

ALTERNATIVE REPORT

**to the list of issues (CAT/C/DNK/Q/5/rev.1)
dated 19 February 2007**

**to be considered by the UN Committee against Torture
during the examination of the 5th periodic report of Denmark**

38th Session, May 2007



**Rehabilitation and Research Centre for Torture Victims (RCT)
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I. Introduction

The present alternative report falls in three parts.

Part 1 briefly lists some of the most significant positive developments regarding Denmark's fulfilment of its obligations under the UN Convention against Torture (UNCAT).

Part 2 seeks to provide alternative replies to some of the questions raised in the list of issues¹ to be considered during the examination of the 5th periodic report of Denmark on 2-3 May 2007. Part 2 also takes up new and important issues, which have not been addressed in the list of issues in the section titled "Other issues of RCT concern". The RCT has chosen to do so, because some of these issues give rise to concern regarding Denmark's fulfilment of its international obligations under the UNCAT.

Part 3 contains a list of recommendations about what steps Denmark could (or ought to) take in order to further improve its adherence to the UNCAT.

The documentation presented in this alternative report primarily derives from the RCT's ongoing monitoring of Danish law and practice within the areas of the UNCAT, including the advocacy activities carried out vis-à-vis the Danish government, parliament and relevant public institutions. Other parts of the information provided stems from cooperation with various Danish authorities, such as the police and the military. Finally, the report draws upon legal analysis and studies, which have been conducted by researchers at the Law Faculty of the Copenhagen University, the Danish Institute for Human Rights and the Danish Refugee Council.

II. Positive developments

At the international level, Denmark has continued its efforts to work for the eradication of torture. In the United Nations during the General Assembly Denmark has continuously drafted a resolution on torture underlining the importance of the prevention of torture. This issue has also been supported by Denmark during its seat on the UN Security Council and the UN Human Rights Commission (now the UN Human Rights Council).

Most recently, Denmark has presented its candidature to the UN Human Rights Council for the period 2007-10.² As appears from the pledges and commitments³, the fight against torture is one of the government's key priorities.

In the EU, Denmark has also actively supported the prohibition of torture, in particular during the Danish presidency of the EU. During the Danish presidency of the EU in the second half of 2002, Denmark was instrumental in working for the adoption of the OPCAT.

Since the adoption of the OPCAT, Denmark has promoted this legal instrument in various international fora, notably the EU and the OSCE. The government has also nominated a Danish candidate for the Sub-Committee, who was elected member in December 2006.

¹ List of issues (CAT/C/DNK/Q/5/rev.1) dated 19 February 2007.

² Note verbale dated 2 February 2007 from the Permanent Mission of Denmark to the United Nations addressed to the President of the General Assembly, 15 February 2007.

<http://daccessdds.un.org/doc/UNDOC/GEN/N07/240/31/PDF/N0724031.pdf?OpenElement>

³ Annex to Note verbale dated 2 February 2007 from the Permanent Mission of Denmark to the United Nations addressed to the President of the General Assembly, Voluntary pledges and commitments in accordance with resolution 60/251.

At the domestic level, Denmark has ensured an early ratification of the OPCAT in May 2004, where the parliament unanimously gave its consent to Denmark's ratification of this treaty,⁴ and on 26 June 2004, the Danish government deposited the instrument of ratification in New York.

The issue of the prevention of torture has been incorporated into the Danish strategies for bilateral development assistance and particularly as regards the Danish support to the Middle East, the prevention of torture has been made an important issue in the government's "Arab Initiative".

The Danish government has also continued its financial support of projects on the prevention of torture and the rehabilitation of torture victims in Africa, Asia, Latin America and the Middle East. Through its financial assistance to the RCT and other rehabilitation centres for torture victims, the Danish state also contributes to the rehabilitation of torture survivors residing in Denmark.

With regard to jurisdiction, the Ministry of Justice has set up a committee to examine the provisions of the Criminal Code on jurisdiction. This step has been taken in response to the international development with increasing cross-border activities and the "internationalisation" of crime, with the aim of countering that perpetrators of serious crime abroad may have a safe haven in Denmark.

In the area of criminalisation, the Minister of Justice has asked the Standing Committee on Criminal Matters to consider whether to introduce a specific torture provision in the Criminal Code and possibly a specific provision on statute of limitation in relation to such a torture provision. This step has been taken in response to the fierce international and national criticism and the revelation that "old" torture cases cannot be prosecuted within the existing framework of the Criminal Code.

As regards the obligation of ensuring prompt and impartial investigations, the Ministry of Justice has set-up a committee, which will review the current system for dealing with complaints against the police, the so-called Police Complaints Boards. In the terms of reference the committee is given a wide mandate to review the existing system and to propose changes within this mandate, and also to propose more fundamental changes of the existing system. This initiative came about as a result of several individual cases of, where the impartiality of the Police Complaints Boards has been questioned.

In the area of pre-trial solitary confinement, the government has amended the Administration of Justice Act (*retsplejeloven*) hereby limiting the scope for using solitary confinement during the period of pre-trial detention. Most recently, the length of the period of solitary confinement was reduced for minors from 8 weeks to 4 weeks.⁵

Within the military ranks, and as a result of the first case in which Danish soldiers were accused of abusing Iraqi prisoners, the Danish Defence Command has issued a Directive on the Prohibition of Torture. The Directive lists the military personnel's duties to prevent torture, to report on acts of torture and to take action to bring acts of torture to an end, etc..

Finally, it should be emphasised that the present government – like its predecessors – has continued to provide moral and financial support to NGOs engaged in the struggle against torture, including the Rehabilitation and Research Centre for Torture Victims (RCT) and the International Rehabilitation Council for Torture Victims (IRCT). Danish authorities maintain a good and constructive cooperation with the RCT and, at their invitation, the RCT is thus able to contribute to Denmark's fulfilment of its obligation under the UNCAT Article 10.

⁴ The National Gazette (*folketingsstidende*), Annex C, 602,

http://www.folketinget.dk/Samling/20031/beslutningsforslag_som_vedtaget/B129.htm The proposal for a parliamentary decision on the OPCAT (B 129) was presented by the Minister of Foreign Affairs on 19 February 2004.

⁵ Law no. 1561 on amendments to the Administration of Justice Act, 20 December 2006, The national Gazette Annex C 259, p. 32.

III. Alternative replies to the list of issues

Article 3

Question 2

The Committee takes note of the amendments to the Aliens Act introduced by Law No. 367 of 6 June 2002 (in effect since 1 July 2002). In the light of the safeguards contained in Article 3 of the Convention, please elaborate in greater detail on the abolition of the “de facto” refugee status and the introduction of a new “protection status”.

Before 1 July 2002, the Danish Aliens Act Section 7(2) contained the *de facto* refugee status. This provision granted aliens a residence permit, when there was an existing and individual risk of the alien being subjected to persecution or similar actions upon return to his/her country of origin.

In practice, *de facto* refugee status was granted to different categories of aliens, notably persons who due to previous persecution, such as torture or rape, had a considerable subjective fear of persecution upon return to their country of origin, but where this fear was no longer objectively founded. Furthermore, *de facto* refugee status was granted to aliens who, upon return to their country of origin, would risk:⁶

- Disproportionate punishment
- Being summoned to active military service in a waging war
- Persecution as a result of previous participation in revolt, civil war, militias, etc.

Law No. 367 of 6 June 2002 (in effect since 1 July 2002) amended the Danish Aliens Act Section 7(2) and abolished the *de facto* refugee status, which was a subsidiary protection status. Pursuant to the present formulation of Section 7 (2), a residency permit will be issued to an alien upon application, if the alien risks being sentenced to death or being subjected to torture or inhuman or degrading treatment or punishment in case of return to his/her country of origin (protection status).

The rationale for abolishing the *de facto* refugee status is explained in the comments to the Law No. 367: It is the government's position that Denmark shall only provide protection in those cases, where Denmark is under an international legal obligation to do so. The *de facto* refugee status gives aliens a much broader right of residency, which goes beyond Denmark's international obligations. The abolition is meant to ensure that - in the future - residency permits will only be granted to asylum seekers, who have a right to protection under the international conventions.⁷

The new protection status contains a more narrow definition of when an alien can be granted a residence permit compared to the *de facto* refugee status. The main difference between the two is that under the *de facto* refugee status, refugees fleeing from countries in war would be granted a resident permit merely on these grounds. This is no longer the case with the protection status.

The new Section 7 (2) requires the Danish authorities to observe the jurisprudence of the European Court of Human Rights in their handling of applications for protection status. This entails that the authorities shall assess whether a refusal of refugee status would amount to a violation of the ECHR Article 3 (prohibition of torture). In practice, this requirement may be difficult to honour, because the European Court of Human Rights has only passed a relatively limited number of judgments concerning ECHR Article 3. Furthermore, the judgments mostly contain a very concrete reasoning, which may not be generally applicable, beyond the case in question. Consequently, it will be challenging for the Danish

⁶ Cf. <http://www.ft.dk/?/samling/20061/MENU/00000002.htm>

⁷ Cf. <http://www.ft.dk/?/samling/20061/MENU/00000002.htm>

authorities to establish the precise boundary between observance and violation of ECHR Article 3.⁸ With the abolition of the *de facto* refugee status, one has effectively removed the “safety net” that could otherwise capture some of the cases where it was not crystal clear whether a refusal would amount to a violation of ECHR Article 3 and UNCAT Article 3. In conclusion, there is now an increased risk of breaching ECHR Article 3 and UNCAT Article 3.

Within the Council of Europe, a recommendation on subsidiary protection was adopted in 2001.⁹ It recommends that the Member States grant protection to persons, who upon return to their country of origin may risk being subjected to torture or other inhuman or degrading treatment in violation of ECHR Article 3. Protection is also recommended for persons who have been forced to flee their home country as a result of threats against the person’s life, security or freedom as a result of arbitrary violence stemming from an armed conflict.

Within the European Union, a draft directive on subsidiary protection was put forward in 2001.¹⁰ According to Article 15 the Member States shall consider granting subsidiary protection status to persons who upon return to their country of origin would risk a violation of ECHR Article 3 or serious unjustified harm on the basis of a violation of a human right. Furthermore, subsidiary protection is proposed in cases where there exists a well-founded fear for one’s life on an individual basis. The proposed subsidiary protection is to a large degree a codification of the existing practices in the EU Member States.¹¹ Denmark is one of the few countries that does not recognise the need for protection of persons fleeing armed conflict.

Both the Council of Europe recommendation and the EU draft directive are aimed at ensuring protection of persons who flee their country as a result of an international or internal armed conflict. Although Denmark has signed the Council of Europe recommendation, the abolition of the *de facto* refugee status clearly demonstrates that there is no intention of honouring this recommendation.

In practice, the abolition of the *de facto* refugee status has had the desired political aim of reducing the number of residency permits issued by Denmark. According to the Danish Refugee Council, the abolition has particularly affected persons fleeing from war – notably from Somalia¹² – and persons with severe traumas as a result of previous persecution, such as rape.

The Ashkan case

The Ashkan case was initiated in 1999 during the session of the previous government in Denmark; however, the case has lasted well into the period of the present government. The case underlines the problems as regards compulsory expulsion of aliens after they are refused asylum. The case also raises concerns as regards the principle of non-refoulement in Article 3 of the UNCAT. The exposition of the case is based on an Article published in RCT’s Annual Report for 2004.¹³

Ashkan Panjeheighalehei entered Denmark along with his mother and sister in July 1997 when he was 15. Shortly afterwards, his mother received news from home that an illegal political group, in which she

⁸ “ *Afskaffelse af de facto-begrebet – fup eller fakta ?* ” (“ *Abolition of the de facto concept – false or true?* »), *Juristen* 2003, by Kim Kjær.

⁹ Council of Europe Recommendation (2001) 18 of the Committee of Ministers to the member states on subsidiary protection, 27 November 2001.

¹⁰ Proposal for a Council Directive on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001) 510 final, 12 September 2001.

¹¹ For further details, see Kim Kjær, “ *Afskaffelse af de facto-begrebet – fup eller fakta?*”, *Juristen* 2003, no. 1/2003.

¹² According to the statistics of the Danish Refugee Council 98% of the asylum seekers coming from Somalia in 2001 were admitted a residency permit, whereas the figure for 2004 had dropped to 12%, cf. Section 1a - Newsletter from the Danish Refugee Council, 01/2005.

¹³ Return to Torture, Kim U. Kjær, PhD, the Danish Institute for Human Rights, RCT Annual Report 2004.

http://www.rct.dk/About_RCT/Material/~media/8F76CAB50E3242978A437392DCD7BB04.ashx

had been active, had been broken up by the Iranian authorities and that she and her children were now wanted by the Iranian police. As a result, she applied for asylum in Denmark.

The Danish Immigration Service rejected her explanation about her political activities as unreliable and informed her that her application had been refused in October 1998. The Danish Refugee Board upheld that decision in January 1999, citing the same reasons. Ashkan, now 17, his mother and sister went underground, afraid of being sent back to Iran.

Two months later, Ashkan was, however, arrested by the police and immediately imprisoned at the Sandholm Refugee Camp north of Copenhagen. After two unsuccessful attempts to escape, he was transferred to Vestre Prison, where a nurse stated on 23 April 1999 that she was afraid Ashkan would commit suicide. The repatriation was nevertheless scheduled for 28 April 1999 and turned into an unusually dramatic affair. On the day of the repatriation – as Ashkan had just turned 18 – he was driven to the police “waiting room” in Kastrup Airport. Due to a “high risk assessment”, it had been decided that Ashkan should be accompanied by three Danish police officers on the plane to Teheran.

During a visit to the toilet, he slit both his wrists with a razor blade he had smuggled along. His suicide attempt was discovered and an ambulance transported Ashkan to Amager Hospital. According to the hospital case notes: “The patient ought to be examined by a psychiatrist, as it is impossible to rule out mental illness as the cause of the suicide attempt. It has been agreed that the patient is sent to the psychiatric reception unit at the Municipal Hospital.” That did not happen though. Ashkan was taken in an ambulance directly to Kastrup Airport instead, strapped to a stretcher this time. Badly weakened and wearing a blood-spattered shell suit, he was almost carried up into the plane by the three officers.

Ashkan and the three Danish policemen arrived in Teheran around midnight on the night between 28 and 29 April 1999, where he was handed over to the Iranian authorities. After a number of interviews, during which Ashkan denied having applied for asylum in Denmark, as admitting to this would have deemed him a traitor in the eyes of the Iranian authorities, he was allowed to go at first and went to stay with acquaintances in Teheran. After that, things really started to go wrong.

Acquaintances in Denmark were informed 1 May 1999 that Ashkan had been handcuffed, blindfolded and driven away by three men that same morning. After that, nothing was heard of him until 12 October 2002, almost two and a half years later, when he suddenly turned up at a refugee camp on the Greek island of Rhodes. In the meantime, Ashkan’s mother and sister had been granted residence permits in Denmark on humanitarian grounds.

In the Greek camp, he told Danish television that he had been kept in two “secret” prisons in Teheran and frequently subjected to torture and other forms of abuse. According to statement, his captors tried to get him to provide details of both his own and his mother’s political activities.

Finally, after just under two years in prison, he was released on bail (the deeds to his grandmother’s house). Well aware that the authorities still had an eye on him, he soon decided to flee. With the help of a human trafficker, Ashkan made it to Turkey on foot and after approx. three months was taken by boat to Rhodes where he was interned in a refugee camp in October 2002.

The Rehabilitation and Research Centre for Torture Victims (RCT) submitted a report 2 December 2002, which concluded that Ashkan had been subjected to severe torture and needed professional help as quickly as possible. The report was mainly based on a study of a three-hour interview by the Danish TV crew recorded with Ashkan in the refugee camp in Greece. RCT sent the report to the Ministry of Integration and called for an enquiry into whether or not mistakes had been made by the Danish authorities in their handling of the case. RCT also requested that Ashkan be allowed to enter Denmark to receive the medical and psychological assistance he needed after the torture.

In February 2003, the Danish Immigration Service granted Ashkan permission to enter the country and he returned 20 March 2003. Immediately on arrival, Ashkan applied for asylum. After almost six months

on 11 September 2003, the Service announced that Ashkan had been granted a residence permit as a refugee in Denmark with what is known as "protected status". In October 2003, RCT submitted an appeal to the Refugee Board on Ashkan's behalf asking for him to be recognised as a political refugee in accordance with the UN Refugee Convention on the grounds that the torture and other abuse he had suffered in Iran were due to the fact that the authorities attributed anti-government views to him, because of his mother's political activities. After a number of bureaucratic half-measures, Ashkan was finally granted the status of political refugee by the Board 2 December 2004.

The question is whether the Danish authorities ought to have realised in 1999 that the repatriation of Ashkan to Iran was not without risk.

It has not been— and probably never will be — established that the torture was directly linked to his mother's illegal political activities. It is, however, a generally acknowledged pattern that the Iranian authorities often imprison and abuse relatives of people who are wanted for political reasons, or attribute "forbidden" political views of their own to them. In theory, it *could* of course be claimed that Ashkan was imprisoned and tortured for completely different reasons. All things considered, that does not seem particularly likely though.

Another equally well-documented phenomenon in Iran is the tendency of the authorities to be highly arbitrary and unpredictable in their dealings with citizens: harsh punishments are doled out to innocent people on the basis of specially fabricated accusations while others, on whom the police have had their eye for one reason or another, avoid problems with the help of personal contacts or bribes. In other words, particularly when assessing applications for asylum by Iranian citizens, the Danish authorities ought to exhibit extreme caution.

The fact that the Danish police, immediately before the forced repatriation, chose to ignore a medical re-recommendation that psychiatric help be sought, is in itself criticisable. The Ministry of Justice, which became involved in the case to defend the decision, stated that it is up to a "professional police judgement" to decide whether such a medical recommendation should be followed. It is not a particularly convincing explanation. How is a policeman supposed to be equipped to decide that a person does *not* need medical assistance when a doctor has recommended it?

And finally: the very fact that Ashkan was escorted by three Danish policemen during the repatriation and that he arrived in Teheran in blood covered bandages after his attempted suicide drew attention to him. "Why does the returnee look like that and why does he have a police escort? I wonder if he applied for asylum in Denmark? Maybe he's a political dissident? We better take a closer look at him."

What conclusions can be drawn from the Ashkan Case? At least three, and all quite tangible ones.

Firstly, by deporting Ashkan in 1999 to face torture and other forms of severe mistreatment in Iran, Denmark has breached the European Convention on Human Rights, the UNCAT, the UN Refugee Convention and the ICPPR - irrespective of whether the Danish authorities try to excuse themselves by saying that they "did not do it deliberately."

Secondly, and closely connected to the first point: the Ashkan Affair ought to occasion in-depth soul-searching on the part of the Danish authorities with a view to remedying the faults in the Danish asylum system so clearly illustrated by the affair - not just out of respect for Denmark's international obligations but also — and especially — in order to avoid unfortunate stories like Ashkan's in the future. Unfortunately, there is no sign of such an initiative being taken.

Thirdly, the Ashkan Affair also highlights the importance of the media paying critical attention to the Danish practice of forced repatriation - and it is worth remembering that the media do not focus on an issue until organisations like RCT and others highlight the case, in this example Ashkan's, as part of their anti-torture advocacy work.

Article 4

Question 4

In the light of the Committee's previous recommendation (CAT/C/CR/28/1, paragraph 6(a)), please provide updated information on the State party's position on introducing into Danish penal legislation the definition of torture, as provided for in Article 1 of the Convention.

The traditional position of Denmark has been that it fulfils Article 4 of UNCAT as the convention does not require a specific provision on torture in national legislation as long as all acts of torture are offences under national criminal law. Since Denmark's ratification of the UNCAT it has been the position of the Director of Public Prosecutions and the Ministry of Justice that torture can be punished appropriately according to the Criminal Code's provisions on assault (Sections 244-46), placing another person in a helpless position (Section 250), causing danger intentionally (Section 252), unlawful coercion/duress (Section 260), unlawful deprivation of liberty (Section 261), threats about committing an unlawful act (Section 266) and crimes committed in public duty (chapter 16).

The problem of Denmark's "missing" torture provision has been raised with successive Danish governments and with the Parliament by Amnesty International and RCT¹⁴. The issue has also been debated extensively in the media and within the general public. In recent years, there has been an increasing popular demand to criminalise torture in Denmark. As a result, Amnesty International was able to collect 145.000 signatures, which were handed over to the Minister of Justice on 10 December 2005, urging the government to introduce a torture provision in Denmark.

In 2006, the Minister of Justice requested the Standing Committee on Criminal Matters to consider whether to introduce a specific torture provision in the Criminal Code. The Standing Committee will also consider whether there should be a specific provision on statute of limitation in relation to such a torture provision.¹⁵ The Standing Committee was given this assignment in June 2006. In the terms of reference for the assignment it is stated that:

"The Ministry of Justice finds that Denmark is not under any international obligation to introduce a specific torture provision in the Criminal Code. At the same time, the Ministry of Justice is aware of the fact that the introduction of a torture provision in the Criminal Code would send a positive signal to the international community. Furthermore, such a provision would address the criticism, which has been raised against Denmark. In addition, there is the question of the statute of limitation in relation to criminal liability for acts of torture"

As of April 2007, the Standing Committee has not yet completed this assignment.

Statute of limitation

As stated above, acts of torture are punishable under Danish criminal law pursuant to the provisions on assault, coercion, etc. Consequently, the provisions on limitation that apply to the offences of assault, coercion, etc. also apply to the crime of torture. In case an act of torture is covered by the provision on assault in Section 245 of the Criminal Code, which carries the maximum penalty of 8 years, the crime of torture will be statute-barred after 10 years, cf. Section 93 (1), no. 3 of the Criminal Code.

The Criminal Code's provisions on the statute of limitations were amended in 2005, where Section 93a was introduced. According to this provision, a crime may not be statute-barred, if criminal liability for the

¹⁴ Letter from RCT to the Minister of Justice, 2 February 2004, and response from the Minister of Justice to RCT, 8 March 2004. Meeting with the Parliamentary Committee on Legal Affairs, 24 June 2004.

¹⁵ Mandate of the Standing Committee on Criminal Matters, 23 June 2006.

violation in question is mentioned in an international treaty, to which Denmark is a State Party and according to which the statute of limitations is not applicable.¹⁶

Since the UNCAT is silent on the issue of statute of limitations the new provision Section 93a of the Criminal Code will not cover the provisions of the UNCAT and the crime of torture therefore has a statute of limitation under Danish law. This means that perpetrators of torture can only be prosecuted in Denmark up to 10 years after the act of torture was committed.

This present legal status has had the consequence that Denmark's State Prosecutor for Special International Crimes (*Statsadvokaten for Særlige Internationale Straffesager*) has been unable to press charges against suspected perpetrators of torture in at least three cases because such cases are subject to the ordinary rules in the Criminal Code concerning statute of limitations.¹⁷

Under international law, torture is considered to be one of the most serious international crimes. The practice of torture is so fundamentally at odds with the notion of civilized life that it is prohibited at all times. The prohibition of torture is enshrined in all the major human rights conventions and is a firmly rooted principle of customary international law and a peremptory norm of general international law. In order to ensure that there are no safe havens for torturers, the crime of torture is also subject to universal jurisdiction. Consequently, it goes against the very purpose and spirit of the UNCAT if the States Parties do not ensure – in their national legislation - that torturers can be prosecuted indefinitely for their hideous crimes.

The symbolic value of criminalisation

Several other European states have adopted a specific provision in their national criminal legislation defining and prohibiting torture.¹⁸ Some of these states have underlined the important symbolic value of such criminalisation. Norway, for instance, decided to introduce a specific torture provision in 2004, although the crime of torture was already covered by existing provisions on assault, coercion, threats and abuse of public authority. The explanation was:

*“Internationally it would be unfortunate if Norway would not follow the recommendations of the Committee against Torture. This would amongst others be a bad signal in relation to states, where there is a greater need for the authorities to mark in clear text that torture is unacceptable”.*¹⁹

Denmark has so far rejected to introduce a torture provision in the Criminal Code solely for its symbolic value. Nevertheless, Denmark has on other occasions introduced provisions in the Criminal Code exclusively to mark the society's rejection of a particular crime. A case in point is the introduction in 2003 of a specific provision on female circumcision in the Criminal Code. In the comments to the draft law it is stated that:

*“Female circumcision is presently punishable pursuant to the ordinary provisions on violence, but it is proposed to introduce a new, specific provision in the Criminal Code on female circumcision in order to mark more strongly the society's rejection of such mutilating and purely tradition-bound operations and to state in the law that under no circumstances can consent be given to female circumcision – neither by the girl herself or her parents – with the effect at such operation is unpunished.”*²⁰

¹⁶ Law no. 366 of 24 May 2005 concerning amendments to the Criminal Code, notably the introduction of Section 93a. The introduction of the new provision is based on the White Paper no. 1441/2004 of the Standing Committee on Criminal Matters.

¹⁷ Newspaper Article by Ole Damkjær, "Danmark har udviklet sig til et fristed for torturbøddler" (Denmark has developed into a safe haven for perpetrators of torture), Berlingske Tidende, 9 November 2005, cf. www.sico.ankl.dk.

¹⁸ Torture is criminalised in several European states, including the Germany (Article 340 and 223a, 224-25), Great Britain (Article 134), France (Article 222), Spain (Article 173-77) and Norway (§ 117a).

¹⁹ Norway's Justice and Police Department's hearing of 14 June 2002 concerning a new Criminal Code.

²⁰ Comments to the proposed law amending the Criminal Code and the Aliens Act, Parliamentary Session 2002-03 Law 183, presented by the Minister of Justice on 12 March 2003. <http://www.ft.dk/?samling/20061/MENU/00000002.htm>

Question 5

Please elaborate on the State Party's decision not to introduce a special provision on the prohibition of torture in the new Military Criminal Code, which was adopted in 2005.

Denmark has increasingly become involved in international military operations and peacekeeping missions. This strong international military presence increases the risk of torture occurring in a Danish context as such presence may give rise to Danish soldiers committing acts of torture or ill treatment in exceptional circumstances. Due to this fact it is therefore important to have a provision on the prohibition of torture in the Military Criminal Code.

Currently Denmark's Military Criminal Code contains a general provision in Section 36, which criminalises violations of international conventions, which Denmark has ratified and rules of general customary international law, when such violations occur during armed conflict.²¹ The purpose of Section 36 is to ensure that all violations of international humanitarian law, which are not covered by other provisions in the Danish criminal legislation, are criminalised.

The Military Criminal Code Section 36 has been inserted to ensure the fulfilment of Denmark's international obligations, which have come about as a result of Denmark's ratification of a number of international conventions including those on the rules of armed conflict and the protection of victims of armed conflict.²² Section 36 also emanates from Denmark's obligation to prosecute and punish persons who commit torture, inhuman treatment or other grave breaches of the Geneva Conventions of 1949 on the protection of victims in armed conflict and the UNCAT.²³

The Military Criminal Code Section 36 does not list the different criminal acts for which a Danish soldier or a civilian Danish citizen risks being punished during an armed conflict. Section 36 states in general terms that one can be punished for the intentional use of an instrument of war, which is contrary to international law. According to the provision, a violation may be punished with a maximum penalty of life imprisonment.

In connection with the Danish Parliament's reading of the draft Military Criminal Code in 2005, the Parliament considered introducing a torture provision in light of the recommendation made by the UN Committee against Torture. RCT drafted a proposal for an amendment of Section 36 of the Military Criminal Code, which contained a reference to UNCAT and various other international conventions.²⁴ However, a majority in Parliament decided that it would not be necessary to introduce a specific torture provision in the Military Criminal Code. The majority based its conclusion on the fact that the Civil Criminal Code does not contain a specific torture provision and the introduction of such a provision in the Military Criminal Code would throw unnecessary suspicion on Danish military personnel.²⁵

According to Section 36 of the Military Criminal Code, a Danish citizen can only be punished, when three conditions are met. Firstly, the person in question must have committed an act that violates international law. Secondly, the act must take place during an armed conflict in which Denmark participates. Thirdly, the act must be committed intentionally. Consequently, negligent acts are not covered by Section 36.

The law was adopted on 13 May 2003 and published in the National Gazette (*Lovtidende*), Annex C, 398.

²¹ Law number 530 from 24 June 2005 (military criminal code), Gazette 2004-05, Annex C, page 221.

²² White Paper on the Military Criminal Code, the Civil Procedure Code and the Military Disciplinary Law, Copenhagen 2004, page 114.

²³ I. Geneva Convention Article 49, II. Geneva Convention Article 50, III. Geneva Convention Article 129 og IV. Geneva Convention Article 146.

²⁴ <http://www.folketinget.dk/samling/20042/Lovforslag/L54/Bilag/12/164499.HTM> and

<http://www.folketinget.dk/samling/20042/Lovforslag/L54/Bilag/11/163637.HTM>

²⁵ White Paper on the draft Military Criminal Code from the Parliamentary Defence Committee 4 May 2005 page 3.

<http://www.folketinget.dk/samling/20042/Lovforslag/L54/Bilag/17/169994.HTM>

The Military Criminal Code Section 36 has been broadly defined so as to allow for both current and future prohibitions in international law to be covered by the provision. This is extremely relevant in the eyes of the Danish lawmakers as international humanitarian law continues to evolve.²⁶

However, the broad scope of the provision and the fact that it does not specify which treaties are covered by the provision in practice has the effect that Danish military personnel and ordinary citizens must have knowledge of all international treaties to which Denmark is a party. On top of this, they must also have extensive knowledge of customary international law and unwritten principles of international law to not risk violating Section 36.

The Committee that was established in 1999 to review the Military Criminal Code and which submitted a White Paper in 2003 concluded that a more precise formulation of Section 36 would be extremely difficult and would entail the enumeration of an extensive list of possible violations of international law. It also follows from the White Paper that there is no need for a clear authority in national law as a prerequisite for the prosecution of a number of serious international crimes.²⁷

However, it is a generally recognized principle that the law should be precise, predictable and accessible. The current broad formulation of Section 36 does not live up to this principle as the elements of crime are not elaborated and as the provision contains no reference to the international conventions that are covered by Section 36. Based on the legal rights of the individual citizen this solution seems particularly severe, as a person risks life imprisonment for actions he or she has no way of knowing are criminal actions.

It should be noted that in connection with the Danish ratification of the Statute for the International Criminal Court, the Danish lawmakers chose to include the Statute as an annex to the Danish law incorporating the Statute. This is a possibility that could be considered in connection with a future revision of the Military Criminal Code. As an alternative the lawmakers could introduce a footnote to the current Military Criminal Code in which reference is made to the relevant international conventions and to their publication in the national Gazette.

The Military Criminal Code Section 36 is not the only provision that may play a role regarding cases of torture within the Danish military context. The Military Criminal Code adopted in 2005 also contains a provision on the dereliction of duty in Section 27. According to this provision military personnel may be punished with up to three months imprisonment for gross dereliction of duty. The provision is applicable both in times of armed conflict and military occupation. Before the revision of the Military Criminal Code, this provision was previously Section 15 and also included lesser serious dereliction of duty as the provision made no mention of it being limited to gross violations.

As will be mentioned under question 6 below acts of ill treatment and even torture may be prosecuted under Section 27 of the Military Criminal Code as a dereliction of duty. The minor derelictions of duty that are not covered by Section 27 may instead be prosecuted under Section 36. As stated above, this provision is only applicable in times of armed conflict and not during military occupation, which may have the effect that certain minor derelictions of duty committed during military occupation will not be covered by the Military Criminal Code. As Section 36 is intended to be a provision, which ensures that all of Denmark's international obligations from international treaties are criminalised, the possibility of some minor derelictions of duty not being included in Section 36 represents a loophole in the Danish Military Criminal Code.

²⁶ White Paper on the Military Criminal Code, the Civil Procedure Code and the Military Disciplinary Law, Copenhagen 2004, page 287.

²⁷ White Paper on the Military Criminal Code, the Civil Procedure Code and the Military Disciplinary Law, Copenhagen 2004, page 287, footnote 36, and pages 288-89.

Question 6

Please provide data with respect to persons tried and convicted, including sanctions imposed, for the crime of torture

In January 2005, the Danish Judge Advocate decided to institute criminal proceedings against Captain Annemette Hommel of the Danish military and four military police officers for dereliction of duty in accordance with the Military Criminal Code Section 15 (cf. IV. Geneva Convention Articles 27 and 31). The institution of criminal proceedings was based on events, which took place in Iraq in March-June 2004 in the Danish military camp "Camp Eden".

In the indictment the judge advocate claimed that Captain Hommel and the four officers in their interrogation of Iraqi prisoners at Camp Eden had used excessive interrogation methods. The Captain and the officers had allegedly kept the prisoners in stressful positions for long periods of time, denied them access to drinking water and used condescending vocabulary including calling the prisoners "dogs, dog shit, dick heads, men without dicks and pigs."

In January 2006 the Copenhagen City Court found Captain Hommel and the four military police officers guilty of violating Section 27 in the new Military Criminal Code, which had come into force at the time the verdict was reached.²⁸ The City court found that the condescending remarks made towards the prisoners and the use of stressful positions during the interrogations represented a gross dereliction of duty and a violation of the IV Geneva Convention. The verdict of the City Court was appealed to the High Court.

On 6 July 2006, the High Court acquitted all five defendants.²⁹ The Court found that there was insufficient evidence to ascertain whether the techniques applied during the interrogations were legal in relation to the Military Criminal Code. In its verdict the High Court makes a general comment as regards Captain Hommel's description of the interrogations, stating that they were hardly in conformity with the desired protection of detainees under the IV. Geneva Convention Articles 27 and 31. However, the High Court goes on to state that the interrogations cannot be assessed as the High Court may only look at gross violations of dereliction of duty according to Section 27 of the Military Criminal Code. This being a minor dereliction of duty, it falls outside the scope of Section 27.

In this statement the High Court supports the argument that with the introduction of the new Section 27 in conjunction with Section 36, a loophole has been made in the Military Criminal Code. In effect minor derelictions of duty committed by Danish military personnel in times of military occupation may go unpunished.

Article 10

Question 9

[...] Please provide information on the training provided for law enforcement officials with respect to human rights in general and the measures for the prevention of torture and cruel, inhuman or degrading treatment or punishment in particular. How and by whom is this training monitored and evaluated?

As stated by the Danish Government, the Danish police receive training in human rights from amongst others the Danish Institute for Human Rights and the RCT, as part of their basic education at the Police Academy. This training has, since the late-1990s, been given to every single police recruit.

Within the Danish Military, the personnel receive training in international humanitarian law as an integral part of their basic education. However, the military staff does not, to the best of our knowledge, receive any training in human rights on an ongoing basis. The Danish Institute for Human Rights and the RCT

²⁸ Copenhagen City Court judgment, 12 January 2006, 40.2120/2005.

²⁹ High Court judgment, 6 July 2006, S-239-06.

have on an ad-hoc basis conducted specific training sessions in human rights, torture prevention, medical ethics and the consequences of torture, to future military commanders and the military's legal advisors, among others.

In 2004, the Danish Defence Command (*Forsvarskommandoen*) approached the Danish Institute for Human Rights and the RCT with an invitation to help design and implement a human rights training programme for military personnel. A preliminary dialogue was initiated, but shortly afterwards it was suspended due to the restructuring of the Defence Command. Consequently, human rights training has up until now only been provided on an ad hoc basis upon request by the Defence Academy (*Forsvarsakademiet*) and the Judge Advocate (*Forsvarets Auditørkorps*).

In recent years, Denmark has increased its engagement in international military operations, and Denmark presently participates in several UN peace-keeping operations around the world and in other military operations with the authorization of the UN, notably in Afghanistan and Iraq.

As a result of Denmark's increasing military engagement it has become even more urgent to ensure that Danish military personnel receive education and information about the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (CIDT) as well as the treatment of persons deprived of their liberty. This became very clear during Denmark's participation in the US-led war and subsequent occupation of Iraq in 2004, which gave rise to the first case in which Danish soldiers were accused of violating the Geneva Conventions on the protection of civilians in times of war.

On 6 July 2006 the Danish High Court acquitted Annemette Hommel, a female captain in the Danish army, and four military police officers of abusing Iraqi prisoners in the Danish Camp Eden in Iraq in 2004. The High Court concluded that there was not sufficient evidence to convict the accused; although it did point out that the interrogations conducted by Captain Hommel – as described by herself – were presumably not fully in accordance with the IV. Geneva Convention. Please refer to the comments under UNCAT Article 4 for further details on the Hommel-case

The High Court further concluded that there had been a lack of training, guidance and instruction for the military staff operating in Iraq. In the present case, Captain Hommel had applied outdated interrogation techniques, and no one had informed her that she could no longer apply the much criticised techniques that she had learned during the Prisoner of War Exercises (POWEX).

In response to the Hommel-case the Danish Defence Command (*Forsvarskommandoen*) issued a Directive on the prohibition of torture and CIDT. The Directive provides guidelines to military personnel on how to implement their duties while ensuring full respect for the prohibition of torture and CIDT. The Directive explains the legal concepts of torture and CIDT, providing examples of treatment contrary to UNCAT. The Directive also lists the military personnel's duties to prevent torture, to report on acts of torture and to take action to bring acts of torture to an end. However, the directive does not list which methods Danish military personnel are allowed to use. Before issuing the Directive, it was sent to various human rights organisations, including AI, DIHR and RCT, for comments. To the best of our knowledge the final version of the Directive is classified.

The adoption of the Directive prohibiting torture is clearly a positive step. However, the need remains to address the shortcomings identified by the High Court in the Hommel case, notably to draft guidelines on interrogation, to operationalise the new Directive and to provide regular training on human rights and torture prevention. The need for clear guidelines and training applies particularly to Danish military forces that operate in international military operations.

Article 11

Question 10

Please provide information and statistics about cases where an inmate has been provided with opportunities to associate with one or more inmates in the same situation during his or her solitary confinement.

The information in this section has been provided by Peter Scharff Smith, Senior Researcher at the Danish Institute for Human Rights.

Denmark has throughout the last two decades received international, regional, and national human rights criticism for its use of solitary confinement during pre-trial detention. In response, the Danish government has taken initiatives to limit the use of pre-trial solitary confinement but has largely refrained from addressing the most important human rights problem in this context: the lack of psychologically meaningful social contact available to remand prisoners subjected to solitary confinement in Danish prisons.

Research has shown that the lack of psychologically meaningful social contact causes mental illness among pre-trial detainees in solitary confinement, and in 1997 a large scale official study on the effects of pre-trial solitary confinement in Denmark recommended both “medically and psychologically” the termination of this practice.³⁰ Furthermore, recent research based on studies from Denmark, Norway, Switzerland, Canada, South Africa, and the US, conclude that solitary confinement “causes serious health problems for a significant number of inmates. The central harmful feature is that it reduces meaningful social contact to an absolute minimum: a level of social and psychological stimulus that many individuals will experience as insufficient to remain reasonably healthy and relatively well functioning”.³¹

Accordingly, human rights bodies have directed their attention in that direction and as late as in 2002 the European Committee for the Prevention of Torture (CPT) once again recommended that “rules be adopted and implemented without delay to ensure that prisoners held in isolation have increased staff contact and access to visits, individual work and teaching, and are offered regular and longer conversations with chaplains, doctors, psychologists and other persons”.³² However, the latest revision of the Danish Administration of Justice Act in 2006 contains no provisions, which will ensure increased human contact for pre-trial detainees in solitary confinement (more visits, additional contacts with staff, regular and longer conversations with chaplains, doctors, psychologists and other persons etc.).³³

Comment regarding the use of solitary confinement in Denmark³⁴

During the late 1990s, the use of pre-trial isolation significantly declined (possibly due to international criticism), with 20.1 percent of all remand prisoners isolated in 1995 compared with 12.7 percent in 1999. The decline continued to 8.2 percent in 2002. This was still 501 pre-trial imprisonments in a country with a population of 5.4 million and an average prison population of 3.435 inmates in 2002.⁶ At the same time, though, the average length of a stay in pre-trial solitary confinement has risen from 27 days in 1988 to 37 days in 2003 (Smith 2005, p. 12). The total number of days spent in pre-trial solitary confinement has therefore gone up recently, and has during 2003 and 2004 risen to a level beyond the situation in 2000, contrary to the intentions of the law introduced the same year.

³⁰ Henrik Steen Andersen, Tommy Lillebæk, and Dorte Sestoft: "Efterundersøgelsen – en opfølgingsundersøgelse af danske varetægtsarrestanter" [The follow up study – a study of Danish pre-trial detainees]. København: Schultz, 1997, p. 59.

³¹ Peter Scharff Smith "The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature" in Michael Tonry (ed.) *Crime and Justice, Vol. 34*, Chicago University Press 2006, p. 503.

³² Visit Report, Denmark, 2002, par. 38, p. 21.

³³ "Forslag til lov om ændring af retsplejeloven fremsat af Justitsministeren d. 25. oktober 2006".

³⁴ The information provided is an excerpt from Peter Scharff Smith, "The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature" in Michael Tonry (ed.) *Crime and Justice, Vol. 34*, Chicago University Press 2006

⁶ See figures and tables in "Rigsadvokaten Informerer" (The Director of Public Prosecutions Informs), no. 21/2003, assessed at <http://www.rigsadvokaten.dk/>.

Article 12 and 13

Question 21

As regards the examination of complaints against the police and the evaluation of the operation of the police complaints board in Denmark as well as the police complaints board in Greenland, please provide information on the results of the latest evaluations. In particular, how many complaints against the police have been filed and investigated in Denmark and in Greenland in 2003, 2004 and 2005 and how many of these complaints have led to the issuance of a decision? What is the current length of complaint proceedings?

Under the current system the Police Complaints Boards (PCB) (*Politiklagenævnen*) are comprised of a lawyer, who is the Chairperson, and two laypersons. The Public Prosecutor (*Statsadvokaten*) notifies the PCBs of any complaints initiated against the police, but the PCBs may also request the Public Prosecutor to take up complaints against the police. The Public Prosecutor is in charge of the investigation into the police complaint and deals with all aspects of the investigation, including interrogation of possible witnesses and any dealings with the complainant. The PCBs may request the Public Prosecutor to take certain investigatory steps, but the PCBs do not have investigatory powers. A decision taken by the Public Prosecutor supported by the PCB may be appealed to the Director of Public Prosecutions (*Rigsadvokaten*).³⁵ The decision of the Director of Public Prosecutions is final and may not be appealed to the courts.

The current system of the PCBs in Denmark gives rise to a number of concerns. Firstly, it is questionable whether the investigations carried out by the Public Prosecutor are impartial. In Denmark there is a very close relationship between the prosecution service and the police. The Public Prosecutors may request the assistance of the Commissioner of Police and the Serious Crime Squad in the investigations of police misconduct.³⁶ This means that the police may assist the Public Prosecutor in the investigations. In essence this has the effect that certain complaints against police misconduct are investigated by the police system itself.

Secondly, the decisions made by the Public Prosecutor as to whether the police officers in question have committed a criminal offence and whether a criminal charge should be brought against them is based heavily on the Public Prosecutor's evaluation of the evidence. Based on its investigations the Public Prosecutor weighs the evidence against the police officers, in essence deciding whether or not there is sufficient evidence to bring charges against the police. In the interest of justice, the evaluation of the evidence and interpretation of the criminal code should be left to the courts. Justice must not only be done, but must also be seen to be done.

Thirdly, the PCBs have only limited possibilities to make their own investigations. As stated above the PCBs have the possibility to request the Public Prosecutor to take certain investigatory steps. However, the PCBs have to rely solely on the evidence produced by the Public Prosecutor when making their decision. They may not hear witness testimonies and they do not have the possibility to speak with the complainant. This appears to be contrary to the fact that the courts, to a large extent, depend on the testimonies of both defendants and witnesses. Thus if the PCBs are not in agreement with the decision made by the Public Prosecutor and the evidence before them, they have no way of carrying out their own investigation or hearing witness statements again.³⁷

Fourthly, there is no possibility of appeal to the courts of the final decision taken by the PCBs and the Director of Public Prosecutions.

On 11 October 2006, the Ministry of Justice set-up a committee to review the current system of PCBs. In the terms of reference for the committee it is stated that it shall review and assess the PCBs to

³⁵ Danish Administration of Justice Act, Chapter 93 d.

³⁶ Danish Administration of Justice Act, Section 1019,2.

³⁷ Amnesty International, Danish Section, briefing paper on processing complaints against the police, 29 November 2005.

determine whether they are functioning satisfactorily. The committee shall furthermore make recommendations to improve the PCBs within the existing mandate or based on the experience from other countries the committee may find that the PCBs may need to have an altered composition and mandate in order to ensure a greater trust from the general public.

Due to the limitations in the current system of PCBs it is important to underline that the committee should not limit itself to only making smaller changes within the existing system of PCBs. The committee should indeed, as mentioned in the terms of reference, look at the possibility of making more substantial changes to the system. The committee could be inspired by the recent changes made to the police complaints mechanism in Norway.

Question 22

Please comment on the case of Jens Arne Ørskov and the allegations that there was a failure to conduct a thorough, effective, independent and impartial investigation into his death. Have any measures been taken to respond to the request to establish a new mechanism for the investigation of human rights violations by law enforcement officials, which would be completely independent of the police?

The case of Jens Arne Ørskov (JAØ) concerns a 21 year old man, who died in police custody. He was arrested on 14 June 2002 in an intoxicated state for disorderly conduct after a party in Northern Jutland. According to the arresting officers JAØ violently resisted his arrest. After being placed in the police vehicle and on route to the police detention JAØ ran amuck in the car. The police had to stop at a lay-by to contain him. They took JAØ out of the police vehicle and placed him on his stomach with his hands cuffed behind his back to make him settle down. While placed on his stomach JAØ suddenly became unconscious. The officers thought JAØ was faking it in order for him to be able to attack them by surprise. When JAØ did not react the officers removed the handcuffs and placed JAØ on his side. An ambulance was called and when it arrived on the scene JAØ was found to be dead. The autopsy showed that Jens was under the influence of alcohol and cannabis.³⁸

On the day of the incident the Public Prosecutor initiated an investigation into the death of JAØ. On 4 September 2002, the Public Prosecutor decided to suspend the investigation as the findings had not given reason to suspect the police officers of any wrongdoings.³⁹ The Public Prosecutor concluded that the most probable cause of death was cardiac arrest due to violent physical activity. The Police Complaints Board supported the decision of the Public Prosecutor.

On 5 September 2002, the Public Prosecutor's decision was appealed to the Director of Public Prosecutions. On 11 April 2003, the Director of Public Prosecutions found no reason to overturn the decision of the Public Prosecutor.

After massive media coverage and a documentary about the case on Danish national television and a report filed by the deceased's mother against the four police officers for violation of the Danish Criminal Code, the Public Prosecutor decided to re-open the case. The media coverage had focused in particular on the cause of death, which was to be the focus of the new inquiry. In this connection the Public Prosecutor submitted the case to the Medico-Legal Council (Retslægerådet) for their comments. The cause of death was found to be a combination of alcohol, cannabis, violent physical activity and the lack of oxygen due to restrained breathing as a result of being placed on the stomach. The result could not be said to be conclusive. On 17 March 2005 the Public Prosecutor decided to once again suspend the investigation due to lack of sufficient evidence against the arresting police officers. On 16 March 2005, the Police Complaints Board supported the decision of the Public Prosecutor.

On 12 April 2005, the case was appealed to the Director of Public Prosecutions and in November 2005, the case of JAØ was again the subject of a documentary on Danish national television. On 17 January

³⁸ Jens Arne Ørskov's death in custody : A mother's quest for justice. <http://www.amnesty.dk/default.asp?page=1993&lang=da>)

³⁹ Danish Administration of Justice Act ,Section 749 (2).

2006, the Director of Public Prosecutions found no reason to overturn the decision of the Public Prosecutor.⁴⁰

The case gives rise to a number of concerns, namely the relationship between the Public Prosecutor and the police and whether this relationship guarantees an independent and impartial investigation into the case. The fact that the evidence in the case has been disputed and that the cause of death of JAØ was also disputed, gives rise to concern. Furthermore JAØ's mother has no possible way of appealing the final decision taken by the Director of Public Prosecutions and has instead filed a civil law suit against the police officers involved in the incident.

Article 14

Question 24

Please provide information on the implementation of the decision by Parliament to cover the Rehabilitation Department of the Rehabilitation and Research Centre for Torture Victims (RCT) by the Hospital Act as of 2006. How has this decision affected the number and quality of services provided by the Rehabilitation Department?

RCT's costs for rehabilitation of torture survivors has since January 2006 been covered by the Danish Health Care System. This decision has not affected the quality of services provided by the Rehabilitation Department. However, the Rehabilitation Department has increased the number of patients going through the rehabilitation process after the change of funding source, mainly due to the fact that staff from 1 January 2006 focus almost exclusively on clinical work.

In 2005, RCT treated a total of 225 patients and 41 patients were still undergoing treatment at year's end. In 2006, RCT treated a total of 279 patients and 95 patients were still in treatment at year's end.

Since the funding source has changed to the Danish Health Care System, RCT has been under the obligation to develop a waiting list for all torture survivors waiting for treatment at the RCT. This waiting list renders visible the amount of torture survivors currently waiting for an assessment of their ability for treatment and to undergo treatment at the RCT. Currently there is a waiting time of between 11 – 22 months depending on the kind of treatment required. Under the Danish Health Care System there is a three month guarantee for treatment, which currently cannot be met by any of the rehabilitation centres in Denmark.

During open consultations of the Parliamentary Committee on Health on 12 January 2007, the Committee expressed concern on the long waiting list for treatment at RCT and the other Danish rehabilitation centres. In response to these concerns the Minister of Health has promised to address the issue of waiting lists for survivors of torture to receive treatment and has formed a working group with several of the rehabilitation centres, including RCT that will look into the issue.⁴¹

Other

Question 32

As regards Denmark's ratification of the Optional Protocol to the UN Convention against Torture on 25 June 2004, please provide information on the independent national preventive mechanism(s) for the prevention of torture at the domestic level.

⁴⁰ Question posed to the Parliamentary Legal Committee

⁴¹ Question posed by the Parliamentary Committee on Health, nr. 224. www.ft.dk

The Government's position

The Danish State's position on the National Preventive Mechanism (NPM) is that the OPCAT is considered fulfilled under the present arrangements with the Danish Ombudsman – the so-called Parliamentary Commissioner for Civil and Military Administration in Denmark – on inspections of places of detention. This appears from the comments to the (adopted) proposal for a parliamentary decision on ratification of the OPCAT. In support of this assessment it is mentioned that:

- The Ombudsman is empowered to examine any institution under his mandate, including institutions of the police, the prison services, mental health facilities and asylum centres;
- The Ombudsman Act of 1996 contains several provisions on the Ombudsman's independence, the Ombudsman's publication of an annual report and the Ombudsman's duty to inform the Parliament about deficiencies in existing laws; and
- In relation to draft legislation on human rights, such initiatives are sent in consultation to relevant organisations, including the Danish Institute for Human Rights.

With regard to the legal basis it is stated in the comments to the proposal for a parliamentary decision on ratification that the OPCAT does not require any legislative amendments because it can be implemented within the existing legal framework and administrative practice. It is further stated that the proposal is not expected to have any direct financial consequences.⁴²

In conclusion, it is the government's assessment that, on the whole, Denmark fulfils the OPCAT provisions on the NPM. In the light of the experience gained after the NPM has started its work, the government will assess whether there may be a need to adjust the present arrangement, notably with regard to expertise.

In anticipation of Denmark's establishment of its NPM, RCT made a legal study of the existing Danish visiting mechanisms and assessed them against the OPCAT. The study - "*New Optional Protocol to the UN Convention against Torture – Danish Ratification and Implementation*" was published in a Danish human rights journal in 2003.⁴³ The main conclusion of the study was that the existing domestic visiting mechanisms of the Ombudsman and the parliamentary Section 71-Inspection, respectively, would not be able to live up to the obligations of Denmark under the OPCAT. A summary of the study's conclusions are presented below:

Designation of the National Preventive Mechanism

During the parliament's consideration of the proposal to ratify the OPCAT, the RCT shared the main conclusions of the review - "*New Optional Protocol to the UN Convention against Torture – Danish Ratification and Implementation*" – with the Parliamentary Committee on Foreign Affairs.⁴⁴

The Committee was informed of RCT's position that the functions of the NPM in Denmark would best and most effectively be served by establishing cooperation between various independent institutions to ensure the presence of the necessary professional knowledge. The Committee was also informed about the dialogue that had taken place between the Ombudsman Institution, the Danish Institute for Human Rights and the RCT in 2003, where the three institutions discussed the possibility of attending to the duties of the NPM in cooperation. This possibility has also been presented to the Ministry of Foreign Affairs.⁴⁵

⁴² http://www.folketinget.dk/Samling/20031/beslutningsforslag_oversigtsformat/B129.htm

⁴³ "*Optional Protocol to the UN Convention against torture – Danish Ratification and Implementation*" ("*Ny Tillægsprotokol til FN's Torturkonvention – Dansk ratifikation og implementering*"), Peter Vedel Kessing, EU & Human Rights Journal (EU & Menneskeret), volume 4, September 2003.

⁴⁴ Cf. Letter from the RCT to the Parliamentary Committee on Foreign Affairs, 10 March 2004.

⁴⁵ Cf. Letter from RCT to the Ministry of Foreign Affairs, 7 July 2003.

In response to the RCT's address to the Committee on Foreign Affairs, the Minister of Foreign Affairs informed the Committee that in order to ensure efficiency and impact, the government finds it most appropriate to use the existing visiting mechanisms as a point of departure rather than to establish new mechanisms, which may seem alien to the present system.⁴⁶

The Minister further stated that the Ombudsman has the powers to inspect any institution under his mandate, although he does not have the mandate to provide proposals for or comments to draft legislation. Finally, he stated that if it proves necessary to adjust the Danish NPM in the light of the experience and recommendations of the Sub-Committee, the government would be open to doing so.

According to Article 17 of the OPCAT, each State Party shall establish or designate its NPM(s), at the latest one year after the entry into force of the OPCAT or of its ratification.

Denmark ratified the OPCAT on 26 June 2004 and the OPCAT came into force on 22 June 2006. Consequently, Denmark must designate its NPM(s) by 22 June 2007.

In the proposal for ratification of the OPCAT,⁴⁷ the Committee on Foreign Affairs expresses that it expects the Minister of Foreign Affairs to consult with the Committee before he takes the final decision about Denmark's NPM so as to give the Committee an opportunity to express its views about this matter. To the best of our knowledge as of 10 April 2007, the Committee on Foreign Affairs has not yet been consulted about the future Danish NPM.

Guarantees of the National Preventive Mechanism

a) Capabilities and professional knowledge (OPCAT, Article 18 (2))

The OPCAT is silent on the issue of the required or desired professional knowledge of the NPM. However, some guidance can be obtained by looking at the required experience of the Sub-Committee on Prevention, which says that the members shall be chosen from among persons having proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration or in the various fields relevant to the treatment of persons deprived of their liberty, cf. Article 5 (2). Inspiration may also be drawn from the experience of the European Committee for the Prevention of Torture (CPT) in conducting independent visits to places of detention:

"[...] The experience of the CPT's first year of activity has shown that although lawyers and experts in human rights constitute an indispensable component of the CPT, persons coming from other professions, and in particular medical doctors and experts in penitentiary systems, play a decisive role in the Committee's operation, especially in the course of the visits.[...]"

The Danish Ombudsman institution is charged with the responsibility of ensuring that the public administration does not act in contravention to Danish law, notably public administrative law. It is thus a body exercising legality control⁴⁸, and the institution almost exclusively employs legal professionals. The Ombudsman only has limited human rights expertise and no health professional expertise. It is therefore questionable whether this Institution is able to assess the physical and mental treatment that persons deprived of their liberty are exposed to in places of detention, which is an important element in the prevention of torture and other forms of ill-treatment.

⁴⁶ Cf. Response by the Minister of Foreign Affairs to the parliamentary Committee on Foreign Affairs concerning the concerns raised by RCT, 16 April 2004.

⁴⁷ Cf. The Parliamentary Committee on Foreign Affairs' White Paper on the proposal for a parliamentary decision on Denmark's ratification of the OPCAT, 29 April 2004, p. 2.

⁴⁸ "Law no. 473 of 12 June 1996 on the Parliamentary Ombudsman" ("Lov nr. 473 af 12. juni 1996 om folketingsets ombudsmand"), Jon Andersen, Annual Report of the Ombudsman, 1996, page 447.

b) Resources and capacity (OPCAT, Article 18 (3))

During its most recent visit to Denmark in 2002, the CPT stressed that inspections of police detention facilities should be both regular and unannounced to be fully effective. With regard to the Danish Ombudsman, the CPT concluded:

“given the very wide scope of the Ombudsman’s mandate and the resources at his disposal, it is unrealistic to expect the Ombudsman to carry out the regular monitoring of police stations advocated by CPT. The CPT invites the Danish authorities to establish a system of regular visits to police establishments by an independent authority.”⁴⁹

Consequently, it is most uncertain whether the Ombudsman has capacity to fulfil the obligations of the NPM with the existing human and financial resources, which – as stated by the government – are not expected to be increased as a result of his designation as NPM.

Mode of operation of the National Preventive Mechanism

c) Powers of the NPM (OPCAT, Article 19)

The NPM shall be granted – at a minimum – the powers to regularly examine the treatment of persons deprived of their liberty; to make recommendations to relevant authorities with the aim of improving the treatment and conditions of persons deprived of their liberty; and finally to submit proposals and observations concerning existing or draft legislation cf. Article 19 of the OPCAT. The Danish Ombudsman is an institution that primarily exercises legality control – as stated in Article 5 of the European Prison Rules.⁵⁰ Nevertheless, the Ombudsman will undoubtedly be able to fulfil the first two powers of the NPM with the limitation, however, that the activities will be restricted to the Ombudsman’s field of expertise (excluding human rights and health expertise).

With regard to the power to submit proposals and observations concerning existing or draft legislation, it is questionable whether the Ombudsman will be able to fulfil this power. According to Section 12 of the Ombudsman Act his powers are restricted to notification:

“If any deficiencies in existing laws or administrative regulations come to the attention of the Ombudsman, he shall notify the Folketing (i.e. the Parliament) and the responsible Minister thereof. In the case of deficiencies in local authority bylaws, the Ombudsman shall notify the local authority concerned”.⁵¹

First of all, it should be noted that this power only applies to existing legislation. Draft laws are thus not covered by the above mentioned provision, and the Ombudsman usually refrains from commenting on legislative initiatives and draft laws, probably because of his position as the Parliamentary Ombudsman. Secondly, the Ombudsman has in practice exercised self-restraint when it comes to commenting on existing legislation.

Furthermore, it is stated in the comments to the (adopted) proposal for a parliamentary decision on ratification that new draft laws, which raise questions about the relation to human rights will be sent in

⁴⁹ Report to the Government of Denmark on the visit to Denmark carried out by the CPT from 28 January to 4 February 2002. <http://www.cpt.coe.int/documents/dnk/2002-18-inf-eng.htm>

⁵⁰ The Ombudsman Act was amended in 1997 hereby extending the Ombudsman’s inspections to systematic inspections of prisons and other closed institutions. This legislative amendment came about as a result of a recommendation from the CPT from 1990 and as a result of the European Prison Rules, which in Article 5 states that: “The protection of the individual rights of prisoners with special regard to the legality of the execution of detention measures shall be secured by means of a control carried out, according to national rules, by a judicial authority or other duly constituted body authorised to visit the prisoners and not belonging to the prison administration”.

⁵¹ “Law no. 473 of 12 June 1996 on the Parliamentary Ombudsman” (“Lov nr. 473 af 12. juni 1996 om folketingets ombudsmand”)

consultation to relevant institutions, including the Danish Institute for Human Rights.⁵² It is thus not envisaged that the Ombudsman will comment on draft laws.

In conclusion, it is unlikely, that the Ombudsman will be able to exercise the third power of the NPM: submitting proposals and observations to existing or draft laws.

d) Standards of assessment

According to Article 19 (2) of the OPCAT, the NPM shall carry out its functions “taking into consideration the relevant norms of the United Nations”. These norms include both international human rights treaties, such as the UNCAT, and relevant UN declarations, resolutions and principles (“soft law”), such as the Standard Minimum Rules for the Treatment of Prisoners (1997).

With regard to the Ombudsman’s inspections, his standards of assessment are primarily those embodied in the national legislation, and in addition he may take into account general humanitarian and human(e) considerations.⁵³

In practice, it appears from the Ombudsman’s reports on inspections that neither international human rights conventions nor “soft law” are included in his standards of assessment. Furthermore, the Ombudsman does not include relevant health expertise in his standards of assessment.

e) Cooperation with international bodies, notably the Sub-Committee on Prevention

The role of the Sub-Committee vis-à-vis the NPM is regulated in Articles 11 and 20 of the OPCAT. It appears from these provisions that the Sub-Committee is envisaged to have both an advisory role and a supervisory role in relation to the NPM.

The Danish Ombudsman is a Parliamentary Ombudsman who exercises control over the public administration on behalf of the Parliament. The Ombudsman is exclusively responsible towards the Parliament and he rarely engages in close cooperation with international institutions, e.g. the CPT.

It is questionable whether the Ombudsman would enter into close cooperation with the Sub-Committee. In principle, the Ombudsman may be able to reconcile his present mandate with the advisory role of the Sub-Committee and accept advice and training, for instance. However, as regards the supervisory role of the Sub-Committee it is questionable whether this would be fully reconcilable with the Ombudsman’s mandate, according to which he answers solely to Parliament and his standards of assessment are first and foremost Danish legislation.

Other issues of RCT concern

Comments on Denmark’s transfer of detainees to US forces in Afghanistan in 2002

The present section addresses the issue of Denmark’s transfer of detainees to US custody during the military operation in Afghanistan in 2002. This matter was brought to the attention of the Danish public with the release of the documentary “The Secret War” (*Den Hemmelige Krig*), broadcast on Danish national television in December 2006. In response to the documentary the Danish Government issued a report on 13 December 2006 on the factual and legal questions in relation to Danish forces’ detention and transfer of persons in Afghanistan in the first half of 2002.⁵⁴

⁵² Comments to the (adopted) proposal for a parliamentary decision on ratification, chapter IV on NPMs.

http://www.folketinget.dk/Samling/20031/beslutningsforslag_oversigtsformat/B129.htm

⁵³ The comments to § 21 of the Law on the Parliamentary Ombudsman, 1997.

⁵⁴ Forsvarsministeriet (Danish Ministry of Defence): *Redegørelse for faktuelle og retlige spørgsmål i tilknytning til danske styrkers tilbageholdelse og overladelse af personer i Afghanistan i 1. halvår 2002*, (Report on the factual and legal questions in relation to the Danish forces’ detention and transfer of persons in Afghanistan in the first half of 2002”, 13 December 2006, available at <http://www.folketinget.dk/Samling/20061/aimdel/FOU/bilag/54/index.htm>.

On at least two occasions, the Danish forces in Afghanistan captured individuals, who were subsequently transferred to the US forces. According to official information, the Danish forces detained and transferred three persons on 13 February 2002 and 31 persons on 17 March 2002.⁵⁵

The question is whether these transfers were in accordance with Denmark's obligations pursuant to UNCAT Article 3.

UNCAT Article 3

According to the UNCAT Article 3 no State Party shall expel, return or extradite a person to another State if there are substantial grounds for believing that he would be in danger of being subjected to torture. Although Article 3 only refers to three ways of handing a person over to another state: expulsion, return and extradition, as it now reads the article is intended to cover all measures by which a person is physically transferred to another State.⁵⁶ With regard to the scope of Article 3, the commentary to UNCAT states:

"[...] article 3 of the present Convention applies to any person, who for whatever reason, is in danger of being subjected to torture if handed over to another country".⁵⁷

Consequently, the transfer of detainees from one State to another, as in the present case, shall take place in conformity with UNCAT Article 3.

Extraterritorial applicability of UNCAT

In the context of an armed conflict, when a state acts on the territory of another state, as in the present case, where Denmark acted on Afghan territory, the question is whether the international human rights conventions, and in this case UNCAT, apply extraterritorially. According to the jurisprudence of the UN committees and the European Court of Human Rights (ECHR), the international human rights conventions apply extraterritorially in two situations:

- when the State Party exercises effective control over an *area* on the other state's territory; and
- when the state party exercises control and authority over *persons* on the other state's territory.

The UN monitoring bodies and the ECHR have found that a State Party can be said to exercise control and authority over a person on another state's territory, in case a representative of the State Party detains, imprisons or abducts persons on the territory of another state.⁵⁸ Consequently, it must be assumed that Denmark had jurisdiction over the persons it captured and detained in Afghanistan in 2002, and that it was therefore under an obligation to observe UNCAT Article 3 in relation to the transfer of these persons.

⁵⁵ Forsvarsministeriet 2006 [footnote 1], pp. 12-13.

⁵⁶ Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture*, Martinus Nijhoff Publishers, 1988, p. 126.

⁵⁷ Herman Burgers and Hans Danelius, p. 125.

⁵⁸ Committee against Torture, Conclusions and recommendations of the Committee against Torture : United Kingdom of Great Britain and Northern Ireland – Dependant Territories, CAT/C/CR/33/3, 10 December 2004, para. 4b and 5e ; European Commission of Human Rights, *Ilse Hess v United Kingdom* (Appl. No. 6231/73), 28 May 1975; European Commission of Human Rights, *Ramirez v France* (Appl. No. 28780/95), 24 June 1996 ; European Court of Human Rights, *Öcalan v Turkey* (Appl. No. 46221/99), 12 March 2003, affirmed by Grand Chamber decision of 12 May 2005. For further details see "Menneskerettighedernes anvendelsesområde – Skal danske styrker i udlandet overholde Danmark's menneskeretlige forpligtelser?" ("The applicability of human rights – Are Danish Forces obliged to respect Denmark's human rights obligations?"), Juristen 2007, by Peter Vedel Kessing.

However, according to the Danish Government, the Danish forces did not have “control and authority” over the persons, who were transferred to US forces in Afghanistan. Consequently, the Government’s position is that Denmark did not have jurisdiction, cf. ECHR Article 1, and the Danish forces were therefore not bound by the ECHR in relation to the transfer of detainees. The rationale was that the operation took place under US command and control, and that the Danish Special Forces operated in a structure, which was completely integrated with the Americans. In conclusion, the Danish State held that the detention of the 31 persons on 17 March 2002 took place under such circumstances and was so brief that it did not give rise to Danish jurisdiction.⁵⁹

If it is assumed, in accordance with the general legal view, that Denmark had jurisdiction over the persons transferred to the US forces, then Denmark had to assess whether each individual person would be in danger of being subjected to torture if transferred to the US forces. Such individual assessment was, however, never made. (If such assessment had been made, it would have had to take into consideration the US position that the UNCAT does not apply extraterritorially, and that the persons transferred to US custody, would therefore not be protected under the UNCAT).⁶⁰

US legal position on applicability of the Geneva Conventions

In the context of an international armed conflict, not only UNCAT but also the Geneva Conventions apply. As regards prisoners of war, III Geneva Convention, Article 12(2) concerning the transfer of prisoners to another state, in the same vein as UNCAT Article 3, allows such transfer only, if the receiving state is willing and able to apply, i.e. respect, the Geneva Convention, including its prohibitions on torture and other inhuman or degrading treatment.

Consequently, in assessing whether Denmark’s international obligations allowed it to transfer prisoners to the US forces, the content of the general US legal position on the applicability and interpretation of the Geneva Conventions is crucial.

- On 7 February 2002, President Bush issued a memo laying down the official US interpretation of international treaties relating to the detainees and the US policy concerning their treatment.⁶¹ The memo directed the Secretary of State to inform US allies of its contents in an appropriate way. On the same day the White House issued a press release – a fact sheet - that reiterated the essentials of the Presidential memo.⁶² The essence of the White House Fact Sheet regarding the status and treatment of detainees is that - as a matter of law - none of the prisoners are entitled to legal protection under the III or IV Geneva Convention (hereinafter GC III or GC IV). Nevertheless, they will - as a matter of policy - be treated humanely.
- The US legal position on GC III meant that the detainees, considered by the US as “unlawful combatants”, were not protected at all by the Geneva Conventions, since, according to the US view, the GC IV applies only to civilian non-combatants.
- The US position that the detainees would be treated humanely was specified in the Fact Sheet as meaning that “the detainees will not be subjected to physical or mental abuse or cruel treatment”. This formula might indicate a threshold of ill-treatment, which is higher than the one recognised under customary international law.

⁵⁹ *Forsvarsministeriet* (Danish Ministry of Defence), [footnote 54], p. 12.

⁶⁰ UN Committee against Torture, Conclusions and recommendations of the Committee against Torture, United States of America (CAT/U/USA/CO/2), 25 July 2006, para. 14.

⁶¹ *George W. Bush*: Humane Treatment of al Qaeda and Taliban Detainees, 7 February 2002, available at http://en.wikisource.org/wiki/Humane_Treatment_of_al_Qaeda_and_Taliban_Detainees.

⁶² *White House*, Fact Sheet: Status of Detainees at Guantánamo, 7 February 2002, www.whitehouse.gov/news/releases/2002/02/.

Danish legal position on the applicability of the Geneva Conventions

According to the general legal view, which corresponds to the traditional Danish view, Bush's decisions concerning the legal status and the treatment of prisoners are incompatible with international humanitarian law. According to the Danish legal view detainees, which are not protected by GC III, will be protected as civilians by GC IV. Consequently, they shall be treated in accordance with the Geneva Conventions – not as a matter of policy – but as a matter of law. This entails that the prisoners would be able to claim their enforceable rights, which would not be the case pursuant to the US policy statement, which is devoid of any legal commitment vis-à-vis the prisoners, who could not claim enforceable legal rights on the basis of the statement.

The US understanding of the terms “humanely” does not correspond to the Danish understanding. While the US has a more narrow understanding of the term “humanely”, Denmark's legal view corresponds to the general legal view that “humane” treatment encompasses not only freedom from the most severe forms of ill-treatment, but also freedom from “cruel, inhuman and degrading treatment”.

Despite the US legal position, the Danish Government concluded in its Report⁶³ that the Danish transfers of detainees to the US forces in 2002 were in accordance with Article 12 GC III.⁶⁴ The Report further states that although the US legal position, excluding all detainees from prisoner-of-war status without individual determination, could give rise to “some doubt”, it did “not entail so significant derogations from the detainees' rights that Denmark could not transfer detained individuals to the US forces”. In this connection the Report attaches weight to the fact that the USA had promised that, as a minimum, all detainees, regardless of status, would be treated humanely”.

Reports concerning the treatment of detainees in US custody

On 10 January 2002, the first detainees were transported from Afghanistan to Guantánamo Bay. International NGOs expressed concern over photos and reports implying ill-treatment of prisoners in transit to Guantánamo Bay and characterised the conditions of detention there as inhumane.⁶⁵ Several European governments were also worried. Even the UK Government, the strongest ally of the USA, expressed publicly its concern for the prisoners' treatment and conditions.⁶⁶ The international concern for the detainees' treatment was also reflected in the Danish press.⁶⁷

Conclusion

In conclusion, it is highly questionable whether the Danish transfer of detainees to the US forces was in accordance with Denmark's international obligations⁶⁸: Firstly, because of the US position that the UNCAT did not apply extraterritorially; secondly, because the USA did not appear to be “willing to apply” III Geneva Convention to prisoners in Afghanistan, in the sense of Article 12 GC III;⁶⁹ and finally,

⁶³ Forsvarsministeriet 2006 [footnote 54], p. 3.

⁶⁴ Cf. Forsvarsministeriet 2006 [footnote 54], pp. 11-12 and again pp. 19-20.

⁶⁵ Amnesty International in a letter to Donald Rumsfeld released on 10 January 2002, available at <http://web.amnesty.org/library/Index/ENGAMR510052002>; Amnesty International on 10 January 2002, available at <http://web.amnesty.org/library/Index/ENGAMR510042002?open&of=ENG-USA>; and Amnesty International on 15 January, available at <http://web.amnesty.org/library/print/ENGAMR510092002>.

⁶⁶ See *Intelligence and Security Committee: The Handling of Detainees by UK Intelligence Personnel in Afghanistan, Guantánamo Bay and Iraq*, 1 March 2005, p. 16: “The UK Government had expressed publicly at the time of the first transfers of detainees to Guantánamo Bay a sense of unhappiness about the process and the need for the US to abide by international law. UK ministers expressed the need for the detainees to be properly treated and, if necessary, submitted to due process”. The report is available at <http://www.dr.dk/DR2/Hemmelig/Emne+3/20061124120110.htm>.

⁶⁷ See e.g. *Politiken*, 24 January 2002: “Kritik af fangelejr i Afghanistan”; *Politiken*, 11 February 2002: “Briterne vil ikke være skødehund”; and *Jyllands-Posten*, 13 February 2002: “Dansker ført til USA-base i Cuba”. All articles are available at www.infomedia.dk.

⁶⁸ Jens Elo Rytter, “*With Eyes Shut – Denmark alongside of the USA fights terrorism in Afghanistan*” in, “Implementing Human Rights, Essays in Honour of Morten Kjærum”, Danish Institute for Human Rights, 2007, p. 405-32.

⁶⁹ Cf. *International Committee of the Red Cross*, Official Commentary to Article 12 of the Third Geneva Convention, available at <http://www.icrc.org/ihl.nsf/COM/375-590016?OpenDocument>.

because the US had a more narrow understanding of the term “humane” treatment than the one generally recognised under international law and by Denmark.

Comments on torture victims’ possibility of acquiring Danish citizenship

On 8 December 2005, the Danish government and the Danish Peoples’ Party (*Dansk Folkeparti*) concluded an agreement on citizenship, which lays down general guidelines to the Ministry of Integration for its elaboration of draft laws on the granting of (Danish) citizenship.⁷⁰ These new guidelines replaced the guidelines of 12 June 2002.⁷¹

According to the guidelines of 2002, it was the general rule that a person was eligible for Danish citizenship if s/he fulfilled various criteria regarding residency permit, residence in Denmark, etc. In addition, the applicant was required to document Danish language skills (level 2) and knowledge of Danish society, culture and history. These qualifications had to be certified by a test passed at particular language schools or other institutions in the educational system, cf. Section 25,1.

Two groups of persons were exempted from the Danish language requirement, notably applicants who did not fulfil the requirements in Section 1, if the person in question was unable to learn sufficient Danish due to “*a mental illness, for instance as a result of torture*”, cf. Section 25, 2.

In other words, torture victims who were suffering chronically from the physical and/or mental effects of torture and who were consequently unable to learn a foreign language could be exempted from the language requirement, if their condition was duly certified by a medical doctor.

According to the guidelines of 2005, it is the general rule that a person is eligible for Danish citizenship if s/he fulfils various criteria regarding residency permit, residence in Denmark, self-support, etc. In addition, the applicant is required to document Danish language skills (level 3) among other things. The possibility of exempting particular groups of persons from the language requirement was maintained although it was limited considerably and, more importantly, torture victims were explicitly deprived of the possibility of being granted dispensation from the Danish language requirement, cf. the comments to Section 24, (3):

“The Ministry of Integration is expected to deny dispensation from the language requirement to applicants who suffer from PTSD – even if the condition is chronic and even if this is duly documented by a medical doctor.”

In response to the exclusion of any applicant with Post-Traumatic Stress Disorder (PTSD) from dispensation, three Danish organisations engaged in the rehabilitation of torture victims and other refugees with PTSD and the Danish Refugee Council expressed their concern to the Minister of Integration and the Parliamentary Committee on Citizenship in 2005 and 2006.⁷²

The four organisations pointed out that the guidelines of 2005 would entail that a wide range of severely traumatised refugees with chronic PTSD would be excluded from obtaining Danish citizenship. It was furthermore pointed out that such exclusion of a particular group of persons from obtaining dispensation is in contravention with the prohibition of discrimination in Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which says that:

⁷⁰ Agreement on citizenship (*Aftale om indfødsret*) concluded by the government – The Liberal Party (*Venstre*) and the Conservative Popular Party (*Det Konservative Folkeparti*) - and the Danish Peoples’ Party (*Dansk Folkeparti*), 8 December 2005.

⁷¹ Circular 2002-06-12 no. 55 about new guidelines for admittance to draft laws on granting of citizenship (*Cirkulæreskrivelse 2002-06-12 nr. 55 om nye retningslinier for optagelse på lovforslag om indfødsrets meddelelse*).

⁷² Cf. Letters from Danish Refugee Council (*Dansk Flygtningehjælp*), OASIS, RCT-Jutland and RCT to the Minister of Integration (21 December 2005) and the Parliamentary Committee on Citizenship (28 March 2006).

“Art. 26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. “

In the guidelines of 2005, a particular group of persons, those suffering from PTSD, are explicitly excluded from being granted dispensation from the language requirement in applications for Danish citizenship. The criterion for excluding this group is a medical diagnosis of a mental disorder, and the exclusion is not in any way explained so as to justify the exclusion. In consequence, the exclusion can only be categorised as unlawful discrimination, cf. Article 26 of ICCPR. This conclusion has also been reached by the Danish Institute for Human Rights.⁷³

Finally, it should be mentioned that RCT had a meeting with the Parliamentary Committee on Citizenship in November 2005 in order to inform the Committee about the consequences of PTSD in relation to the acquisition of language skills.⁷⁴ The Committee was informed that PTSD is a psychiatric disorder, which can arise after a person has been exposed to a life-threatening situation, such as armed conflict or torture. Torture victims with PTSD usually have a wide range of mental symptoms, such as amnesia, concentration difficulties and learning impairment. In addition, most of them suffer from fear, depression and emotional withdrawal.

The Committee was also informed that decades of psychiatric and psychological research⁷⁵ have shown that certain severely traumatised torture victims with PTSD will never be able to function “normally”. While the majority of torture victims will be able to acquire the necessary foreign language skills, a minority of severely traumatised torture victims with chronic mental disorders are so seriously impaired that they will never be able to learn a foreign language, and so – under the present conditions – they would never be able to acquire Danish citizenship.

During its meeting with the Committee on Citizenship, RCT was informed that in recent years, the Committee had received an increasing number of medical certificates, which contained a lenient diagnosis of PTSD. In order to minimise the number of unfounded medical certificates submitted to the Committee, RCT was asked to assist the Committee by drawing up a list of criteria that all medical doctors would have to consider before s/he could certify the diagnosis of PTSD.

In cooperation with several other Danish institutions, engaged in rehabilitation of torture victims and other refugees with PTSD, RCT drew up a list of such criteria, which was submitted to the Committee on Citizenship in November 2005.⁷⁶ However, this list of criteria was never used by the Committee, but it was, on the contrary, made redundant with the guidelines passed in 2005, which definitively and *en bloc* removed the possibility for persons with PTSD to obtain a dispensation.

Comments on the Incorporation of UNCAT in Danish law

In 1999 the Minister of Justice established a committee on incorporation of human rights conventions in Danish law (“The Incorporation Committee”). The Incorporation Committee was mandated to examine the advantages and disadvantages of incorporating the general human rights conventions into Danish

⁷³ Cf. Memo from the Danish Institute of Human Rights, 8 December 2005.

⁷⁴ RCT’s meeting with the Parliamentary Committee on Citizenship, 3 November 2005.

⁷⁵ Cf. *Language Acquisition in Relation to Cumulative PTSD Symptom Load over Time in a Sample of Resettled Refugees*, Hans Peter Södergaard and Töres Theorell, *Psychotherapy and Psychosomatics*, 2004, 73: 320-323; *Torture and Mental Health, A Research Overview*, Metin Basoglu, James Jaranson Richard Mollica and Marianne Kastrup, *Mental Health Consequences of Torture*, Kluwer Academic/Plenum Publishers, New York, 2001.

⁷⁶ List of criteria regarding PTSD developed by RCT and other rehabilitation centres to the Parliamentary Committee on Citizenship, 24 November 2005.

law, notably whether the UN Convention against Torture (UNCAT) was suited to be incorporated into Danish law.

In October 2001 the Incorporation Committee presented its White Paper no. 1407/2001.⁷⁷ The Committee recommended that UNCAT be incorporated into Danish law. The rationale for incorporating the UNCAT into Danish law was as follows:

- UNCAT is central for the protection of human rights insofar as it concerns one of the most fundamental rights, which allows no derogation
- UNCAT is suitable to serve as the legal basis for resolution of disputes pending before national courts, because its provisions are formulated clearly and precisely.
- UNCAT may in some instances provide a better protection than the European Convention on Human Rights, notably with regard to the standards of proof regarding whether an alien risks being subjected to torture upon return to his/her home country.

Despite the clear recommendation of the Incorporation Committee to incorporate UNCAT into Danish law, the government decided not to do so. The Minister of Justice has stated that such incorporation would not change the current legal state of affairs, but merely have a symbolic value.

However, the political opposition in Parliament does not share the government's position. On two occasions in 2004, various political parties presented proposals for a parliamentary decision on the incorporation of human rights conventions.

The first proposal regarded the incorporation of the ICCPR, ICESCR, UNCERD and UNCAT into Danish law⁷⁸. This proposal was defeated by an overwhelming majority.

The second proposal concerned the incorporation of UNCAT (and the criminalisation of torture).⁷⁹ This proposal went through the first round of legislative review in Parliament and was referred to the Committee on Legal Affairs. However, the Committee did not finalise its reading before the end of the Parliamentary session 2004/05, and the proposal was consequently taken off the table.

⁷⁷ On the Incorporation of Human Rights Conventions in Danish Law, White Paper no. 1407, October 2001.
<http://www.jm.dk/wimpdoc.asp?page=dept&objno=44473>

⁷⁸ On 25 February 2004, the political party Socialistisk Folkeparti presented a proposal for a parliamentary decision on incorporation of UN human rights convention in Danish law (B134). The proposal was defeated with 96 votes to 12, cf. The National Gazette, Annex A 6307, http://www.folketinget.dk/Samling/20031/beslutningsforslag_som_fremsat/B134.htm.

⁷⁹ On 7 October 2004, the four political parties in opposition to the government (Socialistisk Folkeparti, Radikale Venstre, Socialdemokraterne and Enhedslisten) presented a proposal for a parliamentary decision on incorporation of UNCAT (B13). The proposal was transferred to Parliament's Legal Affairs Committee, but was never passed.
<http://www.folketinget.dk/?samling/20061/MENU/00000002.htm>

IV. Recommendations

Article 3

The State Party is reminded of its obligation to observe the principle of non-refoulement during its administration of the Aliens Act.

The State Party is urged to take steps to ensure that the transfer of prisoners and detainees by Danish forces abroad take place in accordance with UNCAT Article 3. To this end, it is recommended that the treatment and conditions of such prisoners and detainees are regularly monitored by way of independent on-site inspections. Such preventive measures could be undertaken by Denmark's National Preventive Mechanism under the OPCAT.

Article 4

The State Party is urged to reconsider making torture a criminal offence by introducing a provision on torture in the Criminal Code and the Military Criminal Code, which contains a definition of torture in accordance with the UNCAT Article 1. Furthermore, the State Party is urged to ensure that acts of torture are not subject to statute of limitations.

Article 10

The State Party is recommended to ensure that military personnel receive adequate education and information on the prohibition of torture. To this end, the State Party is recommended to develop or update its guidelines on interrogation in the context of military operation.

Article 11

The State Party is recommended to increase the level of psychological meaningful social contact for remand prisoners in solitary confinement as recommended by international human rights bodies as well as experts in psychology, psychiatry and criminology.

Other

The State Party is urged to designate or establish one or more National Preventive Mechanisms that live up to the OPCAT criteria. To this end, the State party is urged to reconsider whether the present arrangements with the Ombudsman are in compliance with the OPCAT, or whether the Ombudsman should be provided with additional recourses and professional expertise.

The State Party is recommended to incorporate the UNCAT into Danish law as recommended by the Incorporation Committee in 2001.

The State Party is urged to amend the guidelines of 2005 to the Ministry of Integration for its elaboration of draft laws on granting of citizenship. In doing so, the State party is urged to remove the clause, which excludes persons suffering from PTSD from being granted dispensation from the language requirement in connection with their application for Danish citizenship.