



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

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Decisions of the Committee Against Torture under article 22 of the

Convention against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment

- Thirty-fourth session

Communication No. 233/2003 *

Submitted by: Mr. Ahmed Hussein Mustafa Kamil Agiza (represented by counsel, Mr. Bo Johansson, of the Swedish Refugee Advice Centre)

Alleged victim: The complainant

State party: Sweden

Date of complaint: 25 June 2003

The Committee against Torture, established under Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 20 May 2005,

Having considered complaint No. 233/2003, submitted to the Committee against Torture by Mr. Ahmed Hussein Mustafa Kamil Agiza, under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant and the State party,

Adopts the following decision:

**Decision of the Committee under article 22, paragraph 7,
of the Convention**

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. He is represented by counsel, who provides as authority to act a letter of authority issued by the complainant's father. The complainant himself, detained, is allegedly not allowed to sign any documents for external purposes without special permission from the Egyptian State prosecutor, and according to counsel such a permit cannot be expected.

The facts as presented

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. Hannan 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 on security grounds, and thereafter 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 Syria under assumed Sudanese identities, in order to continue to Europe. This plan failed and the family moved to Iran, where the complainant was granted a university scholarship.

2.3 In 1998, the complainant was tried in Egypt for terrorist activity directed against the State before a "Superior Court Martial" in absentia, along with over one hundred other accused. He was found guilty of belonging to the terrorist group "Al Jihad", 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, under Saudi Arabian identities, to Canada, and claimed asylum during a transit stop in Stockholm, Sweden, 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 account of terrorism linked to Islamic fundamentalism, **(1)** and that, if returned, he would be executed as other 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 enquiry" with the complainant, with a further enquiry 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 organisation guilty of terrorist acts and was responsible for the activities of the organisation. The Migration Board thus 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 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 organisation referred to in the Security Police statement, arguing that one of the designated organisations was not a political organisation but an Arab-language publication. He also claimed that he had criticised Usama Bin Laden and the Afghan 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 this 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. **(3)** The same day, the complainant's parents visited him for the first time. They allege that when they met him in the warden's office, he was supported by an officer and 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 hands and foot. Upon arrival, he was allegedly subjected to "advanced interrogation methods" at the hand of Egyptian state security officers, who told him the guarantees provided by the Egyptian Government concerning him were useless. The complainant told his mother that a special electric device with electrodes connected to his body was utilized, and that electric shocks were utilized if he did not respond properly to orders.

2.7 On 11 February 2002, a correspondent for Swedish radio visited the complainant in prison. According to him, the complainant walked with difficulty but he could not see any sign of torture. In response to a question by counsel, the correspondent stated that he had explicitly asked the complainant if he had been tortured, and that he had replied that he could not comment. After the initial visit, the Ambassador or other Swedish diplomats were permitted to visit the complainant on a number of occasions. Counsel states that what can be understood from the diplomatic dispatches up to March 2003, is that the complainant had been treated "relatively well", and that he had not been subjected to torture even if the prison conditions were harsh.

2.8 On 16 April 2002, the complainant's parents again visited him. He allegedly told his mother that after the January visit further electric shocks had been applied, and that for the last ten days he had been held in solitary confinement. His hands and legs had been tied, and he had not been allowed to visit a toilet. At a following visit, he told his parents that he was still in solitary confinement but no longer bound. He was allowed to visit a toilet once a day, and the cell was cold and dark. With reference to a security officer, he was said to have asked his mother, "do you know what he does to me during the nights?" He had also been told that his wife would soon be returned to Egypt and that

she and his mother would be sexually assaulted in his presence. Thereafter, the complainant's parents visited him once a month until July 2002 and then every fortnight. According to counsel, the information available is that he is held in a two square meter cell, which is artificially cooled, dark and without a mattress to sleep on. His toilet visits are said to be restricted.

2.9 In December 2002, the complainant's Egyptian lawyer, Mr. Hafeez Abu Saada, the head of an Egyptian human rights organization with knowledge of local conditions of detention and interrogation methods, met in Cairo with Mr. Thomas Hammarberg, head of the Olaf Palme International Centre. Mr. Abu Saada expressed his belief that the complainant had been subjected to torture.

2.10 On 5 March 2003, the Swedish Ambassador met the complainant with a human rights envoy from the Swedish Ministry of Foreign Affairs. The complainant allegedly stated for the first time that he had been subjected to torture. In response to the question as to why he had not mentioned this before, he allegedly responded, "It does no longer matter what I say, I will nevertheless be treated the same way".

The complaint

3.1 Counsel claims that the reason that he lodged the complaint over one and a half years after the complainant's removal was that for a long period it was uncertain who was able to represent him. Counsel contends that the original intention had been for lawyer who had represented the complainant in domestic proceedings in Sweden to submit the complaint; "due to the circumstances", that lawyer found himself "unable to fulfill the commission" and transferred the case to present counsel "some months ago". Counsel adds that it had been difficult to obtain the complainant's personal consent to lodge a complaint.

3.2 As to the merits, counsel argues that the complainant's removal to Egypt by Sweden violated his right under article 3 of the Convention. He bases this proposition both on what was known at the time the complainant was expelled, as viewed in the light of subsequent events. He contends that it has been satisfactorily established that the complainant was in fact subjected to torture after his return.

3.3 Counsel argues that torture is a frequently used method of interrogation and punishment in Egypt, particularly in connection with political and security matters, and that accordingly the complainant, accused of serious political acts, was at substantial risk of torture. In counsel's view, the State party must have been aware of this risk and as a result sought to obtain a guarantee that his human rights would be respected. Counsel emphasizes, however, that no arrangements had been made prior to expulsion as to how the guarantees in question would be implemented after the complainant's return to Egypt. Counsel refers to the judgment of the European Court of Human Rights in Chahal v. United Kingdom, (3) where the Court found a guarantee provided by the Indian government to be, of its own, insufficient protection against human rights violations.

3.4 Subsequent events are said to bear out this view. Firstly, Amnesty International expressed concerns about the complainant's situation in communiqués dated 19 and 20 December 2001, 10, 22 January, and 1 February 2002. Secondly, the conclusions drawn by the State party as a result of its visits should be discounted because they took place in circumstances which were deficient. In particular, the visits were short, took place in a prison which is not the one where the complainant was actually detained, were not conducted in private and without the presence of any medical practitioners or experts. Thirdly, independent evidence tends to corroborate that torture did occur. Weight should be attached to the complainant's parents' testimony as, although supervised, not every word was recorded as it was with the official visits and there was opportunity for him to

share sensitive information, especially when bidding his mother farewell. In the course of these visits, supervision lessened, with persons entering and leaving the room. Counsel argues it would not be in the parents' or the complainant's interests for them to have overrepresented the situation, as this would needlessly put him at risk of prejudicial treatment as well as distress the complainant's family still in Sweden. In addition, the parents, elderly persons without political motivation, would thereby be placing themselves at risk of reprisal.

3.5 Furthermore, the complainant's Egyptian lawyer is well qualified to reach his conclusion, after meeting with the complainant, that he had been tortured. Mr. Hammarberg, for his part, considers this testimony reliable. In advice dated 28 January 2003 provided by Mr. Hammarberg to counsel, the former considered that there was prima facie evidence of torture. He was also of the view that there were deficiencies in the monitoring arrangements implemented by the Swedish authorities, given that during the first weeks after return there were no meetings, while subsequent meetings were neither in private nor with medical examinations undertaken.

3.6 For counsel, the only independent evidence on the question, that of the radio correspondent's visit, confirms the above conclusions, as the complainant declined to answer a direct question as to whether he had been tortured. He would not have done this had he not feared further reprisals. The complainant also informed the Swedish Ambassador directly on 5 March 2003 that he had been subjected to torture, having by that point allegedly given up any hope that the situation would change.

3.7 Counsel concludes that the complainant's ability to prove torture has been very limited, though he has done his best to inform on his experiences in prison. He has been unable to present a full statement of his experiences or corroborative evidence such as medical reports.

The State party's submissions on the admissibility and merits of the complaint

4.1 By submission of 5 December 2003, the State party contests both the admissibility and the merits of the complaint. It regards complaint as inadmissible (i) for the time elapsed since the exhaustion of domestic remedies, (ii) as an abuse of process, and (iii) as manifestly ill-founded.

4.2 While accepting that neither the Convention nor the Committee's case law prescribe a definitive timeframe within which a complaint must be submitted, the State party submits that in light of the content of Rule 107(f) of the Committee's rules of procedure, this cannot mean that a complaint could never be time-barred. The State party refers to the six month limit applicable to cases submitted to the European Court of Human Rights, including with respect to expulsion cases arising under article 3 of the European Convention, and the strong rationale of legal certainty for both complainants and States underlying that rule. The State party argues that this principle of legal certainty must be considered as one of the fundamental principles inherent in the international legal order. As the Convention as well as the European Convention are both important parts of international human rights law, it would be natural for one regime to seek guidance from another on an issue on which the former is silent. In view of Rule 107(f) of the Committee's Rules, **(4)**therefore, a six-month limit could arguably serve as a point of departure for the Committee.

4.3 With respect to the present case, the State party argues that no convincing information has been provided for the delay of over one and a half years in submission of the complaint. As counsel derives his authority to act from the complainant's father rather than the complainant himself, there is no reason why this could not have been obtained at an earlier stage. Nor does it appear that any attempt was made shortly after

expulsion to obtain authority to act from this or another relative, such as the complainant's wife in Sweden. The State party refers to the complaint submitted by the same counsel on behalf of the complainant's wife in December 2001, **(5)** where it was argued that her situation was so closely linked to that of the present complaint that it was impossible to argue her case without referring to his. The arguments advanced in her case show that counsel was well acquainted with the circumstances presently invoked, and he should not be allowed to argue that the delay was due to his involvement with the family's case until a much later stage. There is, in the State party's view, no reason why the present complainant could not have been included in the first complaint submitted in December 2001. Accordingly, the State party argues that in the interests of legal certainty, the time that has elapsed since exhaustion of domestic remedies is unreasonably prolonged, and the complaint is inadmissible pursuant to article 22, paragraph 2, of the Convention and Rule 107(f).

4.4 The State party also argues that the complaint discloses an abuse of the right of submission, disputing whether the complainant can be considered to have justifiable interest in having his complaint considered by the Committee. The factual basis of the current complaint is the same as that submitted on his wife's behalf in December 2001, **(6)** with the crucial issue in both cases relating to the guarantees issued by the Egyptian authorities prior to and for the purpose of the expulsion of the complainant and his family. In its decision on that case, after having assessed the value of the guarantees and finding no violation of the Convention, the Committee already dealt with the very issue raised by the present complaint. The issue should accordingly be considered *res judicata*.

4.5 Furthermore, within the framework of the proceedings concerning the complaint by the complainant's wife, the same extensive information has been submitted concerning his past activities, present whereabouts and conditions of detention. As both complaints were submitted by the same counsel, the present complaint places an unnecessary burden both on the Committee and the State party. Accordingly, the complainant does not have a demonstrable interest in having his complaint examined by the Committee. It should thus be regarded as an abuse of the right of submission and inadmissible pursuant to article 22, paragraph 2, of the Convention and Rule 107(b). **(7)**

4.6 Finally, the State party considers the complaint manifestly unfounded, as the complainant's claims fail to rise to the basic level of substantiation required in light of the arguments on the merits set out below. It should thus be declared inadmissible under article 22, paragraph 2, of the Convention and Rule 107(b).

4.7 On the merits, the State party sets out the particular mechanisms of the Aliens Act 1989 applicable to cases such as the complainant's. While asylum claims are normally dealt with by the Migration Board and, in turn, the Aliens Appeals Board, under certain circumstances either body may refer the case to the Government, while appending its own opinion. This constellation arises if the matter is deemed to be of importance for the security of the State or otherwise for security in general, or for the State's relations with a foreign power (chapter 7, section 11(2)(2), of the Act). If the Migration Board refers a case, it must first be forwarded to the Aliens Appeals Board which provides its own opinion on the case.

4.8 An alien otherwise in need of protection on account of a well-founded fear of persecution at the hand of the authorities of another State on account of a reason listed in the Convention on the Status of Refugees (under chapter 3, section 2, of the Act) may however be denied a residence permit in certain exceptional cases, following an assessment of that alien's previous activities and requirements of the country's security (chapter 3, section 4 of the Act). However, no person at risk of torture may be refused a residence permit (chapter 3, section 3 of the Act). In addition, if a person has been

refused a residence permit and has had an expulsion decision issued against him or her, an assessment of the situation at the enforcement stage must be made to avoid that an individual is expelled to face, inter alia, torture or other cruel, inhuman or degrading treatment or punishment.

4.9 The State party recalls UN Security Council Resolution 1373 of 28 September 2001, which enjoins all UN Member States to deny safe haven to those who finance, plan, support or commit terrorist acts, or themselves provide safe haven. The Council called on Member States to take appropriate measures, consistent with international human rights and refugee law, to ensure asylum seekers have not planned, facilitated, or participated in, terrorist acts. It also called upon Member States to ensure, in accordance with international law, that the institution of refugee status is not abused by perpetrators, organizers or facilitators of terrorist acts. In this context, the State party refers to the Committee's statement of 22 November 2001, in which it expressed confidence that responses to threats of international terrorism adopted by States parties would be in conformity with their obligations under the Convention.

4.10 The State party also recalls the interim report **(8)** submitted in July 2002 by the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, submitted in accordance with resolution 56/143 of 19 December 2001. In his report, the Special Rapporteur urged States "to ensure that in all appropriate circumstances the persons they intend to extradite, under terrorist or other charges, will not be surrendered unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity" (paragraph 35).

4.11 As to the facts of the present case, the State party details the information obtained by its Security Police, which led it to regard the complainant as a serious security threat. At the State party's request, this information, while transmitted to counsel for the complainant in the context of the confidential proceedings under article 22 of the Convention, is not set out in the Committee's public decision on the present complaint.

4.12 The State party observes that on 12 December 2001, after referral of the case from the Migration and Aliens Appeals Boards, a state secretary of its Ministry of Foreign Affairs met with a representative of the Egyptian government in Cairo. At the State party's request and with the Committee's agreement, details of the identity of the interlocutor are deleted from the text of the decision. As the State party was considering to exclude the complainant from protection under the Refugee Convention, the purpose of the visit was to determine the possibility, without violating Sweden's international obligations, including those arising under the Convention, of returning the complainant and his family to Egypt. After careful consideration of the option to obtain assurances from the Egyptian authorities with respect to future treatment, the State party's government concluded it was both possible and meaningful to inquire whether guarantees could be obtained to the effect that the complainant and his family would be treated in accordance with international law upon return to Egypt. Without such guarantees, return to Egypt would not be an alternative. On 13 December 2002, requisite guarantees were provided.

4.13 The State party then sets out in detail its reasons for refusing, on 18 December 2001, the asylum claims of the complainant and his wife. These reasons are omitted from the text of this decision at the State party's request and with the agreement of the Committee.

4.14 The State party advises that the complainant's current legal status is, according to the Egyptian Ministries of Justice and Interior, that he presently serves a sentence for his conviction, in absentia, by a military court for, among other crimes, murder and terrorist activities. His family provided him with legal representation, and in February 2002, a petition for review of the case was filed with the President. By October 2002, this had been dealt with by the Ministry of Defence and would soon be handed to the President's office for decision. Turning to the monitoring of the complainant's situation after his expulsion, the State party advises that his situation has been monitored by the Swedish embassy in Cairo, mainly by visits approximately once every month. As of the date of submission, there had been seventeen visits. **(9)** On most occasions, visitors have included the Swedish Ambassador, and several on other visits a senior official from the Ministry of Foreign Affairs.

4.15 According to the embassy, these visits have over time developed into routine, taking place in the prison superintendent's office and lasting an average 45 minutes. At no time has the complainant been restrained in any fashion. The atmosphere has been relaxed and friendly, with the visitors and the complainant being offered soft drinks. At the end of the June 2002 visit, embassy staff observed the complainant in seemingly relaxed conversation with several prison guards, awaiting return to detention. At all times he has been dressed in clean civilian clothes, with well-trimmed beard and hair. He appeared to be well-nourished and not to have lost weight between visits. At none of the visits did he show signs of physical abuse or maltreatment, and he was able to move around without difficulty. At the request of the Ambassador, in March 2002, he removed his shirt and undershirt and turned around, disclosing no sign of torture.

4.16 In the embassy's report of the first (January 2002) visit, the complainant did not seem to hesitate to speak freely, and told the Ambassador that he had no complaints as to his treatment in prison. Asked whether he had been subjected to any kind of systematic abuse, he made no claim to such effect. When asked during the April 2002 visit whether he had been in any way maltreated, he noted that he had not been physically abused or otherwise maltreated. During most visits he had complaints concerning his general health, concerning a bad back, gastric ulcer, kidney infection and thyroid gland, causing inter alia sleeping problems. He had seen a variety of internal and external medical specialists, and had had an MRI spinal examination, physiotherapy for his back and an X-ray thyroid gland examination. The X-ray revealed a small tumour for which he will undergo further tests. In August 2003, he expressed to the Ambassador, as he had done before, his satisfaction with the medical care received. At the November 2003 visit, he advised that a neurologist had recommended a back operation. He has received regular medication for various health problems.

4.17 During the May and November 2002 visits, the complainant remarked adversely about the general conditions of detention. He referred to the absence of beds or toilets in the cell, and that he was being held in a part of the prison for unconvicted persons. According to him, this generally improved after December 2002, when he was no longer kept apart from other prisoners and could walk in the courtyard. In January 2003, he was moved on health grounds to a part of the prison with a hospital ward. In March 2003, in response to a question, he said he was treated neither better nor worse than other prisoners; general prison conditions applied. At no subsequent visits did he make such complaints.

4.18 On 10 February 2002, that is at an early stage of detention, the Swedish national radio reported on a visit by one of its correspondents with the complainant in the office of a senior prison official. He was dressed in dark-blue jacket and trousers, and showed no external signs of recent physical abuse, at least on his hands or face. He did have some problems moving around, which he ascribed to a long-term back problem. He

complained about not being allowed to read and about lack of a radio, as well as lack of permission to exercise.

4.19 Further issues that have been brought up regularly between the complainant and embassy staff are visits from family and lawyers. Following the June 2002 visit, a routine of fortnightly family visits appeared to have been established. At the time of submission this routine continued, though visits in May and June 2003 were restricted for security reasons. The complainant remarked that he had only received two visits from his lawyer, in February and March 2002. He had not requested to see his lawyer as he considered it meaningless. This issue was raised in the embassy's follow-up meetings with Egyptian government officials, who affirmed that the complainant's lawyer is free to visit and that no restrictions apply.

4.20 As the complainant on several occasions and in reply to direct questions, stated he had not suffered abuse, the Ambassador concluded after the November 2002 visit that, although the detention was mentally trying, there was no indication that the Egyptian authorities had breached the guarantees provided. The State party details certain allegations subsequently made by the complainant and the actions it took in response thereto. At the request of the State party and with the Committee's agreement, details of these matters are not included in the text of this decision.

4.21 As to the application of the Convention, the State party observes that the present case differs from most article 3 complaints before the Committee in that the expulsion has already taken place. The wording of article 3 of the Convention however implies that the Committee's examination of the case must focus on the point in time when the complainant was returned to his country of origin. Events that have taken place or observations made thereafter may naturally be of interest in establishing whether the guarantees provided have been respected, and this bears on the assessment of the State party's Government that the complainant would not be treated contrary to the Convention was in fact correct. But while such developments are relevant, the State party maintains that the principal question in the current complaint is whether or not its authorities had reason to believe, at the time of the complainant's expulsion on 18 December 2001, that substantial grounds existed for believing him to be at risk of torture.

4.22 The State party refers to the Committee's constant jurisprudence that an individual must show a foreseeable, real and personal risk of torture. Such a risk must rise beyond mere theory or suspicion, but does not have to be highly probable. In assessing such a risk, a standard which is incorporated into Swedish law, the guarantees issued by the Egyptian government are of great importance. The State party recalls the Committee's decision on the complaint presented by the complainant's wife where the same guarantees were considered effective, **(10)** and refers to relevant decisions of the European organs under the European Convention on Human Rights.

4.23 In Aylor-Davis v. France (judgment of 20 January 1994), it was held that guarantees from the receiving country, the United States, were found to eliminate the risk of the applicant being sentenced to death. The death penalty could only be imposed if it was actually sought by the State prosecutor. By contrast, in Chahal v. United Kingdom, the Court was not persuaded that assurances from the Indian government that a Sikh separatist "would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect mistreatment of any kind at the hand of the Indian authorities" would provide an adequate guarantee of safety. While not doubting the Indian government's good faith, it appeared to the Court that despite the efforts *inter alia* of the Indian government and courts to bring about reform, violations of human rights by members of the security forces in Punjab and elsewhere in India remained a recurrent problem. The case law thus suggests that guarantees may be

accepted where the authorities of the receiving State can be assumed to have control of the situation.

4.24 Applying this test, the State party argues that the current case is more in line with Aylor-Davis. The guarantees were issued by a senior representative of the Egyptian government. The State party points out that if assurances are to have effect, they must be issued by someone who can be expected to be able to ensure their effectiveness, as, in the State party's view, was presently the case in light of the Egyptian representative's senior position. In addition, during the December 2001 meeting between the Swedish state secretary and the Egyptian official, it was made clear to the latter what was at stake for Sweden: as article 3 of the Convention is of absolute character, the need for effective guarantees was explained at length. The state secretary reaffirmed the importance for Sweden to abide by its international obligations, including the Convention, and that as a result specific conditions would have to be fulfilled in order to make the complainant's expulsion possible. It was thus necessary to obtain written guarantees of fair trial, that he would not be subjected to torture or other inhuman treatment, and that he would not be sentenced to death or executed. The trial would be monitored by the Swedish embassy in Cairo, and it should be possible to visit the complainant, even after conviction. Moreover, his family should not be subjected to any kind of harassment. It was made clear that Sweden found itself in a difficult position, and that Egypt's failure to honour the guarantees would impact strongly on other similar European cases in the future.

4.25 The State party expands on the details of these guarantees. They are omitted from the text of this decision at the request of the State party, and with the consent of the Committee. The State party points out that the guarantees are considerably stronger than those provided in Chahal and are couched much more affirmatively, in positive terms of prohibition. The State party recalls that Egypt is a State party to the Convention, has a constitutional prohibition on torture and acts of, or orders to torture, are serious felonies under Egyptian criminal law.

4.26 For the State party, it is of interest in assessing the complaint whether the guarantees have been and are being respected. It recalls the allegations of ill-treatment made by the complainant's mother, and subsequently by non-governmental organisations, including the mother's description of his physical condition at her first visit on 23 January 2002. The State party's Ambassador's visit the same day immediately followed the mother's visit, and the Ambassador observed no signs of physical abuse. As observed, he seemed to speak freely, made no complaints about torture, and in response to a direct question on systematic abuse in prison, made no claim to that effect. The State party thus argues the allegation of ill-treatment on that date has been effectively refuted by its Ambassador's observations.

4.27 The State party asserts that judging from the numerous reports provided by the Ambassador, embassy staff and the senior official of its Ministry of Foreign Affairs, the guarantees provided have proved effective vis-à-vis the complainant. Allegations made by him to the contrary have not been substantiated, and on numerous occasions, he confirmed to the Swedish Ambassador that he had not been tortured or ill-treated. The allegations of March 2003 were refuted by the Egyptian authorities. The complainant receives the medical care he requires as a result of his health problems, and legal assistance has been provided to him by his family. That his lawyer so far may not have taken sufficient action to achieve review of sentence is of no relevance to the current complaint. In addition, his family visits him regularly. On the whole, considering the inherent constraints of detention, the complainant appears to be in fairly good health. The State party concludes that as the allegations of torture have not been substantiated, they cannot form the basis of the Committee's assessment of the case. The State party also points out that the case has been widely reported in national media and has

received international attention. The Egyptian authorities can be assumed to be aware of this, and are likely to ensure as a result he is not subjected to ill-treatment.

4.28 The State party recalls that in its decision on the complaint of the complainant's wife, **(11)** the Committee appeared to make a prognosis for her in the light of the information about the effectiveness of the guarantees regarding her husband, the present complainant, to whom she had linked her case solely on the basis of her relationship to him. The Committee declared itself "satisfied by the provision of guarantees against abusive treatment" and noted that they were "regularly monitored by the State party's authorities *in situ*." It went on to observe that Egypt "is directly bound properly to treat prisoners within its jurisdiction." In the State party's view, therefore, the Committee's conclusion that she had not made out a breach of article 3 in her complaint is of "essential importance" to the present complaint.

4.29 In conclusion, the State party argues that by obtaining the guarantees in question from the competent Egyptian official, it lived up to its commitments under the Convention while at the same time as fulfilling its obligations under Security Council Resolution 1373. Prior to expelling the complainant, appropriate guarantees were obtained from the official best placed to ensure their effectiveness. The guarantees correspond in content to the requirements of the Special Rapporteur (see paragraph 4.10 above), while a monitoring mechanism was put into place and has been functioning for almost two years. Therefore, the complainant has not substantiated his claims that the guarantees have, in practice, not been respected. Should the Committee come to another conclusion, the crucial question is what the State party's Government had reason to believe at the time of the expulsion. As the complainant has not substantiated his claim under article 3, his removal to his country of origin was not in breach of that provision.

Counsel's comments on the State party's submissions

5.1 By letter of 21 January 2004, counsel disputed the State party's submissions both on admissibility and merits. On the State party's arguments concerning timely submission of the complaint, he argues that it was unclear for a long period who was entitled to represent the complainant. Counsel argues that his prior lawyer had been unable to arrange for a power of attorney to be signed prior to the complainant's rapid removal, and that the prior lawyer considered his responsibilities at an end once the complainant had been removed. Counsel argues that once the complainant had been removed and could not be consulted directly, it was necessary to obtain more information about his situation, before carefully evaluating, together with his parents, whether it would be productive to file a complaint on his behalf. Counsel argues that the circumstances in the complaint brought by the complainant's wife were "completely different", as she had remained in Sweden and thus an urgent communication was necessary in order to prevent removal. In the present case, the complainant had already been expelled, and there was no urgent need to submit the complaint before a careful evaluation of its substance. He also points out that the six-month limit for submission refers only to complaints presented under the European Convention, and that there is no difficulty in the existence of different treaty regimes. In any case, counsel argues that the issue of principle before the Committee in terms of the satisfactory protection afforded by diplomatic assurances is so important that it should consider the case rather than declare it inadmissible.

5.2 Counsel denies that the complaint constitutes an abuse of the right of submission. While conceding that many of the "basic factors" in the cases of the complainant and his wife are the same and that the circumstances "coincide to a considerable degree", the current complainant is the individual at most serious risk of torture. His wife, who by

contrast based her claim simply as a close relative to a person sought for terrorist activities, is in a subsidiary position facing a less serious risk than her husband. As a result there are "major differences" between the two cases and the complaint should thus not be declared inadmissible on this ground. Counsel also rejects the characterisation of the case as manifestly ill-founded.

5.3 On the merits, counsel refers, for a general picture of the gross, flagrant and widespread use of torture by Egyptian authorities to reports of several human rights organizations. The human rights report of the Swedish Ministry of Foreign Affairs itself refers to frequent torture by Egyptian police, especially in terrorism-related investigations. Counsel argues that the complainant was not involved in any terrorist activities, and rejects any applicability of Security Council Resolution 1373. In any event, this resolution could not override other international obligations such as the Convention. Counsel denies that the complainant participated in terrorist activities, including through those organisations that the Security Police claimed he was involved in. In any case, allegations of involvement with terrorist organisations would only have served to heighten the existing interest of the Egyptian authorities in the complainant, an individual convicted of terrorist offences, and this aggravating circumstance exacerbating the risk of torture should have been considered by the State party prior to expelling him.

5.4 For counsel, the key issue is not whether a guarantee was given by a government official, but rather whether it can be implemented and, if so, how. The guarantee in question was obtained at short notice, vague in its terms and provided no details on how the guarantees would be given effect with respect to the complainant; nor did the Egyptian government provide, or the Swedish authorities request, any such information. Neither did the Swedish authorities conceive an effective and durable arrangement for monitoring, conducting the first visit over a month after the complainant's removal. This arrangement, coming shortly after the Committee had requested interim measures of protection with respect to the complainant's wife, appeared to be an ad hoc reaction rather than part of a properly conceived monitoring plan. Counsel reiterates his criticisms of the effectiveness of the monitoring arrangements, observing that standard routines in such cases applied by organisations such as the International Committee of the Red Cross had not been met. In addition, the Swedish authorities apparently did not seek to call any medical expertise, particularly after the complainant's direct allegation of torture in March 2003. Counsel contends that differences between the complainant's testimony to his parents on one hand, and to Swedish authorities, unknown to him and accompanied by Egyptian authorities, on the other, are explicable.

5.5 Counsel criticizes the Committee's decision on the complaint presented by the complainant's wife, as the information that her husband had suffered ill-treatment, was based on a variety of sources and could not be dismissed as unfounded. Counsel disputes the State party's interpretation of the jurisprudence of the European organs, viewing the content of the current guarantee and that offered by India in Chahal as "basically the same". He observes that the Court did not doubt the good faith of the Indian government, but regarded the fundamental problem as human rights violations committed at the operational level by the security forces. In the present case, similarly, even assuming the same good will at the political level on the part of Egyptian authorities such as the representative with whom the guarantees were agreed, the reality at the lower operational levels of the state security services and other authorities with whom the complainant was in contact is that torture is commonplace. The Aylor-Davis case, by contrast, is inapposite as the guarantee there was offered by a State the circumstances of which cannot be compared to those appertaining in Egypt.

5.6 With respect to the State party' statement that the Egyptian authorities rejected the allegations made by the complainant in March 2003, counsel observes that any contrary reaction would have been surprising, and that such refutation does not disprove the

complainant's allegation. In counsel's view, the burden of proof to show ill-treatment did not occur rests with the State party, with the most effective capacity to present evidence and conduct appropriate supervision. Counsel submits that the State party has not discharged this burden.

5.7 While accepting that Egypt is a State party to the Convention, counsel observes that this formal act is regrettably no guarantee that a State party will abide by the commitments assumed. As to the prophylactic effect of media publicity, counsel argues that there was some coverage of the cases of the complainant and his wife around the time of the former's removal, but that thereafter interest has been limited. In any case, there is reason to doubt whether media coverage has any such protective effect, and even where coverage is intensive, its positive effect may be doubted.

5.8 Counsel submits that if the Committee were to accept guarantees such as those offered in the present case as sufficient protection against torture, one could not discount that large scale deportations could take place after some standard form of assurance provided by States with poor human rights records. At least in circumstances where there was a limited will and capability on the part of the removing state appropriately to monitor the consequences, the results could readily be wide scope for authorities of the receiving state to engage in and conceal torture and ill-treatment. As a result, counsel invites the Committee to find that there was (i) a violation by the State party of article 3 of the Convention at the time of the complainant's expulsion, in the light both of the information then available and of subsequent events, and (ii) that he has been subjected to torture after removal.

Supplementary submissions by the parties

6.1 By letter of 20 April 2004, counsel advised that on 18 February 2004, the complainant met his mother in prison. He informed her that he had been threatened by interrogation officers that he could be killed or tortured, and the same day lodged a complaint that he had been tortured. On 19 February 2004, he was transferred to Abu-Zabaal prison some 50 kilometres from Cairo, against which he protested by hunger strike lasting 17 days. He was allegedly placed in a small punitive isolation cell measuring 1.5 square meters in unhygienic conditions, receiving a bottle of water a day. On 8 March 2004, representatives of the Swedish embassy visited him with unknown results. On 20 March 2004, following unsuccessful attempts by the complainant's mother to visit him, it was announced that no family visits would be permitted outside major holidays due to his status as a security prisoner with special restrictions. On 4 April 2004, he was returned to Masra Torah prison. On 10 April 2004, a retrial began before the 13th superior military court on charges of joining and leading an illegal group or organization and criminal conspiracy, to which the complainant pleaded not guilty. A representative of Human Rights Watch was admitted, but family, journalists and representatives of the Swedish embassy were not. The complainant's lawyer requested an adjournment in order that he could read the 2000 pages of charging material and prepare a defence. As a result, the trial was adjourned for three days, with the lawyer permitted only to make handwritten notes. In counsel's view, this information demonstrates that the complainant had been tortured in the past, has been threatened therewith and faces a considerable risk of further torture. It also shows he has been treated in cruel and inhumane manner as well as denied a fair trial.

6.2 By further letter of 28 April 2004, counsel advised that on 27 April 2004 the complainant had been convicted and sentenced to 25 years' imprisonment. He also contended that the court rejected a request from the complainant for a medical examination as he had been tortured in detention. In counsel's view, the complainant's

statement to the court and the court's rejection of his request constitute a further clear indication that he had been subjected to torture.

7.1 By submission of 3 May 2004, the State party responded to counsel's letter of 20 April 2004. The State party advised that since the last (seventeenth) visit reported to the Committee on 5 December 2003, four further visits on 17 December 2003, 28 January 2004, 8 March 2004 and 24 March 2004 had taken place. The State party advised that from December 2003 to January 2004, the complainant's situation remained broadly the same, with him taking up law studies. While complaining that his two cellmates disturbed peace and quiet required for study, he managed to prepare for examinations that took place in the facility in January 2004. The reportedly maximum security Abu-Zabaal facility to which he was transferred was said to be a more customary facility for prisoners sentenced to long terms. At the same time, the prison director advised that the complainant had been ordered to spend 15 days in isolation as a disciplinary sanction for having attempted to instigate a rebellion amongst Masra Torah inmates. The State party had obtained separate corroborating evidence that (i) the complainant had attempted to start a prison riot by "shouting words calling for disobedience against the instructions and regulation of the prison" and that (ii) restrictions had been imposed on correspondence and visiting rights, for a period of three months. The State party observed that the complainant was found guilty of one of the two offences with which he was charged, namely having held a leading position in, and being responsible for, the terrorist organization *Islamic Al-Fath Vanguard*s. He was sentenced to life imprisonment, hard labour (abolished in 2003) not being imposed. He is currently in Masra Torah prison awaiting decisions as to future placement.

7.2 The State party maintained its earlier positions with respect to the admissibility of the complaint, as well as to the merits, that is, that the complainant has not substantiated his claims that the Egyptian authorities have not respected the guarantees in practice. It recalled that the crucial question is what the State party had reason to believe, in light of the guarantees given, at the time of the expulsion. The State party thus submitted that it has been in full conformity with its obligations under the Convention.

8.1 By letter of 3 May 2004, counsel argued that he had initially only been supplied with a redacted version of the diplomatic report supplied after the first ambassadorial meeting in 23 January 2002 with the complainant. Counsel contended that the full report had just been provided to him by a lawyer representing a third party deported at the same time as the complainant. Counsel contends that according to this report the complainant informed the Ambassador that he had been tortured (in the form of beating by prison guards) and subjected to cruel and degrading treatment (in the form of blindfolding, solitary confinement in a very small cell, sleep deprivation and refusal of prescribed medication). Counsel argued that the State party had not supplied this information to the Committee. Counsel further provided a report by Human Rights Watch critical of diplomatic assurances in this context, **(12)** as well as a statement dated 27 April 2004 of the Egyptian Organization for Human Rights critical of the complainant's retrial.

8.2 By letter of 4 May 2004, counsel provided his translation of the diplomatic report described. After describing a forced posture during the air transport to Egypt, the complainant is said to have told the Ambassador at the first meeting, in the presence of Egyptian officials, that he had been "forced to be blindfolded during interrogation, kept in too narrow cells, 1.50 x 1.50 metres during the same period, lack of sleep due to supervision in cells, a delay of ten days before [he] once gets access to his anti-gastric drugs (after medical examination), that [he] had been beaten by prison guards during transport to and from interrogation and threats from interrogation offices that it could affect his family if he did not tell everything about his time in Iran". The Ambassador concluded that he could not evaluate the veracity of these statements, but did not

understand the claim to be of any form of systematic, physical torture. Counsel viewed this newly-disclosed information as a clear indication that the complainant had been subjected to torture. Counsel also argued that the real reason that the complainant had been transferred to the Abu-Zaabal facility was because he had lodged a complaint of threatened torture. He also contended that the complainant was denied "real and fair possibilities" to prepare his defence and observed that the State party did not address issues arising from the complainant's trial.

8.3 By a further letter of 4 May 2004, counsel provided a statement of the same day by Human Rights Watch entitled "Suspected Militants Unfair Trial and Torture Claim Implicate Sweden", in which the complainant's retrial as well as the State party's monitoring arrangements were criticized. Counsel also provided a letter to him by a Human Rights Watch researcher purporting to confirm the contents of the unredacted first diplomatic report described above and concluding that there were credible allegations of ill-treatment.

8.4 By submission of 5 May 2004, the State party advised that it considered the Committee to be in a position to take a decision on the admissibility and, if necessary, the merits of the complaint on the basis of the Convention and the information before the Committee. Accordingly, it did not intend to make additional submissions beyond those already made on 3 May 2004. It observed in conclusion that counsel's letter of 4 May 2004 raised, *inter alia*, issues falling outside the scope of the Convention.

The Committee's admissibility decision:

9.1 At its 32nd session, the Committee considered the admissibility of the communication. The Committee ascertained, as it was required to do under article 22, paragraph 5 (a), of the Convention, that the same matter had not been and was not being examined under another procedure of international investigation or settlement.

9.2 On the State party's argument that the present complaint was an abuse of process which rendered it inadmissible, the Committee observed that the complaint submitted on behalf of the complainant's wife in order to prevent her removal had necessarily been filed with dispatch, and had concerned, at least at the time of the Committee's decision, the issue of whether at that point the circumstances were such that her removal would be a violation of article 3 of the Convention. In reaching the conclusion that removal of the complainant's wife would not breach article 3, the Committee had considered the chronology of events up to the time of its decision, a necessarily wider enquiry than that at issue in the present case, which was focused upon the situation of the complainant at the time of his expulsion in December 2001. Indeed, the Committee had observed in its decision on the original complaint that it was not being presented with the issue of whether the present complainant's removal itself breached article 3. The two complaints related to different persons, one already removed from the State party's jurisdiction at the time of submission of the complaint and the other still within its jurisdiction pending removal. In the Committee's view, the complaints were thus not of an essentially identical nature, and it did not consider the current complaint to be a simple re-submission of an already decided issue. While submission of the present complaint with greater dispatch would have been preferable, the Committee considered that it would be inappropriate to take so strict a view that would consider the time taken in obtaining authorization from the complainant's father as so excessively delayed as amounting to an abuse of process.

9.3 As to the State party inadmissibility argument grounded on Rule 107(f), the Committee observed that this Rule required the delay in submission to have made consideration of the case "unduly difficult". In the present case, the State party had had

ready access to the relevant factual submissions and necessary argumentation, and thus, while the timing of submission of the two complaints may have been inconvenient, consideration of the present complaint could not be said to have been made unduly difficult by the lapse of 18 months from the date of the complainant's expulsion. The Committee thus rejected the State party's argument that the complaint is inadmissible on this ground.

9.4 The Committee noted that Egypt has not made the declaration provided for under article 22 recognizing the Committee's competence to consider individual complaints against that State party. The Committee observed, however, that a finding, as requested by the complainant, that torture had in fact occurred following the complainant's removal to Egypt (see paragraph 5.8), would amount to a conclusion that Egypt, a State party to the Convention, had breached its obligations under the Convention without it having had an opportunity to present its position. This separate claim against Egypt was thus inadmissible *ratione personae*.

9.5 In terms of the State party's argument that the remaining complaint was insufficiently substantiated, for purposes of admissibility, the Committee considered that the complainant had presented a sufficiently arguable case with respect to Sweden for it to be determined on the merits. In the absence of any further obstacles to the admissibility of the complaint advanced by the State party, the Committee accordingly was ready to proceed with the consideration of the merits.

9.6. Accordingly, the Committee against Torture decided that the complaint was admissible, in part, as set out in paragraphs 9.2 to 9.5 above.

Supplementary submissions by the parties on the merits of the complaint

10.1 By letter of 20 August 2004, counsel for the complainant made additional submissions on the merits of the case, providing additional details on the complainant's retrial in April 2004. He stated that the complainant's defence counsel was only provided with copies of parts of the criminal investigation that had been conducted, despite a request to be able to photocopy the investigation records. When the trial was resumed on 13 April, the complainant was only able to speak to his counsel for about 15 minutes. The State called a colonel of the State Security Investigation Sector to testify against the complainant, to the effect that the complainant had had a leading position since 1980 in the Jamaa group, as well as links since 1983 with Ayman al Zawahiri, a central figure of the group. He further testified that the complainant had attended training camps in Pakistan and Afghanistan, and participated in weapons training sessions. Upon cross-examination, the colonel stated that the Jamaa leadership continually changes, that his testimony was based on secret information, that the sources thereof could not be revealed due to risks to their lives and that he (the colonel) had had a supplementary role in the investigation alongside other officers whom he did not know. According to counsel for the complainant, the court in its verdict of 27 April 2004 rejected the complainant's request for a forensic medical examination made during the trial, but referred to a medical examination report by the prison doctor which indicated that the complainant had suffered injuries in prison.

10.2 Counsel refers to a Swedish television broadcast of 10 May 2004 on entitled "Kalla Fakta", examining the circumstances of the expulsion of the complainant and another individual. **(13)** The programme stated that the two men had been handcuffed when brought to a Stockholm airport, that a private jet of the United States of America had landed and that the two men were handed over to a group of special agents by Swedish police. The agents stripped the clothes from the men's bodies, inserted suppositories of an unknown nature, placed diapers upon them and dressed them in black overalls. Their

hands and feet were chained to a specially-designed harness, they were blindfolded and hooded as they were brought to the plane. Mr. Hans Dahlgren, State Secretary at the Foreign Ministry, stated in an interview that the Egyptian Government had not complied with the fair trial component of the guarantees provided.

10.3 According to counsel for the complainant, following this programme, the Swedish Foreign Ministry sent two senior representatives to Egypt to discuss with the Egyptian Government how the two deportees had been treated. Results of the meeting are not known apart from an Egyptian denial of maltreatment and that an investigation under Egyptian leadership, but with international participation and medical expertise, would be involved. Three separate investigations in Sweden have also resulted and are ongoing: (i) a *proprio motu* investigation by the Chief Ombudsman to determine whether the actions taken were lawful, (ii) a criminal investigation by the Stockholm public prosecutor, upon private complaint, on whether Swedish Security Police committed any crime in connection with the deportation, and (iii) an investigation by Parliament's Constitutional Committee into the lawfulness of the Swedish handling of the cases.

10.4 On 15 June 2004, the Aliens Appeals Board granted the complainant's wife and her five children permanent resident status in Sweden on humanitarian grounds. Later in June, the Egyptian Government through prerogative of mercy reduced the complainant's twenty-five year sentence to fifteen years' of imprisonment. According to counsel for the complainant, the complainant last met Swedish representatives in July 2004. For the first time, the meeting was wholly private. After the meeting, he met his mother and told her that prior to the meeting he had been instructed to be careful and to watch his tongue, receiving from an officer the warning "don't think that we don't hear, we have ears and eyes."

10.5 As at 20 August 2004, the date of the submissions, there was no information as to the announced inquiry in Egypt. **(14)** However, that day, the Swedish Minister of Foreign Affairs announced in a radio broadcast the receipt of a Note from the Egyptian government rejecting all allegations of the complainant's torture and considering an international inquiry unnecessary and unacceptable. The Minister of Foreign Affairs also considered there reason to be self-critical concerning the Swedish handling of the case.

10.6 Counsel submits that the retrial fell patently short of international standards, being conducted in a military court with limited time and access available to the defence resulting in a conviction based on weak and insufficient evidence. **(15)** The failure to respect this portion of the guarantee, as conceded by State Secretary Dahlgren, raised of itself serious doubts as to the fulfillment of the remaining commitments. Counsel states that the complainant told his mother that he is irregularly sent to hospital for his back damage, there being no indication that he has been examined by a forensic physician. In counsel's view, the information already made known, coupled with the finding by the prison doctor that the complainant had suffered medical injuries (see paragraph 8.1, *supra*) and the refusal of the Egyptian authorities to allow an international investigation, together show that he has been subjected to torture. The burden to prove the contrary must rest upon the State party, with its commensurately greater resources and influence upon proceedings.

10.7 Reiterating his previous arguments, counsel contends that the complainant faced substantial risks of torture at the time of expulsion irrespective of the guarantees obtained from a country with a record such as Egypt. Counsel refers in this connection to a report on Sweden, dated 8 July 2004, of the Council of Europe, where criticism was expressed on the use of guarantees. **(16)** Alternatively, counsel argues that the steps taken to prevent and monitor the guarantees were insufficient. In addition to the arguments already raised, no detailed plans or programs featuring matters such as special orders on permissible interrogation techniques, confirmation that subordinate

personnel were aware and would adhere to the guarantees or a post-expulsion treatment and trial plan were implemented.

11.1 By submission of 21 September 2004, the State party responded, observing that further visits since its last submissions of 3 May 2004 took place on 4 May, 2 June, 14 July and 31 August 2004. Each visit, excepting the most recent, took place in Masra Torah prison where the complainant appears to be serving sentence. The most recent visit took place at the Cairo university hospital. The State party refers to the complainant's improved legal situation, with the reduction to fifteen years' imprisonment subject, according to the complainant, to further reduction in the event of good behaviour. An assessment thereof is conducted automatically by the Egyptian Ministry for Interior Affairs. The complainant's health situation has also improved since May when he fell ill with pneumonia. Upon his return to Masra Torah prison on 4 April 2004, his previous treatments and medication were resumed. In late August 2004, he underwent surgery at the Cairo university hospital on spinal discs. The neurosurgeon involved informed the embassy on 31 August that the operation had taken five hours, involving microsurgery, but had been successful and without complications. According to the physician, the back problems were of a type which could befall anyone and had no apparent cause.

11.2 Concerning general conditions at Masra Torah prison, the complainant offered embassy staff no particular complaints when asked. Family visits have resumed upon his return to that prison. He was pleased to be informed of the permanent residence granted his wife and children, and has continued with his law studies and exams.

11.3 Following renewed allegations of ill-treatment by the complainant's counsel, his Egyptian lawyer and NGOs, the State party's Government made further investigative efforts. On 18 May 2004, it dispatched Ms. Lena Hjelm-Wallén, former Minister of Foreign Affairs and Deputy Prime Minister, as special envoy to Egypt, accompanied by the Director General for Legal Affairs of the Swedish Ministry for Foreign Affairs. The envoy met with the Egyptian Deputy Minister of Justice and the Minister in charge of the General Intelligence Service (GIS), voicing the State party's concerns over the alleged ill-treatment in the first weeks following the complainant's return to Egypt. She requested an independent and impartial inquiry on the allegations, including international medical expertise. The Egyptian Government dismissed the allegations as unfounded, but agreed to undertake an investigation. Subsequently, on 1 June 2004, the Swedish Minister of Foreign Affairs dispatched a letter to the Egyptian Minister in charge of the GIS, suggesting that in order for the Egyptian investigation to receive the widest possible international acceptance, it should be carried out with or by an independent authority, involving the judiciary and medical expertise, and preferably international expertise with recognized expertise in investigation of torture. She also professed willingness to allow a Swedish official, such as senior police officer or prosecutor, to assist. She added that it was crucial that the fight against terrorism be carried out with full respect for the rule of law and in conformity with international human rights obligations. In his answer of late July 2004, the responsible Egyptian Minister refuted the allegations of ill-treatment as unfounded, referring without detail to Egyptian investigations. While confirming the reduction of the complainant's sentence, he gave no direct answer to the Swedish request for an independent investigation.

11.4 The State party states that its Government is not content with the Egyptian response. In the process of considering possible further action, it is of the utmost importance that the Government receives a confirmation that such action will be in line with the complainant's own wishes, as further measures should not risk affecting his legal interests, safety or welfare adversely in any way. It is also necessary, in the circumstances, for the Egyptian Government to concur and co-operate in any further investigative efforts.

11.5 The State party reiterated its previous submissions based on a deficient retrial are outside the scope of the present case, concerned with whether the complainant's return to Egypt was in breach of the absolute ban on torture. It reiterates that the complainant has not substantiated his claim that he was ill-treated following return, and, thus, that the guarantees provided were not respected. The State party recalls that the crucial issue for decision is what its Government, in view of the guarantees received, had reason to believe at the time of the expulsion. Accordingly, the State party has complied with its obligations under the Convention, including article 3.

11.6 By letter of 16 October 2004, counsel responded to the State party's supplementary submissions, pointing out that the circumstances of the four visits from May to August 2004 described by the State party remained unclear but that it is likely that Egyptian officials were present and it would be difficult to speak freely. The situation may have been different for the hospital visit. Counsel criticises the State party for stating that it appeared that Masra Torah prison was the detention facility for sentence, arguing that as it is well known that the complainant was serving sentence at the Esquebahl Torah prison, the State party appeared to be ill-informed on the circumstances of his detention.

11.7 Counsel observes argues that the complainant's back condition was already diagnosed, as moderate, in Sweden. These problems deteriorated after his return and in 2003 he was brought to a Cairo hospital for examination, where he was recommended for surgery. Only a year later was "absolutely necessary" surgery actually carried out. He stayed for eleven days in hospital under supervision and received controlled visits from family. Although far from recovered, he was then returned to prison in an ordinary transport vehicle rather than an ambulance. Counsel argues that the State party knew of but neglected to tend to the complainant's medical condition for two and a half years, and in that time exposed him to treatment such as being kept in "very small" cells and with arms being tied behind the back. Apart from itself causing severe pain, such treatment seriously risked exacerbating his medical condition.

11.8 Counsel argues that the reduction in sentence does not affect how the complainant has been treated, is being and will be treated until release. As to law studies, it is not known whether and how the complainant has been able to pass any exams. Counsel rejects that there has been a significant improvement of the complainant's situation during the summer of 2004, conceding only that the situation is an improvement on that just after his return, arguing that as late as March 2004 the complainant was detained in a very small cell without adequate hygiene facilities and proper access to water. There remains a considerable risk the complainant will be subjected to torture or treatment approximating it. In any event, counsel argues that the complainant's present condition does not establish how he was treated in the past.

11.9 Counsel points out that the complainant's Egyptian attorney has lodged a request for review of verdict to the Highest State Security Court, on grounds that the trial Military Court misjudged the evidence, that the preliminary investigation was afflicted with serious shortcomings, that defence rights were violated at trial and that during the investigation the complainant had been subjected to violence and torture. The attorney has also lodged a special complaint with the Egyptian Minister of the Interior, the Chief Public Prosecutor and the Director-General of the Prison Institutions, alleging improper treatment of the complainant during his hospitalisation, including being chained to the bed and rendered immobile on medical grounds, and being returned to prison prior to recuperation.

11.10 Counsel argues that after the publicity generated by the television broadcast referred to in paragraph 10.2, *supra*, the State party shifted its position from a firm denial that torture had taken place to the "more reluctant position" shown by the measures it then took by way of dialogue with Egypt. Counsel points out Egypt's curt

dismissal as unfounded of the allegations giving rise to the Swedish requests for an investigation, without so much as supplying any detail of the investigation allegedly conducted. This strongly suggests the complainant was in fact tortured, as Egypt would benefit significantly from being able to demonstrate to other countries, through an independent investigation showing the complainant had not been tortured, that Egypt could safely be entrusted with the return of sensitive prisoners and to abide by assurances given.

11.11 Counsel refers to the State party's apparent unwillingness to further press the Egyptian authorities, with the State party citing possible prejudices to the complainant's legal interests or welfare. This suggests the State party accepts, in contrast to its earlier view, that the complainant is at risk of external pressure in the event of an insistence on an independent investigation. In fact, the complainant, through his relatives, has repeatedly made known his desire for the fullest possible defence of his interests.

11.12 Counsel goes on to refer to relevant case law in national jurisdictions. In the case of Mr. Bilasi-Ashri, the Egyptian government refused to accept a detailed set of assurances, including post-return monitoring, requested by the Austrian Minister of Justice following a decision to that effect by an Austrian court of appeal. In the case of Ahmed Zakaev, a British extradition court found that a real risk of torture was not discounted by assurances given in open court by a Russian deputy minister overseeing prisons. Counsel argues that a similarly rigorous approach, with effective protection provided by the legal system, ought to have been followed in the complainant's case.

11.13 Counsel expands on the earlier reference to involvement of the United States of America in the complainant's case in paragraph 10.2, *supra*, referring to a book entitled "Chain of Command" by Seymour Hersh. This contended that "the Bromma action" (referring to the airport from which the complainant was removed) was carried out by members of the Special Access Program of the United States Department of Defense who were engaged in returning terrorist suspects to their countries of origin utilising "unconventional methods". It is said that the complainant's removal was one of the first operations carried out under this program and described by an operative involved as "one of the less successful ones". In counsel's view, this third State involvement at the removal stage in an anti-terrorism context should have confirmed what the State party already knew from its knowledge of the common use of torture in Egypt and the complainant's particular vulnerability, that is, that a real risk of torture existed at the time of his removal, in breach of article 3.

11.14 By further letter of 16 November 2004, counsel provided a copy of a Human Rights Watch report to the Committee entitled "Recent Concerns regarding the Growing Use of Diplomatic Assurances as an Alleged Safeguard against Torture". The report surveys recent examples of State practice in the area of diplomatic assurances by Germany, the United States of America, the Netherlands, the United Kingdom and Canada. The report argues that such assurances are increasingly viewed as a way of escaping the absolute character of non-refoulement obligations, and are expanding from the anti-terrorism context into the area of refugee claims. It contends that assurances tend to be sought only from countries where torture is a serious and systematic problem, which thus acknowledges the real risk of torture presented in such cases.

11.15 In the light of national experience, the report concludes that assurances are not an adequate safeguard for a variety of reasons. Human rights protection is not amenable to diplomacy, with its tendency to untransparent process and to place the State to State relationship as the primary consideration. Such assurances amount to trusting a systematic abuser who otherwise cannot be trusted to abide by its international obligations. It also amounts to giving a systematic abuser a "pass" with respect to an individual case when torture is otherwise widespread. Finally, the effectiveness of post-

return monitoring is limited by the undetectability of much professionally-inflicted torture, the absence of medical expertise from typical monitoring arrangements, the unwillingness of torture victims to speak out for fear of retribution, and the unwillingness of either the sending State or the receiving State to accept any responsibility for exposing an individual to torture.

11.16 In conclusion, the report refers to the October 2004 report to the General Assembly of the United Nations Special Rapporteur on Torture, who argued that, as a baseline, diplomatic assurances should not be resorted to in circumstances where torture is systematic, and that if a person is a member of a specific group that is routinely targeted and tortured, this factor must be taken into account. In the absence of either of these factors, the Special Rapporteur did not rule out the use of assurances provided that they reflect an unequivocal guarantee that is meaningful and verifiable.

12.1 By letter of 11 March 2005, the State party provided additional submissions on the merits of the complaint. It observed that the Swedish embassy in Cairo had continued to monitor the complainant's situation, with further visits taking place in Toraj prison on 3 October 2004, 21 November 2004, 17 January 2005 and 2 March 2005. The State party notes for the sake of clarity that there are several buildings on the prison grounds, one of which is called Masra and another Estekbal. The complainant has been detained, and visits have taken place, in both parts of the prison compound at different points in time.

12.2 With respect to his legal situation, the complainant stated that he had instructed his Egyptian lawyer to lodge a petition with the President of Egypt for a new trial in a civil court, invoking Egypt's undertaking prior to his expulsion from Sweden that he was to be given a fair trial. He had not met with the lawyer in person; his mother appeared to be the one giving instructions to the lawyer. According to the complainant, she had subsequently been informed by the lawyer that the petition had been lodged. However, the complainant was not very hopeful with regard to the outcome of such a petition.

12.3 Concerning the health situation, the complainant was recovering according to plan from the back surgery he underwent in August 2004 at the university hospital in central Cairo. Back at the Torah prison, he had spent some time in the prison hospital before returning to a normal cell. He had received physiotherapy treatment and a so-called MRI-examination, where his back had been x-rayed. He complained about the lack of further physiotherapy sessions which, he stated, had to be held at the hospital. This was due to the fact that the necessary equipment was not available in the prison. In order to further strengthen his back, he had been scheduled for special magnetic treatment.

12.4 With regard to the issue of the general conditions of detention, the State party observes that by March 2005 the complainant was placed in a cell of his own. He continued to receive visits from his mother, who brought him books, clothes and extra food. She also appeared to be providing him with information about his family in Sweden on a regular basis. However, he complained that his request to call his wife and children had been denied. Moreover, it was his intention to continue with his law studies. He had managed to pass further exams during the autumn.

12.5 In addition to the measures described in its last submissions to the Committee on 21 September 2004, the State party states that it had made further efforts to bring about an investigation into the ill-treatment allegedly suffered by the complainant at the hands of the Egyptian authorities during the initial stage of the detention. In a new letter of 29 September 2004 to the Egyptian Minister in charge of the GIS, the Swedish Minister of Foreign Affairs, Ms. Laila Freivalds, responded to the answer given by him in July of that year. Ms. Freivalds remarked that the letter she had received in July 2004 contained no information on the type of investigations that had been carried out by the Egyptian authorities and on which the Egyptian Minister's conclusions were based. She

concluded, in her turn, that under the circumstances she did not exclude that she would have to revert to him on the same matter at a later stage.

12.6 In the course of the Swedish embassy's visit to the complainant on 3 October 2004, the question of the complainant's position in respect of further inquiries into the allegations of ill-treatment was raised again. When the issue had been raised with him for the first time (during the visit of 14 July 2004), the complainant's prison sentence had recently been reduced to 15 years and he was concerned that new investigations might have a negative impact on the chances of further reductions being made as a consequence of good behaviour on his part. On 3 October 2004, however, the complainant's position had changed. He then declared that he was in favour of an independent inquiry and said that he was willing to contribute to such an inquiry.

12.7 In view of the importance attached by the State party to the complainant's own wishes in this regard, the State party regarded the complainant's new position as making way for further measures on its part. Since the envisaged inquiry would naturally require the additional approval and cooperation of the Egyptian government, the Swedish Ambassador to Egypt was instructed on 26 October 2004 to raise this issue with the Egyptian Foreign Ministry at the highest possible level. The Ambassador consequently met with the Egyptian Minister of Foreign Affairs on 1 November 2004. The Ambassador conveyed the message that the Swedish Government continued to be concerned about the allegations that the complainant had been exposed to torture and other ill-treatment during the initial period following his return to Egypt. The need for a thorough, independent and impartial examination of the allegations, in accordance with the principle of the rule of law and in a manner that was acceptable to the international community, was stressed by the Ambassador. In response, the latter was informed of the Minister's intention to discuss the matter with the Minister in charge of the GIS. The Egyptian Minister of Foreign Affairs, however, anticipated two problems with regard to an international inquiry. Firstly, there was no tradition in Egypt when it came to inviting representatives of the international community to investigate domestic matters of this character. It would probably be viewed as an unwelcomed interference with internal affairs. Secondly, attempting to prove that ill-treatment had not occurred could pose a problem of a more technical nature, particularly in view of the fact that several years had passed since the ill-treatment allegedly took place.

12.8 As a follow-up to the meeting with the Minister of Foreign Affairs, the State party informs that its Ambassador met with the Undersecretary of State of the GIS on 22 November and 21 December 2004. During the first of these meetings, the undersecretary of state mentioned that Egypt was anxious to comply, as far as possible, with the Swedish Government's request for an inquiry. However, during the second meeting, the Ambassador was handed a letter by the Minister in charge of the GIS containing the Egyptian government's formal answer to the renewed Swedish request for an inquiry. The content of the letter was similar to that of the previous letter from the same Minister in July 2004. Thus, the allegations concerning ill-treatment of the complainant were again refuted as unfounded. Furthermore, no direct answer was provided to the request that an independent inquiry be conducted.

12.9 The matter was again brought up by Ms. Freivalds in connection with a visit to Stockholm on 15 February 2005 by the Egyptian Deputy Minister of Foreign Affairs responsible for multilateral issues. Ms. Freivalds informed the Egyptian Deputy Minister of the complainant's case and the allegations made regarding his ill-treatment. She stressed that it ought to be a common interest for Sweden and Egypt to look into those allegations and asked the Deputy Minister to use his influence with the Egyptian authorities in favour of the Swedish position. The Deputy Minister assured her that he would raise the issue upon his return to Cairo.

12.10 The State party also points out that the issue of an international inquiry was raised with the United Nations High Commissioner for Human Rights, Ms. Louise Arbour, when she visited Stockholm in December 2004. On that occasion, Ms. Freivalds made clear that the Swedish Government would welcome any efforts that might be undertaken by the High Commissioner to investigate the allegations that the complainant had been subjected to torture or other forms of ill-treatment while in detention in Egypt. The State party also observes that the investigation initiated by the Swedish Chief Parliamentary Ombudsman into the circumstances surrounding the execution of the Government's decision to expel the complainant from Sweden has not yet concluded.

12.11 The State party recalls that already in May 2004, counsel for the complainant provided the Committee with a written account of the embassy's report of its first visit on 23 January 2002 to the complainant after his return to Egypt. A copy of the report was submitted by counsel to the Committee in August 2004. In the State party's view, therefore, the Committee had thus been provided with all the information of relevance for its examination of the present case. Prior to explaining the fact that the report was not fully accounted for by the Government in its initial observations of 5 December 2003, the State party provides the following translation of the relevant portion of the Ambassador's report:

"Agiza and [name of another person] had just been transferred to the Torah prison after having been interrogated for thirty days at the security service's facilities in another part of Cairo. Their treatment in the Torah prison was "excellent". However, they had a number of complaints that related to the time period between their apprehension in Sweden and the transfer to the Torah: excessive brutality on the part of the Swedish police when they were apprehended; forced to remain in uncomfortable positions in the airplane during the transport to Egypt; forced to be blindfolded during the interrogation period; detention in too small cells 1.5 x 1.5 meters during the same period; lack of sleep due to surveillance in the cells; a delay of ten days before Agiza, following a medical examination, had access again to his medication for gastric ulcer; blows from guards while transported to and from interrogation; threats from interrogator that there could be consequences for Agiza's family if he did not tell everything about his time in Iran etc. It is not possible for me to assess the veracity of these claims. However, I am able to note that the two men did not, not even on my direct questions, in any way claim that they had been subjected to any kind of systematic, physical torture and that they consider themselves to be well treated in the Torah prison."

12.12 The State party argues that it has been aware of difficulties experienced by the Committee in the past with regard to upholding respect for the confidentiality of its proceedings. For that reason, the State party formulated its submissions with great care when they involved the unveiling of information that has been classified under the Swedish Secrecy Act. For the State party, it was a question of balancing the need to reveal information in order to provide the Committee with the correct factual basis for the proper administration of justice, on the one hand, and the need to protect the integrity of Sweden's relations with foreign powers, the interests of national security and the security and safety of individuals, on the other.

12.13 The State party argues that its position in this regard should be seen against the background of the experience gained from the proceedings relating to the case of Hanan Attia. **(17)** In the State party's view, it became clear during those proceedings that the concerns in respect of confidentiality, which existed already at that time, were not unfounded. In that case, the Committee offered the State party in September 2002 the opportunity to withdraw its initial observations of 8 March 2002 and to submit a new version in view of the fact that the Committee could not guarantee that "any of the information submitted by the parties to the case would not be disclosed in any of its decisions or views on the merits of the case". Furthermore, in January 2003 counsel for Hanan Attia appended a briefing note from Amnesty International in London to his own

observations, from which it was clear that counsel had made the State party's observations of 8 March 2002 available to Amnesty International.

12.14 The State party argues that its concerns with regard to the Committee's ability to uphold respect for the confidentiality of its proceedings were reflected in its repeated requests and comments concerning the confidentiality of the information that was in fact included in the initial observations of 5 December 2003 in the present case. However, in the light of the foregoing, the conclusion was drawn that only part of the classified information found in the Security Police's written opinion of 30 October 2001 to the Migration Board could be revealed. Another conclusion was that the information contained in the embassy's report from its first visit on 23 January 2002 to the complainant in detention should not be fully accounted for either. The reason for the latter conclusion was that it could not be ruled out that the information concerning ill-treatment provided by the complainant during the embassy's first visit would later be found in the public domain and thus become known to the Egyptian authorities.

12.15 The State party concludes that for these reasons not all the information that emerged at the embassy's first visit was revealed to the Committee. If such unconfirmed information had been released at that stage, and with the indirect assistance of the Swedish Government, this could have resulted in reprisals against the complainant. The risk for reprisals was not deemed to be insignificant, irrespective of whether the information was correct or not. If the information regarding the complainant's ill-treatment was correct - although such treatment did not appear to amount to torture within the meaning of the Convention -, this would have meant that the diplomatic assurances had not had the intended effect to protect him against treatment in breach of Sweden's international obligations, including treatment prohibited under article 3 of the European Convention on Human Rights. In such a case, there was an apparent risk that the disclosure of the information would put the complainant at risk of further ill-treatment and maybe even of torture. On the other hand, if the disclosed information was incorrect, this could have had a negative impact on the relations between Sweden and Egypt. In turn, it could have led to problems as far as the embassy's monitoring efforts were concerned. In this situation, when the different risks involved were assessed, the conclusion was reached that the best course of action would be to await the report of the embassy's next visit.

12.16 The State party points out that according to the embassy's report from its second meeting with the complainant in the detention facility, there were at that time no indications of torture or other ill-treatment. However, even prior to the third visit on 14 April 2002, information was circulating to the effect that the complainant's mother had stated publicly that her son had been tortured after his return to Egypt. The embassy's report from the first visit on 23 January 2002 confirmed the information submitted by the complainant's mother, namely that the visit when she had allegedly noticed signs of ill-treatment on her son's body had been interrupted by the Swedish Ambassador's first visit. The fact that the Ambassador had reported that he had not been able to see any signs of physical abuse on that very same day led the State party to doubt the veracity of the claims made by the complainant's mother and affected its assessment of the credibility of the complainant's own information to the Ambassador the same day.

12.17 The State party observes that there was no new information from the complainant regarding ill-treatment during the following year and the view that the information submitted during the embassy's first visit had been incorrect gradually gained in strength. It was essential that the embassy's opportunities to carry out the monitoring on a regular basis were not hampered, which could have been the result if the State party had forwarded unconfirmed or incorrect information to the Committee already during the first months of 2002. Considering the situation in April 2002 when the contents of a letter by the complainant's mother became known, it was therefore, on

balance, not deemed appropriate to supplement, at that time, the information already submitted by the State party regarding the embassy's first visit in its observations of 8 March 2002.

12.18 A different assessment was made by the State party when the complainant, on 5 March 2003, repeated his complaints about ill-treatment at the hands of the Egyptian authorities during the initial stages of his detention. The allegations were much more serious this time and included claims that he had been subjected to torture involving the use of electricity. The mere fact that the complainant came back more than a year later to what had allegedly occurred already at the beginning of the detention period contributed to the fact that a different assessment was made in March 2003. The allegations of torture were therefore immediately raised with representatives of the relevant Egyptian authorities, who refuted them categorically. The State party accounted for the information submitted by the complainant, and the Egyptian authorities' reactions to it, in its submissions to the Committee of 26 March 2003. It should be reiterated that the information in issue was considerably more serious than that provided by the complainant a year earlier and that it concerned the same time period.

12.19 The State party further contends that by March 2003 the reasons for confidentiality were not as weighty as before. Even if the information from the embassy's tenth visit on 5 March 2003 would have ended up in the public domain despite the fact that the proceedings before the Committee were confidential according to the applicable provisions in the Convention and the Committee's own rules of procedure, the damaging effects were no longer considered to be as serious as before. Following the State party's initial submissions to the Committee, information had already been in circulation that - if correct - amounted to a breach on the part of Egypt of the diplomatic assurances. Moreover, the issue of torture had already been raised with the Egyptian authorities in March 2003. Furthermore, the monitoring carried out by the embassy had been going on for more than a year by that time and had become routine for both the Egyptian authorities, the embassy and the complainant himself. It was thus no longer likely that there would be a negative impact on the monitoring so that it would be more difficult in the future to ensure the continued effectiveness of the assurances. The State party also stresses that the allegations made by the complainant during the first embassy visit did not amount, in its view, to torture within the meaning of the Convention. It is, however, clear that the ill-treatment complained of at that time would have amounted to inhuman and maybe also cruel treatment, had the allegations been substantiated.

12.20 The State party refers the Committee to the recent decision of the Grand Chamber of the European Court on Human Rights, on 4 February 2005, in the case of Mamatkulov et al. v. Turkey. This case concerned the applicants' extradition in March 1999 to Uzbekistan under a bilateral treaty with Turkey. Both applicants had been suspected of homicide, causing injuries to others by the explosion of a bomb in Uzbekistan and an attempted terrorist attack on the President of Uzbekistan. Following their extradition, they were found guilty of various offences and sentenced to twenty and eleven years' imprisonment respectively.

12.21 Before the European Court, the applicants claimed that Turkey had violated *inter alia* article 3 of the European Convention. In defence, Turkey invoked assurances concerning the two applicants given by the Uzbek authorities. According to those assurances, which were provided by the public prosecutor of the Republic of Uzbekistan, the applicants would not be subjected to acts of torture or sentenced to capital punishment. The assurances also contained the information that Uzbekistan was a party to the Convention against Torture and accepted and reaffirmed its obligation to comply with the requirements of the provisions of the Convention "as regards both Turkey and the international community as a whole". Officials from the Turkish embassy in Tashkent had visited the applicants in their respective places of detention in October 2001. They

were reportedly in good health and had not complained about their prison conditions. Turkey also invoked medical certificates drawn up by military doctors in the prisons where the applicants were held.

12.22 The State party observes that the European Court assessed the existence of the risk primarily with reference to those facts which were known or ought to have been known to the State party at the time of the extradition, with information coming to light subsequent to the extradition potentially being of value in confirming or refuting the appreciation that had been made by the State party of the well-foundedness or otherwise of a complainant's fears. The Court concluded that it had to assess Turkey's responsibility under article 3 by reference to the situation that obtained on the date of the applicants' extradition, i.e. on 27 March 1999. While taking note of reports of international human-rights organisations denouncing an administrative practice of torture and other forms of ill-treatment of political dissidents and the Uzbek regime's repressive policy towards such dissidents, the Court furthermore stated that, although those findings described the general situation in Uzbekistan, they did not support the specific allegations made by the applicants in the case and required corroboration by other evidence. Against the background of the assurances obtained by Turkey and the medical reports from the doctors in the Uzbek prisons in which the applicants were held, the Court found that it was not able to conclude that substantial grounds existed at the relevant date for believing that the applicants faced a real risk of treatment proscribed by article 3 of the European Convention.

12.23 The State party invites the Committee to adopt the same approach. It points out that assurances similar to those in the case before the European Court were indeed obtained by the Swedish Government in the instant case. Although the guarantees given in this case did not refer to Egypt's obligations under the Convention against Torture, this is of no particular consequence since Egypt, like Uzbekistan, is in fact bound by the Convention. It is doubtful whether the value of assurances should be considered to be increased simply because they include a reference to a state's human rights obligations. The important factor must be that the State in issue has actually undertaken to abide by the provisions of a human rights convention by becoming party to it. The fact that Egypt was a party to the Convention against Torture was known to the State party when it obtained the diplomatic assurances in this case and subsequently decided to expel the complainant.

12.24 The State party goes on to argue that the assurances obtained in the present case must be regarded as carrying even more weight than those in the case against Turkey since they were issued by the person in charge of the Egyptian security service. It is difficult to conceive of a person better placed in Egypt to ensure that the diplomatic guarantees would actually have the intended effect, namely to protect the complainant against treatment in breach of Sweden's obligations under several human-rights instruments.

12.25 The State party acknowledges that no medical certificates have been invoked in the present case. However, the medical certificates obtained in the Turkish case had been issued by Uzbek military doctors working in the prisons where the applicants in that case were detained. In the State party's view, such certificates are of limited value in view of the fact that they had not been issued by experts who could be perceived as truly independent in relation to the relevant state authorities. Moreover, in the current case, the absence of corresponding medical certificates must reasonably be compensated by the monitoring mechanism put in place by the Swedish Government. To this date, almost thirty visits to the complainant in detention have been made by its embassy in Cairo. The visits have taken place over a period of time that amounts to over three years. This should be compared to the single visit by two officials from the Turkish

embassy in Tashkent more than two and a half years after the extradition of the applicants in the case examined by the European Court.

12.26 By letter of 7 April 2005, counsel for the complainant made further submissions. As to his medical care, counsel argues that treatment following the complainant's surgery in August 2004 was interrupted prior to full recovery, and he was denied medical treatment in the form of micro-electric stimulation that he required.

12.27 Counsel observes that in December 2004 and January 2005, the expulsion of the complainant and a companion case was debated in the Swedish parliament and media. The Prime Minister and the Minister of Immigration stated that the expellees were terrorists and their removal was necessary to prevent further attacks and deny safe haven. According to counsel, these statements were presented to the complainant by Egyptian officials during an interrogation. For counsel, this demonstrates that the Egyptian security services are still interrogating the complainant and seeking to extract information, exposing him to ongoing risk of torture.

12.28 Counsel provides the conclusions (in Swedish with official English summary) dated 22 March 2005 of the investigations of the Parliamentary Ombudsman into the circumstances of deportation from Sweden to Cairo, with an emphasis on the treatment of the expellees at Bromma Airport. According to the Ombudsman's summary, a few days prior to 18 December 2001 the Central Intelligence Agency offered the Swedish Security Police the use of an aircraft for direct expulsion to Egypt. The Security Police, after apparently informing the Minister of Foreign Affairs, accepted. At mid-day December 18, the Security Police was informed that American security personnel would be onboard the aircraft and they wished to perform a security check on the expellees. It was arranged for the check to be conducted in a police station at Bromma airport in Stockholm.

12.29 Immediately after the Government's decision in the afternoon of December 18, the expellees were apprehended by Swedish police and subsequently transported to Bromma airport. The American aircraft landed shortly before 9.00 p.m. A number of American security personnel, wearing masks, conducted the security check, which consisted of at least the following elements. The expellees had their clothes cut up and removed with a pair of scissors, their bodies were searched, their hands and feet were fettered, they were dressed in overalls and their heads were covered with loosely fitted hoods. Finally, they were taken, with bare feet, to the airplane where they were strapped to mattresses. They were kept in this position during the entire flight to Egypt. It had been alleged that the expellees were also given a sedative per rectum, which the Ombudsman was unable to substantiate during the investigation. The Ombudsman found that the Security Police had remained passive throughout the procedure. The Ombudsman considered that, given that the American offer was received only three months after the events of 11 September 2001, the Security Police could have been expected to inquire whether the American offer involved any special arrangements with regard to security. No such inquiry was made, not even when the Security Police had been informed of the fact that American security personnel would be present and wished to perform a security check. When the actual content of the security check became obvious as it was performed at Bromma airport, the attending Swedish police personnel remained passive.

12.30 In the Ombudsman's view, the investigation disclosed that the Swedish Security Police lost control of the situation at the airport and during the transport to Egypt. The American security personnel took charge and were allowed to perform the security check on their own. Such total surrender of power to exercise public authority on Swedish territory was, according to the Ombudsman, clearly contrary to Swedish law. In addition, at least some of the coercive measures taken during the security check were not in

conformity with Swedish law. Moreover, the treatment of the expellees, taken as a whole, must be considered to have been inhuman and thus unacceptable and may amount to degrading treatment within the meaning of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Ombudsman emphasized that the inhuman treatment to which the expellees were subjected could not be tolerated. The Security Police should have decided to discontinue the expulsion proceedings and deserved severe criticism for its handling of the case.

12.31 Counsel observes that the Ombudsman declined to bring charges against any individuals, as it was not possible to hold any individual to account before a court. Counsel contends that, at least, the prolonged hooding amounted to torture, and that what occurred on the aircraft could also be formally imputed to Sweden. Counsel argues that in the prevailing atmosphere the State party ought to have been sceptical of American motives in offering to transport the expellees to Egypt and been reluctant to accept the Egyptian guarantees provided.

12.32 By letter of 12 April 2005, the State party also provided the summary of the Ombudsman's report, as "background information in full understanding that the execution of the Government's decision to expel the complainant from Sweden is not part of the case now pending before the Committee, which deals with the issue of the diplomatic assurances by Egypt with regard to the complainant."

12.33 By letter of 21 April 2005, counsel for the complainant submitted final remarks. He criticizes the modalities of the State party's most recent visits on the same basis as the earlier visits. As to medical care, the complainant has been re-examined twice at the facility that performed the 2004 surgery and may require further surgery. Concerning the proposed international investigation, counsel argues that the only reason for Egypt's refusal to co-operate lies in its breach of the guarantees provided.

12.34 Counsel rejects the State party's reasons for concealing part of the initial Ambassadorial report from the Committee, arguing that they can only be relevant to protect the complainant from Egyptian reprisals concerning his outspokenness as to the torture suffered. The complainant's statement was made in the presence of the prison warden and other officials, and the Ambassador raised the issue with the Ministry of Foreign Affairs. In any event, having already endured reprisals, there was nothing left for the State party to protect against in withholding information. Mistreatment of the author was already in the public domain through the complainant's mother and Amnesty International shortly after January 2002. Counsel argues that the State party's position also reflects "weak confidence" in the integrity of the Egyptian guarantees. Counsel also questions how national security could be affected by public knowledge of the complainant's allegations. In sum, the only plausible reason to conceal the information was to avoid inconvenience and embarrassment on the part of the State party.

12.35 Concerning his transmittal of information supplied in the context of the article 22 process to non-governmental organisations, counsel argues that at the time he saw no obstacle to doing so, neither the Convention nor the Committee's Rules proscribing, in his view, such a course. He did not intend to disseminate the information to the media or the broader public. Following the Committee's advice that complaint information was confidential, counsel argues his capacity to defend the complainant was significantly reduced, particularly given the disparity of resources available to the State party. In any event, the State party has shared other confidential intelligence information with the Committee, belaying its concerns that sensitive information would be inappropriately disseminated. Counsel argues that the conduct described is, contrary to the Ambassador's characterisation, torture as understood by the Committee, bearing in mind that the complainant may have been reluctant to disclose the totality of circumstances to

the Ambassador and that more severe elements emerged through the testimony of his mother.

12.36 With respect to the European Court's decision in Mamatkulov et al., counsel seeks to distinguish the instant case. He emphasises however that in both cases the speed with which the removal was undertaken denied an effective exercise of a complaint mechanism, a circumstances that for the European Court disclosed a violation of article 34 of the European Convention. In counsel's view, the Mamatkulov Court was unable to find a violation of article 3 of the European Convention as, in contrast to the present case, there was insufficient evidence before the Court. A further distinction is that the treatment at the point of expulsion clearly pointed, in the current case, to the future risk of torture. Given the prophylactic purpose of article 3, it cannot be correct that an expelling State simply transfers, through the vehicle of diplomatic assurances, responsibility for an expellee's condition to the receiving State.

12.37 Finally, counsel supplies to the Committee a report, dated 15 April 2005, by Human Rights Watch, entitled "Still at Risk : Diplomatic Assurances no Safeguard against Torture", surveying the contemporary case law and experiences of diplomatic assurances and concluding that the latter are not effective instruments of risk mitigation in an article 3 context. Concerning the current case, Human Rights Watch argues that "there is credible, and in some instances overwhelming, evidence that the assurances were breached" (at 59).

Issues and Proceedings before the Committee

Consideration of the merits

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. **(18)**

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. 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 particular person was in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned was personally at risk. Similarly, the absence

of a consistent pattern of gross violations of human rights does not mean that a person could not be considered to be in danger of being subjected to torture in his or her specific circumstances.

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. **(19)** 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, **(20)** 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 below); 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 goes to 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 been some years after the complainants, raised issues differing from to 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, **(21)** while in other cases

the Committee has interpreted a substantive provision to contain within it a remedy for its breach. **(22)** In the Committee's view, in order to reinforce the protection of the norm in question and understanding the Convention consistently, the prohibition on refoulement contained in article 3 should be interpreted the same way to encompass 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. **(23)**

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, due 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 emphasise 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 article 3's requirements 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 does not meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention.

Frustration of right under article 22 to exercise 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 included 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 co-operate fully with the Committee

13.10 Having addressed the merits of the complaint, the Committee must address the failure of the State party to co-operate 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 co-operate 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, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, decides that the facts before it constitute breaches by the State party of articles 3 and 22 of the Convention.

15. In pursuance of rule 112, paragraph 5, of its rules of procedure, the Committee requests the State party to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in response to the Views expressed above. The State party is also under an obligation to prevent similar violations in the future.

[Adopted in English, French, Russian and Spanish, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]

* The text of a separate opinion, dissenting in part, by Committee member Mr. Alexander Yakovlev is appended to the present document.

Separate Opinion of Committee Member Mr. Alexander Yakovlev

(dissenting, in part)

I respectfully disagree with the majority's finding on the article 3 issues. The Committee establishes, correctly, the time of removal as the key point in time for its assessment of the appropriateness, from the perspective of article, of the complaint's removal. As is apparent from the Committee's decision, the bulk of the information before it relates to events transpiring after expulsion, which can have little relevance to the situation at the time of expulsion.

It is clear that the State party was aware of its obligations under article 3 of the Convention, including the prohibition on refoulement. Precisely as a result, it sought assurances from the Egyptian government, at a senior level, as to the complainant's

proper treatment. No less an authority than the former Special Rapporteur of the Commission on Human Rights on Torture, Mr. van Boven, accepted in his 2002 report to the Commission on Human Rights the use of such assurances in certain circumstances, urging States to procure "an unequivocal guarantee ... that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return" . This, which is precisely what the State party did, is now faulted by the Committee. At the time, the State party was entitled to accept the assurances provided, and indeed since has invested considerable effort in following-up the situation in Egypt. Whatever the situation may be if the situation were to repeat itself today is a question that need not presently be answered. It is abundantly clear however at the time that the State party expelled the complainant, it acted in good faith and consistent with the requirements of article 3 of the Convention. I would thus come to the conclusion, in the instant case, that the complainant's expulsion did not constitute a violation of article 3 of the Convention.

[signed] Alexander Yakovlev

[Adopted in English, French, Russian and Spanish, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]

Notes

1. 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.
2. 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.
3. Judgment of 15 November 1996.
4. Rule 107(f) provides: "With a view to reaching a decision on the admissibility of a complaint, the Committee, its Working Group or a rapporteur designated under rules 98 or 106, paragraph 3, shall ascertain: ... (f) That the time elapsed since the exhaustion of domestic remedies is not so unreasonably prolonged as to render consideration of the claims unduly difficult by the Committee or the State party."
5. Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden, Case No 199/2002, Decision adopted on 17 November 2003.
6. Ibid.
7. Rule 107(b) provides: "With a view to reaching a decision on the admissibility of a complaint, the Committee, its Working Group or a rapporteur designated under rules 98 or 106, paragraph 3, shall ascertain: ... (b) That the complaint is not an abuse of the Committee's process or manifestly unfounded."
8. A/57/173, 2 July 2002.

9. These took place on 23 January, 7 March, 14 April, 27 May, 24 June, 22 July, 9 September and 4 November 2002, as well as 19 January, 5 March, 9 April, 14 May, 9 June, 29 July, 25 August, 30 September and 17 November 2003.

10. Ibid.

11. Ibid.

12. Human Rights Watch: "Empty Promises : Diplomatic Assurances No Safeguard against Torture", April 2004, Vol.16 No. 4(D).

13. Counsel has supplied a transcript of the programme.

14. Counsel supplies a public statement by Amnesty International, dated 28 May 2004, entitled "Sweden : Concerns over the treatment of deported Egyptians" calling for an "international, wide-ranging, independent and impartial investigation " (EUR 42/001/2004), and, to similar effect, a statement by Human Rights Watch, dated 27 May 2004, entitled "Sweden : Torture Inquiry Must Be Under U.N. Auspices".

15. Counsel cites in support a public statement by Human Rights Watch, dated 4 May 2004, entitled "Sweden/Egypt: Suspected Militant's Unfair Trial and Torture Claims Implicate Sweden".

16. Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to Sweden (21-23 April 2003), CommDH(2004)13, stating, at paragraph 19: "The second point relates to the use of diplomatic assurances regarding the treatment of deported aliens in the countries to which they are returned. This example, which is not unique to Sweden, clearly illustrates the risks of relying on diplomatic assurances. The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture and ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains. As the UN Special Rapporteur on Torture has noted, such assurances must be unequivocal and a system to monitor such assurances must be in place. When assessing the reliability of diplomatic assurances, an essential criteria must be that the receiving state does not practice or condone torture or ill-treatment, and that it exercises effective control over the acts of non-state agents. In all other circumstances it is highly questionable whether assurances can be regarded as providing indisputable safeguards against torture and ill-treatment."

17. Op.cit.

18. Security Council Resolution 1566 (2004), at preambular paragraphs 3 and 6, Resolution 1456 (2003) at paragraph 6, and Resolution 1373 (2001) at paragraph 3(f).

19. See, among other sources, the Report of the Committee against Torture to the General Assembly (A/51/44), at paragraphs 180 to 222 and the Committee's Conclusions and Recommendations on the fourth periodic report of Egypt (CAT/C/CR/29/4, 23 December 2002).

20. Op.cit.

21. See articles 12 to 14 in relation to an allegation of torture.

22. See Dzemajl v. Yugoslavia, Case No 161/2000, Decision adopted on 21 November 2002, at paragraph 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."

23. Arkauz Arana v. France, Case No. 63/1997, Decision adopted on 9 November 1999, at paragraphs 11.5 and 12.