the two men. Agiza and El Zary did not even have the time to file a complaint to an international body. My opinion is that the Swedish government felt pressured to expel immediately and thereby giving in for the views that have again been emphasized after 11 September 2001, not to give protection to suspected terrorists. If the government would have waited, the legal representatives would have had time to file a complaint to either the European Court or the UN Committee Against Torture and the Swedish decision of expulsion could be suspended until the international body chosen had taken its decision. So did not happen.

By using the guarantee the Swedish government made a show of being able to expel Agiza and El Zary in full accordance with human rights. Too much trust was put on this guarantee and the impression is that Sweden used a short cut that can in fact turn out to be a detour. The government should have made more thorough research on the effectiveness of the guarantee, where they in that case, as I have understood it, would have come to the conclusion not to use it.

So where are we headed? Several voices have been raised that there is a changed political climate in Europe and in the rest of the world since the 11 September attacks in the USA in 2001. Rapid decisions are taken, forgetting or disregarding the obligation to secure human rights. Yes, it is important that the international community reacts and tries to fight terrorism, but not to an unlimited extent. Asylum seekers have also human rights and they shall never become a pawn in the game of suppressing terrorism.

## **6.1 Considerations relevant for further research**

When Sweden excluded Agiza and El Zary, they based their decision on the exclusion clause of the Refugee Convention and the guarantee received from the Egyptian government. However, they also referred to the 1373 UN

Security Council Resolution from 2001, to justify their decision.<sup>220</sup> According to this resolution member states shall assure that refugee status is not misused by persons who has committed, organized or facilitated terrorist acts.<sup>221</sup> The Swedish government was of the opinion that Agiza and El Zary were responsible for terrorist acts and thus complied with this resolution when they excluded Agiza and El Zary from refugee status and denied them safe haven in Sweden. The Swedish government did however not deny that they also had obligations to comply with international human rights instruments. Again, referring to the guarantee received from the Egyptian government, the Swedish government concluded that they could both comply with human rights obligations *and* resolutions by the UN Security Council. However, taking due regard to the fact that it is probable that the guarantee did not provide Agiza and El Zary with sufficient protection, an interesting conflict may arise. The obligations of Sweden to comply with UN Security Council Resolutions may clash with the obligations Sweden has according to international human rights instruments. Relevant to further analysis is therefore, if the government had an obligation to expel Agiza and El Zary according to the resolution and if so, could the government expel them without taking due regard to human rights standards that they also must comply with? Both the obligations of complying with the UN Security Council Resolution and that of human rights instruments cannot be secured at the same time. The question therefore arises which obligation shall prevail. The issues are interesting and relevant, but it is beyond the scope of this thesis.

---

<sup>220</sup> Decision of the Swedish government 1:1 and 1:2, 2001-12-18.

<sup>221</sup> UN Security Council Resolution 1373 (2001) Threats to international peace and security caused by terrorist acts, S/RES/1373.

# Bibliography

## Literature

Danelius, H., *Mänskliga rättigheter i europeisk praxis – en kommentar till Europakonventionen*, 2000, Norstedts Juridik AB, Stockholm.

Gilbert G., *Current Issues in the Application of the Exclusion Clauses*, UNHCR Note, 2001, available at [www.unhcr.ch](http://www.unhcr.ch) Searchpath: Global Consultations > Documents > Second track.

Goodwin-Gill G. S., *The Refugee in International law*, 2<sup>nd</sup> edition, 1996, Clarendon Press, Oxford.

Grahl-Madsen A., *The Status of Refugees in International Law*, Vol I, 1966, A. W. Sijthoff, Leiden.

Melander G., *Flyktingar och asyl*, 1972, P.A. Norstedt & Söners Förlag, Stockholm.

Noll, G., *Negotiating Asylum: the EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, 2000, Martinus Nijhoff Publishers, The Hague.

Stenberg G., *Non-expulsion and non-refoulement- The Prohibition against Removal of Refugees with Special Reference to Articles 32 and 33 of the 1951 Convention relating to the Status of Refugees*, 1989, Iustus förlag, Uppsala.

UNCHR, *The State of the World's Refugees – Fifty Years of Humanitarian Action*, 2000, Oxford University Press, New York.

## Articles

Aiken S., “Manufacturing ‘Terrorists’: Refugees, National Security, and Canadian Law” in *Refuge – Canadas Periodical on Refugees*, vol. 19, no 3, (2000).

Amarasinha Daya, S., and Isenbecker M., “Terrorism and the Right to Asylum under the 1951 Convention and the 1967 Protocol Relating to the Status of refugees – A Contradiction in Terms or Do Opposites Attract?” in *Nordic Journal of International Law*, vol. 65, (1996).

Beyani C., Fitzpatrick J., Kalin W., and Zärd M., “Introduction – the Editorial Group”, in *International Journal of Refugee Law*, vol. 12 supplement winter: 2000.

Bliss M., “ ‘Serious Reasons for Considering’: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses”, in *International Journal of Refugee Law*, vol 12 supplement winter: 2000.

Hathaway J. C. and Harvey C.J., “Framing Refugee Protection in the New World Disorder”, in *Cornell International Law Journal*, vol. 32, no.2 (2001).

Pejic J., “Article 1.F(a): The Notion of International Crimes” in *International Journal of Refugee Law*, vol. 12 supplement winter: 2000.

UNHCR, Refugee Magazine “1951 Geneva Convention, 50<sup>th</sup> Anniversary”, Refugees Magazine vol.2, no 123 (2001), available at [www.unhcr.ch](http://www.unhcr.ch)  
Searchpath: publications > 2 July 2001 Refugees Magazine Issue 123: 1951 Geneva Convention 50th Anniversary.

Zühlke S. and Pastille J-C., “Extradition and the European Convention – Soering revisited”, in *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, volume 59 (1999).

## **International instruments**

Charter of the United Nations, 26 June 1945, 1 U.N.T.S. XVI.

Constitution of the International Military Tribunal, 8 August 1945, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>, last visited 2003-01-17.

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31.

Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked in Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85.

Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135.

Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287.

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85.

European Convention on Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221.

ILC Draft Code of Crimes Against the Peace and Security of Mankind (Part II), A/51/332 (1996).

International Covenant of Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 71.

Protocol Relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S. 267.

Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9.

Statute of the International Criminal Tribunal for Former Yugoslavia, S/RES/827 (1993), Annex.

Statute of the International Tribunal for Rwanda, S/RES/955, (1994), Annex.

Vienna Convention on the Law of Treaties, 24 May 1969, 1155 U.N.T.S. 331.

## **UN instruments and documents**

Concluding observations: Egypt 20/11/2002, CAT/C/XXIX/Misc. 4, non-edited version, 11-22 November 2002, available at [www.unhchr.ch](http://www.unhchr.ch)  
Searchpath: Treaty Monitoring Bodies > Committee Against Torture > Treaty Body Database > CAT > Concluding Observations > 20/11/2002 Egypt.

Human Rights Committee, Concluding Observations, Sweden 24/04/02, CCPR/CO/74/SWE.

Implementation of article 3 of the Convention in the context of article 22,21/11/97, CAT General Comment 1, UN Doc. A/53/44.

Lisbon Expert Roundtable, Global Consultations on International Protection, Summary Conclusions – Exclusion from Refugee Status, EC/GC/01/2Track/1, 30 May 2001.

Standing Committee, UNHCR, Note on exclusion clauses, 30 May 1997, EC/47/SC/CPR.29.

UN General Assembly Resolution 3314 (XXIX) Definition of Aggression, 14 December 1974, A/RES/3314.

UN General Assembly Resolution 51/210 on measures to eliminate international terrorism, of 17 December 1996, A/RES/51/210.

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees*, 1992, UNHCR, Geneva.

UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998.

UNHCR, The Exclusion Clauses: Guidelines on Their Application, 1 December 1996.

UN Security Council Resolution 1373 (2001) Threats to international peace and security caused by terrorist acts, S/RES/1373.

## **Council of Europe documents**

Council of Europe Recommendation No. R (98) 13 on the right to an effective remedy against decisions on expulsion in the context of article 3 of the European Convention on Human Rights.

## **Amnesty International documents**

Amnesty International report, "Sweden: Deportation leave men at risk of torture in Egypt", 20 December 2001, [www.amnesty.org](http://www.amnesty.org) Searchpath: library > Egypt , last visited 2002-11-20;

Amnesty International Annual Report on Egypt 2000, [www.amnesty.org](http://www.amnesty.org) Searchpath: library > Egypt > Annual report 2000, last visited 2002-11-20.

Renvois forcés/ Craintes de torture, Action Urgente, Amnesty International, Document Public AU 324/01, MDE 12/035/01.

## **Other documents**

Appendix 16, United Kingdom Parliament, <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmhaff/351/351ap20.htm>, last visited 2002-12-05.

RWI Report number 33, Gorlick Brian, "Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status" in *Asylum in Europe: Strategies, Problems and Solutions*, 2001

Special Immigration Appeals Commission Act 1997,  
<http://www.hmso.gov.uk/acts/acts1997/1997068.htm>, last visited 2002-12-04.

UNHCR, Estimated Number of Persons of Concern who fall under the Mandate of UNHCR – 1<sup>st</sup> January 2002, available at [www.unhcr.ch](http://www.unhcr.ch) Searchpath: statistics, last visited 2002-12-28.

"Uttalande med anledning av lagrådsremissen om handläggningen av säkerhetsärenden", joint statement from representatives of several non-governmental organizations in Sweden, available at [www.humanrights.se/svenska/uttalande0206.pdf](http://www.humanrights.se/svenska/uttalande0206.pdf), last visited 2003-01-13.

## Swedish government documents

Aide-Mémoire, 12 December 2001. Both the request from the Swedish government and the reply from the Egyptian government can be obtained from the Swedish Foreign Ministry, Stockholm.

Decision by the Swedish government 1:1 and 1:2, 2001-12-18, serie B, UD2001/1528/MAP.

Memorandum by the Swedish Foreign Ministry, 2002-02-28, attached as a supplement to KU 2001/02:38 and 40.

Memorandum by the Swedish Ambassador Sven G. Linder written after his visit to the Masra'at Tora prison, 18 January 2002.

Report from Sven G. Linder from the Swedish Embassy in Cairo, Egypt, 23 January 2002.

## Other Swedish documents

Lagrådsremiss, ny instans -och processordning i utlänningsärenden, available at [http://www.utrikes.regeringen.se/pdf/lagrad\\_map.pdf](http://www.utrikes.regeringen.se/pdf/lagrad_map.pdf), last visited 2003-01-17.

SOU 1999:16, "Ökad rättssäkerhet i asylärenden – Slutbetänkande av Kommittéen om ny instans –och process ordning i utlänningsärenden" (NIPU)

## Interviews

Telephone interview with Nils Eliasson, Deputy Director-General of the Department for Migration and Asylum Policy at the Swedish Foreign Ministry, Stockholm.

Telephone interview with Bo Johansson, lawyer at the Swedish Refugee Advice Centre, Stockholm.

## Newspaper articles

“Sverige fick inga garantier från Egypten”, Pressnotis, Amnesty International, 17 January 2002.

“Väst på väg att acceptera tortyr”, in *Svenska Dagbladet*, 18 January 2002.

Finn, P., “L’Europe renvoie en Egypte des dissidents et des personnes accusées de terrorisme” (en anglais), in *Washington Post*, January 29, 2002, available at <http://moise.sefarad.org/belsef.php/id/251/>, last visited 2002-10-08. (articles from the Washington Post cannot be viewed without subscribing to the newspaper, why this French web site was used instead)

Finn, P., “New Willingness to Expel Terrorism Suspects”, in *Washington Post*, January 29, 2002.

”Utvisningsfall anmäls till KU idag”, in *Sydsvenska Dagbladet*, 2002-02-04.

”De två egyptierna riskerar fortfarande tortyr”, Pressnotis, Amnesty International, 5 February 2002.



# Table of Cases

Chahal v. the United Kingdom, Judgment of 15 November 1996, E.C.H.R. Reports 1996-V.

Communication No. 185/2001: Sweden 25 May 2002, CAT/C/28/D/185 (Jurisprudence).

Communication No. 204/2002: Sweden. 28 November 2002, CAT/C/29/D/204/2002 (Jurisprudence).

Communication No. 39/1996: Sweden. 28 April 1997, CAT/C/18/D/39/199 (Jurisprudence).

Cruz Varas v. Sweden, Judgment of 20 March 1991, E.C.H.R. Ser. A 201.

Klass v. Germany, Judgment of 6 September 1978, E.C.H.R, Ser. A. 28.

Leander v. Sweden, Judgment of 26 March 1987, E.C.H.R, Ser.A 116.

Prosecutor v. Dusko Tadic a/k/a “Dule”, Decision on the Defense motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of ICTY, Case No.IT-94-1-AR72 (1995).

Pushpanathan v Canada (Minister of Citizenship and Immigration) [1998] 1 SCR 982.

Ramirez v. Canada (MEI) [1992] 2 F.C. 306.

Soering v. United Kingdom, Judgment of 7 July 1989, E.C.H.R. Ser. A 161.

Vilvarajah v. United Kingdom, Judgment of 30 October 1991, E.C.H.R Ser. A. 215.