THE WAR ON TERROR AND THE INSTITUTION OF HUMAN RIGHTS – CAN THE TWO BE COMBINED?

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You had to live – did live, from habit that became instinct – in the assumption that every sound was overheard, and except in darkness, every movement scrutinized.

From George Orwell’s “1984”

Introduction

The threat posed by terrorism to democratic society and its citizens has been extensively researched and forms a reoccurring topic in government and NGO reports, as well as in academic works. Due to extensive coverage in the media, it is also well-known to the common man. Through live transmissions, people have been able to follow the atrocities of 9/11, as well as the bombings on Bali and the killings that took place in Madrid and London. Images of children crying for their dead parents, and parents for their deceased children have been etched into the minds of the public.

People increasingly fear new terrorist acts, which the governments in turn have sworn to keep at bay. But the fight against terrorism carries a heavy price. In the name of the war on terror, some of our basic human rights are being violated; our freedom and integrity are being diminished. Paradoxically, these represent the very values that al-Qaeda is trying to eradicate.

Respect for the institution of human rights was not easily won, but it could be very easily lost. Already in the 1720s, authors of the Cato letters warned us: “It is the Nature of Power to be ever encroaching, and concerting every extraordinary Power, granted at particular Times, and upon particular Occasions, into an ordinary Power, to be used at all Times, and where there is no Occasion/…/”¹

A discussion of this problem is not the same as the encouragement of states to stop their fight on terrorism. Rather, it highlights certain values which make our society distinct from the one envisaged by al-Qaeda and its followers. The discussion shows how important and unique these values are and that they deserve our protection. Unfortunately, this side of the war on terror is much less discussed than the one

pertaining to the threats that are posed by terrorism. “The public and academic scrutiny of national regulatory activity for the protection of privacy is also lacking – both concerning policy formulation and enforcement.” The above mentioned development is regrettable for various reasons.

Not only would extensive studies in this area point to potential human rights violations and how these can be avoided. They would also add to the field in general, and would potentially facilitate the creation of more effective tools against terrorism. This unwillingness to discuss the negative side effects to the war on terror constitutes, to say the least, a paradox, since one of the main threats posed by overly intrusive legislation is a diminished respect for the rule of law and the freedom of the individual. This, in turn, is what the terrorists are striving for.

The concept of terrorism

Before proceeding to a discussion on terrorism, and the measures undertaken to counter it, we must define the term and its scope. This, however, presents somewhat of a problem, since multiple definitions exist. Nevertheless, attempts have been made to compartmentalize the crime. For example, scholars distinguish between domestic and international terrorism. This distinction, however, does not mirror reality. In the majority of cases some degree of interstate movement, whether of terrorists, money or weapons, undeniably takes place.

Another important category is made up of so called state-sponsored terrorism. States that use terrorism as a means of suppressing national opposition, often utilize it against other states as well. The Taliban regime constitutes an illustrative example. While oppressive towards the Afghan populace, the regime was also exporting its terror abroad.

There are also different forms of so called factional terrorism. Purposes of this form of terrorism are many, as are the actors that are carrying it out. Examples within this

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category range from ideological terrorists to extreme nationalists. The latter include groups such as the ETA in Spain and the Tamil Tigers in Sri Lanka. Other scholars have chosen to conceptualize terrorism within different contexts, such as crime, religion, warfare, politics and propaganda, which often overlap each other. These contexts, however, can also be viewed as a form of factional terrorism.

Professor of international relations and chairman of the Advisory Board of the Centre for the Study of Terrorism and Political Violence at the University of St Andrews, Paul Wilkinson, offers a brief, but in my opinion useful, definition. He defines terrorism as “the systematic use of murder, injury and destruction or threat of same to create a climate of terror, to publicize a cause and to intimidate a wider target into conceding to the terrorists’ aims.”

The European Union (EU) has its own definition of terrorism, which is expressed in a framework decision. Framework decisions, though binding on the Member States as to the intended results, can be interpreted freely as to the methods needed to achieve the results. Consequently, it is up to the Member States to decide the ways in which the framework decision is to be implemented in national legislation. This, in turn, results in a myriad of differing legal frameworks for interpreting and consequently dealing with terrorism. This study will address this issue by comparing relevant British and Swedish laws.

One of the pivotal questions is whether terrorism has changed during the last decade or two. If one looks at terrorism and its involvement in armed conflicts, such as civil wars, from historical perspective it becomes clear that it has always constituted an omnipresent threat. From state regimes to guerilla warriors, terror has been used to further own agendas and suppress dissent. The human behavior is furthermore such that there will always be conflicts, be it between individuals, among states, or between individuals and states. Even if a totalitarian state of Orwell’s “1984” proportions would arise in order to curb terrorism, terror would remain and would be wielded by that very

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It would, indeed, form an integral part of such a society, since the revolutionist human nature, i.e. the free will, would have to be chained by the state.

If terror, however, is no stranger to man, what is it that makes the al-Qaeda network and similar groups so dangerous? According to Wilkinson “(m)any Europeans are still under the illusion that al-Qaeda is just as any other terrorist group. This assumption is not only misinformed, it is positively dangerous because it grossly underestimates the nature of the threat the al-Qaeda movement poses to international peace and security.”

There are different variables distinguishing the al-Qaeda network from other terrorist organizations. The main differences include the structure of the network, its rigid ideology, and the way it is financed. The network is ruled in a hierarchical manner by, among others, Osama bin Laden; nevertheless it is very fluid and far-reaching. al-Qaeda, which translates as “the base,” is supported by innumerous organizations, small and large. This structure allows for terrorist acts to be carried out all over the globe and then be attributed to the network.

Osama bin Laden and his closest associates are responsible for developing the ideological base, whereas affiliated networks carry out the actual attacks. The uniting factor is the ambition to wage a global holy war, jihad, against the Americans and their allies, especially Israel, or, in the network’s own words, the “crusaders” and the “Zionists”. The aim of the jihad is to clear the Muslim world of American presence and, eventually, to create a pan-Islamist Caliphate. This final goal is non-negotiable, which means that it cannot be altered through diplomatic means.

To al-Qaeda human life in itself is worthless, only when offered to the greater cause does it gain meaning. That is why the organization does not care if its actions harm or kill innocent civilians, even fellow Muslims. On the contrary, those who are not with the network are against it and, thus, deserve to die. This explains why, on numerous occasions, bin Laden has called for his followers to inflict damage on innocent civilians whenever opportunity presents itself.

A significant part of the global war on terrorism is aimed at cutting off terrorist funding. In order to circumvent these measures, the terrorist networks are exploring new

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7 Ibid., p. 13.
ground. They are increasingly either creating alliances with criminal organizations or transforming into criminal-terror entities.\(^8\) According to experts, transnational organized crime and international terrorism share many operational and organizational traits.\(^9\)

But al-Qaeda also operates by abusing legal organizations, such as the hawala banking system and charitable organizations of diaspora communities.\(^10\) Hawala translates as remittance, and means that money is transferred from one party to another in an informal manner, i.e. without the use of formal financial intermediaries. The benefits of hawala include faster transactions, better exchange rates and, as far as al-Qaeda is concerned, no paper trails.\(^11\) Due to the informal nature of the hawala system, it is impossible to tell the exact degree to which it is abused by the al-Qaeda. To date, only two hawala organizations that have been used by the network have been identified, namely the al-Taqwa (Piety) and al-Barakat (Blessings). Several hundreds hawala organizations are presumed to exist all over the globe. Experts estimate the annual hawala transfers at $2 trillion.\(^12\)

Even if the al-Qaeda and its associate networks represent a type of threat that is new, the debates pertaining to the relation between the war on terrorism and the respect for human rights are not. Similar discussions took place in Germany during the Baader-Meinhof era that eventually (1977) led to a government crisis. Members of the organization died in prison, according to some under dubious circumstances. One of the leaders, Ulrike Meinhof, hung herself in her cell, but some argue that her death was not self-inflicted.

What makes the situation in Germany during the 1970s different from the one in today’s Sweden is, apart from the obviously different threat level, the fact that the German constitution contains a true division of powers. This, in short, means that the executive, legislative and judiciary branches of the state constitute separate entities. This in turn implies that actions of the legislative branch are supervised by the judiciary

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\(^10\) Ibid., p. 130.


\(^12\) Ibid.
branch, for instance through a constitutional court. In the 1970s’ Germany, as still today, the constitutional court was able to review and abolish legislative acts that were viewed as infringing on individuals’ human rights. Swedish courts of the 21st century, however, lack this ability.

Purpose and outline of the paper

The aim of this paper is to discuss the relation between the war on terrorism and the institution of human rights. The hypothesis is that an overly vigorous fight on terror will risk violating human rights. The paper will present three areas where such violations have already occurred or risk occurring, namely the issues of extradition of refugees suspected of having committed terrorist acts, targeted sanctions, certain aspects of antiterrorism legislation, as well as surveillance and other types of intrusive measures. The study will take its point of departure in the Swedish context, but will contain references to both relevant British legislation and international law, where this is useful for a comprehensive analysis. The sources include research from prominent scholars and reports stemming from NGOs, as well as writings originating from various state actors and the media.

The paper will be divided into five parts. The first part will deal with Swedish, and to a lesser degree British, antiterrorism legislation in the light of pertinent EU acts. This part will also touch upon the role of the Union in the fight against terrorism, notably its counterterrorism policies. The paper will then proceed to outline how the antiterrorism framework decision was implemented in Sweden, referring to the criticism in this respect put forth by important actors.

Part two will analyze recent legislative efforts, including both recently adopted laws and proposals for new laws, concerning surveillance and other intrusive measures. It will compare Swedish and British legislation and point to possible human rights violations.

Part three will deal with so called targeted sanctions, and their potential implications for individuals’ human rights, especially the right to property. Also this section will take its starting point in a true case involving a Swedish man of Somali origin, who’s assets had been frozen for five years due to his involvement in the hawala banking system, and
who just recently has been taken off the US and UN blacklists without no explanation as to why he was placed there in the first place. This part will, furthermore, include a more philosophical discussion on property rights as basic human rights, especially in the light of the ruling of the European Court of First Instance, where they were not afforded status of *jus cogens*.\footnote{For an explanation of the term *jus cogens* see p. 29 below.}

Part four will discuss the issue of extradition of refugees suspected of having committed terrorist acts to their countries of origin after diplomatic assurances of the latter. This part will focus on a true case of two Egyptian men who were extradited from Sweden to their native country after diplomatic assurances, and who were later found to have been tortured.

Finally, part five will summarize the findings and present some concluding remarks. The findings indicate that the war on terror may, in the long run, undermine the institution of human rights, especially when the right to property is concerned. This trend has been brought to the public’s attention by several experts. The UN Special Rapporteur against Torture, for instance, voices concerns as to a tendency among the European states to increasingly circumvent the absolute prohibition on torture.\footnote{“Diplomatic Assurances not an Adequate Safeguard for Deportees, UN Special Rapporteur against Torture Warns,” United Nation’s Press Release, 2005-04-23.}

Other experts note the effect that targeted sanctions directed against individuals can have on the latter. The above mentioned case of the Swedish citizen clearly illustrates the impact that such sanctions may have on not just property but almost every aspect of a person’s life. “It is frankly alarming to see the UN Security Council sacrificing essential principles pertaining to fundamental rights in the name of the fight against terrorism. The compilation of so-called black lists of individuals and companies suspected of maintaining connections with organisations considered terrorist and the application of the associated sanctions clearly breach every principle of the fundamental right to a fair trial: no specific charges, no right to be heard, no right of appeal, no established procedure for removing one’s name from the list.”\footnote{“Alleged Secret Detentions and Unlawful Interstate Transfers Involving Council of Europe Member States,” Committee on Legal Affairs and Human Rights Draft Report Part II (Explanatory Memorandum) Council of Europe, 2006-06-07.}
In Sweden, experts have voiced concerns as to newly adopted, as well as recently proposed, laws pertaining to increasingly more intrusive surveillance measures. The need for such measures is questioned from the point of view of proportionality, but also legality.

Some politicians, however, view the above mentioned measures as necessary. Moreover, they increasingly consider human rights of secondary importance as compared to the fight against terrorism.¹⁶

This paper advocates caution, and careful afterthought. After all, the freedoms that citizens and residents of western democracies enjoy today were not easily won, but may be easily lost. Politicians, experts and legislatures should therefore always consider the institution of human rights while engaging in their efforts to fight terror.

This paper was finished before the Swedish parliamentary elections were held on 17 September 2006. By “Swedish government” is thus understood the Social Democratic government of 1998-2006.

Antiterrorism policies and legislation in the EU and Member States

The counterterrorism policy of the European Union first developed in the 1970s. This, in turn, was a result of terrorist activities in late 1960s and early 1970s carried out by organizations such as the Rote Armee Fraktion (Baader-Mainhof).

After 9/11, several political agreements where reached within the EU. Perhaps the most important is the European Arrest Warrant from 2002. This document is based on mutual recognition among the members of the Union of criminal judgements of the courts of the Member States. This, in turn, shows that where there is a political will, even the third pillar decision making process proves surprisingly swift. There are serious doubts, however, as to how these agreements have been implemented at the national level: “Often, decisions adopted at the EU level have not been fully implemented by the

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Member States and there have been cases of different interpretations of agreed measures.”

The Member States are not only said to consider bilateral cooperation as the best instrument, but also to regard the work of Europol with scepticism. Experts claim that the reluctance of the Member States to share information with Europol has on several occasions resulted in Europol’s lacking understanding of current threat levels, as well as their own members’ efforts to curb terrorism, etc: “As a consequence, whilst formally supporting political initiatives at the EU level, they simultaneously participate in informal, practitioner-led networks such as the Police Working Group on Terrorism (PWGT) and the Club of Berne, often at the expense of supporting Europol.”

One of the most important documents within the area of counterterrorism policies is the framework decision on terrorism. The Member States, however, have chosen to implement the decision in differing ways. The Swedish government chose, instead of utilizing existing provisions in the Swedish Criminal Code, to draft a new law, namely the Law on Penalties for Terrorist Acts “lag om straff för terroristbrott”. This decision has been criticised by important actors.

The Council of Legislation (Lagrådet) was of the opinion that the provisions contained in the Swedish Criminal Code would have been sufficient for implementing the framework decision, if complemented by more severe penalties in cases of terrorism. In the opinion of the Council, the wording of the framework decision was misinterpreted, perhaps due to a poor translation into Swedish. The Swedish version of the framework decision reads “offences referred to in points a-i shall be considered terrorist offences according to definitions of criminal acts under national law,” while the English (original) version reads “acts referred to below in points (a) to (i), as defined offences under national law, shall be deemed to be terrorist offences”.

Due to the wording of the Swedish version of the framework decision, the government considered it necessary to create an entirely new law for the acts contained in the decision, since they were said to have been expressed as definitions of “new” criminal offences.

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18 Ibid., p 63.
19 My translation.
The definitions of the new terrorist crimes are, furthermore, said to be very broad, containing subjective as well as objective prerequisites. The Swedish branch of the International Jurist Commission is of the view that the requirements for legal foreseeability, legality, proportionality, necessity and non-discrimination will be difficult to uphold due to the vague wording of the law. The Commission especially highlights the significant differences in penalties contained in the Criminal Code as compared to the antiterrorism law. This, and the vagueness of the antiterrorism law, may result in arbitrary judgments, something that is not acceptable in a Rechtstaat.\(^{20}\)

Not only are the prerequisites of the antiterrorism law, even the objective ones, considered to be very vague, but experts also maintain that little guidance has been given as to how they should be interpreted.\(^{21}\) This, in turn, risks violating the principle of legality.

The Council of Legislation stated that a draft of the framework decision was approved by the government, without the Council being able to review the content. In the government’s proposition that preceded the approval no changes in pertinent national laws were suggested. Instead changes were created at a later stage within the Ministry of Justice, after the framework decision was already approved by the government and thus binding on Sweden. As a result, due process for adaptation of international agreements was circumvented. Questions of approval and possible implementation of international documents in Sweden are usually accompanied by questions of potential changes in national legislation, giving the experts a chance to comment on both.\(^{22}\)

The British antiterrorism law differs a great deal from its Swedish counterpart. The Terrorist Act (hereafter the Act) from 2006 contains all relevant antiterrorism legislation. The law is divided into three parts. Part one, which describes various offences falling under the scope of the Act, is divided into several subsections dealing with questions such as encouragement of terrorism, preparation of terrorist acts and terrorist training, offences involving radioactive devices and material as well as nuclear facilities and sites. There are also provisions on increases of penalties as well as incidental provisions about


\(^{21}\) Lagrådets yttrande, prop. 2002/03:38, p. 148.

\(^{22}\) Ibid., p. 146.
offences, such as the liability of company directors. There is also a section containing references to how part one should be interpreted.

The Act has been viewed as one of Europe’s most intrusive. According to Part 1 Section 1 and 2, for instance, a person commits a criminal offence if s/he publishes a statement which at the time of the publishing is intended by that person to encourage members of the public, directly or indirectly, or otherwise induce them to commit, prepare or instigate acts of terrorism. The same applies if the person does not intend to encourage people to commit such acts, but is nevertheless reckless as to such a risk. According to Section 5, it is irrelevant whether any members of the public are actually encouraged to commit a terrorist act after reading the publication. Penalties for this crime are severe, at most seven years incarceration. From the point of legal foresee-ability, however, the law must be seen as satisfactory.

It thus seems as if European legislation in this area is, in different ways, lacking. While some experts refer to British antiterrorism legislation as severely intrusive, its Swedish counterpart has been criticised for lacking legal foresee-ability, and even legality. Such weaknesses cannot be justifiable in states governed by the rule of law and the principles of the Rechtstaat.

**Surveillance and other intrusive measures**

The British antiterrorist law, as well as its surveillance laws, is often viewed by legal scholars as severely intrusive. The Swedish laws in these areas have, at least until recently, been considered more forgiving, prompting foreign experts to speak of Sweden as a possible place of refuge for terrorists in the making.\(^{23}\) However, the very same experts underline the importance of international cooperation in this area, and attribute Sweden’s alleged status as safe haven for terrorists to its lacking interest in promoting the operative work against terrorism, rather than to its laws. Indeed, when international

\(^{23}\) Speech held by professor of international law Ove Bring at the conference “Terroristbekämpning i Europa – effektivitet i rättsstaten,” 2006-05-02.
operative efforts to curb terrorism are concerned, Sweden struggles with a very bad reputation.24

Perhaps the bad reputation can be partly explained by the constitutional status of Swedish authorities. According to the Swedish constitution, namely Chapter 11 Section 7 of the Instrument of Government (Regeringsformen), Swedish authorities enjoy significant degrees of constitutional independence. Neither the government nor parliament nor any other authority has the right to interfere with the work of an authority performing its duties according to law. Also, the authorities are, as a main rule, not allowed to consult each others’ files. This, in turn, has resulted in a certain degree of skepticism towards national, and even more so international, cooperation.

Still, the question pertaining to Swedish surveillance laws deserves an answer. Are they truly less intrusive than their British counterparts, and, most importantly, are Swedish citizens better protected against state intrusions than the British? In the following, surveillance laws as well as other intrusive measures in Sweden and Great Britain will be compared and analyzed.

In Britain there are different types of surveillance that can be employed by the police, intelligence agencies and public authorities. The kind of measure employed depends on the particulars of the case, and the seriousness of the crime the suspect has allegedly committed or intends to commit. The nature of surveillance implies that most measures are carried out covertly, i.e. without the knowledge of the person under surveillance.

The different surveillance measures range from communication data surveillance to intrusive surveillance. The latter is, due to its invasiveness, employed only to apprehend offenders suspected of very serious crimes. This type of surveillance can only be authorized by a Chief Constable or Secretary of the State. In both cases, the decision to authorize intrusive surveillance is reviewed by a special surveillance commissioner.25 Furthermore, if the police, or other law enforcement agency responsible for concealing the surveillance device, are forced to interfere with property or wireless telegraphy while hiding the device, this too has to be authorized.

24 Ibid.
In short, intrusive surveillance is either carried out by an individual that is present on residential premises, such as a home or a hotel bedroom, or in a private vehicle, or by means of a surveillance device. According to the Annual Report of the Chief Surveillance Commissioner to the Prime Minister and to Scottish Ministers for 2003-2004, there were 447 intrusive surveillance warrants issued during these years.\(^{26}\)

In Sweden, proposals have been made to pass a law concerning a form of intrusive surveillance (buggning). The proposal has been found very controversial by several important actors, among them the Council of Legislation and the Swedish Bar Association, which voiced concerns pertaining to questions such as legal foresee-ability, proportionality and legality. In its original form, the draft law made possible surveillance of not only private homes, but also, inter alia, doctors’ offices. One of the arguments made by Minister of Justice, Thomas Bodström, in favor of this particular provision was that many doctors in Sweden are of foreign origin.\(^{27}\) This provision was subsequently removed from the draft after severe criticism from various actors. The Doctors’ Association (Läkarförbundet) called Bodström’s statement uneducated and prejudiced, adding: “It is remarkable that the Minister of Justice expresses such fear when his own Ministry is responsible for integration.”\(^{28}\) The draft law, however, remains the subject of a heated debate. Its adoption has been delayed by six months due to a minority decision of the parliament, which is one of the few constitutional constraints available under Swedish law.

According to the draft law, intrusive surveillance would mean that individual conversations, or private meetings involving several participants, would be listened to or recorded by a surveillance device. Intrusive surveillance would, as a general rule, only be available in connection with investigations of serious crimes carrying a minimum sentence of four years. However, it would also be possible in connection with other crimes, if it could be assumed that the alleged crime would lead to a prison sentence of more than four years. It goes without saying that this type of surveillance is severely intrusive, and would, if allowed, have significant repercussions on the privacy and integrity of affected individuals. Yet the wording of the proposed law is very vague. One

\(^{26}\) Ibid.
\(^{27}\) “Polisen kan få bugga läkarmottagningar,” DN, 2006-02-10.
might, for instance, ask what crimes fall under the scope of grave offences, and how, and even if, courts would be able to make statements on possible penalties in advance without being able to first review the cases in full. The principle of legal foresee-ability, the very cornerstone of the Rechtstaat, would thus risk being circumvented.

According to the draft law, intrusive surveillance would only be possible at designated places, such as the home of the suspect. Additional criteria would have to be met if homes other than the one of the suspect were to be put under intrusive surveillance. The authorization would only be allowed if of utmost importance for the investigation, and if reasons for it would outweigh the violation of personal integrity. Nonetheless, it would be possible to put a person not suspected of having committed a crime under intrusive surveillance, if that person was, in one way or another, connected to a suspected criminal.

According to the Minister of Justice, legal safeguards would be met as a result of public courts being responsible for authorizing this type of surveillance, and public counselors being appointed to represent the individuals. The latter of course would remain unaware of the charges brought against them, and the fact that a legal counsel had been appointed to them without them being able to choose their defense counsel. Moreover, even if public courts would be appointed as the authorities responsible for authorizing intrusive surveillance, they would still lack the capacity to evaluate intelligence information. The courts would thus to a certain degree be forced to rely on the authorities petitioning for the authorization, in other words on the very same authorities responsible for gathering intelligence. A conflict of interest would thus seem inevitable.

Other important types of surveillance include communications data surveillance and interception. The first type of surveillance does not monitor content, whereas interception does. In Britain, communication data is held by telecommunication companies and Internet service providers and might, with due authorization, be acquired for specified objectives within certain operations. Information that may be acquired includes names, addresses, telephone numbers and the time when these numbers were called, IP-addresses and when a session was started and ended, as well as when an email-server was accessed,

but not the websites viewed. The information may also include data on the geographical location of the calling and called parties.

All decisions authorizing access to communications data must pass a strict necessity test. Surveillance is only approved if found to be in the interest of national security, or if it is employed to detect a crime or prevent disorder, or in the interest of the economic wellbeing of the UK, or in the interest of public safety, or to protect public health, or to assess or collect tax, duties, levies or other monies owned to a government department, or to prevent death, injury or damage to a person’s physical or mental health in case of emergency. Furthermore, if the purpose for which the authorization is sought includes preventing or detecting a crime, or assessing or collecting taxes, additional authorizations are needed. In order to obtain communications traffic data, approval is required from a senior officer in a public authority.

Interception of communications involves a type of surveillance where a communication is intercepted before it reaches its destination. This type of surveillance monitors the content of communications, and includes mobile and stationary telephone calls, postal mail and email. Interception of communications is said to play an important part in Britain’s fight against terrorism. According to the Report of the Interception of Communications Commissioner for 2003, 1983 interception warrants were issued by the Home Secretary and the Secretary of State of Scotland.

Like with data communication surveillance, a necessity test must be met before interception can be authorized. Consequently, interception can only take place when in the interest of national security, or with the purpose of preventing a serious crime, or with the aim of safeguarding the economic wellbeing of the UK. It can only be authorized when the conduct authorized by the warrant is proportionate to what is sought to be achieved by that conduct.

According to the British authorities, surveillance is used only when serious crimes, such as terrorist acts, are concerned. It is utilized in order to gather intelligence, to bring the criminals before justice and, ultimately, to ensure community safety. It is often held that the criminals are quick to exploit new technologies, which often puts them ahead of the law enforcement agencies. Surveillance measures are said to constitute a means of ensuring that the authorities do not lag behind in this struggle.
Balancing the scales

It is of crucial importance that surveillance measures are meticulously registered, since their misuse can have serious repercussions on individuals’ civil rights. In the UK, civil rights are protected by the Regulation of Investigatory Powers Act 2000 (RIPA), and the European Convention on Human Rights, especially Article 8 where the right to respect for the individual’s private and family life, home and correspondence is enshrined. Also, there is the Data Protection Act of 1998, as well as the Covert Surveillance Code of Practice and the Interception of Communications Code of practice.

The laws, furthermore, necessitate the highest level of approval from the relevant authorities. Interception warrants, for instance, require the approval of the Secretary of State, who in turn must be convinced that the warrant is necessary in order to safeguard the interest of the country. Authorizing officers must take into consideration the so called risk of collateral intrusion, namely the probability of obtaining private information about a person other than the one subjected to surveillance. The latter can have the result that surveillance is not authorized. This stands in stark contrast to Sweden, where so called access information (överskottsinformation) about a person other than the subject of surveillance can, under certain circumstances, be used by the authorities.

Moreover, in Britain the interception warrant system is overseen by an independent authority, called the Interception of Communications Commissioner, which ensures that authorized agencies have proper process in place, and have considered the human rights of individuals before the interception takes place. In Sweden, a proposed counterpart has been declared a pro forma agency by several important actors. It has been criticized for lack of constitutional independence by, among others, the Council of Legislation, the Swedish Bar Association, and even the Swedish Security Police (SÄPO), which the provisions if enacted are likely to benefit the most.

Perhaps the most important difference between Britain and Sweden in this respect is the individual’s right to legal remedy. In Britain, an individual that suspects that s/he has been unjustly put under surveillance has the possibility of contacting the Investigatory Power Tribunal, i.e. a special court which deals exclusively with these matters. The

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30 Speech by Anne Ramberg held at the conference “Terroristbekämpning i Europa – effektivitet i rättsstaten,” 2006-05-02.
Investigatory Powers Tribunal hears complaints from members of the public concerning inappropriate interception activities by any of the intelligence services, and in certain circumstances, even the public authorities. It is thus able to receive and decide on individual complaints, something that is inconceivable in Sweden.

While introducing intrusive legislation, Swedish politicians seem to have forgotten about balancing the scales. Intrusive laws are not balanced by adequate legal remedies. Hence, when the British and Swedish laws are discussed and compared the possibility of legal redress for individuals should also be taken into consideration.

The proposal of the investigator appointed by the Swedish government concerning the creation of an organization (referred to as a parliamentary committee) that would supervise the appropriate implementation of surveillance measures is, to say the least, lacking. According to the proposal, the committee would answer to the government and have the possibility of reviewing whether the ways in which surveillance and other preventive measures are applied are in conformity with relevant legislation. Also, it would have competence to suggest to the government that certain legislation might be lacking and should be amended.31

The government would, however, be responsible for appointing the members of the committee as well as its chairman and secretary.32 This has caused General Secretary of the Swedish Bar Association, Anne Ramberg, to question the name parliamentary committee,33 since in reality the committee would have little to do with the parliament. Even agencies in favor of increased surveillance measures, such as the Security Police, have voiced concerns in this respect. The latter authority opposes the idea of the committee as an administrative agency under the government, stressing the importance of constitutional independence for an agency responsible for supervising surveillance measures.34

The lack of possibility of legal remedy and proper review is, indeed, a very serious matter. But it does, unfortunately, not end there.

31 Ds 2005:35 “Hemliga tvångsmedel m.m. under en stärkt parlamentarisk kontroll,” p. 11-13.
32 Ibid.
34 Säkerhetspolisen, Rättssekreteriätet, “Hemliga tvångsmedel m.m. under en stärkt parlamentarisk kontroll (Ds 2005:35)”.
**Nulla poena sine lege**

In 2002, actor Tom Cruise starred in the blockbuster movie “Minority Report”. His character, a criminal investigator, was involved in preventing crime in a crime-free utopian society. A sort of seers were used to foresee crimes that had not yet come to pass and were to be prevented by Cruise’s character from ever happening. The plot, inspired by a story of the science-fiction author Phillip K. Dick, was that the hero eventually realized that the oracles were wrong, when he himself was incriminated. The movie ends by exposing the oracles as mere humans, thus being capable of making mistakes. The morale of the movie is that unless we find a perfect oracle, which undoubtedly will prove an impossible task, it must never be permissible to incriminate innocent people on mere assumptions that perhaps in the future they will commit a crime. At the end of the movie the viewer rests assured, for science fiction does not have anything in common with the real world. Or, so it would seem.

The Swedish government, presumably not in the business of storytelling, has pronounced itself capable of just that, i.e. of predicting the future. A proposal for a new law makes it possible to put a person under surveillance or subject him or her to other intrusive measures, if it can be assumed that s/he might sometime in the future commit a crime.\(^{35}\)

The draft law proposes that surveillance and other intrusive measures, such as house searches, might be utilized in a preemptive fashion, i.e. not due to a suspicion that a specific crime has been committed or an attempt to commit a crime has been made, but because of an assumption that a certain crime *might* be committed in the future. Data communication surveillance, interception, directed video surveillance are all proposed to be carried out, even if no criminal investigation has been initiated due to a suspicion of a specific crime. Hence, regardless of how you choose to frame and defend such a law, the fact remains that we are no longer dealing with facts, but with guesses and prophecies, and that in a field which has an immense impact on individuals and their human rights.

This is, indeed, a new notion for Swedish criminal law. The law would, if passed, introduce a possibility of connecting surveillance measures not to a specific criminal act, but to an individual. According to the proposal, not only would the person that has been

\(^{35}\) Ds 2005:21.
put under surveillance but also people in his or her proximity, be affected by the intrusive measures. Interception, for instance, would be possible not just on the telephone address used by the subject, but also on other addresses s/he might contact. Furthermore, it would be possible to use video surveillance at a location where the person under surveillance may be residing, or where a certain criminal activity either has taken or might take place, and even the surrounding area. Also, there would be a possibility to perform a house search, and to examine and open private correspondence and packages, while performing the search. These measures would amount to gross human rights violations. Moreover, they would be based on assumptions of a possibility of crimes being committed in the future, not on suspicions of crimes that have already been committed. This law is proposed to enter into force on 1 January 2007.

In response to the above mentioned draft the Council of Legislation has stated that the aim of the proposed provisions is not to investigate crime but to stop potential future crimes, and that such a law would consequently imply that a person can become subject to intrusive and integrity violating measures due to assumptions regarding possible actions that have not yet even manifested themselves in the form of attempts to commit or prepare a crime. The prerequisite “can assume” allows for a very extensive interpretation, due to the fact that one is dealing with intentions and hypothetical circumstances.36

Currently a committee is investigating the above mentioned questions, and is expected to present its findings in March 2007. According to the Council of Legislation, one of the crucial questions that the committee should investigate is the possibility of individuals being informed of the fact that they had been put under surveillance or subjected to other intrusive measures. The Council points to violations of the European Convention on Human Rights, which may occur if the above mentioned law is passed.

In the government proposal on the draft law, Article 8 of the ECHR is dealt with in a very summary fashion. According to the ECHR, the right to privacy can be infringed upon if necessary for, for instance, the upholding of public safety. But intrusive measures may only be carried out to the extent allowed in a democratic society, meaning that they must be proportional, necessary and in accord with the principle of legality. One might

ask whether the possibility of subjecting someone who has not yet committed a crime, not even an attempt to commit an offence, to surveillance measures is compatible with these three principles.

Perhaps an even more alarming tendency is that the above mentioned proposal neglects to discuss the right to effective legal remedy, as stated in Article 13 of the ECHR. Difficulties may arise when persons who are subjected to intrusive measures lack the opportunity to learn about these at a later stage, when they have been cleared of suspicion. In a ruling of 6 September 1978 (Klass and others vs. the Republic of Germany), the European Court of Human Rights ruled on this subject, and declared the lack of such a remedy a convention violation.

According to the Council of Legislation, the government should await the committee’s findings before drafting new laws in this area. Furthermore, the proposed provisions should have a very clear wording, so that the principle of legality is met. Otherwise, a risk of extensive use, and even misuse, of surveillance measures might occur.

The Swedish Bar Association seconds the view of the Council, expressing concerns of a possible paradigm shift. If the government manages to pass the law, the Swedish legislation will become far more intrusive than its counterparts in other countries. The reasons for such intrusive legislation, however, are not stated in the proposal. Is Sweden more at risk than other countries? Is it plausible to argue that it is threatened by, let’s say terrorism, to a greater extent than other European countries? Common sense would imply otherwise. According to the proposal, it can be assumed that the proposed measures may become effective in the fight of serious crime. But there is no concrete evidence to support this claim.

The most important criticism voiced against the proposal is the extent to which it risks violating personal integrity. The area of application is very wide, and the means of safeguarding a proper interpretation very small. Ultimately, the question is whether it is even possible to determine, in a way that is compatible with the principles of the rule of law, if someone can be realistically assumed to commit serious criminal offences in the future. The government argues that the fact that courts will make the authorization decisions will ensure adequate procedure and correct rulings. In reality, as has been
already mentioned, the courts do not possess their own intelligence resources, and are thus dependent on information supplied by the agency requesting the authorization.\footnote{Sveriges Advokatsamfund, Anne Ramberg genom Maria Billing, R-2005/1085, Stockholm 30 september 2005, p.3.}

Another expert who has criticized the draft law is the Chancellor of Justice. The Chancellor points to a dangerous shift, where individual integrity interests tend to be overlooked in the favor of the interest to fight crime, or, indeed, to eradicate it entirely. The main point of the Chancellor is that studied separately perhaps one can be persuaded to think that certain intrusive measures are needed for a successful fight on terrorism and organized crime, and that they may not necessarily constitute violations of basic human rights. But he lacks a comprehensive study of how all these proposals taken together influence individual integrity.\footnote{Remissytrande över promemorian Tvångsmedel för att förebygga eller förhindra allvarig brottslighet (Ds 2005:21),, www.justitiekanslern.se.}

The Chancellor voices the same concern as an array of other significant actors, namely that this proposal will mean a shift from a paramount principle in criminal law, namely that intrusive measures can only be applied while investigating a specific crime. The proposed measures are further said to be both too intrusive and too vague. Vague wording in this type of legislation is, furthermore, said to be unacceptable. These are very strong words from the Chancellor of Justice.\footnote{Ibid., p. 3.} The Chancellor, thus, argues that the draft should not, in its current form, be allowed to form basis for a law.\footnote{Ibid., p. 4.}

The Swedish branch of the International Jurists Committee expresses the same concerns. The organization argues that intrusive measures should be connected to a criminal investigation, i.e. a concrete crime and not a suspicion of a crime that might be committed in the future. It also points to the fact that it has become apparent that measures that were first adopted to counter terrorism and grave organized crime have now expanded to include other parts of criminal law.\footnote{“Rättspolitisk debatt 2005,” Svenska Avdelningen av Internationella Juristkommissionen, 2005, p. 5}

However contrary to the rule of law the above mentioned law might be, it is still just the tip of an iceberg. If a patient reader studies Swedish laws passed and proposals made during the last couple of years it becomes apparent how steps are increasingly taken in a certain direction. The fight against crime and terrorism is facilitated at the expense of
basic human rights. Despite the fact that the effectiveness of intrusive measures has never
been properly examined, they are still seen to be more important than the rights of the
individual. Basic human rights, such as property rights, right to family life and privacy,
the freedom of speech and expression are increasingly violated in the name of the public
good. But are the violations at least outweighed by an increased security?

This question, although of immense importance, has never been truly considered. On
being asked this question by the General Secretary of the Swedish Bar Association, the
Minister of Justice points to other states that have adopted more intrusive surveillance
measures. But this cannot, as the General Secretary correctly points out, constitute a
bearing argument. Indeed, if one examines the development over time, despite more
intrusive laws or maybe because of them, people do not feel more secure. Rather the
opposite is the case; while repeated calls for more intrusive measures have been heard,
the perceived insecurities have prevailed, thus giving birth to a self-fed circle of fear.

As an example one can study a draft law, as expressed in a government proposal from
2002, to allow interception and secret video surveillance in instances where the crime is
not punishable by a minimum of two years incarceration, but where it can be assumed
that the final sentence will amount to more than two years in jail.\textsuperscript{42} One can thus observe
first how the criterion of only allowing crimes carrying a minimum of two years
sentences to warrant surveillance, is removed. Later proposals, and subsequently laws,
then make it possible to put other people, and not just the suspect against whom an
investigation has been initiated, under surveillance. And now, there is a proposal to
remove the prerequisite of a crime actually being committed altogether. With small but
decisive steps, human rights are thus being devalued and the sway of the rule of law
quietly reduced.

These proposals and “reforms” are carried out in the name of the war on terror and
organized crime. There is, however, as many experts remark, no substantial evidence that
they actually work. Are intrusive laws really the solution? To answer this question, one
must consider how people respond to laws. Force exercised by the state may perhaps
constitute a solution when people refuse to collaborate, honor contracts and
commitments. According to Hobbes, however, a totalitarian state is not necessary and

\textsuperscript{42} Prop. 2002/03:74.
even inadequate to force people to act in a certain way. Even in the most totalitarian of states there is a slight possibility for individuals who want to escape their commitments to do so.\textsuperscript{43} Hence, by setting aside basic human laws in the pursuit of fighting terrorism, only one is certain. We do not know if intrusive laws actually work, or if their effectiveness is such that it might justify the intrusion. What we do know for certain, is that serious human rights violations have an immense impact on the lives of people, and their respect for, and trust in, law and society.

Targeted sanctions

Blacklisting is the most significant form of applying so called targeted sanctions. While there is no general consensus they usually imply the following measures: freezing of financial assets (most commonly bank accounts), the suspension of credits and grant aid, the denial and limitation of access to foreign financial markets (trade embargos), flight bans and denial of international travel, denial of visas and educational opportunities.\textsuperscript{44} This paper will take its starting point in a Swedish case, and hence deal only with targeted sanctions aimed at freezing financial assets.\textsuperscript{45}

The EU has its own blacklist, the aim of which is to promote the Union’s interests, as well as blacklists based on UN Security Council Resolutions. As a means of upholding international peace, the Security Council can undertake certain measures, such as sanctions. This is spelled out in Articles 24(1), 39 and 41 of the UN Charter. The first of these Articles designates the Security Council as the protector of international peace; in case of threats to international security, Article 39 authorizes the Security Council to act; and Article 41 proposes non-forceful measures, sanctions.

The measures that are relevant for our discussion are contained in Resolutions 1267 of 15 October 1999, 1333 of 19 December 2000, 1390 of 16 January 2002, and 1373 of 28

\textsuperscript{43} Tännsjö T, “Konservatism,” Bilda förlag, 2001, p. 57.
\textsuperscript{44} Andersson T, Cameron I, Nordback K, “EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale,” EBLR, 2003, p. 112.
\textsuperscript{45} It should be noted, however, that in this case the man subjected to the freezing of funds was at a later stage also subjected to travel restrictions.
September 2001. The first Resolution was directed against the Taliban regime in Afghanistan. Under Article 4(b) of the mentioned document states are obligated, inter alia, to ensure that funds or other financial resources are not made available by their nationals or residents to the Taliban. The Sanctions Committee is entitled to make exemptions based on humanitarian grounds. Resolution 1333 is aimed primarily at the Taliban regime, but also at Osama bin Laden, and at individuals and entities associated with him. According to Article 8(c) of said Resolution, states are forced, without delay, to freeze funds and other financial assets of bin Laden and associates. States are also required to ensure that no other funds or financial resources are made accessible, directly or indirectly, to bin Laden or his associates by their nationals. The blacklist is prepared by the Sanctions Committee.

According to Resolution 1373, states are responsible for freezing financial assets of individuals who commit, attempt to commit, or participate in or facilitate the commission of terrorist acts. The Resolution is expressed in general terms and forms an obligation for states to apply the UN Convention on the Financing of International Terrorism. After the downfall of the Taliban in Afghanistan, Resolution 1390 was adopted. In this document it is stated that Article 8(c) of Resolution 1333 shall continue to apply, as well as Article 4(b) of Resolution 1267. Resolution 1390 is different from its predecessors in that the connection with specific territories and states is abandoned.

The issue of the European implementation of economic sanctions imposed by the Security Council illustrates the problems that may arise partly due to the fact that the EU is not a member of the UN. As a result, it is not obligated to carry out decisions of the Security Council. Theoretically the Member States of the Union can, thus, be faced with implementation difficulties. Their competence in the field of common commercial policy has been attributed to the European Community entirely, and the latter is not bound by Security Council decisions.

Article 103 of The UN Charter, however, states that all earlier and later international obligations of its contracting parties are overruled by the obligations contained in the Charter. Therefore, the EU Member States are forced to implement Security Council decisions. Furthermore, the EC is required, according to Article 301 of the Treaty on the European Communities (TEC), read together with Article 60(1) of the Treaty on the
European Union (TEU), to take the necessary legislative measures where common foreign security positions (CFSP), or a joint action, call for economic sanctions to be undertaken by the community. In the following, the decision mechanisms within the second pillar will be explained.

EU foreign security policies are implemented within the framework of the so called second pillar, which has at its disposal a wide array of instruments. These instruments include declarations, common strategies, common positions and joint actions, among others. Joint actions and common positions are most demanding in terms of implementation, since they require cross-pillar action. Common positions are employed in order to impose economic sanctions on third countries. Since economic sanctions affect the common commercial policy, an EC regulation is required in order to implement the sanction. The UN Resolutions 1267 and 1333, as well as the Common Positions implementing the Resolutions, were therefore followed by Council Regulation 467/2001/EC, whereby Articles 60 of the TEU and 301 of the TEC were used as legal basis. Since the beginning of 2001, the Commission has passed nine EC Regulations amending the original blacklist, which initially contained names of individuals connected to territories outside the Union. These Regulations were later replaced by Regulation 881/2002 and an updated blacklist, which had lost its connection with specific territories and contained names also of citizens of the Union.

Unlike in the first, and to some extent third, pillars, the European Court of Justice (ECJ) lacks jurisdiction in the second pillar. The Amsterdam Treaty thus neglected to establish one of the most important traits of the Rechtstaat for the CFSP legal order, namely a system of legal remedies and a possibility for the ECJ to review the legality of CFSP adopted by the institutions.

“In respect of the CFSP legal order, the rule of law requires above all that both Member States and the institutions of the European Union are under a duty to ensure that the CFSP measures are adopted and implemented in accordance with the provisions of the TEU.” One of the provisions of the TEU is Article 11(1) paragraph 5, which

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presents as Union objectives the strengthening of democracy, the rule of law principle as well as respect for human rights and basic freedoms. One might therefore argue that the lack of legal remedy when targeted sanctions are concerned constitutes a breach of this provision, and thus a behaviour counter to one governed by the rule of law.

**The Ahmed Yusuf case**

In 2001, three Swedish citizens, among them Ahmed Yusuf, discovered that all their economic assets had been frozen. They could not withdraw money from the bank, nor could their salaries be paid, lest their employers would commit a criminal offence. The men were involved in the informal hawala banking sector. No official charges were brought against them, other than their involvement in the al-Barakat organization, in their case an informal money transfer system to Somalia. After some time, two of the men were taken off the list. Yusuf’s name, however, remained on the list, which resulted in his financial assets being frozen for half a decade.49 Yusuf’s case has just recently been reviewed by the European Court of First Instance (CFI).

The EU was challenged by a “world system of governance established at three levels, the United Nations (UN) level, represented primarily by the Security Council, the Community level and lastly the national level, where the relevant measures – the freezing of funds and other financial resources, in practice mainly bank accounts – were to be carried out.”50

The judges of the CFI were forced to find their way through this maze, at the end of which they did not emerge victorious. Indeed, experts point to several weaknesses in the legal reasoning of the court.51 Two questions, paramount for the case, will be discussed in the following. The first question concerns the right of individuals to be heard before a court. The other question concerns the right to property, and whether or not it should enjoy the status of *jus cogens*, and, finally, how the court viewed it.

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49 He was just recently (16 August 2006) taken off the US blacklist.
51 Speech held by Professor Torbjörn Andersson at the conference “Terroristbekämpning i Europa – effektivitet i rättsstaten,” 2006-05-02.
The lack of ability on behalf of the CFI to adequately review the legality of the Resolution at hand is said to constitute the “core issue of the case”\textsuperscript{52} that is not satisfactorily highlighted by the court. On the contrary, the court argues that the individuals affected by the Resolution were in fact entitled to bring their action before the court. The same court, however, lacks the jurisdiction to review the case in full. For instance, it does not have the competence to assess whether the Security Council has acted in conformity with Chapter VII of the UN Charter. Nor does the court have the right to evaluate the content of the EC Regulation, since the Regulation is actually a transcript of a Security Council decision, which is to be transformed into Community legislation without the possibility for the latter to alter the contents of the decision. It should be added that even if the CFI were to evaluate the content of the blacklist in the light of intelligence information concerning the subjects listed therein, it would lack the competence to do so.

The court also adds that undertaking a review before the Sanctions Committee of the Security Council, the body responsible for creating the blacklists, before the lists are drafted would be contradictory to the whole purpose of such lists. The element of surprise would be lost, and individuals given time to relocate their funds.

According to international law, however, individuals lack the right to appear before the International Court of Justice (ICJ), UN’s judicial organ. Nor do states have the possibility to argue before the ICJ that their rights have been violated. Indeed, the ICJ has but an advisory function. Its opinion can neither be obtained by states nor by affected individuals, but only by the General Assembly and the Security Council. Common sense would imply that the latter will probably abstain from requesting an opinion concerning its own actions. It thus seems clear that individuals lack the possibility of legal redress also at the UN level.

The CFI finally notes that individuals affected by the freezing of funds are able to petition their national states for delisting. However, even if a petition for delisting is filed this does not guarantee, as the case of Ahmed Yusuf proves, that the affected individual will be removed from the list. It would thus seem as if the right to adequate legal remedy is missing also at the national level. An individual affected by a targeted sanction thus

\textsuperscript{52} Tomuschat, 2006, p. 550.
becomes blacklisted in more than one sense; apart from his or her means of subsistence being cut off, s/he also lacks the possibility of an adequate legal remedy. This is what happened to the Swedish citizen Ahmed Yusuf.

Even though no formal charges concerning the financing of terrorism were brought against Yusuf, the man was still placed on the blacklist. What makes the matter even worse is that Swedish authorities had basically confirmed Yusuf’s innocence, but not tried hard enough to take him off the list. Theoretically, the Swedish government could have argued that the relevant UN Resolutions and subsequent EC Regulations were in breach of Swedish law, namely Chapter 10 Section 5 of the Swedish Instrument of Government. According to this provision, Sweden may only delegate certain powers to the EU if the area to which the powers pertain is in accordance with the Swedish constitution and the ECHR. As has been mentioned above, it might be the case that the relevant Regulations are incompatible with the ECHR.

The matter of Yusuf’s innocence became very clear when a number of Swedish citizens, among them several public figures, lent Yusuf financial support and then reported it to the police, or, in other words, turned themselves in. Had the latter been considered a terrorist, or someone associated with terrorists, these people would have been found guilty of aiding a terrorist. They were not.

The Swedish state justifies its actions by declaring its respect for international law and the UN. It is often said that we cannot unilaterally change Security Council decisions even if we oppose them. It is, though, clear that this is a question of politics rather than law. This is borne out by the Swedish state’s inconsistency in these matters. As will be shown in the following sections of this study, Sweden has violated the absolute prohibition to return persons in risk of persecution to their native country after so called diplomatic assurances from the latter state. The returned individuals were found to be tortured, perhaps already on Swedish soil, and Sweden was found in breach of Article 3 of the UN Convention against Torture (CAT). One could therefore argue that some questions are more important than others, notably the fight against terrorism as compared to the upholding of human rights.

However, even when questions pertaining to terrorism are concerned, the Swedish state has violated international law. The Palestinian organization Hamas is branded as a
terrorist network both by the UN and by the Swedish state.\textsuperscript{53} One of the EU’s common positions was, consequently, not to let members of this organization visit their territories. Sweden, however, violated this position by allowing a prominent Hamas member to visit the country in May 2006.\textsuperscript{54} Paradoxically, criticism has been directed, at the highest level, against the US concerning its war on terror, which is said to have “challenged international law in a negative way, and derailed basic rule of law principles.”\textsuperscript{55} Violations of international law by the Swedish state, however, remain taboo.

The Security Council is not above the law. It is bound by certain considerations, and the barrier that it cannot transgress is \textit{jus cogens}. Briefly, \textit{jus cogens} means: “/…/ norms of general international law which are of a peremptory force and from which, as a consequence, no derogation may be made except by another norm of equal weigh. A treaty, for instance, which conflicts with such a norm is void /…/.”\textsuperscript{56} Both the scope and extent of the notion of \textit{jus cogens} are said to be rather uncertain, some norms, however, have been internationally agreed to be characterized as \textit{jus cogens}. These norms include the prohibition on genocide and torture.

It is thus puzzling how the Swedish state, having failed to act decisively to remove one of its citizens from the blacklist due to unwillingness to go against its international obligations, has chosen to violate the principle of non-refoulment, and thus \textit{jus cogens}, by extraditing two Egyptians to their native country, despite the apparent risk of torture.

The Security Council must respect basic human rights. It must act in accordance with the purposes of the UN Charter (UNC) and the protection of human rights forms, according to Article 1(2) of the Charter, one of the purposes: “(The purposes of the United Nations are) (t)o achieve international cooperation in /…/ promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Regardless of the purposes mentioned above, the leitmotif of the UN remains the promotion of international peace and security. It also places the Charter in an apparent historical context, where threats were posed against states, and not necessarily people, by

\footnotesize{\textsuperscript{53} Utrikesutskottets betänkande 2005/06:UU9, “Internationell terrorism,” p. 16. 
\textsuperscript{54} “Hamasförreträdare till Malmö i helgen,” Sydsvenskan, 2006-05-04. 
\textsuperscript{55} Utrikesutskottets betänkande 2005/06:UU9, p. 31. My translation. 
other states. Not surprisingly, this document was drafted during the Cold War era, where the bipolar order of two opposing superpowers was a reality. This assumption, however, does no longer merit the same plausibility. During the last two decades, more people have lost their lives due to conflicts within as opposed to between states. In the 1990s alone, nearly 3.6 million people died as a result of internal conflicts, while 220,000 deaths were attributed to conflicts among states. The dramatic change in the security climate notwithstanding, the state-centred stance remains. The Resolutions on targeted sanctions constitute new measures to counter the “new” type of terrorism. The measures are focused on protecting states, but increasingly tend to neglect what should be their main concern, namely the citizens.

The CFI does not seriously address the issue if the right to be heard constitutes *jus cogens*, let alone whether the right to property should be afforded that status. This constitutes a true weakness in the court’s reasoning. “At no point does it seriously consider whether the right to property may be classified as a universal human right and, additionally, as a right to be classified as jus cogens.”

**Property rights as human rights?**

The opinion that property rights should not be considered *jus cogens* and, thus, not viewed as a universal human right has been a fairly common view in international law, in fact also within other disciplines. The common consensus to date seems to be that the life and physical integrity of human beings are placed under the protection of *jus cogens*, while property rights are not. This is not a new discussion; in fact it has been the subject of heated debates since antiquity and the differing standpoints of two of its greatest thinkers Plato and Aristotle.

Plato’s utopia envisaged a society free of private property. His ideal was the Spartan state where all was common, including women and children. His *Republic* exerted influence on subsequent thinkers who would share his view on property as one of the greatest evils ever devised by men. This view was challenged by his pupil, Aristotle, in *Politics*. He also believed that excessive inequalities in the distribution of wealth could result in social strife, but he considered the institution of property as eternal and held it as

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57 Tomuschat, 2006, p. 547.
a positive force. He argued that an inherent trait of property is that it belongs to the household, i.e. the private sphere, and not the community or the state.\textsuperscript{58}

This line of thought was also common among the Romans, notably the lawyer, politician and philosopher, a true Renaissance man before his time, Cicero, who argued that the government could not interfere with property, for it was created in order to protect it. Later Thomas Hobbes seconded that opinion, by explaining the very reason why men choose to give up some of their freedoms to ruling elite, such as a government: “To this end it is that men give up all their natural power to the society they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of nature.” If man would lose his chance to claim and protect what is rightfully his there would be no point of having a government. For the state is there to protect, not to rob. If the latter is the case even the state of general anarchy would be preferable to a “governed” society. Probably one would stand a better chance at protecting one’s property from dispersed and roving, as opposed to, stationary bandits.

John Locke, on the other hand, endorsed political regulation of private property. In fact, he perceived it as one of the chief functions of the government: “In Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions.”\textsuperscript{59} He considered the state best suited to distribute wealth.\textsuperscript{60} He thus drew back on the philosophy of Plato.

Hugo Grotius, among others, brought property rights into the domains of natural law. The principle rules of the law of nature were the equality of men, notably equality before the law, and the notion of human rights, including the right to property.\textsuperscript{61} The law of nature was rational, and all human rights were closely intertwined. Therefore one could not suppress one right without affecting other rights: If you take away someone’s plough you take away his or hers means of making a living, if you confiscate a printing press you take away peoples’ freedom of expression and potentially prevent others from gaining

\textsuperscript{61} Ibid, p. 12.
access to important information. These are simplified examples, but they illustrate the
importance of the institution of property.

There were different schools of natural law, but they viewed laws not as entities
unaffected by moral considerations, but as products of outer circumstances. The laws
were said to gain their very meaning from the above mentioned circumstances. The latter
also justified the laws as well as provided individuals with reasons to follow them. It was,
thus, considered of utmost importance that the laws, in order to be effective, were in
accord with the views of the majority of the population.

At the end of the 1920s, it was considered almost a blasphemy to admit to being a
follower of the school of natural law. The extreme form of legal positivism existent at
that time provided for an excellent breeding ground for extremists like Hitler. Extreme
positivism denied the possibility of the state being limited by law. In Nazi Germany,
Fascist Italy and Communist Russia, the idea en vogue was that a state that had submitted
itself to governance under law was not free. It was considered a prisoner of law, and in
order to be able to promote justice, it had to be freed of the abstract rules. 62

Just how closely the right to property is connected with the very essence of mankind,
one’s right to think freely and to reap the fruits of one’s work, is illustrated in Ayn
Rand’s *Anthem*, which was inspired by a true story. During the era of the communist
dictatorship, there was a serious proposal in the Soviet Union to prohibit individuals from
having names. People were to be identified by numbers, so that there would be no
individuals, only a collective mass.

Despite the atrocities of the communist dictatorship, and the fact that a property-less
society has proven an impossibility (even during the Soviet era, a shadow economy
existed on the side) the dream of an egalitarian society, where all are equal and all assets
are common, has not lost its sway over some people, including many politicians.
Capitalism, which has made people wealthier, is more often than not associated with
greed. Hence, the right to property, measured by such yardsticks, cannot be regarded as a
universal human right.

According to Adam Smith, however, the actions of people are governed by self-
interest, which some have unjustly termed as greed. But greed was, as many people

wrongly assume, not considered a positive force by Smith. According to Smith, people also take pleasure in selfless acts that are not driven by any economic incentives: “How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.”

The reality of things, however, is that most people act in ways that benefit their interests. In such a case there are two scenarios available. Either, one might attempt to alter the human nature by forbidding people to act in their self interest, or one might allow people to act according to that interest, and in that interest serve others: “It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.”

Paradoxically, the elusive word freedom is seen by many as the greatest and most important human right. How such a view is to be combined with an unwillingness to regard the institution of property as a universal human right seems impossible to conceive.

Jeremy Bentham once wrote that where there is no law there is no property, and where there is no property there is no law. One could ask whether the faith of Ahmed Yusuf in the equality of men before the law has not been shattered due to the de facto expropriation that he has been subjected to.

Another argument presented by the CFI in favour of the UN Resolution is that it can hardly amount to a violation of property rights, since it is a measure of a temporary nature. According to Richard Pipes, however, all interference with someone’s property, whether of temporary or partial character, should be seen as infringements on, or a denial, of the right to property. To be sure, for the affected individual it is a gross violation with severe repercussions on his or her life. According to Yusuf, his subsistence was dependent on the good will of friends, relatives and others who took pity on him.

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Also, the CFI argues that the relevant Resolution is to be reviewed after a certain time period has passed. It is true that the measures carried out according to the Resolution are to be reviewed after a twelve month period has lapsed, at the end of which the Security Council decides to either continue the measures or to improve them. But it should be added that a veto from one of the permanent members of the Security Council can keep the Resolution in place indefinitely.\textsuperscript{65}

It is not the intention of this paper to argue that threats to international peace do not exist, they do. Terrorist are dependent on funds. The execution of the 9/11 attack would not have been possible without sufficient financial support. Conversely, lack of funding has played an important part in limiting the scope of attacks. After the bombings of World Trade Center in 1993 one of the terrorist behind the attack, Ramzi Yusef, admitted that they had intended to build a much larger bomb that could cause more damage, but that they were unable to do so due to lacking financial resources.\textsuperscript{66} It is thus of immense significance for a successful fight on terrorism to be able to trace and stop terrorist funding. Still, a system of global freezing of assets, especially when it is also directed at individuals, must be combined with effective legal remedies to protect and uphold basic human rights.

In the case of Ahmed Yusuf, the right to be heard before a court has a shallow ring to it. Even though his case was brought before the CFI, far from the entire substance of the case was reviewed by the court. Although subjected to a targeted sanction, i. e. a quasi-criminal measure, no criminal charges, other than the abstract one of being somehow associated with terrorists, were brought against him. Hence, the CFI was unable to apply a concrete proportionality test. In criminal proceedings, in societies governed by the rule of law, this is unacceptable. One of the purposes of the EU, as expressed in Article 11 TEU, as has been already mentioned, is to “develop and consolidate democracy, the rule of law and respect for human rights and fundamental freedoms”. The judgment of the CFI does not correspond to these principles. If it is the case that a person cannot find out what it is exactly that s/he is being accused of, and is thus unable to defend him or herself, it can hardly be said that the person’s case has been heard by a court.

\textsuperscript{66} Raphaeli, 2003, p. 60.
Had the CFI declared the Regulation invalid, it would have sent a powerful message to the international community, that human rights should be respected under all circumstances. Two of the EU members are also permanent members of the Security Council, which provides them with an excellent platform to promote the purposes of the EU, one of which is the respect for human rights. In fact, they have an obligation under Article 19(2) TEU to ensure that the interests and positions of the Union are respected and protected in the Security Council.67

On 17 August 2006, we were informed that Ahmed Yusuf had been taken off the US blacklist and that the Swedish state had requested to have him removed from the UN and EC blacklists as well. Yusuf has neither been informed for the reason of the removal of his name from the list, nor has he received an explanation as to why he was placed there in the first place. For five years he was forced to leave in absolute uncertainty; not being able to access his bank accounts, but being forced to depend on the good will of others.

**Persona non grata**

“The case of the two Egyptian asylum-seekers handed over by the Swedish authorities to American agents who took them to Egypt, where they were tortured in spite of diplomatic assurances given to Sweden, is another very well documented case.”68 The case, which eventually led to Sweden being declared in breach of international law by the United Nations Committee against Torture, will be discussed in the following.

On 18 December 2001, two Egyptians, Ahmed Agiza and Mohammed El Zari, were extradited by the Swedish government to their native country. Initially, the men were not able to find out the content of the accusations made against them, nor they have the opportunity to appeal the extradition decision.69 It is not the first time, however, that Sweden has withheld such information from the asylum seeker, making it impossible for

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the latter to address the accusations. In fact, Sweden has been criticised on several occasions by the UN Committee against Torture for this. 70

The removal order was executed on the same day that the government made its decision to extradite the men. Not even their legal counsels were notified of the decision until after the enforcement of the removal order. El Zari’s counsel, Kjell Jönsson, was also notified of the fact that the Swedish government had decided to keep the diplomatic assurances secret. 71

The Swedish Migration Board had recognized that if returned to Egypt the men risked torture and degrading treatment. 72 According to various international documents, most notably Article 7 of the International Covenant on Civil and political rights (ICCPR), Article 3 of the UN Convention against Torture (CAT), Article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), the principle of non-refoulment applied. This was also the case according to national legislation, namely Chapter 8 Section 1 of the Aliens Act.

As stated in Article 3 of the ECHR the prohibition on torture is absolute. This means that a person cannot be returned to his or her country of origin or a third country if s/he there risks torture or other degrading treatment. The men, however, were accused by the Egyptian state of committing terrorist acts and were sentenced in their absence to long prison terms. The accusations made by the Egyptian government seemed to have a negative impact on the men’s claim for refuge, and also, what later become clear, their very status as human beings, at least when the respect for basic human rights is concerned.

The men’s asylum applications were dismissed, and their deportation was ordered on grounds of security on the very same day of the issuance of the asylum decision. The decision to extradite the men was taken by the government, in the form of a special procedure at ministerial level. 73 It should be noted that the above mentioned procedure

has previously been declared inadequate when Sweden’s obligations under international law are concerned. Agiza’s and El Zari’s cases were thus viewed by the government as the only tribunal, regardless of fact that a unanimous parliamentary committee in 1996 found such a procedure incompatible with Sweden’s obligations under international law, by pointing to the fact that the government could not guarantee impartiality.  

The government’s view, however, has remained unaltered. It defends its right to act as the only instance, and thus both as the opposing party and the arbitrator, in cases affecting national security, by the fact it has the main responsibility for the country’s security. This statement alone proves that as a result of having a certain interest, namely the upholding of national security, the government cannot guarantee total impartiality. Therefore, only a court should be competent to deal with such matters. This is illustrated by the unfortunate fates of Agiza and El Zari.

After the issuance of so called diplomatic assurances on behalf of the Egyptian state, the men were returned to Egypt. The Committee against Torture later noted in its decision concerning the Swedish government’s actions that Sweden was in breach of Article 22 of the UN Convention against Torture (CAT) due to the fact that the complainant was arrested and removed immediately upon the government’s expulsion decision, and the complainant’s counsel was first notified of this decision the following day. This made it impossible for the complainant to even consider invoking Article 22, let alone seizing the Committee.

The removal order of the two Egyptians was carried out by American agents: “In order to ensure that the decision could be executed that same day, the Swedish authorities accepted an American offer to place at their disposal an aircraft which enjoyed special over-flight authorisations. Following their arrest by the Swedish police, the two men were taken to Bromma airport where they were subjected, with Swedish agreement, to a “security check” by hooded American agents.”

76 CAT/C/34/D/233/2003, p. 34.
The form of the extradition of the two Egyptians was first brought to the public’s knowledge by the television program Kalla Fakta on 10 May 2004. There it was stated that the two men were handcuffed when brought to the airport, picked up by a private US jet and handed over to a group of special agents by the Swedish police. The men were first stripped of all their clothes and inserted with suppositories of unknown nature then diapers were placed upon them and they were dressed in black overalls. They were blindfolded and hooded as they entered the plane, and later chained to a specially designed harness. The men did not know with whom they were travelling or where they were going. For all they knew, they could have been on their way to sure and painful deaths. The investigative journalists behind the program also presented a previously classified version of the report of Sweden’s ambassador to Egypt on how the men were treated in prison. One of the declassified sections states that Agiza had complained that he was subjected to excessive brutality by the Swedish security police when he was seized, and that he was repeatedly beaten in Egyptian prisons. TV4’s translation of Embassy report 1, classified part on Page 2, dated 23 January 2002 reads:

“between the arrest in Sweden and the transfer to Tora: excessive brutality from the Swedish police when they were apprehended; enforced uncomfortable position in the aircraft during the transport to Egypt; forced blindfolding during the interrogation period, too cramped cells, ten days wait for Agiza’s ulcer medication after being examined by a doctor; beatings by guards during transport to and from interrogation; threats from interrogator of repression against his family in case he didn’t tell everything about his time in Iran etc.”

The assurances made by the Egyptian state to its Swedish counterpart were very vague, and amounted to the following statement: “We herewith assert our full understanding to all items of this memoire, concerning the way of treatment upon repatriate from your government, with full respect to their personal and human rights. This will be done according to what the Egyptian constitution and law stipulates.”

One of the assurances was that a Swedish representative would be able to visit the men in prison to ensure that torture did not occur. According to experts, torture is most

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78 Statewatch.org, see the program “Kalla Fakta” with the title “The broken promise” from May 17 2004.
likely to occur during the initial period in prison, i.e. during the first days. The Swedish representative paid the men his first visit on their fifth week in prison. During this and following visits, the representative was not allowed to have private conversations with the prisoners. During one of the visits, 11 guards were present. Consequently, the men were not able to complain torture, even if such practice had occurred.80

The parents of Agiza, his wife and his legal counsel, however, made frequent complaints of torture. His mother reported that Agiza was, among other things, tortured with electrodes that were strapped to his body. Their statements were ignored by the Swedish government. Furthermore, the asylum claim of his wife, Hannan Attia, and their five children was rejected by the authorities. Her case was brought before the Committee against Torture, which found in favour of the Swedish state. They dismissed Hannan Attia’s statements of alleged torture of her husband as a result of the Swedish state’s testimony that Agiza had not been subjected to torture, but in fact was treated well by the Egyptian authorities. The Committee found the Swedish state’s version more credible that the one of Hannan Attia and, thus, did not oppose the former’s decision to return Attia and her five children to Egypt.

At that point, Attia and her children had already gone into hiding. Numerous national and international human rights organizations spoke on Attia’s behalf.81 Moreover, 23 Swedish public figures voiced their criticism, concerning the decision to extradite Hannan Attia and her children.82 At this point, however, Agiza’s allegations of torture became known, and so did the classified version of the ambassador’s report. Moreover, investigative reporters uncovered the true story of how the men were extradited.

The Swedish Parliamentary Ombudsman, Mats Melin, who investigated the actions of the Swedish state found that: “/.../the enforcement by the Security Police of the Government's decision to expel two Egyptian citizens, A. and E.Z., on December 18, 2001, reveals serious shortcomings in the way in which this case was handled by the Security Police. I have therefore found reason to express extremely grave criticism of the Security Police./.../ At Bromma airport the security police already failed to maintain

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80 Ibid., p. 23.
82 “Ge Hanan Attia upprättelse!,” SvD, 2004-12-23.
control of the enforcement, thereby allowing American officials free hands to exercise public authority on Swedish territory. Relinquishing Swedish public authority in this way to foreign officials is not compatible with Swedish law.”

Concerning the way in which the men were treated the Ombudsman stated the following: “The enforcement was carried out in an inhuman and therefore unacceptable manner. The way in which A. and E.Z. were treated is alien to Swedish police procedures and cannot be tolerated. The treatment to which the two men were subjected was in some respects unlawful and must be characterized overall as degrading. Questions may also be raised as to whether the way in which the enforcement was carried out constituted a breach of Article 3 of the European Convention. The Security Police should have intervened to prevent this inhuman treatment.”

The UN Human Rights Commission's Special Investigator on Torture, Manfred Novak, pleaded with the Swedish government to have the men returned to Sweden, but his pleas were ignored. Instead the Minister of Justice, Thomas Bodström, and Minister of Migration, Barbro Holmberg, published a disturbing statement concerning the two Egyptians on the government’s homepage: “and that we in the fight against terrorism also have to combat suspected terrorists.” It should be noted that the statement does not speak of combating terrorism as such, but of persons suspected of terrorism. The statement portrayed the two men as alleged terrorist. It contrasted them against innocent victims of terrorist attacks carried out in the past. The statement might thus be interpreted in such a way as to mean that the government was not only doing its job by extraditing terrorists, but possibly also saving innocent lives. The statement, however, remained silent on the issues of the principle of non-refoulment and the alleged torture. It also depicted the men as terrorists, despite the fact that at that point El Zari had been cleared of all suspicions, by an Egyptian military court no less.

84 Ibid.
According to Article 8 of the ECHR, a person has a right to not have his or her reputation ruined: “Article 8 offers general protection for a person’s private and family life, home and correspondence from arbitrary interference by the State. This right affects a large number of areas of life ranging from surveillance to sexual identity – it is framed extremely broadly. However, the right to respect for these aspects of privacy under Article 8 is qualified. This means that interferences by the State can be permissible, but such interferences must be justified and satisfy certain conditions.” Interferences with the rights enshrined in Article 8 are only allowed if in accordance with law; and in the interests of the legitimate objectives identified in Article 8(2), and necessary in a democratic society. One might therefore wonder if by referring to an innocent man as a terrorist, the government has not only violated this right, but also placed the man in grave danger.

Egyptian human rights organizations claim that a person once publicly portrayed as a terrorist remains just that in the eyes of the public. This person, as well as his or her family, are faced with grave danger inside and outside prison walls alike. The Swedish government is not only said to have endangered El Zari’s life, but also offered a justification of the arbitrary terrorism politics of Egypt, which Sweden has criticized in the past.

Although Agiza’s sentence was shortened to 15 years in prison, he was not afforded a fair trial. Agiza’s case was not heard by a civil court and Swedish representatives were, counter to the diplomatic assurances, not allowed to enter the courtroom. Instead he was tried by a military court. Human Rights Watch, which was allowed to monitor the proceedings, reported that Agiza was not even entitled to meet with his legal counsel prior to trial or to call own witnesses. He was neither able to make allegations of torture,

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86 Article 8 Section 1 reads: “Everyone has the right to respect for his private and family life, his home and his correspondence”.
88 Article 8 Section 2 reads: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
nor to appeal the court’s verdict. Weeks before the trial, he was not allowed to see his family.\footnote{Ibid.}

The Egyptian state has, thus, violated at least two of the assurances. Agiza was tortured and was not afforded a fair trial. Hence, the Swedish state has all the reasons to request the Egyptian government to return the men to Sweden. But it has chosen to remain silent. Moreover, it has tried to conceal the particulars of the case from the UN as well as the public.\footnote{“Alleged Secret Detentions and Unlawful Interstate Transfers Involving Council of Europe Member States,” Committee on Legal Affairs and Human Rights Draft Report Part II (Explanatory Memorandum) Council of Europe, 2006-06-07.} The investigative journalists, who first uncovered the story, also allege that both Egyptian and Swedish authorities tried to sabotage their work.

While Egyptian officials resorted to threatening witnesses, members of the Swedish embassy in Cairo were supposedly giving out wrong dates and addresses intentionally. They were, in the reporters’ opinion, classifying public information in order to prevent the reporters from gaining access to relevant documents: “No one at the Swedish Foreign Ministry was, despite repeated and informal talks, willing to reveal even an ounce of what was later shown to be the truth. The embassy in Cairo tried with cheap tricks, like leaving messages at wrong places, to throw us off so that we would not be able to conduct the interviews on time, etc.”\footnote{“Egypten arbetsbeskrivning,” Föreningen Grävande Journalister,” www.fgj.se, 2004-12-09, accessed 2006-05-16. My translation.}

The journalists also maintain that, despite the fact that their story initially received much attention in the media, many questions still remain unanswered. These are questions concerning who in the government authorized the extradition, who was informed of the American agents’ involvement, who made the decision to conceal from the UN and the general public the information that Agiza had been tortured, etc? As was mentioned above, the parliamentary Ombudsman who investigated the case found little clarity concerning the matter of responsibility. While representatives of the Swedish Security Police claimed that the Foreign Ministry was aware of the American agents’ involvement, the Ministry argued the opposite.\footnote{“Review of the Enforcement by the Security Police of a Government Decision to Expel Two Egyptian Citizens,” Adjudication of March 22, 2005 by Chief Parliamentary Ombudsman Mats Melin, Registration number 2169-2004.}
The legal framework of the case of Agiza and El Zari

According to, among other documents, the ECHR the prohibition on torture is absolute. It is expressed in absolute terms, and over the years there have been several cases cementing its status as an absolute right. In Chahal vs. United Kingdom, the Indian government had made diplomatic assurances, but these were not considered adequate protection against torture by the European Court of Human Rights (ECtHR). This was regardless of the fact that the ECtHR found the Indian government in good faith. It was noted that the government did not exercise central control over all its organs, and that the risk of torture could not be eliminated. The British government was thus not allowed to extradite the complainant, who by the British authorities was suspected of terrorist activities.

Also, experts have repeatedly pronounced the absolute nature of the prohibition on torture, from which no derogations are allowed. It is absolute and is considered *jus cogens*. But lately some states have found ways to circumvent it, notably by requesting diplomatic assurances. The very fact that such assurances are needed, however, implies that the receiving state is not to be trusted. Moreover, a state that openly practices torture does not usually honour this type of commitment. The Special Rapporteur on questions relating to torture appointed by the United Nation’s Commission on Human Rights argues that expelling aliens despite the risk of torture reflects a tendency in Europe to circumvent the principle of non-refoulement.

Perhaps it was to avoid a political scandal that the Swedish government did not make Agiza’s testimony public. But the public was not the only party from whom the government withheld the truth. The Government allegedly also concealed the truth from Amnesty. On March 2003, Swedish Foreign Ministry was asked by Amnesty about what had happened to the extradited Egyptians. At that point a representative of the Foreign Ministry had already met Agiza, who had informed him of the alleged torture. Moreover, after Agiza’s testimony State Secretary Gun-Britt Andersson stated repeated times to the

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95. “Prohibition of Refoulment: The Meaning of Article 3 of the ECHR” by Clare Ovey, Registry of the European Court of Human Rights.
news agency TT that the men had not mentioned anything about torture or bodily injuries.97

The Swedish state maintained before the UN Committee against Torture that torture had not taken place, and that the men in fact were treated well. In light of the information uncovered by the investigative reporters, the Committee noted: “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.”98

The Committee added: “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 in for in Article 22 extending to individual complainants the right to complain to the Committee alleging a breach of State party’s obligations under the Convention, a State party assumes an obligation to co-operate fully with the Committee.../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.../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.”99

Sweden was eventually declared by the UN Committee against Torture in breach of Articles 3 and 22 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the prohibition on torture.100 This decision, however, has been of little avail for the two men. The Swedish government insists that its actions were justified, despite the pleas of, among others, UN Human Rights Commission’s Special Investigator on Torture Manfred Novak asking Sweden to stop undermining the prohibition on torture,101 and to allow the Egyptians to return to

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98 CAT/C/34/D/233/2003, p. 32.
99 Ibid.
100 See CAT/C/34/D/233/2003.
101 “Sverige måste sluta underminera tortyrförbudet,” DN, 2006-03-09.
Novak’s opinion that the government was wrong and should rectify its actions is refuted by placing all the blame on the Egyptian state. The legal counsels of the men argue that they know of no other western country with so poor legal safeguards as Sweden. So perhaps if we cannot help the two Egyptians, we can, at least, amend our laws and policies so that others will not have to share their fates.

Final remarks

The concept of modern western democracy is fairly young. The notion of the Rechtstaat rests mainly on three pillars, namely the equality of people before the law, the principle of legality, and the principle of proportionality. The principle of legality implies that there is no crime without a corresponding law criminalizing the offence. This not only means that a person cannot be sentenced for a non-existent crime, but also that s/he cannot be subjected to quasi-criminal measures, such as certain forms of surveillance, without being suspected of having committed a crime. The principle of legality, thus, prohibits retroactivity and allows for legal foresee-ability. The principles of proportionality and necessity guarantee that state organs exercise their powers in a proportional and justifiable manner.

What was typical to, for instance, the communist dictatorship was that the state was not governed by the rule of law, but instead ruled by law. This implied that that laws were applied arbitrarily, offences fabricated and laws invented to serve specific needs, for instance to fight opposition. The law was an instrument of power devised to keep the populace in check. The communist party was the holder of all power, and acted simultaneously as legislative, judiciary and executive branches.

This stands in stark contrast to a liberal democracy governed by the rule of law, which respects the principle of the division of powers. When the history of mankind is considered, one realizes that dictatorship, be it communist or other, was not an anomaly.

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103 “Sverige kränker och ljuger,” SVD, Brännpunkt, 2006-06-09.
104 SVD, 2002-01-18.
but rather the normal state of things. If anything, our western democracies constitute an oddity, known to man for less than a century. When considering this, one realizes how unique and fragile they actually are. The institution of human rights took years to establish. At the same time, history has shown how easy it is to destroy. Hitler came to power in a democratic fashion, by using, and not violating, one of the strongest constitutions in the world. Seen in this light, the recent events described in this study seem even more alarming.

According to Hayek, the resistance to liberalism, extreme reverence for state organs, and an almost blind faith that everything can be centrally organized, that existed in pre-Hitler Germany is present among some modern western politicians. We should therefore compare our circumstances to those that were present in Germany before Hitler seized power, for they are in certain respects very much alike.\textsuperscript{105} State organs increasingly arrogate to themselves more and more power, be it in the form of more intrusive surveillance laws or greater possibilities to control peoples’ property. This development the state tries to justify by its supposed role as the voice of the people.

But all power needs constraints. Therefore there should be institutions responsible for watching the politicians, such as constitutional courts. In Sweden there has been a great resistance among the former ruling elite against this institution. During the last years, however, concerns have been voiced by the political opposition – which just recently won the parliamentary elections – as well as the general public. Currently these questions are being investigated within a framework of a constitutional investigation (grundlagsutredningen), which will hopefully suggest reforms in this area.

Today, a person’s assets can be frozen. One might, thus, be subjected to a quasi-criminal measure, without being able to defend oneself as a result of the fact that one is unaware of the content of the allegations. A person’s life can be suspended for as long as the Security Council deems necessary, but the person lacks an adequate legal remedy to question the Council’s actions. Refugees can be extradited without a right to appeal or without their legal counsels being informed of the measure, if a quasi-dictatorship offers a pro forma assurance.

The government can accuse someone of terrorism, and at the same time have the right to have the last say in the matter of that person’s supposed guilt. Hence, the opposing party becomes the judge. Soon, it will become possible to put people under surveillance without suspicion of specific crimes, but as a result of assumptions.

Terrorism is a serious offence and governments are not satisfactorily equipped to deal with it. They are still adapting to this new mobile enemy that has no particular nationality or background. Some argue that terrorism can be explained by the level of poverty in the third world, which has supposedly been inflicted on this region by the western civilization. The majority of the men involved in al-Qaeda, however, are wealthy. Its leader, Osama bin Laden, is a millionaire. It is true that some of the suicide bombers of Saudi origin were recruited among poor and disillusioned communities, but we should not be tempted to accept such a simplistic definition.

Perhaps it is convenient to assume that poverty is the root of all evil. If anything, it is a convenient approach to believe that all problems can be solved just by giving financial aid. For those more pragmatically inclined, it is apparent that other reasons of terrorism, apart from poverty-related ones, exist. The men responsible for the London bombings were all integrated into British society. They were respectable citizens, with good professions, who enjoyed cricket in their spare time. Yet, they killed the very people they were living amongst.

Perhaps it is the notion of the enemy among us that creates the demand for more intrusive laws. It is understandable that people are frightened, and government officials are only human. But governments have responsibilities towards the public; in return they are given the public’s trust. They should not violate this trust by succumbing to legal radicalism. Although fear is difficult to keep in check while literally under attack, or constantly fearing one, it should not be allowed to be the governing force behind decisions affecting human rights. There is, however, an alarming tendency in Europe to consider the institution of human rights of secondary importance to the war on terror. British Home Secretary John Reid illustrates this tendency with the following statement: “We face a persistent and very real threat across Europe/…/the rights of the individual
must and will be balanced against the collective rights of security and protection of life and limb.”

The governments have a duty to defend our societies against terrorism, but this duty also implies protecting what makes our societies special. The war on terror must not be waged at the cost of the individual. As soon as we start violating human rights, this fight becomes counter productive. Fearing foreign terrorism is bad, fearing one’s own government is worse.

“Anyone who claims to have a total solution to terrorism is either a fool or a knave. This does not mean that there is nothing democracies can do to reduce terrorist violence. There are measures of proven effectiveness which they can undertake while remaining true to their basic values. But such measures are bound to be limited not only by the fundamental requirement that they must be consistent with the maintenance of basic civil rights and democracy, but also by the inherent complexities in the causation and development of political violence.”

One of the most important legal safeguards is the individual’s inalienable right to have his or her case heard by an impartial court that is able to alleviate possible injustices. This paper has illustrated how the war on terror, waged at any cost, even at the cost of the individual, may lead us to a situation where the importance of this right, along with other basic human rights, becomes undermined.

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