



FACULTY OF LAW
University of Lund

Liv Tigerstedt

Article 3 of the UN Convention against
torture and cruel, inhuman or degrading
treatment or punishment - and
Sweden's observance of it

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Göran Melander

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1 Summary

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was signed on 10 December 1984, and entered into force on 26 June 1987. As of 1 September 1998, 117, of the 185 UN Members States, had joined through ratification, accession or succession. Through the establishment of the Committee against Torture, an international body with the sole aim of preventing torture has been created to step up the fight against this barbaric violence against the personal integrity of people.

Since the end of World War Two, the efforts to prohibit and prevent torture have increased through the inclusion of an express prohibition against torture in most international and regional human rights instruments. It was not until 1975 that an attempt to define torture was first made through The UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That definition was included, with some changes, in the Convention.

The Committee is responsible for commenting on reports from the State parties, to investigate, on its own initiative, probable breaches of the Convention in State parties and to handle inter-State complaints. It also receives individual complaints and gives its view in those cases. In regard to individual complaints concerning breaches of article 3 of the Convention, the Committee has established how the article should be interpreted. In deciding whether there are substantial grounds for believing that a person is in danger of being exposed to torture, if he is returned to another country, the Committee takes all relevant circumstances into account. This includes the existence of a consistent pattern of gross flagrant or mass violations of human rights in the country of return and the existence of a personal danger, which must be necessary and foreseeable. To make a decision, the Committee has also established the level of proof to be required of the complainants, taking into account the difficulties to provide evidence and the mental state of those who have been tortured in the past. Consequently, the level of proof has not been set too high.

This has been the Achilles' heel for Sweden. The provisions in the Swedish Aliens Act formally correspond to those in article 3, but the level of proof has been set higher by the Swedish immigration authorities. As a result, Sweden has been found in breach of the Convention four times, and in three of them it was due to the differentiating evaluation of the credibility of the asylum seeker/complainant and the evidence. This has led to criticism from the Committee, NGO's and advocates for asylum seekers in Sweden. It is time for Sweden to honor its obligations under the Convention and follow the criteria set up by the Committee.

2 Preface

“Torture is the strongest weapon against democracy. Torture hits the actual heart of democracy: the freedom to speak and express oneself. The right to political opposition.”

-Dr. Inge Genefke¹.

This is one reason for why it is so important to fight against torture and raise awareness of the international protection, and work of prevention, against torture. Another obvious reason to condemn it, is that it is a horrible violation of a person’s integrity, which should never occur in our so-called civilized world.

It has been very interesting to write about The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, its article 3 and its interpretation by Swedish immigration authorities. I would like to thank many people, who have helped me with information and/or good advise. In particular, Prof. Julia Iliopoulos-Strangas, who helped me choose this special subject and gave me some initial material, which really caught my interest. I also have to thank my family who has supported me throughout, in spite of my weird working hours and periods of frustration.

I hope this paper will be as interesting to read, as it was for me to research and write about.

September 1998, Lund.

-Liv Tigerstedt.

¹ Mrs. Genefke is the doctor who started the Danish Rehabilitation and Research Center for Torture victims (RCT).

3 Abbreviations

AAB	Aliens Appeal Board (<i>Utlänningsnämnden</i>)
AI	Amnesty International
CAT	Committee against Torture
ECHR	European Convention on Human Rights
FARR	The Refugee Groups' and Asylum Committees' National Council (<i>Flyktinggruppernas och Asylkommittéernas Riksråd</i>)
ICCPR	International Covenant on Civil and Political Rights
ILC	International Law Commission
IRCT	International Rehabilitation Council for Torture Victims
NGO	Non-Governmental Organization
OAS	Organization of American States
Prop.	Government's Bill (<i>Regeringens proposition</i>)
RCT	Rehabilitation and Research Center for Torture Victims
Rskr.	Parliament's Communication (<i>Riksdagsskrivelse</i>)
SIB	Swedish Immigration Board (<i>Statens Invandrarverk</i>)
Skr.	Government's Communication (<i>Regeringsskrivelse</i>)
SOU	Swedish Government Reports (<i>Statens Offentliga Utredningar</i>)
UN	United Nations
UNGA	United Nations General Assembly
WMA	World Medical Association

4 Introduction

Exactly 11 years after The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment², entered into force, the first day for victims of torture was established by the UN, and held, on 26 June, this year. Although the fight against torture has been stepped up, it is still common practice in some countries and tolerated in many more. It is also occurring more and more frequently, which is why, it is so important to clearly repudiate this usage through rules that prohibit and prevent it. Sweden, which is a loud advocate for human rights, would be expected to set a good example and live up to the standards set by international organizations and bodies, especially those it has been actively involved in creating.

My purpose with this thesis is to analyze how the Committee against Torture³ has interpreted article 3 of the Convention and how Sweden has adhered to it, through legislation and in practice, including whether Sweden needs to adopt a more Convention conform viewpoint.

To achieve this purpose, I have divided the paper into three main parts. In the first part, I intend to discuss and analyze the relevant parts relating to the Convention, i.e. the structure of the Convention and the Committee, the powers of the Committee and its responsibilities. The second part will deal with article 3 of the Convention, its criteria and how these are interpreted by the Committee. The third part, focuses on Swedish legislation and practice in relation to article 3 of the Convention, and gives an analysis of whether or not Sweden lives up to its obligations under this article of the Convention.

To begin the paper with, I have chosen to give a brief historic development of the fight against torture and the effort to create an internationally accepted definition of torture. The motive for this is to give the reader some background as to why the Convention was created, and the Committee established, for the single purpose of preventing torture. This will be followed by the three main parts, in which my own conclusions are interwoven, where appropriate. Finally, there is a general conclusion to tie the paper together and make some final remarks.

Where it has been necessary to translate material from Swedish or any other language, into English, I have done it myself. I have put much effort into translating everything as literally as possible, without losing its original meaning. It is my hope that, especially in regard to legal provisions, I have found the correct words to correspond to the original ones, so there will not be any misinterpretations.

² Hereafter referred to as: the Convention.

³ Hereafter referred to as: the Committee.

5 The Concept of Torture

5.1 Introduction

If someone says the word “torture”, most people will immediately think about severe physical pain being willfully imposed on an innocent person. Although torture is as old as mankind (more or less, unfortunately), it has never been defined in legal terms until very recently and then only in broad terms and more like a general description. Part of the horror with torture is that it becomes more refined and cunning all the time. It is no longer only physical but the focus has shifted more towards mentally destroying the personality of a person. This, naturally, makes it more difficult to detect and prove.

5.2 Historical development

Torture has been part of human history from the beginning, either as a form of punishment, as a way to extract confessions or information or simply to manifest power over others and/or scare them into obedience. Torture had its “peak” during the Inquisition period, in the Middle Ages in Europe, since a confession, no matter how it was obtained, was regarded as the best proof. They used torture as a “routine element of criminal procedure”⁴. We still have plenty of horrible accounts from this time and even museums dedicated to show the variety of equipment and methods used to torture⁵. It was not until the Enlightenment period (from about 1750) that the attitude towards the use of torture changed. The new scholars⁶, of whom Cesare Beccaria is one of the most famous, regarded torture as both legally and morally wrong and argued that it was unnecessary, inhumane and irrational. Instead they focused on the individual’s rights and the proportionality between the crime and the punishment. It was also during this time that the concept of Human Rights was introduced through the French Revolution, which even further condemned the use of torture.

As a consequence of these new ideas, torture was omitted in revisions of the penal codes throughout Europe and universally rejected as a thing of the past. This was so successful that Victor Hugo in 1874 announced that

⁴ “The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, by J. Burgers and H. Danelius, 1988, p.10.

⁵ Read for example the introduction to Beccaria’s “On Crime and Punishment”, where he gives an account on how the man trying to assassinate the French King Louis XVI was tortured and executed. Or visit the “Dungeon of York” in England.

⁶ Labeled as the “Classical thinkers” who focused on clarity of thought, reason, rationality and individual freedom.

“torture has ceased to exist”⁷. Since this time torture has been condemned worldwide, but as we know, it still occurs too often and in too many places on earth.

After World War II, when the horrors of the totalitarian regimes (which included torture and inhuman treatment to spread terror and debase humans in prisons and concentrations camps) came to light, serious efforts to internationally condemn and try to prevent torture began. The UN Universal Declaration of Human Rights from 1948⁸, was the first instrument that explicitly forbade this behavior. Its article 5 states:

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

This was followed by The UN International Covenant on Civil and Political Rights in 1966⁹ where article 7 reads:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The Covenant points out that medical and scientific experimentation without consent are specific kinds of torture to be attentive to. It is the first effort to try to exemplify and specify this category of crimes. The Covenant’s article 4 paragraph 2 adds that the prohibition in article 7 is absolute, and no derogation, whatsoever, is allowed. This underlines the fundamental nature of the prohibition and the seriousness by which it is regarded.

The prohibition against torture and other cruel, inhuman and degrading treatment and punishment is also found in most regional conventions such as The European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) of 1950¹⁰. Its article 3 reads:

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

The word “cruel” has been omitted since it was seen as being “too subjective”¹¹, but otherwise this article is an exact copy of the Universal Declaration. The prohibition is absolute in the ECHR according to its Article 15. The Council of Europe has also, in 1987, adopted The European

⁷ Burgers and Danelius, p.10.

⁸ Adopted and proclaimed by UN General Assembly on 10 December 1948, through Resolution 217A (III).

⁹ Adopted by the UN General Assembly on 16 December 1966, through Resolution 2200A (XXI). It entered into force on 23 march 1976 (in accordance with its Article 49).

¹⁰ Signed in Rome on 4 November 1950 by the Council of Europe and entered into force on 3 September 1953 (according to its Article 66).

¹¹Burgers and Danelius. p. 11.

Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment¹², which establishes a Committee that shall work to prevent torture of persons deprived of their liberty by making visits and conduct examinations. Other regional instruments containing this prohibition are The American Convention on Human Rights of 1969 (article 5), The African Charter on Human and Peoples' Rights of 1981 (article 5) and The Universal Islamic Declaration on Human Rights of 1981 (article 7). The exact wording of these articles can be found in Appendix 1, as well as their dates of adoption.

Other important instruments that prohibit torture are the common articles 3 of the four Geneva Conventions of 1949 relating to humanitarian law applicable in armed conflicts, article 5 of The Code of Conduct for Law Enforcement Officials and article 31 of The Standard Minimum Rules for the Treatment of Prisoners. See Appendix 2 for the wording of these provisions and their dates of adoption.

Today, torture is generally considered as a peremptory norm of customary international law (*Jus Cogens*)¹³ much as a consequence of the international community's¹⁴, and all the above mentioned instruments', unified and total repudiation of torture. This means that every State is bound by the prohibition even if they have not signed any of the instrument that prohibits torture¹⁵. Torture has also been included by some in the group of crimes that constitute "crimes against humanity"¹⁶. A consequence of the absolute prohibition against torture is the need for a universal definition of the word "torture" to ensure a unified and common application throughout the world.

¹² Adopted by the Committee of Ministers of the Council of Europe on 26 June 1987, and opened for signature on 26 November 1987.

¹³ See Article 53 of the Vienna Convention on the Law of Treaties of 1969, where the definition of a peremptory norm is defined. It is a norm accepted and recognized by the international community of States, as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

¹⁴ See for example "International Law", by M. Wallace, 1997, p. 33, which states: "...other examples of instances of norms warranting characterization as jus cogens are...the prohibition on genocide and torture". Also, "FN för en tryggare värld", by G. Melander and I. Segerstedt, 1982, p. 40, which reads: "*Tortyrförbudet gäller enligt allmän folkrätt och helt oberoende av generalförsamlingens resolution*". Torture has also been included as an international crime in the International Law Commission's (ILC), 1991, Draft Code of Peace and Security of Mankind and in the 1992 Draft Statute of International Criminal Law.

¹⁵ There is an exception for countries, which have adhered to the *persistent objector's rule*.

¹⁶ "The Law of Refugee Status", by J. Hathaway, 1991, p. 217. And, The Draft Code of Offences against the Peace and Security of Mankind, by the ILC in 1987.

5.3 A Definition of Torture

The first concrete effort to create a definition of torture was made in 1975 when the UN adopted The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁷, which included a definition of torture in its article 1. This article states:

- 1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.*
- 2. Torture constitutes an aggravated form of cruel, inhuman or degrading treatment or punishment.*

The Declaration also mentions in its article 2 that torture is “an offense to human dignity and shall be condemned as a denial of the Charter of the United Nations and a violation of...the Universal Declaration of Human Rights”. Article 3 adds that the prohibition is absolute.

This non-binding Declaration was used as the foundation when the UN began to work on The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment. The original draft of the Convention, made by Sweden, included an identical definition of torture to the one in the Declaration, but many of the delegates wanted a more precise and clear definition since the Convention would be binding and it thus was considered more important with a precise definition. Many suggestions were discussed during the session of the working group in 1979 and they finally agreed on the following definition:

For the purpose of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

¹⁷ Adopted by the UN General Assembly on 9 December 1975, through Resolution 3452 (XXX).

They also added in a second paragraph that:

This article is without prejudice to any international instrument or national legislation which does or may contain provisions of a wider application.

This second part was added as an escape clause since they knew the definition in the Convention was rather narrow and they did not want to exclude application of wider definitions to protect individuals, while still at least guaranteeing a minimum level of security¹⁸.

It should also be noted that the Convention did not include paragraph 2 of the Declaration about torture being an aggravated form of cruel, inhuman or degrading treatment or punishment. The delegates wanted the Convention to include these aspects because they were included in other international instruments but found them too vague to define¹⁹. It was left to the Committee against Torture to develop a common interpretation, but with respect to “all particularities of a concrete situation”²⁰. In other words, the Committee might give some guidelines for the interpretation of “other cruel, inhuman or degrading treatment or punishment”, but not create a specific definition.

So, according to article 1 of the Convention torture is defined through three basic elements. The first element concerns the nature of the act. At a *prima facie* look the definition only includes acts, not omissions, but this was not the intention. According to Burgers and Danelius, who were both involved in the drafting, omissions can “in special cases” be “assimilated to an act”²¹. An example of this might be the intentional deprivation of food or water for long periods. Further, this act has to cause “severe pain or suffering” to the victim, either physically or mentally. The United States and the United Kingdom both wanted an even higher threshold, namely “extreme pain or suffering”, to limit the scope even further²², but it was agreed that “severe” was sufficient to clarify that the pain has to be of a certain gravity. However, it can be one single act, it does not have to happen more than once to constitute torture. Physical pain is most commonly beating or kicking, with or without equipment (knives, canes, or cigarettes), while mental pain or suffering can be vile threats or being forced to watch others (maybe a family member) being tortured or killed. Unfortunately, some of the most modern methods of torture do not include any pain and is therefore not included in

¹⁸ Burgers and Danelius, p. 122.

¹⁹ Burgers and Danelius, p. 47.

²⁰ Burgers and Danelius, p. 122.

²¹ Burgers and Danelius, p. 118. Also, M. Tardu states in “The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, that; “Giving them the benefit of the doubt, we may admit that the treaty embraces any behavior, active or passive, which shows the characteristics of torture”. p. 304 in Nordic Journal of International Law, vol. 56, 1987.

²² Burgers and Danelius, p. 41 and 45.

the definition, which is a weakness. These methods, so called “mind-control techniques”, include psychology and the use of psychopharmacological drugs to destroy the conscious mind or suppress the free will. It can be done without the victim’s knowledge and obliterate his personality or change it profoundly which will, later on, persistently handicap the victim²³. The Inter-American Convention to Prevent and Punish Torture does include these modern methods in its definition²⁴. It should also be underlined that the act must be intentional. Negligence or accidents resulting in severe pain or suffering do not constitute torture.

The second element is the necessity of a specific purpose for committing the act. The definition lists the most common purposes but, as the words “such purposes as” indicates, the list is not exhaustive. Tardu has criticized that the definition does not include “basic subconscious motivations of torturers” (such as feelings of inferiority or power craving) or “tortures committed out of jealousy, revenge or other personal motivations”²⁵. However, Burgers and Danelius are of the opinion that “even where a sadistic motive is predominating, there is normally also an element of punishment or intimidation which would bring the act under the definition” and that “it can often be assumed that where a public official performs such an act, there is also to some extent a public policy to tolerate or to acquiesce in such acts”²⁶. This viewpoint seem to be logical and if the purpose was truly personal, then the State would probably take appropriate actions to remedy it. Normally, torture will be committed for one or more of the purposes listed; to obtain information or confession or to punish, intimidate, coerce or discriminate either the person being tortured or another person (for example a son is tortured to make the father speak).

The third element is the person carrying out the act. The act has to be somehow connected to an official authority, but not necessarily directly. It is enough that a public official knows about the act but does not intervene. Through the word “acquiescence”, authorities cannot simply look the other way regarding what occurs at some local police station, or ignore prison guards’ “rough treatment” of prisoners. Torture committed by private persons (or by rebels) would normally fall under the domestic criminal codes, i.e. battery or assault, and are also covered by other international instruments²⁷, but the Convention does not cover these cases.

²³ “Criterion-related validity of screening for exposure to torture”, by E. Montgomery and A. Foldspang from the Journal “Torture” nr.4/94, by IRCT, p. 117.

²⁴ Signed in Colombia on 9 December 1985. Its Article 2 states, *inter alia*, that “Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish”.

²⁵ Tardu, p. 305.

²⁶ Burgers and Danelius, p. 119.

²⁷ The Universal Declaration, the ECHR and the ICCPR protect everyone from torture, no matter who commits the atrocity.

It is important to note that the definition explicitly excludes “pain or suffering arising only from, inherent in or incidental to lawful sanctions”. This limits the definition of torture, by allowing States to develop its domestic penal law as it sees fit. However, since the Convention’s aim is to strengthen the prohibition against torture, States that adhere to it would be expected to share this aim. Besides, as shown above, many other international instruments, as well as customary international law, prohibit torture which States must take into account when forming their domestic law. Article 1 paragraph 2 also underlines this aspect.

To conclude the Convention’s definition, it might be interesting to note that article 1 has more often been considered a description of torture than an actual definition, much because of the listing of “constitutive elements...for the purpose of understanding and implementing the Convention”²⁸, rather than giving an exact legal definition.

Another effort to define torture was made by the World Medical Association (WMA) in 1975 when it adopted a Declaration²⁹ in which torture is defined as:

...the deliberate, systematic or wanton infliction of physical or mental suffering by one or more persons acting alone or on the orders of any authority, to force another person to yield information, to make a confession or for any other reason.

The WMA does not require any pain or severe suffering or a connection to public authorities. This definition is very general and wide, leaving much to the interpretation of medical practitioners.

NGOs have also defined torture more extensive than the Convention. For example, Amnesty International consider in particular rape, but also other forms of sexual abuse, as torture³⁰, which has not traditionally been considered as such³¹, but rather as an individual crime, standing on its own (“she was raped *and* tortured in the prison”).

How the definition in the Convention is applied naturally depends on how the Committee against Torture decides to interpret it. So far it seems as if the Committee interpret it in a dynamic and flexible way, with consideration to

²⁸ Burgers and Danelius, p. 122.

²⁹ The World Medical Association Declaration of Tokyo. Adopted in October 1975. Taken from the Quarterly Journal “Torture” nr. 4/94, by IRCT, p. 116.

³⁰ See AI’s “Plan of Action against Torture”, adopted by the International Conference on Torture in Stockholm, 4-6 October 1996, AI ACT 40/02/96, Ch. I, point 9, which states that: “rape clearly constitutes torture”. Also, AI ACT/34/09/97, where they state that “rape is increasingly used to torture women...”.

³¹ The view has changed with proof that rape has been used in wars as a strategic method to terrorize and humiliate the opponents. Today, the Swedish Government also shares this view. See, Government Communication (*Regeringsskrivelse*), Skr. 1997/98:89, p. 43.

the particulars in every case³². Normally, the torture is not one single incident but rather systematic violence, consisting of several different acts of cruelty, that when put together clearly constitute torture even if alone the acts would be borderline.

³² Mr. J. Voyame, a member of the Committee against Torture until 1990, claimed that they had had no problem with the interpretation of the definition of torture. “La Convention des Nations Unie contre la torture et autres peines ou traitements cruel, inhumains ou dégradants du 10 décembre 1984”, by Joseph Voyame, from: “The International fight against torture”, edited by A. Cassese, 1991, p. 54.

6 The Convention

6.1 General aims

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the UN General Assembly on 10 December 1984, through Resolution 39/46. It came into force on 26 June 1987, according to article 27 p.1 of the Convention, 30 days after the twentieth State had deposited its ratification with the UN Secretary General.

The Convention is based on the view that torture and other cruel, inhuman or degrading treatments or punishments are forbidden in international law and not acceptable under *any* circumstances. The main purpose of the Convention is therefore, according to the *preamble* of the Convention, to “make more effective the struggle” against any of these forms of ill treatment.

The *preamble* refers specifically to article 5 of The Universal Declaration of Human Rights and article 7 of The International Covenant on Civil and Political Rights, which both prohibit torture or other cruel, inhuman or degrading treatment or punishment. With these two fundamental articles as the backbone, the Convention sets out to strengthen the prohibition and specify preventive methods and mechanisms to achieve its goal.

6.2 The structure

The Convention is divided into three main parts. Part 1 contains the substantive provisions of the Convention, see below. Part 2 deals with the implementation of the Convention (art. 17-24), through the establishment of the Committee against Torture, see chapter 7. Part 3 contains the usual final clauses about ratification, accession, amendments and reservations (art. 25-33).

6.2.1 The substantial provisions

This part contains articles 1 to 16 and they deal mostly with only torture. The articles that also cover other cruel, inhuman or degrading treatment or punishment are listed in article 16 p.1, which states that:

In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for reference to torture of references to other cruel, inhuman or degrading treatment or punishment.

The Convention starts off with a definition of torture (art.1 p.1), but adds that this definition “is without prejudice” to any other definitions in other instruments (international or national) that have a “wider application” (art.1 p.2). The definition of torture and how it has been interpreted is found in the previous chapter (ch. 5.3). It should be mentioned here again, though, that it has to be “severe pain or suffering” either physical or mental, and that it has to be inflicted intentionally to obtain a specific purpose. Further, it has to be committed by, or with the consent of, a public official or someone else acting in an official capacity. The definition excludes pain or suffering caused, naturally or accidentally, by “lawful actions”.

The prohibition against torture is absolute according to article 2. That means that nothing, not even war or internal instability, can be used as a justification for torture (p.2). On the other hand, it is especially in such extreme circumstances that it is important to remember and adhere to the prohibition against torture. Even an order from a superior officer or public authority is not a valid or acceptable excuse (p.3) for having resorted to torture. The question if an order could be used, not as an excuse, but as an extenuating circumstance to get a milder sentence has been discussed. Danelius and Burgers comment that it “cannot be excluded, although it would be contrary to the spirit of the Convention if the penalty was so lenient as not to take into account the very serious nature of the offense”³³. So, it is a possibility, even though not encouraged.

Article 2 commits States parties to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction” (p.1). Some of these measures, which States should take, are contained in the other articles, namely:

- Article 3 contains a prohibition to return, extradite or expel a person to a State where he is at personal risk of being tortured³⁴.
- Article 4 states that acts of torture, as well as attempts, participation and complicity to torture shall be offenses under national criminal law in the States parties. Article 9 adds that State parties shall help each other in proceedings against these offenses.
- Article 8 provides that the offenses referred to in article 4 shall be included as extraditional offense in treaties between State parties.
- Articles 5, 6 and 7 establish a universal jurisdiction over the crime of torture (between States parties to the Convention). This means that there is no safe haven for torturers within the borders of State parties, since all these States can prosecute alleged torturers, no matter where they committed their crime.
- Article 10 relates to the obligation of State parties to educate and inform their public official about the prohibition against torture according the Convention.

³³Burgers and Danelius, p. 124.

³⁴ This article, being the focus of the thesis, will be elaborated specifically in chapter 8.

- Article 11 confers an obligation on the State party to review, systematically, rules, methods and practices for the treatment of persons deprived of their freedom.
 - Article 12 to 15 deals with the impartial investigation and proceeding in cases where torture is suspected, as well as the right to compensation and rehabilitation for victims of torture and the omission of any statements given as a result of torture, in judicial proceedings.
- In other words, States that join the Convention should do everything in their power to prevent torture from occurring and have effective remedies if it happens anyway.

7 The Committee

7.1 General Information

According to article 17 of the Convention, a Committee against Torture shall be established to “ensure that the Convention is observed and implemented”³⁵. This Committee was created by the State parties at their first meeting on 26 November 1987 at the UN office in Geneva. According to the Convention’s article 17 p.1 the Committee should consist of “10 experts of high moral standing and recognized competence in the field of human rights” and be elected by the States parties through secret ballot (art. 17 p.2) for a period of four years (art. 17 p.5)³⁶. The nominations are made by the State parties in advance and put on a list. Each State party can only nominate one person from among their own nationals (art. 17 p.2) and the members are eligible for re-election (if nominated again, art. 17 p.5).

It is important to underline that the members of the Committee are working in a personal capacity (art. 17 p.1), i.e. they do not represent a country but work completely on an independent basis. Much of the Committee’s efficiency consequently depends on the members’ personality and commitment, or as one of its first members put it; “The Committee must distinguish itself through its competence, its impartiality and its courage”³⁷.

According to article 24 of the Convention, the Committee shall write a report every year and submit it to the UN General Assembly and the State parties. The report shall include an account of the work done by the Committee during the year. It is important to note that it is a *public* report³⁸, so anyone who is interested can follow the Committee’s work.

The first session of the Committee was held in Geneva in April 1988, where the Committee established its own Rules of Procedure in accordance with art. 18 p.2 of the Convention. These rules were divided up into³⁹:

1. General Rules (rules 1-63),
2. Rules on “Reports from States parties under article 19 of the Convention” (rules 64-68),
3. Rules on the “Procedure for the consideration of communications received under article 21 of the Convention” (rules 85-95),

³⁵ “The Committee against Torture”, UN Fact Sheet No. 17, 1992, p. 1.

³⁶ In the first election five of the members elected should only serve for two years to create a system of five members being elected every second year. In the first election these five members were selected through a lot, all in accordance with art. 17 p. 5.

³⁷ Voyame, p. 50. “La Comité doit se distinguer par sa compétence, son impartialité et son courage”. Mr. Voyame was a member of the Committee from 1988 to 1990.

³⁸ Burgers and Danelius, p. 159.

³⁹ “Report of the Committee against Torture”, UNGA Official Records 43rd Session, Supplement No. 46 (A/43/46) 1988, para. 13 (page 3).

4. Rules on the “Procedure for the consideration of communications received under article 22 of the Convention” (rules 96-112) and,
5. Rules on the “Interpretation and amendments” of the Convention (rules A and B).

To this list the rules on the “Procedure relating to the Committee’s functions under article 20 of the Convention” (rules 69-84) should be added, although they were first decided upon at the second session of the Committee, in April 1989⁴⁰, because of the complexity of the issue.

The Rules of Procedure, established by the Committee, give an overview of the main aspects of the Committee’s duties during their work, of which the most important will now be discussed.

7.2 Reports under article 19

All State parties have to submit to the Committee “reports on the measures they have taken to give effect to their undertakings under [the] Convention” (art. 19 p.1). This article is obligatory for all State parties and are not open to any reservations. The first report shall be handed over within one year after the Convention has entered into force for the State party in question and then every fourth year (art. 19 p.1). The first report should be comprehensive and cover *all* measures that the State has undertaken and which are relevant to the Convention’s implementation and observance. The following reports “only” have to be complementary to the initial one in that they should include any *new* measures taken by the State party to ensure the full conformity with the Convention (rule 64 p.1). However, the State party always has to answer any relevant questions asked by the Committee, to clarify or supplement the information.

The State parties are also under an obligation to submit “such other reports as the Committee may request” (art. 19 p.1 and rules 64 p.1 and 67). This opens the possibility for the Committee to ask for additional information, from a State party, which the Committee feels it needs to make a complete review of a report or to get informed about a specific situation. The Committee can ask for these special reports at any time if they get information, from the media or other sources, that a State party is in breach of the Convention⁴¹. It is a method for the Committee to stay continuously informed about how the State parties observe the Convention and to give recommendations if it is needed.

⁴⁰ “Report of the Committee against Torture”, UNGA Official Records 44th Session, Supplement No. 46 (A/44/46) 1989, para. 229 (page 39).

⁴¹ See for example the case where the Committee asked Israel for a special report due to certain decisions of the Supreme Court of Israel regarding interrogation methods. “Report of the Committee against Torture”, UNGA Official Records, 52nd Session, Supplement No. 44 (A/52/44) 1997, para. 253-260, (p. 38-39).

After the Committee has received a report, it shall go through it and “make such general comments” (art. 19 p.3) as it feels is desirable and give them to the State party concerned, who can then respond to the comments (rule 68 p.1). During the examinations of the reports the State parties are invited to attend and should be ready to answer questions by the Committee or clarify any ambiguities in the report⁴² (rule 66). This is aimed at creating a form of dialogue between the Committee and the State parties to ensure better understanding and co-operation. All States, up to date, have sent representatives when the Committee has reviewed their reports⁴³, which is very encouraging.

If a State party does not hand in its report on time, the Committee will send that State party a reminder to submit a report. If the State party still does not supply a report, the Committee will announce this in its annual report to the UN General Assembly and all State parties (art. 24 and rule 65), and to everybody else interested, since the report, it should be remembered, is public. This procedure has been followed by the Committee each year to pressure the States parties that are late with their reports (which are quite a few every year⁴⁴).

In its annual report, the Committee may include the general comments that it has given to a State party (art. 19 p.4 and rule 68 p.3). It is, however, completely up to the “discretion” of the Committee whether to include these remarks or not. If it chooses to include the comments, then it is also obliged to add the observations from the State party concerned and it can even (if it so chooses) include a copy of the actual report, to give a complete picture. Through the Committee’s annual reports, it can be seen that the Committee has established a routine of giving a summary of the State parties’ reports and then include the text of the conclusions and recommendations adopted by the Committee⁴⁵. The recommendations are often seen as judgments over how well the State parties observe the Convention, and they are under a moral obligation to follow the recommendations.

7.3 Investigative powers according to article 20

Article 20 of the Convention gives the Committee a unique⁴⁶ and important possibility to investigate breaches against the Convention in State parties, on its own initiative. The prerequisite for such an investigation is that there is

⁴²UN Fact Sheet No. 17, p.3.

⁴³ See the Annual reports of the Committee, from 1989 to 1997.

⁴⁴ See the Annual Reports of the Committee, from 1989 to 1997.

⁴⁵ In “Report of the Committee against Torture”, UNGA Official Records 49th Session, Supplement No. 44 (A/49/44) 1994, para. 13-44 (pages 3-4) the final decision on how to outline the reports from State parties was taken.

⁴⁶ The Convention is the first UN human rights instrument which “explicitly authorizes its Committee to conduct an inquiry” of this kind. “The United Nations and Human Rights, 1945-1995”, The UN Blue Books Series, Volume VII, 1995, p. 64 (paragraph 295).

“well-founded indications that torture is being systematically practiced in the territory of a State party” (art. 20 p.1). The Committee shall invite the State party to co-operate with it throughout the investigation. The entire procedure is completely confidential (art. 20 p.5 and rule 72) and the aim is to give recommendations to the State party on how to improve the situation and to stop torture from occurring again.

After the investigation is finished the Committee has the power to decide whether to publish a summary account of the results in its annual report. It has to discuss it with the concerned State party, but the decision is up to the Committee (art. 20 p.5 and rule 84 p.1). This is an important means for the Committee to pressure the State party into co-operating in the investigation and to follow the recommendations made by the Committee since no State would want a negative report about itself made public.

The most significant restriction to this power of the Committee, is the State parties' possibility to make a reservation in regard to article 20 (art. 28) at the time of signature, ratification or accession to the Convention, but only at this time. This “opting-out” possibility has only been used by a very few State parties. But on the other hand, the Committee has only made use of its power twice towards Turkey⁴⁷ and Egypt⁴⁸, so the “risk” of an article 20 investigation is very slight. There are two more investigations going on at the moment though, so the trend may be changing⁴⁹.

7.4 Inter-State complaints under article 21

This article opens the possibility for one State party to complain to the Committee that another State party is in breach of the Convention. However, this article is only effective between State parties who have expressly accepted it (art. 21 p.1, a so-called “opting-in clause”). Of the 114 State that have signed, ratified or acceded to the Convention, up until 9 May 1997, only 37 have declared that they recognize article 21. To weaken the article's effectiveness even further, it is possible for the States parties that have recognized the article to withdraw from its declaration at any time. It would not, however, affect any matter before the Committee at that moment (art. 21 p.2 and rule 85 p.2).

The procedure under this article is aimed at a friendly solution between the two States concerned, on the basis of “respect for the obligations provided for in the Convention...and by setting up, when appropriate, an ad hoc

⁴⁷ The investigation took place between April 1990 and November 1992. The inquiry is published in “Report of the Committee against Torture”, 48th Session, Supplement No. 44A (A/48/44/Add.1) 1994.

⁴⁸ This investigation took place in 1996. See, “Report of the Committee against Torture”, 52nd Session, Supplement No. 44 (A/52/44) 1997.

⁴⁹ Which States that are being investigated are confidential. We have to wait until they are finished and published.

conciliation commission”⁵⁰. The meetings to find a solution are closed (art. 21 p.1d and rule 89) and the final report on the issue is only given to the States concerned (art. 21 p.1h and rule 95 p.3). So far this article has not been used in practice.

7.5 Individual complaints under article 22

For persons under the jurisdiction of a State party it is an important tool to be able to lodge an individual complaint about a violation of the Convention to an impartial, international body of experts, i.e. the Committee. It is also a method to draw attention about particular situations within States parties that might not otherwise be observed. There are some requirements that have to be fulfilled before a communication can be considered on its merits by the Committee i.e. the formal consideration of admissibility.

7.5.1 Requirements for admissibility

First of all, this article is, just as the previous one, optional for the State parties. They have to make an express declaration (which can be done at any time) that they recognize the competence of the Committee to consider individual complaints against them (art. 22 p.1). On the other hand, they also have the possibility to withdraw from their declaration at any time, but without this withdrawal affecting a current complaint (art. 22 p.8 and rule 96 p.2). As of 9 May 1997, only 36 States parties had recognized this article⁵¹. So, the first thing the Committee has to check is if the State party, complained against, has accepted the procedure under article 22. If not, then the communication will be considered inadmissible directly.

Second, the communication must not be anonymous (art. 22 p.2 and rule 107 p.1a). The person lodging the complaint must be identified by “name, address, age and occupation” (rule 99 p.1a). The committee can also consider a communication made “on behalf of” an individual (art. 22 p.1). This would occur if the individual is unable to personally complain⁵². Although the group able to complain on the alleged victim’s behalf, is not specifically identified anywhere, rule 107 p.1b of the Rules of Procedure mentions relatives, designated representatives and others if they can justify their action. Danelius and Burgers suggest that this group includes close relatives and “in certain circumstances a non-governmental organization could be entitled to act on behalf of the individual directly affected”⁵³. The

⁵⁰ Fact Sheet No. 17, p.6.

⁵¹ It is interesting to note that the United Kingdom and the United States of America have not recognized this article while for example Algeria, Yugoslavia and the Russian Federation have accepted it.

⁵² For example if he has already been sent out of the State, allegedly contrary to article 3 of the Convention.

⁵³ Danelius and Burgers, p. 167. See also Voyame, p. 52, where he also takes non-governmental organizations as an example.

Committee only examines individual complaints; there are no possibilities for an *actio popularis*, since no two persons can have the exact same background, experiences and reasons for their complaints.

Third, the communication has to relate to a breach of one or more provisions of the Convention and not clearly “be an abuse of the right of submission” (art. 22 p.2 and rule 107 p.1c). This is simply to ensure that the procedure is not abused by unserious individuals and that the workload of the Committee is not unnecessarily increased.

Fourth, the Committee is not eligible to consider any communications that are, or have been, examined by another procedure of international investigation or settlement (art. 22 p.5a and rule 107 p.1e). This requirement is to avoid double examinations of the same case and the risk of differentiating conclusions, which could undermine the international co-operation and common goals. This restriction is only applicable in cases that have been dealt with in substance. If a case have been rejected by another international body on purely formal grounds then the Committee may try the case in substance (if it fulfills the requirements under article 22). Other international bodies referred to are primarily the Human Rights Committee and the European Commission of Human Rights.

Fifth, and last, all available domestic remedies must have been exhausted, *unless* “the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief“ to the claimant (art. 22 p.5b and rule 107 p.1f). Exhaustion of domestic remedies is a logical and normal requirement since recourse to an international body should be the last step when the domestic system has failed. The first exception from the rule is also logical since a State should not be able to drag out the procedure at home in order to avoid having to answer to an international body. The second exception, however, is rather subjective because of the term “unlikely”, which opens for a wide range of interpretations. It will be up to the Committee to decide in each case where the question arises, based on the specific circumstances in that case.

If the communication fails to meet one or more of the requirements, then the Committee shall declare it inadmissible and “as soon as possible” inform the claimant about it (rule 109 p.1) and the State party if it, previously, has been informed about the communication.

7.5.2 Admissible communications

If a communication fulfills all the requirements for admissibility, the Committee will consider it on its merits after having informed the claimant and the State party concerned about its decision of admissibility (rule 110 p.1). The State party has six month, after being informed, to submit a written statement in regard to the matter. This statement should include an

explanation of the State party's view of the issue as well as being a clarification of the facts of the matter and the background to the State party's stance. If any measures have been taken by the State party to remedy the situation this should also be included (art. 22 p.3 and rule 110 p.2). The claimant also has the possibility to hand in any additional information he feels is necessary as a response to the State party's statement (rule 110 p.4).

After the Committee has received all information it deems necessary, it shall consider the communication at closed meetings (art. 22 p.6). The Committee may invite the claimant and the State party to be present at these meetings, if it deems it appropriate (rule 110 p.5), but it has not done so yet. The Committee may also, during the examination, ask for "any documentation that may assist in the disposal of the case from United Nations bodies or the specialized agencies" (rule 111 p.2). These options are possibilities for the Committee to get extra information or clarifications from the two involved parties and/or others in order to be able to formulate an exact and correct view of the case.

The Committee may also ask the State party involved to take some interim measures "to avoid possible irreparable damage" to the claimant (rule 108 p.9, when deciding on admissibility and rule 110 p.3, when trying the case on its merits). This is primarily to avoid putting the claimant in a situation where the final views of the Committee will be of no importance anymore⁵⁴. So far all State parties have followed the Committee's recommendations in this matter.

After the Committee has reviewed all the material available to it, it has to formulate its views on the matter (art. 22 p.4 and rule 111 p.1 and 3). Any member of the Committee may have his/her individual opinions expressed as well (rule 111 p.4), but so far the Committee seems to have been unanimous in its conclusions. These views are then sent to the State party concerned and the claimant (art. 22 p.7 and rule 111 p.4) and a summary of the communication and the Committee's views are published in the annual report of the Committee (rule 112).

It must be stressed that these views of the Committee are not legally binding for the State parties, but since the views are reasoned and then published in the annual report there is a strong moral obligation for the States parties to follow them (that is also the point with having the individual procedure, as the States which have accepted it very well knows).

⁵⁴ For example if a person, making a claim under art. 3, were expelled from the State party and consequently tortured, then a view from the Committee backing the persons complaint would not help him anymore.

7.6 Relation to other international bodies

Considering that the prohibition against torture exist in many other international instruments which can also be subjected to interpretation and considerations under different international bodies⁵⁵, the Committee should co-operate with these to avoid too diverse interpretations or overlapping and instead enhance a unified international view. The Committee's obligation to not try any individual communications that are, or have been, considered by other international bodies (art. 22 p.5a), demands at least a minimum of exchange between the different bodies. An effective limitation to the co-operation between different bodies is the confidentiality of information that exists in many cases and therefore hinders exchange.

The UN Commission on Human Rights has established a special Rapporteur on torture to step up the fight against torture. The Committee (against Torture) has established close contact with this Rapporteur in order to exchange information and reports. The Committee and the Rapporteur consider their mandates to be "different but complementary"⁵⁶ which makes the fight against torture more effective.

⁵⁵ For example, art. 3 of the ECHR prohibits torture and is subject to interpretation of the European Commission of Human Rights and art. 7 of the ICCPR also prohibits torture and is subjected to control by the Human Rights Committee.

⁵⁶ UN Fact Sheet No. 17, p.10.

8 Article 3

8.1 General background

Article 3 of the Convention reads as follows:

- 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.*

This article has no equivalent in the 1975 UN Declaration against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment but was included already in the first draft suggested by Sweden in 1978, in its article 4. It stated:

“No State Party may expel or extradite a person to a State where there are reasonable grounds to believe that he may be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment”.
(My underlining)

After some discussions in the working group in 1979, the Swedes changed the wording in its revised draft, where it was article 3, to:

“No State Party shall expel, return (“refouler”) or extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture”. (My underlining)

The principle of *non-refoulement* means the prohibition to send any person back to a State where he would be in danger of being subjected to torture, or where he would not be protected from being sent to a third State where he would be exposed to such a risk. The inclusion of this principle was aimed at giving additional protection to anyone in this “risk zone”. The article is partly based on article 33 in the 1951 Geneva Convention relating to the Status of Refugees⁵⁷, which states:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of 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.

⁵⁷ Adopted by the UN on 28 July 1951 and entered into force on 21 April 1954. Hereafter referred to as “the Refugee Convention”.

That article is only applicable to refugees under the specific circumstances set forth in the Refugee Convention, while article 3 of the Convention is aimed at all persons who need its protection, for whatever reasons, against a risk of being tortured if sent to another State. Article 33 of the Refugee Convention is limited further by its paragraph 2 which deals with exceptions from the first paragraph in cases where the refugee is considered “a danger to the security of the country in which he is”. Since article 3 is not open to any exceptions, as the Convention’s article 2 p. 2 points out and the Committee has reaffirmed⁵⁸, it makes it even more useful and important.

The Swedes also had article 3 of the ECHR, and the case law relating to it, in mind when including the principle of *non-refoulement* in its draft. The European Commission of Human Rights, and the European Court, have over many years, and through many cases⁵⁹, established that article 3 in the ECHR includes a prohibition against sending persons back to a State where he faces a real risk of being tortured or otherwise cruelly, inhumanely or degradingly treated⁶⁰.

Besides, the principle of *non-refoulement* has, lately, been established as a principle of customary international law, or *Jus Cogens*, by most scholars⁶¹. This acceptance is based on the fact that the principle is included in several international instruments, such as this Convention, in national laws and well established in refugee law⁶². Amnesty International clearly views the principle as fundamental. In its 1997 “Refugee Theme Campaign”, it repeatedly refers to *non-refoulement* as “the fundamental basis of international refugee law” and that “it is a norm of customary international law”⁶³.

The inclusion of Article 3 in the Convention was generally supported by the delegations since it was seen as providing “significant additional protection”⁶⁴, but there was much discussion over the exact wording. For example, should it be “reasonable” grounds, as Sweden’s first draft stated, or “substantial” grounds, as the United Kingdom suggested? In the end, the

⁵⁸ Communication No. 39/1996, Paez v. Sweden, para. 14.5.

⁵⁹ See for example: X v. Germany (Decision of 26 March 1963) Soering v. United Kingdom (Judgement of 7 July, 1989), Cruz Varas v. Sweden (Judgement of 20 March 1991) or D v. United Kingdom (Judgement of 2 May 1997).

⁶⁰ See, “The Case-Law of the European Commission of Human Rights on Art. 3 of the ECHR”, by L. Kellberg. From: “The International Fight against Torture”, edited by A. Cassese, 1991, p. 114-115.

⁶¹ For example, A. Grahl-Madsen (p. 42 in “Territorial Asylum”), G. Goodwin-Gill (p. 134 in “The Refugee in International Law”) and J. Hathaway (p. 26 in “The Law of Refugee Status”).

⁶² For a thorough analysis of the fundamental character of the principle see: “Europa- och tortyrkonventionernas betydelse inom flyktingrätten”, by K. Lindholm, from “Bevis 2, prövning av flyktingärenden”, by C. Diesen et. al., 1998, p. 91-96.

⁶³ AI Report, ACT 34/08/97, “Refugees: Human Rights have no boarder”, especially Chapter 3, but also Ch. 6, 8 and 9.

⁶⁴ Burgers and Danelius, p. 125.

word “substantial” was decided upon since it was considered more precise. A “considerable discussion”⁶⁵ on whether to include the word “return” (refouler) was also held, since some States felt that there were “strong humanitarian reasons to include that word, which broadened the protection of the persons concerned”⁶⁶ and since the article would then cover all measures by which a person is transferred between States. On the other hand, some States expressed concern that if the word “return” was included then States would be required to accept a mass flow of persons, even if it was not capable of it. In the end the word was included, partly also because the principle of *non-refoulement* was already considered by many States as fundamental in international law (although not universally accepted as such in 1979 when the working group decided the wording of article 3 para. 1). The final wording of article 3 paragraph 1 was adopted by the working group at its session in 1980.

Another issue was how this article would affect already existing extradition treaties with third States. Some States wanted an exception from the article in regard to existing treaties with third States. This issue was never clearly resolved, but a remark was included in all reports of the working groups, including the last one in 1984⁶⁷, which states that:

Some delegations indicated that their States might wish, at the time of signature or ratification of the Convention or accession thereto, to declare that they did not consider themselves bound by Article 3 of the Convention, in so far as that article might not be compatible with obligations towards States not Party to the Convention under extradition treaties concluded before the date of signature of the Convention.

A reservation according to the remark would reasonably be “legally permissible”⁶⁸ if a State wishes to do it. However, it has not been done so far, so it seems to have been a theoretical problem more than a practical one. Besides, in relation to a State that has not joined the Convention, it is even more important to protect individuals from being sent to that State, if there is a risk of him being subjected to torture, since he will not be protected by the Convention in that State.

The last major problem, regarding the wording of article 3, was the existence of the entire second paragraph. It was first suggested by the Soviet Union to the working group in 1979, but with a list of situations to illustrate when “flagrant and massive violations of human rights” would most likely exist. This list included “apartheid, racial discrimination or genocide, the suppression of national liberation movements, aggression or the occupation

⁶⁵ Burgers and Danelius, p. 50.

⁶⁶ Burgers and Danelius, p.50.

⁶⁷ Doc. E/CN.4/1984/72, para. 12.

⁶⁸ Burgers and Danelius, p. 127.

of foreign territory”⁶⁹. Naturally, the list could not be exhaustive and various delegations wanted different situations expressly mentioned. For example did some delegations want the words “colonialism”, “religious persecution” and “suppression of political dissent” included. Others were worried that the list may lead to the false conclusion that it was exhaustive and thus situations, which were not meant to be excluded, might be tolerated. Further, it was pointed out that “the main purpose of the article was to ensure an evaluation of each individual case, and a reference to general situations was not helpful for that purpose”⁷⁰. The working group could not agree on the issue, so they suspended the discussion until the next meeting in 1980 and then to the next in 1981 without being able to decide whether to maintain, change or delete this second paragraph. It was not until the last session, in 1984, that the working group finally agreed to include a second paragraph but without the list of situations. The compromise replaced the list with the general wording “a consistent pattern of gross, flagrant or mass violations of humans rights”, which were considered to include all the situations in the list and more. It was also added to the paragraph that it was the “competent authorities” which should take these considerations into account when evaluating the individual cases.

The final report, with the Draft Convention included, was given to the Commission on Human Rights, which adopted it without a vote on 6 March 1984⁷¹. It was finally adopted by the UN General Assembly on 10 December without a vote⁷² and thus the decisive interpretation of article 3 was left to the Committee against Torture.

8.2 The interpretation of Article 3

Since the Convention came into force in June 1987, and the Committee started its work in 1988, over 70 individual complaints, many dealing with article 3, have been received by the Committee⁷³. Some complaints have been declared inadmissible or clearly ill founded and others have not yet been considered, but many have been examined on their merits and views adopted by the Committee. It is through this process the Committee has established its interpretation of article 3, by clearing out uncertainties and setting the level of how extensive the article should be applied. Most complaints regarding article 3 are made by asylum seekers who have had their applications rejected by a State party.

⁶⁹ Burgers and Danelius, p. 51, where the exact wording of the Soviet proposal can also be found.

⁷⁰ Burgers and Danelius, p. 51.

⁷¹ Adopted through Resolution 1984/21 of the Commission on Human Rights.

⁷² Adopted through UNGA Resolution 39/46.

⁷³ “Report of the Committee against torture”, UNGA Official Records, 52:nd Session, Supplement No. 44 (A/52/44), 1997, p. 42 (paragraph 273; 67 complaints up through 1997).

The Committee, to adopt a view on a complaint, evaluates the following elements to see if there is a breach of article 3 by a State party or not.

1. Are there substantial grounds to believe the complainant would be in danger, or experience a “real risk”, of being tortured if he is sent back to the other State (considering all relevant circumstances of the case).
2. Is this danger necessary and foreseeable.
3. Is there a consistent pattern of gross flagrant or mass violations of human rights in the other State.
4. Which is the level of proof required (since the behavior of torture victims can be unpredictable, should they be given the benefit of the doubt or be demanded to give full evidence).

The article, it must be remembered, only applies to torture, as it is defined in the Convention’s article 1.

8.2.1 Is there substantial grounds to believe the complainant is in danger of being subjected to torture

The complainant must be exposed to the danger that he will be tortured upon his return to another State and it is the Committee’s job to “ensure that his security is not endangered”⁷⁴. It is not enough that the complainant has been tortured previously while in that other State, there must be substantial grounds to believe that he is still in danger if he was returned. On the other hand, it is not necessary that he has been tortured before, if he can show that he is now in such a danger. To establish if there are substantial grounds to believe the danger, “all relevant considerations” must be taken into account according to article 3 paragraph 2. These relevant considerations could include the complainant’s political affiliation and/or activities, ethnic background, part of a social minority, history of detention, history of being tortured, the work he has done while outside the State, or any other reasons that might attract the attention of the authorities in the other State⁷⁵. It can also be relevant to consider what the complainant’s family and close friends do or have gone through. If, as in one case⁷⁶, a cousin had been murdered by police and another cousin had disappeared and they both were members of the same organization as the complainant, these circumstances are relevant for the Committee to know when making a decision, since they can give indications of what the complainant would risk if he was sent back.

It is important to underline that the Committee has expressly stated that the protection of article 3 is absolute⁷⁷. It does not matter what the complainant has done (for example participated in terrorist attacks or other illegal activities). If he risks torture upon a return, then he cannot be sent back

⁷⁴ Communication 13/1993 Mutombo v. Switzerland, para. 9.2.

⁷⁵ Burgers and Danelius, p. 127. Mutombo, para. 9.4, Communication No. 41/1996 Kisoki v. Sweden, para. 9.3 and 9.4

⁷⁶ Communication No. 39/1996 Paez v. Sweden.

⁷⁷ Paez, para. 14.5, Communication No. 34/1995 Aemei v. Switzerland, para. 9.8.

there. This is important to remember since article 33 in the Refugee Convention, about *non-refoulement*, does include exceptions where it is acceptable to return a person even if he would be at risk of being tortured. States that are parties to both Conventions must therefore follow the Convention against Torture in this case, since it offers a wider protection for the individual.

It should be noted that the Committee uses the words “danger” and “real risk” interchangeable in its communications. This might partly be because the European Commission of Human Rights uses the term “real risk” when dealing with complaints under article 3 of the ECHR and some Committee members have been, or are also, members of the Commission. The meaning of the words are, however, meant to be identical and they are used as if they were⁷⁸.

8.2.2 Is the danger necessary and foreseeable

The danger can not be abstract, such as “since he is part of the minority group in the State and the State does not like them, he might be tortured if returned”. The complainant must be able to show that it is he, personally, that the authorities are interested in finding and that they would torture him if he was returned to that State. In one case⁷⁹, the complainant belonged to a discriminated ethnic group, he was also a member of an illegal political movement and had been detained and tortured more than once. He had moreover deserted from the army and left the State in a “clandestine manner”. These circumstances put together was considered, by the Committee, to “have the foreseeable and necessary consequence of exposing him to a real risk of being tortured”⁸⁰. In another case⁸¹, the complainant was a member of an illegal political organization, he had a history of detention and he had worked actively against the government of his home country after he had left that State. This was enough for the Committee to consider that a foreseeable and necessary risk of being tortured existed for the complainant⁸² if he was returned. On the other hand, it was not considered enough to have published articles that were critical against the government of the State of return, even though he had been tortured while still in that country. A contributing factor in this case was that no pattern of gross human rights violations existed in the State of return. The Committee therefore concluded that the complainant was not exposed to a foreseeable, necessary or personal risk if sent back⁸³.

⁷⁸ This can be seen already in Mutombo (para. 9.4).

⁷⁹ Communication No. 13/1993 Mutombo v. Switzerland.

⁸⁰ Mutombo, para. 9.4.

⁸¹ Communication No. 34/1995 Aemei v. Switzerland.

⁸² Aemei, para. 9.5, 9.7 and 9.10.

⁸³ Communication No. 65/1997 I.A.O. v. Sweden, para. 14.5.

8.2.3 Is there a consistent pattern of gross, flagrant or mass violations of human rights in the other State

This issue is often controlled by the Committee itself through contacts with other UN organs, such as the Commission of Human Rights, the UNHCR and the UN Special Rapporteur on Torture. The Complainant often has information about this as well which is submitted, sometimes from contacts in the other State, but most often from NGOs, such as Amnesty International and Human Rights Watch. The State Parties often gather information about the other State from its embassy in that State.

The Committee has in almost every case before them included the following sentences about article 3 paragraph 2⁸⁴:

The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances.

The Committee has followed this view and taken into account the general situation in the State to which the complainant would be returned. But, it has not used this information as a decisive element, although if there is gross violations of human rights in the State “it lends force to the Committee’s belief that substantial grounds exist within the meaning of paragraph 1”⁸⁵.

The Committee has also underlined that if the State of return has not ratified or acceded to the Convention that will be taken into consideration, since a person returned to such a State has no legal possibilities to apply to the Committee for protection if he is exposed to a violation once there⁸⁶. On the other hand, the fact that a State is a party to the Convention does not exclude that in a specific case, a person should not be returned to that State because of the risk of torture he would face on a return⁸⁷. The preventive responsibility of the Committee is therefore very important (and one of the Committee’s main purposes).

⁸⁴ See for example: Mutombo, para.9.3, Communication No. 15/1994 Khan v. Canada, para.12.2, Paez, para. 14.2 and I.A.O., para. 14.2.

⁸⁵ Aemei, para. 9.3.

⁸⁶ Mutombo, para. 9.6 (Mr. Mutombo was from Zaire) and Khan, para. 12.5 (Mr. Khan was from Pakistan).

⁸⁷ Communication No. 21/1995 Alan vs. Switzerland, para. 11.5. “That Turkey is a party to the Convention....does not...constitute a sufficient guarantee for the author’s security”.

The question of what amounts to a consistent pattern of gross, flagrant or mass violations of human rights has not been specifically answered. Since the definition of torture in article 1 states that the official authorities must somehow be involved, it seems logical to deduce that the mass violations of human rights also are connected to the official authorities in the State. This is a view that the Committee supports⁸⁸. It can be mentioned that the International Colloquium on how to combat torture, in 1983, suggested that “a ‘consistent pattern of gross violations’ is constituted by a systematic practice of torture. At least in its institutionalized form, torture should be seen as a gross violation of human rights”⁸⁹.

Further, the States, against which the complaints are lodged, often admits that there are “concerns” about the human rights situation in the State of return or that the situation is “grave”, “unacceptable” or “far from satisfactory”. However, they either deny that it should amount to a level of a consistent pattern of gross, flagrant or mass violations of human rights or they leave it to the Committee to decide if the violations reach this level⁹⁰. In some cases they admit there are violations but claim that the complainant is not personally at risk⁹¹. However, the Committee seems to be setting the level lower than the States and takes the situation in a State into account, to a varying degree, depending on the seriousness of the violations occurring. This is acceptable since the provision in the second paragraph is “neither absolute nor exhaustive”⁹² and “leaves a wide power of appreciation”⁹³ to the states and the Committee. In other words, since the Committee shall take all relevant circumstances into account, it is up to them to decide how important the general human rights situation in a State is for the determination of the case before them.

8.2.4 Does the evidence and credibility of the complainant reach the level of proof required

The Committee has throughout its work been conscious of the fact that victims of torture seldom can give a full and complete story of their experiences at a first interview when arriving to a new State to seek asylum.

⁸⁸ UN Document CAT/C/XX/Misc.1 “General Comment by the Committee against Torture on the Implementation of article 3 in the context of article 22 of the Convention against Torture”, 21 November 1997, para. 3 (page 1).

⁸⁹ “How to combat torture -report on the international colloquium on how to combat torture”, by the Swiss Committee against Torture, 1983, p. 67.

⁹⁰ Khan, para. 8.2, Kisoki, para. 6.2, Communication No. 43/1996 Tala vs. Sweden, para. 7.3.

⁹¹ Aemei, para. 6.4 and 6.10, and Mutombo, para. 6.3.

⁹² Burgers and Danelius, p. 128.

⁹³ Tardu, p. 313.

Their story can change, and new information can be revealed at later stages in the process, without the general veracity of the story being affected. Consequently, since the burden of proof is upon the complainant, the Committee has not required too high a level of proof and often given the complainant the benefit of the doubt, even if they do not say so directly. The Committee has stated that “the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable”⁹⁴. The level of proof that the Committee requires, and the considerations taken, seem to correspond rather well with the suggestions made by the UNHCR in its “Handbook on Procedure and Criteria for Determining Refugee Status”. In this Handbook the UNHCR states that “if the applicant’s account is credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt”⁹⁵ and that “the requirement of evidence should thus not be too strictly applied in view of the difficulty of proof”⁹⁶. An asylum seeker has often fled from his country without personal documents or other documents to prove his need for asylum. Besides, because the complainants have often been tortured or ill treated by the authorities in the State from which they flee, they usually do not trust the authorities in the State where they apply for asylum. They are therefore “afraid to speak freely and give a full and accurate account of his case”⁹⁷. A victim of torture is focused on surviving, by lying and by considering all official persons, especially those in uniform, as potential enemies. It takes a great effort to establish a relationship of trust with such a person⁹⁸. It has also been shown in reliability studies that victims of torture can change their stories if they are interviewed more than once. This is primarily due to improved memory of the events caused by mainly four reasons⁹⁹:

1. Emotional arousal. The victim becomes defensive or exaggerates the events, when he has to tell about it, because of all the emotions the memories stir in him.
2. Coping mechanisms. The victim uses denial and avoids talking about the torture, or situations connected to it, to be able to go on living.
3. Cultural differences. The victim might only feel comfortable talking about his traumatic experiences under very confidential circumstances because he feels ashamed, guilty or is afraid that family/friends will find out. Especially women who have been raped and are from a non-western

⁹⁴ UN Doc. CAT/C/XX/Misc.1, 1997, para. 6 (page 2).

⁹⁵ “Handbook on Procedures and Criteria for Determining Refugee Status”, by UNHCR, 1992, para.196 (page 47).

⁹⁶ The Handbook, para. 197 (page 47).

⁹⁷ The Handbook, para. 198 (page 47).

⁹⁸ “Mere viden om tortur til dem der håndhæver love og orden”, from the Journal “Torture” No. 1/95, by IRCT, p.15-16, and “Avhøringstema, bevisproblemer og troverdighet”, by A. Grahl-Madsen. From: Nordic Journal of International Law, vol. 56 1987, p.146-147.

⁹⁹ “Criterion-related validity of screening for exposure to torture”, by E. Montgomery and A. Foldspang. From the Journal “Torture” No. 4/94, by IRCT, p. 118.

culture, often do not want to admit to this torture because of shame and fright of being cast out from her family¹⁰⁰.

4. Impaired memory. The victim's memory can have been damaged by the torture (through physical violence, psychological methods or medications) and only slowly recovers when he receives help and treatment.

Due to these special circumstances, victims of torture must be treated with understanding and patience and the authorities must realize that they do not change their stories to be allowed to stay, but because they remember more and start trusting those interviewing them. Many national authorities do not seem to have this knowledge and rejects the applications of asylum on the grounds that the applicant's story was "inconsistent and full of contradictions" and therefore not trustworthy. These arguments have also been used as the basis for States when explaining why, according to their view, a complainant is not personally at risk of being tortured if returned to another State¹⁰¹.

The Committee, however, has taken the background and special experiences of victims of torture into account when deciding on the reliability of the complainant's story. The Committee has explained that it considers that¹⁰²:

...complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims.

The Committee has used similar expressions in other communications where the States have based their case on the trustworthiness of the complainants¹⁰³. In one communication¹⁰⁴ it expanded a little bit on their view by stating that:

...even though there may be some remaining doubts as to the veracity of the facts adduced by the author of the communication, it [the Committee] must ensure that his security is not endangered. In order to do this, it is not necessary that all the facts invoked by the author should be proven; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable.

¹⁰⁰ In Communication No. 41/1996 Kisoki v. Sweden, the complainant did not tell that she had been raped twice until over a year after she arrived in Sweden and only after another two years did she tell that she had been raped not twice, but ten times.

¹⁰¹ See, Mutombo, para. 6.1, Khan, para. 7.2, Aemei, para. 6.5, Alan, para. 6.3 and 6.4, Tala, para. 5.4 and 7.4, and I.A.O., para. 5.9.

¹⁰² Alan, para. 11.3, Kisoki, para. 9.3, and Tala, para. 10.3, where the Committee added "especially since it has been demonstrated that the author suffers from post-traumatic stress disorder".

¹⁰³ See for example: Mutombo, para. 9.2, I.A.O., para. 14.3, and Khan, para. 12.3.

¹⁰⁴ Aemei, para. 9.6.

It has, however, not always accepted the complainant's story. In one case¹⁰⁵, the Committee noted all the inconsistencies in the complainant's story and considered that the total information available was not enough to show that substantial grounds existed to believe that the complainant would, personally, risk being exposed to torture if he was returned to the other State. In another case¹⁰⁶, the Committee rejected the complaint on the grounds that the complainant had not claimed that he had been tortured and that there was no medical evidence that he suffered from any mental or physical consequences of torture.

*“The Committee therefore concludes that the inconsistencies in the author's story cannot be explained by the effects of a post-traumatic stress disorder, as in the case of many torture victims”*¹⁰⁷.

The Committee added that the complainant had not shown that he belonged to a political, professional or social group that was persecuted by the State of return and that even if there were gross violations of human rights in that State, the complainant had not showed that he would be personally at risk.

Another reason, not to get hooked on minor inconsistencies in an asylum seeker's story, is that an interpreter have been involved in most cases and they may not always be able to translate the exact meaning of a word. Furthermore, different interpreters can translate words and sentences differently, which is why it is important that, when possible, one interpreter is used throughout the handling of the application, so no variance of the translation occurs. This is also important from the view that the asylum seeker gets to know and trust the interpreter (it creates some stability) and therefore does not hesitate to tell him more. Also, the interpreter might knowingly interpret falsely, either because he wants to help or because he, due to personal reasons (such as being of a different political affiliation or religion), wants to ruin the asylum seeker's chances. It is therefore important that the interpreters are absolutely objective, without any diverting loyalties¹⁰⁸.

When it comes to written evidence, the Committee is also here more lenient, than the States, in its acceptance of it. If medical documentation corroborates a complainant's story of how he was tortured, then the Committee accepts it¹⁰⁹. The States are more suspicious and consider that the scars might have an origin other than torture¹¹⁰, or that the medical certificates are not “persuasive”¹¹¹. If a doctor has not been present at the actual torture, then

¹⁰⁵ Communication No. 27/1995, X v. Switzerland.

¹⁰⁶ Communication No. 38/1995, X v. Switzerland.

¹⁰⁷ Communication No. 38/1995, X v. Switzerland, para. 10.4.

¹⁰⁸ “Handbok i invandrarrätt”, by G. Melander and P. Nobel, p. 169.

¹⁰⁹ Tala, para. 10.3, Khan, para. 12.3, and I.A.O. para. 14.3.

¹¹⁰ Tala, para. 7.6, Khan, para. 3.1, and I.A.O., para. 5.7.

¹¹¹ Mutombo, para. 6.1.

he can not with 100% certainty say that torture is the cause of the scars. This viewpoint may be true, but it is highly unlikely that a person would come up with a story, and scars to corroborate it, if there were not an ounce of truth to it.

Due to the lower level of evidence required by the Committee compared to the States, the States have expressed concern that asylum seekers might invoke article 3 of the Convention “improperly” or “abuse” the possibility it gives¹¹². The Committee has noted the concerns but pointed out that its first priority is that the security of the complainant is not endangered¹¹³. It has pointed out, though, that its views are only of a *declaratory character*, which does not require the national authorities to alter their decisions regarding the granting of asylum. However, the State Party “does have a responsibility to find solutions that will enable it to take all necessary measures to comply with the provisions of article 3 of the Convention”¹¹⁴. The Committee gives some examples of solutions of a legal, or political, nature:

- The State can decide to admit the applicant temporarily.
- The State can try to find a third State that is willing to admit the applicant into its territory, without returning or expelling him from there.

States have also considered that the interpretation of article 3 by the Committee should correspond to the case-law of the European Commission of Human Rights regarding article 3 of ECHR, since both deal with the prohibition against sending a person back to a State where he is at risk of being tortured. Switzerland has argued that “article 3 of the Convention against Torture does not provide a wider protection than article 3 of the European Convention”¹¹⁵. Sweden has pointed out that “diverging standards...would create serious problems for States, which have declared themselves bound by both instruments...when States attempt to adapt themselves to international case-law, if this case-law is inconsistent”¹¹⁶. The Committee has not answered to this directly, but has continued to apply its own standards to its cases, in accordance with its established interpretation of article 3 of the Convention. It might be interesting for the reader to note that the two articles have different levels of protection. The ECHR is more strictly interpreted by the Commission, than the Convention against Torture is by the Committee, with regard to the level of proof that they require¹¹⁷. This was demonstrated, in two identical cases¹¹⁸, one before each body. These cases were put forward by two brothers, who had the same political and social background and similar reasons for their complaints. The one

¹¹² Mutombo, para. 9.2, Aemei, para. 9.6.

¹¹³ Mutombo, para. 9.2, Aemei, para. 9.6.

¹¹⁴ Aemei, para. 11.

¹¹⁵ Mutombo, para. 6.4.

¹¹⁶ I.A.O., para. 5.11.

¹¹⁷ For a comparison between the two Conventions’ level of protection in regard to their respective article 3, see: Diesen et. al., p. 89-150.

¹¹⁸ Communication No. 39/1996 Paez v. Sweden and: Paez against Sweden, Report of the Commission, decision adopted on 6 December 1996.

before the Commission was not considered to be at risk if sent back (with 15 votes against and 14 vote for a violation of art. 3), due to lack of proof that he was wanted by the authorities in the State of return. The Committee, on the contrary, considered that the other brother would be at risk if sent back and consequently accepted the proof before it as sufficient. It seems to me that States, which are party to both Conventions, just has to focus on living up to the standards set by the Convention which offers the greatest protection for the individuals. Then they will automatically fulfill their obligations under the other Convention as well.

9 Sweden and the Convention

9.1 General introduction

Sweden was one of the States that initiated and actively worked to create the Convention. It, consequently, signed the Convention on 4 February 1985, and ratified it on 12 December 1985, with declarations under articles 21 and 22 of the Convention that Sweden recognizes the Committee's competencies¹¹⁹. The instrument of ratification was the first one to be deposited with the General-Secretary of the UN on 8 January 1986. Still, Sweden has not, as of yet, complied with the Convention entirely and cases against Sweden in regard to article 3 occur and some have found Sweden in breach of the article.

9.2 Sweden's relation to International Law

Sweden belongs to the group of States that have adopted a dualistic legal system¹²⁰. This means that Sweden has to incorporate international treaties into its domestic law, or transform them into Swedish legal rules with corresponding content, before they become legally binding within the State. Naturally, the State is bound by its international commitments towards other States as soon as it has signed and ratified a treaty. But, national authorities are only obliged to follow Swedish law and thus not any international treaty or rule, if it has not been incorporated or transformed into domestic law first.

However, since the 1980's the Swedish Supreme Court has tried to interpret the Swedish legal rules in the light of international treaties, ratified by Sweden (especially the ECHR, which has frequently been invoked by lawyers), because of the international, and moral, obligations Sweden has accepted through the ratifications¹²¹. Since the Swedish provisions are already supposed to be in accordance with the Convention, it should be okay for the courts and authorities to use it to interpret the Swedish provisions¹²². The authorities have followed the Supreme Court's lead and seem to try to interpret provisions in conformity with relevant international provisions, to the extent possible. But, it is the Swedish rule that the authority applies directly in each case and refers to in its decision.

¹¹⁹ Ratified after Parliamentary preparation; Government's Bill (*Regeringens proposition*) Prop. 1985/86:17, Standing Committee on Foreign Affairs' Report (*Utrikesutskottets betänkande*) UU. 1985/86:11 and Parliament's Communication (*Riksdagsskrivelse*) Rskr. 1985/86:38.

¹²⁰ As compared to the monistic legal system, where international treaties become directly applicable within the State due to a general constitutional norm in its legal system.

¹²¹ Diesen et al., p. 97-98.

¹²² Prop. 1996/97:25, p. 69. It is called "the principle of treaty conform interpretation" (*den fördragkonforma tolkningens princip*).

9.2.1 Should the Convention be incorporated into Swedish Law?

The Convention has not been incorporated into domestic law since Sweden considers that it already lives up to the requirements of the Convention, through provisions in existing Swedish laws¹²³. This has been criticized by the Committee, especially since there is no definition of torture in any Swedish legislation and the complete implementation of the Convention depends on the existence of such a definition¹²⁴. Sweden has not followed the recommendation of the Committee on this issue and continues to claim that it is not necessary, because the existing protection against torture in the Swedish law is sufficient. In spite of this, the Government has said in a bill that it is important to clearly define illegal acts in order to protect, efficiently, against them¹²⁵. Because of this statement, it is strange that they did not decide to include a definition of torture to raise, and clarify, the level of protection against it in the Swedish law.

Of the provisions existing in Swedish law to protect against torture, the most important is in the Swedish Constitution. The provision in chapter 2, section 5 of the Instrument of Government (*Regeringsformen*) expressly forbids torture and corporal punishment¹²⁶:

Every citizen is protected against corporal punishment. He is also protected against torture and against medical treatment for the purpose of forcing or hindering statements.

This provision is not only applicable to citizens but to all persons within the Swedish territory according to chapter 2, section 22, p. 3. The prohibition against torture and corporal punishment is absolute¹²⁷, just as it is in the Convention.

In addition, the Swedish Penal Code have provisions that prohibit “battery”¹²⁸ and “aggravated assault”¹²⁹, which according to the Swedish

¹²³ Prop. 1985/86:17, p.1, “Report of the Committee against Torture”, UN General Assembly Official Records: 44th Session, Supplement No. 46 (A/44/46) 1989, para. 41 (page 9) and para. 57 (page 11) in regard to Sweden’s initial Report,.

¹²⁴ “Report of the Committee against Torture”, UN General Assembly Official Records: 52nd Session, Supplement No. 44 (A/52/44) 1997, para. 218, 219 and 223 (page 34), in regard to Sweden’s third Periodic Report.

¹²⁵ Prop. 1985/86:17, p. 11.

¹²⁶ Corporal punishment is considered to be equal to torture in accordance to this provision, and according to the Government. See, Prop. 1988/89:86, p. 115.

¹²⁷ Chapter 2, section 12, para. 1, *e contrario*.

¹²⁸ “*Misshandel*”, Chapter 3, section 5 of the Penal Code (*Brottsbalken*).

¹²⁹ “*Grov Misshandel*”, Chapter 3, section 6 of the Penal Code (*Brottsbalken*).

initial report to the Committee¹³⁰ includes torture and is treated very seriously by the Courts (as reflected in the fact that the maximum penalty is 10 years in prison for aggravated assault). These provisions read as follows:

Chapter 3, section 5

“He who inflicts on another person bodily harm, illness or pain or puts him or her in powerlessness or any other such condition, is sentenced for battery to imprisonment for a maximum of two years or, if the crime is insignificant, to a fine or imprisonment for a maximum of six months”.

Chapter 3, Section 6

“Is the crime referred to in section 5 to be considered as serious, shall he be sentenced for aggravated assault to imprisonment, at least one year and for a maximum of ten years”.

The Government, in its proposition to the Parliament, expressly stated that it considered these provisions to well cover the definition in the Convention¹³¹. These provisions, however, do not give a definition of torture that the authorities dealing with asylum seekers can use as a basis when they have to decide if an applicant has been exposed to torture or not. In practice this does not seem to have caused any problems since the Swedish authorities are aware of the Convention and try to interpret what constitutes torture in conformity with its definition, even though the Convention is not directly applicable for the authorities.

In regard to requests made by the Committee to inhibit the enforcement of a State’s decision to expel until the Committee has tried the complaint, Sweden has, since 1997¹³², a new provision in the Aliens Act, ch. 8, sec. 10a. It states that if an international body, with the competence to try individual complaints, asks Sweden to inhibit a decision regarding expulsion or extradition, then this shall be done unless there are particular reasons not to follow the request. In accordance with this provision, but also before, Sweden has inhibited all the cases pending before the Committee at its request¹³³.

In conclusion it can be noted that the Committee in 1993, in response to Sweden’s second periodic report, said that Sweden met the standard of the Convention in all respects¹³⁴. In 1997, in response to Sweden’s third periodic

¹³⁰ “Reports of the Committee against Torture”, UNGA Official records 44th Session, Supplement No. 46 (A/44.46) 1989, para. 66 (page 13).

¹³¹ Prop. 1985/86:17 p. 12.

¹³² This provision was included in the Aliens Act through *Lag (1996:1379) om ändring i utlänningslagen*.

¹³³ See for example; Tala, para. 5.1, Paez, para. 5.1 and I.A.O., para. 5.1.

¹³⁴ “Report of the Committee against Torture”, UNGA Official Records, 48th Session Supplement No. 44 (A/48/44) 1993, para. 385 (page 62).

report, the Committee had changed its opinion and recommended Sweden to incorporate the Convention into its domestic law. The Committee considered it a “continued failure of the Swedish Government” that it had not already incorporated the Convention¹³⁵. As a result, Sweden should either add a definition of torture into its domestic law (for example in the Penal Code) or, preferably, incorporate the entire Convention, as Sweden has already done with the ECHR¹³⁶.

9.3 Sweden’s Refugee Policy

It was in the early 1970’s that the number of refugees seeking protection in Sweden began to rise substantially, due to political instability in many parts of the world and the wish, hidden behind other reasons, to achieve a better financial situation¹³⁷. Before that, it was mostly foreign workers who came to Sweden because of the good working opportunities. In the 1980’s, most refugees fled from wars and ethnic oppression¹³⁸. It has been estimated that there are almost 300,000 refugees living in Sweden at the moment¹³⁹, and every year more asylum seekers enter the country. In 1990, 29,420 asylum seekers came to Sweden, mostly from Iran, but also many from Lebanon and Somalia and 12,839 were granted residence permits. There was a huge influx during the war in former Yugoslavia (84,000 in 1992 and 37,500 in 1993, when 36,482 were allowed to stay) but the last couple of years there have been a decrease and in 1996, the lowest number of asylum seekers came to Sweden. Only 5753 persons arrived and 4832 received a residence permit. However, there was a rise again last year, 1997, when 9662 applications for asylum were received by the Swedish Immigration Board, and 9596 were granted. These last couple of years most asylum seekers have been from Iraq and the Federal Republic of Yugoslavia¹⁴⁰. Keep in mind that since it takes a while to process and investigate the applications (it can take a few months or many years), the figures for those who are granted residence permits are not exactly corresponding to those who have applied for it that same year.

The Swedish refugee policy is aimed at helping those who have a real need to be protected. This is achieved through active work in international organizations, such as the UN, and by coordinating refugee relief and development aid in regions with refugee problems. Also, Sweden accepts refugees for resettlement, in co-operation with the UNHCR. These are

¹³⁵ “Report of the Committee against Torture” UNGA Official Records, 52nd Session, Supplement No. 44 (A/52/44) 1997, para.219 and 223 (page 34).

¹³⁶ The ECHR was incorporated into Swedish law through “*Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*”.

¹³⁷ The State’s Official Investigations (*Statens Offentliga Utredning*), SOU 1995:75, ch. 6.1.1., p. 119.

¹³⁸ Many Irani and Iraqi refugees came because of the war between their countries.

¹³⁹ UNHCR Statistics in March 1997.

¹⁴⁰ All this statistic is from the UNHCR and the Swedish Immigration Board, from their respective internet sites (www.unhcr.org and www.siv.se), downloaded on 15 July 1998.

refugees who, mainly for reasons of protection, need relocation in a new country. Sweden has accepted an annual average of 2700 such refugees between 1990 and 1996¹⁴¹. However, in 1997 Sweden allowed a maximum quota of 1800 persons to come here¹⁴², which is a considerable decrease from former years.

Further more, in relation to asylum seekers coming to Sweden, the Government has declared that¹⁴³:

People, who need and seek protection here, often because their human rights have been violated, shall know that they are welcomed, in accordance with the conventions that Sweden has adhered to and our own legislation. People, who are not in need of protection according to the international and national criteria that Sweden follows, shall also know that they can not be admitted and why. In order for the legislation on migration to fulfill its function, i.e. to guarantee protection for those who really need it, it must be clear, effective and follow the Rule of Law. In the asylum process, everyone shall be met with dignity and respect.

This is the basic concept of the Swedish refugee policy and from it follows that Sweden is committed to admitting into the country those who really needs protection, but not anyone else. The criteria for determining if there is a need, is primarily found in the Swedish legislation but based on, and interpret in accordance with, Sweden's international obligations. One of the most important of these international instruments is the Refugee Convention and its 1967 Protocol Relating to the Status of Refugees¹⁴⁴, which Sweden has ratified¹⁴⁵. As a consequence, Sweden guarantees refuge to anyone who falls within the scope of the Refugee Convention's article 1 (in 1997, 1300 persons received residence permits as convention refugees¹⁴⁶). This article can be found, almost literally translated, in the Swedish Alien Act of 1989 (*Utlänningslagen*) chapter 3, section 2, which reads:

With Refugee is in this law considered an alien, who is outside the country of which he is a citizen, because he feels a well-founded fear of being persecuted due to his race, nationality, membership of a particular social group or due to his religious or political opinion, and who is unable or due to his fear is unwilling to avail himself of the protection of that country. What has been said is applicable no matter if the persecution emanates from that country's authorities or if they cannot protect against persecution from individuals.

¹⁴¹ UNHCR Country Profiles –SWEDEN. Updated: March 1997.

¹⁴² Fact Sheet on Sweden: Immigrants in Sweden, by the Swedish Institute. November 1997, p. 2.

¹⁴³ Prop. 1997/98:173, p. 16.

¹⁴⁴ Adopted by UNGA, on 31 January 1967, and entered into force on 4 October 1967.

¹⁴⁵ Sweden ratified the Refugee Convention in 1954 and the Protocol in 1967.

¹⁴⁶ "Årsstatistik 1997", by the Swedish Immigration Board. From: Aktuellt 1998 v. 5.

Besides this group of Convention refugees, the Aliens Act guarantees protection for “others in need of protection” according to its chapter 3, section 3. This group includes those who:

1. Feel well-founded fear of being punished by death, with corporal punishment or being subjected to torture or other inhuman or degrading treatment or punishment¹⁴⁷.
2. Because of an external or internal conflict need protection or because of an environmental catastrophe are unable to return to their country of origin.
3. Because of their gender or homosexuality feel well-founded fear of persecution.

There are restrictions to the protection awarded by the Aliens Act. According to ch. 3, sec. 4, para. 2, an application may be refused if, there are firm reasons to believe that the applicant poses a threat to the security of the State. This does not apply to those who risk torture or other inhuman or degrading treatment, that group is absolutely protected (ch. 3, sec. 4, para.2, p. 1). It is also possible to send an applicant back to a country (not his country of origin), where he has stayed before coming to Sweden, if he is safe there and protected from being sent back, from there, to his country of origin (ch. 3, sec. 4, para. 2, p. 4 and 5). This is a reflection of the principle of *non-refoulement*, as established in article 33 of the Refugee Convention.

It is also possible to get a residence permit if there are humanitarian reasons for allowing the applicant to stay in Sweden (ch. 2, sec. 4, para. 1, p. 5). What is included in “humanitarian reasons” is not specified anywhere, but it is primarily used for applicants with pure personal reasons, such as having a life-threatening disease or a particularly serious impairment¹⁴⁸.

Generally, it can be noted that the Refugee Convention has been a model for the provisions dealing with refugee status in the Aliens Act. These provisions have also been interpreted with regard to the UNHCR’s Handbook on the Procedures and Criteria for Determining Refugee Status, which was created by the UNHCR to explain various aspects of the Refugee Convention and to guide national authorities dealing with refugees¹⁴⁹. The Aliens Act seems to give sufficient protection for refugees who need it. But, as often, it is the authority, which interprets the provisions, that decides their range of application in practice. At the moment, the refugee policy is rather strict and, as a consequence, the interpretation of the provisions is narrower than ten years ago, and the criteria are set higher.

¹⁴⁷ This will be discussed in detail in ch. 9.5, since it is relevant for this thesis.

¹⁴⁸ ”Handbok –Utlänningsärenden”, by the Swedish Immigration Board, 1997, para. 9.4.

¹⁴⁹ The UNHCR Handbook, para. VII, p. 2.

9.4 The Swedish Immigration Authorities

It is the Ministry of Foreign Affairs (*Utrikesdepartementet*) that co-ordinates the immigration and refugee policy in Sweden, in accordance with the decisions made by the Government and the Parliament.

The implementation of the refugee policy is under the responsibility of the Swedish Immigration Board (*Statens Invandrarverket*)¹⁵⁰. The SIB is the central, administrative authority responsible for receiving asylum seekers, dealing with requests for asylum applications and other immigration issues, such as deciding about visa and working permits (the Aliens Act, ch. 2, sec. 7, para. 1). It is the first instance in cases regarding expulsion and extradition, where decisions rejecting an applicant's request, according to the Aliens Act, ch. 7, sec. 3, para. 1, can be appealed to the Aliens Appeal Board (*utlänningsnämnden*)¹⁵¹.

The AAB is also an administrative agency, but it has powers that are similar to that of a Court of Law¹⁵². It is the final instance in cases regarding extradition and expulsion if it does not decide to hand over a case to the Government. This can be done only under the exceptional circumstances, which are listed in the Aliens Act, ch. 7, sec. 11, para. 2. The list includes the situation where a decision in one case will have implications for more applications with similar reasons for asylum (p. 3), or where guidelines are deemed as necessary to evaluate future cases (p. 4). It also includes situations where the security of the State is involved or the State's relation to another country, or international organization, is involved (p. 2). When referring a case to the government, the AAB must include its own comments to it, giving its opinions and conclusions about the case and explaining why the Government should decide on it. The SIB may also refer a case to the Government, with its comments, but it then has to go through the AAB which also have to include its comments regarding the case (the Aliens Act, ch. 7, sec. 11, para. 3).

An application by an asylum seeker can only be rejected if the process before the SIB has included an oral hearing (the Aliens Act, ch. 11, sec. 1, para. 1). This requirement is only necessary before the AAB if it can speed up or add anything to the process (para. 2). A decision by either authority must be motivated with the reasons for the decision expressly stated (the Aliens Act, ch. 11, sec. 3), which is particularly important if the application has been rejected and can be appealed.

¹⁵⁰ Hereafter abbreviated SIB.

¹⁵¹ Hereafter abbreviated AAB.

¹⁵² There is an inquiry into whether the AAB should be replaced by a special "Aliens' Court". This court would be part of the administrative courts, and an appeal to a "Supreme Aliens' Court" would be possible. For more information see: Government's Directive, Dir. 1997:20 or "Ny behandling av utlänningsärenden", Artikel 14, Nr. 2/98 (98-05-24), by FARR (Flyktinggruppernas och asylkommittéernas riksråd).

When an asylum seeker arrives in Sweden, it is the police authority that has the responsibility for the initial investigation of the application¹⁵³. During the hearings with the applicant, a translator must be present (if it is necessary) to avoid misunderstandings and to get all information through. After the foundation is laid, SIB takes over and makes the complete investigation to sort out all facts and relevant issues, as well as looking into the general human rights situation in the country of origin of the applicant. It then makes its decision based on all the information available. If the application is accepted, the asylum seeker is granted a residence permit. However, if the application is rejected, then the asylum seeker will be expected to leave the country voluntarily or appeal. The decision made by the AAB is based on all the previous material, as well as any new circumstances that the applicant submits. The AAB is also expected to look into the case and get the additional information it needs to make a complete examination of the case¹⁵⁴.

If an application has been rejected, both by SIB and AAB, then the asylum seeker can lodge a renewed request for asylum, if he can put forward new circumstances (the Aliens Act, ch. 2, sec. 5b). The request is dealt with by the AAB only, so there is no possibility for another appeal. This opportunity has been extensively used by asylum seekers, in a last effort to halt expulsion or extradition, and get a new chance. It is important, however, that an asylum seeker does not withhold any information during his first application, just to be able to try again, since this will only backlash on his credibility. As long as new circumstances appear, the asylum seeker can keep lodging renewed applications if the earlier ones are rejected.

9.5 Swedish legal provisions corresponding to Article 3 of the Convention.

Although the Convention entered into force in 1987, the Aliens Act did not contain a specific provision that prohibited extradition, expulsion or *refoulement* of persons to a State where he was in danger of being tortured. It existed in practice but was first introduced in the new Aliens Act of 1989 as an obstacle to enforcement, not as a ground for asylum. This provision, contained in chapter 8 section 1, reads as follows:

Expulsion or extradition may never be enforced to a country if there are reasonable grounds for believing that the alien there would be in danger of suffering capital or corporal punishment or being subjected to torture or other inhuman or degrading treatment or punishment, nor to a country where he is not protected from being sent on to a country where he would be in such a danger.

¹⁵³ Prop. 1996/97:25, p. 132.

¹⁵⁴ "Aliens Appeal Board –a presentation", by the Aliens appeal Board 1998, p. 9.

The prohibition against enforcement of a decision to extradite or expel is absolute in the situations specified by section 1. It can be deduced from the use of the word “never” in the beginning of the section. This is a natural consequence, considering that both article 3 in the Convention and that in the ECHR are absolute.

The direct reason for including this section, was that Sweden had ratified the Convention, as well as the European Convention on the same subject, and that the ECHR also included such a prohibition against enforcement (established through its case law)¹⁵⁵. A general prohibition against enforcement, when the asylum seeker would be exposed to life threatening situations, has been used in practice even before this provision was created¹⁵⁶. However, it is important with an express prohibition, in order to firmly establish the fundamental nature of this provision and avoid any uncertainty.

The meaning of “torture” in the provision should, according to the Government¹⁵⁷, be given the same meaning as in the Convention. The Swedish Constitution mentions torture and corporal punishment separately and, in order to correspond to that, section 1 does the same. However, this is not meant to expand the protection in relation to the Convention, since the Government considers that the Convention includes corporal punishment as a form of torture. In my view there is a difference, since the Convention makes an exception for pain or suffering caused by lawful sanctions, while the Swedish provision has no such exception. It means that, according to the Swedish law, a person cannot be sent to a country where he, as a legal punishment for a crime he has already committed, would be caned or whipped. The Convention, on the other hand, would not consider it as torture since it was part of that country’s legal sanctions for a specific crime, and thus not included under article 3 as a ground for protection. The Swedish provision, therefore, should have a wider application.

In an amendment, which entered into force in 1997¹⁵⁸, the word “reasonable” grounds replaced the word “substantial” grounds, which was used before. The change was done to underline that the level of proof cannot be set too high in cases of such a serious matter, since complete proof can seldom be obtained. “The alien’s story should therefore be accepted if it appears credible and reasonable” according to the government¹⁵⁹. Because these obstacles to enforcement shall be taken into account by the authorities, when they examine a request for asylum (the Aliens Act, ch. 4, sec. 12), the lowered level of proof required, should affect the process to the advantage of the applicant. Unfortunately, it has showed that in practice this has not been

¹⁵⁵ SOU 1995:75, p.142.

¹⁵⁶ ”Utlänningslagen, med kommentarer”, by G. Wiklén and H. Sandesjö, p. 305 and 306.

¹⁵⁷ prop. 1988/89:86, p. 194-195.

¹⁵⁸ *Lag (1996:1379) om ändringar i utlänningslagen*; SOU 1995:75, prop. 1996/97:25, rskr. 1996/97:80.

¹⁵⁹ Prop. 1996/97:25, p. 294, but also underlined by the Government on p. 98 and 102!

the case. The AAB has in a decision¹⁶⁰ stated that the change in the Aliens Act does not include a lowering of the level of proof since, in practice, this lower level has already, before the change, been applied by the authorities. At the SIB, they have also claimed that the change is purely technical and that no material change has occurred¹⁶¹. I will discuss this issue of proof further in chapter 9.6.

It should also be noted that the word "cruel" is missing from the wording of section 1. It is a minor detail, but worth mentioning since it reflects the superiority given to the ECHR, by the Swedish authorities, over other international instruments. It can also be seen in SIB's Handbook, which gives the personnel at SIB guidance about considerations to be made when dealing with asylum applications. Article 3 of the ECHR is mentioned, as a source of consideration, but not the Convention¹⁶².

One further provision, corresponding to the protection in article 3 of the Convention, was added to the Aliens Act in 1997¹⁶³. This provision, ch. 3, sec. 3, para. 1, p. 1, states:

As, others in need of protection, is in this Act considered an alien who under other circumstances than given in section 2 has left the country, in which he is a citizen, because he

1. Feels well-founded fear of being subjected to the death penalty or to corporal punishment or to torture or other inhuman or degrading treatment or punishment.

This provision was included to give express protection to a group of persons who have been able to get asylum before due to the practice of the authorities, but without protection in any provisions¹⁶⁴. It gives the right to asylum to persons who face a real risk of being subjected to torture if returned to their country of origin. The protection in ch. 8, sec.1, is only to protect against enforcement of a decision to extradite or expel, not as ch. 3, sec. 3, para. 1, p. 1, to award asylum to a person. It follows that the latter provision has priority and the first only becomes important if such circumstances arise after a decision to expel or extradite has been taken by the authorities.

This provision is, as mentioned before, absolute (Ch. 3, sec. 4, para. 1, p. 1) in the regard that, no matter who he is or what he has done, he cannot be sent to a country where he risks being tortured. Neither can he be sent to a

¹⁶⁰ Decision on 30 June 1997, by the Aliens Appeal Board. Referred to in: "Beviskraven har inte ändrats", Artikel 14, Nr. 4/97, by FARR.

¹⁶¹ From a telephone interview with Björn Händel, administrator at SIB, on 22 June 1998.

¹⁶² "Handbok –Utlänningsärenden", by, SIB, ch. 9.6.1.

¹⁶³ *Lag (1996:1379) om ändringar i utlänningslagen*; SOU 1995:75, prop. 1996/97:25, rskr. 1996/97:80.

¹⁶⁴ Prop. 1996/97:25, p. 99.

country that will not protect him from being sent to another country where he faces such a risk (the *non-refoulement* principle).

It is also important not to set the level of proof required too high, when applying this provision, due to the difficulties to produce waterproof evidence. This has been underlined by the Government, throughout the bill dealing with this issue¹⁶⁵, and in the SIB Handbook in regard to this provision¹⁶⁶. The Governmental Committee that first suggested the inclusion of this provision, pointed out that when applying the provision guidance should be sought from the jurisprudence of the European Commission of Human Rights and the Committee against Torture¹⁶⁷. One member of the Governmental Committee, Mr. De Geer, added, in a reservation, that the European Commission has a more restrictive interpretation of its article 3, than the Committee against Torture has in regard to its article 3. He therefore suggested that his Committee should have examined the Committee against Torture's requirements thoroughly and make sure that Swedish legislation was on the same level, especially since Sweden had already been found in breach of article 3 in two cases¹⁶⁸.

It appears from reading the two provisions dealing with the protection against torture that they correspond to the Convention and even should be more extensive, since they include other inhuman and degrading treatment as well as corporal punishment, while the Convention only covers torture. Besides, ch. 8, sec. 1, requires "reasonable grounds" where the Convention demands "substantial grounds" to be established to evaluate the risk if a person being subjected to torture. However, as mentioned above, the Swedish authorities interpret those criteria very harsh, while the Committee has a much more lenient interpretation. This will now be exemplified and discussed through the cases Sweden has faced before the Committee.

9.6 Must Sweden adopt a more Convention conform interpretation of its provisions?

As shown above, Swedish legislation appears to be in accordance with article 3 of the Convention. This might be true, but it does not mean that the provisions are interpreted by the authorities in conformity with the Committee's interpretation of article 3. So far, Sweden has been criticized, by the Committee, for not following article 3 in four instances. On the other hand, it must be observed that in 1997, Sweden granted asylum to 700 persons as "others in need of protection", 6400 was admitted due to humanitarian reasons and 1300 were given refugee status¹⁶⁹. Still, since the

¹⁶⁵ Prop. 1996/97:25, p. 98, 102 and 294. (See footnote 159).

¹⁶⁶ The SIB Handbook, ch. 9.3.1.

¹⁶⁷ SOU 1995:75, p. 152.

¹⁶⁸ SOU 1995:75, p. 275.

¹⁶⁹ The SIB Statistics for 1997.

asylum process is of such importance to the asylum seekers, it is very important that all aspects and circumstances, in each case, are thoroughly examined by competent authorities. The Swedish Minister responsible for asylum, Mr. Pierre Schori, has said, in a comment on the view of the Committee in the first case against Sweden, that the case “emphasizes the importance of a particularly diligent and careful handling of cases involving allegations of torture. I assume that this is what happens”¹⁷⁰. Since Sweden has lost three cases after that, it seems as if this is not really how the cases are handled.

In three of the cases, criticizing Sweden, the basis for Sweden’s initial rejection of the asylum seekers has been that the applicants have not been trustworthy and their stories inconsistent and full of contradictions¹⁷¹. For example did Sweden put much weight on the fact that Mrs. Kisoki had not, at first, told the authorities that she had been raped. This information was not given until one year after her arrival in Sweden, when she claimed she had been raped twice. After another two years she claimed to have been raped more than ten times. The Government considered these inconsistencies to have a significant impact on the entire story given by Mrs. Kisoki¹⁷². The Committee pointed out that victims of torture could seldom give a completely accurate account of past experiences and that the general veracity of the story was most important. It further added that the inconsistencies in this case were not material¹⁷³. In the case of Mr. Tala, the Government pointed out that he had changed his grounds for political asylum several times and given different statements to how his injuries were caused (by a key, a knife, a metal object or a gas burner). Because of this the Government considered the medical evidence irrelevant, and concluded that Mr. Tala’s injuries had not been caused through torture¹⁷⁴. Also this time, did the Committee emphasize on the general veracity of the story, given by a victim of torture, rather than on details which were not considered important. It further stressed that the injuries could only have been inflicted intentionally by someone other than Mr. Tala himself, thus accepting the medical evidence¹⁷⁵. In the third case¹⁷⁶, the AAB stated that Mr. Falakaflaki’s account of his political activities was not credible and that, as a consequence, his statement that he had been torture was not trustworthy either. The Committee notes that Mr. Falakaflaki suffers from post-traumatic stress syndrome, and that they have no reason to doubt the general veracity of his story.

¹⁷⁰ ”UN Committee warns Sweden and Switzerland against violating Convention against torture”, by N. Busch, editor. In: Fortress Europe?, Circular letter No. 45, July 1996, p. 5.

¹⁷¹ Kisoki, para. 6.5, Tala, para. 5.4, 7.4 and 7.5.

¹⁷² Kisoki, para. 6.5.

¹⁷³ Kisoki, para. 9.3.

¹⁷⁴ Tala, para. 5.4 and 5.6.

¹⁷⁵ Tala, para. 10.3.

¹⁷⁶ I have not been able to get the actual case. The information here is from: ”FN prickar Sverige på nytt”, Artikel 14, Nr. 3/98 (1998-09-13), by FARR.

In the fourth case, the facts of the case were not in dispute. The case can be seen as a clarification of the absolute nature of article 3, but does not deal with any other issues. Sweden had rejected Mr. Paez request for asylum on the ground that he belonged to a terrorist organization (Sendero Luminoso in Peru) and therefore did not have the right to asylum in accordance with the exception clause in article 1F of the Refugee Convention. Even if these facts were correct, the Committee pointed out that article 3 of the Convention is absolute and no exceptions are allowed¹⁷⁷. After this decision in April 1997, the Swedish Government changed its policy regarding asylum seekers from Peru, who are thought to be members of terrorist groups. In a decision in June 1997¹⁷⁸, the Government stated that this group is at risk of being tortured if returned to Peru and that, at present, no one belonging to this group of asylum seekers should be returned there.

Sweden has also claimed that ch. 8, sec. 1 of the Aliens Act corresponds to article 3 of the Convention¹⁷⁹ and that the same test, that the Committee applies for article 3, is applied by the Swedish authorities to their provision. The Committee has responded to this, in one of the cases¹⁸⁰, by simply stating that in the present case the same test had not been applied. The Committee makes its own examination of the case and reaches a decision based on their own interpretation of article 3.

Seen in the light of these cases, the Swedish authorities need to be more educated about the behavior of torture victims and the long-term impact torture has on a person. They have to accept that the complete truth and 100% consistency can never be presented, especially under the pressing circumstances that an asylum seeker finds himself, when arriving in a new country. They also have to acknowledge that medical documentation from specialist doctors, especially in Sweden, have substance and cannot be rejected due to other issues in the case. Every fact has to, first, be evaluated by itself and then they can be put together to create the whole picture.

However, there are asylum seekers who do fabricate stories and produce false evidence to be allowed to stay, and those who simply do not have enough reasons to be granted asylum. There has been one communication against Sweden¹⁸¹ before the Committee where this was the case. The complainant could not show that he faced personal danger if he was returned to his country of origin. He had written critical articles about that country and been tortured in the past. But, he was not politically active and there were no indications of gross violations of human rights, or of torture of detainees¹⁸². The Committee therefore stated that Sweden had not violated article 3 of the Convention when they decided not to grant the complainant

¹⁷⁷ Paez, para. 14.4 and 14.5.

¹⁷⁸ Government Decision on 19 June 1997, case: UD97/383/MP.

¹⁷⁹ Kisoki, para. 6.3, Paez, para. 5.2, Tala, para. 5.2, I.A.O., para. 5.6.

¹⁸⁰ Tala, para. 10.2.

¹⁸¹ Communication No. 65/1997, I.A.O. v. Sweden.

¹⁸² I.A.O., para. 14.4 and 14.5.

asylum. The authorities must, consequently, be very observant in their examinations to be able to distinguish between those who really lies, or does not need protection, and those who need protection but cannot give a completely coherent story from the beginning. It is a very difficult balance with very high stakes for the applicants so, as mentioned above, the competence, experience and integrity of the decision-makers are very important¹⁸³.

If the Committee adopts the view that Sweden has not followed article 3 in a particular case, then the complainant is not granted asylum automatically. A decision from the Committee only forbids Sweden to expel, extradite or return a person to another State. It does not oblige the State to give asylum or even to let him stay in the country, if the person can be sent to another “safe” country. It is a principle of well-established international law that States have the right to control their entry, residence and expulsion of aliens¹⁸⁴. As a consequence, the person, who has won a complaint against Sweden, must hand in a renewed application for asylum to the AAB. It is not clear whether the decision by the Committee can be considered as a new circumstance (which is required for the formal acceptance of a renewed application), but in practice it has been accepted and asylum granted almost automatically¹⁸⁵. The first case from the Committee was handed over from the AAB to the Government for guidance, in accordance with the Aliens Act, ch. 7, sec. 11, para. 2, p. 4. The Government stated in its decision¹⁸⁶ that:

The Government finds, with particular consideration to the view of the United Nations Committee against Torture, that [...] has given such reasons that it follows that she is to be considered as a refugee according to the Aliens Act ch. 3, sec. 2, and the 1951 Geneva Convention relating to the status of refugees. She therefore has the right to asylum in Sweden.

The AAB has, in the subsequent cases, followed the Government’s lead and granted residence permit to these persons. However, the AAB has not considered the applicants as refugees under the Aliens Act, ch. 3, sec. 2, but as “others in need of protection” under ch. 3, sec. 3, para. 1, p. 1. In its motives to the decisions the AAB has expressly pointed out that it is “with particular consideration to”¹⁸⁷ or “on the basis of”¹⁸⁸ the Committee’s view and the Government’s decision, that the AAB has decided to grant asylum. In order to avoid these forced reasons by the AAB, without any clear foundation in the Swedish law, I think that a provision similar to that in the

¹⁸³ SOU 1995:55, p. 49.

¹⁸⁴ Report of the European Commission of Human Rights, adopted 23 April, 1998, Application No. 32448/96 Hatami v. Sweden, para. 93.

¹⁸⁵ Telephone interviews, on 28 July 1998, with Eva Jagander at the section for Human Rights at the Foreign Ministry and Tommy Lindberg at the AAB.

¹⁸⁶ The Foreign Ministry, Government Decision on 7 November 1996, p. 3 (last paragraph).

¹⁸⁷ The Aliens Appeal Board’s Decision on 23 June 1997.

¹⁸⁸ The Aliens Appeal Board’s Decision on 17 July 1998.

Aliens Act, ch. 8, sec. 10a (regarding inhibition requested by international bodies), should be included. This would create a stable reference for the authorities to follow in cases where Sweden, through its international commitments, is obliged to adhere to the decisions of international bodies.

The question in the heading to this sub-chapter, whether Sweden needs to adopt a more Convention conform interpretation of its provision, consequently has to be answered affirmative, if Sweden wants to avoid violating article 3 in the future.

10 Conclusions

Torture is being systematically practiced in about 40 countries around the world, but it occurs in many more countries. It has been estimated that about half of the world's population lives in countries where they are at risk of being tortured¹⁸⁹. At the same time, the prohibition against torture has been recognized as a norm of customary international law and special instruments have been established to protect against, and prevent, this evil. Only a state, in which torture occurs, can efficiently stop it. However, other states can prevent innocent people from being exposed to torture by letting them stay in their states. For the States that are party to the Convention, that is not an optional possibility but an obligation. Article 3 of the Convention, as interpreted by the Committee, gives solid protection to persons who are in danger of being tortured if returned to their country of origin. Consequently, the State parties have to follow the Convention and let those stay, who would be in danger of being tortured if sent away. Sweden, as a party to the Convention, must therefore make sure that no one is at risk of being tortured if they are returned to their country of origin from Sweden.

Unfortunately, Sweden has been found in breach of article 3 four times by the Committee, but also in breach of article 3 of the ECHR by the European Commission of Human Rights. It is, therefore, important for Sweden to quickly change its interpretation of the relevant asylum provisions, to get them into conformity with the Committee's standards. Especially, since the Government has stated that, countries which join a Convention also has the responsibility to follow it, through legislation and other necessary actions¹⁹⁰.

It is also important that the immigration authorities are educated in how victims of torture think and act, in order to be able to make the correct evaluations of asylum seekers' stories. It is further important that evidence is taken seriously and not brushed aside because of other weaknesses in an asylum seeker's story. Every fact and statement must, necessarily, be evaluated on its own merits at first. The collected evaluation can then be done by taking all the circumstances into account, to the degree each component deserves. This is a very difficult evaluation but since the applicant's life might be at stake, it is very important that competent decision-makers make a thorough and objective evaluation, with consideration to the particulars of every case. No case is the same, and sometimes what seems highly unlikely and unbelievable is the truth, so it is imperative, for those involved, to keep an open mind.

To conclude this thesis, I would like to mention a proverb that I find rather catching. "Make sure your own backyard is clean, before complaining about

¹⁸⁹ "Kampen mod Tortur –en dansk mærkesag", from: Tidskrift for sygeplejersker, Nr. 25/98, 19 June 1998, p. 17.

¹⁹⁰ UU 1985/86:11, p. 4, and Skr. 1997/98:89, p. 32.

your neighbor's". It would be useful for Sweden to keep it in mind when they criticize other countries for their poor human rights records. If Sweden does not live up to its obligations, it will lose its possibilities to, in a credible way, act as an activist on human rights issues. This has been acknowledged by the Government recently¹⁹¹, so hopefully there will soon be some changes to the better in Sweden's interpretation of article 3 of the Convention.

¹⁹¹ Skr. 1997/98:89, p. 32.

11 Appendix 1

1. The American Convention on Human Rights.

Adopted by the O.A.S. in 1969, and entered into force on 18 July 1978.

Article 5, paragraph 2:

No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

Article 27, para. 2, adds that the prohibition is absolute under all circumstances.

2. The African Charter on Human and Peoples' Rights.

Adopted by the 18th Assembly of Heads of State and Government in June 1981, and entered into force on 1 October 1986.

Article 5:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment or treatment shall be prohibited.

There is no provision relating to derogation or suspension of this article.

3. The Universal Islamic Declaration of Human Rights.

Adopted by the Islamic Council on 19 September 1981.

Article 7:

No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests.

There is no provision relating to derogation or suspension of this article.

11 Appendix 2

1. The Code of Conduct for Law Enforcement Officials.

Adopted by the UN General Assembly on 17 December 1979 (Res. 34/169).

Article 5:

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

2. The Standard Minimum Rules for the Treatment of Prisoners.

Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders on 30 August 1955 and approved by the UN Economic and Social Council on 31 July 1957.

Article 31

Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offenses.

3. The four Geneva Conventions of 1949¹⁹².

Signed on 12 August 1949 and entered into force on 21 October 1950.

Article 3 (Common to all four Conventions)

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, to the following provisions: (1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, shall in all

¹⁹² Geneva Convention (I) for the amelioration of the condition of the wounded and sick in armed forces in the field. Geneva Convention (II) for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea. Geneva Convention (III) relative to treatment of prisoners of war. Geneva Convention (IV) relative to the protection of civilian persons in time of war.

circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking hostage;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.

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