

UPR-submission from Civil Rights Defenders, (formerly The Swedish Helsinki Committee for Human Rights)

Executive summary:

During the last few years, in the aftermath of September 11, a number of new pieces of legislation have been adopted in Sweden that is troublesome from a Human Rights perspective. Even though there are serious attempts to improve legal certainty and abuse of power when new laws are being introduced, there is a constant lack of diligent investigations on the need for, and effectiveness of new measures and the impact they have on human rights. Safe-guards are often introduced with a copy-past approach and not on scientific proof. This concerns in particular a range of new pieces of legislation on secret surveillance. Other pieces of new legislation seemingly improve the legal rights of the individual, but have in reality proven to be insufficient to avoid violations of e.g. the refoulement prohibition. This concerns in particular the new procedures in so called security cases.

During the same period, a lack of legal activity is also problematic from a Human Rights perspective. There is still no definition of torture in the Swedish Penal Code and the crimes of the Rome Statute are still not implemented. This is not only unsatisfying but also somewhat embarrassing for a state such as Sweden with an officially high concern for the respect of Human Rights world wide.

The torture prohibition and the implementation of the Rome Statute.

1. Despite being a member of the CAT, as well as the ICCPR and, of course the European Convention on the protection of Human Rights and Fundamental Freedoms, Sweden has not yet specifically criminalized torture. And although being a strong supporter of the International Criminal Court, Sweden has also not so far implemented the Statute of the court, in particular the list of crimes.

2. Swedish legislation concerning international crimes is incomprehensive, a bit hard to grasp and difficult to apply. It does not fully respect the different commitments Sweden has made in the area and are thus in urgent need of amendment. Today a crime such as torture will be investigated as an e.g. assault and crimes against humanity as an undefined “international crime”. The lack of a criminal definition of torture makes it perfectly impossible to detect, punish and, not least, understand the crime of torture and cruel, inhuman and degrading punishment. Accordingly there is thus currently no data on the use of torture or internationally prohibited treatment in Sweden.

3. The Genocide convention is only partly implemented through the Law on punishment for Genocide (1964:169). Where war crimes are concerned it can be questioned if the Swedish laws covers all acts and participations of such crimes, in particular regarding commander’s responsibility and exclusion of criminal responsibility due to superior orders. Swedish law is in these two circumstances in contradiction with international law. If an international crime

has been committed outside Sweden, it is generally the case that the government needs to give its approval before the case goes to court.

4. In 2002 a Commission of Inquiry presented a submission for new legislation. The investigator, a High Court Judge, suggested, among other things, new regulations specifically criminalizing genocide, crimes against humanity and war crimes. He also suggested that Swedish Courts should have universal jurisdiction over the ICC-crimes. Of course it also meant that current rules on immunity would have to be repealed and that the statute of limitation for serious crimes needed to be withdrawn.

5. But the suggestions have not been followed through with any bills. According to the minister of Justice, the matter is being dealt with within the ministry, but at the same time she has publicly announced that she believes the current laws to be sufficient. Memos from the ministry also emphasize the fact that the Rome Statute does not demand that states implement the crimes in the statute.

6. It is true that the Rome Statute does not directly demand that states introduce the ICC-crimes in their penal codes. But indirectly it is a necessary requirement in order for the treaty to receive full effect and reach its goals; that is to end impunity and never let serious human rights crimes go unpunished. One of the most important features of the Statute is the rule on complementarity, which gives all member states a possibility and a right under certain circumstances, to try their own citizens.

Civil Rights Defenders urgently recommend the Government of Sweden to implement the main crimes of the Rome Statute. We also recommend the government to introduce the crime of torture as developed through international law, into Swedish legislation.

Civil Rights Defenders is also concerned that current regulations on approval from the government for indictments of international crimes, inhibits the fight against impunity and recommends the government to give the Prosecutor General the right to independently decide on such matters.

Secrecy Clauses and Security Cases¹

7. Over the years there has been continuous criticism from both national NGO:s and international bodies about the procedures in so called security cases where the government is the decision making body. In the new Aliens Act from 2006, the procedures for so called security cases was altered. The Migration Board is now introduced as a mandatory first instance but its decision can be appealed only to the Government.

9. If a decision by the Board is appealed the Board should immediately ask the Supreme Migration Court for an assessment of the case. The Court is in particular asked to examine if there is a risk that the individual will be subjected to torture, the death penalty and other serious violations if returned. The Supreme Migration Court will hand over its assessment to the Government. Only in situations where there is an absolute prohibition to expel the

¹ A longer version on the respect for the refoulement prohibition can be found in the Shadow Report the CAT from Civil Rights Defenders, formerly the Swedish Helsinki Committee for human Rights, dated April 2008.

individual, the Government is forced to respect the judgment by the court. Other assessments are only considered to be recommendations.

10. According to the preparatory work of the Act it was taken for granted that the Supreme Migration Court should take consideration to all the circumstances of the case. This could include matters concerning evidence, reliability of sources or an evaluation of information that ties the asylum seeker to a particular piece of evidence or event. It was however not necessary according to the legislators that an obligation to make a comprehensive evaluation was included in the text of the law.

11. The security police (SÄPO) are without doubt the strongest actor in a security case. According to the law SÄPO defines and identifies a security risk. SÄPO can thus decide what procedure should be used. According to the new Aliens Act, SÄPO can also appeal a decision from the Migration Board. SÄPO is also allowed to be counterpart to the asylum seeker before the Supreme Migration Court and the Government. At the same time SÄPO is in control of evidence and information concerning the asylum seeker that can be used against him without having been communicated. This strongly affects the rights of the individual to provide argument against an expulsion and/or to evaluate the risk of torture if returned.

12. Even though the preparatory work states that one of the tasks of the Supreme Migration Court is to assess evidence that is used against a security labeled individual, it is unclear if the Migration Board or the Courts at all question the information given by the Security Police. Security Cases are still heavily surrounded by secrecy clauses and judgments or decisions do not generally reveal if and how the bodies have questioned or examined the information from the Security Police. Neither is it clear if the decision-making bodies have examined with enough diligence if the information really should be classified or not.

13. If information classified as secret by the security police out of national security interest, is revealed in part to the individual and or the counsel, communication is often surrounded by strict rules on non-disclosure. Interviews with counsels and clients who have been “gagged” show that the information they are forbidden to reveal – with the risk of being prosecuted – sometimes concerns matters that are already in the public domain, information that the client has already revealed as it is part of his or her claim for asylum and even – sometimes – purely legal information, such as references to the law or preparatory work of a law. Restrictions will always place the applicant in a weaker position than the party representing the state, in particular since it makes consultations with external experts such as human rights organizations impossible.

14. According to the new Aliens Act, a decision by the Supreme Migration Court can never be appealed against. Not even non-disclosure of information. The only way for the applicant and his/her counsel to appeal a decision not to reveal information is through the Freedom of Information Act, referring to the right to public documents.

15. The Government has recently suggested that security cases henceforth should be classified in two different groups, “normal” security cases and cases of larger concern. In normal cases, if

there ever will be any, the procedures will be the same as in regular asylum cases. High risk cases will still be decided by the Government upon appeal.

Civil Rights Defenders recommend the Government to consider and suggest changes in the Aliens Act concerning appeals against decisions from the Supreme Migration Court on classified information.

Right to private life

16. In January 2008 two new pieces of legislation entered into force in Sweden, giving the crime fighting authorities an extended right to secretly monitor individuals. The law on bugging (SFS 2007:078) gave the police and the security police the right to use bugging as a method to investigate already committed crimes, and the law on measures to prevent particularly serious crimes (SFS 2007:979) introduced a right for the authorities to use secret surveillance to thwart criminal behavior before a crime was committed.

17. Both laws were heavily debated outside and inside the parliament before they were enacted. The use of bugging as a crime investigating method had been discussed for many years and a bill was presented already in 2000, but due to heavy criticism the suggested law never reached the Riksdag. Instead, in 2003, the government suggested extended use of already applicable surveillance techniques; telephone tapping, wire monitoring and camera surveillance.

18. As a result of the amended law, the number of situations where secret surveillance was used rose considerably. Telephone tapping, for example was in 2002 used in 533 cases, in 2003 the number was 636 and in 2004 714. The increase continues. Recent figures from the Prosecutor General and State Police Board show that telephone tapping was used in 990 cases in 2008.

19. In 2006 a new bill on bugging, resembling the old one from 2000, was presented. The Law Commission however considered the new bill to lack efficient safe guards against abuse of power. Among other things, it suggested that a right for the individual to be informed of the measures needed to be established.

20. The Law Commission gave very much the same comments on the bill on secret surveillance for preventive a purpose, which also was put forward by the Government in 2006. For many years there has been a demand from the crime fighting authorities to use secret surveillance to avert crimes. The possibility to use e.g. telephone tapping for preventive purposes was however up until 1991 “only” allowed on foreign nationals suspected of planning terrorist acts.

21. The Bill from 2006 would make it possible for the police and security police to use secret surveillance (telephone tapping, wire monitoring and fixed camera surveillance) for certain specific crimes such as sabotage, terrorism, high treason, arson and riot, on all individuals. Not only foreigners.

22. After having been deferred for over a year the new laws were adopted in November 2007. During the postponement some additional safe guards had been added, including a right to be informed of the use of secret surveillance. A new board, the Security and Integrity Board, was established which would oversee all use of regulated secret surveillance through technical devices. The board would also be able to receive complaints and inquiries from the public. However, the right to be informed of secret surveillance does not include measures taken by the security police.

23. The new laws entered into force on January 1 2008. The regulations are initially temporary until December 2010. Already in July 2009 a Commission of Inquiry assigned to evaluate the two new pieces of legislation, delivered its statement. The commission suggests that the law on bugging be prolonged until 2014 and the law on preventive secret surveillance allowed continued use until 2010. At the same time it concludes that the laws have had *no or very little effect*.

24. Where efficiency is concerned, the commission found itself in an awkward position, being ordered to investigate the effectiveness of the laws but with no tools to do so. Even if the government has presented reports on the use of secret surveillance since 1982, there have never been any clear demands from the legislators or the executive powers on what kind of effect it expects the methods to have. There is also a lack of autonomous, scientific investigations of the efficiency of methods of secret surveillance. Despite a number of investigations and inquiries no such independent study has been made. Nor has there been an in depth analysis of the impact on private life caused by secret surveillance.

25. On January 23, 2008, a Parliamentary Committee on Integrity delivered its final statement. One of its main conclusions is that the right to private life (integrity) is not being, and has never been, sufficiently considered when new laws are enacted. There is a need not only for an improved protection of the right in the Instrument of Government (Bill of Rights) but also in many other pieces of legislation. The Committee also pointed out that the right to an effective remedy for human rights violations needs to be protected through legislation.

28. Despite the fact that the Committee was unanimous and consisted of parliamentarians from all political parties in the Riksdag, their suggestions for an improved protection of the right to integrity has not resulted in any new laws or bills.

29. The regulations mentioned above are but two of a range of laws that have been or will be introduced shortly. Many of these laws tend to be presented as temporary to meet a current threat but are prolonged year by year and in effect everlasting. Flaws in the implementation of for example the right to be notified have already been visible, since local prosecutors have different routines and opinions on when and if a notification should be made.

30. Civil Rights Defenders is concerned by the influx of new and amended laws on secret surveillance in Sweden in particular since the effect on private life, freedom of expression, right to a fair trial and freedom of opinion has not been investigated properly and thoroughly enough.

We recommend the government of Sweden to take the conclusions of the Committee on integrity into consideration and suggest legislative changes to improve the protection of the right to private life.

We recommend the government to initiate an independent investigation in order to examine the effectiveness of the different surveillance methods used.

We recommend the government not to enact or prolong new laws on secret surveillance until the impact on personal integrity and the effectiveness of the methods used have been scientifically investigated.