REFUGEES

III. JURISPRUDENCE

ICCPR

- *A. v. Australia* (560/1993), ICCPR, A/52/40 vol. II (3 April 1997) 125 (CCPR/C/59/D/560/1993) at paras. 9.1-9.6 and Individual Opinion by Prafullachandra N. Bhagwati (concurring), 145.

...
9.1 The Human Rights Committee has examined the present communication in the light of all the information placed before it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol to the Covenant. Three questions are to be determined on their merits:

> (a) whether the prolonged detention of the author, pending determination of his entitlement to refugee status, was "arbitrary" within the meaning of article 9, paragraph 1;
>
> (b) whether the alleged impossibility to challenge the lawfulness of the author's detention and his alleged lack of access to legal advice was in violation of article 9, paragraph 4...
>
> ...

9.2 On the first question, the Committee recalls that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.

9.3 The Committee agrees that there is no basis for the author's claim that it is *per se* arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.

9.4 The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a

need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1.

9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act of 5 May 1992; after that date, the domestic courts retained that power with a view to ordering the release of a person if they found the detention to be unlawful under Australian law. In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is "unlawful" either under the terms of domestic law or within the meaning of the Covenant. As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

9.6 As regards the author's claim that article 9, paragraph 4, encompasses a right to legal assistance in order to have access to the courts, the Committee notes from the material before it that the author was entitled to legal assistance from the day he requested asylum and would have had access to it, had he requested it. Indeed, the author was informed on 9 December 1989, in the attachment to the form he signed on that day, of his right to legal assistance. This form was read in its entirety to him in Kampuchean, his own language, by a certified interpreter. That the author did not avail himself of this possibility at that point in time

cannot be held against the State party. Subsequently (as of 13 September 1990), the author sought legal advice and received legal assistance whenever requesting it. That A was moved repeatedly between detention centres and was obliged to change his legal representatives cannot detract from the fact that he retained access to legal advisers; that this access was inconvenient, notably because of the remote location of Port Hedland, does not, in the Committee's opinion, raise an issue under article 9, paragraph 4.

...

Individual Opinion by Prafullachandra N. Bhagwati

I am in agreement with the opinion rendered by the Committee save and except that in regard to paragraph 9.5, I would prefer the following formulation:

> "9.5 The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act on 5 May 1992; after that date, the domestic courts retained the power of judicial review of detention with a view to ordering the release of a person if they found the detention to be unlawful. But with regard to a particular category of persons falling within the meaning of the expression 'designated person', in the Migration Amendment Act, the power of the courts to review the lawfulness of detention and order release of the detention was found unlawful, was taken away by Section 54R of the Migration Amendment Act. If the detained person was a 'designated person' the courts had no power to review the continued detention of such person and order his/her release. The only judicial review available in such a case was limited to a determination of the fact whether the detained person was a 'designated person' and if he was, the court could not proceed further to review the lawfulness of his detention and order his/her release. The author in the present case, being admittedly a 'designated person', was barred by Section 54R of the Migration Amendment Act from challenging the lawfulness of his continued detention and seeking his release by the courts."

But it was argued on behalf of the State that all that article 9, paragraph 4, of the Covenant requires is that the person detained must have the right and opportunity to take proceedings before a court for review of lawfulness of his/her detention and lawfulness must be limited merely to compliance of the detention with domestic law. The only inquiry which the detained person should be entitled to ask the court to make under article 9, paragraph 4, is whether the detention is in accordance with domestic law, whatever the domestic law may be. But this would be placing too narrow an interpretation on the language of article 9, paragraph 4, which embodies a human right. It would not be right to adopt an interpretation which will attenuate a human right. It must be interpreted broadly and expansively. The

interpretation contended for by the State will make it possible for the State to pass a domestic law virtually negating the right under article 9, paragraph 4, and making non-sense of it. The State could, in that event, pass a domestic law validating a particular category of detentions and a detained person falling within that category would be effectively deprived of his/her right under article 9, paragraph 4. I would therefore place a broad interpretation on the word "lawful" which would carry out the object and purpose of the Covenant and in my view, article 9, paragraph 4, requires that the court be empowered to order release "if the detention is not lawful", that is, the detention is arbitrary or incompatible with the requirement of article 9, paragraph 1, or with other provisions of the Covenant. It is no doubt true that the drafters of the Covenant have used the word "arbitrary" along with "unlawful" in article 17 while the word "arbitrary" is absent in article 9, paragraph 4. But it is elementary that detention which is arbitrary is unlawful or in other words, unjustified by law. Moreover the word "lawfulness" which calls for interpretation in article 9, paragraph 4, occurs in the Covenant and must therefore be interpreted in the context of the provisions of the Covenant and having regard to the object and purpose of the Covenant. This conclusion is furthermore supported by article 9, paragraph 5, which governs the granting of compensation for detention "unlawful" either under the terms of the domestic law or within the meaning of the Covenant or as being arbitrary. Since the author in the present case was totally barred by Section 54R of the Migration Amendment Act from challenging the "lawfulness" of his detention and seeking his release, his right under article 9, paragraph 4, was violated.

- *Adu v. Canada* (654/1995), ICCPR, A/52/40 vol. II (18 July 1997) 304 (CCPR/C/60/D/654/1995) at para. 6.3.

...
6.3 As regards the author's claim that he did not have a fair hearing, once the Federal Trial Court Division rejected the author's application for leave to appeal which was based, *inter alia*, on allegations of bias, no further domestic remedies were available. The author claims that the hearing was not fair, as one of the two Commissioners who participated was of Ghanaian origin and a member of the Ewe tribe whose hostile attitude towards Ghanaian refugees was said to be well known among members of the Ghanaian community in Montreal. However, neither the author nor his counsel raised objections to the participation of the Commissioner in the hearing until after the author's application for refugee status had been dismissed despite the fact that the grounds for bias were known to the author and/or his counsel at the beginning of the hearing. The Committee is therefore of the opinion that the author has failed to substantiate, for purposes of admissibility, his claim that his right to a fair hearing by an impartial tribunal was violated. In the circumstances, the Committee need not decide whether or not the decision in the author's refugee claim was a determination "of his rights and obligations in a suit at law", within the meaning of article 14, paragraph 1, of the Covenant.

REFUGEES

- *A. R. J. v. Australia* (692/1996), ICCPR, A/52/40 vol. II (28 July 1997) 205 (CCPR/C/60/D/692/1996) at paras. 6.4, 6.8-6.15 and 7.

...
6.4 The author has claimed a violation of article 14, paragraph 7, because he considers that a retrial in Iran in the event of his deportation to that country would expose him to the risk of double jeopardy. The Committee recalls that article 14, paragraph 7, of the Covenant does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more states - this provision only prohibits double jeopardy with regard to an offence adjudicated in a given State. 66/ Accordingly, this claim is inadmissible *ratione materiae*...as incompatible with the provisions of the Covenant.
...
6.8 What is at issue in this case is whether by deporting Mr. J. to Iran, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant. States parties to the Covenant must ensure that they carry out all their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with the Covenant. Relevant for the consideration of this issue is the State party's obligation, under article 2, paragraph 1, of the Covenant, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most fundamental of these rights.

6.9 If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.

6.10 With respect to possible violations by Australia of articles 6, 7 and 14 of the Covenant by its decision to deport the author to Iran, three related questions arise:

> (a) Does the requirement under article 6, paragraph 1, to protect the author's right to life and Australia's accession to the Second Optional Protocol to the Covenant prohibit the State party from exposing the author to the real risk (that is, the necessary and foreseeable consequence) of being sentenced to death and losing his life in circumstances incompatible with article 6 of the Covenant as a consequence of deportation to Iran?
>
> (b) Do the requirements of article 7 prohibit the State party from exposing the author to the necessary and foreseeable consequence of treatment contrary to article 7 as a result of his deportation to Iran?
>
> (c) Do the fair trial guarantees of article 14 prohibit Australia from deporting

> the author to Iran if deportation exposes him to the necessary and foreseeable consequence of violations of due process guarantees laid down in article 14?

6.11 The Committee notes that article 6, paragraph 1, of the Covenant must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Australia has not charged the author with a capital offence but intends to deport him to Iran, a State which retains capital punishment. If the author is exposed to a real risk of a violation of article 6, paragraph 2, in Iran, this would entail a violation by Australia of its obligations under article 6, paragraph 1.

6.12 In the instant case, the Committee observes that Mr. J.'s allegation that his deportation to Iran would expose him to the "necessary and foreseeable consequence" of a violation of article 6 has been refuted by the evidence which has been provided by the State party. Firstly and most importantly, the State party has argued that the offence of which he was convicted in Australia does not carry the death penalty under Iranian criminal law; the maximum prison sentence for trafficking the amount of cannabis the author was convicted of in Australia would be five years in Iran, i.e. less than in Australia. Secondly, the State party has informed the Committee that Iran has manifested no intention to arrest and prosecute the author on capital charges, and that no arrest warrant against Mr. J. is outstanding in Iran. Thirdly, the State party has plausibly argued that there are no precedents in which an individual in a situation similar to the author's has faced capital charges and been sentenced to death.

6.13 While States parties must be mindful of their obligations to protect the right to life of individuals subject to their jurisdiction when exercising discretion as to whether or not to deport said individuals, the Committee does not consider that the terms of article 6 necessarily require Australia to refrain from deporting an individual to a State which retains capital punishment. The evidence before the Committee reveals that both the judicial and immigration instances seized of the case heard extensive arguments as to whether the author's deportation to Iran would expose him to a real risk of violation of article 6. In the light of these circumstances, and especially bearing in mind the considerations in paragraph 6.12 above, the Committee considers that Australia would not violate the author's rights under article 6 if the decision to deport him to Iran is implemented.

6.14 ...The Committee does not take lightly the possibility that if retried and resentenced in Iran, the author might be exposed to a sentence of between 20 and 74 lashes. But the risk of such treatment must be real, i.e. be the necessary and foreseeable consequence of deportation to Iran. According to the information provided by the State party, there is no evidence of any actual intention on the part of Iran to prosecute the author. On the contrary, the State party has presented detailed information on a number of similar deportation cases in which no prosecution was initiated in Iran. Therefore, the State party's argument that it is extremely unlikely that Iranian citizens who already have served sentences for drug-related sentences

abroad would be re-tried and re-sentenced is sufficient to form a basis for the Committee's assessment on the foreseeability of treatment that would violate article 7. Furthermore, treatment of the author contrary to article 7 is unlikely on the basis of precedents of other deportation cases referred to by the State party. These considerations justify the conclusion that the author's deportation to Iran would not expose him to the necessary and foreseeable consequence of treatment contrary to article 7 of the Covenant; accordingly, Australia would not be in violation of article 7 by deporting Mr. J..

6.15 ...In the Committee's opinion, the author has failed to provide material evidence in substantiation of his claim that if deported, the Iranian judicial authorities would be likely to violate his rights under article 14, paragraphs 1 and 3, and that he would have no opportunity to challenge such violations. In this connection, the Committee notes the information provided by the State party that there is provision for legal representation before the tribunals which would be competent to examine the author's case in Iran, and that there is provision for review of conviction and sentence handed down by these courts by a higher tribunal. The Committee recalls that there is no evidence that Mr. J. would be prosecuted if returned to Iran. It cannot therefore be said that a violation of his rights under article 14, paragraphs 1 and 3, of the Covenant would be the necessary and foreseeable consequence of his deportation to Iran.

7. The Human Rights Committee...is of the view that the facts as found by the Committee do not reveal a violation by Australia of any of the provisions of the Covenant.

Notes

...

66/ See decision on case No. 204/1986 (*A. P. v. Italy*), declared inadmissible 2 November 1987, paragraphs 7.3 and 8.

- *G. T. v. Australia* (706/1996), ICCPR, A/53/40 vol. II (4 November 1997) 184 (CCPR/C/61/D/706/1996) at paras. 8.1-8.7 and 9.

...

8.1 What is at issue in this case is whether by deporting T. to Malaysia, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant. States parties to the Covenant must ensure that they carry out all their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with the Covenant. Relevant for the consideration of this issue is the State party’s obligation, under article 2, paragraph 1, of the Covenant, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the

Covenant. The right to life is the most fundamental of these rights.

8.2 If a State deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.

8.3 The Committee observes that article 6, paragraphs 1 and 2 read together, allows the imposition of the death penalty for the most serious crimes, but that the Second Optional Protocol , to which Australia is a party, provides that no one within the jurisdiction of a State party shall be executed and that the State party shall take all necessary measures to abolish the death penalty in its jurisdiction. The provisions of the Second Optional Protocol are to be considered as additional provisions to the Covenant.

8.4 In cases like the present case, a real risk is to be deducted from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases. The Australian Government is deporting T. from its territory because he has no entitlement to remain in Australia; Malaysia has not requested T.'s return. Although the Committee considers that the "assurances" given by the Malaysian Government do not as such preclude the possibility of T.'s prosecution for exporting or possessing drugs, nothing in the information before the Committee points to any intention on the part of Malaysian authorities to prosecute T. The State party itself has made investigations into the possibility of the imposition of the death sentence for T. and has been informed that in similar cases no prosecution has occurred. In the circumstances, it cannot be concluded that it is a foreseeable and necessary consequence of T.'s deportation that he will be tried, convicted and sentenced to death.

8.5 The Committee therefore concludes that Australia would not violate T.'s rights under article 6 of the Covenant and article 1 of the Second Optional Protocol if the decision to deport him were to be implemented.

8.6 In assessing whether the author could be exposed to a real risk of a violation of article 7 of the Covenant, because he might be subjected to caning, considerations similar to those detailed above in paragraph 8.4 apply. The information before the Committee does not indicate that any treatment in violation of article 7 of the Covenant is the foreseeable and necessary consequence of T.'s deportation from Australia. The Committee concludes that Australia would not violate its obligations under article 7 of the Covenant if it deports T. to Malaysia.

8.7 With regard to the possible preventative detention of T. under the Dangerous Drugs (Special Preventative Measures) Act 1985, the Committee notes that it is likely that T. will be detained for questioning upon his return to Malaysia. According to the State party,

however, preventative detention is not automatic and is not likely to occur in the instant case, taking into account T.'s limited knowledge of the trafficking in which he was involved. The author has not challenged this information, and only relies on the existence of the law in claiming that there is a risk that her husband may be subject to preventative detention. In the circumstances, the Committee cannot conclude that T.'s deportation to Malaysia would amount to a violation by Australia of his rights under article 9 of the Covenant.

...

9. The Human Rights Committee...is of the view that the facts before it do not reveal a violation by Australia of any of the provisions of the Covenant.

- *Karker v. France* (833/1998), ICCPR, A/56/40 vol. II (26 October 2000) 144 at paras. 2.1-2.3, 9.2 and 9.3.

...

2.1 In 1987, Mr. Karker, who is co-founder of the political movement Ennahdha, fled Tunisia, where he had been sentenced to death by trial in absentia. In 1988, the French authorities recognized him as a political refugee. On 11 October 1993, under suspicion that he actively supported a terrorist movement, the Minister of the Interior ordered him expelled from French territory as a matter of urgency. The expulsion order was not, however, enforced, and instead Mr. Karker was ordered to compulsory residence in the department of Finistère. On 6 November 1993, Mr. Karker appealed the orders to the Administrative Tribunal of Paris. The Tribunal rejected his appeals on 16 December 1994, considering that the orders were lawful. The Tribunal considered that from the information before it, it appeared that the Ministry of the Interior was in possession of information showing that Mr. Karker maintained close links with Islamic organizations which use violent methods, and that in the light of the situation in France the Minister could have concluded legally that Mr. Karker's expulsion was imperative for reasons of public security. It also considered that the resulting interference with Mr. Karker's family life was justifiable for reasons of *ordre public*. The Tribunal considered that the compulsory residence order, issued by the Minister in order to allow Mr. Karker to find a third country willing to receive him, was lawful ... in view of the fact that Mr. Karker was a recognized political refugee and could not be returned to Tunisia. On 29 December 1997, the Council of State rejected Mr. Karker's further appeal.

2.2 Following the orders, Mr. Karker was placed in a hotel in the department of Finistère, then he was transferred to Brest. Allegedly because of media pressure, he was then transferred to St. Julien in the Loire area, and from there to Cayres, and subsequently to the South East of France. Lastly, in October 1995, he was assigned to Digne-les-Bains (Alpes de Haute Provence), where he has resided since. According to the order fixing the conditions of his residence in Digne-les-Bains, Mr. Karker is required to report to the police once a day.

The author emphasizes that her husband has not been brought before the courts in connection with the suspicions against him.

2.3 The author states that she lives in Paris with her six children, a thousand kilometres away from her husband. She states that it is difficult to maintain personal contact with her husband. On 3 April 1998, Mr. Karker was sentenced to a suspended sentence of six months' imprisonment for having breached the compulsory residence order by staying with his family during three weeks.

...

9.2. The Committee notes that Mr. Karker's expulsion was ordered in October 1993, but that his expulsion could not be enforced, following which his residence in France was subjected to restrictions of his freedom of movement. The State party has argued that the restrictions to which the author is subjected are necessary for reasons of national security. In this respect, the State party produced evidence to the domestic courts that Mr. Karker was an active supporter of a movement which advocates violent action. It should also be noted that the restrictions of movement on Mr. Karker allowed him to reside in a comparatively wide area. Moreover, the restrictions on Mr. Karker's freedom of movement were examined by the domestic courts which, after reviewing all the evidence, held them to be necessary for reasons of national security. Mr. Karker has only challenged the courts' original decision on this question and chose not to challenge the necessity of subsequent restriction orders before the domestic courts. In these circumstances, the Committee is of the view that the materials before it do not allow it to conclude that the State party has misapplied the restrictions in article 12, paragraph 3.

9.3 The Committee observes that article 13 of the Covenant provides procedural guarantees in case of expulsion. The Committee notes that Mr. Karker's expulsion was decided by the Minister of the Interior for urgent reasons of public security, and that Mr. Karker was therefore not allowed to submit reasons against his expulsion before the order was issued. He did, however, have the opportunity to have his case reviewed by the Administrative Tribunal and the Council of State, and at both procedures he was represented by counsel. The Committee concludes that the facts before it do not show that article 13 has been violated in the present case.

- *Jalloh v. The Netherlands* (794/1998), ICCPR, A/57/40 vol. II (26 March 2002) 144 (CCPR/C/74/D/794/1998) at paras. 2.1-2.4, 8.2, 8.3 and 9.

...

2.1 The author states that he is a national of the Ivory Coast and was born in 1979. He arrived in the Netherlands on or around 3 September 1995. The author had no identification documents in his possession on arrival, but on 15 October 1995 the immigration authorities

recorded that he was 15 years of age. Earlier on 4 September 1995, he applied for asylum to the State Secretary for Justice. From this date until June 1996, the author was under the responsibility of the guardianship agency, which is appointed as the legal guardian of all unaccompanied minor asylum seekers and aliens. The author was received and accommodated at an open facility.1/

2.2 In August 1996, the author absconded from his reception facility and went into hiding out of fear of an immediate deportation.2/ His lawyer advised him to apply again for refugee status, in order to bring an end to his illegal status and to regain access to refugee accommodation. On 4 September 1996, the author made a second application for refugee status with the State Secretary for Justice. On 12 September 1996, following an interview with the Aliens Department, his detention was ordered for the following reasons: because he did not have a valid permit, because he did not possess a document proving his identity, because he did not have any financial means to live nor to return to his home country, and because of a serious suspicion that he would fail to cooperate with his removal.3/ On 17 September 1996, the author's second application for refugee status was dismissed.

2.3 On 24 September 1996, the author's request for a ruling that he was being unlawfully detained was rejected by the District Court of 's-Hertogenbosch, though the issue of his status as a minor was allegedly raised by counsel. From the judgement of the Court it appears that the author was brought before the representative of the Ivory Coast in Brussels to ascertain his identity, but with negative result. It also appears from the judgement that he was then presented to the Consulates of Sierra Leone and Mali, with equally negative results. On 8 November 1996, counsel filed a request to have the author's detention reviewed once more. On 2 December 1996, the same Court rejected the author's second request partly because a further identity investigation was being prepared to determine his nationality. However, on 9 January 1997, the State Secretary for Justice terminated the author's detention, as at that point there was no realistic prospect of expelling him. Notice was then served on the author that he must leave the Netherlands immediately.

2.4 On 5 February 1997, the author appealed against the refusal to grant him refugee status on the basis of his second application. The same Court, on 23 April 1997, decided to reopen proceedings to allow the author to undergo a medical examination. This examination took place in May 1997. On 4 June 1997, the report of a psychological examination and the results of X-ray tests to determine the author's age were made available to the Court. As a result, the Court declared the author's appeal well-founded and the State Secretary for Justice granted him a residence permit "admitted as an unaccompanied minor asylum-seeker" with effect from the date of his second asylum application.4/

...

8.2 With regard to the author's claim that his rights under article 9 have been violated, the Committee notes that his detention was lawful under Dutch law, section 26 of the Aliens Act.

The Committee further notes that the author had his detention reviewed by the courts on two occasions, once twelve days after the beginning of his detention, and again two months later. On both occasions, the Court found that the author's continued detention was lawful, because he had evaded expulsion before, because there were doubts as to his identity, and because there were reasonable prospects for expulsion, as an identity investigation was still ongoing. The question remains therefore as to whether his detention was arbitrary. Recalling its previous jurisprudence6/ the Committee notes that "arbitrariness" must be interpreted more broadly than "against the law" to include elements of unreasonbleness. Considering the author's flight from the open facility at which he was accommodated from the time of his arrival for around 11 months, the Committee considers that it was not unreasonable to have detained the author for a limited time until the administrative procedure relating to his case was completed. Once a reasonable prospect of expelling him no longer existed his detention was terminated. In the circumstances, the Committee finds that the author's detention was not arbitrary and thus not in violation of article 9 of the Covenant.

8.3 The author has raised a further claim against his detention in so far as it violated the State party's obligation under article 24 of the Covenant to provide special measures of protection to him as a minor. In this connection, while the author's counsel alleges that the issue of "mental underdevelopment" was raised before the State party's authorities, he does not specify the authorities before which the issue was raised. Moreover, the judgement of the Court concerning the lawfulness of the author's detention does not reveal that the issue was actually raised in Court during the proceedings. The State party has argued that there were doubts about the author's age, that it was not certain that he was a minor until the Court's judgement following the medical examination of 4 June 1997, and that in any event article 26 of the Aliens Act does not preclude the detention of minors. The Committee notes that apart from a statement that the author was detained, he does not provide any information on the type of detention facility he was accommodated, or his particular conditions of detention. In this respect, the Committee notes the State party's explanation that the detention of minors is applied with great restraint. The Committee further notes that the detention of a minor is not per se a violation of article 24 of the Covenant. In the circumstances of this case, where there were doubts as to the author's identity, where he had attempted to evade expulsion before, where there were reasonable prospects for expulsion, and where an identity investigation was still ongoing, the Committee concludes that the author has failed to substantiate his claim that his detention for three and a half months entailed a failure by the State party to grant him such measures of protection as are required by his status as a minor. The Committee therefore finds that the facts before it do not disclose a violation of article 24(1) of the Covenant.

...

9. The Human Rights Committee...is of the view that the facts before it do not reveal a breach of any articles of the Covenant.

Notes

1/ On 15 October 1995, the immigration authorities recorded that the author was 15 years of age.

2/ It appears that the Aliens Department attempted to contact the author on 9 August 1996 but he had already fled.

3/ No further details on the type of detention facility or on the specific conditions of his detention have been provided.

4/ This information was provided by counsel after the initial submission to the Human Rights Committee.

...

6/ *Van Alpen v. The Netherlands*, Case no. 305/1988, Views adopted on 23 July 1990, *Suárez de Guerrero*, Case no. 45/1979, Views adopted on 31 March 1982.

- *C. v. Australia* (900/1999), ICCPR, A/58/40 vol. II (28 October 2002) 188 (CCPR/C/76/D/900/1999) at paras. 2.1, 3.1-3.3, 7.4, 8.2-8.5, 9 and 10.

...

2.1 The author, who has close family ties in Australia 3/ but none in Iran, was lawfully in Australia from 2 February 1990 to 8 August 1990 and left thereafter. On 22 July 1992, the author returned to Australia with a Visitor's Visa but no return air ticket, and was detained, as a "non-citizen" without an entry permit, in immigration detention under (then) s.89 *Migration* Act 1958 pending removal ("the first detention").

...

3.1 The author contends that he has suffered a violation of his rights under article 7 in dual fashion. Firstly, he was detained in such a way and for such a prolonged period (from his arrival on 22 July 1992 until 10 August 1994) as to cause him mental illness, from which he did not earlier suffer. The medical evidence was unanimous in concluding that his severe psychiatric illness was brought about by his prolonged incarceration ... and this had been accepted by the AAT [Administrative Appeals Tribunal] and the courts. The author contends that he was initially imprisoned without any evidence of a risk of abscondment or other danger to the community. He could have been released into the community with commonly utilized bail conditions such as a bond or surety, or residential and/or reporting requirements. The author also alleges that his current detention is in breach of article 7.20/

3.2 Secondly, the author argues a violation of article 7 by Australia in that his proposed

deportation to Iran would expose him to a real risk of a violation of his Covenant rights, at least of article 7 and possibly also article 9, by Iran. He refers in this connection to the Committee's jurisprudence that if a State party removes a person within its jurisdiction, and the necessary and foreseeable consequence is a violation of that person's rights under the Covenant in another jurisdiction, the State party itself may be in violation of the Covenant.21/ He considers that the Minister's delegate found that the author had a well-founded fear of persecution in Iran because of his religion and because his psychological state may bring him to the notice of the authorities which could lead to the deprivation of his liberty under such conditions as to constitute persecution. Far from being overturned in subsequent proceedings, the AAT in fact affirmed this position. Moreover, the author argues that the pattern of conduct shown by Iran supports the conclusion that he will be exposed to a violation of his Covenant rights in the event of deportation.22/

3.3 The author further claims that his prolonged detention in Australia upon arrival breaches articles 9, paragraphs 1 and 4, of the Covenant, as he was detained upon arrival under the mandatory (non-discretionary) provisions of (then) s.89 Migration Act. Those provisions do not provide for any review of detention, either by judicial or administrative means. The author considers his case to fall within the principles laid down by the Committee in its Views in *A. v. Australia*,23/ in which the Committee held that detention, even of an illegal immigrant, which was neither reviewed periodically nor otherwise justified in the particular case violated article 9, paragraph 1, and that the absence of real judicial review including the possibility of release violated article 9, paragraph 4. The author emphasizes that, as in *A*'s case, there was no justification for his prolonged detention, and that the present legislation had the same effect of depriving him of the ability to make an effective judicial application for review of detention. For these violations of article 9, the author seeks adequate compensation for his detention under article 2, paragraph 3. The author also maintains that his current detention is in violation of article 9.24/

...

7.4 As to the claims relating to the first period of detention, the Committee notes that the legislation pursuant to which the author was detained provides for mandatory detention until either a permit is granted or a person is removed. As confirmed by the courts, there remained no discretion for release in the particular case. The Committee observes that the sole review capacity for the courts is to make the formal determination that the individual is in fact an "unlawful non-citizen" to which the section applies, which is uncontested in this case, rather than to make a substantive assessment of whether there are substantive grounds justifying detention in the circumstances of the case. Thus, by direct operation of statute, substantive judicial review which could provide a remedy is extinguished. This conclusion is not altered by the exceptional provision in s.11 of the Act providing for alternative restraint and custody (in the author's case his family's), while remaining formally in detention. Moreover, the Committee notes that the High Court has confirmed the constitutionality of mandatory regimes on the basis of the policy factors advanced by the State party.68/ It follows that the

State party has failed to demonstrate that there were available domestic remedies that the author could have exhausted with respect to his claims concerning the initial period of detention, and these claims are admissible.

...

8.2 As to the claims relating to the first period of detention, in terms of article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.69/ In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention...the Committee observes that the State party has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.

8.3 As to the author's further claim of a violation of article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to the author was confined purely to a formal assessment of the question whether the person in question was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a court, as indeed held by the Full Court itself in its judgement of 15 June 1994, to review the author's detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

8.4 As to the author's allegations that his first period of detention amounted to a breach of article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State party's courts and tribunals, was essentially unanimous that the author's psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him

from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow. In the Committee's view, the continued detention of the author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant.

8.5 As to the author's arguments that his deportation would amount to a violation of article 7, the Committee attaches weight to the fact that the author was originally granted refugee status on the basis of a well-founded fear of persecution as an Assyrian Christian, coupled with the likely consequences of a return of his illness. In the Committee's view, the State party has not established that the current circumstances in the receiving State are such that the grant of refugee status no longer holds validity. The Committee further observes that the AAT, whose decision was upheld on appeal, accepted that it was unlikely that the only effective medication (Clozaril) and back-up treatment would be available in Iran, and found the author "blameless for his mental illness" which "was first triggered while in Australia". In circumstances where the State party has recognized a protection obligation towards the author, the Committee considers that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of article 7 of the Covenant.

9. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 7 and 9, paragraphs 1 and 4, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violations of articles 7 and 9 suffered by the author during the first period of detention, the State party should pay the author appropriate compensation. As to the proposed deportation of the author, the State party should refrain from deporting the author to Iran. The State party is under an obligation to avoid similar violations in the future.

Notes

...

3/ The author's mother, along with his brother and sister-in-law reside in Australia, while his father is deceased. Another brother resides in Canada.

...

20/ This is clarified by his subsequent (final) submissions of 21 September 2001. See paragraph 5.3 (with footnote 57), paragraph 6.3 and paragraphs 6.5 to 6.8.

21/ *ARJ v. Australia* (No. 692/1996) and *T. v. Australia* (No. 706/1996), coupled with

general comment 20 on article 7.

22/ In this connection the author supplies reports, dated 14 December 1994, 1 August 1997, and 19 November 1999, by Dr. Colin Rubinstein, Senior Lecturer in Middle East Politics (Monash University) and member of Victorian Ethnic Affairs Commission, detailing "real and effective discrimination against Christians", "effective intimidation", "the fiercest campaign since 1979 against the small Christian minority", including killings of clerics and arrests of apostates and a "gradual eradication of existing churches under legal pretences". The situation for minorities, including Christians, is "clearly degenerating" and "deteriorating rapidly". Accordingly, the author could expect a "high probability of vindictive retaliation" and "real persecution" in the event of his return.

23/ No. 560/1993.

24/ This is clarified by his subsequent (final) submissions of 21 September 2001. While the initial complaint appears confined to the initial period of detention, the State party's main submissions also address the second detention from the perspective of article 9 (see especially paragraphs 4.22-4.24 and 4.32-4.35).

...

68/ *Lim v. Australia* (1992) 176 CLR 1 (HCA).

69/ *A. v. Australia*, op. cit., at para. 9.4.

For dissenting opinions in this context, see C. v. Australia (900/1999), ICCPR, A/58/40 vol. II (28 October 2002) 188 (CCPR/C/76/D/900/1999) at Individual Opinion of Mr. Nigel Rodley, 213, and Individual Opinion of Mr. David Kretzmer, 214.

- *Bakhtiyari v. Australia* (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at paras. 2.1, 2.2, 2.5, 2.6, 2.8-2.10, 2.13, 2.14, 8.4, 9.2-9.7, 10 and 11.

...

2.1 In March 1998, Mr. Bakhtiyari left Afghanistan for Pakistan where he was subsequently joined by his wife, their five children, and Mrs. Bakhtiyari's brother. Rather than being smuggled to Germany as he had understood, Mr. Bakhtiyari was instead smuggled by an unidentified smuggler to Australia through Indonesia, losing contact with his wife, children and brother-in-law. He arrived unlawfully in Australia by boat on 22 October 1999. On arrival, he was detained in immigration detention at the Port Hedland immigration detention facility. On 29 May 2000, he lodged an application for a protection visa. On 3 August 2000,

he was granted a protection visa on the basis of Afghan nationality and Hazara ethnicity.

2.2 Apparently unknown to Mr. Bakhtiyari, Mrs. Bakhtiyari, her children and her brother were also subsequently brought to Australia by the same smuggler, arriving unlawfully by boat on 1 January 2001 and were taken into immigration detention at the Woomera immigration detention facility. On 21 February 2001, they applied for a protection visa, which was refused by a delegate of the Minister of Immigration and Multicultural and Indigenous Affairs ("the Minister") on 22 May 2001 on the ground that language analysis suggested that she was Pakistani rather than Afghan, as claimed by her, and she was unable to give adequate response to questions concerning Afghanistan. On 26 July 2001, the Refugee Review Tribunal ("RRT") dismissed their application for review of the refusal. The RRT accepted that Mrs. Bakhtiyari was Hazara, but was not satisfied that she was an Afghan national, finding her credibility "remarkably poor" and her testimony "implausible" and "contradictory".

...

2.5 On 2 April 2002, the Minister declined to exercise his discretion in Mrs. Bakhtiyari's favour. On 8 April 2002, an application was made to the High Court of Australia in its original jurisdiction constitutionally to review the decisions of government officials. The application challenged (i) the RRT's decision on the ground that it should have been aware of Mr. Bakhtiyari's presence on a protection visa, and (ii) the Minister's decision under s. 417 of the *Migration* Act. The application sought to require the Minister to grant a visa to Mrs. Bakhtiyari and her children based on the visa already granted to Mr. Bakhtiyari.

2.6 On 12 April 2002, as a consequence of receiving information that Mr. Bakhtiyari was not an Afghan farmer, as he had claimed, but rather a plumber and electrician from Quetta, Pakistan, the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") issued him a notice of intention to consider cancellation of his visa and provided him with an opportunity to comment on the allegations. On 26 April 2002, Mrs. Bakhtiyari made a further request to the Minister under s.417 of the *Migration* Act, but was informed that such matters were generally not referred to the Minister while litigation was underway.

...

2.8 On 2 August 2002, an application was filed with the Family Court in Adelaide on behalf of Almadar and Montazer, seeking orders against the Minister under s.67ZC of the *Family Law* Act 1975[2] for the release of the boys from detention and for them to be made available for examination by a psychologist.

2.9 On 30 August 2002, following Mr. Bakhtiyari's institution of legal proceedings to compel the Department to release to him details of his alleged visa fraud, the Department informed him of the additional information obtained in relation to his identity and nationality, including an application by him for Pakistani identification documentation in

1975, family registration documents of 1973 and 1982 listing his birthplace, citizenship and permanent residence as Pakistani. The letter also referred to pieces of investigative journalism published in major Australian newspapers, where journalists were unable to find any person in the Afghan area from where he claimed to be who knew him, or any further evidence that he had lived there. On 20 September 2002, Mr. Bakhtiyari replied to these issues.

2.10 ...On 5 December 2002, Mr. Bakhtiyari's protection visa was cancelled, and he was taken into custody at the Villawood immigration detention facility, Sydney. The same day he lodged an application for review of this decision with the RRT, as well as an application with the Department for bridging visa seeking his release pending determination of the RRT proceedings. On 9 December 2002, a Minister's delegate refused the request for a bridging visa. On 18 December 2002, the Migration Review Tribunal upheld the decision to refuse a bridging visa.

...

2.13 On 4 March 2003, the RRT affirmed the decision to cancel Mr. Bakhtiyari's protection visa. On 22 May 2003, the Federal Court (Selway J) dismissed the author's application for judicial review of the RRT's decision, finding its conclusion open to it on the evidence. He lodged an appeal from this decision to the Full Bench of the Federal Court.

2.14 On 19 June 2003, the Full Bench of the Family Court held, by a majority, that the Court did have jurisdiction to make orders against the Minister, including release from detention, if that was in the best interests of the child. The case was accordingly remitted for hearing as a matter of urgency as to what orders would be appropriate in the particular circumstances of the children. On 8 July 2003, the Full Bench of the Family Court granted the Minister leave to appeal to the High Court, but rejected the Minister's application for a stay on the order for rehearing as a matter of urgency. On 5 August 2003, the Family Court (Strickland J) dismissed an application for interlocutory relief, that is, that the children be released in advance of the trial of the question of what final orders would be in their best interests. On 25 August 2003, the Full Bench of the Family Court allowed an appeal and ordered the release of all of the children forthwith, pending resolution of the final application. They were released the same day and have resided with carers in Adelaide since.

...

8.4 Referring to the arguments that Mrs. Bakhtiyari and her children, if removed to Afghanistan, would be in fear of being subjected to treatment contrary to article 7 of the Covenant, the Committee observes that as the authors have not been removed from Australia, the issue before the Committee is whether such removal if implemented at the present time would entail a real risk of treatment contrary to article 7 as a consequence. The Committee also observes that the State party's authorities, in the proceedings to date, have determined, as a matter of fact, that the authors are not from Afghanistan, and hence they do not stand in fear of being returned to that country by the State party. The authors on the other hand have

failed to demonstrate that if returned to any other country, such as Pakistan, they would be liable to be sent to Afghanistan, where they would be in fear of treatment contrary to article 7. Much less have the authors substantiated that even if returned to Afghanistan, directly or indirectly, they would face, as a necessary and foreseeable consequence, treatment contrary to article 7. The Committee accordingly takes the view that the claim that, if the State party returns them at the present time, Mrs. Bakhtiyari and her children would have to face treatment contrary to article 7, has not been substantiated before the Committee, for purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

...

9.2 As to the claims of arbitrary detention, contrary to article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification.18/ In the present case, Mr. Bakhtiyari arrived by boat, without dependents, with his identity in doubt and claiming to be from a State suffering serious internal disorder. In light of these factors and the fact that he was granted a protection visa and released two months after he had filed an application (some seven months after his arrival), the Committee is unable to conclude that, while the length of his first detention may have been undesirable, it was also arbitrary and in breach of article 9, paragraph 1. In the light of this conclusion, the Committee need not examine the claim under article 9, paragraph 4, with respect to Mr. Bakhtiyari. The Committee observes that Mr. Bakhtiyari's second period of detention, which has continued from his arrest for purposes of deportation on 5 December 2002 until the present may raise similar issues under article 9, but does not express a further view thereon in the absence of argument from either party.

9.3 Concerning Mrs. Bakhtiyari and her children, the Committee observes that Mrs. Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs. Bakhtiyari and her children for length of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.

9.4 As to the claim under article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review

available to Mrs. Bakhtiyari would be confined purely to a formal assessment of whether she was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a domestic court to review the justification of her detention in substantive terms. The Committee considers that the inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

9.5 As to the children, the Committee observes that until the decision of the Full Bench of the Family Court on 19 June 2003, which held that it had jurisdiction under child welfare legislation to order the release of children from immigration detention, the children were in the same position as their mother, and suffered a violation of their rights under article 9, paragraph 4, up to that moment on the same basis. The Committee considers that the ability for a court to order a child's release if considered in its best interests, which subsequently occurred (albeit on an interim basis), is sufficient review of the substantive justification of detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. Accordingly, the violation of article 9, paragraph 4, with respect to the children came to an end with the Family Court's finding of jurisdiction to make such orders.

9.6 As to the claim under articles 17 and 23, paragraph 1, the Committee observes that to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant. In the present case, however, the State party contends that, at the time Mrs. Bakhtiyari made her application to the Minister under section 417 of the *Migration* Act, there was already information on Mr. Bakhtiyari's alleged visa fraud before it. As it remains unclear whether the attention of the State party's authorities was drawn to the existence of the relationship prior to that point, the Committee cannot regard it as arbitrary that the State party considered it inappropriate to unite the family at that stage. The Committee observes, however, that the State party intends at present to remove Mrs. Bakhtiyari and her children as soon as "reasonably practicable", while it has no current plans to do so in respect of Mr. Bakhtyari, who is currently pursuing domestic proceedings. Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs. Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs. Bakhtiyari and her children would face if returned to Pakistan without Mr. Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs. Bakhtiyari and her children without awaiting the final determination of Mr. Bakhtiyari's proceedings would constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

9.7 Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an

integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up that point in time.

10. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Australia of articles 9, paragraphs 1 and 4, and 24, paragraph 1, and, potentially, of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violation of article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs. Bakhtiyari, the State party should release her and pay her appropriate compensation. So far as concerns the violations of articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State party is under an obligation to pay appropriate compensation to the children. The State party should also refrain from deporting Mrs. Bakhtiyari and her children while Mr. Bakhtiyari is pursuing domestic proccedings, as any such action on the part of the State party would result in violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

Notes

...

2/ Section 67ZC provides:

"(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

...

18/ *A. v. Australia* [Case No. 506/1993, Views adopted on 4 March 1993] and *C. v. Australia* [Case No. 900/1999, Views adopted on 28 October 2002].

REFUGEES

For dissenting opinion in this context, see Bakhtiyari v. Australia (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at Individual Opinion by Sir Nigel Rodley, 319.

- *Ahani v. Canada* (1051/2002), ICCPR, A/59/40 vol. II (29 March 2004) 260 at paras. 2.1-2.10, 8.1, 8.2, 10.2-10.10, 11 and 12.

  ...
  2.1 On 14 October 1991, the author arrived in Canada from Iran and claimed protection under the Convention on the Status of Refugees and its Protocol, based on his political opinion and membership in a particular social group. He contended, on various occasions, (i) that he had been beaten by members of the Islamic Revolutionary Committee in Iran for being intoxicated, (ii) that his return to Iran would endanger his life due to his knowledge of Iranian covert operations and personnel, knowledge which he had acquired as a forced conscript in the foreign assassins branch of the Iranian Foreign Ministry, (iii) that he had been jailed for four years as a result of refusing to carry out a drug raid which was in fact a raid on the home of an Iranian dissident, with women and children, in Pakistan, and (iv) that he had been released after pretending to repent. On 1 April 1992, the Immigration and Refugee Board determined that the author was a Convention refugee based on his political opinion and membership in a particular social group.

  2.2 On 17 June 1993, the Solicitor-General of Canada and the Minister of Employment and Immigration, having considered security intelligence reports stating that the author was trained to be an assassin by the Iranian Ministry of Intelligence and Security ("MIS"), both certified, under section 40 (1) of the *Immigration Act* ("the Act"), that they were of the opinion that the author was inadmissible to Canada under section 19 (1) of the Act as there were reasonable grounds to believe that he would engage in terrorism, that he was a member of an organization that would engage in terrorism and that he had engaged in terrorism. On the same date, the certificate was filed with the Federal Court, while the author was served with a copy of the certificate and, pursuant to section 40 (1) (2) (b) of the Act, he was taken into mandatory detention, where he remained until his deportation nine years later.

  2.3 On 22 June 1993, in accordance with the statutory procedure set out in section 40 (1) of the Act for a determination of whether the Ministers' certificate was "reasonable on the basis of the information available", the Federal Court (Denault J) examined the security intelligence reports *in camera* and heard other evidence presented by the Solicitor-General and the Minister, in the absence of the plaintiff. The Court then provided the author with a summary of the information, required by statute to allow the affected person to be "reasonably" informed of the circumstances giving rise to the certification while being appropriately redacted for national security concerns, and offered the author an opportunity

to respond.

2.4 Rather than exercising his right to be heard under this procedure, the author then challenged the constitutionality of the certification procedure and his detention subsequent to it in a separate action before the Federal Court. On 12 September 1995, the Federal Court (McGillis J) rejected his challenge, holding that the procedure struck a reasonable balance between competing interests of the State and the individual, and that the detention upon the Ministers' certification pending the Court's decision on its reasonableness was not arbitrary. The author's further appeals against that decision were dismissed by the Federal Court of Appeal and the Supreme Court on 4 July 1996 and 3 July 1997, respectively.

2.5 Following the affirmation of the constitutionality of section 40 (1) procedure, the Federal Court (Denault J) proceeded with the original reasonableness hearing, and, following extensive hearings, concluded on 17 April 1998 that the certificate was reasonable. The evidence included information gathered by foreign intelligence agencies which was divulged to the Court in camera in the author's absence on national security grounds. The Court also heard the author testify on his own behalf in opposition to the reasonableness of the certificate. The Court found that there were grounds to believe that the author was a member of the MIS, which "sponsors or undertakes directly a wide range of terrorist activities including the assassination of political dissidents worldwide". The Federal Court's decision on this matter was not subject to appeal or review.

2.6 Thereafter, in April 1998, an immigration adjudicator determined that the author was inadmissible to Canada, and ordered the author's deportation. On 22 April 1998, the author was informed that the Minister of Citizenship and Immigration would assess the risk the author posed to the security of Canada, as well as the possible risk that he would face if returned to Iran. The Minister was to consider these matters in deciding under section 53 (1) (b) of the Act1/ (which implements article 33 of the Convention on the Status of Refugees) whether the prohibition on removing a Convention refugee to the country of origin could be lifted in the author's case. The author was accordingly given an opportunity to make submissions to the Minister on these issues.

2.7 On 12 August 1998, the Minister, following representations by the author that he faced a clear risk of torture in Iran, determined, without reasons and on the basis of a memorandum attaching the author's submissions, other relevant documents and a legal analysis by officials, that he (a) constituted a danger to the security of Canada, and (b) could be removed directly to Iran. The author applied for judicial review of the Minister's opinion. Pending the hearing of the application, the author applied for release from detention pursuant to section 40(1)(8) of the Act, as 120 days has passed from the issue of the deportation order against him2/. On 15 March 1999, the Federal Court (Denault J), finding reasonable grounds to believe that his release would be injurious to the safety of persons in Canada, particularly

Iranian dissidents, denied the application for release. The Federal Court of Appeal upheld this decision.

2.8 On 23 June 1999, the Federal Court (McGillis J) rejected the author's application for judicial review of the Minister's decision, finding there was ample evidence to support the Minister's decision that the author constituted a danger to Canada and that the decision to deport him was reasonable. The Court also dismissed procedural constitutional challenges, including to the process of the provision of the Minister's danger opinion. On 18 January 2000, the Court of Appeal rejected the author's appeal. It found that "the Minister could rightly conclude that the [author] would not be exposed to a serious risk of harm, let alone torture" if he were deported to Iran. It agreed that there were reasonable grounds to support the allegation that the author was in fact a trained assassin with the Iranian secret service, and that there was no basis upon which to set aside the Minister's opinion that he was a danger to Canada.

2.9 On 11 January 2001, the Supreme Court unanimously rejected the author's appeal, finding that there was "ample support" for the Minister to decide that the author was a danger to the security of Canada. It further found the Minister's decision that he only faced a "minimal risk of harm", rather than a substantial risk of torture, in the event of return to Iran to be reasonable and "unassailable". On the constitutionality of deportation of persons at risk of harm under section 53 (1) (b) of the Act, the Court referred to its reasoning in a companion case of *Suresh v. Canada (Minister of Citizenship and Immigration)*3/ decided the same day, where it held that "barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice". As *Suresh* had established a *prima facie* risk of torture, he was entitled to enhanced procedural protections, including provision of all information and advice the Minister intended to rely on, receipt of an opportunity to address the evidence in writing and to be given written reasons by the Minister. In the author's case, however, the Court considered that he had not cleared the evidentiary threshold required to make a *prima facie* case and access these protections. The Court was of the view that the author, in the form of the letter advising him of the Minister's intention to consider his danger to Canada as well as the possible risks to him in the event of expulsion, "was fully informed of the Minister's case against him and given a full opportunity to respond". The process followed, according to the Court, was therefore consistent with principles of fundamental justice and not prejudicial to the author even though it had not followed the *Suresh* requirements.

2.10 The same day, the Committee indicated its request pursuant to rule 86 of its rules of procedure for interim measures of protection, however the State party's authorities proceeded with arrangements to effect removal. On 15 January 2002, the Ontario Superior Court (Dambrot J) rejected the author's argument that the principles of fundamental justice, protected by the *Charter*, prevented his removal prior to the Committee's consideration of

the case. On 8 May 2002, the Court of Appeal for Ontario upheld the decision, holding that the request for interim measures was not binding upon the State party. On 16 May 2002, the Supreme Court, by a majority, dismissed the author's application for leave to appeal (without giving reasons). On 10 June 2002, the author was deported to Iran.

...

8.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Optional Protocol, by deporting the author before the Committee could address the author's allegation of irreparable harm to his Covenant rights. The Committee observes that torture is, alongside the imposition of the death penalty, the most grave and irreparable of possible consequences to an individual of measures taken by the State party. Accordingly, action by the State party giving rise to a risk of such harm, as indicated *a priori* by the Committee's request for interim measures, must be scrutinized in the strictest light.

8.2 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from a State party to face torture or death in another country, undermines the protection of Covenant rights through the Optional Protocol.

...

10.2 As to the claims under article 9 concerning arbitrary detention and lack of access to court, the Committee notes the author's argument that his detention pursuant to the security certificate as well as his continued detention until deportation was in violation of this article. The Committee observes that, while the author was mandatorily taken into detention upon issuance of the security certificate, under the State party's law the Federal Court is to promptly, that is within a week, examine the certificate and its evidentiary foundation in order to determine its "reasonableness". In the event that the certificate is determined not to be reasonable, the person named in the certificate is released. The Committee observes, consistent with its earlier jurisprudence, that detention on the basis of a security certification by two Ministers on national security grounds does not result *ipso facto* in arbitrary detention, contrary to article 9, paragraph 1. However, given that an individual detained under a security certificate has neither been convicted of any crime nor sentenced to a term of imprisonment, an individual must have appropriate access, in terms of article 9, paragraph 4, to judicial review of the detention, that is to say, review of the substantive justification of detention, as well as sufficiently frequent review.

10.3 As to the alleged violation of article 9, paragraph 4, the Committee is prepared to accept that a "reasonableness" hearing in Federal Court promptly after the commencement of mandatory detention on the basis of a Ministers' security certificate is, in principle, sufficient judicial review of the justification for detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. The Committee observes, however, that when judicial proceedings that include the determination of the lawfulness of detention become

prolonged the issue arises whether the judicial decision is made "without delay" as required by the provision, unless the State party sees to it that interim judicial authorization is sought separately for the detention. In the author's case, no such separate authorization existed although his mandatory detention until the resolution of the "reasonableness" hearing lasted 4 years and 10 months. Although a substantial part of that delay can be attributed to the author who chose to contest the constitutionality of the security certification procedure instead of proceeding directly to the "reasonableness" hearing before the Federal Court, the latter procedure included hearings and lasted nine and half months after the final resolution of the constitutional issue on 3 July 1997. This delay alone is in the Committee's view too long in respect of the Covenant requirement of judicial determination of the lawfulness of detention without delay. Consequently, there has been a violation of the author's rights under article 9, paragraph 4, of the Covenant.

10.4 As to the author's later detention, after the issuance of a deportation order in August 1998, for a period of 120 days before becoming eligible to apply for release, the Committee is of the view that such a period of detention in the author's case was sufficiently proximate to a judicial decision of the Federal Court to be considered authorized by a court and therefore not in violation of article 9, paragraph 4.

10.5 As to the claims under articles 6, 7, 13 and 14, with respect to the process and the fact of the author's expulsion, the Committee observes, at the initial stage of the process, that at the Federal Court's "reasonableness" hearing on the security certification the author was provided by the Court with a summary redacted for security concerns reasonably informing him of the claims made against him. The Committee notes that the Federal Court was conscious of the "heavy burden" upon it to assure through this process the author's ability appropriately to be aware of and respond to the case made against him, and the author was able to, and did, present his own case and cross-examine witnesses. In the circumstances of national security involved, the Committee is not persuaded that this process was unfair to the author. Nor, recalling its limited role in the assessment of facts and evidence, does the Committee discern on the record any elements of bad faith, abuse of power or other arbitrariness which would vitiate the Federal Court's assessment of the reasonableness of the certificate asserting the author's involvement in a terrorist organization. The Committee also observes that the Covenant does not, as of right, provide for a right of appeal beyond criminal cases to all determinations made by a court. Accordingly, the Committee need not determine whether the initial arrest and certification proceedings in question fell within the scope of articles 13 (as a decision pursuant to which an alien lawfully present is expelled) or 14 (as a determination of rights and obligations in a suit at law), as in any event the author has not made out a violation of the requirements of those articles in the manner the Federal Court's "reasonableness" hearing was conducted.

10.6 Concerning the author's claims under the same articles with respect to the subsequent

decision of the Minister of Citizenship and Immigration that he could be deported, the Committee notes that the Supreme Court held, in the companion case of *Suresh*, that the process of the Minister's determination in that case of whether the affected individual was at risk of substantial harm and should be expelled on national security grounds was faulty for unfairness, as he had not been provided with the full materials on which the Minister based his or her decision and an opportunity to comment in writing thereon and further as the Minister's decision was not reasoned. The Committee further observes that where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture. The Committee emphasizes that this risk was highlighted in this case by the Committee's request for interim measures of protection.

10.7 In the Committee's view, the failure of the State party to provide him, in these circumstances, with the procedural protections deemed necessary in the case of *Suresh*, on the basis that the present author had not made out a *prima facie* risk of harm fails to meet the requisite standard of fairness. The Committee observes in this regard that such a denial of these protections on the basis claimed is circuitous in that the author may have been able to make out the necessary level of risk if in fact he had been allowed to submit reasons on the risk of torture faced by him in the event of removal, being able to base himself on the material of the case presented by the administrative authorities against him in order to contest a decision that included the reasons for the Minister's decision that he could be removed. The Committee emphasizes that, as with the right to life, the right to be free from torture requires not only that the State party not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties.

10.8 The Committee observes further that article 13 is in principle applicable to the Minister's decision on risk of harm, being a decision leading to expulsion. Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, "compelling reasons of national security" existed to exempt the State party from its obligation under that article to provide the procedural protections in question. In the Committee's view, the failure of the State party to provide him with the procedural protections afforded to the plaintiff in *Suresh* on the basis that he had not made out a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal in the light of the administrative authorities' case against him and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority. The Committee thus finds a violation of article 13 of the Covenant, in conjunction with article 7.

10.9 The Committee notes that as article 13 speaks directly to the situation in the present case and incorporates notions of due process also reflected in article 14 of the Covenant, it would be inappropriate in terms of the scheme of the Covenant to apply the broader and general provisions of article 14 directly.

10.10 As a result of its finding that the process leading to the author's expulsion was deficient, the Committee thus does not need to decide the extent of the risk of torture prior to his deportation or whether the author suffered torture or other ill-treatment subsequent to his return. The Committee does however refer, in conclusion, to the Supreme Court's holding in *Suresh* that deportation of an individual where a substantial risk of torture had been found to exist was not necessarily precluded in all circumstances. While it has neither been determined by the State party's domestic courts or by the Committee that a substantial risk of torture did exist in the author's case, the Committee expresses no further view on this issue other than to note that the prohibition on torture, including as expressed in article 7 of the Covenant, is an absolute one that is not subject to countervailing considerations.

11. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Canada of article 9, paragraph 4, and article 13, in conjunction with article 7, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by deporting the author before the Committee's determination of his claim.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. In the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.

Notes

1/ Section 53 (1) (b) reads, in relevant part: "…[N]o person who is determined…to be a Convention refugee…shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

...

(b) the person is a member of an inadmissible class described in paragraph 19 (1) (e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada".

2/ Section 40 (1) provides, in material part:

"(8) Where a person is detained under subsection (7) and is not removed from Canada within 120 days of after the making of a removal order relating to that person, the person may apply to the [Federal Court].

(9) On [such] an application, the [Federal Court] may, subject to such terms and conditions as the [Federal Court] deems appropriate, order that the person be released from detention if the [Federal Court] is satisfied that:
(a) The person will not be removed from Canada within a reasonable time; and
(b) The person's release would not be injurious to national security or the safety of persons."

3/ [2002] 1 SCR.

For dissenting opinion in this context, see Ahani v. Canada (1051/2002), ICCPR, A/59/40 vol. II (29 March 2004) 260 at Individual Opinion of Mr. Nisuke Ando, 280, and Individual Opinion of Sir Nigel Rodley, Mr. Roman Wieruszewski and Mr. Ivan Shearer, 282.

CAT

- *Mutombo v. Switzerland* (13/1993), CAT, A/49/44 (27 April 1994) 45 at paras. 9.1-9.4, 9.6 and 9.7.

...
9.1 ...The issue before the Committee is whether the expulsion or return of the author of the communication to Zaire would violate the obligation of Switzerland under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he would be in danger or being subjected to torture.

9.2 The Committee is aware of the concerns of the State party that the implementation of article 3 of the Convention might be abused by asylum seekers. The Committee considers that, even if there are doubts about the facts adduced by the author, it must ensure that his security is not endangered.

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9.3 ...The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that Mr. Mutombo would be in danger of being subjected to torture. In reaching this conclusion, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. 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.

9.4 The Committee considers that in the present case substantial grounds exist for believing that the author would be in danger of being subjected to torture. The Committee has noted the author's ethnic background, alleged political affiliation and detention history as well as the fact, which has not been disputed by the State party, that he appears to have deserted from the army and to have left Zaire in a clandestine manner and, when formulating an application for asylum, to have adduced arguments which may be considered defamatory towards Zaire. The Committee considers that, in the present circumstances, his return to Zaire would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured. Moreover, the belief that "substantial grounds" exist within the meaning of article 3, paragraph 1, is strengthened by "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights", within the meaning of article 3, paragraph 2.

...

9.6 Moreover, the Committee considers that, in view of the fact that Zaire is not a party to the Convention, the author would be in danger, in the event of expulsion to Zaire, not only of being subjected to torture but of no longer having the legal possibility of applying to the Committee for protection.

9.7 The Committee therefore concludes that the expulsion or return of the author to Zaire in the prevailing circumstances would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

See also:

- *Khan v. Canada* (15/1994), CAT, A/50/44 (15 November 1994) 46 at para. 12.2.
- *X. v. The Netherlands* (36/1995), CAT, A/51/44 (8 May 1996) 76 at para. 7.2.
- *Tala v. Sweden* (43/1995), CAT, A/52/44 (15 November 1996) 56 at para. 10.1.

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- *X. v. Switzerland* (27/1995), CAT, A/52/44 (28 April 1997) 64 at para. 11.2.
- *Paez v. Sweden* (39/1996), CAT, A/52/44 (28 April 1997) 86 at paras. 14.2, 14.3, 14.5 and 14.6.
- *Aemei v. Switzerland* (34/1995), CAT, A/52/44 (9 May 1997) 71 at paras. 9.2, 9.5-9.10, 10, and 11.

- *Khan v. Canada* (15/1994), CAT, A/50/44 (15 November 1994) 46 at paras. 12.1 and 12.3-12.6.

...
12.1 ...The issue before the Committee is whether the forced return of the author to Pakistan would violate the obligation of Canada under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
12.3 The Committee notes that the author of the present case has claimed that he was a local leader of the Baltistan Student Federation, that he has twice been tortured by Pakistani police and military, that he was scheduled to appear before a Court upon charges related to his political activities, and that he will face arrest and torture if he were to return to Pakistan. In support of his claim, the author presented, among other documentation, a medical report which does not contradict his allegations. The Committee notes that some of the author's claims and corroborating evidence have been submitted only after his refugee claim had been refused by the Refugee Board and deportation procedures had been initiated; the Committee, however, also notes that this behaviour is not uncommon for victims of torture. The Committee, however, considers that, even if there could be some doubts about the facts as adduced by the author, it must ensure that his security is not endangered. The Committee notes that evidence exists that torture is widely practised in Pakistan against political dissenters as well as against common detainees.

12.4 The Committee considers therefore that in the present case substantial grounds exist for believing that a political activist like the author would be in danger of being subjected to torture. It notes that the author has produced a copy of an arrest warrant against him, for organizing a demonstration and for criticizing the Government, and that moreover he has submitted a copy of a letter from the President of the Baltistan Student Federation, advising him that it would be dangerous for him to return to Pakistan. The Committee further notes that the author has adduced evidence that indicates that supporters of independence for the northern areas and Kashmir have been the targets of repression.

12.5 Moreover, the Committee considers that, in view of the fact that Pakistan is not a party to the Convention, the author would not only be in danger of being subjected to torture, in

the event of his forced return to Pakistan, but would no longer have the possibility of applying to the Committee for protection.

12.6 The Committee therefore concludes that substantial grounds exist for believing that the author would be in danger of being subjected to torture and, consequently, that the expulsion or return of the author to Pakistan in the prevailing circumstances would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

- *Kisoki v. Sweden* (41/1996), CAT, A/51/44 (8 May 1996) 81 at paras. 9.1-9.7.

...
9.1 The issue before the Committee is whether the forced return of the author to Zaire would violate the obligation of Sweden under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.2 Pursuant to article 3, paragraph 1, the Committee must decide whether there are substantial grounds for believing that Ms. Kisoki would be in danger of being subject to torture upon return to Zaire. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. 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 or she 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; specific 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 or her specific circumstances.

9.3 In the instant case, the Committee considers that the author's political affiliation and activities, her history of detention and torture, should be taken into account when determining whether she would be in danger of being subjected to torture upon her return.
...
9.4 ...In the circumstances, the Committee need not take into consideration the general situation of returned refugee claimants, but rather the situation of returned refugee claimants who are active members of the opposition to the Government of President Mobutu.

9.5 In this context, the Committee has noted the position of the United Nations High Commissioner for Refugees, according to whom deportees who are discovered to have sought asylum abroad undergo interrogation upon arrival at Kinshasa airport, following which those who are believed to have a political profile are at risk of detention and consequently ill-treatment. The Committee also notes that, according to the information available, members of UDPS continue to be targeted for political persecution in Zaire.

9.6 In the circumstances, the Committee considers that substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Zaire.

9.7 The Committee concludes that the expulsion or return of the author to Zaire in the prevailing circumstances would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

See also:

- *Alan v. Switzerland* (21/1995), CAT, A/51/44 (8 May 1996) 68 at paras. 11.1, 11.3, 11.4 and 11.6.
- *Falakaflaki v. Sweden* (89/1997), CAT, A/53/44 (8 May 1998) 99 at para. 6.3.
- *G. R. B. v. Sweden* (83/1997), CAT, A/53/44 (15 May 1998) 92 at para. 6.3.
- *Chipana v. Venezuela* (110/1998), CAT, A/54/44 (10 November 1998) 96 at para. 6.3.

- *Alan v. Switzerland* (21/1995), CAT, A/51/44 (8 May 1996) 68 at paras. 11.1, 11.3, 11.4 and 11.6.

...

11.1 The issue before the Committee is whether the forced return of the author to Turkey would violate the obligation of Switzerland under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

...

11.3 In the instant case, the Committee considers that the author's ethnic background, his alleged political affiliation, his history of detention, and his internal exile should all be taken into account when determining whether he would be in danger of being subjected to torture upon his return. The State party has pointed to contradictions and inconsistencies in the author's story, but the Committee considers that 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.

11.4 The Committee has noted the State party's argument that the author has invoked the general situation of Kurds in Turkey to substantiate his fears of torture, but that he has failed to demonstrate that he personally risks to be subject to torture. The Committee has also noted the State party's statement that, according to information collected by its embassy in Ankara, the author is no longer sought by the police and that no prohibition of a passport is in force for him. On the other hand, the author's counsel has stated that, according to the author's wife, his house in Izmir had been under constant surveillance by the police, also after his departure, and that, in January 1995, the police questioned his former neighbours about the author. Furthermore, since the author left, his brother has been arrested on more than one occasion and his native village was demolished. As regards the State party's argument that the author could find a safe area elsewhere in Turkey, the Committee notes that the author already had to leave his native area, that Izmir did not prove secure for him either, and that, since there are indications that the police are looking for him, it is not likely that a "safe" area for him exists in Turkey. In the circumstances, the Committee finds that the author has sufficiently substantiated that he personally is at risk of being subjected to torture if returned to Turkey.

...

11.6 The Committee concludes that the expulsion or return of the author to Turkey in the prevailing circumstances would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

- *X. v. The Netherlands* (36/1995), CAT, A/51/44 (8 May 1996) 76 at paras. 7.1, 8 and 9.

...

7.1 The issue before the Committee is whether the forced return of the author to Zaire would violate the obligation of the Netherlands under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

...

8. The Committee notes that the author has claimed that, during his first detention, he was beaten with a rope with wire in it. Although not explicitly corroborated by the medical note submitted by the author, the Committee is prepared to find that X was maltreated during his first detention in Zaire. The Committee also notes that the author has not claimed that he was tortured during his second detention. Finally, the Committee notes that the periods of the author's detention have been short, that the author has not claimed that he was an active political opponent and that there is no indication that the author is being sought by the authorities in his country. Therefore, the Committee considers that the author has not substantiated his claim that he will be personally at risk of being subjected to torture if he is returned to Zaire.

9. The Committee against Torture...is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

- *Tala v. Sweden* (43/1996), CAT, A/52/44 (15 November 1996) 56 at paras. 10.1 and 10.3-10.5.

...
10.1 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that Mr. Tala would be in danger of being subjected to torture upon return to Iran...
...
10.3 In the present case, the Committee considers that the author's political affiliation with the People's Mujahedin Organization and activities, his history of detention and torture should be taken into account when determining whether he would be in danger of being subjected to torture upon his return. The State party has pointed to contradictions and inconsistencies in the author's story, but the Committee considers that complete accuracy is seldom to be expected by victims of torture and that the inconsistencies that exist in the author's presentation of the facts do not raise doubts about the general veracity of his claims, especially since it has been demonstrated that the author suffers from post-traumatic stress disorder. Further, the Committee has noted from the medical evidence that the scars on the author's thighs could only have been caused by a burn and that this burn could only have been inflicted intentionally by a person other than the author himself.

10.4 The Committee is aware of the serious human rights situation in Iran, as reported, *inter alia*, to the Commission on Human Rights by the Commission's Special Representative on the situation of human rights in Iran. The Committee notes the concern expressed by the Commission, in particular in respect of the high number of executions, instances of torture and cruel, inhuman or degrading treatment or punishment.

10.5 In the circumstances, the Committee considers that substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Iran.

See also:
- *Falakaflaki v. Sweden* (89/1997), CAT, A/53/44 (8 May1998) 99 at paras. 6.5-6.7.

- *X. v. Switzerland* (27/1995), CAT, A/52/44 (28 April 1997) 64 at paras. 11.2-11.4 and 12.

...
11.2 The Committee must decide, pursuant to article 3, paragraph 1, whether there are

substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Sudan...

11.3 The author bases his claim on incidents which occurred in Lebanon. He has never been subject to detention or ill-treatment in Sudan and there is no indication that his wife, who returned to Sudan after December 1991, has been harassed by the Sudanese authorities. Further, the author stayed in Lebanon for almost two years after threats were made against him by the leader of a Sudanese militia, during which period he was not further harassed. The author has claimed that his brother was arrested in Sudan in 1992 and has since disappeared, but there is no indication that his arrest had anything to do with the author, and the information provided remains vague. The author left Lebanon in November 1993, allegedly after having heard that the newly opened Sudanese embassy planned to take dissidents back to Sudan by force. In this context he claims that the Hezbollah came to a friend's apartment in order to kidnap him.

11.4 The Committee notes the inconsistencies in the author's story as pointed out by the State party, as well as the general failure by the author to provide detailed reasons for his departure from Lebanon in 1993. The Committee considers that the information before it does not show that substantial grounds exist for believing that the author will be personally at risk of being subjected to torture if he is returned to Sudan.

12. The Committee against Torture...is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

- *Paez v. Sweden* (39/1996), CAT, A/52/44 (28 April 1997) 86 at paras. 14.2, 14.3, 14.5 and 14.6.

...
14.2 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that Mr. Tapia Paez would be in danger of being subjected to torture upon return to Peru...

14.3 The Committee notes that the facts on which the author's asylum claim are based are not in dispute. The author is a member of Sendero Luminoso and on 1 November 1989 participated in a demonstration where he handed out leaflets and distributed handmade bombs. Subsequently, the police searched his house and the author went into hiding and left the country to seek asylum in Sweden. It is, further, beyond dispute that the author comes from a politically active family, that one of his cousins disappeared and another was killed for political reasons, and that his mother and sisters have been granted *de facto* refugee status by Sweden.

...
14.5 The Committee considers that the test of article 3 of the Convention is absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.

14.6 In the circumstances of the instant case, as set out in paragraph 14.3 above, the Committee considers that the grounds invoked by the State party to justify its decision to return the author to Peru do not meet the requirements of article 3 of the Convention.

- *Mohamed v. Greece* (40/1996), CAT, A/52/44 (28 April 1997) 95 at paras. 11.2, 11.3 and 12.

...
11.2 Under article 3 of the Convention, the Committee is required to decide whether an expulsion, return or extradition of an individual would breach the obligation of a State party not to expose that individual to the danger of being subjected to torture. The Committee cannot determine whether or not the claimant is entitled to asylum under the national laws of a country, or can invoke the protection of the 1951 Convention relating to the Status of Refugees.

11.3 In the instant case, the Committee notes that the State party has not ordered the author's expulsion, return or extradition to Ethiopia and has stated that the author remains in Greece for humanitarian reasons. It also appears from the State party's submission that, were the authorities to order his deportation at a later stage, the author would have an appeal possibility against such decision. The Committee is therefore of the opinion that the facts before it do not show any violation of the Convention by Greece.

12. The Committee against Torture...is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

- *Aemei v. Switzerland* (34/1995), CAT, A/52/44 (9 May 1997) 71 at paras. 9.5-9.10, 10 and 11.

...
9.5 In the present case...the Committee has to determine whether the expulsion of Mr. Aemei (and his family) to Iran would have the foreseeable consequence of exposing him to

a real and personal risk of being arrested and tortured. It observes that the "substantial grounds" for believing that return or expulsion would expose the applicant to the risk of being subjected to torture may be based not only on acts committed in the country of origin, in other words before his flight from the country, but also on activities undertaken by him in the receiving country: in fact, the wording of article 3 does not distinguish between the commission of acts, which might later expose the applicant to the risk of torture, in the country of origin or in the receiving country. In other words, even if the activities of which the author is accused in Iran were insufficient for article 3 to apply, his subsequent activities in the receiving country could prove sufficient for application of that article.

9.6 The Committee certainly does not take lightly concern on the part of the State party that article 3 of the Convention might be improperly invoked by asylum seekers. However, the Committee is of the opinion that, even though there may be some remaining doubt as to the veracity of the facts adduced by the author of a communication, it 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 proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable.

9.7 In the case of the author of the present communication, the Committee considers that his membership of the People's Mojahedin organization, his participation in the activities of that organization and his record of detention in 1981 and 1983 must be taken into consideration in order to determine whether he would be in danger of being subjected to torture if he returned to his country...The Committee considers that although there may indeed be some doubt about the nature of the author's political activities in his country of origin, there can be no doubt about the nature of the activities he engaged in in Switzerland for the APHO, which is considered an illegal organization in Iran...In the circumstances, the Committee must take seriously the author's statement that individuals close to the Iranian authorities threatened the APHO members and the author himself on two occasions, in May 1991 and June 1992...

9.8 The Committee...would recall that the protection accorded by article 3 of the Convention is absolute. Whenever there are substantial grounds for believing that a particular person would be in danger of being subjected to torture if he was expelled to another State, the State party is required not to return that person to that State. The nature of the activities in which the person engaged is not a relevant consideration in the taking of a decision in accordance with article 3 of the Convention. (see below: 4. Communication No. 39/1996, para. 14.5) In the present case, the refusal of the competent Swiss authorities to take up the author's request for review, based on reasoning of a procedural nature, does not appear justified in the light of article 3 of the Convention.

9.9 Lastly, the Committee is aware of the serious human rights situation in Iran, as reported

inter alia to the United Nations Commission on Human Rights by the Commission's Special Representative on the situation of human rights in the Islamic Republic of Iran. The Committee notes, in particular, the concern expressed by the Commission, especially about the large number of cases of cruel, inhuman or degrading treatment or punishment.

9.10 In the light of the content of the preceding paragraphs, the Committee considers that substantial grounds exist for believing that the author and his family would be in danger of being subjected to torture if they were sent back to Iran.

10. Taking account of the above, the Committee is of the view that, in the present circumstances, the State party has an obligation to refrain from forcibly returning the author and his family to Iran, or to any other country where they would run a real risk of being expelled or returned to Iran.

11. The Committee's finding of a violation of article 3 of the Convention in no way affects the decision(s) of the competent national authorities concerning the granting or refusal of asylum. The finding of a violation of article 3 has a declaratory character. Consequently, the State party is not required to modify its decision(s) concerning the granting of asylum; on the other hand, it 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. These solutions may be of a legal nature (e.g. decision to admit the applicant temporarily), but also of a political nature (e.g. action to find a third State willing to admit the applicant to its territory and undertaking not to return or expel him in its turn).

- *X. v. Switzerland* (38/1995), CAT, A/52/44 (9 May 1997) 80 at paras. 10.2, 10.4-10.6 and 11.

...
10.2 The issue before the Committee is whether or not the forced return of the author to Sudan would violate the obligation of Switzerland under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
10.4 The Committee notes that the author does not claim that he has been tortured by the police or security forces in Sudan, and that no medical evidence exists that he suffers from the consequences of torture, either physically or mentally. 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.

10.5 The Committee further considers that, even if it were to ignore those inconsistencies,

the facts as presented show that the author has not participated in political activities, nor worked as a journalist, nor was member of the Ba'ath Party. The Committee further notes that the author has been kept in detention only once, for 24 hours, in March 1992. On the basis of the information before it, the Committee finds that the author does not belong to a political, professional or social group targeted by the authorities for repression and torture.

10.6 The Committee is aware of the serious human rights situation in Sudan but, on the basis of the above, considers that the author has not substantiated his claim that he will be personally at risk of being subjected to torture if he is returned to Sudan.

11. The Committee against Torture...is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

- *E. A. v. Switzerland* (28/1995), CAT, A/53/44 (10 November 1997) 54 at paras. 11.2-11.6 and 12.

...
11.2 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that E. A. would be in danger of being subject to torture upon return to Turkey...

11.3 The Committee has noted that the State party's argument that the danger to an individual must be serious ("substantial") in the sense of being highly likely to occur. The Committee does not accept this interpretation and is of the view that "substantial grounds" in article 3 require more than a mere possibility of torture but do not need to be highly likely to occur to satisfy that provision's conditions.

11.4 In the present case, the Committee notes that the author's political activities date back to the beginning of the eighties, at which time he was arrested, tortured, prosecuted and acquitted. The author himself states that he did not resume his activities and although was interrogated by the police twice (once in 1988 and once five months before leaving) there is no indication that the police intended to detain him. In this context, the Committee finds also that the author has not provided substantiation for his claim that the collision with a jeep in 1988 was in fact an attack on him. The Committee further notes that the author has not contested the State party's assertion that the authorities in Tunceli issued him a passport in 1991, and that there is no indication that the police are looking for him at present.

11.5 The Committee is aware of the serious human rights situation in Turkey, but recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned. On the basis of the

considerations above, the Committee is of the opinion that such risk has not been established.

11.6 The Committee considers that the information before it does not show that substantial grounds exist for believing that the author will be personally at risk of being subject to torture if he is returned to Turkey.

12. The Committee against Torture...is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

- *P. Q. L. v. Canada* (57/1996), CAT, A/53/44 (17 November 1997) 60 at paras. 10.2, 10.4-10.7 and 11.

...
10.2 The issue before the Committee is whether or not the forced return of the author to China would violate the obligation of Canada under article 3 of the Convention not to expel a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
10.4 The Committee notes that the author claims the protection of article 3 on the grounds that he is in danger of being arrested and retried for the offences which he committed in Canada. However, he does not claim that he has participated in political activities in China, nor that he belongs to a political, professional or social group targeted by the authorities for repression or torture.

10.5 The Committee adds that, according to the information in its possession, there is no indication that the Chinese authorities intend to imprison the author because of his Canadian convictions. On the contrary, the State party has stated that judicial proceedings are not undertaken in such cases. Moreover, the Committee considers that, even if it were certain that the author would be arrested on his return to China because of his prior convictions, the mere fact that he would be arrested and retried would not constitute substantial grounds for believing that he would be in danger of being subjected to torture.

10.6 Furthermore, the Committee refers to the documents submitted by the author, in support of his request for repeal of the decision to revoke his permanent resident status, which allegedly provide proof of his rehabilitation and reintegration into Canadian society. The Committee notes that article 3 of the Convention authorizes it to determine whether return would expose a person to the danger of being subjected to torture but that it is not competent to determine whether or not the author is entitled to a residence permit under a country's domestic legislation.

10.7 The Committee is aware of the seriousness of the human rights situation in China, but, on the basis of the above, considers that the author has not substantiated his claim that he will be personally at risk of being subject to torture if he is returned to China.

11. The Committee against Torture...is of the view that the situation as established by the Committee does not reveal a breach of article 3 of the Convention.

- *X. Y. and Z. v. Sweden* (61/1996), CAT, A/53/44 (6 May 1998) 75 at paras. 11.1-11.6 and 12.

...

11.1 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the authors would be in danger of being subject to torture upon return to the Democratic Republic of the Congo...

11.2 The Committee notes that the authors have claimed that they have been subjected to torture in the past, and that Y has provided medical evidence showing that she suffers from a post traumatic stress disorder. The Committee observes that past torture is one of the elements to be taken into account by the Committee when examining a claim concerning article 3 of the Convention, but that the aim of the Committee's examination of the communication is to find whether the authors would risk being subjected to torture now, if returned to the Democratic Republic of the Congo.

11.3 The authors' fear of being subjected to torture was originally based on their political activities for the PRP. The Committee notes that the party is part of the alliance forming the present Government in the Democratic Republic of the Congo, and that the authors' fear thus appears to lack substantiation.

11.4 In their latest submission, the authors have raised other grounds for fearing to be subjected to torture upon return to their country. In this context, they have stated that they disagree with the present Government's policy and that they have participated in a demonstration against the arrest of a political leader in the Democratic Republic of the Congo. According to the Committee's jurisprudence, c/ activities in the receiving country should also be taken into account when determining whether substantial grounds exist for believing that the return to their country would expose the authors to a risk of torture. In the instant case, however, the Committee considers that the authors' activities in Sweden are not such as to substantiate the belief that they would be in danger of being subjected to torture.

11.5 The Committee is aware of the serious situation of human rights in the Democratic Republic of the Congo, as *inter alia*, reflected by the report of the Special Rapporteur of the Commission on Human Rights. The Committee observes however, that UNHCR has not

issued a recommendation to suspend the return of rejected asylum seekers to the Democratic Republic of the Congo in view of the current situation and accordingly that no objective impediments exist to the return of failed refugee claimants to the Democratic Republic of the Congo. The Committee recalls that, for the purpose of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned. On the basis of the above considerations, the Committee is of the opinion that such risk has not been established.

11.6 In the light of the above, the Committee considers that the information before it does not show that substantial grounds exist for believing that the authors will be personally at risk of being subject to torture if they are returned to the Democratic Republic of the Congo.

12. The Committee against Torture...is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

Notes

...

c/ See Committee's Views in communication No. 34/1995 (*Aemei v. Switzerland*), adopted on 9 May 1997.

- *I. A. O. v. Sweden* (65/1997), CAT, A/53/44 (6 May 1998) 82 at paras. 14.2-14.6 and 15.

...

14.2 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Djibouti...

14.3 The Committee has noted the medical evidence provided by the author, and on this basis is of the opinion that there is firm reason to believe that the author has been tortured in the past. In this context, the Committee observes that the author suffers from a post-traumatic stress disorder, and that this has to be taken into account when assessing the author's presentation of the facts. The Committee is therefore of the opinion that the inconsistencies as exist in the author's story do not raise doubts as to the general veracity of his claim that he was detained and tortured.

14.4 The Committee further notes that the author was detained in 1991, allegedly because he had published articles abroad, criticizing the Government. The author has stated that he has continued to publish articles about Djibouti, and that he therefore continues to be at risk of being detained and tortured when returned to Djibouti. The Committee notes that the

State party's immigration authorities were of the opinion that the author's writings were not of such character as to endanger him upon his return. The author has provided a list of his publications in Arabic-language magazines, in which he has criticized the Government for its policies and denounced the discriminatory treatment of Afars. There is no indication that the author is otherwise politically active against the Government of Djibouti.

14.5 The Committee is aware of reported human rights violations in Djibouti, but has no information which would allow it to conclude that a consistent pattern of gross, flagrant or mass violations of human rights exists in Djibouti. According to the information available to the Committee, although journalists are occasionally jailed or intimidated by police, they do not appear to be among the groups that are targeted for repression and opposition periodicals circulate freely and openly criticise the Government. The Committee also notes that no reports of torture exist with regard to the FRUD officials who were detained in September 1997. The Committee recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being subjected to torture in the country to which a person is returned. On the basis of the considerations above, the Committee is of the opinion that such risk has not been established. In this connection, the Committee notes that a risk of being detained as such is not sufficient to trigger the protection of article 3 of the Convention.

14.6 The Committee considers that the information before it does not show that substantial grounds exist for believing that the author will be in danger of being subjected to torture if he is returned to Djibouti.

15. The Committee against Torture...is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

- *G. R. B. v. Sweden* (83/1997), CAT, A/53/44 (15 May 1998) 92 at paras. 6.2, 6.4-6.6 and 7.

...
6.2 The issue before the Committee is whether the forced return of the author to Peru would violate the obligation of Sweden under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture...
...
6.4 The Committee notes that the facts on which the author's claim are based, are not in dispute. The Committee further notes that the author has never been subjected to torture or ill-treatment by the Peruvian authorities and that she has not been politically active since 1985 when she left Peru to study abroad. According to unchallenged information, the author has been able to visit Peru on two occasions without encountering difficulties with the

national authorities.

6.5 The Committee recalls that the State party's obligation to refrain from forcibly returning a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is directly linked to the definition of torture as found in article 1 of the Convention. For the purposes of the Convention, according to Article 1, "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". The Committee considers that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention.

6.6 The Committee notes with concern the numerous reports of torture in Peru, but recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned. On the basis of the considerations above, the Committee is of the opinion that such risk has not been established.

7. The Committee against Torture...is of the view that the facts as found by the Committee do not reveal a breach of article 3...of the Convention.

See also:

- *S. V. et al. v. Canada* (49/1996), CAT, A/56/44 (15 May 2001) 102 at para. 9.5.

- *A. L. N. v. Switzerland* (90/1997), CAT, A/53/44 (19 May 1998) 106 at paras. 8.1, 8.3-8.8 and 9.

...
8.1 The Committee must decide whether sending the author back to Angola would violate Switzerland's obligation under article 3 of the Convention not to expel or return (*refouler*) an individual to another State if there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
8.3 The Committee observes that past torture is one of the elements to be taken into account when examining a claim under article 3 of the Convention, but its purpose in considering the communication is to decide whether, if the author were returned to Angola, he would now

risk being tortured.

8.4 In the case in point the Committee notes the author's claim to have been tortured in 1987 and beaten upon his arrest in February 1997. The author has however, supplied no evidence, whether medical certificates or other, attesting to acts of torture or ill-treatment or the sequelae of such. In particular, the Committee notes that the author has supplied no detailed information on how he was treated when arrested in February 1997, although it was that arrest that prompted him to leave for Switzerland.

8.5 The author bases his fear of torture on the fact that he is still being sought by MPLA soldiers because of the video cassette. The Committee notes, however, that he has put forward no reason to suggest that he is indeed still wanted. Neither does he make any allusion to the circumstances of his family, including his father, who, according to the author, was also wanted in connection with the video cassette.

8.6 The Committee notes that the situation in Angola, given the peace process, is still difficult, as recently stated in a report by the Secretary-General on the United Nations Observer Mission in Angola (MONUA). The same report states that human rights violations, including torture, which are attributed to the national police among other parties, continue to take place. But it also says that significant progress has been made and that the Government and UNITA have agreed on important points which should enable the peace process to advance. It would therefore seem that the situation in the country has not deteriorated since the author left.

8.7 The Committee points out that, for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he is returned. On the basis of the above considerations, the Committee is of the opinion that such a risk has not been established.

8.8 In the light of the foregoing, the Committee considers that the information before it does not show substantial grounds for believing that the author runs a personal risk of being tortured if sent back to Angola.

9. The Committee against Torture...concludes that the facts before it do not indicate a breach of article 3 of the Convention.

REFUGEES

- *K. N. v. Switzerland* (94/1997), CAT, A/53/44 (19 May 1998) 111 at paras. 10.2-10.5 and 11.

...
10.2 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger of being subject to torture upon return to Sri Lanka...

10.3 The author has claimed that he was arrested once in 1990 by the Indian armed forces, that his brother became a member of the Tamil Tigers in 1994 and that for this reason the army is looking for him and has searched his family's house on several occasions. The Committee notes that the only substantiation in support of the author's claim is a letter from the author's father, in which it is stated that the army came to the house to look for him and his brother. The Committee notes, however, that the letter does not give any details about either the author's or his family's situation. The author has not presented any other evidence in support of his claim. He does not claim that he has been tortured in the past.

10.4 The Committee has carefully examined the material before it and finds that it appears that the author's main reason to leave his country was that he felt caught between the two parties in the internal conflict. There is no indication that the author himself is personally targeted by the Sri Lankan authorities for repression.

10.5 The Committee is aware of the serious situation of human rights in Sri Lanka and notes with concern the reports of torture in this country. The Committee recalls however that, for the purpose of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned. On the basis of the considerations above, the Committee is of the opinion that such risk has not been established.

11. The Committee against Torture...is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

- *J. U. A. v. Switzerland* (100/1997), CAT, A/54/44 (10 November 1998) 63 at paras. 6.2, 6.4-6.6 and 7.

...
6.2 The Committee must decide whether sending the author back to Nigeria would violate the State party's obligation under article 3 of the Convention not to expel or return (*refouler*) an individual to another State if there are substantial grounds to believe that he would be in danger of being subjected to torture.

...
6.4 In the case in point, the Committee notes that the author has never been arrested or subjected to torture. Nor has the author claimed that persons in his immediate circle or individuals who participated in the events which according to him were the reason for his departure from the country were arrested or tortured. Furthermore, it has not been clearly established that the author continues to be sought by the Nigerian police or that the arrest warrant he furnished is an authentic document. Finally, the author has not cited specific cases of individuals alleged to have been tortured in Nigeria after being rejected by countries from which they had requested asylum.

6.5 The Committee...recalls that, for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

6.6 On the basis of the above considerations, the Committee considers that the information before it does not show substantial grounds for believing that the author runs a personal risk of being tortured if he is sent back to Nigeria.

7. The Committee against Torture...concludes that the facts before it do not indicate a breach of article 3 of the Convention.

- *Chipana v. Venezuela* (110/1998), CAT, A/54/44 (10 November 1998) 96 at paras. 6.2-6.4, 7 and 8.

...
6.2 The question that must be elucidated by the Committee is whether the author's extradition to Peru would violate the obligation assumed by the State party under article 3 of the Convention not to extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

6.3 The Committee must then decide whether there are well-founded reasons for believing that the author would be in danger of being subjected to torture on her return to Peru. In accordance with article 3, paragraph 2, of the Convention, the Committee should take account, for the purpose of determining whether there are such grounds, of 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. However, the existence of a pattern of this nature does not in itself constitute a sufficient reason for deciding whether the person in question is in danger of being subjected to torture on her return to this country; there must be specific reasons for believing that the person concerned

is personally in danger. Similarly, the absence of this pattern does not mean that a person is not in danger of being subjected to torture in her specific case.

6.4 When considering the periodic reports of Peru, A/50/44, paras. 62-73, and A/53/44, paras. 197-205, the Committee received numerous allegations from reliable sources concerning the use of torture by law enforcement officials in connection with the investigation of the offences of terrorism and treason with a view to obtaining information or a confession. The Committee therefore considers that, in view of the nature of the accusations made by the Peruvian authorities in requesting the extradition and the type of evidence on which they based their request, as described by the parties, the author was in a situation where she was in danger of being placed in police custody and tortured on her return to Peru.

7. In the light of the above, the Committee...considers that the State party failed to fulfil its obligation not to extradite the author, which constitutes a violation of article 3 of the Convention.

8. Furthermore, the Committee is deeply concerned by the fact that the State party did not accede to the request made by the Committee...that it should refrain from expelling or extraditing the author while her communication was being considered by the Committee and thereby failed to comply with the spirit of the Convention. The Committee considers that the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee.

- *Ayas v. Sweden* (97/1997), CAT, A/54/44 (12 November 1998) 57 at paras. 6.2, 6.4-6.6 and 7.

...
6.2 The issue before the Committee is whether the forced return of the author to Turkey would violate the obligation of Sweden under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
6.4 The Committee is aware of the serious human rights situation in Turkey. Reports from reliable sources suggest that persons suspected of having links with the PKK are frequently tortured in the course of interrogations by law enforcement officers and that this practice is not limited to particular areas of the country.

6.5 It is not in dispute that the author comes from a politically active family. Moreover, the Committee considers the explanations regarding his own political activities as credible and consistent with the findings of the medical reports according to which he suffers from post-traumatic stress syndrome and his scars are in conformity with the alleged causes Although the author changed his first version of the facts he gave a logical explanation of his reasons for having done so. Hence, the Committee has not found inconsistencies that would challenge the general veracity of his claim.

6.6 In the circumstances the Committee considers that, given the human rights situation in Turkey, the author's political affiliation and activities with the PKK as well as his history of detention and torture constitute substantial grounds for believing that he would be at risk of being arrested and subjected to torture if returned to Turkey.

7. In the light of the above, the Committee is of the view that the State party has an obligation, in conformity with article 3 of the Convention, to refrain from forcibly returning the author to Turkey or to any other country where he runs a real risk of being expelled or returned to Turkey.

- *A. v. The Netherlands* (91/1997), CAT, A/54/44 (13 November 1998) 50 at paras. 6.2, 6.4-6.8 and 7.

...
6.2 The issue before the Committee is whether the forced return of the author to Tunisia would violate the obligation of the Netherlands under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
6.4 Reports from reliable sources have over the years documented cases suggesting that a pattern of detention, imprisonment, torture and ill-treatment of persons accused of political opposition activities, including links with the Al-Nahda movement, exist in Tunisia.

6.5 The Committee notes that in the proceedings that followed his first request for asylum the author lied about his identity and his nationality and expressed a number of inconsistencies as to the reasons that prompted his departure from Tunisia. In the Committee's view, however, these inconsistencies were clarified by the explanations given by the author in his interview with immigration authorities on 24 February 1997, explanations which have not been referred to in the State party's submission.

6.6 With respect to the medical evidence provided by the author, in the Committee's view the State party has failed to explain why his claims were considered insufficiently substantial

as to warrant a medical examination.

6.7 The author has repeatedly stated that he is not a supporter of the Al-Nahda movement. This fact leads the State party to conclude that the Tunisian authorities would not have interest in him. The Committee notes, however, that the State party does not dispute that the author was tortured while held in police custody as a result of assisting an Al-Nahda member to flee to Algeria and emphasizes the fact that it occurred because of the Al-Nahda association. It also notes that the author escaped from the barracks where he was performing military service. If the author was tortured in the past despite not being an Al-Nahda supporter, he could be tortured again in view of his past history of detention, his assistance of an Al-Nahda member to flee to Algeria and his desertion from the military barracks in Ghafsa.

6.8 In the circumstances, the Committee considers that substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Tunisia.

7. In the light of the above, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the author to Tunisia or to any other country where he runs a real risk of being expelled or returned to Tunisia.

- *Korban v. Sweden* (88/1997), CAT, A/54/44 (16 November 1998) 45 at paras. 6.2, 6.4, 6.5 and 7.

...
6.2 The issue before the Committee is whether the forced return of the author to Iraq or Jordan would violate the obligation of Sweden under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
6.4 The Committee is aware of the serious human rights situation in Iraq and considers that the author's history of detention in that country as well as the possibility of his being held responsible for his son's defection from the army should be taken into account when determining whether he would be in danger of being subjected to torture upon his return. The Committee also considers that the presentation of the facts by the author do not raise significant doubts as to the general veracity of his claims and notes that the State party has not expressed doubts in this respect either. In the circumstances, the Committee considers that substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Iraq.

6.5 The Committee notes that the Swedish immigration authorities had ordered the author's expulsion to Jordan and that the State party abstains from making an evaluation of the risk that the author will be deported to Iraq from Jordan. It appears from the parties' submissions, however, that such risk cannot be excluded, in view of the assessment made by different sources, including UNHCR, based on reports indicating that some Iraqis have been sent by the Jordanian authorities to Iraq against their will, that marriage to a Jordanian woman does not guarantee a residence permit in Jordan and that this situation has not improved after the signature of a Memorandum of Understanding between the UNHCR and the Jordanian authorities regarding the rights of refugees in Jordan. The State party itself has recognized that Iraqi citizens who are refugees in Jordan, in particular those who have been returned to Jordan from a European country, are not entirely protected from being deported to Iraq.

7. In the light of the above, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation to refrain from forcibly returning the author to Iraq. It also has an obligation to refrain from forcibly returning the author to Jordan, in view of the risk he would run of being expelled from that country to Iraq. In this respect the Committee refers to paragraph 2 of its general comment on the implementation of article 3 of the Convention in the context of article 22, according to which "the phrase 'another State' in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited". Furthermore, the Committee notes that although Jordan is a party to the Convention, it has not made the declaration under article 22. As a result, the author would not have the possibility of submitting a new communication to the Committee if he was threatened with deportation from Jordan to Iraq.

- *Haydin v. Sweden* (101/1997), CAT, A/54/44 (20 November 1998) 67 at paras. 6.2 and 6.4-6.9.

...
6.2 The issue before the Committee is whether the forced return of the author to Turkey would violate the obligation of Sweden under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
6.4 The Committee is aware of the serious human rights situation in Turkey. Reports from reliable sources suggest that persons suspected of having links with the PKK are frequently tortured in the course of interrogations by law enforcement officers and that this practice is not limited to particular areas of the country. In this context, the Committee further notes that the Government has stated that it shares the view of UNHCR, i.e. that no place of refuge is available within the country for persons who risk being suspected of being active in or

sympathizers of the PKK.

6.5 The Committee recalls that, for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he is returned. The Committee wishes to point out that the requirement of necessity and predictability should be interpreted in the light of its general comment on the implementation of article 3 which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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" (A/53/44, annex IX, para. 6).

6.6 The Committee notes the medical evidence provided by the author. The Committee notes in particular that the author suffers from a post-traumatic stress disorder and that this has to be taken into account when assessing the author's presentation of the facts. The Committee notes that the author's medical condition indicates that the author has in fact been subjected to torture in the past.

6.7 In the author's case, the Committee considers that the author's family background, his political activities and affiliation with the PKK, his history of detention and torture, as well as indications that the author is at present wanted by Turkish authorities, should be taken into account when determining whether he would be in danger of being subjected to torture upon his return. The Committee notes that the State party has pointed to contradictions and inconsistencies in the author's story and further notes the author's explanations for such inconsistencies. The Committee considers that complete accuracy is seldom to be expected by victims of torture, especially when the victim suffers from post-traumatic stress syndrome; it also notes that the principle of strict accuracy does not necessarily apply when the inconsistencies are of a material nature. In the present case, the Committee considers that the presentation of facts by the author does not raise significant doubts as to the trustworthiness of the general veracity of his claims.

6.8 In the circumstances, the Committee considers that substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Turkey.

6.9 In the light of the above, the Committee is of the view that the State party has an obligation to refrain from forcibly returning the author to Turkey, or to any other country where he runs a real risk of being expelled or returned to Turkey.

REFUGEES

- *H. D. v. Switzerland* (112/1998), CAT, A/54/44 (30 April 1999) 101 at paras. 6.2 and 6.4-6.7.

...
6.2 The issue before the Committee is whether the forced return of the author to Turkey would violate the obligation of the State party under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
6.4 In the present instance, the Committee notes that the State party draws attention to inconsistencies and contradictions in the author's account, casting doubt on the truthfulness of his allegations. The Committee considers, however, that even in the presence of lingering doubts as to the truthfulness of the facts presented by the author of a communication, it must satisfy itself that the applicant's security will not be jeopardized. It is not necessary, for the Committee to be so satisfied, that all the facts related by the author should be proved: it is enough if the Committee considers them sufficiently well attested and credible.

6.5 From the information submitted by the author, the Committee observes that the events that prompted his departure from Turkey date back to 1991, and seem to be particularly linked to his relations with members of his family who belong to the PKK. The apparent object of arresting the author in 1991 was, on the first occasion, to force him to disclose his cousin's whereabouts, and on the second occasion, to force him to collaborate with the security forces. On the other hand, the question of a prosecution against him on specific charges has never arisen. Furthermore, there is nothing to suggest that he has collaborated with PKK members in any way since leaving Turkey in 1991, or that he or members of his family have been sought or intimidated by the Turkish authorities. In the circumstances, the Committee considers that the author has not furnished sufficient evidence to support his fears of being arrested and tortured upon his return.

6.6 The Committee notes with concern the numerous reports of human rights violations, including the use of torture, in Turkey, but recalls that, for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

6.7 The Committee against Torture...concludes that the State party's decision to return the author to Turkey does not constitute a breach of article 3 of the Convention.

See also:
- *Y. S. v. Switzerland* (147/1999), CAT, A/56/44 (14 November 2000) 166 at paras. 6.3-6.7.
- *S. L. v. Sweden* (150/1999), CAT, A/56/44 (11 May 2001) 187 at paras. 6.3 and 6.4.

REFUGEES

- *S. M. R. and M. M. R. v. Sweden* (103/1998), CAT, A/54/44 (5 May 1999) 73 at paras. 9.2, 9.4-9.8 and 10.

...
9.2 The issue before the Committee is whether the forced return of the authors to Iran would violate the obligation of Sweden under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture.
...
9.4 In the case under consideration the Committee notes the State party's statement that the risk of torture should be a "foreseeable and necessary consequence" of an individual's return. In this respect the Committee recalls its previous jurisprudence, that the requirement of necessity and predictability should be interpreted in the light of its general comment on the implementation of article 3, which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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" (A/53/44, annex IX, para. 6).

9.5 ...[T]he Committee has no reasons to question S.M.R.'s credibility regarding her past experiences of detention, her political activities and the way in which she obtained a passport. However the Committee considers, on the basis of the information provided, that the political activities that S.M.R. claims to have carried out after 1991, inside and outside Iran, are not of such a nature as to conclude that she risks being tortured upon her return. The Committee notes, in particular, that after M.M.R.'s release he was not further questioned about his wife's activities and whereabouts, neither was he molested by the Iranian authorities. Moreover, there is no indication that an arrest order has been issued against S.M.R. Counsel submits that the other members of her group were arrested and that the head of the group was sentenced to imprisonment. No information is provided, however, as to the grounds for her conviction and there is no indication that the women were subjected to torture or ill-treatment.

9.6 The Committee further considers that the fact that M.M.R. left Iran without a visa to enter Sweden does not constitute an additional argument to conclude that the authors risk being tortured if they return to Iran. No evidence has been provided to the Committee that such an act is punished in Iran with imprisonment, let alone torture.

9.7 The Committee...recalls that for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the

country to which he is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

9.8 On the basis of the above considerations the Committee considers that the information before it does not show substantial grounds for believing that the authors run a personal risk of being tortured if they return to Iran.

10. The Committee against Torture...concludes that the decision of the State party to return the authors to Iran would not constitute a breach of article 3 of the Convention.

- *M. B. B. v. Sweden* (104/1998), CAT, A/54/44 (5 May 1999) 82 at paras. 6.2, 6.4-6.9 and 7.

...
6.2 The issue before the Committee is whether the forced return of the author to Iran would violate the obligation of Sweden under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
6.4 In the case under consideration the Committee notes the statement of the National Immigration Board that the author was not entitled to asylum in accordance with the Convention relating to the Status of Refugees in view of the fact that he had admitted having committed the kind of crimes referred to in article 1 F of the said Convention. The Committee recalls, however, that unlike the provisions of the above Convention, article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment applies irrespective of whether the individual concerned has committed crimes and the seriousness of those crimes. On the other hand, the legal status of the individual concerned in the country where he/she is allowed to stay is not relevant for the Committee.

6.5 The Committee further notes the State party's argument that "substantial grounds" in article 3, paragraph 1, of the Convention means that the risk of the individual being tortured if returned is a "foreseeable and necessary consequence". In this respect the Committee recalls its previous jurisprudence [Communication No. 101/1997 (CAT/C/21/D/101/1997), Views adopted on 20 November 1998] that the requirement of necessity and predictability should be interpreted in the light of its General Comment on the implementation of article 3 which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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" (A/53/44, annex IX, para. 6).

6.6 In the present case the Committee notes that the author has provided it with an account of his activities in Iran which differs in many respects from the one he provided to the Swedish authorities. In the Committee's view, the important disparities cannot fully be explained by "poor translations", as suggested by the author, and raise doubts about his credibility. The author's credibility is further undermined by the fact that he provided the Swedish authorities with copies of an arrest warrant issued by a prosecutor and a judgement drawn up by the supreme military tribunal of Iran which turned out to be forgeries. In these circumstances the Committee finds that the author has not substantiated his claims that he is at risk of being tortured if he returns to Iran.

6.7 The Committee further notes that the author has also failed to substantiate his claim that deserters from the Pasdaran who leave the country, as well as converts to Christianity, in general face a risk of being subjected to torture, especially if, in the case of the latter, they are not prominent members of the Christian community.

6.8 The Committee notes with concern the numerous reports of human rights violations, including the use of torture, in Iran, but recalls that for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

6.9 On the basis of the above considerations the Committee considers that the information before it does not show substantial grounds for believing that the author runs a personal risk of being tortured if he is sent back to Iran.

7. The Committee against Torture...concludes that the decision of the State party to return the author to Iran does not constitute a breach of article 3 of the Convention.

- *N. P. v. Australia* (106/1998), CAT, A/54/44 (6 May 1999) 89 at paras. 6.4-6.6 and 7.

...
6.4 The Committee must decide whether the forced return of the author to Sri Lanka would violate the State party's obligation under article 3, paragraph 1, of the Convention not to expel or return (*refouler*) an individual to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture...

6.5 The Committee is aware of the serious situation of human rights in Sri Lanka and notes with concern the reports of torture in the country, in particular during pre-trial detention. It is also aware of the fact that Tamils are at particular risk of being detained following controls at checkpoints or search operations.

6.6 Although the Committee considers that complete accuracy is seldom to be expected from victims of torture, it notes the important inconsistencies in the author's statements before the Australian authorities. It further notes that the author has not provided the Committee with any arguments, including medical evidence, which could have explained such inconsistencies. Accordingly, the Committee is not persuaded that the author faces a personal and substantial risk of being tortured upon his return to Sri Lanka.

7. In the circumstances the Committee...is of the view that the decision of the State party to return the author to Sri Lanka would not constitute a breach of article 3 of the Convention.

- *Elmi v. Australia* (120/1998), CAT, A/54/44 (14 May 1999) 109 at paras. 6.4, 6.6-6.9 and 7.

...
6.4 The Committee must decide whether the forced return of the author to Somalia would violate the State party's obligation, under article 3, paragraph 1 of the Convention, not to expel or return (*refouler*) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In order to reach its conclusion the Committee must take into account all relevant considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. The aim, however, is to determine whether the individual concerned would personally risk torture in the country to which he or she 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 sufficient grounds for determining whether the particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must be adduced to show 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 or her specific circumstances.
...
6.6 The State party does not dispute the fact that gross, flagrant or mass violations of human rights have been committed in Somalia. Furthermore, the independent expert on the situation of human rights in Somalia, appointed by the Commission on Human Rights, described in her latest report the severity of those violations, the situation of chaos prevailing in the country, the importance of clan identity and the vulnerability of small, unarmed clans such as the Shikal, the clan to which the author belongs. (E/CN.4/1999/103)

6.7 The Committee further notes, on the basis of the information before it, that the area of Mogadishu where the Shikal mainly reside, and where the author is likely to reside if he ever reaches Mogadishu, is under the effective control of the Hawiye clan, which has established

quasi-governmental institutions and provides a number of public services. Furthermore, reliable sources emphasize that there is no public or informal agreement of protection between the Hawiye and the Shikal clans and that the Shikal remain at the mercy of the armed factions.

6.8 ...[T]he Committee considers that two factors support the author's case that he is particularly vulnerable to the kind of acts referred to in article 1 of the Convention. First, the State party has not denied the veracity of the author's claims that his family was particularly targeted in the past by the Hawiye clan, as a result of which his father and brother were executed, his sister raped and the rest of the family was forced to flee and constantly move from one part of the country to another in order to hide. Second, his case has received wide publicity and, therefore, if returned to Somalia the author could be accused of damaging the reputation of the Hawiye.

6.9 In the light of the above the Committee considers that substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Somalia.

7. Accordingly, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the author to Somalia or to any other country where he runs a risk of being expelled or returned to Somalia.

- *A. D. v. The Netherlands* (96/1997), CAT, A/55/44 (12 November 1999) 88 at paras. 7.2-7.4 and 8.

...
7.2 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Sri Lanka...

7.3 The Committee notes the State party's information that the author at present does not risk expulsion, pending the consideration of the author's request for extension of his residence permit for medical treatment. Noting that the order for the author's expulsion is still in force, the Committee considers that the possibility that the State party will grant the author an extended temporary permit for medical treatment is not sufficient to fulfil the State party's obligations under article 3 of the Convention.

7.4 The Committee considers that the author's activities in Sri Lanka and his history of detention and torture are relevant when determining whether he would be in danger of being

subjected to torture upon his return. The Committee notes in that respect that although the State party has pointed to inconsistencies in the author's account of events, it has not contested the general veracity of his claim. The Committee further notes the medical evidence indicating that the author, although not at present fulfilling the criteria for a diagnosis of a post-traumatic stress disorder, may have suffered from this syndrome in the past. However, the Committee also notes that the harassment and torture to which the author was allegedly subjected was directly linked to his exposure of human rights violations taking place while the previous Government was in power in Sri Lanka. The Committee is aware of the human rights situation in Sri Lanka but considers that, given the shift in political authority and the present circumstances, the author has not substantiated his claim that he will personally be at risk of being subjected to torture if returned to Sri Lanka at present.

8. The Committee against Torture...is of the view that the decision of the State party to return the author to Sri Lanka would not constitute a breach of article 3 of the Convention.

- *K. M. v. Switzerland* (107/1998), CAT, A/55/44 (16 November 1999) 109 at paras. 6.2, 6.4-6.8 and 7.

...
6.2 The issue before the Committee is whether the forced return of the author to Turkey would violate the obligation of Switzerland under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
6.4 The Committee recalls its general comment on the implementation of article 3 which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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" (A/53/44, annex IX, para. 6).

6.5 In the present case the Committee notes that the State party draws attention to a number of inconsistencies and contradictions in the author's account, casting doubt on the truthfulness of his allegations. It also notes the explanations provided by counsel in that respect. The Committee considers, however, that those inconsistencies and contradictions are not of such nature as to be relevant for the assessment of the risk under which the author might be if he is returned to Turkey.

6.6 From the information submitted by the author the Committee observers that the events that prompted his departure from Turkey date back to 1995. The author provided the Swiss

authorities with a document allegedly issued by the Office of the Public Prosecutor of Gazantiep, soon after his departure, as evidence of proceedings initiated against him for his links with the PKK. The Swiss authorities considered that the document in question was a forgery. In the Committee's opinion the explanations provided by the author to demonstrate that the said document is authentic are not convincing. Furthermore, the Committee notes the information provided by the Swiss embassy in Ankara according to which the police has not established a dossier on the author and he is not under an order of arrest. Accordingly, the author has failed to demonstrate that he is under risk of being arrested upon his return. The Committee further notes the author's allegations that his father was arrested by the police and questioned about his whereabouts. However, the arrest in question took place in 1995. There is nothing to suggest that the author or members of his family have been sought or intimidated by the Turkish authorities since then. There is nothing to suggest either that the author has collaborated with the PKK in any way since leaving Turkey in 1995.

6.7 The Committee notes with concern the numerous reports concerning the use of torture in Turkey, but recalls that, for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

6.8 On the basis of the above considerations, the Committee is of the opinion that the information before it does not show substantial grounds for believing that the author runs a personal risk of being tortured if he is sent back to Turkey.

7. The Committee against Torture...concludes that the decision of the State party to return the author to Turkey does not constitute a breach of article 3 of the Convention.

- *K. T. v. Switzerland* (118/1998), CAT, A/55/44 (19 November 1999) 121 at paras. 2.1, 6.2-6.5 and 7.

...
2.1 The author states that he was a member of the People's Revolution Movement (MPR) from 1992. He was working on behalf of former President Mobutu and promoting Mobutu's interests. He received money from the MPR and had no other occupation. On 10 May 1997, six soldiers loyal to Laurent-Désiré Kabila questioned him and sacked his house. The author hid for four days at the home of his superior in the MPR before leaving the country on 14 May 1997 using a false passport.
...
6.2 The issue before the Committee is whether the expulsion of the author to the Democratic Republic of the Congo would violate the State party's obligation under article 3 of the

Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

6.3 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture if returned to the Democratic Republic of the Congo. In reaching this decision, it must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in the country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon returning to that country; there must be other grounds indicating that he or she 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 in danger of torture in his or her specific circumstances.

6.4 In the present case it must be pointed out that the author has provided neither the Committee nor the State party with any evidence that he was a member of MPR or that his family has been persecuted by the current regime in Kinshasa. The Committee does not find his explanations for the absence of such evidence convincing. Nor has the author provided evidence of the alleged persecution to which former, in particular junior, members of MPR are supposedly subject at present owing to their support for the country's former president and active backing for the opposition to the regime currently in power.

6.5 The Committee is concerned at the many reports of human rights violations, including the use of torture, in the Democratic Republic of the Congo, but recalls that for the purposes of article 3 of the Convention the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

7. The Committee against Torture...concludes that the decision of the State party to return the author to the Democratic Republic of the Congo does not constitute a breach of article 3 of the Convention.

See also:

- *G. T. v. Switzerland* (137/1999), CAT, A/55/44 (16 November 1999) 147 at paras. 6.2-6.9.

REFUGEES

- *N. M. v. Switzerland* (116/1998), CAT, A/55/44 (9 May 2000) 115 at paras. 6.2 and 6.4-6.8.

...
6.2 The issue before the Committee is whether the forced return of the author to the Democratic Republic of the Congo would violate the obligation of the State party under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
...
6.4 The Committee recalls its General Comment on the implementation of article 3 which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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" (A/53/44, annex IX, para. 6).

6.5 In the present case, the Committee notes that the State party draws attention to a number of inconsistencies and contradictions in the author's account, casting doubt on the truthfulness of his allegations. It also notes the explanations provided by counsel in that respect.

6.6 The Committee finds the arguments advanced by the author in support of his allegations of being tortured before fleeing the Democratic Republic of the Congo to be inconsistent and unconvincing.

6.7 The Committee also finds that it has not been given enough evidence by the author to conclude that the latter would run a personal, real and foreseeable risk of being tortured if returned to his country of origin.

6.8 The Committee against Torture...concludes that the decision of the State party to return the author to the Democratic Republic of the Congo does not constitute a breach of article 3 of the Convention.

- *H. A. D. v. Switzerland* (126/1998), CAT, A/55/44 (10 May 2000) 125 at paras. 8.3, 8.5 and 8.6.

...
8.3. The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Turkey...
...

8.5. The Committee does not doubt the allegations of ill-treatment to which the author was subjected during his 28-day detention after his arrest in 1985, even though the medical reports do not substantiate the author's description of acts of torture or their effects.

8.6. However, in view of the time that has elapsed between the events described by the author, the establishment of the veracity of his claims and the present day (15 years have passed), the current risk for the author of being subjected to torture or "deliberate persecution" on being returned to Turkey does not appear to have been sufficiently well-established.

- *V. X. N. and H. N. v. Sweden* (130 and 131/1999), CAT, A/55/44 (15 May 2000) 133 at paras. 1.1, 13.3, 13.6-13.8 and 14.

1.1 The authors of the communications are Mr. V.X.N., born on 1 December 1959, and Mr. H.N., born on 10 November 1963, two Vietnamese nationals currently residing in Sweden where they received refugee status and permanent residence permits on 18 August 1992 and 23 August 1991 respectively. The authors claim that they risk torture if they are returned to Viet Nam and that their forced return to that country would therefore constitute a violation by Sweden of article 3 of the Convention ...
...
13.3 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the authors would be in danger of being subjected to torture upon return to Viet Nam ...
...
13.6 ...[T]he Committee considers that the authors' activities in Viet Nam and their history of detention and torture are relevant in determining whether they would be in danger of being subjected to torture upon their return. The Committee notes in that respect that the State party has pointed to inconsistencies in the authors' accounts of events and has contested the general veracity of their claim. In the present case, although a number of disparities may be explained by difficulties in translation, the considerable time which has elapsed since the authors' escape from Viet Nam and the procedural circumstances, the Committee considers that some doubts as to the authors' credibility remain.

13.7 Notwithstanding the above, the Committee is aware of the human rights situation in Viet Nam, but considers that given, *inter alia*, the considerable time which has elapsed since the escape of the authors and the fact that the illegal departure from Viet Nam in the middle of the 1980s is no longer considered an offence by the Vietnamese authorities, the authors have not substantiated their claims that they will personally be at risk of being subjected to torture if returned to Viet Nam at present. In this connection the Committee notes that a risk of being imprisoned upon return as such is not sufficient to trigger the protection of article

3 of the Convention.

13.8 The Committee recalls that, for the purposes of the Convention, one of the prerequisites for "torture" is that it 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. The Committee considers that the issue whether a State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a private person, without the consent or acquiescence of the State, falls outside the scope of article 3 of the Convention.

14. The Committee...is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

- *T. P. S. v. Canada* (99/1997), CAT, A/55/44 (16 May 2000) 94 at paras. 2.1-2.4, 15.1-15.5, 16.1 and 16.2.

...

2.1 In January 1986, the author and four co-accused were convicted by a Pakistani court of hijacking an Indian Airlines aeroplane in September 1981 and sentenced to life imprisonment...

2.2 In October 1994, the Government of Pakistan released the author and his co-accused on the condition that they leave the country. The author states that he could not return to India for fear of persecution. With the assistance of an agent and using a false name and passport, he arrived in Canada in May 1995. Upon arrival he applied for refugee status under his false name and did not reveal his true identity and history ...

2.3 At the end of 1995, an immigration inquiry was opened to determine whether the author had committed an offence outside Canada which, if committed in Canada, would constitute an offence punishable by a maximum prison term of 10 years or more. His refugee application was suspended. In the beginning of 1996, an adjudicator decided that the author had committed such an offence and, as a result, a conditional deportation order was issued against him. At the same time the Canadian Minister of Immigration was requested to render an opinion as to whether the author constituted a danger to the Canadian public. Such a finding by the Minister would prevent the author from having his refugee claim heard and would remove his avenues of appeal under the Immigration Act.

2.4 The author successfully appealed the adjudicator's decision and a new inquiry was ordered by the Federal Court of Canada. As a result of the second inquiry the author was again issued with a conditional deportation order. No appeal against the decision was filed, for lack of funds. The Minister was again requested to render an opinion as to whether the

author constituted a danger to the public. The Minister issued a certificate so stating and the author was detained with a view to his removal.

...

15.1 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to India...

15.2 The Committee first notes that the author was removed to India on 23 December 1997, despite a request for interim measures pursuant to rule 108 (9) of the rules of procedure according to which the State party was requested not to remove the author while his communication was pending before the Committee.

15.3 One of the overriding factors behind the speedy deportation was the claim by the State party that the "author's continued presence in Canada represents a danger to the public". The Committee, however, is not convinced that an extension of his stay in Canada for a few more months would have been contrary to the public interest. In this regard, the Committee refers to a case of the European Court of Human Rights (*Chahal v. United Kingdom*) which requires that scrutiny of the claim "must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State".

15.4 As for the merits of the communication, the Committee notes that the author has now been living in India for more than two years. During this time, although he claims to have been harassed and threatened along with his family, on various occasions by the police, it seems that there was no escalation in the manner in which he has been treated by the authorities. In these circumstances, and given the substantial period that has elapsed since the author's removal - ample time for the allegations of the author to have materialized - the Committee cannot but conclude that such allegations were unfounded.

15.5 The Committee is of the opinion that after a period of nearly two and a half years, it is unlikely that the author would still at risk of being subjected to acts of torture.

16.1 The Committee considers that the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee. The Committee is deeply concerned that the State party did not accede to its request for interim measures under rule 108, paragraph 3, of its rules of procedure and removed the author to India.

16.2 The Committee...concludes that the author's removal to India by the State party does not constitute a breach of article 3 of the Convention.

For dissenting opinion in this context, see T. P. S. v. Canada (99/1997), CAT, A/55/44 (16 May 2000) 94 at Individual Opinion by Guibril Camara, 109.

- *A. M. v. Switzerland* (144/1999), CAT, A/56/44 (14 November 2000) 161 at paras. 2.1-2.3 and 6.6-6.8.

...
2.1 The author has been trained in computing. He was an active member of the Chadian Human Rights League (LTDH), vice-president of one of the components of the Alliance Nationale de Résistance (ANR) and acting vice-president of the Union des Jeunes Révolutionnaires (UJR) for an 18-month period during the president's absence. After this period he was denounced to the security forces by agents who had infiltrated those bodies.

2.2 On 16 September 1998, soldiers came to the author's home during his absence. A police officer friend advised him to leave his house. After he had gone into hiding at his mother's home, the soldiers returned to his house at night. This convinced him he should leave the country.

2.3 The author then requested asylum in Switzerland but his request was turned down. Thereupon he was allegedly forced by the Swiss authorities to contact the Chadian Embassy in France in order to organize his return home. The embassy officials reportedly refused to assist him as they claimed they could not ensure his safety unless he expressly renounced the opposition movement and supported the existing regime.
...
6.6 The Committee finds that the author has not mentioned any forms of persecution to which he was subjected in his country of origin. He was never ill-treated or tortured; nor was he ever questioned or detained by the security forces.

6.7 The Committee also finds that the author has not produced conclusive evidence of, nor demonstrated convincingly his membership of, or activities in, the Chadian Human Rights League, the Alliance nationale de résistance or the Union des jeunes révolutionnaires.

6.8 The Committee therefore finds that it has not been given enough evidence by the author to conclude that the latter would run a personal, real and foreseeable risk of being tortured if returned to his country of origin.

REFUGEES

- *M. R. P. v. Switzerland* (122/1998), CAT, A/56/44 (24 November 2000) 124 at paras. 2.1-2.4, 6.3, 6.5 and 6.6.

...
2.1 The author claims to be a member of the Bangladesh National Party (BNP), the main opposition political party. He was president of the BNP Union from 1994 to 1997 and vice-president of a regional BNP youth organization (the Yuba Dubal) as of 1997.

2.2 On 13 January 1997, the author and his brother were apparently attacked by members of the Awami League (AL), the political party in power. The author managed to flee, but his brother was seriously injured. A complaint was lodged with the police. The police arrested one of the suspected attackers, but quickly released him without charge. Members of the arrested person's family also exerted pressure on the author, who in the end withdrew his complaint.

2.3 After that incident, the author was forced to leave his home during the day. In the night of 13-14 June 1997, an AL member who was a driver for one of the organization's leaders, Mr. Shafijrahman, was killed. The attack's intended victim was apparently Mr. Shafijrahman himself, who was prompted to lodge a complaint against the author and four other BNP sympathizers. In that regard, the author points out that, in Bangladesh, it is common practice for BNP members to have complaints lodged against them and to be charged on non-existent grounds; this, in fact, constituted an abuse of power by AL members to intimidate and eliminate political opponents. After the complaint was lodged, the author decided to leave his country immediately.

2.4 The author arrived in Switzerland on 26 August 1997 and applied for asylum on 29 August 1997. His application was turned down on 7 January 1998, essentially on the grounds that the attack against him and his brother had not been carried out by the State ...
...
6.3 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Bangladesh ...
...
6.5 The Committee notes the arguments advanced by the author and by the State party regarding the alleged risk of the author's being tortured and considers that the latter has not produced enough evidence to show that he would run a personal real and foreseeable risk of being tortured in Bangladesh.

6.6 The Committee therefore finds that the information submitted to it does not demonstrate that there are substantial grounds for believing that the author would be in danger of being

personally tortured if returned to Bangladesh.

- *A. S. v. Sweden* (149/1999), CAT, A/56/44 (24 November 2000) 173 at paras. 2.1-2.5, 2.7, 2.8, 8.3-8.7 and 9.

...
2.1 The author submits that she has never been politically active in the Islamic Republic of Iran. In 1981, her husband, who was a high-ranking officer in the Iranian Air Force, was killed during training in circumstances that remain unclear; it has never been possible to determine whether his death was an accident. According to the author, she and her husband belonged to secular-minded families opposed to the regime of the mullahs.

2.2 In 1991, the Government of the Islamic Republic of Iran declared the author's late husband a martyr. The author states that martyrdom is an issue of utmost importance for the Shia Muslims in that country. All families of martyrs are supported and supervised by a foundation, the *Bonyad-e Shahid*, the Committee of Martyrs, which constitutes a powerful authority in Iranian society. Thus, while the author and her two sons' material living conditions and status rose considerably, she had to submit to the rigid rules of Islamic society even more conscientiously than before. One of the aims of *Bonyad-e Shahid* was to convince the martyrs' widows to remarry, which the author refused to do.

2.3 At the end of 1996 one of the leaders of the *Bonyad-e Shahid*, the high-ranking Ayatollah Rahimian, finally forced the author to marry him by threatening to harm her and her children, the younger of whom is handicapped. The Ayatollah was a powerful man with the law on his side. The author claims that she was forced into a so-called *sighe* or *mutah* marriage, which is a short-term marriage, in the present case stipulated for a period of one and a half years, and is recognized legally only by Shia Muslims. The author was not expected to live with her *sighe* husband, but to be at his disposal for sexual services whenever required.

2.4 In 1997, the author met and fell in love with a Christian man. The two met in secret, since Muslim women are not allowed to have relationships with Christians. One night, when the author could not find a taxi, the man drove her home in his car. At a roadblock they were stopped by the Pasdaran (Iranian Revolutionary Guards), who searched the car. When it became clear that the man was Christian and the author a martyr's widow, both were taken into custody at Ozghol police station in the Lavison district of Tehran. According to the author, she has not seen the man since, but claims that since her arrival in Sweden she has learned that he confessed under torture to adultery and was imprisoned and sentenced to death by stoning.

2.5 The author says that she was harshly questioned by the Zeinab sisters, the female equivalents of the Pasdaran who investigate women suspected of "un-Islamic behaviour", and was informed that her case had been transmitted to the Revolutionary Court. When it was discovered that the author was not only a martyr's widow but also the *sighe* wife of a powerful ayatollah, the Pasdaran contacted him. The author was taken to the ayatollah's home where she was severely beaten by him for five or six hours. After two days the author was allowed to leave and the ayatollah used his influence to stop the case being sent to the Revolutionary Court.

...

2.7 The author and her son arrived in Sweden on 23 December 1997 and applied for asylum on 29 December 1997. The Swedish Immigration Board rejected the author's asylum claim on 13 July 1998. On 29 October 1999, the Aliens Appeal Board dismissed her appeal.

2.8 The author submits that since her departure from Iran she has been sentenced to death by stoning for adultery. Her sister-in-law in Sweden has been contacted by the ayatollah who told her that the author had been convicted. She was also told that the authorities had found films and photographs of the couple in the Christian man's apartment, which had been used as evidence.

...

8.3 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to the Islamic Republic of Iran...

8.4 From the information submitted by the author, the Committee notes that she is the widow of a martyr and as such supported and supervised by the *Bonyad-e Shahid* Committee of Martyrs. It is also noted that the author claims that she was forced into a *sighe* or *mutah* marriage and to have committed and been sentenced to stoning for adultery. Although treating the recent testimony of the author's son, seeking asylum in Denmark, with utmost caution, the Committee is nevertheless of the view that the information given further corroborates the account given by the author.

8.5 The Committee notes that the State party questions the author's credibility primarily because of her failure to submit verifiable information and refers in this context to international standards, i.e. the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, according to which an asylum-seeker has an obligation to make an effort to support his/her statements by any available evidence and to give a satisfactory explanation for any lack of evidence.

8.6 The Committee draws the attention of the parties to its general comment on the implementation of article 3 of the Convention in the context of article 22, adopted on 21 November 1997, according to which the burden to present an arguable case is on the author

of a communication. The Committee notes the State party's position that the author has not fulfilled her obligation to submit the verifiable information that would enable her to enjoy the benefit of the doubt. However, the Committee is of the view that the author has submitted sufficient details regarding her *sighe* or *mutah* marriage and alleged arrest, such as names of persons, their positions, dates, addresses, name of police station, etc., that could have, and to a certain extent have been, verified by the Swedish immigration authorities, to shift the burden of proof. In this context the Committee is of the view that the State party has not made sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture.

8.7 The State party does not dispute that gross, flagrant or mass violations of human rights have been committed in the Islamic Republic of Iran. The Committee notes, *inter alia*, the report of the Special Representative of the Commission on Human Rights on the situation of human rights in the Islamic Republic of Iran (E/CN.4/2000/35) of 18 January 2000, which indicates that although significant progress is being made in that country with regard to the status of women in sectors like education and training, "little progress is being made with regard to remaining systematic barriers to equality" and for "the removal of patriarchal attitudes in society". It is further noted that the report, and numerous reports of non-governmental organizations, confirm that married women have recently been sentenced to death by stoning for adultery.

9. Considering that the author's account of events is consistent with the Committee's knowledge about the present human rights situation in the Islamic Republic of Iran, and that the author has given plausible explanations for her failure or inability to provide certain details which might have been of relevance to the case, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the author to the Islamic Republic of Iran or to any other country where she runs a risk of being expelled or returned to the Islamic Republic of Iran.

- *M. K. O. v. The Netherlands* (134/1999), CAT, A/56/44 (9 May 2001) 147 at paras. 2.1-2.3, 2.5, 4.3 and 7.3-7.5.

...

2.1 The author comes from a village located in the region of Tunceli, Turkish Kurdistan, where for many years there has been a war between the Turkish army and the Kurds. He claims to have been urged several times by the Turkish military to become a village guard, which he always refused.

2.2 The author alleges that as a village guard he would have to kill Kurds and Alevis, his

own people. Because of this refusal, he was very often ill-treated. He was beaten on several occasions by the Turkish militaries. During the winter, the author and other Kurds were forced to stand barefoot in the snow for hours. The author suffers from a kidney ailment as a result. Sometimes he and other Kurds were threatened with death and their food supplies stopped by the Turkish military. The author also alleges that he was arrested on several occasions and taken to the forest or the mountains where he was tortured.

2.3 When the author's neighbours were arrested for giving food to the guerrillas, he decided to leave Turkey because he was afraid of being arrested for the same reason. He arrived in the Netherlands on 21 June 1997 and applied for refugee status the same day. His request was turned down on 22 August 1997.

...

2.5 The author is an active member of the Kurdish Union in The Hague and in various Kurdish activities. He has run in marathons for the Kurds in the Netherlands and Germany, and has been seen with his Kurdish music band, Zylan several times on MED-TV, a Kurdish television station in Europe which can also be seen in Turkey and which was recently forbidden. On 16 February 1999, he was arrested in the Netherlands along with 300 other Kurds during a demonstration against Abdullah Öcalan's extradition to Turkey. Since then, he has remained in detention because he does not have a residence permit.

...

4.3 The State party maintains that the author has not proved that he would attract special attention from the Turkish authorities because he expressly said that he had never been arrested and had never had any problem despite having helped the PKK. It was only during the appeal phase of the asylum procedure that the author told the Dutch authorities that he was once arrested by three soldiers in civilian clothes. The author has never furnished a clear explanation for this contradiction.

...

7.3 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Turkey...

7.4 The Committee notes the arguments developed by both parties and considers that the author has not given any satisfactory explanation for the contradictions between his different statements to the Dutch immigration authorities. It notes that he fulfilled his military obligation without any appreciable problems and finds that he has not demonstrated that his later activities in the Netherlands could draw the attention of the Turkish authorities to the extent that he would risk being tortured were he removed to Turkey.

7.5 The Committee concludes that the author has not furnished sufficient evidence to substantiate his claim that he would run a personal, real and foreseeable risk of being tortured if he were sent back to his country of origin.

REFUGEES

- *S. S. and S. A. v. The Netherlands* (142/1999), CAT, A/56/44 (11 May 2001) 153 at paras. 2.1-2.6, 6.3 and 6.5-6.8.

  ...
  2.1 As to Mr. S. S., a member of the Tamil ethnic group, it is stated that he was held in detention by the Tamil Tiger organization LTTE from 10 January 1995 until 30 September 1995 for having publicly criticized the organization and its leader, and refusing to take part in its activities. During the period of detention, he performed tasks such as wood cutting, filling sandbags, digging bunkers and cooking. Before he was detained by LTTE, his father had been detained in his place and he had died in detention of a heart attack. On 30 September 1995, Mr. S. S. escaped from the LTTE barracks and travelled to Colombo.

  2.2 On 3 October 1995, he was arrested by police, during a routine check, for inability to show an identity card. He was questioned as to personal details and whether he was involved with LTTE, which he denied. He claims not to have been believed and to have been accused of spying for LTTE and travelling to Colombo to plan an attack. The next day he was released upon the intervention of an uncle and payment of a sum of money, subject to an obligation to report daily to police while staying in Colombo. The author states that he heard that the authorities intended to transfer him to Boosa prison, from which allegedly detainees never emerge alive. On 8 October 1995, Mr. S. S. left the country by air for the Netherlands.

  2.3 On 18 December 1995, Mr. S. S.'s request for asylum of 19 October 1995 was denied. An appeal made to the Secretary of Justice on 23 January 1996 was rejected on 16 September 1996 ...

  2.4 As to Mrs. S. A., also a member of the Tamil ethnic group, it is contended that in mid-November 1995 she was also detained by LTTE in an attempt to determine her husband's whereabouts and activities. While in the LTTE camp, she was forced to perform duties such as cooking and cleaning. After being taken to hospital at the end of March 1996, she escaped on 3 April 1996.

  2.5 On 17 June 1996, she was arrested by the Eelam People's Revolutionary Liberation Front (EPRLF). She states that she was accused by a third party of collaboration with LTTE and was repeatedly questioned in this regard by EPRLF, but explained that she had performed forced labour for LTTE and why. She states she was not ill-treated but occasionally struck. She was handed over to the Sri Lankan authorities, held in custody and made to identify various alleged LTTE members at roadblocks. In mid-August 1996, she was able to escape after a convoy in which she was travelling struck a mine. She travelled to Colombo in late August and left the country by air for the Netherlands on 12 September

1996. It is alleged, without any details being provided, that because of her escape her uncle was killed by the authorities.

2.6 On 18 November 1996, Mrs. S. A.'s request for asylum of 16 October 1996 was denied. An appeal made to the Secretary of Justice on 31 December 1996 was rejected on 20 March 1997...

...

6.3 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that the authors would be in danger of being subjected to torture if returned to Sri Lanka.

...

6.5 In the present case, the Committee notes that the authors were provided with a comprehensive examination of their claims, with multiple opportunities to contribute to and correct the formal record, with an investigation by an independent advisory commission as well as judicial review. The Committee notes the attention drawn by the State party to the determinations of its various authorities of a number of inconsistencies and contradictions in the authors' accounts, casting doubt on the veracity of the allegations. It also notes the explanations provided by the authors in that respect.

6.6 The Committee finds that the authors have failed to show significant grounds that the evaluation of the State party's authorities was arbitrary or otherwise unreasonable, in concluding generally that the likelihood of torture of Tamils in Colombo who belong to a "high risk" group is not so great that the group as a whole runs a substantial risk of being so exposed. Nor have they demonstrated any inaccuracy in the State party's conclusion that the situation in Sri Lanka is not such that for Tamils in general, even if they are from the north of the country, substantial grounds exist for believing that they risk torture if returned from abroad.

6.7 As to the authors' individual circumstances, the Committee considers that the respective detentions suffered by the authors do not distinguish the authors' cases from those of many other Tamils having undergone similar experiences, and in particular they do not demonstrate that the respective detentions were accompanied by torture or other circumstances which would give rise to a real fear of torture in the future. In the circumstances, the Committee considers that the authors have failed to demonstrate, generally, that their membership of a particular group, and/or, specifically, that their individual circumstances give rise to a personal, real and foreseeable risk of being tortured if returned to Sri Lanka at this time.

6.8 The Committee...concludes that the authors' removal from the State party would not constitute a breach of article 3 of the Convention.

REFUGEES

- *S. V. et al. v. Canada* (49/1996), CAT, A/56/44 (15 May 2001) 102 at paras. 1, 2.1, 9.2 and 9.6-9.8.

1. The authors of the communication are Mr. S.V., his wife and daughter, citizens of Sri Lanka currently seeking refugee status in Canada. They claim that forcible return to Sri Lanka would constitute a violation of articles 3 and 16 of the Convention against Torture by Canada. They are represented by counsel.

...

2.1 The author is a Tamil from the area of Jaffna in the north of Sri Lanka. He and his wife have two children, an 8-year-old daughter and a 2-year-old son who was born in Canada and is a Canadian citizen. The authors claim that in the period from 1987 until their departure from Sri Lanka in 1992 they, and especially the author, suffered serious persecution from the Indian Peacekeeping Force (IPKF), the Liberation Tigers of Tamil Elam (LTTE), the Sri Lankan Army (SLA) and the Colombo police. The author was arrested on several occasions and, in the course of at least two of them, he was tortured by the army and the police.

...

9.2 The issue before the Committee is whether or not the forced return of the authors to Sri Lanka would violate the obligation of Canada under article 3 of the Convention not to expel a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

...

9.6 With respect to the possibility of the author suffering torture at the hands of the State on return to Sri Lanka, the Committee notes the author's allegations that he was tortured by the Sri Lankan army in December 1990 and that this treatment, which left him disabled, amounted to torture in terms of article 3 of the Convention. It also notes the allegations that he was maltreated by the police in Colombo in 1991. However, the Committee also notes the State party's contention, unchallenged by the author, that he left Sri Lanka regularly and always returned, even after the incident in December 1990. The Committee notes that with respect to the incident in March 1992, which according to the author was the reason for his departure, he was not maltreated and was released by the authorities. Furthermore, the author has not indicated that since that period he has been sought by the authorities. In fact, the author has not alleged to have been engaged in political or other activity within or outside the State, or alleged any other circumstance which would appear to make him particularly vulnerable to the risk of being placed in danger of torture. For the above-mentioned reasons, the Committee finds that the author has not provided substantial grounds for believing that he would be in danger of being tortured were he to be returned to Sri Lanka and that such danger is personal and present.

9.7 Similarly, the author's wife and their daughter have never been arrested or subjected to torture. The obligation to register at the police station at Colombo and the allegation, challenged by the State party, that the police took her identity card are not substantial

grounds for believing that they would be in danger of being subjected to torture were they to be returned to Sri Lanka and that such danger is personal and present.

9.8 The Committee recalls that, for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is returned. In light of the foregoing, the Committee deems that such a risk has not been established by the authors. Moreover, the Committee observes that article 3 applies only to situations of torture as defined in article 1 of the Convention.

- *Z. Z. v. Canada* (123/1998), CAT, A/56/44 (15 May 2001) 129 at paras. 2.1-2.3, 8.4, 8.5 and 9.

...
2.1 The author allegedly fled Afghanistan in 1977 at the time of the armed intervention of the Soviet Union in the Afghan conflict. His brother was killed by Soviet forces and he feared the same fate...

2.2 The author arrived in Canada in 1987 on a false passport. Upon his arrival in Montreal, he applied for asylum. He was found to have a credible basis for his refugee claim, which entitled him to apply for permanent residence, and he became a permanent resident in 1992.

2.3 On 29 June 1995, the author, found guilty of importing narcotics, was sentenced to 10 years' imprisonment. On 10 April 1996, the Minister of Citizenship and Immigration declared him a "danger to the public in Canada" and decided that he should therefore be removed to his country of origin...
...
8.4 The Committee is of the opinion that the author did not bring any evidence that he would be personally at risk of being subjected to torture if he were returned to Afghanistan. The Committee also noted that the author has not suggested that he had been subjected to torture in the past. Nor has he alleged that he has been involved in any political or religious activities such that his return could draw the attention of the Taliban to the extent of putting him at personal risk of torture.

8.5 The author only brought information on the general situation in Afghanistan and claimed that, as a member of the Tajik ethnic group, he would face torture upon return to Afghanistan. Although it recognizes the difficulties encountered by some ethnic groups in Afghanistan, the Committee considers that the mere claim of being a member of the Tajik ethnic group does not sufficiently substantiate the risk that the author would be subjected to torture upon return.

9. As a consequence, the Committee...is of the view that the facts as presented by the author and as found by the Committee do not reveal a breach of article 3 of the Convention.

- *X. Y. v. Switzerland* (128/1999), CAT, A/56/44 (15 May 2001) 138 at paras. 2.1-2.4, 6.7, 6.8, 8.3, 8.5, 8.6 and 9.

...

2.1 The author claims that he has been a member of the Kurdistan Democratic Party in Iraq (KDP-Iraq) 1/ since 1980. As such, he allegedly participated in various activities of that organization, chiefly by transporting funds to support Kurds in Iraq and by distributing pamphlets deploring the situation of the Syrian Kurds, who had been stripped of their nationality by the Syrian State.

2.2 The author claims that he was twice arrested by the Syrian security forces. The first time, during the Iraqi invasion of Kuwait, he was in possession of funds intended for Iraq. He was freed after 18 days, only after a large sum of money had been paid by his family for his release. The second arrest reportedly took place in 1993. On that occasion, the author was held for 96 days in Mezze prison near Damascus and was reportedly tortured. He was released only after swearing to forgo any political activities in the future. His family again paid approximately 6,000 United States dollars to secure his release.

2.3 Subsequently, however, the author continued his political activities. In March 1995 he was warned by a family member who had reportedly received information from the security services that he was going to be arrested once again. The author then decided to flee the country and crossed the border into Lebanon illegally. He left Lebanon by boat in March, but it is not clear when he arrived in Europe. Nevertheless, on 10 April 1995 he applied for political asylum in Switzerland, largely on the basis of his alleged persecution in the Syrian Arab Republic.

2.4 The author's request for asylum was turned down on 28 May 1996 by the Federal Office for Refugees as being implausible, and 15 August 1996 was set as the deadline for the author's departure from Swiss territory. Subsequently the author appealed against that decision to the Swiss Appeal Commission on Asylum Matters, supporting his appeal with a medical report certifying that he might have been tortured in the past. The Appeal Commission dismissed the appeal on 8 July 1996, declaring it inadmissible on the grounds that the deadline for submission of an appeal had not been met.

...

6.7 According to the State party, the author never reported that he had been subjected to torture, either during the hearings at the transit centre or to the Federal Office for Refugees. The author's counsel apparently reproached the authorities with failing to question the

petitioner on that specific point. The State party replies that it could "legitimately be expected that a person who subsequently claimed he had to leave his country for fear of being subjected again to torture would at least mention this circumstance when questioned in the host country about the reasons for applying for asylum".

6.8 The State party queries the fact that the author only produced a medical certificate dated 20 August 1996 3/ stating that he could have been subjected to torture in the past when he appeared before the Swiss Appeal Commission on Asylum Matters and not when filing his initial application for asylum. The State expresses surprise that a seeker of asylum on grounds of torture waited to have his application turned down before producing a medical certificate, whose evidential status was, moreover, compromised by the fact that three years had passed since the alleged facts. The State adds that, even if one considered the author's allegation that he had been subjected to torture in the past to be well founded, it did not follow that he ran a foreseeable personal and present risk of being subjected to torture again if he was returned to the Syrian Arab Republic. 4/

...

8.3 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to the Syrian Arab Republic...

...

8.5 The Committee expresses doubts about the credibility of the author's presentation of the facts, since he did not invoke his allegations of torture or the medical certificate attesting to the possibility of his having been tortured until after his initial application for political asylum had been rejected (paras. 6.7 and 6.8 of the present decision).

8.6 The Committee also takes into consideration the fact that the State party has undertaken an examination of the risks of torture faced by the author, on the basis of all the information submitted. The Committee considers that the author has not provided it with sufficient evidence to enable it to consider that he is confronted with a foreseeable, real and personal risk of being subjected to torture in the event of expulsion to his country of origin.

9. Consequently, the Committee...considers that the decision of the State party to return the author to the Syrian Arab Republic constitutes no violation of article 3 of the Convention.

Notes

1/ The file contains a document dated 12 July 1995 certifying the author's membership in KDP-Europe, based in London; the document states that the author, whose name is misspelled, was a party member and had "taken part in the resistance movement and in the struggle for peace and democracy".

...

3/ The certificate was drawn up by the Hôpitaux universitaires de Genève on 20 August 1996 at the request of the author's counsel. It is based on two interviews with the author and sets forth the facts as presented by him with details of the acts of torture to which he was allegedly subjected. With regard to his physical condition, the doctors describe it as being within the bounds of normality but mention a number of scars on his body (a fine bow-shaped scar at the base of the first toe of his right foot, three round scars on his left hand and wrist, and a star-shaped scar on his left cheek). With regard to his psychological condition, they say that the author was cooperative, with sound temporal and spatial orientation and without major memory disorders, but that he had trouble remembering specific dates accurately. They note a tendency towards dissociation when scenes of violence were mentioned. A reading of the medical report provoked considerable nervousness and agitation. The doctors consider that the author's description of the scenes of torture are compatible with what is known about the treatment of opponents of the regime in Syrian prisons, especially Mezze prison (see *Amnesty International Report 1994*, pp. 319-322). The scars correspond to his description of the torture he allegedly suffered, and the lesions are probably the sequelae of torture. Taking this and his psychological condition into account, the doctors diagnose post-traumatic stress syndrome (PTSS), a characteristic disorder of torture victims. The doctors go on to state that "we therefore conclude that there has been a flagrant violation of human rights. Under these circumstances and in view of the fact that the Kurdish issue in Syria has not been settled, the return of [the author] to his country would condemn him to renewed acts of violence ...". The doctors further conclude that the PTSS is in remission for the time being because the author feels safe in Switzerland. His refoulement would probably lead to a return of the symptoms, whose seriousness should not be underestimated. Moreover, as far as treatment is concerned, the doctors state that, to their knowledge, the type of medical care needed to stabilize the author's condition (physiotherapy and supportive psychotherapy) do not exist in the Syrian Arab Republic.

4/ In this connection, the State party refers to the Committee's jurisprudence, in particular communications *I.A.O. v. Sweden* (65/1997) and *X, Y and Z v. Sweden* (61/1996), in which the Committee, while finding that medical certificates established that the authors had been subjected to torture, nevertheless considered that it had not been shown that the authors would be in danger of being subjected to torture if they were returned.

____

- *H. O. v. Sweden* (178/2001), CAT, A/57/44 (13 November 2001) 174 at paras. 2.1-2.7 and 13-15.

...

2.1 Counsel submits that the petitioner, who is Kurdish by descent and comes from the city of Sanandaj, started in 1990 to take part in political activities on behalf of the interests of the

Kurdish people directed against the Iranian authorities. These activities included turning the photos of the Ayatollah the wrong side around and encouraging students at his school to take part in demonstrations. In February 1994 the petitioner allegedly was arrested and accused of distributing leaflets at his school and writing slogans against the regime. He states that he was interrogated for two days, and then tortured by methods such as beating on the bottom of the feet. After two months' detention, the petitioner was released. He then discovered that he had been expelled from his school. He has lately been working as a taxi driver. After his release, the petitioner stopped his political activities for fear of persecution.

2.2. On 22 February 1999, demonstrations officially sanctioned by the Government were held in Sanandaj to protest against the arrest by the Government of Turkey of Kurdish Workers Party leader Abdullah Oçalan in Nairobi. The petitioner states that the Government's intention was to turn the Kurdish people against the Governments of the United States of America and Israel.

2.3 The petitioner and about 15 of his friends planned to use the demonstrations to express their opinions on the injustices suffered by the Kurdish people in Iran. They prepared posters and leaflets with anti-Iranian and pro-Kurdistan slogans. After they started the demonstrations, thousands of people joined in and began to shout anti-Government slogans, while the petitioner and his friends handed out posters and leaflets. The military and Revolutionary Guards opened fire at the demonstrators, and many were arrested. The petitioner's friend, Jamil, was shot and the petitioner ran away. He considered it too risky to return to his family, so he hid in a friend's house for 13 days. While hidden, the petitioner was informed that Revolutionary Guards had arrested his father and brother. The petitioner left to stay with a relative in Ourmiyeh, where he stayed for 24 days. Another relative provided him with a passport under a false name, and an exit visa. The petitioner travelled to Van and Istanbul in Turkey, and after 20 days took a plane to Sweden.

2.4 The petitioner entered Sweden on 21 April 1999 and applied for asylum the following day. Upon arrival, the petitioner carried neither passport nor identification document. The Swedish Migration Board held an initial interview with the petitioner on 22 April 1999, lasting about one hour. A fuller interview took place on 20 May, lasting for about four hours. On 8 September 1999, the Swedish Migration Board rejected the petitioner's application for asylum. The Board found that the petitioner's statements were not credible and that the petitioner had not proved that he risked persecution if he returned to Iran.

2.5 The petitioner appealed to the Aliens Appeals Board, explaining that he carried no identification documents when arriving in Sweden because he had been forced to give the documents to the smuggler that brought him there, and that Iranian authorities twice had made inquiries about him at his family's house. On 11 August 2000, the Aliens Appeals Board rejected his application for asylum.

2.6 On 1 September 2000, the petitioner lodged a new application for asylum and a residence permit with the Aliens Appeals Board. The petitioner submitted further information, stating that his father and brother had been released from detention and that the Iranian authorities had made further inquiries about his whereabouts. He referred to an appeal from the Iranian Refugee Council of Stockholm that expressed concerns about his security should he be deported to Iran. Finally, he invoked humanitarian reasons for a residence permit based upon a statement from a psychiatrist affirming that he suffered from post-traumatic stress disorder, acute depression, strong memories of previous torture and was suicidal. Again, on 5 October 2000, the Aliens Appeals Board rejected his application.

2.7 On 7 November 2000, the petitioner lodged a new application with the Aliens Appeals Board, and submitted information that was intended to clarify the information he had provided at the earlier stages of his case, together with a new statement from a psychiatrist about his post-traumatic stress disorder and the serious risk of suicide. The Aliens Appeals Board rejected the application on 12 December 2000.

...

13. In the present case...the Committee has to determine whether the expulsion of the petitioner to Iran would have the foreseeable consequence of exposing him to a real and personal risk of being arrested and tortured.

14. The State party has pointed to inconsistencies and contradictions in the petitioner's statements which in its opinion cast doubt on the veracity of his allegations. Even assuming, however, the truth of the petitioner's statements regarding his past experience of detention in Iran, the Committee considers, on the basis of the information provided, that the political activities that the petitioner claims to have carried out prior to and during the demonstrations in February 1999 are not of such a nature as to lead to the conclusion that he risks being tortured upon his return. This view is further supported by the fact that the petitioner was not the object of interest by Iranian authorities after he was released from detention in 1994, assuming that this occurred, and until the demonstrations in February 1999.

15. On the basis of the above considerations, the Committee considers that the petitioner of the communication has not substantiated his claim that he would be subjected to torture upon return to the Islamic Republic of Iran.

- *B. S. v. Canada* (166/2000), CAT, A/57/44 (14 November 2001) 153 at paras. 2.1-2.5, 7.1, 7.3, 7.4 and 8.

...

2.1 On 2 August 1990, the petitioner arrived in Canada. He was granted refugee status by decision of the Immigration and Refugee Board on 11 January 1996.

2.2 Since 1992, the petitioner was convicted of various criminal offences, including theft, uttering threats, assault, will to cause personal injury, false pretences, sexual assault, obstructing a peace officer and altering a forged document. Restraining orders were issued against the petitioner in 1997 and 1998. On 15 January 1999, the Minister of Citizenship and Immigration's delegate issued an opinion pursuant to sections 70 (5) and 53 (1) of the Immigration Act that the petitioner constitutes a danger to the public in Canada due to the number and nature of criminal convictions acquired by the applicant in Canada since 1992. A deportation order was issued against the petitioner on 1 March 1999.

2.3 On 15 April 1999, the petitioner filed an application for leave and judicial review of the decision to remove him to Iran. The Federal Court dismissed the application on 12 July 2000. The Federal Court had denied his application for leave and for judicial review of the decision that he constituted a danger to the public on 14 July 1999. Counsel submits that all effective domestic remedies have been exhausted and that the petitioner expects his deportation any time.

2.4 The petitioner alleges that he fled persecution in Iran in July 1990. He submits that, in early 1985, while in high school, he had been arrested and questioned by Revolutionary Guards about his participation in political discussions. The Petitioner was held for eight days during which he was beaten, punched, kicked, and tortured. In September 1984, the petitioner's family home was raided by Revolutionary Guards after siblings left Iran because of perceived involvement with the pro-monarchist movement. The petitioner alleges that he was held for 18 days and that his sister, his mother, and he himself were beaten. In January 1985, while serving in the military, the petitioner was suspected of political activity and detained and questioned by an officer of the Ideological/Religious Department of the Army for two days. The petitioner submits that he was forced to witness the execution of six soldiers convicted of opposing the regime and its war efforts. In April 1985, the petitioner was wounded by a grenade and released from the army, after treatment in a military hospital, in February 1986. In October 1989, the petitioner was arrested by Revolutionary Guards, handcuffed and taken to the offices of the branch of police that deals with anti-revolutionary offences (Komiteh), where he was allegedly beaten and held for one month. In March and April 1990, the Komiteh again detained the petitioner for 24 hours each time. After the second arrest, the petitioner was ordered to report daily to the Komiteh office. The petitioner submits that every time he reported to the office, he was afraid that the police officers would kill or torture him. After four or five days, the petitioner fled to Bandar Abbas, obtained a false passport and fled Iran by plane. In 1993 a summons was published in the Iranian newspaper *Khabar* indicating that the petitioner had been charged with escape and was requested to report to the Investigation Branch of the General Prosecutor's Office in Shiraz.

2.5 The petitioner submits that he fears for his life and safety if he is returned to Iran. Furthermore, the Iranian authorities would be alerted to his return, because the petitioner

would require travel documents issued by Iran. The petitioner alleges that the State party did not assess the risks he faced upon his return. The petitioner alleges also that he has never been assessed for determining the likelihood that he will commit more crimes.

...

7.1 The issue before the Committee is whether the removal of the petitioner to the Islamic Republic of Iran would violate the obligation of Canada under article 3 of the Convention not to expel or return a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

...

7.3 In the present case, the Committee notes that the petitioner has claimed that, during his first detention in early 1985, he was tortured. Although not explicitly corroborated by medical evidence or detained submission by the petitioner, the Committee is prepared to consider that the petitioner may have been maltreated during his first detention. The Committee also notes that the petitioner has not claimed that he was tortured during his subsequent detentions. Finally, the Committee notes that the periods of the two latest detentions in 1990 were short, that the petitioner has not claimed that he was ever an active political opponent and that there is no indication that he is being sought by the authorities in Iran at the present time or would be at a particular risk of being tortured for reason of his Canadian criminal record. Therefore, the Committee considers that the petitioner has not substantiated his claim that he will be personally at risk of being subjected to torture if he is returned to Iran.

7.4 With regard to the alleged violation of article 16 of the Convention, the Committee notes that article 3 of the Convention does not encompass situations of ill-treatment envisaged by article 16, and further finds that the petitioner has not substantiated a claim that he would face such treatment upon return to Iran as would constitute cruel, inhuman or degrading treatment or punishment with the meaning of article 1 of the Convention.

8. The Committee against Torture...concludes that the removal of B.S. to the Islamic Republic of Iran, on the basis of the information submitted, would not entail a breach of articles 3 and 16 of the Convention.

- *M. S. v. Australia* (154/2000), CAT, A/57/44 (23 November 2001) 124 at paras. 2.1-2.6, 6.3-6.7 and 7.

...

2.1 On 24 August 1998, coming from South Africa, the petitioner arrived in Australia without valid travel documents. In his interview at the airport he requested the State party's protection as a refugee.

2.2 On 3 September 1998, the petitioner made an application for refugee status (protection visa) with the Department of Immigration and Multicultural Affairs under the Migration Act. On 2 October 1998, a delegate of the Minister for Immigration and Multicultural Affairs delivered a decision denying a protection visa. On 14 December 1998, the Refugee Review Tribunal RRT) affirmed this decision. On 30 April 1999, the Federal Court of Australia dismissed the petitioner's request for judicial review.

2.3 On 22 March 1999, the petitioner requested the Minister for Immigration and Multicultural Affairs to intervene and set aside the decision of the RRT in the public interest, pursuant to section 417 of the Migration Act. In an undated letter, the Minister responded that he decided not to exercise this power. On 13 September 1999, counsel again wrote to the Minister requesting that the petitioner be permitted to submit a second application for a protection visa pursuant to section 48B of the Migration Act. Counsel has not received a response to this request.

2.4 The petitioner submits that he was involved in the social assistance activities of the Front islamique du salut (FIS) since 1990, i.e. after work, the petitioner sued to go to the local FIS office and assess what to give to families in need. In January 1992, after the results of the general election for the National Peoples' Assembly were cancelled, the local FIS office was closed and the petitioner was called by the police (gendarmerie) and questioned for more than two hours. The petitioner submits that after his release, he was required to report to the gendarmerie on a daily basis and not to leave his hometown, Ngaos. On 16 September 1994, supported by a friend, he left Algeria for the Syrian Arab Republic by plane. The day after his departure, and again in October, the gendarmerie questioned his father about the residence of the alleged victim. It is further submitted that the petitioner's father subsequently advised him not to return to Algeria because the police accused him of avoiding his military recall.

2.5 The petitioner submits that he left Algeria in 1994 after he heard of an official decree calling up reservists who had only served 18 months of military service for an extra six months. The petitioner had served in the National Republic Army from May 1988 to March 1990. The petitioner submits that in March 1994 it was reported that the Algerian Minister of the Interior announced the Government's intention to draft thousands of army reservists and that these reports were not before the RRT when it reviewed the case.

2.6 The petitioner submits that, in 1996, he obtained a copy of a court verdict, dated 17 November 1996, convicting him of forming a terrorist group and, in absentia, sentencing him to death.1/

...

6.3 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the petitioner would be in danger of

being subjected to torture upon return to Algeria...

6.4 In the present case, the Committee notes that the petitioner's social activities for the FIS date back to the beginning of 1992, at which time he was detained and interrogated for two hours. It is not submitted that the petitioner was tortured or prosecuted for his activities for FIS before leaving for Syria.

6.5 The Committee notes that the petitioner invokes the protection of article 3 on the grounds that he is personally in danger of being arrested and tortured in connection with the disputed court verdict of 1996. However, the petitioner does not submit any information supporting the claim that the petitioner will be exposed to the risk of torture. The Committee considers that, even if it were certain that the petitioner would be arrested on his return to Algeria because of a prior conviction, the mere fact that he would be arrested and retried would not constitute substantial grounds for believing that he would personally be in danger of being subjected to torture.2/

6.6 With regard to the claim that the petitioner will be targeted and that an anti-Government opinion will automatically be attributed to him, the Committee notes that the petitioner did not present evidence that there was, in fact, a military recall of the petitioner at all. From the evidence before the Committee, it also cannot be established that the petitioner is at risk of being tortured if interviewed at the airport upon his return to Algeria.

6.7 The Committee recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned. On the basis of the considerations above, the Committee considers that the petitioner has not presented sufficient evidence to convince the Committee that he faces a personal risk of being subjected to torture if returned to Algeria.

7. The Committee against Torture...concludes that the removal of the petitioner to Algeria, on the basis of the information submitted, would not entail a breach of article 3 of the Convention.

Notes

1/ The translated text of the decision submitted by the petitioner reads in its relevant part: "The Court has in default sentenced accused 'M.S.' to death..."

2/ See *P.Q.L. v. Canada*, communication No. 57/1996, para. 10.5.

REFUGEES

- *M. P. S. v. Australia* (138/1999), CAT, A/57/44 (30 April 2002) 111 at paras. 2.1-2.8, 7.1, 7.3-7.5 and 8.

...
2.1 On 9 September 1997, the complainant arrived in Australia without a passport or other identification papers. On 15 September 1997, he applied for refugee status (protection visa) to the Department of Immigration and Multicultural Affairs. His application was rejected on 25 September 1997. The decision not to grant a protection visa was confirmed by the Refugee Review Tribunal (RRT) on 30 October 1997, after conducting a hearing, where a legal adviser and an interpreter assisted the complainant. Upon decision of the Federal Court of 13 May 1998, the matter was referred back to the RRT for re-determination. On 20 August 1998, the Tribunal decided again not to grant a protection visa, after hearing the complainant. On 3 February 1999, the federal Court dismissed the complainant's appeal against the second RRT decision. An appeal to the Full Court of the Federal Court was dismissed on 14 May 1999. On 3 November 1997, 20 August 1998 and 18 June 1999, his case was considered not to satisfy the requirements for granting a visa to remain in Australia on humanitarian grounds. Counsel submits that all effective domestic remedies have been exhausted.

2.2 Counsel submits that the complainant lived in Nuwara Eliya, an area in the south of Sri Lanka. In 1989, when fighting broke out between the pro-Sinhalese movement Janatha Vimurthi Peramuna (JVP) and the Government in the Nuwara Eliya area, the complainant was arrested and detained for six to seven months in the Diyatalawa Army Camp on suspicion of being a member of JVP. During this time, the complainant was allegedly questioned and subjected to torture by army officers. The complainant's father paid a large amount of money to secure his release.

2.3 From 1992 to 1995, members of the Liberation Tigers of Tamil Eelam (LTTE), friends of his wife's family, visited frequently and the complainant was obliged to provide food and accommodation. On the last occasion, in October 1995, several members of the LTTE came to stay with his family for 15 days. During this time, the oil tanks in Kolonawa, Colombo, were bombed and the police believed that the people staying with the complainant's family had been involved. The complainant was allegedly taken to the police station in Nuwara Eliya, interrogated and tortured. It is submitted that the complainant had only been released after three days upon payment of a large amount of money to the police officer in charge.

2.4 In February 1996, the LTTE accused the complainant of providing the Government with information on the oil tank attack. Counsel submits that the complainant was beaten and threatened with death. After intervention by his family and his wife, he was spared.

2.5 Towards the end of February 1996, the complainant was arrested by the police and taken to Diyathalawa Army Camp, detained for three days, and allegedly tortured. Counsel submits

that the father of the complainant paid a large amount of money for his release. Immediately after his release, the complainant fled Nuwara Eliya for fear of the Sri Lankan authorities and the LTTE. He stayed with friends in Kandy and later in Hatton for some months, before he went to Colombo.

2.6 Later in 1996, the Maradana police arrested the complainant in Colombo, detained him for one week and questioned him on his relationship with the LTTE. It is submitted that the complainant was beaten every night by police officers and that he was not given proper food. In March 1997, the complainant managed to flee Sri Lanka to Cambodia, Bangkok and Sydney.

2.7 Counsel submits that in view of the two arrests of the complainant with regard to the Kolonawa bomb blast, there is a real chance that he would be arrested again should he return to Sri Lanka. Counsel believes that the documents, which have been taken away from the complainant by the police, have been supplied to the secret police (NIB) and, therefore, the authorities will be in a position to trace the complainant wherever he lives. Counsel argues that the complainant had been arrested and come to the attention of the security forces for providing a safe place to LTTE members who allegedly were involved in what is considered to be one of the major assassinations committed by the LTTE. The complainant would very likely be detained and interrogated at the airport upon his return to Colombo.

2.8 Counsel further submits that there are substantial grounds for believing that the complainant would be in danger of being subjected to torture by Sri Lankan police, security forces and the LTTE if he returned to Sri Lanka. The complainant experienced torture and ill-treatment by the authorities and the LTTE before he left the country. Counsel quotes Human Rights Watch reports and reports by the United States Department of State of 1996 as evidence of a consistent pattern of gross and systematic violations of human rights in Sri Lanka. Counsel argues that under the Prevention of Terrorism Act and Emergency Regulations the police can arrest on the basis of mere suspicion, often based on the presumption of guilt arising merely from a person coming from the north or east of the country. In such an atmosphere, counsel sees every chance that the complainant, as a Tamil-speaking young man from the Eastern Province of Sri Lanka, will be harassed and mistreated by the authorities on mere suspicion. Counsel quotes from Sri Lankan newspaper headlines and articles in this regard.

...

7.1 The issue before the Committee is whether the forced return of the complainant to Sri Lanka violated the obligation of Australia under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

...

7.3 In the present case, the Committee notes the State party's argument that it is beyond its

competence to review findings of fact or the interpretation of domestic legislation by national organs of the State party. The Committee agrees that it cannot overturn an authoritative domestic organ's interpretation of the application of domestic legislation, but reiterates that it is not bound by findings of fact that are made by organs of the State party and instead has the power, provided for by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case 1/. The Committee recalls that, even though there may be some remaining doubt as to the veracity of the facts adduced by a complainant, it must ensure that his security is not endangered 2/. In order to do this, it is not necessary that all the facts invoked by the complainant should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable.

7.4 With regard to the complainant's claim that he was in danger of being subjected to torture by the LTTE, the Committee recalls that the State party's obligation to refrain from forcibly returning a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is directly linked to the definition of torture as found in article 1 of the Convention. For the purposes of the Convention, according to article 1, "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". The Committee recalls its previous jurisprudence that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention 3/.

7.5 The Committee notes with concern the reports of torture by public officials in Sri Lanka, including those submitted by the complainant, but points out that, for the purposes of article 3 of the Convention, substantial grounds must exist that create a foreseeable, real and personal risk of torture in the country to which the complainant is to be returned. On the basis of the facts as submitted by the complainant, the Committee is of the opinion that such grounds have not been established. Therefore, the Committee considers that the complainant has not substantiated his claim that he was personally at a real risk of being subjected to torture, if returned to Sri Lanka.

8. The Committee against Torture...concludes that the removal of the complainant to Sri Lanka, on the basis of the information submitted, did not constitute a breach of article 3 of the Convention.

REFUGEES

Notes

1/ General Comment No. 1, sixteenth session (1996), para. 9 (b).

2/ See *Mutombo v. Switzerland*, case No. 13/1993, Views adopted on 27 April 1994, para. 9.2.

3/ *G.R.B. v. Sweden*, case No. 83/1997, Views adopted on 15 May 1998, para. 6.5.

- *B. M. v. Sweden* (179/2001), CAT, A/57/44 (30 April 2002) 182 at paras. 2.1-2.5, 2.9-2.11, 5.3 and 6.

...
2.1 The complainant lived and worked in Saudi Arabia from 1983 to 1998. During this period, he was very active in the Muslim community, holding religious discussions with other Muslims and collecting money for the poor and for the families of imprisoned members of the Al-Nadha Party in Tunisia. The complainant is not a member of that party but an active supporter. He states that all Muslim organizations in Tunisia are considered to be working politically against the Tunisian regime, including the Al-Nadha Party.

2.2 In 1989, 1990 and 1992, while the complainant was still residing in Saudi Arabia, he made several visits to Tunisia. His first visit in 1989 was to arrange his marriage contract. He was arrested at the airport, detained and interrogated in prison and then brought before the "Al-Kassabah" court where he was forced to sign a confession stating that he adhered to Wahhabism, which is the interpretation of Islam practised in Saudi Arabia. The complainant was allegedly tortured during the interrogation.

2.3 In 1990, the complainant entered Tunisia again in order to marry. He was again arrested at the airport, interrogated, accused again of being a Wahhabi and then released. In 1992, the complainant and his wife went to Tunisia together. They were arrested at the airport and interrogated about the complainant's activities and religious ideas. He was again accused of being a Wahhabi and of collecting money for the families of men imprisoned for activities against the Tunisian regime. After interrogation they were released, but a travel ban was issued. A few days later, uniformed and civilian police forcibly entered the house where they were staying. The police forcibly removed the veil of the complainant's wife, and beat the complainant. The couple were brought to a camp where they were interrogated separately for approximately three hours and then released after the complainant signed a confession stating that he had adopted the Wahhabi ideas and had forced his wife to wear a veil. On their release, the couple was helped by a friend of the complainant's to leave the country and return

to Saudi Arabia.

2.4 On his return to Saudi Arabia in 1992, the complainant continued with his activities in the Muslim community. In July of that year, he also received a new passport at the Tunisian Embassy in Riyadh. In 1993 a "secret decree" was issued in Tunisia, which forbade Tunisian embassies from issuing or renewing passports without consulting the Tunisian Ministry of Internal Affairs. For wanted persons, the embassies could only issue a laisser-passer for a journey back to Tunisia.

2.5 In 1996, the complainant received information that he and other Tunisians were being monitored by the Tunisian Embassy. He was also told that another Tunisian who lived in Saudi Arabia and whom he used to meet for religious discussions had been arrested and imprisoned when he was visiting Tunisia on vacation.

...

2.9 On 1 March 1999, the complainant's application for asylum and a residence permit was turned down by the Swedish Immigration Board. He appealed the decision to the Aliens Appeals Board. On 28 September 2000, his appeal was refused.

2.10 In February 2001, the complainant then made a second application for asylum and a residence permit to the Aliens Appeals Board. His second application was also refused although he submitted the false stamps he had bought in Saudi Arabia to extend his passport, a second letter from the Chairman of the Al-Nadha certifying his personal knowledge of the complainant and referring to the likelihood of his being subjected to torture if deported to Tunisia, and a letter from UNHCR stating the following, "UNHCR has no reasons to doubt the genuineness of the above attestation [certificate from the Chairman of Al-Nadha]. In light of this, and considering that members of the Al-Nadha Party still risk persecution in Tunisia, we would advise against the return of the applicant to Tunisia."

2.11 On 6 March, the complainant submitted a third application for consideration by the Aliens Appeals Board. The complainant included a letter from Amnesty International, Sweden and the United States Department of State country report describing the general human rights situation in Tunisia. The letter from Amnesty also states that in the opinion of the organization the complainant would be at risk of torture if returned to Tunisia because of his involvement with Al-Nadha. On 19 March 2001, the Aliens Board rejected his application, stating that the complainant had referred to the same information as in his previous applications.

...

5.3 The Committee notes the complainant's argument that there is a foreseeable risk that he will be tortured if deported to Tunisia because of his involvement with Al-Nadha and the fact that he was previously interrogated and tortured by the Tunisian authorities. The Committee takes note of the information provided by Amnesty International but observes that the

complainant does not contest that he was not a member of Al-Nadha nor involved in any political activity, but merely involved in work of a humanitarian nature. In addition, the Committee notes that the complainant has not provided any evidence of having been tortured by the Tunisian authorities and has not alleged any other circumstances which would appear to make him particularly vulnerable to the risk of being torture. This consideration is further supported by the fact that the author, although allegedly tortured in Tunisia in 1989, returned to Tunisia in 1990 without being subjected to torture. For the above-mentioned reasons, the Committee finds that the complainant has not provided substantial grounds for believing that he would be in danger of being tortured were he to be returned to Tunisia and that such danger is personal and present.

6. The Committee against Torture...concludes that the complainant's removal to Tunisia would not constitute a breach by the State party of article 3 of the Convention.

- *H. M. H. I. v. Australia* (177/2001), CAT, A/57/44 (1 May 2002) 166 at paras. 2.1-2.5, 6.4-6.6 and 7.

...

2.1 The complainant is a member of the Dabarre sub-clan of the Rahanwein clan. His uncle was a Minister for Higher Education of the former Said Barre regime. Upon the outbreak of clan violence in 1991, the complainant and his family resided in Baidoa, largely populated by Rahanwein, but controlled by Said Barre's brother-in-law, a member of the Marehan sub-clan of the Darod clan. According to the complainant, a competing sub-clan destroyed the city, killing many, only for Rahanwein forces to return, followed by pillaging Marehan forces.

2.2 Following the destruction of the complainant's house, Marehan forces detained the complainant and his wife. Upon learning they were Rahanwein, they were taken prisoner and forced to work on local farms. The complainant alleges that his wife was raped, but they escaped in April 1992. After the death of his brother at the hands of the forces of a militia warlord, Hussain Aideed, of the Hawiye clan, the complainant and his wife reached an area where some of his Dabarre sub-clan lived and where he left his family. He departed the area as Aideed forces had killed many of his relatives. In November 1992, close to the national border, the complainant heard that his Dabarre sub-clan had been attacked by another sub-clan of the Rahanwein. In December 1994, he heard that his uncle, the former Minister, had died at the hands of Aideed forces.

2.3 On 25 December 1997, the complainant reached Sydney, Australia, via Thailand, without valid documentation. From that point he has remained in immigration detention. On 2 January 1998, the complainant applied for a "protection visa" (refugee status) and was

granted legal representation. He claimed to fear treatment amounting to persecution in Somalia (torture or execution) on the basis of either his race or, alternatively, on the basis of his nationality, political opinion or membership of a particular social group due to his clan membership and familial ties to a political figure of the former Barre Government. On 15 January 1998, the complainant's application was refused.

2.4 On 8 July 1998, following a hearing with the complainant on 9 April 1998, the Refugee Review Tribunal (RRT) refused his application for review of the first instance decision. The RRT found the complainant to be credible and accepted his account of his clan's and sub-clan's experiences. However, it found that the human rights violations he feared were not "persecution" within the meaning of the 1951 Convention relating to the Status of Refugees since he was, instead, a victim of civil war.

2.5 On 15 October 1998, the Federal Court of Australia dismissed the complainant's application for review of the RRT's decision. On 9 April 1999, the Full Federal Court upheld the complainant's appeal against the Federal Court decision. On 26 October 2000 a majority of the High Court upheld an appeal by the Minister of Immigration and Multicultural Affairs against the decision of the Full Federal Court, and affirmed the RRT's decision.

2.6 On 30 November 2000 and 2 February 2001, the Department of Immigration and Multicultural Affairs rejected applications for a discretionary ministerial waiver under the Migration Act of the RRT decision.

...

6.4 The Committee recalls its jurisprudence that the State party's obligation under article 3 to refrain from forcibly returning a person to another State where there are substantial grounds of a risk of torture, as defined in article 1 of the Convention, which requires actions by "a public official or other person acting in an official capacity". Accordingly, in *G.R.B. v. Sweden*9/ the Committee considered that allegations of a risk of torture at the hands of Sendeero Luminoso, a non-State entity controlling significant portions of Peru, fell outside the scope of article 3 of the Convention. In *Elmi v. Australia*,10/ the Committee considered that, in the exceptional circumstance of State authority that was wholly lacking, acts by groups exercising quasi-governmental authority could fall within the definition of article 1, and thus call for the application of article 3. The Committee considers that, with three years having elapsed since the *Elmi* decision, Somalia currently possesses a State authority in the form of the Transitional National Government, which has relations with the international community in its capacity as central Government, though some doubts may exist as to the reach of its territorial authority and its permanence. Accordingly, the Committee does not consider this case to fall within the exceptional situation in *Elmi*, and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of article 3 of the Convention.

6.5 Moreover, the Committee has taken into account all relevant considerations, including the existence in the State party of a consistent pattern of gross, flagrant or mass violations of human rights, although the existence of such a pattern does not as such constitute sufficient grounds for determining whether the particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. In this case, the Committee considers that the complainant has failed to show that there are substantial grounds for believing that he is personally at a risk of being subjected to torture in the event of return to Somalia.

6.6 The Committee also takes note that the State party does not intend to return the complainant to Mogadishu, and that the complainant will be at liberty to avail himself of the UNHCR voluntary repatriation programme and choose the area of Somalia to which he wishes to return.

7. The Committee against Torture...is of the view that the removal of the complainant from Australia would not entail a breach of article 3 of the Convention.

Notes

...

9/ [Communication No. 83/1997.]

10/ [Communication No. 120/1998.]

- *Chedli Ben Ahmed Karoui v. Sweden* (185/2001), CAT, A/57/44 (8 May 2002) 198 at paras. 2.1-2.9 and 8-12.

...

2.1 Mr. Karoui grew up in the town of Jendouba, north-west of the capital Tunis. He attended high school, where he became interested in philosophical and political issues, especially in the Islamic movement. He has been an active member of the Islamic Al-Nahdha Movement since 1981. Later on, he became responsible for the cultural and ideological teaching within the organization in his neighbourhood.

2.2 Because of his affiliation with Al-Nahdha, he was expelled from school in 1979. His family supported his continued studies in a private school. In 1981, he was detained for 1 month and 10 days, and interrogated about his political activities, and more specifically about the demonstrations he had participated in. However, still being a minor, he was released without penalty. This was the first of a total of seven arrests between 1981 and 1996.

2.3 In 1983, he was detained for one month, before being sentenced to six months in prison for participating in demonstrations against the Government. He was also expelled from school because of the allegations made against him. When released, he was unemployed and relied upon the financial support of his family. In 1984, he was arrested and sentenced to two and a half years in prison for affiliating with Al-Nahdha and participating in demonstrations. In 1986, he was again arrested and detained for six months under the accusations of having produced and distributed leaflets against the Government. As the accusations were not proved, he was released without conviction.

2.4 Mr. Karoui tried to leave for Algeria in order to continue his studies, but his passport was confiscated, and he was prohibited from leaving the country as well as taking up employment in Tunisia. In spite of this prohibition, he took up casual work for shorter periods. In November 1987, when the President Ben Ali was elected, the tensions in Tunisia were eased for a while before the repression hardened again. Although wanted for his participation in demonstrations against the United States of America's involvement in the Gulf War, he managed to travel illegally to Algeria in the end of 1990, in order to continue his studies. He returned to Tunisia once in June 1991, when his father became ill, but returned to Algeria at the end of the year after obtaining a Tunisian passport. He pursued his studies until the end of 1992.

2.5 In 1992 he was expelled to Tunisia together with 11 other Tunisians affiliated with Islamic movements. In Tunisia, they were kept in pre-trial detention for two and a half months. He and three other prisoners managed to escape while awaiting trial. He fled to Algeria again, where he applied for asylum on 8 September 1992. The application was rejected in December 1992, and he was again sent to Tunisia in 1993.

2.6 Upon return to Tunisia, he was arrested, and sentenced to one and a half years in prison for being a member of an illegal organization, and for having participated in demonstrations and agitation. According to the complainant, he was maltreated and tortured during every detention, but even more so during the last one, including hitting in his right leg with a baton causing a fracture and permanent pains, pouring of water over him while he was handcuffed, removing hair from his body, and burning his body with cigarettes.

2.7 When he married an Algerian woman in December 1994, he planned to abandon political activity. He worked for a construction company from 1 March 1996 to 30 June 1999. However, in 1996, he was again accused of anti-governmental activity, after refusing to participate in meetings called by the local leader of the governmental party. He was arrested and sentenced to one and a half years in prison. He was released in January 1997, due to demonstrations and international pressure to ease the repression. Subsequent to his detention, he had to report to the police every day. From 1998, the reporting frequency was changed to once a week and it was still in effect when he left Tunisia.

2.8 In the summer of 1999, he was informed that several members of Al-Nahdha whom he knew had been arrested; therefore he decided to escape the country. He obtained a passport through contact and bribes, and a visa for Sweden to visit his cousin, and left for Sweden on 7 August 1999. He arrived in Sweden on the same day, and destroyed his passport immediately after arrival. Before applying for asylum on 24 August 1999, he awaited documents and proof from Tunisia. Whilst in Sweden he was summoned for trial in Tunisia for 15 September 1999, and he was sentenced to eight years in prison in absentia, for attempts of agitation, disturbing the public order and collecting funds. The complainant submitted a fax copy of a certificate from the Jendouba court dated 18 February 2000, confirming these alleged facts. The police came to search his house in Tunisia several times, and once detained his wife for three days. Subsequently, his wife had a miscarriage. After he left for Sweden, his wife went to Algeria since she was under the constant pressure of Tunisian authorities, and in January 2000 his wife and daughter travelled to Sweden.

2.9 On 4 January 2000, the Swedish Immigration Board rejected his application, and ordered his expulsion to Tunisia. The reasons for rejection were mainly that the Board doubted his credibility, since he had destroyed his passport when arriving in Sweden, and he had waited 17 days before applying for asylum. Furthermore, the Board noted that in spite of the strict controls at Tunisian airports, he was able to leave through a Tunisian airport in his own name. The Board therefore considered it unlikely that he was wanted by Tunisian authorities. The Board also noted that there were several discrepancies in the information provided by him, i.e. about the length of time he was employed, when he was first tortured, and the length of the sentence he was convicted to in 1996. It also noted that meanwhile he informed the Swedish Immigration authorities in an interview on 25 August, that he had a case pending before a Tunisian court.

...

8. In accordance with article 3, paragraph 1, of the Convention, the Committee has to determine whether there are substantial grounds for believing that he would be in danger of being subjected to torture if returned to Tunisia. In order to do this, the Committee must, in accordance with article 3, paragraph 2, take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. Furthermore, the Committee has to determine whether the expulsion of Mr. Karoui to Tunisia would have the foreseeable consequence of exposing him to a real and personal risk of being arrested and tortured, especially in view of an *in absentia* judgement against him.

9. The Committee refers to its consideration of the report submitted by Tunisia, in 1997, where it expressed concern over the reported widespread practice of torture and other cruel and inhuman treatment perpetrated by police and security forces. Later human rights reports from reliable sources suggest that a pattern of detention, imprisonment, torture and ill-treatment of persons accused of political opposition activities, including links with the

Al-Nahdha Movement, still exist in Tunisia.

10. The Committee notes the State party's arguments that the inconsistencies in the information provided by the complainant in the asylum process in Sweden cast doubts on the veracity of his claim. However, the Committee attaches importance to the explanations for these inconsistencies given by the complainant, and reiterates its jurisprudence that complete accuracy is seldom to be expected from victims of torture. The Committee finds it impossible to verify the authenticity of some of the documents provided by the complainant. However, in view of the substantive reliable documentation he has provided, including medical records, a support letter from Amnesty International, Sweden, and an attestation from the Al-Nahdha chairman, the complainant should be given the benefit of the doubt, since he has provided sufficient reliable information for the burden of proof to shift. The Committee attaches importance to the medico-legal reports of past torture, and an assessment of the risk that the complainant may be subjected to torture if he is returned to Tunisia and detained, pursuant to the judgement of 15 September 1999, or consequent to his record of being a member of the Al-Nahdha and a political opponent to the existing Government in Tunisia.

11. In the circumstances, the Committee considers that substantial grounds exist for believing that the complainant may risk being subjected to torture if returned to Tunisia.

12. The Committee against Torture...concludes that the removal of Mr. Karoui to Tunisia would constitute a breach of article 3 of the Convention.

- *V. N. I. M. v. Canada* (119/1998), CAT, A/58/44 (12 November 2002) 75 (CAT/C/29/D/119/1998) at paras. 1.1, 2.1-2.3, 8.1, 8.5-8.5 and 9.

...
1.1 The complainant is Mr. V. N. I. M., a national of Honduras born in 1966. He is currently living in Canada, where he requested asylum on 27 January 1997. This request was rejected and he claims that his enforced repatriation to Honduras would be a violation by Canada of article 3 of the Convention against Torture...
...
2.1 The complainant claims that, in April 1988, he was accused by the military of having planted a bomb in a building where he was arrested, being the only person on the scene at the time of the explosion on 19 April 1988. While seriously injured, he was interrogated the day after his arrest and claims that doctors amputated his arm under pressure from the military in order to make him reveal the names of his alleged accomplices. An army officer reportedly told a nurse and a doctor that removing part of his arm was a way of sending a warning to other "leftists".

2.2 Following his arrest, he was detained for three years and four months until 8 August 1991. Meanwhile, a decision by San Pedro Sula Criminal Court No. 3 of 13 January 1989 dismissed the proceedings against him for lack of evidence.1/ The complainant claims that during his detention, he was treated by the military as if he was guilty of the bombing and was tortured and ill-treated many times.

2.3 With the help of the Pentecostalist Church, the author then contacted the Canadian authorities to obtain refugee status in Canada, but was informed that he had to be present himself in Canada for an application to be valid. In April 1992, he fled to Costa Rica. During this period, his brothers and sisters were constantly harassed by the military to make them say where he was hiding. In May 1992, his brother was detained illegally for five days for that purpose. He was then released, but only after having again been threatened with death. The complainant then contacted the Canadian Embassy in Costa Rica once more to obtain help, but this was refused because the political situation was delicate, on account of terrorist acts carried out by Honduran citizens during that period and the Canadian authorities could not assist him. For lack of resources, the complainant returned to Honduras in March 1993, where he hid in a small village near the border with El Salvador until 1995.

...

8.1 The Committee must decide whether the claimant's return to Honduras would be a breach of the State party's obligation under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

...

8.3 The Committee draws attention to its General Comment on the implementation of article 3, which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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" (A/53/44, annex IX, para. 6).

8.4 In the present case, the Committee takes note of the State party's observations that the claimant's statements about the risks of torture are not credible and not corroborated by objective evidence.

8.5 On the basis of the information submitted to it, the Committee considers that the complainant has not demonstrated that he is an opponent of the regime who is wanted for terrorist activities. The Committee notes that he was acquitted of responsibility for the 1988 explosion and that he has not been accused of other opposition activities since then. He has thus not shown that there is a personal risk of being subjected to torture if he returns to Honduras. Accordingly, the Committee takes the view that it is not necessary to examine the general human rights situation in Honduras and that the claimant has not demonstrated that

there are substantial grounds, in accordance with article 3 of the Convention, for believing that he would be in danger of being subjected to torture if he returned to his country of origin.

9. Consequently, the Committee against Torture...concludes that the return of the complainant to Honduras would not constitute a breach of article 3 of the Convention.

____

Notes

1/ He claims that he was not released on the day of the decision because of an appeal filed by the opposing party.

____

- *H. K. H. v. Sweden* (204/2002), CAT, A/58/44 (19 November 2002) 98 (CAT/C/29/D/204/2002) at paras. 2.1-2.5, 2.7, 2.8, 6.3 and 7.

...
2.1 While living in Iran, the complainant belonged to and worked for the political organization Cherikhaj Fadai Schalg. The complainant alleges that he was arrested several times between 1983 and 1988 as a suspect for illegal political activities. In or around September 1989, he alleges that he accidentally killed a revolutionary guard in the following circumstances. The complainant was having a relationship with a girl of Armenian origin. On taking a walk together in a park in central Tehran, they met a group of revolutionary guards. These guards "interfered" with the complainant and his girlfriend because she wore a Christian cross around her neck. The guards threw acid at his girlfriend's face. When one of the guards threatened the complainant with a knife, the complainant managed to grab the knife and stab the guard. He and his girlfriend then fled.

2.2 After this incident, the complainant hid at different places around Tehran. During this period in hiding, he was informed that the guard had died from his wounds and that his girlfriend had committed suicide. He was also informed that some of his relatives' houses had been searched. On 26 October 1989, the complainant succeeded in leaving Iran illegally and arrived in Sweden, where he applied for asylum to the National Immigration Board (now Migration Board and hereinafter referred to as such). On 17 September 1990, the Migration Board rejected the complainant's application as he had given contradictory information about his political activities. The complainant appealed his decision to the Aliens Appeals Board which rejected his application for similar reasons and refused to grant him refugee status. He was later granted a residence permit on the basis of a general amnesty for asylum applicants.

2.3 According to the complainant, his mother was murdered in 1996. In his view, it is likely

that the murder was a consequence of his actions. One of his brothers, committed suicide in 1996 and another brother was killed in 2000. His two other brothers fled Iran and were granted asylum in Canada. The complainant also alleges that he received oral information that he has been sentenced to death in Iran. A representative of the Revolutionary Guard had told the complainant's mother about the verdict before her death.

2.4 In 1994, the complainant was prosecuted for drug smuggling. He was sentenced to 10 years' imprisonment and ordered deported, as he was considered a danger to the public. The complainant failed in his efforts to appeal his case to the Appellation Court for Middle Sweden and then the Supreme Court. The complainant alleges that his need for protection was not considered through this court procedure. The National Board of Corrections Institutions reduced the complainant's sentence so that he would be released on 8 March 2002.

2.5 On 10 January 2002, the complainant lodged an application with the Government arguing that the Court's decision to expel him from Sweden should be revoked as he had the same need of protection as he had previously maintained in his claim to the Migration Board. In addition, he claimed that the contradictions in the information he had supplied to the Migration Board were related to the fact that he was suffering from the effects of torture which he had suffered during his arrests and interrogations in Iran.1/ Although the author provided information on further documents taken into account by the Government in assessing the complainant's case, this information was provided to the author under the Swedish Secrecy Act and, at the complainant's request, is not provided herein.

2.6 In a decision dated 21 March 2002, the Government decided that there was no reasonable risk that the complainant would be subjected to torture if returned to Iran. On 10 April 2002, the complainant was released from custody by decision of the Minister of Justice, who decided to stay the enforcement of the complainant's expulsion until further notice.

2.7 According to the complainant, the use of torture is common in Iran. Police, the Revolutionary Guard and other Security Services frequently practise grave forms of torture, with various methods during investigations. Torture is also used in the prison system after a verdict. In this regard, the complainant refers to reports from UNOHCHR's Special Rapporteur for Iran the Secretary-General's Special Representative on Iran, the United States State Department's Country Reports on Human Rights's report and Amnesty International.s report. Even the The Iranian Parliament itself, he states, has found that torture and excess of violence are used in Iranian prisons.

...

6.3 The Committee notes that the main reason the complainant fears a personal risk of torture if returned to Iran is because he allegedly killed a guard in a park in Tehran prior to his departure. The complainant admits that he provided inconsistent information to the State

party on his alleged involvement in political activities, which he attributes to the effects of torture, but argues that he was never inconsistent in describing the incident in the park. The Committee notes that the complainant has provided a medical report which indicates that he has marks on his body, but does not support the allegation that he suffers from post traumatic stress disorder resulting from being subjected to torture. Indeed, the Committee notes the State party's argument that the complainant did not mention any instances of torture until the appeal to the Aliens Appeal Board and even then provided no details of the alleged torture. Neither has the complainant provided details of any torture in his submission to the Committee. Consequently, the Committee finds it difficult to believe that inconsistencies in the information provided to the State party and to the Committee resulted from the effects of torture. In addition, and contrary to the complainant's claim, the Committee notes that the complainant was inconsistent in his description of the incident in the park including his failure to mention his girlfriend's presence until his application to the Government in 2002. The Committee also observes that the complainant has failed to sufficiently explain many other inconsistencies in his claim including the circumstances of his mother's death, and his departure from Iran, which raise doubts with the Committee as to his credibility. In light of the foregoing, and while recognising the ongoing widespread violations of human rights in Iran, the Committee finds that the complainant has not established that he himself would face a foreseeable, real and personal risk of being tortured within the meaning of article 3 of the Convention.

7. The Committee against Torture...concludes that the complainant's removal to Iran by the State party would not constitute a breach of article 3 of the Convention.

Notes

1/ The complainant provided a medical report, dated 23 May 1996, indicating that he had scars on his body alleged to have been caused by cigarette burns and whipping. The complainant provided no details of the alleged torture.

- *H. B. H., T. N. T., H.J.H., H. O. H., H. R. H. and H. G. H. v. Switzerland* (192/2001), CAT, A/58/44 (29 April 2003) 126 (CAT/C/30/D/192/2001) at paras. 1.1, 2.1-2.8, 6.2 and 6.5-6.11.

1.1 The complainants, Mr. H.B.H., his wife, Mrs. T.N.T., and their children H.J.H., H.O.H., H.R.H. and H.G.H. - are Syrian nationals of Kurdish origin. They are currently in Switzerland, where they submitted an application for asylum. The application was rejected, and the complainants maintain that their return to the Syrian Arab Republic would constitute a violation by Switzerland of article 3 of the Convention. They have therefore asked the

Committee to deal with the case as a matter of urgency, as they were facing imminent expulsion when they submitted their complaint. They are represented by counsel.

...

2.1 Mr. H. states that he was arrested while performing his compulsory military service owing to his refusal to join the ruling Baath party. He claims to have been imprisoned in Tadmur prison from 1 November 1987 to 31 March 1988, and to have been ill-treated.

2.2 He also states that he has been a committed Yekiti party sympathizer since 1992, and that he became a member of the party in 1995. In this connection, he explains that he has distributed pamphlets and newspapers and taken part in party meetings. He asserts that on 5 November 1996 the Syrian political security service accused him of handing out prohibited leaflets and arrested him, releasing him owing to lack of evidence on 20 November 1996.

2.3 On 18 July 1998 a meeting attended by some 45 to 50 people, including senior officials of the Yekiti party, was held at his home in Al Qamishli, at which he roundly criticized government policy. Following the meeting, on the advice of the organizer, the complainant went to stay with his sister for fear that the authorities would be told about his remarks. Shortly after the meeting, members of the Syrian security service in fact went to his home to look for him. Over the next few days he heard that the security forces had reportedly made several attempts to arrest him. He first hid at his sister's home in Al Qamishli, then at his uncle's home, near to the border with Turkey. There he met up with his family, which had meanwhile also fled Al Qamishli. The complainants state that they left Syria together, in early August 1998, and crossed Turkey en route to Switzerland.

2.4 Mr. H. affirms that, after he fled, he remained in contact with organizations of party exiles in Europe. He also states that he took part in a demonstration against the Syrian regime in the spring of 2000 in Geneva.

2.5 The complainants applied for asylum in Switzerland on 17 August 1998; the application was rejected on 21 January 1999. The Swiss Asylum Appeal Commission (CRA), ruling on the appeal submitted by the complainants on 20 February 2001, confirmed the initial decision to reject the application on 11 April 2001. In a letter dated 23 April 2001 the complainants were given a deadline for departure of 23 July 2001.

2.6 On the basis of a new document intended to demonstrate that the fear of persecution cited was well founded - an internal memorandum from the Al Hasakah political security division, dated 21 August 1998, addressed to the Al Qamishli political security division for the arrest of Mr. H. for prohibited political propaganda on behalf of the Kurdish cause - the complainant, on 21 June 2001, submitted to CRA an application for review of the decision of 11 April 2001. By an interlocutory decision of 28 June 2001 CRA rejected a request for the applications for review to have suspensive effect and for expulsion to be deferred.

2.7 In a letter dated 27 August 2001 a copy of a judgement of 20 May 1999 by an Al Hasakah court sentencing Mr. H. to three years' imprisonment for belonging to a prohibited organization was sent to CRA. The Commission did not consider it appropriate to overturn its interlocutory decision.

2.8 On 31 August 2001 a report from the Swiss section, Berne, of Amnesty International was sent to CRA; the report concluded that the complainants would very probably be imprisoned, interrogated under torture and subjected to arbitrary detention if they returned to Syria. CRA did not change its original decision.

...

6.2 The issue before the Committee is whether the return of the complainants to the Syrian Arab Republic would violate the obligation of the State party under article 3 of the Convention not to expel or return a person to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

...

6.5 In this case the Committee notes that the State party draws attention to blatant inconsistencies and contradictions in the accounts and submissions by the complainants, casting doubt on the veracity of their allegations. It also takes note of the information supplied in this regard by the complainants.

6.6 Regarding the allegations of ill-treatment and torture in Syria, the Committee notes that only Mr. H. states that he suffered such treatment while imprisoned in Tadmur prison between 1 November 1987 and 31 March 1988, and that he remained in the country undisturbed until his departure in 1998.

6.7 Regarding the complainants' political activities, the Committee notes, firstly, that only Mr. H. reports such an involvement in Syria. Secondly, in view of the complainants' contradictions and inconsistencies and the serious doubts as to the authenticity of the internal memorandum from the Syrian security service of 21 August 1998 and of the Al Hasakah court judgement of 20 May 1999, the Committee considers that the complainant has not established, either in his statements or by means of the documents produced, his active membership in the Yekiti party and opposition to the Syrian authorities. Lastly, the Committee considers that the complainants have not shown involvement in opposition political activities in Switzerland.

6.8 The Committee considers that the above-mentioned documents were produced by the complainants only in response to decisions by the Swiss authorities to reject their application for asylum, and that the complainants have failed to offer any coherent explanation of the delay in making submissions.

6.9 Regarding the 2001 Amnesty International report, in addition to the contradictions

pointed out by the State party concerning the conclusions drawn regarding the complainants' political activities in Syria, the Committee notes that the information relating to measures that might affect persons returning to Syria after a long stay abroad is invoked in general terms without being linked in a relevant manner to the specific cases of the complainants, and is contradicted by the information transmitted by the State party, in submissions which the complainants have not subsequently contested. It is also apparent that the Kurdish origin of the complainants would not in itself constitute a reason for ill-treatment or torture in Syria.

6.10 Lastly, the Committee notes that the complainant Mrs. T. has submitted no arguments as to the risk of her being subjected to ill-treatment in the event of return to Syria.

6.11 Consequently the Committee considers that the complainants have not demonstrated the existence of serious grounds suggesting that their return to Syria would expose them to real, specific and personal risk of torture.

- *A. A. v. The Netherlands* (198/2002), CAT, A/58/44 (30 April 2003) 161 (CAT/C/30/D/198/2002) at paras. 1.1, 2.1-2.4, 4.6, 4.17, 4.19, 4.20 and 7.4-7.7.

1.1 The complainant is A.A., a Sudanese citizen, born on 11 November 1968, currently residing in the Netherlands, where he has requested asylum. He claims that his removal to the Sudan would constitute a violation of article 3 of the Convention by the Netherlands. He is represented by counsel.

...

2.1 The complainant was a practising lawyer in the Sudan. He alleges that his sister, Zakia, is the widow of Bashir Mustafa Bashir, who was one of the 28 persons involved in the *coup d'état* in the Sudan in 1989, for which Mr. Bashir was executed. The complainant's sister later became active in an opposition organization for the relatives of martyrs. Since 1993, the complainant had been active in the banned Democratic Unionist Party (DUP) belonging to al-Tajammu' al-Watani li'adat al-Dimuqratiya (the National Democratic Alliance, a coalition of opposition parties). He has been a member of the Sudanese Bar Association since 1992.

2.2 In the summer of 1997, a pro-government party competed with DUP in elections for the Sudanese Bar Association. During preparations for the elections, DUP organized a meeting for its supporters. The complainant participated as one of the organizers and speakers. He claims that the meeting was attended by so many people that Sudanese authorities intervened and arrested several persons, among them the complainant. He alleges that he was subsequently kept in a detention centre of the State security service in Al Khartoum-Bahri for 10 days, during which he was questioned, mistreated and tortured. He was then conditionally released (travel ban).

2.3 While travelling to Port Sudan to participate in activities for the opposition party in September 1997, the complainant was arrested for the second time. He was kept in detention in Sawakin, where he was questioned and allegedly threatened with death. After three days in detention, he claims that he was thrown into the sea and was picked up after about 15 minutes. He was then brought to a prison where he was detained for a week. Upon release, he was told to stop his political activities.

2.4 On the day of the elections, a conflict erupted between the government party and the supporters of the opposition over allegations of election fraud. The complainant was once again arrested and kept in detention for three days, during which he claims to have been tortured. On 30 January 1998, he again was arrested while attending a mass demonstration that he had helped to organize. He was brought to a secret underground prison, a so-called "ghost house", where he was kept in detention for about two months. He managed to escape from the prison and fled to the Netherlands, where he arrived on 13 April 1998.

...

4.6 The State party argues that according to the above report, political prisoners were mainly detained in the Khartoum North Central Prison (Kober prison). By European standards, the living conditions in that prison were poor, but the prohibition of torture was respected. The military and security services had their own detention centres where torture and detention without charge were frequent. "Ghost houses" were unofficial detention centres not subjected to any form of oversight. Detention generally lasted from a few days to three weeks. The purpose was to intimidate suspected political adversaries; detainees were subjected to mental and physical abuse and torture. The armed attacks in eastern Sudan led to increased use of these centres in the first half of 1997, but once the Government established greater control over the situation later in 1997, their use declined. The Minister concluded that since 1997, some positive changes in the Sudan were discernible. The situation was not such as to imply that it would be irresponsible to return a Sudanese national whose application for admission as a refugee or for a residence permit on humanitarian grounds had been refused after careful consideration.

...

4.17 For the State party, the fact that the complainant was a lawyer and a member of DUP does not in itself constitute sufficient grounds for assuming that if he were returned to the Sudan, he would be in danger of being subjected to treatment contrary to article 3 of the Convention. The State party invokes the country reports of the Minister for Foreign Affairs referred to above. Though complete freedom for activists of political parties has yet to arrive, there are no longer any cases of detention lasting longer than a day, or other serious abuse. Furthermore, in response to the "Motherland Call" and the proclamation of an amnesty, important members of the northern opposition have returned to the Sudan.

...

4.19 The State party dismisses as implausible the complainant's allegation that he was detained from 30 January 1998 to 23 March 1998. His statements allegedly were

contradictory, vague and imprecise. In particular, he gave contradictory accounts of the number of people present at his interrogations.

4.20 The complainant was unable, according to the State party, to provide details about the prison in which he was held and, despite having been detained for over two months, could not describe his cell in any detail. The State party dismisses as implausible his statement that obstacles in the cell made it impossible for him to walk. It is unimaginable, in the State party's opinion, that during a detention of almost two months, he would not have investigated his surroundings. He should have been able to describe his cell in more detail, at least because he alleges that food was thrown into his cell daily.

...

7.4 In the instant case, the Committee notes the inconsistencies in the complainant's account, as pointed out by the State party, as well as the general failure by the complainant to substantiate his allegations that he was subjected to torture.

7.5 The Committee further notes the State party's remarks that the complainant failed to give any information on the conditions of detention in a so-called "ghost house", and that he failed to describe the cell in which he alleges to have been detained for several weeks. The complainant has not responded to these arguments other than by noting that it is insufficient for the State party to manifest "some doubts" about the credibility of his statements. The Committee also notes that the complainant failed to respond to the doubts voiced by the State party concerning the ease with which he claims to have been able to leave the prison.

7.6 The Committee finally notes the State party's observations on the evolution of the political system in the Sudan over the last few years, in particular the legalization of the political parties, the presidential amnesty of political refugees of 3 June 2000 and the "Motherland Call" under which important members of the opposition have returned to the Sudan. The Committee notes that the complainant has not challenged any of these arguments in his comments.

7.7 On the basis of the above, the Committee considers that the information made available by the complainant does not show that substantial grounds exist for believing that he would be personally in danger of being subjected to torture in the event of his return to the Sudan.

- *U. S. v. Finland* (197/2002), CAT, A/58/44 (1 May 2003) 153 (CAT/C/30/D/197/2002) at paras. 2.1-2.7, 7.2 and 7.4-7.8.

...

2.1 The complainant was a member of the People's Liberation Organization of Tamil Eelam (PLOTE) until 1985, when the organization was forbidden by the Liberation Tigers of Tamil

Eelam (LTTE). In 1985, LTTE arrested the complainant and detained him for four months, during which he was interrogated about the location of PLOTE weapons. Subsequently, LTTE interrogated him on several occasions.

2.2 During this period, the complainant was working as a bus conductor and travelling between areas controlled by LTTE and by the Sri Lankan army. In view of his occupation and the fact that he was no longer a member, PLOTE suspected him of cooperating with LTTE and informed the Sri Lankan army of their suspicion.

2.3 In March 1987, the complainant was arrested by the Sri Lankan army and detained for almost two years. During his detention, the complainant was allegedly tortured on a regular basis for a period of six months. He was beaten, kicked, hung in the "chicken position" where he was left to hang from his left shoulder, his genitals were "injured", his hands were burned with a hot object, and he was given electrical shocks while cold water was poured over him.

2.4 After his release on 2 January 1989, the complainant was rearrested and interrogated three or four times, for up to three days each, by the Indian Peace Keeping Force (IPKF). He was also interrogated by the LTTE in order to find out what he had told IPKF about members of LTTE.

2.5 In June 1989, the complainant escaped to Germany, where he applied for asylum. His application was rejected, and he immediately attempted to go to France. French police arrested him and returned him to Germany. From Germany, he was returned to Sri Lanka in July 1989. On his return, he stayed in the LTTE-controlled area of Jaffna until 1995. He was interrogated several times by LTTE to find out whether he had any connections with PLOTE.

2.6 In 1996, after the Sri Lankan army occupied Jaffna, the complainant escaped to Vanni, where he lived with relatives, and then moved on to Hatton. During his time in Hatton, he was arrested twice by the Sri Lankan army, as he was new in the area. In 1998, he was arrested by the Sri Lankan police and detained for three months on suspicion of being an LTTE member. During his detention he was severely beaten; he remains scarred on his lips and behind his ear, as a result of being hit by a gun. In March 1998, after bribing the police, he was released.

2.7 After his release, the complainant escaped through Russia to Finland where he arrived on 21 December 1998. He immediately applied for asylum. On 12 February 2001, the Directorate of Immigration rejected his application and issued a deportation order against him. On 13 November 2001, the Helsinki Administrative Court rejected his appeal. The complainant then applied for leave to appeal and suspension of the deportation order to the

Supreme Administrative Court. On 31 December 2001, his application was rejected.

...

7.2 The issue before the Committee is whether or not the forced return of the complainant to Sri Lanka would violate the obligation of Finland under article 3 of the Convention not to expel a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

...

7.4 The Committee refers its general comment No. 1 on the implementation of article 3 in the context of article 22, paragraph 6, of which reads:

> "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the petitioner would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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."

7.5 The Committee observes that the State party's obligation to refrain from forcibly returning a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is directly linked to the definition of torture as found in article 1 of the Convention. For the purposes of the Convention, according to article 1, "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".

7.6 As to the possibility of the complainant suffering torture at the hands of the State upon his return to Sri Lanka, the Committee has taken due note of the complainant's claim that he was previously detained and tortured by members of the Sri Lankan army. It further observes that the complainant provided medical reports attesting to injuries that were "possibly caused by torture", though none of the reports conclusively confirms that he was tortured during his detention in 1998. The State party does not challenge the authenticity of these reports but notes that the reports themselves attest to a gradual improvement of the author's health and that treatment for his current medical condition would be available in Sri Lanka. The State party does not concede that such torture as the complainant might have been subjected to was suffered at the hands of the Sri Lankan army - in any case, such events would have occurred years ago.

7.7 The Committee notes the relevance of the ongoing peace process, which led to the conclusion of the February 2002 ceasefire agreement between the Government and LTTE, and the negotiations between the parties to the conflict which have taken place since. It further recalls the results of the proceedings concerning its inquiry on Sri Lanka under article 20 of the Convention and its conclusion that, although a disturbing number of cases of torture and ill-treatment as defined by articles 1 and 16 of the Convention are taking place, its practice is not systematic in the State party.e/ It finally notes the opinion of UNHCR of March 1999, according to which those who do not fulfil the refugee criteria, including those of Tamil origin, may be returned to Sri Lanka, and that a large number of Tamil refugees returned to Sri Lanka in 2001 and 2002. In this context, it should also be noted that the complainant has not been politically active since the mid-1980s.

7.8 The Committee recalls that, for article 3 of the Convention to apply, the individual concerned must face a foreseeable and real risk of being subjected to torture in the country to which he/she is being returned, and that this danger must be personal and present. In the light of the observations in paragraphs 7.6 and 7.7 above, the Committee does not consider that the existence of a personal and real risk has been established by the complainant.

Notes

...

e/ [Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 44 (A/56/44)] chap. IV, sect. B, para. 181.

- *M. V. v. The Netherlands* (201/2002), CAT, A/58/44 (2 May 2003) 170 (CAT/C/30/D/201/2002) at paras. 2.1-2.3, 6.2, 7.1, 7.3 and 8.

...

2.1 The complainant states that he and his wife are related to Kurdish Workers Party (PKK) leader Abdullah Öçalan, who also comes from his home town, Ömerli, in the Kurdish part of Turkey. The complainant's grandfather is a nephew of Abdullah Öçalan's mother. The grandmother of the complainant's wife is a sister of Abdullah Öçalan's father. He contends that he belongs to a politically active family and that he himself is politically active.

2.2 In 1997, the complainant joined the pro-Kurdish People's Democracy Party (HADEP). He also collected information for the Human Rights Association (IHD) about alleged human rights abuses by Turkish authorities. He alleges that he was arrested several times and ill-treated in connection with these activities, and that the Turkish authorities sought information from him concerning PKK, HADEP and IHD. In May 1998 (after also being approached in 1993 and 1995), he was allegedly threatened with death if he did not provide

this information. His family was also threatened with harm if he fled. Thereafter, he left his home village, departed Turkey by truck on 11 June 1998 and arrived in the Netherlands on 17 June 1998, where he alleges he continued his political activities.a/

2.3 On 18 June 1998, the complainant requested asylum and residence. After an interview had taken place in the presence of an interpreter, the State Secretary of Justice decided, on 8 February 2000, that his request for asylum was manifestly unfounded and, further, denied his request for residence on humanitarian grounds.

...

6.2 To the extent that the complainant suggests that such ill-treatment as he might face in Turkey falls within article 3 of the Convention (see paragraphs 3.1 and 5.3), the Committee notes that the scope of article 3 extends only to torture and does not encompass treatment that falls short of that serious threshold. Those parts of the complaint, therefore, are inadmissible *ratione materiae* as falling outside the scope of article 3. With respect to the complainant's claim under article 3 of the Convention concerning as such, the Committee does not identify further obstacles to the admissibility of the complaint, and accordingly proceeds with the consideration of the merits.

7.1 The issue before the Committee is whether removal of the complainant to Turkey would violate the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

...

7.3 In the present case, the Committee observes that, based on the information before it, the political activity that the complainant engaged in was confined to (unspecified) involvement with the political party HADEP and the IHD organization, including the collection of information, and the complainant himself stated that he did not flee for these reasons. There is no suggestion that he was active in or involved with PKK. Nor has the complainant detailed in any manner his political activities in the Netherlands, and how that might strengthen his claim under article 3. Given some measure of documented progress in the human rights situation in Turkey since the complainant's departure in 1998, and the well-known development of the apprehension by Turkish authorities of the PKK leadership, the Committee considers that the complainant has failed to establish that either his past sporadic contact with the authorities, which did not include any allegation of torture, or his family ties of some distance with the PKK leadership are such that there are substantial grounds for believing that any interest the authorities would take in him at the present time would amount to torture.

8. The Committee against Torture...considers that the complainant has not substantiated his claim that he would be subjected to torture upon return to Turkey and therefore concludes that the complainant's removal to that country would not constitute a breach by the State

party of article 3 of the Convention.

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Notes

a/ No further details are supplied as to these activities.
...

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- *S. S. v. The Netherlands* (191/2001), CAT, A/58/44 (5 May 2003) 115 (CAT/C/30/D/191/2001) at paras. 2.1-2.4 and 6.2-6.7.

...
2.1 The complainant lived in the Jaffna peninsula from 1989 until 1995, where he worked as a karate teacher. He also gave lessons to members of the Liberation Tigers of Tamil Eelam (LTTE) but, although he sympathized with LTTE, he refused to give lessons at their military camps. When the Sri Lankan army took over Jaffna in late 1995, he fled to Chavakachchery, and thereafter to Killinochi, together with his wife and children.

2.2 On 7 April 1996, the complainant's mother died in Trincomalee, which was controlled partly by LTTE, partly by the Sri Lankan army. The complainant wanted to travel to Trincomalee to pay tribute to his deceased mother but was refused a travel pass by LTTE because he did not have anyone to vouch for him. a/ In June 1996, in return for free karate lessons for some LTTE members, he finally managed to obtain permission to travel to Mullaitivu - still located in the LTTE-controlled area - together with a guide. After staying in Mullaitivu for two months at the house of a fisherman, he travelled to the Trincomalee district on a fishing boat. He hid for two to three months with a Tamil in the Anbuvelipuram district of Trincomalee before he went to his sister's house in the centre of Trincomalee in

2.3 On 13 December 1996, two days after LTTE bombed a Sri Lankan army camp, the army overran Trincomalee and arrested a large number of people, including the complainant. Everyone above the age of 12 had to stand in front of a temple where a masked man picked out the complainant and other men. The complainant was brought to a military camp in Trincomalee where he was detained for approximately two months. He was locked with four other men in a narrow cell with little light and a concrete floor and without any furniture. He was given one daily meal of poor quality. Since the cell did not have a toilet, the prisoners had to relieve themselves in the corners of the room, excrement being removed from the cell occasionally. Reportedly, the soldiers entered the cell regularly, especially following armed attacks by LTTE, to kick and beat the prisoners, sometimes asking questions at the same time. The complainant states that he was asked whether he was a karate teacher, which he denied. He and the other men were often naked or dressed only in

underwear. Frequently, the soldiers poured water on them before beating them. The complainant was beaten with the flat of the hand, the fist, the butt of a rifle and a rubber rod. Once he was allegedly beaten on the soles of his feet with a round stick, causing severe pain in his feet for several days. Another time, he was put against a cupboard with his hands up and was hit on the back with a rubber rod, causing him chronic pain in the back which allegedly persists to date. He was punched on the eye, leaving an injury on one eyebrow. Soldiers also beat him on the genitals and on the kidneys, which resulted in a swollen testicle and blood in his urine. Moreover, he was allegedly burned with a hot stick on his left arm, leaving scars. The big toe of his right foot was severely injured when his torturers stamped on that foot with their boots. When the soldiers hit his right hand with a broken bottle and asked him "Aren't you a karate teacher?", he lost consciousness. b/

2.4 The complainant woke up in a hospital in the military camp where he stayed for a few days until an unknown Muslim man named Nuhuman managed to organize his escape. The complainant suspects that his sister had paid money to Nuhuman who bribed the guards in front of his hospital room. The complainant states that, together with Nuhuman, he was able to leave the hospital and the military camp without any difficulty.

...

6.2 The Committee must decide whether the forced return of the complainant to Sri Lanka would violate the State party's obligation, under article 3, paragraph 1, of the Convention, not to expel or return (refouler) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture...

6.3 With respect to the general human rights situation in Sri Lanka, the Committee recalls that, in its concluding observations on the initial report of Sri Lanka, it expressed grave concern about "information on serious violations of the Convention, particularly regarding torture linked with disappearances".g/ The Committee also notes from recent reports on the human rights situation in Sri Lanka h/ that, although efforts have been made to eradicate torture, instances of torture continue to be reported, and that complaints of torture are often not dealt with effectively by police, magistrates and doctors. However, the Committee equally notes the ongoing peace process in Sri Lanka which led to the conclusion of the ceasefire agreement between the Government and LTTE of February 2002 and the - albeit currently interrupted - negotiations between the parties to the conflict which have taken place since. The Committee further recalls that, on the basis of the proceedings concerning its inquiry on Sri Lanka under article 20 of the Convention, it concluded that the practice of torture is not systematic in the State party. i/ The Committee finally notes that a large number of Tamil refugees returned to Sri Lanka in 2001 and 2002.

6.4 With regard to the complainant's claim that he would be in danger of being subjected to torture by LTTE for having left the LTTE-controlled area of Sri Lanka without express permission to do so and without designating someone to vouch for him, the Committee

recalls that the State party's obligation to refrain from forcibly returning a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is directly linked to the definition of torture as found in article 1 of the Convention. For the purposes of the Convention, according to article 1, "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". The Committee observes that the issue of whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention, unless the non-governmental entity occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned. j/ Since the complainant can be returned to territory other than that under the control of LTTE, the issue, on which he bases part of his claim, that he would suffer retribution from LTTE upon his return to Sri Lanka cannot be considered by the Committee.

6.5 With respect to the risk that the complainant might be subjected to torture at the hands of State agents upon return to Sri Lanka, the Committee has noted the complainant's claim that he is at high personal risk owing to his previous activities as a karate teacher, that he has allegedly already been severely maltreated by soldiers of the Sri Lankan army, and that he bears scars which the authorities would likely assume to have been caused by fighting for LTTE. It has considered the claim that, because of the failure by IND to take a decision on the complainant's refugee application within the prescribed time limit, the complainant was precluded from filing an objection regarding the merits of the IND final decision, dated 20 May 1999. The Committee has further noted that IND took this decision before BMA gave its advice on the complainant's medical condition. Similarly, the Committee has noted the attention drawn by the State party to a number of inconsistencies and contradictions in the complainant's account which are said to cast doubt on the complainant's credibility and the veracity of his allegations.

6.6 The Committee notes that the medical evidence submitted by the complainant confirms physical as well as psychological symptoms which might be attributed to his alleged maltreatment at the hand of the Sri Lankan army. However, the Committee observes that, even if the complainant's allegation that he was severely tortured during his detention at the Trincomalee military camp in 1996 were sufficiently substantiated, these alleged acts of torture did not occur in the recent past.

6.7 In the Committee's view, the complainant has not demonstrated any other circumstances, other than the fact that he worked as a karate teacher in Jaffna until 1996 and the presence of scars on his body, which would appear to make him particularly vulnerable to the risk of torture if he were to be returned to Sri Lanka. Moreover, the Committee again notes that the positive development of the peace negotiations between the Government of Sri Lanka and LTTE and the implementation of the peace process under way give reason to believe that a person in the situation of the complainant would not be under such risk upon return to Sri Lanka. The Committee therefore finds that the complainant has not provided sufficient evidence for substantiating that he would be in danger of being subjected to torture were he to be returned to Sri Lanka, and that such danger is present and personal.

...

Notes

a/ Counsel submits that the travel pass system applies to everyone wishing to leave the LTTE-controlled area and is intended to raise funds for the armed struggle of LTTE. In order to ensure that the departure of Tamils does not result in a loss of contributions, each Tamil planning to leave the LTTE-controlled area needs someone with sufficient assets to guarantee his return.

b/ The complainant's description of most of the details of his torture is documented in a medical report, dated 14 June 2001, by the medical examination group of the Dutch Section of Amnesty International.

...

g/ *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44), para. 249.

h/ See Amnesty International Report 2002, Sri Lanka, AI index: POL 10/001/2002; Amnesty International, Sri Lanka: Torture prevails despite reforms, AI index: ASA 37/14/1999.

i/ *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 44* (A/57/44), chap. IV, sect. B, para. 181.

j/ See *Sadi Shek Elmi v. Australi*a, communication No. 120/1998, ibid., *Fifty-fourth Session, Supplement No. 44* (A/54/44), annex VII, sect. A, para. 6.5; *M.P.S. v. Australi*a, ibid., *Fifty-seventh Session, Supplement No. 44* (A/57/44), annex VII, sect. A, para. 7.4; *S.V. et al. v. Canad*a, ibid., *Fifty-sixth Session, Supplement No. 44* (A/56/44), annex VII, sect. A, para. 9.5.

REFUGEES

- *K. K. v. Switzerland* (186/2001), CAT, A/59/44 (11 November 2003) 159 (CAT/C/31/D/186/2001) at paras. 2.1-2.6 and 6.2-6.9.

...
2.1 The complainant is from Jaffna in the north of Sri Lanka. When his parents' house was bombed by the Sri Lankan army in October 1995, he and his family fled to the then LTTE a/ -controlled city of Killinochi, from where he left for Colombo in May 1996, together with his mother. On their way to Colombo, he was separated from his mother and arrested, at a checkpoint of the Sri Lankan army and the Eelam People's Revolutionary Liberation Front (EPRLF) near Vavuniya, together with several other Tamil men suspected of LTTE-membership.

2.2 The complainant was subsequently detained in a room of a school from where he was brought to the Criminal Investigation Department (CID) in Thandikulam for interrogations about his LTTE connection. During that time, he was allegedly tortured by Tamil members of the EPRLF who burned his genitals with cigarettes, while he was naked with his hands tied behind his back. The complainant also received blows with a rod and was threatened with execution if he refused to admit his LTTE-membership. During detention, he was only given sandy rice to eat and smelly water, or urine, to drink. After 12 days, the complainant was released because of repeated interventions of his mother and because a remote relative from Colombo, Mr. J.S., had provided guarantees for him.

2.3 Shortly after his arrival in Colombo, where he stayed in a [Tamil] lodge, the complainant was arrested and handed over by the army to the police. The following day, he was brought before a judge who, by decision of 2 August 1996, acquitted him of all charges of terrorist activity, for lack of evidence. Despite his acquittal, he was kept in detention at the CID, in a cell occupied by Singhalese drug addicts and alcoholics who allegedly beat him. After one week, he was brought before court again, where he managed to secure his release with the assistance of a lawyer.

2.4 Shortly thereafter, the complainant was again arrested by the CID on grounds of being a suspected LTTE activist. At the CID office in Boralle, he allegedly was given half an hour to confess his LTTE-membership, failing which the CID officer threatened to execute him. During his subsequent interrogation with two other suspects, Mr. J.S. and his sister, K.S., the complainant received blows on his head with a sand-filled plastic pipe ("S'Lon Pipe"). He was then detained at the CID building for seven days until he was released, together with the two other suspects, after they had paid 15,000 rupees as a bribe.

2.5 In September 1996, the complainant was again arrested by the CID, after a bomb attack on a train in Dehiwala, Colombo, and after weapons and explosives had been found next to the house of his relatives and co-suspects, J.S. and K.S. During detention, where he was

allegedly beaten, forced to exhibit his genitals and given poor food, the complainant was twice visited by delegates of the International Committee of the Red Cross (9 and 19 September 1996). When the police arrested the real perpetrator of the bomb blast, he was released after 22 days' detention, together with Mr. and Ms. Selvarasa, after his mother had paid a bribe of 45,000 rupees. He was told to leave Colombo within one month.

2.6 On 29 October 1996, the complainant left Sri Lanka using a false passport. He arrived in Switzerland on 30 October 1996, where he applied for asylum the same day. After two hearings by the Federal Office for Refugees (BFF) on 14 November 1996 and 6 March 1997, and one hearing by the immigration police in Zug on 9 December 1996, the Federal Office rejected his asylum application by decision of 23 October 1998, at the same time ordering his deportation to Sri Lanka. While considering documents submitted by the complainant as evidence b/ as being authentic, the BFF observed that several contradictions in his statements undermined his credibility. In particular, while he had told the immigration police in Zug that the ICRC delegates had visited him during his second detention in Colombo, he stated during his second hearing by the BFF that he had received these visits during his third and final detention in Colombo. This incoherence, which he could not explain, raised doubts as to whether he had actually been detained three times in Colombo. His statement during the second BFF hearing that he had left Colombo only 12 days after his final release from detention was considered unrealistic, thereby further undermining his credibility. Moreover, the fact that the complainant had been acquitted by a Sri Lankan court and released from police detention several times indicated that he was at no real risk of persecution. The instances of torture alleged by him could not be attributed to the Sri Lankan Government, which had made considerable efforts to improve the domestic human rights situation, but constituted abuses of authority by individual policemen. The medical problems claimed by the complainant (problems to urinate, stomach ache, loss of memory) had not affected his ability to travel.

...

6.2 The Committee must decide whether the forced return of the complainant to Sri Lanka would violate the State party's obligation, under article 3, paragraph 1, of the Convention, not to expel or return (*refouler*) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In reaching its conclusion, the Committee must take into account all relevant considerations, including the existence, in the State concerned, of a consistent pattern of gross, flagrant or mass violations of human rights (article 3, paragraph 2, of the Convention).

6.3 The Committee has taken note of the reports cited by the complainant as well as the State party, which deny or confirm significant improvements in the protection of the rights of Tamils during identity controls, arrest and detention in Sri Lanka. The Committee notes from recent reports on the human rights situation in Sri Lanka that, although efforts have been made to eradicate torture, instances of torture continue to be reported, and that

complaints of torture are often not dealt with effectively by police, magistrates and doctors. However, the Committee equally notes the ongoing peace process in Sri Lanka which led to the conclusion of the ceasefire agreement between the Government and the LTTE of February 2002, and the negotiations between the parties to the conflict which have taken place since. The Committee further recalls that, on the basis of the proceedings concerning its inquiry on Sri Lanka under article 20 of the Convention, it concluded that the practice of torture is not systematic in the State party.d/ The Committee finally notes that a large number of Tamil refugees returned to Sri Lanka in 2001 and 2002.e/

6.4 The Committee recalls, however, that the aim of its examination is to determine whether the complainant would personally risk torture in the country to which he would return. It follows that, irrespective of whether a consistent pattern of gross, flagrant or mass violations of human rights can be said to exist in Sri Lanka, such existence would not as such constitute sufficient grounds for determining that the complainant would be in danger of being subjected to torture upon his return to Sri Lanka. Additional grounds must be adduced to show that he would be personally at risk. Conversely, the absence of a consistent pattern of gross violations of human rights does not necessarily mean that the complainant cannot be considered to be in danger of being subjected to torture in the specific circumstances of his case.

6.5 As regards the personal risk of the complainant to be subjected to torture at the hands of the Sri Lankan security forces, the Committee has noted his claim that the fact that he was arrested and tortured in the past as a suspected LTTE activist, as well as the after-effects of this torture, would expose him to an increased risk of renewed arrest and torture, based on his uncontrolled behaviour in stressful situations, and the suspicion likely to be created by such behaviour, as well as the scars on his body. It has noted the State party's arguments about the contradictions in the complainant's statements before the Swiss immigration authorities, his acquittal by a Sri Lankan court due to lack of evidence of LTTE involvement, and the legal safeguards introduced by the new Committee of Inquiry into Undue Arrest and Harassment since 1998...

6.6 The Committee considers that, assuming that, based on the medical and psychiatric evidence submitted by the complainant, his case has been made out, considerable weight must be given to his allegations that he was tortured during past detention at the CID. However, the Committee notes that these alleged instances of torture did not occur in the recent past.f/

6.7 Insofar as the complainant argues that his post-traumatic stress disorder would result in uncontrolled behaviour in stressful situations, thereby increasing his risk of arrest by the Sri Lankan police, the Committee observes that the fact that the complainant benefited from a court decision which acquitted him of terrorism charges, as well as his low political profile,

can in turn be adduced as factors which are likely to lower any risk of serious consequences should he be arrested again.

6.8 With regard to the alleged absence of adequate psychiatric treatment for the complainant's post-traumatic stress disorder in Sri Lanka, the Committee considers that the aggravation of the complainant's state of health possibly resulting from his deportation to Sri Lanka would not amount to torture within the meaning of article 3, read in conjunction with article 1, of the Convention, which could be attributed to the State party itself.g/

6.9 The Committee therefore is of the view that the complainant has not adduced sufficient grounds which would allow the Committee to conclude that he would be in danger of being subjected to a substantial, present and personal risk of torture if returned to Sri Lanka.

...

Notes

a/ Liberation Tigers of Tamil Eelam.

b/ The documents include the Sri Lankan court decision of 2 August 1996 acquitting the complainant and a prison card issued by ICRC.

...

d/ *Official Records of the General Assembly*, *Fifty-seventh Session, Supplement No. 44* (A/57/44), chap. IV, sect. B, para. 181.

e/ See communication No. 191/2001, *S.S. v. The Netherlands*, decision adopted 5 May 2003, para. 6.3.

f/ See the Committee's general comment No. 1 at 8 (b).

g/ See, *mutatis mutandis*, communication No. 83/1997, *G.R.B. v. Sweden*, decision adopted 15 May 1998, para. 6.7.

- *A. T. A. v. Switzerland* (236/2003), CAT, A/59/44 (11 November 2003) 323 (CAT/C/31/D/236/2003) at paras. 2.1-2.4 and 4.2.

...

2.1 In 1996, the complainant, who belongs to the Ewé ethnic minority, joined the "Union des Forces du Changement" (UFC).

2.2 On 27 April 2000, the complainant played for the UFC soccer team in a match against the team of the ruling political party. The UFC team won the game after the complainant had scored the decisive goal. The same evening, two soldiers came to his residence looking for him. While attempting to escape, he allegedly had to dodge bullets fired by soldiers; however, he managed to escape.

2.3 The complainant argues that the security forces in Togo are controlled by the Khabyé ethnic majority and frequently violate human rights, the Togolese Constitution and domestic laws which protect the rights and freedoms of the individual.

2.4 The complainant left Togo, he arrived in Europe and requested asylum in Switzerland on 30 May 2000. On 11 October 2000, the Federal Refugee Office refused his application and ordered his deportation from Switzerland. On 19 November 2001, the Asylum Appeals Commission dismissed his appeal and, on 15 July 2003, it confirmed the decision of the Federal Refugee Office ordering the complainant's deportation. On 18 September 2003, the Asylum Appeals Commission rejected his request to review its decision of 15 July 2003.
...
4.2 The Committee notes that the information submitted by the complainant in substantiation of his claim is general and vague and does not reveal the existence of any personal and foreseeable risk of torture to which the complainant might be subjected in the event of his return in Togo. The bare assertion of membership in a political party, in the instant case of the UFC, and the vague allegation that he was shot at while attempting to escape, do not satisfy the Committee that the threshold of admissibility has been met in the complainant's case. In the circumstances, the Committee observes that the complaint, as formulated, does not give rise to any arguable claim under the Convention.

- *M. O. v. Denmark* (209/2002), CAT, A/59/44 (12 November 2003) 254 (CAT/C/31/D/209/2002) at paras. 2.1-2.5 and 6.4-6.6.

...
2.1 The complainant served in the Algerian army between approximately 1991 and 1998, where he served as a corporal in a weapons store. He claims that in 1994, he was contacted by representatives of the Groupe Islamique Algérien (GIA), who asked him to work for them. He refused. In 1994, for reasons not specified, he was sent to a military prison. There is no indication as to whether the complainant was tried or convicted, or of precisely when he was released from prison.

2.2 The complainant claims that in 1996, the authorities learned of the GIA's previous contact with him, and that in 1998 he was again arrested and sent to prison, on suspicion of having supplied the GIA with weapons, ammunition and food. He was allegedly interrogated

and tortured by the Algerian security forces, and, unable to bear the torture, admitted to having worked for the GIA. He claims, amongst other things, that he was kicked forcefully in the genitals, that electric shocks were applied to his genitals, shoulders, hands and feet, and that he was threatened with reprisals against his mother if he did not cooperate. He contends that his physical condition became so critical that he had to be transferred to a military hospital, from which he managed to escape. As he was still a member of the armed forces at the time of his escape, this made him a deserter.

2.3 The complainant arrived in Denmark in 1999, and applied for asylum with the Danish Immigration Service (DIS) on 28 December 1999. His application was rejected on 2 March 2001, and on 21 August 2001, the Refugee Review Board (Review Board) upheld the DIS's decision. The Review Board found that the complainant's testimony about his reasons for seeking asylum was unreliable, and that there were discrepancies in his account of events. It found insufficient evidence to establish that the complainant had been tortured in Algeria. The Review Board noted a report prepared by Amnesty International, which found no signs of mental trauma, although marks on the complainant's body were consistent with some of the types of torture described. The Review Board concluded that the evidence did not justify a decision to grant him asylum.

2.4 The complainant subsequently underwent a psychological examination, which concluded that he suffered from post-traumatic stress disorder and displayed the signs of dissociation often seen in a person who had been subjected to torture. The report noted that the complainant would cease participating in conversation when emotional topics were raised, and that he experienced flashbacks. It noted that the complainant was not able to concentrate on certain questions, because of his fear of being tortured again, and that he found it difficult being questioned by men, as his torturers had been men. The report also concluded that his ability to present a story in an interview had been affected by his post-traumatic stress disorder. On 14 September 2002, based on the psychologist's report, he applied to the Refugee Board to reopen his case. The application was refused on 24 January 2003.

2.5 The complainant attributes the inconsistencies in his story to several factors. First, he says that the interpreter provided to him spoke an "eastern" form of Arabic which he did not properly understand. His first language is said to be French. Secondly, he claims that, as demonstrated by the psychologist's report, he suffers from post-traumatic stress disorder, and states that, in telling his story to the Danish authorities, he relived his experiences of torture, which caused him great anxiety. He claims that being kept in detention by the Danish authorities traumatized him and made it much more difficult for him to provide a cogent and consistent account of his experiences. He refers to the psychologist's report, which concluded that his apparent untrustworthiness could be attributable to his psychological dissociation.

...

6.4 In assessing the risk of torture in the present case, the Committee notes that the complainant claims to have been tortured and imprisoned previously by the Algerian authorities. The findings of the medical examination carried out on him are consistent with these claims, although they do not discount other possible causes for the complainant's injuries. In relation to the psychologist's report, the Committee notes that the complainant was found to suffer from post-traumatic stress disorder, and that this was said to be consistent with his claim of having been subjected to torture in the past. The report also found that past torture could account for the discrepancies in the complainant's story. The Committee notes the complainant's submission that this report constitutes the only formal psychological evidence about his mental condition. It also notes that this report was considered by the Danish authorities in connection with the complainant's application to have his case reopened, and was found not to contain new information.

6.5 The relevant evidence in the case was fully considered by the Danish authorities. And, consistent with the Committee's case law, due weight must be accorded to findings of fact made by government authorities. In the present case, the complainant's account of his experiences to the Danish authorities contained numerous discrepancies. The Danish authorities made conclusions about the complainant's credibility which, in the Committee's view, were reasonable and by no reckoning arbitrary. In this regard, the Committee notes paragraph 8 of its general comment No. 1, pursuant to which questions about the credibility of a complainant, and the presence of relevant factual inconsistencies in his claim, are pertinent to the Committee's deliberations as to whether the complainant would be in danger of being tortured upon return.

6.6 The complainant's initial submission and his subsequent explanations of his inconsistencies noted by the State party in its submission do not permit the Committee to make any informed decision on the likelihood of him being subjected to torture on his return to Algeria. In light of the foregoing, the Committee finds that the complainant has not established that he would face a foreseeable, real and personal risk of being tortured, within the meaning of article 3 of the Convention.

- *A. K. v. Australia* (148/1999), CAT, A/59/44 (5 May 2004) 123 at paras. 1.1, 2.1, 2.2, 2.4-2.11 and 6.1-6.6.

1.1 The complainant is A.K., a Sudanese national, currently detained at the Immigration Detention Centre, New South Wales. He claims that his forcible return to Sudan would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment by Australia...

REFUGEES

2.1 The complainant alleges that he is Ansari and a member of the Umma Party, which is one of the two traditionalist parties of the North opposing the current Government. From 1990 to 1995, the complainant attended Cairo University, Khartoum Branch, where he completed a law degree. The Umma Party had about 100 members at Cairo University, and the complainant became the leader of this group.

2.2 In April 1992, the complainant alleges to have organized rallies and demonstrations against the Government. Following one of these rallies, he was detained by members of the security forces. He was threatened, forced to sign an undertaking that he would not participate in political activities and then released. Following this incident, the security forces kept him under surveillance.

...

2.4 In 1994, the Government sent students who were seen as troublemakers and opponents of the regime to fight in Southern Sudan. On 1 June 1996, the complainant allegedly received a summons stating that he had to report to the PDF within 72 hours as he had been chosen "to fulfil the duty of Jihad". As he did not want to fight against his own people or to clear minefields, he decided to flee the country. He was unable to use his passport because of the summons and therefore used his older brother's passport. After his departure the military allegedly visited his home.

2.5 On 10 December 1997, the complainant arrived in Australia without valid travel documents and was detained pending final resolution of his asylum claims. On 12 December 1997, he filed an application for a protection visa (refugee status) with the Department of Immigration and Multicultural Affairs (the DIMA). In support of his application, he submitted, *inter alia*, the following: a letter from the Umma Party confirming his membership; a letter from the Commander of the Popular Forces to the Manager of the Department of Prisons to release the complainant and present himself to the PDF; and a statement from a member of the Australian Sudanese community who stated that she had no doubt that the complainant was a Sudanese citizen and belonged to a family known to be strong supporters of the Ansar group, which supports the Umma Party.

2.6 On 5 January 1998, a delegate of the DIMA denied the complainant's application for a protection visa, finding that he was not a citizen of Sudan and that his claims lacked credibility. On 5 February 1998, the complainant sought administrative review of the delegate's decision before the Refugee Review Tribunal (the RRT). By decision of 7 July 1998, the RRT refused the complainant's application. The complainant lodged an application for judicial review with the Federal Court of Australia. On 25 August 1998, the Court remitted the application back to the RRT for a second determination.

2.7 On 25 November 1998, the newly constituted RRT denied the complainant's application. The matter was appealed to the Federal Court, at which the complainant was unrepresented.

During the hearing, he said that the interpreter who had assisted him at the RRT hearing was inadequate and that he had been misunderstood. The hearing was adjourned so that the complainant could obtain legal representation. On 9 August 1999, the Federal Court dismissed the appeal. Several subsequent requests for ministerial intervention were denied.

2.8 The complainant outlines the recent political history of Sudan and claims that there is a consistent pattern of gross, flagrant and mass violations of human rights. He refers, *inter alia*, to the adoption of a country resolution in April 1997 by the United Nations Commission on Human Rights, according to which human rights violations in Sudan included "extrajudicial killings, arbitrary arrests, detentions without due process, enforced or involuntary disappearances, violations of the rights of women and children, slavery and slavery-like practices, forced displacement of persons and systematic torture, and denial of the freedoms of religion, expression, association and peaceful assembly".

2.9 In January 1998, the United Nations Special Rapporteur on Sudan reported that the authorities, security forces and militia were responsible for a broad range of human rights violations. In April 1998, the United Nations Commission on Human Rights again expressed deep concern over continued serious human rights violations. For the fourth year running, the Commission recommended deploying human rights field officers to monitor human rights.

2.10 The complainant alleges that although much of the religious persecution has been directed against non-Muslims, the fundamentalist nature of the current regime is such that many Muslims, including the Sufis, are not free to practise their own brand of Islam under the NIF regime. The Ansar (consisting largely of Sufis) have been subjected to government control with the confiscation of their mosques. In addition, Muslim groups critical of the Government continue to suffer harassment. b/ On the political level, the complainant submits that contrary Islamist political opinions, including centrist Islamic parties such as the Umma are not tolerated.

2.11 According to the complainant, there is evidence that military deserters will face torture and death. Amnesty International reported in April 1998 that: "Scores of student conscripts died as hundreds of youths broke out of a military training camp at al-Ayfun near Khartoum. The authorities announced that more than 50 deserters had drowned trying to cross the Blue Nile. However, other reports said that over 100 were killed, many of whom had been shot and others beaten to death." He also submits that both the UNHCR and Amnesty International have reported on the detention centres in Sudan and on the risk of ill-treatment and torture, in particular during interrogation in security offices. c/ According to the complainant, "a failed Sufi", Umma Party asylum-seeker, who has spent considerable time in the West, and who has qualified in law, whether or not his military service has been completed, would face considerable difficulty on return to Sudan.

REFUGEES

...

6.1 The Committee must decide whether the forced return of the complainant to Sudan would violate the State party's obligation, under article 3, paragraph 1, of the Convention, not to expel or return (*refouler*) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture...

6.2 In assessing the risk of torture in the complainant's case, the Committee notes the substantial inconsistencies in the complainant's evidence throughout the proceedings, highlighted by the State party, which, in this case, was considered in depth by the Refugee Review Tribunal on two separate occasions. It observes that the complainant has not explained nor given any reasons for these inconsistencies and notes paragraph 8 of its general comment No. 1, pursuant to which questions about the credibility of a complainant, and the presence of relevant factual inconsistencies in his claim, are pertinent to the Committee's deliberations as to whether the complainant would be in danger of being tortured upon return.

6.3 Concerning the allegations of political involvement and previous ill-treatment at the hands of the Sudanese authorities as grounds for fearing that the complainant would be subjected to torture on return, the Committee notes that even if it were to discount the above-mentioned inconsistencies and accept these claims as true, the complainant does not claim to have been politically involved since 1992, and at no time during the domestic proceedings nor in his complaint to the Committee did he claim to have been tortured by the Sudanese authorities.

6.4 On the issue of his alleged desertion, the Committee notes that the State party did examine the letter, dated 1 June 1996, in which the complainant was allegedly drafted by the PDF, but considered it not to be genuine. The Committee considers that due weight must be accorded to findings of fact made by domestic, judicial or competent government authorities unless it can be demonstrated that such findings are arbitrary or unreasonable. Even if the Committee were to consider that the complainant is a deserter or evaded the draft, he has not demonstrated that he would be subjected to torture upon his return to Sudan. The Committee observes that the State party considered a significant amount of information from various different sources before arriving at this conclusion.

6.5 The Committee notes the claim that if returned to Sudan, the complainant would be compelled to perform military service, despite the fact that he is a conscientious objector, and the implication that this would amount to torture, as defined by article 3 of the Convention. The Committee considers that the letter of 1 June 1996, the veracity of which has been challenged, as well as the complainant's allegation that opponents of the regime are called up to fight in the civil war, is insufficient to demonstrate that he either is a conscientious objector or that he would be drafted on return to Sudan. As with the other reasons for claiming a fear of torture on return, the State party's evaluation of the facts in this respect has

not been shown to be unreasonable or arbitrary.

6.6 On the basis of the foregoing, the Committee considers that the complainant has not provided a verifiable basis to conclude that substantial grounds exist for believing that he would face a foreseeable, real and personal risk of being subjected to torture upon his return to Sudan, within the meaning of article 3 of the Convention.

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Notes

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b/ The complainant refers to Amnesty's Annual Report of 1999 in which it reported that those detained in 1997 included five imams who were reported to have cast doubt on the religious credentials of Hassan al-Turabi, Secretary-General of the National Congress and ideological mentor of the Government.

c/ He refers to Amnesty International's Urgent Action of 21 January 1997.

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- *S. G. v. The Netherlands* (135/1999), CAT, A/59/44 (12 May 2004) 115 at paras. 2.1-2.3, 2.5-2.9, 6.2 and 6.4-6.7.

...

2.1 The complainant is a Turkish national of Kurdish ethnic origin from the city of Batman in eastern Turkey. In 1993 he became a supporter of the National Liberation Front of Kurdistan (ERNK), the political wing of the PKK. In 1994 the complainant became a member of the People's Democratic Party (HADEP). He participated in meetings, and collected money and food for Kurds who were forced a/ to leave their villages and relocate to Batman.

2.2 On 19 March 1995, the complainant was arrested with seven others, for reasons unspecified, and detained for 15 days. During this time he claims to have been subjected to torture on several occasions, which left scars on his back and left leg. b/

2.3 On 10 May 1997, the complainant was arrested by four policemen whilst on his way to a meeting of the Turkish Human Rights Association (IHD). He was blindfolded and taken to a field, where the policemen threatened to kill him if he did not become a police informer and provided them with names of PKK, ERNK and HADEP sympathizers. The complainant was frightened and agreed to cooperate, upon which he was released. He then went into hiding, and fled to Istanbul on 14 May 1997. From there, he left Turkey for the Netherlands on 29 May 1997, with a false passport.

...

2.5 On 29 May 1997, the complainant applied for asylum in the Netherlands. This was rejected by the Secretary of the Ministry of Justice on 13 August 1997. On 25 August 1997, the complainant requested the Secretary of Justice to review his decision, but this was declined on 29 September 1997. An appeal against the refusal of the Secretary to grant asylum was dismissed by the District Court of The Hague on 23 July 1998. Thereafter, the complainant left the Netherlands for Denmark, d/ and applied for asylum in that country.e/

2.6 The complainant left Denmark on 14 February 1999 and returned to the Netherlands on 15 February 1999. Shortly afterwards, f/ he participated in a demonstration against the role of the Greek Government in the arrest of Abdullah Ocalan, resulting in the occupation of the Greek ambassador's residence in The Hague by approximately 200 Kurds, including the complainant. The occupation received considerable international attention. The Turkish media described the occupation as a "PKK activity", and labelled the participants as "terrorists". After the occupation ended, the complainant was arrested in connection with his involvement in the occupation, and on 20 February 1999, he was placed in alien detention, and subsequently prosecuted. g/

2.7 On 23 February 1999, whilst in alien detention, the complainant filed a second application for asylum with the Dutch authorities. On 19 March 1999, the Secretary of Justice held the application for asylum to be inadmissible. h/ An appeal from this decision to the District Court of The Hague was rejected on 7 May 1999.

2.8 The complainant claims that, in addition to his participation in the occupation of the Greek ambassador's residence in The Hague, he participated in other Kurdish political activities. In the Netherlands he took part in: meetings in The Hague and in Arnhem in 1997;i/ a "celebration" on 15 August 1997 in Middelburg; the "Newroz celebration" on 21 March 1998 in Middelburg; the International Labour Day celebration on 1 May 1998 in Rotterdam; and the "Mazlum Dogan" Youth festivals in 1998 in several Dutch cities. In Denmark, he participated in meetings in Copenhagen where unspecified leaflets were handed out, and in what he describes as "different 'Abdullah Ocalan related' activities".j/ He also refers to his participation in several "Kurdish activities" in Germany, France and Belgium.

2.9 The complainant refers to the general human rights situation in Turkey, and in particular to reports from a number of non-governmental organizations and Governments concerning the practice of torture in Turkey. He refers to the reports of Amnesty International and Human Rights Watch published in 1999, which indicated that torture in Turkey was "commonplace" and "widespread". Reference is made to a report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment dated 23 February 1999, which refers to a visit by that body to Turkey in 1997 and notes that the existence and extent of the problem of torture in Turkey had been established beyond doubt. In particular, the author refers to a 1999 report by the Swiss

Refugee Assistance Association (*Schweizerische Flüchtlingshilfe*), which describes the "deteriorating human rights situation in Turkey due to the arrest of the PKK leader Abdullah Ocalan", and notes that groups at risk of torture upon return to Turkey included members and sympathizers of HADEP, and persons involved with illegal parties and organizations.
...
6.2 The Committee must determine whether the forced return of the complainant to Turkey would violate the State party's obligations under article 3, paragraph 1, of the Convention not to expel or return (*refouler*) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture...

6.4 In assessing the risk of torture in the present case, the Committee notes that the complainant claims to have been detained and tortured previously by the Turkish authorities. However, the alleged acts of torture occurred in 1995. The Committee notes that, in accordance with its general comment on article 3, information which is considered pertinent to risk of torture includes whether the complainant has been tortured in the past, and if so, whether this was in the recent past. The incidents referred to took place nine years ago, a lapse of time which cannot be described as recent.

6.5 The Committee must also consider whether the complainant has engaged in any political or other activity within or outside his own country which would make him particularly vulnerable to any risk of torture upon return to Turkey. In relation to his activities inside Turkey, the complainant's political activities included collecting money and food for displaced Kurdish villagers. Although he claims to have been detained on two occasions, the complainant does not establish that he was in fact, or was regarded by the Turkish authorities as, a significant Kurdish opposition figure. Nor does he allege to have had any special role within the relevant organizations. As to his activities abroad, the complainant has listed instances of participation in political activities and meetings. Some of these are referred to in very general terms, although particular reference is made to the complainant's participation in the occupation of the Greek ambassador's residence in The Hague in 1999. However, it has not been established that the Turkish authorities are aware of the complainant's participation in this event or any of the other matters referred to. The Committee notes in this regard that proceedings against the author in connection with the occupation of the residence in The Hague were discontinued for lack of evidence. Nor has it been established that, if the Turkish authorities were indeed aware of these actions, this would place the complainant at particular risk of torture upon his return to Turkey.

6.6 The relevant evidence regarding the complainant's history in Turkey, together with his activities inside and outside Turkey, has been considered by the Dutch authorities. The Committee is not in a position to challenge their findings of fact, nor to resolve the question of whether there were inconsistencies in the complainant's account. Consistent with the Committee's case law, due weight must be accorded to findings of fact made by government

authorities.

6.7 In light of the foregoing, the Committee finds that the complainant has not established that he would face a foreseeable, real and personal risk of being tortured in the event of his return to Turkey, within the meaning of article 3 of the Convention.

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Notes

a/ No details are provided.

b/ Reference is made to a very brief medical report in Dutch (untranslated), which is again referred to in the complainant's comments on the State party submissions. There, a description of the medical report is provided in English (see page 3 of that document, under the heading "Ad 2&3").

...

d/ No date is provided.

e/ No details are provided.

f/ No date is provided.

g/ There are no details of the charges, or of any conviction or sentence.

h/ No details are provided.

i/ No details are provided.

j/ No details are provided.

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- *A. I. v. Switzerland* (182/2001), CAT, A/59/44 (12 May 2004) 139 at paras. 1.1, 2.1-2.5 and 6.2-6.9.

1.1 The complainant is A.I., a Sri Lankan national of Tamil origin, born in 1977, currently residing in Switzerland, and awaiting his deportation to Sri Lanka. He claims that his forcible return to Sri Lanka would amount to a violation by Switzerland of article 3 of the Convention against Torture...

2.1 The complainant is from Chankanai in the north of Sri Lanka. In July 1995, he and his family fled the hostilities between combatants in the civil war, and temporarily stayed in a

refugee camp near Navaly. During the bombing of a Catholic church in Navaly by the Sri Lankan Air Force, he witnessed the killing of numerous refugees who had sought shelter in that church, including some of his remote relatives. The complainant and his family subsequently went to the then LTTEa/-controlled Chavakachcheri, where his younger brother, S., joined the LTTE.

2.2 In January 1996, the complainant and his mother travelled to Colombo to make arrangements for his departure from Sri Lanka. Following a bomb attack on a bank in Colombo, in which a neighbour was involved, the complainant and his mother were arrested by security forces on 31 January 1996, and detained at the Pettah police station. On 8 and 16 February 1996, the complainant was visited by a delegation of the International Committee of the Red Cross (ICRC) and, on 22 February 1996, he and his mother were released from detention upon payment of a bribe.

2.3 On 30 March 1996, the complainant was arrested during an identity check by an army patrol that brought him to Welikade prison, where he was interrogated about his connection with the LTTE. After his release on 1 January 1997, he was returned to Chankanai. Meanwhile, his younger brother had died, on 18 July 1996, during an LTTE attack against an army camp near Mullaitivu.

2.4 Following his return to Chankanai, the complainant and his second brother, T., were arrested six or seven times, between April and June 1997, by militia of the EPRLF b/ and TELO. c/ They were taken to a camp near Puttur, where they were interrogated about their links with the LTTE. During interrogation, they were allegedly beaten; in one case, they received blows with an iron chain and were burnt on their back with a hot piece of iron, in order to extract a confession. In July 1997, T. was once again arrested by militia; he has disappeared since.

2.5 Thereafter, the complainant returned to Colombo, from where he left for Switzerland via Turkey and Italy on 22 August 1997, using a false passport.

...

6.2 The Committee must decide whether the forced return of the complainant to Sri Lanka would violate the State party's obligation, under article 3, paragraph 1, of the Convention, not to expel or return (*refouler*) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In reaching its conclusion, the Committee must take into account all relevant considerations, including the existence, in the State concerned, of a consistent pattern of gross, flagrant or mass violations of human rights (article 3, paragraph 2, of the Convention).

6.3 The Committee notes from recent reports on the human rights situation in Sri Lanka that, although efforts have been made to eradicate torture, instances of torture continue to be

reported, and complaints of torture are often not dealt with effectively by the police, judicial officers and doctors. However, the Committee equally notes the conclusion of a formal ceasefire agreement between the Government and the LTTE in February 2002. While recent political developments and changes in Government may have created impediments to the effective pursuit of the ongoing peace process, it remains that the process itself has not been abandoned. The Committee further recalls that, after conducting its inquiry on Sri Lanka under article 20 of the Convention, it concluded that the practice of torture was not systematic in the State party. The Committee finally notes that a large number of Tamil refugees have returned to Sri Lanka in recent years.

6.4 The Committee recalls, however, that the aim of its examination is to determine whether the complainant would personally risk torture in the country to which he would return. It follows that, irrespective of whether a consistent pattern of gross, flagrant or mass violations of human rights can be said to exist in Sri Lanka, such existence would not as such constitute sufficient grounds for determining that the complainant would be in danger of being subjected to torture upon his return to Sri Lanka. Additional grounds must be adduced to show that he would be personally at risk. Conversely, the absence of a consistent pattern of gross violations of human rights does not necessarily mean that the complainant cannot be considered to be in danger of being subjected to torture in the specific circumstances of his case.

6.5 As regards the personal risk the complainant would run to be subjected to torture at the hand of the Sri Lankan security forces, the Committee has noted his claim that he was tortured, in 1997, by the EPRLF and TELO, which had operated in cooperation with the Sri Lankan army. Even if these allegations were assumed to be true, the Committee considers that it does not necessarily follow that the complainant would presently be at risk of being subjected to torture again, given the ongoing peace process in Sri Lanka and the fact that many Tamil refugees have returned to that country in recent years.

6.6 Insofar as the complainant argues that his post-traumatic stress disorder would result in uncontrolled reactions in stressful situations, thereby increasing the risk of his arrest by the Sri Lankan police, the Committee observes that the absence of any criminal proceedings against the complainant in the past, as well as his low political profile, can in turn be adduced as factors likely to lower any risk of serious consequences, should he be arrested again.

6.7 The Committee considers it unlikely that the Sri Lankan authorities, or the militia groups allegedly acting with their consent or acquiescence, remain interested in the LTTE involvement of the complainant’s younger brother, who died almost eight years ago.

6.8 With regard to the question of whether the complainant would be able to receive adequate psychiatric treatment for his post-traumatic stress disorder in Sri Lanka, the

Committee recalls that the aggravation of the complainant's state of health possibly resulting from his deportation to Sri Lanka would not amount to torture within the meaning of article 3, read in conjunction with article 1 of the Convention, which could be attributed to the State party itself.

6.9 The Committee therefore is of the view that the complainant has not adduced sufficient grounds which would lead the Committee to conclude that he would run a substantial, present and personal risk of torture if returned to Sri Lanka.

Notes

a/ Liberation Tigers of Tamil Eelam.

b/ Eelam People's Revolutionary Liberation Front.

c/ Tamil Eelam Liberation Organization.

- *B. S. S. v. Canada* (183/2001), CAT, A/59/44 (12 May 2004) 146 at paras. 2.1-2.4, 3.1, 11.1-11.6 and 11.8.

...
2.1 The complainant is from the Punjab province in India. His religion is Sikh. His wife and three children continue to live in the Punjab.

2.2 According to an "investigation report" dated 12 March 1993 by Mr. S.S., a human rights lawyer at Patiala (Punjab), which substantially relies on the testimony of the complainant's father, his daughter and other villagers, two armed men came to the home of the complainant's family in April 1991 asking the complainant for food while pointing a gun at him. They remained for half an hour. Later that night, the police arrested the complainant accusing him of harbouring terrorists. He was allegedly detained in a special torture cell where he was interrogated and beaten by the police. He was released after two days when his father paid a bribe.

2.3 Pursuant to the same report, the complainant was arrested a second time in September 1991 after six family members of a police officer had been killed in a nearby village. The complainant was detained in an unknown place where he was allegedly subjected to torture by the police again. He was released at the intervention of a local politician and subsequently went to Jaipur (Rajasthan) in order to hide from the Punjab police. The police reportedly continued to harass his family, and on one occasion arrested the complainant's brother.

When the police started to investigate his whereabouts in Jaipur, the complainant decided to leave the country following his father's advice.

2.4 On 1 September 1992, the complainant left India for Brazil, then travelled to Mexico, and entered the United States on 22 September 1992. On 30 October 1992, he entered Canada and applied for refugee status. When he was returned to the United States, the United States immigration authorities asked him to leave the country before 29 November 1992. The complainant subsequently remained illegally within the United States. He failed to report for an examination of his refugee application which was scheduled for 17 August 1993 at the Canadian border post at Lacolle.

...

3.1 Counsel claims that the complainant would be at a risk of torture in India and, therefore, Canada would be violating article 3 of the Convention if he were to be returned to that country. Moreover, owing to the complainant's post-traumatic stress disorder, he would be subject to severe emotional trauma upon return to India without the possibility of obtaining appropriate medical treatment, which in itself would constitute inhuman and degrading treatment, in violation of article 16 of the Convention.

...

11.1 The Committee must evaluate whether there are substantial grounds for believing that the author would be personally in danger of being subjected to torture upon return to India. In assessing the risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights.

11.2 In this regard, the Committee takes note of the reports submitted by the complainant, confirming that incidents of torture in police custody have continued after the end of the militancy period in Punjab in the mid-1990s, and that perpetrators have not been brought to justice in most cases. It also notes the State party's argument that the human rights situation in the Punjab has improved during the 11 years following the complainant's departure from India.

11.3 However, the Committee recalls that the aim of the determination is to establish whether the complainant would be personally at risk of being subjected to torture in India. It follows that, even if a consistent pattern of gross, flagrant or mass violations of human rights could be said to exist in that country, such a finding would not as such constitute a sufficient ground for determining that the complainant would be in danger of being subjected to torture upon his return to India; additional grounds must exist to show that he 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 or her specific circumstances.

11.4 The Committee notes that the complainant submitted evidence in support of his claim that he was tortured during his detention in 1991, including medical and psychiatric reports, as well as written testimony corroborating this allegation. However, the Committee considers that, even if it were assumed that the complainant was tortured by the Punjabi police, it does not automatically follow that, 13 years after the alleged events occurred, he would still be at risk of being subjected to torture if returned to India.

11.5 Insofar as the complainant claims that he currently remains at risk of being tortured in India, the Committee notes that, while confirming the risk of him being subjected to torture, as well as his family's continuing harassment, by the Punjabi police, the evidence produced by the complainant, including affidavits, letters and a document which is said to contain a resolution adopted by the municipal council of his home village, merely refers to his risk of being tortured *in Punjab*. The Committee considers that the complainant has failed to substantiate that he would be unable to lead a life free of torture in another part of India. Although resettlement outside Punjab would constitute a considerable hardship for the complainant, the mere fact that he may not be able to return to his family and his home village does not as such amount to torture within the meaning of article 3, read in conjunction with article 1, of the Convention.

11.6 Regarding the effectiveness of judicial remedies available under the Canadian immigration review scheme, the Committee notes that the final decision on the complainant's deportation was taken after a lengthy and detailed assessment of the risk of returning the complainant to India, in four subsequent proceedings. The Committee also observes that, prior to that decision, the State party agreed to review the complainant's humanitarian and compassionate application when it became apparent that the evidence submitted by him had not been duly considered. Similarly, the Committee takes note of the fact that the Federal Court did not hesitate to refer the case back for reconsideration on the basis that the reviewed decision on the complainant's humanitarian and compassionate application also lacked an appropriate evaluation of the evidence.

11.8 In the light of the foregoing, the Committee concludes that the complainant has failed to establish a personal, present and foreseeable risk of being tortured if he were to be returned to India.

- *M. A. K. v. Germany* (214/2002), CAT, A/59/44 (12 May 2004) 275 at paras. 1.1, 2.1-2.9 and 13.1-13.9.

1.1 The complainant is M.A.K., a Turkish national of Kurdish origin, born in 1968, currently residing in Germany and awaiting expulsion to Turkey. He claims that his forcible return to Turkey would constitute a violation by the Federal Republic of Germany of article 3 of the

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

...

2.1 The complainant arrived in Germany in December 1990 and claimed political asylum on 21 January 1991, stating that he had been arrested for a week in 1989 and tortured by the police in Mazgirt because of his objection to the conduct of superiors during military service. As a PKK sympathizer, he was being persecuted and his life was in danger in Turkey. On 20 August 1991, the Federal Agency for the Recognition of Foreign Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*) rejected the complainant's application on the basis of inconsistencies in his counts.

2.2 The complainant appealed the decision of the Federal Agency before the Wiesbaden Administrative Court which dismissed the appeal on 7 September 1999. On 17 April 2001, the Higher Administrative Court of Hessen refused leave to appeal from that judgement.

2.3 On 7 December 2001, the City of Hanau issued an expulsion order against the complainant, together with a notification of imminent deportation. The expulsion was based on the fact that the complainant had been sentenced by penal order, dated 16 January 1995, of the District Court of Groβ-Gerau to a suspended prison term of four months for participation in a highway blockade organized by PKK sympathizers in March 1994.

2.4 On 17 January 2001, the complainant applied to the Federal Agency to reopen proceedings in his case, arguing that he had been trained by the PKK in a camp in the Netherlands in 1994, with a view to joining the PKK's armed forces in south-east Turkey, a duty from which he had been exempted at his subsequent request. He further claimed that the Turkish authorities knew about his PKK activities and, in particular, his participation in the highway blockade, on the basis of his conviction for joint coercion of road traffic.

2.5 By decision of 6 February 2002, the Federal Agency rejected the application to reopen asylum proceedings, stating that the complainant could have raised these fresh arguments in the initial proceedings, and that his submissions lacked credibility. On 26 February 2002, the complainant appealed this decision before the Frankfurt Administrative Court, where proceedings were still pending in this regard at the time of the initial submission of the complaint.

2.6 The complainant's application for provisional court relief against his deportation to Turkey was rejected by the Frankfurt Administrative Court on 21 March 2002, essentially based on grounds identical to those of the Federal Agency.

2.7 On 16 April 2002, an informational hearing of the complainant was held at the Federal Agency, during which the complainant stated that, prior to his training at the Dutch PKK

camp, he had been introduced to the public of the Kurdish Halim-Dener-Festival, celebrated in September 1994 in the Netherlands, as part of a group of 25 "guerrilla candidates". He had not raised the issue during initial asylum proceedings since he feared punishment for PKK membership (the PKK is illegal under German law).

2.8 The complainant's application to reconsider its decision denying provisional court relief was rejected by the Frankfurt Administrative Court on 18 June 2002. The court reiterated that the late submission, as well as various details in the description of his alleged PKK activities, undermined the complainant's credibility. Thus, it was considered questionable whether the PKK would publicly present its guerrilla candidates, knowing that the Turkish secret service observed events such as the Halim-Dener-Festival. Moreover, following political and ideological training in Europe, PKK members were generally obliged to undergo immediate military training in south-east Turkey.

2.9 On 22 July 2002, the complainant lodged a constitutional complaint with the Federal Constitutional Court against the decisions of the Frankfurt Administrative Court of 21 March and 18 June 2002, claiming violations of his constitutionally protected rights to life and physical integrity, equality before the law as well as his right to be heard before the courts. In addition, he filed an urgent application for an interim decision granting protection from deportation for the duration of the proceedings before the Federal Constitutional Court. By decision of 30 August 2002 of a panel of three judges, the Federal Constitutional Court dismissed the complaint as well as the urgent application, on the basis that "the complainant solely objects to the assessment of facts and evidence by the lower courts without specifying any violation of his basic rights or rights equivalent to basic rights".

...

13.1 The issue before the Committee is whether the forced return of the author to Turkey would violate the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

13.2 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Turkey. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. In this regard, the Committee notes the State party's argument that the Turkish Government acted to improve the human rights situation, including through the enactment of the Reintegration into Society Act in 2003 and the discontinuance of numerous criminal proceedings against PKK supporters. It also notes the complainant's argument that recent legislative changes have not reduced the number of reported incidents of torture in Turkey (770 cases in 2003), and further recalls its conclusions and recommendations on the second periodic report of

Turkey, in which it expressed concern about "[n]umerous and consistent allegations that torture and other cruel, inhuman or degrading treatment of detainees held in police custody are apparently still widespread in Turkey".c/

13.3 The aim of the present determination, however, is to establish whether the complainant would be personally at risk of being subjected to torture in Turkey after his return. Even if a consistent pattern of gross, flagrant or mass violations of human rights existed in Turkey, such existence would not as such constitute a sufficient ground for determining that the complainant would be in danger of being subjected to torture after his return to that country; specific grounds must exist indicating that he 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 or her specific circumstances.

13.4 In the present case, the Committee notes that the State party draws attention to a lack of evidence about the complainant's participation in a PKK training camp in the Netherlands in 1994, and to his failure to raise this claim until late in the asylum proceedings. It equally notes the complainant's explanations relating to the difficulty of presenting witnesses from the PKK, his fear to reveal his claimed PKK membership, punishable under German law, as well as the documentation and testimony he submitted in support of his claims.

13.5 On the burden of proof, the Committee recalls that it is normally for the complainant to present an arguable case and that the risk of torture must be assessed on grounds that go beyond mere theory and suspicion. Although the risk does not have to meet the test of being highly probable, the Committee considers that the complainant has not provided sufficiently reliable evidence which would justify a shift of the burden of proof to the State party. In particular, it observes that the affidavit by F.S. merely corroborates the complainant's claim that he was introduced as a "guerrilla candidate" at the Halim-Dener-Festival, without proving this claim, his participation in the training camp or PKK membership. Similarly, the letter dated 16 February 2003 of the International Association for Human Rights of the Kurds, while stating that it was not implausible that the complainant had temporarily been exempted from military PKK training in Turkey, falls short of proving these claims. In the absence of a *prima facie* case for his participation in the PKK training camp, the Committee concludes that the complainant cannot reasonably claim the benefit of the doubt regarding these claims. Moreover, the Committee observes that it is not competent to pronounce itself on the standard of proof applied by German tribunals.

13.6 With regard to the complainant's conviction for participation in a highway blockade by PKK sympathizers in March 1994, the Committee considers that, even if the Turkish authorities knew about these events, such participation does not amount to the type of activity which would appear to make the complainant particularly vulnerable to the risk of

being subjected to torture upon return to Turkey.

13.7 Regarding the complainant's allegation that he was tortured during police arrest in Mazgirt (Turkey), the Committee observes that these allegations refer to events dating from 1989 and thus to events which did not occur in the recent past.d/ In addition, the complainant has not submitted any medical evidence which would confirm possible after-effects or otherwise support his claim that he was tortured by Turkish police.

13.8 The Committee emphasizes that considerable weight must be attached to the findings of fact by the German authorities and courts and notes that proceedings are still pending before the Frankfurt Administrative Court with regard to his application to reopen asylum proceedings. However, taking into account that the Higher Administrative Court of Hessen dismissed the complainant's first asylum application by a final decision, the complainant's fresh claims relating to his alleged participation in a PKK training camp have not been sufficiently corroborated (see paragraph 13.5) to justify further postponing the Committee's decision on his complaint, pending the outcome of the proceedings before the Frankfurt Administrative Court. In this regard, the Committee notes that both parties have requested the Committee to make a final determination on the complaint...and emphasizes that the complainant exhausted domestic remedies in the proceedings for interim relief and that only this part of the second set of asylum proceedings had suspensive effect.

13.9 The Committee concludes that, in the specific circumstances of the case, the complainant has failed to establish a foreseeable, real and personal risk of being tortured if he were to be returned to Turkey. The Committee welcomes the State party's readiness to monitor the complainant's situation following his return to Turkey and requests it to keep the Committee informed about said situation.

Notes

...

c/ Committee against Torture, thirtieth session (28 April-16 May 2003), Conclusions and recommendations of the Committee against Torture: Turkey, UN Doc. CAT/C/CR/30/5, 27 May 2003, para. 5 (a).

d/ See CAT, general comment No. 1: Implementation of article 3 of the Convention in the context of article 22, 21 November 1997, para. 8 (b).

REFUGEES

- *M. A. M. v. Sweden* (196/2002), CAT, A/59/44 (14 May 2004) 227 at paras. 1.1, 2.1-2.5 and 6.2-6.6.

1.1 The complainant is M.A.M., a Bangladeshi citizen, born on 1 January 1968, currently residing in Sweden, where he has sought asylum. He claims that his removal to Bangladesha/ if his refugee claim is rejected would constitute a violation of article 3 of the Convention by Sweden.b/...

2.1 The complainant belongs to a minority in Bangladesh and lobbied for their rights through a political organization, the Shanti Bahini. During a meeting of the Shanti Bahini in November 1989, in which the claimant participated, the army attacked, and several of the participants were injured or killed. On 7 May 1990, the police arrested the claimant and detained him for six days. During police interrogations, he was allegedly tortured by use of electricity, burned with cigarettes, stuck with needles and kicked and beaten unconscious. On 19 November 1990 he fled the country for Sweden where he applied for asylum. On 4 October 1991, the Migration Board rejected the complainant's application. He appealed the decision to the Aliens Appeals Board, which, on 8 April 1993, rejected his application and ordered him deported to Bangladesh. After that, the complainant went into hiding, and it was not until 5 August 1995 that the decision to expel him could be enforced.

2.2 Upon his return to Bangladesh, the complainant was arrested and accused of political activity in Sweden. During four days of detention, he was allegedly beaten unconscious and a policeman poured warm water through his nose. The complainant also alleges having been subjected to ill-treatment of his genitals, being forced to drink urine, and that police threatened to kill him with a knife.

2.3 The complainant became a member of the Bangladesh National Party's (hereinafter referred to as the BNP) Youth Wing in 1996. He distributed pamphlets, organized demonstrations and in other ways protested against the politics of the Awami League government. He was also a board member in the BNP Mirpur department.

2.4 The complainant submits that because of his political activities for the BNP, he was falsely accused of different crimes, and that this is common treatment of political opponents to the Government. On 10 November 1998, there was a clash between the Awami League supporters and the police against the BNP supporters. The complainant was arrested and detained for five days for using violence against the police and for preventing policemen from carrying out their duties. During the interrogations, the police allegedly tied the complainant to a chair, kicked and beat him with rifles and sticks. He claims to have lost consciousness several times during these interrogations. He was released against bail after a hearing by a local court. On 18 August 1999, the complainant was convicted and sentenced to 20 months' imprisonment and a fine of 50,000 Thaka. The complainant subsequently

escaped to Sweden, where he applied for asylum to the National Immigration Board (now Migration Board and hereinafter referred to as such) on 4 November 1999.c/

2.5 On 18 October 2000, the Migration Board rejected the complainant's application for asylum. The complainant appealed to the Aliens Appeals Board, which, on 18 May 2001, rejected his refugee claim, and decided to deport him to Bangladesh. The Aliens Appeals Board based its decision on the finding that the complainant's political participation and alleged political persecution did not provide sufficient grounds for asylum since there is freedom of political expression in Bangladesh and the BNP is a legal political party. Although the Board did not question that the complainant was subjected to torture in 1990, 1995 and 1998, he resided in Sweden at the time of the alleged torture in 1992 and could therefore not have been subjected to torture at that time. This made the Board doubt the complainant's credibility. Moreover, although the Board members were aware of the incidents of police violence against persons in detention in Bangladesh, it did not consider that the complainant in particular risks being subjected to violence as part of a political persecution, and that the general treatment of prisoners as such did not justify asylum.

...

6.2 The Committee must decide whether the forced return of the complainant to Bangladesh would violate the State party's obligation, under article 3, paragraph 1, of the Convention, not to expel or return (*refouler*) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture...

6.3 The Committee takes note of the information received from the complainant about the general human rights situation in Bangladesh, in particular recurrent incidents of police violence against prisoners and political opponents. The Committee notes that the State party, while agreeing that there are repeated reports of police torture, nevertheless considers that the judiciary displays a significant degree of independence.

6.4 The Committee observes that the main reason the complainant fears a personal risk of torture if returned to Bangladesh is that he was previously subjected to torture for his membership in Shanty Bahini and in the opposition party BNP, and that he risks being imprisoned upon his return to Bangladesh pursuant to his alleged sentence to life imprisonment.

6.5 The Committee also notes that the grounds for which the complainant was previously tortured no longer exist, since he was first tortured in 1990 for belonging to an organization (the Shanti Bahini) but he has not submitted evidence to substantiate that he still belongs to that organization, and later on for participating in the activities of the BNP, which was then in opposition and is now the ruling party in Bangladesh. This fact has added importance in the case since the events that allegedly prompted his departure from Bangladesh were directly related to his activities in support of that party. Furthermore, although reports of

human rights violations in Bangladesh still refer to a widespread practice of ill-treatment of prisoners by the police, the complainant has not submitted information or arguments to substantiate that he personally risks such treatment if he were to be imprisoned upon return to Bangladesh. Moreover, the Committee is not convinced that the complainant risks imprisonment upon his return, since he has failed to substantiate his claim regarding the alleged judgement of 3 September 2001, or in relation to the allegation that he is investigated for murder.

6.6 In light of the foregoing, the Committee finds that the complainant has not established that he himself would face a foreseeable, real and personal risk of being tortured within the meaning of article 3 of the Convention.

Notes

a/ The Convention entered into force for Bangladesh on 4 November 1998, but the State party has not ratified article 22 of the Convention.

b/ The Convention entered into force for Sweden on 26 June 1987, and the State party has ratified the Committee's competence under article 22 of the Convention.

c/ Counsel states on page 2, paragraph 2, of the initial submission that the complainant applied for asylum on 4 November 1999, but then in paragraph 4 that he applied for asylum on 20 November 1990.

- *R. S. v. Denmark* (225/2003), CAT, A/59/44 (19 May 2004) 314 at paras. 1.1, 2.1-2.6 and 6.2.

1.1 The complainant is Mr. R.S., an Indian citizen, who at the time of the initial submission resided in Denmark, where he sought asylum. His current whereabouts are unknown. He claims that his return to India after the rejection of his refugee claim would constitute a violation by Denmark of article 3 of the Convention...

2.1 The complainant grew up in Bilga (India), in the Philour area, in the district of Punjab, where he lived together on a farm with his parents and two brothers. All family members are Sikhs. The complainant went to school for seven years, before entering into the family farming business. While his uncle and older brother became members of the Sikh Students Federation and the Khalistan Commando Force (KCF), the complainant did not himself participate in any political or religious organizations. In 1994, the complainant's uncle was killed by the police. The avowed aim of the KCF is to obtain independence for Punjab.

2.2 In 1995, the complainant's older brother returned to India from Germany, where he had applied for asylum. The police arrested and detained him for about 10-12 days after his arrival, and detained him further on several occasions, until he disappeared on an unspecified date. On 15 September 1997, the police contacted the complainant and asked for information on the whereabouts of his brother. When he replied that he did not know his brother's whereabouts, he was arrested and detained for 10 days. He contends that he was subjected to torture in detention. In April 1998, the complainant was again questioned about the whereabouts of his brother by the police; he was allegedly threatened with death if he did not provide this information.

2.3 The complainant was subsequently detained by the police on several occasions, and subjected to torture when in detention. This included beating with a cane, being subjected to electrical shocks, and being hung upside down. According to the complainant, his problems with the police arose from the fact that he transmitted messages sent between his brother and other people from a neighbour village. He was detained 10 to 12 times in total before, in June 1999, he escaped to Denmark, with the assistance of a paid agent.

2.4 The complainant arrived in Denmark on 17 July 1999 without valid travel documents. He applied for asylum the next day. A brother of his already resided in Denmark since 1998, and had been granted a residence permit pursuant to article 7, paragraph 1, of the Immigration Act. The complainant applied for a residence permit under the same regulations, but the Danish Immigration Board rejected his application on 12 February 2001.

2.5 The complainant then appealed to the Danish Refugee Board, which rejected his claim on 28 June 2001. The majority of the Board members did not believe that the complainant risked persecution if returned to India. They considered that the complainant had not been a member of a political organization in India, nor that he had performed any political activity of importance. Furthermore, they considered it unlikely that he had been subjected to torture while in detention, since his description of the events was unclear, and his allegations were not supported by the findings of the Institute for Forensic Medicine (IFM) in Denmark, in a report dated 16 November 2000. The IFM report concluded that the complainant displayed several physical injuries which did not relate to the torture described, but that he felt pain in his left shoulder which could have been caused by the described torture. They also concluded that the complainant suffered from organic brain damage, but no symptoms of a post-traumatic stress syndrome. This finding was supported by a report from the Forensic Psychiatric Clinic dated 30 October 2000.

2.6 When applying for a reopening of his case, the complainant's counsel provided another medical report, from the Amnesty International Medical Group, dated 28 September 2001, which concluded that some physiological findings were compatible with the complainant's description of torture. On 22 July 2002, the Danish Refugee Board rejected the request for

review, and the complainant thus is not entitled to stay legally in Denmark.

...

6.2 In respect of the State party's contention that the claim under article 3 should be declared inadmissible, since the complainant fails to establish a *prima facie* case, the Committee notes the complainant's information about his political activities, that he transmitted messages between his politically active brother and inhabitants of a neighbouring village in Punjab, and that he was detained and tortured by police as a consequence of his family members' political involvement and his own activities. It also takes notes of the medical reports, which are inconclusive about the reasons underlying the complainant's physical and psychological symptoms, and cannot be considered as strong evidence in support of his claim. The complainant has not supported his claim that he was politically active by any documentary or other pertinent evidence, nor has he submitted evidence to explain why the political group he claims to have transmitted messages for was itself targeted by the police. Even if considering that the complainant has been subjected to torture in the past, the Committee finds no reason to consider that he currently is at personal risk of being subjected to such treatment by the police if returned to India. In the circumstances, the Committee observes that the complaint, as formulated, does not give rise to any arguable claim under the Convention.

- *S. U. A. v. Sweden* (223/2002), CAT, A/60/44 (22 November 2004) 180 at paras. 1.1, 2.1-2.4, 6.2-6.6 and 7.

1.1 The complainant is S.U.A., a Bangladeshi citizen born in 1972 currently awaiting deportation from Sweden. He claims that his expulsion to Bangladesh would constitute a violation by Sweden of article 3 of the Convention...

...

2.1 The complainant belongs to the Ershad faction of the Jatiya Party in Bangladesh, which is not part of the present Government coalition. He claims to have participated in activities organized by the Party in Mithapur, including meetings, demonstrations, distribution of pamphlets, construction of roads and schools and charity work. Because of his involvement with the Party he was kidnapped about 20 times by members of the governing Bangladesh Nationalist Party (BNP) who kept him for periods ranging from a few hours to one week and beat him. Those incidents were reported to the police who took no action.

2.2 The complainant was reportedly arrested by police on three occasions and taken to the Madariapur police station, where he was tortured. He was subjected, *inter alia*, to beatings, rape attempts, electric shocks, cigarette burns, beatings on the soles of the feet, was hanged from the ceiling and forced to drink dirty water. On one occasion he was accused of unspecified crimes and on the other two he was accused, respectively, of murder and violence in the course of a demonstration. He denies the facts of which he was accused and

claims that the purpose of the arrests was to bring his political activities to an end. Counsel states that, because of his mental condition, the complainant cannot recall the exact dates but it seems that such arrests took place in August 1996 and November 1998. The complainant also claims to have been convicted of attempted murder and sentenced to eight years' imprisonment.

2.3 Copies of the medical reports issued by three Swedish doctors in 2001 are attached to the complaint. They indicate that the complainant suffers from post-traumatic stress disorder, that the scars on his body are consistent with the acts of torture that he described and that he requires medical treatment.

2.4 The complainant argues that he has exhausted domestic remedies. His asylum application was rejected by the Swedish Migration Board on 21 February 2001 and his appeal of that decision was rejected by the Aliens Appeals Board on 3 June 2002.

...

6.2 The issue before the Committee is whether the removal of the complainant to Bangladesh would violate the State party's obligation under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

6.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Bangladesh. In assessing the risk the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the return country...

6.4 The Committee has noted the medical reports certifying that the complainant suffers from post-traumatic stress disorder, as well as the doctors' assessment that the scars in his body are consistent with the acts of torture described by the complainant. It also notes the State party's doubts as to the identity of the perpetrators of such acts as well as the reports about the use of torture in Bangladesh and the frequent incidents of violence between supporters of different political parties.

6.5 Nevertheless, the complainant's account of his experiences to the Swedish authorities contained contradictions and lacked clarity on issues that are relevant to assessing his claim. The Swedish authorities drew conclusions about the complainant's credibility which, in the Committee's view, were reasonable and by no reckoning arbitrary.

6.6 The Committee finds that the information submitted by the complainant, including the local and low-level nature of his political activities in Bangladesh, does not contain evidence

to support the claim that he will run a substantial risk of being subjected to torture if he returns to Bangladesh.

7. In the light of the above, the Committee against Torture...concludes that the decision of the State party to return the complainant to Bangladesh would not constitute a breach of article 3 of the Convention.

- *Falcon Ríos v. Canada* (133/1999), CAT, A/60/44 (23 November 2004) 103 at paras. 2.1-2.6, 8.1-8.6 and 9.

...

2.1 The complainant lived and worked on the farm of his uncle, his father's half-brother, a soldier, in the State of Chiapas. His uncle, who had bought the farm in February 1995, had deserted from the army in December 1996, without telling his family; he had also been accused of having links with the Ejército Zapatista de Liberación Nacional (EZLN) and of treason against the homeland.

2.2 On 29 December 1996, the complainant and his family were taken by soldiers to a military camp for questioning about, in particular, the whereabouts of the complainant's uncle. They were released at 7 a.m. but were ordered not to leave their home. On 15 February 1997 the army returned, soldiers smashed the door and the windows of the house and again took the family to a military camp for further questioning. This time, however, they were mistreated, and the complainant's mother and sister were raped in the presence of the complainant and his father. The soldiers then tortured the father, hitting him on the temple with a pistol butt until he lost consciousness. The complainant's hands were tied behind his back and he was hit in the stomach; a hood was put over his head to induce a feeling of asphyxiation. The soldiers continued to question him about where his uncle was hiding; since the complainant could not reply, they stripped him and cut him near the genitals with a knife; they then tied his testicles and yanked them while continuing to question him. Lastly, they dipped his head in a tub filled with excrement in an attempt to obtain the information they wanted.

2.3 The complainant states that when he and his family returned to the farm they were kept under military surveillance. On 20 March 1997 the soldiers returned; the complainant, his father, his mother and his elder sister were taken to different military camps. The two younger sisters, aged 6 and 9, were left alone in the house. It was the last time that the complainant saw his family. The complainant was again tortured: the soldiers placed a bag over his head and beat him severely, including around the head, thereby causing problems with his sight. They burned his arms to make him sign documents proving he had links with EZLN. The complainant finally signed the documents when the soldiers began to burn his

face. They then photographed him, took his fingerprints and falsified an EZLN identity document.

2.4 The complainant states that he lost consciousness after drinking a glass of water containing an unknown substance. When he came to, he had been set free in an unknown location. He claims he was in an armed conflict zone when he regained consciousness.

2.5 Subsequent to these events, the complainant decided to leave his country on 22 March 1997. He arrived in Canada on 2 April 1997 and immediately applied for asylum.

2.6 On 20 March 1998 the Refugee Protection Division of the Immigration and Refugee Board determined that the complainant was not a refugee within the meaning of the Convention relating to the Status of Refugees as defined in the Immigration Act, because his account was not credible. It was particularly critical of the implausible circumstances attending his uncle's desertion and the falsification of an EZLN card, there being no evidence that the movement issues identity cards to its members. On 17 April 1998 the complainant submitted an application for judicial review of the Board's decision. In a decision issued on 30 April 1999, the Federal Court of Canada (First Instance Division) rejected the application for judicial review of the decision by the Refugee Protection Division, as the complainant had been unable to demonstrate any error that would justify intervention by the Court.
...
8.1 As provided in article 3, paragraph 1, the Committee must decide whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if he were returned to Mexico. In order to take this decision, the Committee must take into account all relevant considerations, in accordance with article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights...

8.2 The Committee draws attention to its general comment No. 1 on the implementation of article 3, which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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" (para. 6).

8.3 The Committee recalls the report on its visit to Mexico from 23 August to 12 September 2001 (CAT/C/75), and stresses that recent reports on the human rights situation in Mexico have concluded that although efforts have been made to eliminate torture, many cases of torture are still reported. However, in line with the reasoning previously advanced, although it might be possible to assert that there still exists in Mexico a pattern of human rights violations, that in itself would not constitute sufficient cause for finding that the complainant

was likely to be subjected to torture on his return to Mexico; additional reasons must exist indicating that the complainant would be personally at risk.

8.4 The Committee notes that the State party has at no time challenged the authenticity of the medical and psychological reports on the complainant's case. In the Committee's view, those reports lend considerable weight to his allegation that he was tortured during the interrogations he underwent in a military camp. According to the medical report, Mr. Falcon Ríos bore numerous scars from cigarette burns on various parts of his body, and scars from knife wounds to both legs. The conclusion of the reporting physician was that "the marks on the patient's body are compatible with the torture that he states he suffered".

8.5 The Committee notes the State party's point that the Refugee Protection Division concluded that the complainant's testimony contained significant gaps. However, it also notes that, according to the psychologist's report, the complainant displayed "great psychological vulnerability" as a result of the torture to which he had allegedly been subjected. The same report states that Mr. Falcon Ríos was "very destabilized by the current situation, which presents concurrent difficulties", and that he was "bruised, weakened by the torture he had undergone and events associated with trauma". In the Committee's view, the vagueness referred to by the State party can be seen as a result of the psychological vulnerability of the complainant mentioned in the report; moreover, the vagueness is not so significant as to lead to the conclusion that the complainant lacks credibility. In considering the foregoing and formulating its opinion, the Committee has had due regard for its established practice, according to which it is not the Committee's place to question the evaluation of evidence by the domestic courts unless the evaluation amounts to a denial of justice.

8.6 The Committee also takes note of, and attaches due weight to, the evidence and arguments put forward by the complainant concerning his personal risk of being subjected to torture: the fact that he has been arrested and tortured in the past because he was suspected of having links with EZLN; the scars he continues to bear as a result of acts of torture which he suffered; the fact that the conflict between the Government of Mexico and the Zapatista movement is not yet over and that some members of his family are still missing. In the light of the foregoing, and after due deliberation, the Committee considers that there is a risk of the complainant being arrested and tortured again on returning to Mexico.

9. In the light of the foregoing, the Committee concludes that removal of the complainant to Mexico would constitute a violation by the State party of article 3 of the Convention.

REFUGEES

- *R. D. v. Sweden* (220/2002), CAT, A/60/44 (2 May 2005) 153 at paras. 1.1, 2.1-2.9, 7.2, 8.1-8.3 and 9.

  1.1 The complainant is R.D., a Bangladeshi citizen, currently awaiting deportation from Sweden to Bangladesh. He claims to be a victim of violations of articles 3 and 16, by Sweden, of the Convention against Torture...

  ...

  2.1 The complainant is a Christian and lived in a village about 10 km from Barisal City, Bangladesh, where his father worked as a clergyman. On 7 April 1986, his father was abducted from his house by unknown men. A few days later, he was found dead and his body mutilated. Shortly thereafter, the same men returned, beat his mother and warned her and the rest of the family not to complain to the authorities. The complainant's uncle was also murdered and his family was persecuted because of their religion. As a result of this persecution, he moved with his family to Barisal City.

  2.2 The complainant states that he was subjected to threats and intimidation because of his religion. In 1988, he was recruited to the Bangladesh Freedom Party (BFP) and was politically active from 1990 to 1996. In 1991, he took up the post of deputy coordinator. In 1995, when the Bangladesh Nationalist Party (BNP) was in power, he was arrested after being falsely accused of anti-State activities and kept in custody for five days. On release, he continued with his political activities. After the Awami League came to power in June 1996, he ceased his political activities, as the police had started arresting members of BFP. Several attempts were made to stop him from working with BFP and to induce him to join the Awami League. At the end of 1996, he went into hiding in another part of the city, before finally moving away.

  2.3 In 1998 his mother told him that the police had been looking for him, and that he was accused of murder and anti-State activities. In 1999, when he visited his family in the city, he was warned that the police were going to arrest him, and he fled. Sometime in the same year, when the police could not find the complainant, they arrested his brother, tortured him in the police station and released him after two days. On another occasion in 1999, the complainant was attacked by members of the Awami League while on his way to visit his mother.

  2.4 On 5 February 2000, the complainant entered Sweden and applied for asylum on the same day, on the grounds that he had been persecuted because of his religion and his involvement in BFP. Under the terms of the two arrest warrants issued in 1997, the complainant had been sentenced to life imprisonment for murder and anti-State activities and would be arrested if returned to Bangladesh. On 27 March 2001, the Migration Board denied his application.

2.5 On 18 June 2001, the complainant appealed the decision before the Aliens Appeal Board, stating that he had been subjected to torture, including rape and beatings for two days, while under arrest in 1997 or 1998. Thereafter, he was treated for a week, under police supervision, at Barisal Medical College. He claims that he was released after his mother had promised that he would join the Awami League.

2.6 The following medical information was provided referring to the conclusions of several Swedish doctors. Dr. Edston concluded that the complainant had been subjected to the following torture: hit with blunt instruments; stabbed with a screwdriver and a police truncheon; burned with cigarettes, a heated screwdriver and possibly a branding iron; beaten systematically on the soles of his feet; attempted suffocation by introducing hot water into his nose; "rolling" of the legs with bamboo rods; sexual violence including rape. He found that the complainant had suffered permanent physical damage in the form of pain in his left knee, reduction of mobility in his right shoulder, functional reduction in the movement of his left hand, and pain when defecating. Dr. Soendergaard found that there was no doubt that the complainant suffered from post-traumatic stress disorder. Dr. Hemingstam, a psychiatrist, stated that his symptoms were characterized by: difficulties in concentrating; lack of appetite; feelings of agony; restlessness; nightmares; and hallucinations with impulses to commit suicide. She concluded that there is a great risk of the complainant committing suicide if he were subjected to pressure and if he lost his supportive and nursing contacts. According to a certificate from the Fittja Clinic, the complainant feels confused, "disappears" and is difficult to reach during sessions, and that he has flashbacks of the torture to which he was subjected. Another psychiatrist, Dr. Eriksson, confirmed that the complainant was admitted to hospital in May 2001 because of a risk of suicide. She confirmed that he was deeply depressed and suicidal.

2.7 On 4 March 2002, the Aliens Appeals Board, although acknowledging that the scars could have been the result of beatings inflicted by his political opponents, found after consideration of the case as a whole that it was not probable that he was a refugee. It cited the fact that the information about the torture to which the complainant had been subjected had not been disclosed prior to the Aliens Appeal Board as one of the reasons for questioning the complainant's claims. a/

2.8 In May 2002, another application for a residence permit was submitted, together with further medical information. In two new medical reports of 2 and 9 April 2002, the doctors criticized the Aliens Appeal Board's decision and, as an explanation for the introduction of information on torture at a late stage in the proceedings, suggested that the support the complainant had been receiving from his psychiatrist had given him the confidence to talk openly about his torture. On 5 July 2002, the Board refused his appeal on the grounds that the new evidence provided did not demonstrate that he was a person in need of protection.

2.9 The complainant invokes reports by Amnesty International and the United States Department of State b/ which he claims support the conclusion that police torture of political opponents to extract information and to intimidate is often instigated and supported by the executive.

...

7.2 Concerning the claim under article 16 relating to the complainant's expulsion in light of his mental health, the Committee recalls its prior jurisprudence that the aggravation of the condition of an individual's physical or mental health by virtue of a deportation is generally insufficient, in the absence of additional factors, to amount to degrading treatment in violation of article 16. h/ The Committee notes the medical evidence presented by the complainant demonstrating that he suffers from severe post-traumatic stress syndrome, most probably as the consequences of the torture suffered by him in 1997. The Committee considers, however, that aggravation of the complainant's state of health that might be caused by his deportation is in itself insufficient to substantiate this claim, which is accordingly considered inadmissible.

...

8.1 The issue before the Committee is whether the removal of the complainant to Bangladesh would violate the State party's obligation, under article 3 of the Convention, not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

8.2 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Bangladesh. In assessing this risk, the Committee must take into account all relevant considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights...

8.3 The Committee observes that the State party has not contested the complainant's claim that he was tortured and notes that the Aliens Appeal Board was of the view that the complainant's political opponents may have been responsible for this torture. However, the Committee notes that seven years have passed since the torture took place, that the complainant's alleged level of responsibility in the Bangladesh Freedom Party was low and that his participation was at the local level only. In addition, it observes that the complainant has provided no evidence, documentary or otherwise, either to the State party or to the Committee, to demonstrate that he had been convicted and sentenced to life imprisonment for murder. In fact, it is clear from the judgement provided by the State party on 22 April 2005 that the complainant's name is not among the list of those convicted. For these reasons, and considering the fact that the Government has changed since the alleged torture, the Committee considers that the complainant has failed to show that substantial grounds exist to prove that he would be at a real and personal risk of being subjected to torture if removed from Sweden.

9. The Committee against Torture...considers that the complainant has not substantiated his claim that he would be subjected to torture upon return to Bangladesh and therefore concludes that the complainant's removal to that country would not constitute a breach by the State party of article 3 of the Convention.

Notes

a/ No further information is provided on the reasoning of the Aliens Appeal Board.

b/ Amnesty International, Report 2002 and Bangladesh: Torture and Impunity (ASA 13/011/2000); Amnesty International, Bangladesh: Politically-motivated detention of opponents must stop, press release issued 6 September 2002 (ASA 13/012/2002); United States Department of State, Country Reports on Human Rights Practices.

...

h/ Communication No. 83/1997, decision adopted on 15 May 1998; communication No. 49/1996, decision adopted on 15 May 2001; and communication No. 228/2003, decision adopted on 18 November 2003.

- *M. M. K. v. Sweden* (221/2002), CAT, A/60/44 (3 May 2005) 162 at paras. 1.1, 2.1-2.13 and 8.1-8.8.

1.1 The complainant is Mr. M.M.K., a Bangladeshi citizen currently residing in Sweden, where he has requested asylum. He claims that his removal to Bangladesh in the event of the rejection of his refugee claim would constitute a violation of articles 3 and 16 of the Convention by Sweden...

...

2.1 In 1993, while living in Bangladesh, the complainant was appointed as the local welfare secretary of the Jatiya Party in Mymensingh. He held that position until going to Sweden in 2002. His duties included informing Bangladeshi citizens about their rights and about the widespread corruption in the country. In 1995, the complainant received kidnapping and death threats by followers of the Bangladesh Nationalist Party (BNP), and thereafter from 1999 to 2002 by followers of the Awami League.

2.2 Between 1993 and 1996, the complainant studied in India and went back to Bangladesh during holidays and whenever his duties with the Jatiya Party demanded it. For almost a year during 1995 to 1996, he was not in Bangladesh at all out of fear of being kidnapped and because of death threats.

2.3 In 1995, while on holidays in Bangladesh, the complainant was kidnapped by followers

of BNP and held for four days. During this time he was allegedly severely maltreated and his arms and hands were slashed with knives. The purpose was to make him stop his political activities and his fight against corruption. After four days he was left in the street, and passers-by brought him to hospital. He reported the incident to the police, but was not able to name any of his kidnappers as he had been blindfolded during the ill-treatment. The police were unable to arrest anyone involved.

2.4 In June 1995, the complainant was falsely accused of murder in his home town, Mymensingh. For this reason, and because the police were looking for him, he did not stay at home, but mostly in Dhaka. He continued to carry out his political activities in other parts of the country.

2.5 In September/October 1999, the complainant was arrested while taking part in a demonstration in Dhaka. He was accused of kidnapping. He states that the accusation was false and that according to the police report the Awami League was responsible for it. He was released on bail in January/February 2000 after complaining of torture. Throughout his custody, the complainant was subjected to torture, at least once a week for two or three days at a time. He describes the torture as follows: his hair was shaved and water was dropped on his head and poured through his nostrils; he was subjected to electric shocks; and he was hit with clubs, truncheons and long sticks. He was also subjected to electric shocks by being forced to urinate in hot water into which electric cables had been plunged. The purpose was to obtain a confession and to stop him from being politically active. According to the complainant's counsel in Bangladesh, the responsible authorities acknowledged that he had been subjected to maltreatment but not to "more severe forms of torture", and that sometimes a little force or torture was necessary to obtain "the truth". The case against the complainant is still pending.

2.6 After his release, the complainant was treated for some time in a private clinic for his mental and physical *sequellae* of the torture. In May/June 2000, although the complainant had only regained about 70 per cent of his former capacity, he resumed his political activities.

2.7 In July 2000, the complainant was again arrested and falsely accused of illegal possession of arms and drug dealing. He was refused bail on account of the seriousness of the charges and remanded in custody for two and a half months awaiting trial. He indicates that his father "arranged" for his pending case not to be joined with the murder case. While on remand he was subjected to mental torture, and forced to watch while others were tortured. Upon release on bail in September 2000, he again received medical treatment.

2.8 In February 2001, the complainant left Bangladesh, not because of an isolated incident but because of everything that had happened to him since 1995 and because he feared being killed either by followers of the Awami League or BNP, and of being subjected to torture

again. That BNP and its coalition partners won the elections in October 2001 did not allay his fear.

2.9 On 14 February 2001, the complainant entered Sweden, and requested asylum on the same day. Counsel requested a delay of the examination of the case until 31 January 2002, to obtain documentary evidence of the complainant's case from Bangladesh. The Migration Board rejected counsel's request for such a delay.

2.10 While in Sweden, the complainant was informed that the police in Bangladesh had been looking for him and that they had a warrant for his arrest, as he had not appeared in court. He requested medical assistance in Sweden at the clinic for asylum-seekers in Fittja.

2.11 On 19 December 2001, the Migration Board denied his application. The Board did not consider credible that the complainant had been persecuted by Bangladeshi authorities since, although wanted for murder, he had been able to travel back and forth between Bangladesh and India. It also noted that one page of the complainant's passport had been torn out, and that it was not probable that he was released on bail given the serious charges against him. In its conclusion, the Board also stated that it did not consider it probable that the complainant had been subjected to torture, or that he had a well-founded fear of being subjected to torture or corporal punishment.

2.12 The complainant appealed to the Aliens Appeal Board. The Board was presented with documentary evidence from Bangladesh, including two medical reports. A third medical report from the clinic for asylum-seekers in Fittja was also submitted by counsel. Counsel suggested that if the Board had had doubts about the authenticity of the documents, it should investigate the matter through the Swedish Embassy in Dhaka. The Board did not initiate such an investigation. Counsel requested the Board to consider another medical investigation; this was not deemed necessary.

2.13 On 6 August 2002, the Aliens Appeal Board upheld the decision of the Migration Board, arguing that it is easy to obtain false documents in Bangladesh and therefore they had to be considered of low evidentiary value. It concluded that the complainant's information about his political activities and that he had been subjected to "torture" did not justify the conclusion that he would risk political persecution or torture in Bangladesh if returned there.
...
8.1 The Committee must decide whether the forced return of the complainant to Bangladesh would violate the State party's obligation, under article 3, paragraph 1, of the Convention, not to expel or return an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture...

8.2 The Committee takes note of the complainant's information about the general human

rights situation in Bangladesh, in particular recurrent incidents of police violence against prisoners and political opponents. The State party, while conceding the occurrence of police torture and violent clashes between political opponents, nevertheless considers that the higher levels of the judiciary display a significant degree of independence.

8.3 The Committee observes that the main reason the complainant's fears to be at personal risk of torture if returned to Bangladesh is that he was previously subjected to torture by the police, and that he risks detention upon return to Bangladesh because of criminal charges pending against him.

8.4 The Committee notes that the Swedish immigration authorities have thoroughly evaluated the complainant's case and considered whether the complainant risked torture or persecution in Bangladesh; they concluded that he was not at risk.

8.5 With regard to the complainant's allegations of torture, the Committee considers that while the other medical certificates submitted in this case do not clearly support the complainant's version, the medical report from Sweden submitted in March 2004 does support Mr. M.M.K.'s contention that he was subjected to torture and ill-treatment. The fact that the medical examination took place several years after the alleged incidents of torture and ill-treatment does not, in the present case, allay the importance of this medical report. However, the Committee considers that while it is probable that the complainant was subjected to torture, the question is whether he risks torture upon return to Bangladesh at present.

8.6 In response to this question, the Committee notes the State party's contention that since the Awami League is currently in political opposition, the risk of being exposed to harassment on the part of the authorities instigated by members of that party has diminished. The State party further argues that the complainant does not have anything to fear from the political parties now in power, since he is a member of one of the coalition parties. While noting the complainant's explanation that he supports a faction of the Jatiya Party that is opposed to that part of the party in Government, the Committee does not consider that this fact *per se* justifies the conclusion that the complainant would be at risk of persecution and torture at the hand of supporters of the Government faction of the Jatiya Party or BNP.

8.7. Finally, with regard to the complainant's allegation that since he risks detention in respect of the pending criminal charges against him and that detention is inevitably followed by torture, the Committee concludes that the existence of torture in detention as such does not justify a finding of a violation of article 3, given that the complainant has not demonstrated how he personally would be at risk of being tortured.

8.8 In light of the foregoing, the Committee finds that the complainant has not established

that he himself would face a foreseeable, real and personal risk of being tortured within the meaning of article 3 of the Convention.

- *Z. E. v. Switzerland* (222/2002), CAT, A/60/44 (3 May 2005) 172 at paras. 1.1, 2.1-2.4, 3.1-3.4 and 6.2-6.9.

1.1 The complainant, Mr. Z.E., a Pakistani national, is currently in Switzerland, where he applied for asylum on 27 September 1999. His application was rejected, and he maintains that sending him back to Pakistan would constitute a violation by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment...

...

2.1 The complainant, baptized a Roman Catholic, converted to Islam in 1990 while at university under the influence of his fellow students and in order to improve his career prospects. His conversion was not based on genuine conviction and, conscience-riven, he reverted openly to Christianity in 1996 and had himself rebaptized by a Catholic priest.

2.2 At the University of Lahore, however, the complainant was still regarded as a Muslim and was appointed President of the Muslim Students Federation in 1997. At the same time he was visiting Christian prisoners as a member of the Christian “Prison Fellowship” prisoner aid association. Discovering this in December 1998, Muslim Students Federation officials threatened to kill him and the complainant had to leave the university. Federation officials also pressed the police to bring criminal proceedings against the complainant under article 295c of the Pakistani Criminal Code.

2.3 In early January 1999 the complainant was detained at a police station, where he was ill-treated and threatened with death. He was lucky enough to be able to escape through the lavatory window. He then went into hiding and arranged to flee to Switzerland.

2.4 The complainant submitted an application for asylum in Switzerland on 27 September 1999. The application was rejected by the Federal Office for Refugees by decision dated 10 January 2002. An appeal by the complainant was also rejected, by the Swiss Asylum Review Commission, in a ruling dated 5 August 2002. In a letter dated 9 August 2002, the Federal Office for Refugees set 4 October 2002 as the date on which he should leave Switzerland. On 26 September 2002, the applicant lodged an application for review with suspensive effect with the Swiss Asylum Review Commission. The Commission found the application manifestly groundless in a decision dated 10 October 2002. It rejected the application in a ruling dated 13 November 2002. The complainant is no longer authorized to live in Switzerland and may be expelled to Pakistan at any time.

...

3.1 The complainant asserts that he is in danger of being immediately arrested by the police, tortured or ill-treated or even condemned to death or summarily executed if he is deported to Pakistan.

3.2 In justification of his fear, the complainant points out that the Muslim Students Federation has brought proceedings for blasphemy against him. He supports this assertion with a letter from the President of the Christian Lawyers Association (CLA) dated 17 August 2002, stating that proceedings under article 295c of the Pakistani Criminal Code have been instituted against Z.E. and suspended for the time being owing to the absence of the individual concerned, but that they will be immediately resumed upon his return to Pakistan. The President of CLA also refers to three death sentences passed on Christians under article 295c of the Pakistani Criminal Code. The complainant draws attention, with particular reference to reports by Amnesty International and the Asian Human Rights Commission, to the risks that declared apostates face when they come before the Pakistani justice system.

3.3 The complainant also submits a letter from his father dated 20 June 2002, explaining that under pressure from the Muslim Students Federation the police have been going to his home every month to try and arrest his son pursuant to article 295c of the Criminal Code. The letter makes it plain that the complainant is accused of having insulted the Prophet, cast the Koran into disrepute and spurned Islam, and can therefore expect the death penalty.

3.4 The complainant explains that, even if he were not to be arrested, his life and physical safety would be in danger because the police would afford him no protection against threats from his former fellow students and supporters of the Muslim Students Federation.
...
6.2 The Committee must determine whether sending the complainant back to Pakistan would violate the State party's obligation under article 3 of the Convention not to expel or return (*refouler*) an individual to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

6.3 The Committee must decide, as called for in article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if sent back to Pakistan. In doing so, it must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights...

6.4 The Committee recalls its general comment No. 1 on the application of article 3, which reads:

> "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture were he/she to be expelled, returned or

> extradited, 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" (para. 6).

6.5 In the present case, the Committee notes that the State party has drawn attention to inconsistencies and serious contradictions in the complainant's accounts and submissions which call into question the truthfulness of his claims. The Committee also takes note of the information furnished by the complainant on these points.

6.6 As regards the first part of the complaint, which concerns the risk of arrest by the police if the complainant returns to Pakistan, the complainant argues that there are criminal proceedings pending against him for blasphemy. f/ Yet the Committee observes that the letters from the complainant's father dated 20 June 2002 and the President of CLA dated 17 August 2002 which mention those proceedings are contradicted by the CLA President in the e-mail he sent on 28 October 2002; this has, incidentally, been remarked upon by the State party, but the complainant has made no comment. Similarly, the fact that the complainant spent seven months at his father's second home, then two months at his uncle's home without being troubled by the police when the police were supposed to be searching for him for blasphemy, particularly after he had escaped from a police station, does not seem plausible. The same can be said of the complainant's acquisition of a new passport and untroubled departure from Karachi airport. The complainant's later comments on these points...do not satisfactorily address these inconsistencies.

6.7 The second ground put forward by the complainant for his arrest has to do with his apostasy in 1996. The Committee observes that this argument was only put forward as a reaction to the Swiss authorities' decisions to turn down the complainant's application for asylum, and the complainant - who had a lawyer in attendance throughout the proceedings - has been unable to provide a consistent and convincing explanation for its tardy appearance. The complainant does not contest this point in his comments of 4 August 2002.

6.8 As regards the second part of the complaint, which concerns threats to the complainant's physical safety, the Committee finds, first, that the complainant has not substantiated his allegation of ill-treatment while in detention in early January 1999. Similarly, the assertion by the complainant that he is in danger of being tortured by the police and condemned to death if sent back to Pakistan are contradicted by the Committee's observations concerning the risks of arrest. This assertion, too, is supported by inadequately substantiated, not to say contradictory, arguments from the complainant in his comments of 4 August 2002.

6.9 In the light of the foregoing, the Committee concludes that the complainant has not demonstrated that there are substantial grounds for believing that sending him back to Pakistan would expose him to real, substantial and personal danger of being tortured within

the meaning of article 3 of the Convention.

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Notes

...

f/ Following a complaint to the police from the Muslim Students Federation when it learned of the complainant's Christian activities while he was serving as President of the Federation.

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- *T. A. v. Sweden* (226/2003), CAT, A/60/44 (6 May 2005) 188 at paras. 1.1, 2.1-2.11, 7.1-7.4 and 8.

1.1 The complainant is T.A., a Bangladeshi citizen, who acts on behalf of herself and her daughter, S.T. born in 1996. Both are awaiting deportation from Sweden to Bangladesh. T.A. complains that their expulsion to Bangladesh would amount to a violation by Sweden of articles 3 and 16, and possibly of article 2, of the Convention...

...

2.1 The complainant and her daughter arrived in Sweden on 13 October 2000 on a tourist visa, to visit the complainant's sister residing in Sweden. They applied for asylum on 9 November 2000. On 24 September 2001, the Migration Board denied the application and ordered their expulsion. On 25 February 2002, the Aliens Appeals Board upheld the decision of the Migration Board. Two new applications for a resident permit on humanitarian grounds were subsequently denied by the Aliens Appeals Board. A third application was submitted on 17 December 2002. However, on 19 December 2002, the Aliens Appeals Board denied the application for a stay of execution of the expulsion order. The complainant alleges that she has exhausted all domestic remedies.

2.2 Before the Migration Board, the complainant stated that she became an active member of the Jatiya Party in Bangladesh in 1994, and that her husband had been active in the same party long before that. In 1996, she was appointed women's secretary in the local women's association of the party in Mirpur Thana, where the family lived. Her tasks were to inform people about the work done by the party, to speak at meetings and to participate in demonstrations. In 1999, after the split of the party, she and her husband remained in the faction led by Mr. Ershad.

2.3 On 7 September 1999, the police arrested the complainant in connection with a demonstration in which a grenade was thrown. She was mistreated and suffered injury to her toenail. She was released the next day. On 23 November 1999, members of the Awami League mistreated both the complainant and her husband. They accused him of the murder of one of the members of the League, which occurred during a demonstration in which he had participated. On around 21 January 2000 someone left a cut-off hand in front of their

home. On 10 April 2000, members of the League vandalized their home while asking about the whereabouts of her husband, who had by then gone into hiding. She reported the case to the police, who refused to investigate the complaint when it was made clear to them that the perpetrators belonged to the Awami League.

2.4 On 16 August 2000, the police, accompanied by members of Awami League, arrested the complainant and her daughter at her parents' home, where she had moved. Her daughter, then 4 years old, was pushed so hard that she fell and injured her forehead. The complainant was taken to the police station, accused of illegal arm trading, and subjected to torture including rape, to make her confess the crime. She was hit with a rifle belt, strung up upside down until she started to bleed from her nose, stripped and burned with cigarette butts. Water was poured into her nose. She then was raped and lost consciousness. She was released the next day, after her father had paid a bribe to the police. She was forced to sign a document by which she promised not to take part in any political activity and not to leave her town or the country. After her release, the complainant was treated at a private clinic in Bangladesh. After her arrival in Sweden she was in contact with her relatives, who informed her that the Bangladeshi police had continued to search for her.

2.5 As evidence of her political activities, the complainant submitted to the Migration Board a receipt for the payment of the membership fee and a certificate from the Jatiya Party, which stated that she had joined the party in 1994 and was elected Joint Secretary in January 1996. She also submitted a medical report from a hospital in Bangladesh, dated 17 August 2000, which confirmed that she has been physically assaulted and raped. The report stated that there were several cigarette burns on her right thigh and hand, bruises on her wrist, a small incised wound on her right finger, a bluish mark on the back, and bleeding from the vagina and over the vulva. She also submitted a medical certificate, issued by a psychologist on 22 May 2001, which stated that her mental condition had worsened, that she had insomnia, nausea, vomiting, cold sweats, difficulties in concentrating and talking, feebleness, and strong memories of the rape. Another certificate, issued by a Swedish psychologist on 7 September 2001, showed that she had developed post-traumatic stress disorder syndrome accompanied by nightmares, flashbacks and severe corporal symptoms. The same certificate stated that her daughter suffered from constipation, lacked appetite, and had difficulties in sleeping. The child suffered from particular trauma as a consequence of being kept waiting for a decision on the residence permits.

2.6 The complainant points out that the Migration Board did not dispute that she had been tortured and raped. However, the Board concluded that these acts could not be considered to be attributable to the State of Bangladesh but had to be regarded as the result of the actions of individual policemen. The Board also stated that the Jatiya Party was in alliance with the Bangladesh National Party (BNP), which was currently in Government.

2.7 Before the Aliens Appeals Board, the complainant contested the findings of the Migration Board. She denied that the Ershad faction of the Jatiya Party was allied to BNP, and pointed out that, at the time of the appeal, the leader of her faction, Mr. Ershad, had left Bangladesh. Regarding the acts of torture and rape, she alleged that the police were part of the State of Bangladesh, that it was futile to complain against the police because the institution never investigated such complaints, and that the situation of the victim usually worsened if he or she decided to complain. She invoked reports of the United States Department of State and Amnesty International according to which torture was frequent and a matter of routine in Bangladesh. She also submitted three certificates dated 20 and 22 November 2001 and 22 February 2002, respectively, stating that the post-traumatic stress syndrome had grown worse and that there was a serious risk of suicide. One certificate stated that her daughter had nightmares and flashbacks of the incident in which their home was vandalized in Bangladesh, and that her emotional development had been impaired as a result.

2.8 By its decision of 25 February 2002, the Aliens Appeals Board considered that her torture and rape were not attributable to the State but to the isolated action of some policemen, that the complainant had been working for a legal party and had been an ordinary member without noticeable influence, and that because of the political change in Bangladesh there were no reasonable grounds for believing that she would be subjected to arrest and torture by the police if returned to her country.

2.9 As attachments to the new applications for a resident permit on humanitarian grounds, filed on 20 May and 1 July 2002, the complainant submitted additional medical evidence of her declining mental health and that of her daughter. The medical certificates, dated 19 and 22 April 2002 and 7 May 2002, showed that the complainant's mental health deteriorated after the decision of the Aliens Board. She suffered from a dissociated state of mind, experiencing a feeling of being present in the trauma she had been subjected to. She displayed increasing suicidal tendencies. Her daughter showed symptoms of serious trauma. On 26 May 2002, the complainant tried to commit suicide and was admitted to the psychiatric ward of St. Goran's Hospital in Stockholm on the same day for compulsory psychiatric treatment, on the basis of the risk of suicide. On 26 March 2002, a psychiatrist certified that she suffered from a serious mental disturbance, possibly from psychosis. According to another expert, the complainant's mental health further deteriorated after her release from hospital on 6 August 2002. She could no longer care for her daughter, who had been placed with another family. The expert suggested, however, that she receive ambulatory treatment, because while in hospital her mental health had worsened. As regards the complainant's daughter, the medical certificate stated that she had fallen into a serious and threatening state and that she would need a long period of psychotherapeutic treatment.

2.10 The Aliens Appeals Board denied the new applications on the basis that the evidence presented, as well as an assessment of the personal situation of the complainant as a whole,

were insufficient to justify the issuance of residence permits. Regarding the complainant's daughter, the Board concluded that she had a network in Bangladesh consisting of her father, her maternal grandparents and her mother's siblings, that the complainant and her daughter had been in Sweden only for two years, and that it was in the best interests of the child to return to a well-known environment and that her need for treatment would be best satisfied in such environment.

2.11 On 17 December 2002, a new application for humanitarian residence permits was filed. The new evidence consisted of reports of experts who had been in contact with the complainant and her daughter, as well as a report from the family unit of the social security authority in Rinkeby to Bromstergarden, an institution entrusted with the tasks of evaluating the needs of the child, the ability of the mother to take care of the child and whether the mother and child should be reunited, and of conducting support sessions. According to this evidence, the complainant's mental health was so bad that she could no longer connect with her daughter. This state of alienation not only had prevented her from giving her daughter the support she needed, but also had seriously threatened her daughter's mental equilibrium. Furthermore, one report concluded that the complainant had decided to take her own life and that of her daughter if she were forced to return to Bangladesh. Both the complainant and her daughter were in need of continuous psychotherapeutic contact.

...

7.1 The first issue before the Committee is whether the removal of the complainant to Bangladesh would violate the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

7.2 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Bangladesh. In assessing the risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights...

7.3 The Committee has noted the State party's contention that since the Awami League is currently in political opposition, the risk that the complainant would be exposed to harassment by the authorities at the instigation of members of the party no longer exists. The State party further argues that the complainant does not have anything to fear from the political parties now in power, since she is a member of one of the parties represented in Parliament. However, the State party has not contested that the complainant had in the past been persecuted, detained, raped and tortured. The Committee notes the complainant's statement that she belongs to a faction of the Jatiya Party which is in opposition to the ruling party, and that torture of political opponents is frequently practised by State agents. Furthermore, the acts of torture to which the complainant was subjected appear not only to

have been inflicted as a punishment for her involvement in political activities, but also as retaliation for the political activities of her husband and his presumed involvement in a political crime. The Committee also notes that her husband is still in hiding, that the torture to which she was subjected occurred in the recent past and has been medically certified, and that the complainant is still being sought by the police in Bangladesh.

7.4 In the circumstances, the Committee considers that substantial grounds exist for believing that T.A. may risk being subjected to torture if returned to Bangladesh. Having concluded this, the Committee does not need to examine the other claims raised by the complainant.

8. The Committee against Torture...concludes that, given the specific circumstances of the case, the deportation of the complainant and her daughter would amount to a breach of article 3 of the Convention.

- *Agiza v. Sweden* (233/2003), CAT, A/60/44 (20 May 2005) 197 at paras. 1.1, 2.1-2.6, 13.1-13.10 and 14.

1.1 The complainant is Ahmed Hussein Mustafa Kamil Agiza, an Egyptian national born on 8 November 1962, detained in Egypt at the time of submission of the complaint. He claims that his removal by Sweden to Egypt on 18 December 2001 violated article 3 of the Convention...

...

2.1 In 1982, the complainant was arrested on account of his family connection to his cousin, who had been arrested for suspected involvement in the assassination of the former Egyptian President, Anwar Sadat. Before his release in March 1983, he was allegedly subjected to torture. The complainant, active at university in the Islamic movement, completed his studies in 1986 and married Ms. Hanan Attia. He avoided various police searches, but encountered difficulties, such as the arrest of his attorney, when he brought a civil claim in 1991 against the Ministry of Home Affairs for suffering during his time in prison.

2.2 In 1991, the complainant left Egypt for Saudi Arabia for security reasons, and thereafter went to Pakistan, where his wife and children joined him. After the Egyptian Embassy in Pakistan refused to renew their passports, the family left in July 1995 for the Syrian Arab Republic under assumed Sudanese identities, in order to continue on to Europe. This plan failed, and the family moved to the Islamic Republic of Iran, where the complainant was granted a university scholarship.

2.3 In 1998, the complainant was tried *in absentia* in Egypt for terrorist activity directed against the State before a "Superior Court Martial", along with over 100 other accused. He

was found guilty of belonging to the terrorist group "Al Gihad", and was sentenced, without possibility of appeal, to 25 years' imprisonment. In 2000, concerned that improving relations between Egypt and Iran would result in his being returned to Egypt, the complainant and his family bought air tickets, using Saudi Arabian identities, to Canada, and claimed asylum during a transit stop in Stockholm on 23 September 2000.

2.4 In his asylum application, the complainant claimed that he had been sentenced to "penal servitude for life" *in absentia* on charges of terrorism linked to Islamic fundamentalism, b/ and that, if returned, he would be executed, as others accused in the same proceedings allegedly had been. His wife contended that, if returned, she would be detained for many years, as the complainant's wife. On 23 May 2001, the Migration Board sought the opinion of the Swedish Security Police on the case. On 14 September 2001, the Migration Board held a "major inquiry" with the complainant, with a further inquiry following on 3 October 2001. During of the same month, the Security Police questioned the complainant. On 30 October 2001, the Security Police advised the Migration Board that the complainant held a leading position in an organization guilty of terrorist acts and was responsible for the activities of the organization. The Migration Board thereupon forwarded the complainant's case, on 12 November 2001, to the Government for a strength of the decision under chapter 7, section 11 (2) (2), of the Aliens Act. In the Board's view, on the basis of the information before it, the complainant could be considered entitled to claim refugee status; however, the Security Police's assessment, which the Board saw no reason to question, pointed in a different direction. The balancing of the complainant's possible need for protection against the Security Police's assessment thus had to be made by the Government. On 13 November 2001, the Aliens Appeals Board, whose view the Government had sought, shared the Migration Board's assessment of the merits and also considered that the Government should decide the matter. In a statement, the complainant denied belonging to the organization referred to in the Security Police's statement, arguing that one of the designated organizations was not a political organization but an Arabic-language publication. He also claimed that he had criticized Usama Bin Laden and the Taliban in a letter to a newspaper.

2.5 On 18 December 2001, the Government rejected the asylum applications of the complainant and of his wife. The reasons for these decisions are omitted from the text of the present decision at the State party's request and with the agreement of the Committee. Accordingly, it was ordered that the complainant be deported immediately and his wife as soon as possible. On 18 December 2001, the complainant was deported, while his wife went into hiding to avoid police custody.

2.6 On 23 January 2002, the Swedish Ambassador to Egypt met the complainant at Mazraat Tora prison outside Cairo. c/ The same day, the complainant's parents visited him for the first time. They allege that they when they met him in the warden's office, he was supported by an officer and was near breakdown, hardly able to shake his mother's hand, pale and in

shock. His face, particularly the eyes, and his feet were swollen, with his cheeks and bloodied nose seemingly thicker than usual. The complainant allegedly said to his mother that he had been treated brutally upon arrest by the Swedish authorities. During the eight-hour flight to Egypt, in Egyptian custody, he allegedly was bound by his hands and feet. Upon arrival, he was allegedly subjected to "advanced interrogation methods" at the hand of Egyptian State security officers, who told him that the guarantees provided by the Government of Egypt concerning him were useless. The complainant told his mother that a special electric device with electrodes was connected to his body, and that that he received electric shocks if he did not respond properly to orders.

...

13.1 The Committee has considered the merits of the complaint, in the light of all information presented to it by the parties, pursuant to article 22, paragraph 4, of the Convention. The Committee acknowledges that measures taken to fight terrorism, including denial of safe haven, deriving from binding Security Council resolutions are both legitimate and important. Their execution, however, must be carried out with full respect to the applicable rules of international law, including the provisions of the Convention, as affirmed repeatedly by the Security Council. s/

Substantive assessment under article 3

13.2 The issue before the Committee is whether removal of the complainant to Egypt violated the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected by the Egyptian authorities to torture. The Committee observes that this issue must be decided in the light of the information that was known, or ought to have been known, to the State party's authorities *at the time* of the removal. Subsequent events are relevant to the assessment of the State party's knowledge, actual or constructive, at the time of removal.

13.3 The Committee must evaluate whether there were substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Egypt. The Committee recalls that the aim of the determination is to establish whether the individual concerned was personally at risk of being subjected to torture in the country to which he was returned...

13.4 The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons.t/ The State party was also aware that its own security intelligence services regarded the complainant as implicated in terrorist activities and a threat to its national security, and

for these reasons its ordinary tribunals referred the case to the Government for a decision at the highest executive level, from which no appeal was possible. The State party was also aware of the interest in the complainant by the intelligence services of two other States: according to the facts submitted by the State party to the Committee, the first foreign State offered through its intelligence service an aircraft to transport the complainant to the second State, Egypt, where, to the State party's knowledge, he had been sentenced *in absentia* and was wanted for alleged involvement in terrorist activities. In the Committee's view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party's territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party's police. It follows that the State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.

13.5 In light of this assessment, the Committee considers it appropriate to observe that its decision in the current case reflects a number of facts which were not available to it when it considered the largely analogous complaint of *Hanan Attia*,u/ where, in particular, it expressed itself satisfied with the assurances provided. The Committee's decision in that case, given that the complainant had not been expelled, took into account the evidence made available to it up to the time the decision in that case was adopted. The Committee observes that it did not have before it the actual report of mistreatment provided by the current complainant to the Ambassador at his first visit and not provided to the Committee by the State party (see paragraph 14.10); the mistreatment of the complainant by foreign intelligence agents on the territory of the State party and acquiesced in by the State party's police; the involvement of a foreign intelligence service in offering and procuring the means of expulsion; the progressively wider discovery of information as to the scope of measures undertaken by numerous States to expose individuals suspected of involvement in terrorism to risks of torture abroad; the breach by Egypt of the element of the assurances relating to guarantee of a fair trial, which addresses the question of the weight that can be attached to the assurances as a whole; and the unwillingness of the Egyptian authorities to conduct an independent investigation despite appeals from the State party's authorities at the highest levels. The Committee observes, in addition, that the calculus of risk in the case of the wife of the complainant, whose expulsion would have taken place some years after that of the complainant, raised issues differing from the present case.

Procedural assessment under article 3

13.6 The Committee observes that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the

Convention would be rendered largely illusory. In some cases, the Convention itself sets out a remedy for particular breaches of the Convention,v/ while in other cases the Committee has interpreted a substantive provision to contain within it a remedy for its breach.w/ In the Committee's view, in order consistently to reinforce the protection of the norm in question and the understanding of the Convention, the prohibition on *refoulement* contained in article 3 should be interpreted as encompassing a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof.

13.7 The Committee observes that in the case of an allegation of torture or cruel, inhuman or degrading treatment having occurred, the right to remedy requires, after the event, an effective, independent and impartial investigation of such allegations. The nature of *refoulement* is such, however, that an allegation of breach of that article relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise. The Committee's previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.x/

13.8 The Committee observes that, in the normal course of events, the State party provides, through the operation of the Migration Board and the Aliens Appeals Board, for review of a decision to expel satisfying the requirements of article 3 of an effective, independent and impartial review of a decision to expel. In the present case, however, owing to the presence of national security concerns, these tribunals relinquished the complainant's case to the Government, which took the first and at once final decision to expel him. The Committee emphasizes that there was no possibility for review of any kind of this decision. The Committee recalls that the Convention's protections are absolute, even in the context of national security concerns, and that such considerations emphasize the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy the requirements of article 3 of effective, independent and impartial review. In the present case, therefore, on the strength of the information before it, the Committee concludes that the absence of any avenue of judicial or independent administrative review of the Government's decision to expel the complainant constitutes a failure to meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention.

Frustration of the right under article 22 to exercise the right of complaint to the Committee

13.9 The Committee observes, moreover, that by making the declaration under article 22 of

the Convention, the State party undertook to confer upon persons within its jurisdiction the right to invoke the complaints jurisdiction of the Committee. That jurisdiction includes the power to indicate interim measures, if necessary, to stay the removal and preserve the subject matter of the case pending final decision. In order for this exercise of the right of complaint to be meaningful rather than illusory, however, an individual must have a reasonable period of time before execution of a final decision to consider whether, and if so to in fact, seize the Committee under its article 22 jurisdiction. In the present case, however, the Committee observes that the complainant was arrested and removed by the State party immediately upon the Government's decision of expulsion being taken; indeed, the formal notice of decision was only served upon the complainant's counsel the following day. As a result, it was impossible for the complainant to consider the possibility of invoking article 22, let alone seize the Committee. As a result, the Committee concludes that the State party was in breach of its obligations under article 22 of the Convention to respect the effective right of individual communication conferred thereunder.

The State party's failure to cooperate fully with the Committee

13.10 Having addressed the merits of the complaint, the Committee must address the failure of the State party to cooperate fully with the Committee in the resolution of the current complaint. The Committee observes that, by making the declaration provided for in article 22 extending to individual complainants the right to complain to the Committee alleging a breach of a State party's obligations under the Convention, a State party assumes an obligation to cooperate fully with the Committee, through the procedures set forth in article 22 and in the Committee's rules of procedure. In particular, article 22, paragraph 4, requires a State party to make available to the Committee all information relevant and necessary for the Committee appropriately to resolve the complaint presented to it. The Committee observes that its procedures are sufficiently flexible and its powers sufficiently broad to prevent an abuse of process in a particular case. It follows that the State party committed a breach of its obligations under article 22 of the Convention by neither disclosing to the Committee relevant information, nor presenting its concerns to the Committee for an appropriate procedural decision.

14. The Committee against Torture...decides that the facts before it constitute breaches by the State party of articles 3 and 22 of the Convention.

Notes

...

b/ Counsel explains the deviation from the actual sentence on the basis that a 25-year sentence amounted to the same, as few could be expected to survive that length of time in prison.

c/ Counsel states that the following information concerning the complainant's whereabouts and well-being originates from Swedish diplomatic sources, the complainant's parents, a Swedish radio reporter and the complainant's Egyptian attorney.

...

s/ Security Council resolution 1566 (2004), third and sixth paragraphs; resolution 1456 (2003), para. 6, and resolution 1373 (2001), para. 3 (f).

t/ See, among other sources, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 44* (A/51/44), paras. 180-222 and *ibid*., Fifty-eighth Session, Supplement No. 44 (A/58/44, paras. 37-44).

u/ Communication No. 199/2002, [decision adopted on 17 November 2003].

v/ See articles 12-14 in relation to an allegation of torture.

w/ See *Dzemajl v. Yugoslavia*, communication No. 161/2000, decision adopted on 21 November 2002, para. 9.6: "The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation."

x/ *Arkauz Arana v. France*, communication No. 63/1997, decision adopted on 9 November 1999, paras. 11.5 and 12.

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For dissenting opinion in this context, see *Agiza v. Sweden* (233/2003), CAT, A/60/44 (20 May 2005) 197 at Individual Opinion of Mr. Alexander Yakovlev (partly dissenting), 232.