



## **Human Rights Council**

**8<sup>th</sup> Session of the Working Group on the Universal Periodic Review  
3-14 May 2010**

### **International Commission of Jurists submission on the universal periodic review of Sweden**

*November 2009*

The International Commission of Jurists (ICJ) welcomes this opportunity to submit its comments on the universal periodic review of Sweden. In this submission, the ICJ draws attention to the absence of prosecutions related to Swedish involvement in renditions; to the potential of a new law on interception of communications to violate privacy rights; and to issues related to deportation proceedings and administrative detention of migrants.

#### **Renditions: The Cases of Mohammed Alzery and Ahmed Agiza**

The involvement of Swedish authorities in two cases involving the US CIA renditions from Sweden to Egypt has still not been fully addressed. The removal of Mohammed Alzery from Sweden to Egypt by CIA agents with the co-operation of Swedish officials was found by the Human Rights Committee to have violated Article 7 of the International Covenant on Civil and Political Rights (ICCPR). The removal of Ahmed Agiza under similar circumstances was found by the Committee Against Torture to have violated Articles 3 and 22 of the Convention against Torture (CAT).<sup>1</sup> The practice of rendition, including as applied to these victims, involves multiple human rights violations, including torture and other ill-treatment, enforced disappearance, denial of recognition as a person before the law and arbitrary detention.

Despite these findings, no criminal investigation or prosecutions have been instituted concerning the renditions. Following a private criminal complaint of May 2004, the Stockholm district prosecutor decided not to initiate a preliminary investigation as to whether a criminal offence had been committed in connection with the enforcement of the decision to expel the two men; the Parliamentary Standing Committee on the Constitution similarly decided that no criminal

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<sup>1</sup> *Agiza v Sweden*, CAT/C.34/D.233/2003 (2005); *Alzery v Sweden* CCPR/C/88/D/1416/2005; See also the Report of the Parliamentary Ombudsman, Mats Melin, Reg. No.2169-2004, *A review of the enforcement by the Security Police of a Government Decision to expel two Egyptian citizens*.

investigation should be instituted against members of the government.<sup>2</sup> Reasons for the failure to prosecute appear to have included the junior status of the officials involved, the fact that they were acting pursuant to a political decision, and the importance of the Security Police's national security and counter-terrorism role.<sup>3</sup>

The Parliamentary Ombudsman, who investigated the actions of Swedish Security Police involved in the rendition, decided not to conduct a criminal investigation, but rather an "informational" inquiry through which he could compel testimony from officials. The Ombudsman's investigation did not examine the issue of the command or superior responsibilities of senior officials, or hear from any foreign agents, as such an inquiry was set to go beyond his mandate.<sup>4</sup>

The Human Rights Committee in *Alzery v Sweden* found that the failure to institute criminal prosecutions in respect of the conduct of either Swedish or foreign officials involved in the rendition of Mr Alzery violated Article 7 ICCPR read in conjunction with Article 2 ICCPR, noting that "as a result of the combined investigations of the Parliamentary Ombudsman and the prosecutorial authorities, neither Swedish officials nor foreign agents were the subject of a full criminal investigation, much less the initiation of formal charges [...]"<sup>5</sup> The Committee against Torture in its *Concluding Observations* on Sweden regretted the lack of "an in-depth investigation and prosecution of those responsible, as appropriate."<sup>6</sup>

The ICJ welcomes the fact that in July 2008 the Swedish Chancellor of Justice ruled that Mohammed Alzery be awarded 3 million SEK<sup>7</sup> in damages in a settlement and that, in September 2008, Ahmed Agiza was awarded the same sum.<sup>8</sup> The ICJ is concerned, however, that Sweden has failed to provide full reparation to the two victims, which should include not only compensation, but also rehabilitation and guarantees of non-repetition.<sup>9</sup> Sweden has yet to issue an apology to either victim or to take measures aimed at their restitution or rehabilitation. It has declined to allow Ahmed Agiza to return to Sweden to be reunified with his family and receive necessary medical rehabilitation. Ahmed Agiza remains imprisoned in Egypt following an unfair trial, in contravention of international law.

Finally, the disclosure of Swedish involvement in the renditions also places an obligation on the Swedish authorities to take preventative measures to guard against future involvement in such operations.<sup>10</sup> These preventive measures should include effective, independent and impartial judicial review of all decisions on removal.<sup>11</sup> They should also include a commitment not to use diplomatic assurances against

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<sup>2</sup> The decision of the district prosecutor was confirmed by the Prosecutor Director in April 2004 and the Prosecutor General declined to reopen the investigation in April 2005. *ibid*, paras.3.22-3.27

<sup>3</sup> *ibid* para.3.22, 3.253.27

<sup>4</sup> *ibid*, Para.4.15; Report of the Ombudsman, *op cit*.

<sup>5</sup> *Alzery v Sweden*, *op cit*, Para.11.7

<sup>6</sup> CAT, *Concluding Observation of the Committee against Torture: Sweden*, 4 June 2008, CAT/C/SWE/CO/2, paragraph 13.

<sup>7</sup> See Press Article at <http://www.iht.com/articles/2008/07/03/europe/sweden.5-297821.php> .

<sup>8</sup> See Press Article at <http://www.shc.se/en/4/110/1324/>; <http://www.thelocal.se/14456/20080919/> .

<sup>9</sup> See, *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly in resolution 60/147 of 16 December 2005, paragraphs 15-24.

<sup>10</sup> CAT *Concluding Observations*, *op cit*, para.13.

<sup>11</sup> *Agiza v Sweden*, *op cit*.

torture or ill-treatment as a basis for removals to countries where there is a real risk of such treatment on return.

**The Working Group and the Human Rights Council should:**

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

**Interception of Communications: The Law on Signals Intelligence in Defence Operations**

The new Law on Signals Intelligence in Defence Operations, which will come into force on 1 December 2009, provides for wide powers to intercept electronic communications that cross Swedish borders. The Law, originally approved by the Swedish Parliament in June 2008,<sup>12</sup> was highly controversial, and was the subject of amendments approved by the Parliament in May 2009,<sup>13</sup> which aim to restrict the scope of the law and provide additional safeguards to limit intrusions on privacy. Despite these amendments, there remain concerns that the law is insufficiently precise in its wording to prevent disproportionate interferences with the right to respect for private life, contrary to Sweden's international human rights law obligations, including under Article 17 ICCPR.

The Law, as amended, provides for a signals agency (which in practice is likely be the National Defence Radio Establishment ("FRA" in Swedish)) to acquire electronic signals data for specified purposes,<sup>14</sup> where either the sender or the recipient is located outside Sweden,<sup>15</sup> and where the communications match identified search terms, which must not relate to individual persons and must be designed to minimise intrusion on privacy.<sup>16</sup> The specified purposes for which data may be acquired, however, are wide: they include identification of external military threats to the country; conditions for Swedish participation in peace missions or humanitarian assistance, or threats to the safety of Swedish interests in the implementation of such efforts; strategic relationships for countering international terrorism or other serious cross-border crime; threatening essential national interests; and information on conflicts abroad, with consequences for international

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<sup>12</sup> Law 2008:717

<sup>13</sup> Law 2008/09: 201

<sup>14</sup> 2008/09: 201, §1

<sup>15</sup> *ibid*, § 2.

<sup>16</sup> *Ibid*, § 3. The interception cannot directly target an individual person: §4.

security.<sup>17</sup> The ICJ is concerned that these purposes remain too uncertain in scope and allow for potentially very wide acquisition of data, with consequences for compliance with rights to privacy under Article 17 ICCPR.

The ICJ welcomes the fact that the recent amendments also require signals interceptions to be authorised, except in certain urgent cases<sup>18</sup> by an independent quasi-judicial body, the special Defence Intelligence Court.<sup>19</sup> The Court can authorise gathering of signals data according to specific purposes, search terms, signal carriers, time limitations and other restrictions necessary to protect privacy.<sup>20</sup>

The ICJ remains concerned however that the law contains insufficient safeguards to ensure that those whose privacy is affected by the acquisition of data are able to challenge the acquisition. It appears likely that under the amended law, many of those whose communications are intercepted will not be notified of that fact: the law provides that a person must be informed of the interception only if search terms are used which are directly attributable to that person,<sup>21</sup> and that such notification may be postponed for security reasons.<sup>22</sup> Before the Defence Intelligence Court, privacy interests of affected persons are to be represented by a privacy protection officer<sup>23</sup> who may not however disclose without authorisation information concerning the case<sup>24</sup> and who therefore will not assist individuals affected in ascertaining whether their communications have been intercepted, and in challenging such interception, and obtaining a remedy where appropriate. Although international human rights law allows that security considerations may justify postponing notification to an individual that he or she is subject to surveillance,<sup>25</sup> mechanisms to allow individuals to be informed of and challenge interference with their privacy rights provide an important safeguard where there is large-scale acquisition of data.<sup>26</sup>

**The Working Group and the Human Rights Council should recommend that the Swedish government:**

- **Closely monitor the interpretation and application of the law to prevent any interference with privacy that is not strictly necessary for a compelling and legitimate purpose and proportionate to that purpose, and sufficiently certain to comply with the principle of legality;**
- **Establish an independent review to re-assess, after one year, the permitted purposes for which signal data may be acquired to ensure that they are sufficiently precise and limited to comply with the principle of legality,**

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<sup>17</sup> §1, 2008/09:201

<sup>18</sup> Ibid, §5b

<sup>19</sup> Ibid, §4; See also Draft Law on the Defense Intelligence Court, Prop.2008/09:201.

<sup>20</sup> Prop.2008/09:201, §5a

<sup>21</sup> Ibid, §11a

<sup>22</sup> Ibid, §11b.

<sup>23</sup> 2008/09: 201§5.

<sup>24</sup> Ibid §8

<sup>25</sup> In *Klass v Germany*, Application no. 5029/71, Judgment of 6 September 1978, the European Court of Human Rights held that although in principle there should be ex post facto notification of secret surveillance – in that case directed at specific individuals as part of a criminal investigation - notification could be postponed until such point as it would not jeopardize the purpose of the surveillance.

<sup>26</sup> See *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 804<sup>th</sup> meeting of the Ministers' Deputies, Articles V and VI(1), para.10: "every individual should have the right to ascertain in an intelligible form, whether, and if so, what, personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files."

- and that they do not permit arbitrary or disproportionate interferences with the right to privacy;
- provide for access to the courts by concerned persons in order to obtain binding orders requiring disclosure as to whether such persons have been or are being subject to acquisition of data; and ensure that the courts have jurisdiction to order the rectification or deletion of such information if it has been unlawfully acquired or retained in contravention of international human rights law.

### **Asylum and Immigration: access to information in expulsion procedures**

The ICJ is concerned that, in expulsion proceedings, information may be withheld from the person who is the subject of the case, for security reasons. The Administrative Court Procedure Act (1971:291) provides for *in camera* hearings before administrative courts including the Migration Court of Appeal<sup>27</sup> where information protected by the Secrecy Act (1981:100) is to be presented in court.<sup>28</sup> The Council of Europe's Commissioner for Human Rights in 2007 reported that "[a] party's right to access to information in asylum cases is guaranteed by law, but can be restricted with regard to sensitive information. Decisions in security cases can be based on documents or information that are not revealed to the individual concerned, due to reasons of national security, activities of the National Police Board or protection of an informant."<sup>29</sup>

In this regard, the ICJ recalls that the principle of equality of arms, by which parties to the proceedings must have access to all material adduced against them, is an essential element of the right to a fair trial (Article 14 ICCPR).<sup>30</sup> The Human Rights Committee in its 2009 concluding observations on Sweden expressed concern at the withholding of information in deportation hearings, and recommended that Sweden should ensure that asylum seekers have the right to access adequate information in order to answer arguments and evidence used in their case.<sup>31</sup>

**The Working Group and the Human Rights Council should recommend that the Government make the necessary changes to law and practice to ensure that in asylum deportation hearings, evidence is not withheld from the asylum seeker on national security grounds and the right to equality of arms is protected.**

### **Detention of aliens pending expulsion**

Pending expulsion, adults may, as a general rule, be detained in custody for a maximum period of two weeks or two months, but this can be extended on exceptional grounds.<sup>32</sup> The detention must be reviewed periodically and the final

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<sup>27</sup> Aliens Act (2005:716) "[t]he general provisions on county administrative courts and administrative courts of appeal and their administration of justice apply to the migration courts and the Migration Court of Appeal and to the procedure in these courts unless otherwise provided in this Act." Aliens Act (2005:716), Ch. 16 §1(2) (unofficial translation).

<sup>28</sup> Administrative Court Procedure Act (1971:291), § 16 (unofficial translation).

<sup>29</sup> Council of Europe's Commissioner for Human Rights, *Memorandum to the Swedish Government: Assessment of the progress made in implementing the 2004 recommendations of the Council of Europe Commissioner for Human Rights*, 16 May 2007, CommDH(2007)10, paragraph 31.

<sup>30</sup> Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.

<sup>31</sup> Concluding Observations *op cit* para. 17

<sup>32</sup> Aliens Act (2005:716), Ch. 10 § 4(2).

responsibility for the review in security cases lies with the Migration Court of Appeal.<sup>33</sup> The Human Rights Committee, in its 2009 Concluding Observations on Sweden, expressed concern that some asylum seekers were detained for lengthy periods and recommended that Sweden should permit detention of asylum seekers only in exceptional circumstances, and limit the length of such detentions.<sup>34</sup> This reflects obligations under international human rights law that length of immigration detention should be proportionate to the circumstances of the individual case.<sup>35</sup>

**The Working Group and the Human Rights Council should recommend that the Government review the law and practice in relation to “exceptional” lengthy detention of asylum seekers and impose maximum limitations on such detention.**

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<sup>33</sup> Swedish Act on Special Control of Aliens (1991:572), § 5 referring to Aliens Act (2005:716), Ch. 10 §§ 1 and 16.

<sup>34</sup> Concluding Observations op cit para.17.

<sup>35</sup> ECtHR, *Saadi vs. United Kingdom*, Application no. 13229/03, 29 January 2008, para. 72; Resolution 1521(2006) on Mass Arrival of Irregular Migrants on Europe’s Southern Shores, Parliamentary Assembly of the Council of Europe, 5 October 2006, para. 16.4.