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Implementing international human rights law on behalf of asylum-seekers and refugees: the record of the Nordic countries

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The work of the Office of the United Nations High Commissioner for Refugees (UNHCR) can be seen as intrinsically linked with human rights as those it helps are, by definition, victims of serious human rights violations. However it was only in the early 1990s that UNHCR began to actively cooperate with the UN human rights mechanisms through sharing information, lobbying experts and promoting complementary legal standards. UNHCR's current involvement with UN-based human rights bodies nevertheless continues to be cautiously limited. This may be due to the fact, to cite one reason amongst many, that UNHCR has been accused of having become 'highly politicised and . . . limited by states' concerns regarding sovereignty'. To put it bluntly, 'if UNHCR vociferously criticises states, UNHCR risks being thrown out of the country and losing its access to refugees'.¹ A less dramatic occurrence is that UNHCR's advice to states, particularly when it is critical of asylum laws and practices linked to violations of refugee protection and human rights principles, can simply be ignored. Yet another consideration is that if UNHCR expresses concern about the asylum policies and practices of key supporting states it may find itself saddled with additional political and financial difficulties when support from those same states is reduced or withdrawn.

Notwithstanding political and organisational limitations,² in recent years UNHCR has adopted a constructive engagement with selected human rights fora. A 1997 UNHCR policy paper laid down that 'UNHCR is part of the UN's effort to promote respect for human rights',³ and by 1998 the Office formally stated that 'there is a natural

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¹ Tracey Glover and Simon Russell, 'Coordination with UNHCR and States', University of Michigan, December 2001. The quotation is drawn from a discussion on why UNHCR has had difficulties criticising states for non-compliance with the 1951 Refugee Convention, here applied *a fortiori* to the very same difficulties with alleged human rights abuses; available on-line at: <www.icva.org> Also see Michael Barutciski, 'A Critical View of UNHCR's Mandate Dilemmas', 14 *International Journal of Refugee Law*, nos 2/3 (2002).

² As concerns structural limitations on the Office of the UNHCR, 98 per cent of UNHCR's estimated USD 750 million annual budget is financed from the voluntarily contributions of some 12 industrialised states. The Nordic countries contribute approx. 16 per cent towards UNHCR's annual budget. UNHCR is governed by an Executive Committee of some 60 states, several of which are not parties to the international refugee instruments and thus consider that they have no formal legal obligation to provide protection to asylum seekers and refugees. A final observation is that the refugee issue has become increasingly politicised in recent years, which has put added pressure on UNHCR to address what are in some cases extraordinary demands by states to get involved in unprecedented, large-scale operations in conflict zones as well as seek 'solutions' to refugee problems which would not formally require states, especially western industrialised states, to continue to receive significant numbers of asylum seekers on their territories. Indeed, UNHCR, to a greater extent than other UN human rights bodies, has to 'constantly tread the fine (and at times shifting) line between being diplomatic, pragmatic and principled' (Brian Gorlick: 'Refugee Protection in Troubled Times: Reflections on Institutional and Legal Developments at the Crossroads', in *Problems of Protection: The UNHCR, Refugees, and Human Rights*, Niklaus Steiner, Mark Gibney & Gil Loescher (eds), (Routledge, New York and London, 2003)).

³ See 'UNHCR and Human Rights', UNHCR Geneva, Policy paper resulting from deliberations in the Policy Committee on the basis of a paper prepared by the Division of International Protection (6 August 1997), available on the UNHCR website: <www.unhcr.org>

complementarity between the protection work of UNHCR and the international system for the protection of human rights'. UNHCR has become increasingly aware that 'the protection of refugees operates within a structure of individual rights and duties and state responsibilities . . . human rights law is a prime source of existing refugee protection principles and structures; at the same time it works to complement them'.⁴

Nowadays UNHCR is active with various human rights bodies and this paper is to be seen as a contribution to the necessary dialogue between UNHCR and the UN human rights mechanisms on how best to use the UN system to advance advocacy on refugee protection. The choice of scope for the present article is explained by the fact that the five Nordic countries⁵ represent a sub-region which shares a common geography, and to an extent, similar political systems and values. Moreover the Nordic countries commonly present themselves, often rightly, as forerunners in the human rights field. A common feature in Nordic foreign and human rights policy is promoting internationalism and support for multi-lateral institutions, including UNHCR.⁶ In this and other ways the Nordic states have been viewed as role models in the human rights field. Over the years the Nordics have demonstrated an impressive generosity towards refugees in their laws and policies, although more recently political pressures to reduce the number of asylum seekers and other foreigners from entering the Nordic region is in evidence. It is a fact that many tens of thousands of refugees and other forcibly displaced persons have sought and found refuge in the Nordics since the end of the Second World War. For the same reason that the Nordics share a history of generosity and commitment to the refugee cause, they should arguably be receptive to criticism and recommendations from the different UN-organs including the principal human rights treaty bodies and UNHCR. As we shall see, this is not always the case. On the other hand there are examples of recommendations and concerns expressed by the UN human rights mechanisms resulting in positive changes in law and policy in the Nordic region, and these examples will be highlighted.

In this essay discussion of Council of Europe institutions has been intentionally excluded. Although similar and complementary legal norms are found in the corpus iuris of the Strasbourg bodies, one cannot have the same demands as to coherence between the Strasbourg institutions and mechanisms and the UN-corpus as compared between the UN-bodies themselves. Although all the states in this study are members of the Council of Europe, the obligations incumbent upon them under this body cannot be transposed onto countries outside the jurisdiction of the Council of Europe. Therefore the comparative value of this study may be impeded were obligations under regional human rights instruments to be addressed.

The Council of Europe is not the only regional European body of interest for this particular study. The European Union (EU), of which three of five Nordic countries are members⁷, has declared as one of its primary objectives the institution of an 'area of freedom, security and justice', an important component of which is the

⁴ UN Doc A/AC/96/98 (§1).

⁵ *To wit*: Denmark, Finland, Iceland, Norway and Sweden.

⁶ *See for example* the Swedish government communication 2003/04:20 entitled 'Human Rights in Swedish Foreign Policy', available on-line at: <www.humanrights.gov.se>.

⁷ Nordic EU member states are: Denmark, Finland and Sweden.

harmonisation of immigration and asylum procedures.⁸ Although attempts at harmonisation of EU asylum law and policy is destined to have a profound impact, different priorities amongst member states and questions of burden sharing have made the adoption of progressive and far-reaching common standards limited, to the point that it is still premature to speak of a coherent EU asylum system.

What this paper will survey are the main issues which have arisen before the six UN human rights treaty bodies⁹ in respect of the treatment of asylum seekers and refugees in the Nordic countries. In reviewing the record of these countries, the intention is to assess how well they have implemented their international human rights obligations in certain areas of refugee protection.

The issues are addressed by theme rather than by treaty, as this will provide a more accurate picture of the current situation and can highlight the overlap that exists between the work of the various human rights bodies. The fact that some themes are treated at length is explained by the observation that the traditional requirements of international refugee law are generally complied with in the Nordic countries. It is, for example, difficult to find evidence of flagrant breaches of the non-refoulement principle. On the other hand this essay places considerable emphasis on the obligations of international human rights law resulting notably from the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination Against Women. These Conventions are more recent as compared to the 1951 Refugee Convention and other UN human rights treaties, and there is thus less established international practice for compliance with the obligations under these treaties. Furthermore the Nordic countries have been particularly strong supporters and promoters of these human rights instruments.

Non-refoulement

Article 33 of the 1951 Refugee Convention has been described as the cornerstone of international refugee protection. Article 33 prohibits the *refoulement* or expulsion of a refugee to a country 'where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion'. Convention recognition rates in the Nordic countries are comparatively low,¹⁰ however this is made up by the relatively generous grant of

⁸ Conclusions of the Tampere European Council of 15 and 16 October 1999: §4: 'This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others worldwide who cannot enjoy the freedom Union citizens take for granted. *It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.* This in turn requires the Union to develop common policies on asylum and immigration . . . These common policies must be based on principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union'. §5: 'The aim is *an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments*' (emphasis added).

⁹ Committee on the Rights of the Child, the Committee Against Torture, the Committee on the Elimination of all Racial Discrimination, the Committee on the Elimination of Discrimination Against Women, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights.

¹⁰ Over the last few years the average Refugee Convention recognition rate for Finland, Norway and Sweden has been between 1–2 per cent, while the EU average during the same period was around 12 per cent. Denmark has been the exception amongst the Nordic countries with a Convention recognition rate in 2001 of approx. 12–14 per cent. However, with the adoption of a restrictive asylum policy and

subsidiary protection and humanitarian status which should *inter alia* protect against the risk that an individual may be *refouled*.

The UN human rights treaty system has a similar *non-refoulement* provision in Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which provides that 'no state party shall expel, return (*'refouler'*) or extradite a person to another state where there are substantial grounds for believing that he (or she) would be in danger of being subjected to torture'. Similarly, Article 7 of the International Covenant on Civil and Political Rights states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

Concentrating on the 1951 Refugee Convention and the CAT, there is a fundamental difference between the two provisions as the latter operates *without qualifications*. This means there is no need for a person to be a recognised refugee or otherwise in need of international protection for the provision to be applicable. Normally not even provisions of 'national security' would warrant the deportation of a person to a country where he or she would run the risk of being subjected to torture. It is in light of this provision that the decision by the Swedish government to expel two Egyptians in late 2001 is to be seen. The two expellees were suspected of 'terrorism' in Egypt and the expulsion was executed the same day the decision was taken by the Swedish government, thus depriving the concerned individuals of any opportunity to appeal.

Since 2001 Amnesty International has criticised the decision of the Swedish government to expel the two Egyptians in various reports,¹¹ and in an alternative report to the Committee against Torture (the Committee) a number of NGO's expressed the view that 'the Swedish government in this case acted in contravention with both national law and its international obligations'.¹² UNHCR also expressed its

law in Denmark throughout 2002, on which UNHCR and several prominent NGOs were critical, the number of new immigrants and in particular asylum seekers arriving in Denmark has fallen sharply. Preliminary figures from the Danish Immigration Service's annual report for 2002 show that the number of asylum seekers fell from 12,512 in 2001 to 5,947 in 2002, to some 4,557 in 2003. In addition, fewer asylum seekers are being granted permission to stay in Denmark and the number of residence permits in the asylum area has fallen from 6,263 in 2001 to 4,067 in 2002. In an effort to 'motivate' rejected asylum seekers to go home the Danish authorities plan to introduce a 'lunch pack scheme' if they will not accept the government's offer of a repatriation package. (BBC Monitoring, 4 February 2003, report available on the UNHCR website: <www.unhcr.org>).

¹¹ Amnesty International Annual Report for 2001, 2002, 2003, 2004 on Sweden (viewable on-line at www.amnesty.se). Human Rights Watch has called for an independent panel to be established to investigate alleged abuses by Swedish, Egyptian and U.S. officials in the case of the two Egyptians. Based on Swedish news reports aired in May 2004, evidence was presented that the expelled Egyptians asylum seekers were, contrary to the 'guarantees' secured by the Swedish authorities, mistreated and tortured during the trip to and soon after arriving in Egypt. The Swedish government has had to concede that the two Egyptians were returned to Egypt from Stockholm aboard a private plane leased to the U.S. Defence Department after being hand and leg-cuffed, medically sedated and blindfolded. Several U.S. agents accompanied the two expellees on the flight to Egypt. Further details on this case, including Swedish news reports are available on-line at: www.hrw.org (re: Sweden: Torture Inquiry must be under UN auspices, 27 May 2004). This case and the challenges that the fight against terrorism has created for the protection of human rights and, in particular, for the principle of *non-refoulement* were addressed in the report of Mr Alvaro Gil-Robles, Commissioner for Human Rights, Council of Europe, after his visit to Sweden on 21-23 April 2004 (Strasbourg, 8 July 2004)

¹² 'Alternative Report to the Committee Against Torture regarding Sweden's Fourth Periodic Report' (Stockholm, 2001). A thorough legal analysis of the Egyptian case is found in an unpublished Master

concern, and the Committee in its concluding observations to Sweden's fourth periodic report recommended that the government 'bring the *Special Control of Foreigners Act* into line with the Convention'.¹³ During the oral presentation of Sweden's fourth report, the government representative stated that the *Special Control of Aliens Act* 'could not be enforced where there were substantial reasons to believe that a deported alien might suffer capital or corporal punishment or be subjected to torture'.¹⁴

The Swedish authorities claimed that the guarantees furnished by the Egyptian government that the two would not be tortured or subject to the death penalty were enough to satisfy its obligations under international human rights law. This was not the feeling of the Human Rights Committee (HRC) which went further in its criticism of the Swedish actions by concluding that there were reasons for concern regarding the situation of human rights in Sweden in connection with the international fight against terrorism.¹⁵ The Committee on the Elimination of Racial Discrimination (CERD) echoed the concerns expressed by the HRC, and called on Sweden 'to reconsider this Act to the extent that it provides for the possibility of expulsion without a right of appeal and provide additional information on this issue in its next periodic report'.¹⁶

Policing state-compliance *inter alia* with the *non-refoulement* principle has been made more efficient by Article 22 of the CAT that establishes an individual complaints procedure. It has proven to be a very useful mechanism of last resort for refugee advocates. Perhaps even too much so, as reportedly the Committee receives more communications than it can handle given its limited resources. As is common in international complaints procedures, admissibility criteria include exhaustion of domestic remedies and that the same matter is not being investigated by another international body. The Committee is stringent in its application of these requirements.

of Laws thesis by Ms Amelie Sällfors, *Exclusion, Removal and Risk of Torture*, Faculty of Law, Lund University, Fall 2002.

¹³ UN Doc CAT(C/XXXVIII.CONCL.1 (§7(c)).

¹⁴ UN Doc CAT/C/SR.507 (§21).

¹⁵ In its concluding observations to Sweden's fifth periodic report (2002), UN Doc CCPR/CO/74/SWE. §12 the Committee noted that: 'While it understands the security requirements relating to the events of 11 September 2001, and takes note of the appeal of Sweden for respect for human rights within the framework of the international campaign against terrorism, *the Committee expresses its concern regarding the effect of this campaign on the situation of human rights in Sweden, in particular for persons of foreign extraction. The Committee is concerned at cases of expulsion of asylum seekers suspected of terrorism to their countries of origin. Despite guarantees that their human rights would be respected, those countries could pose risks to the personal safety and lives of the persons expelled, especially in the absence of sufficiently serious efforts to monitor the implementation of those guarantees (two visits by the embassy in three months, the first only some five weeks after the return and under the supervision of the detaining authorities) . . . The Committee also stresses the risk of violations of fundamental rights of persons of foreign extraction (freedom of expression and privacy), and in particular through more frequent recourse to telephone tapping and because of an atmosphere of latent suspicion towards them . . .*' (emphasis added)

¹⁶ UN Doc CERD/C/64/CO/8 of 12 March 2004, at para. 15. See also Brian Gorlick, 'The Institution of Asylum after 11 September', in Diane Amnéus and Göran Gunner (eds.), *Mänskliga Rättigheter – Från Forskningens Frontlinjer (Human Rights – From the Frontiers of Research)* (Iustus Förlag, Uppsala 2003).

The two communications from Norway dealt with by the Committee to date were held inadmissible for non-exhaustion of domestic remedies.¹⁷ This seems to have been due to a particularity of the Norwegian system which provides that after the rejection of an asylum application by both administrative bodies (Directorate of Immigration in first instance and Immigration Appeals Board on appeal), the asylum seeker can still apply for review of the decision before a court of law. The specific problem seems to be that because the asylum seeker is first provided with a legal aid lawyer for the refugee status determination process, who may withdraw from the case after it is rejected, the asylum seeker is then left unaware that further legal aid is available for the application for a subsequent review. Since both communications filed against Norway suffered the same fate, this appears to be a distinct problem. The Committee has not specifically acknowledged this point in its concluding observations, but in the case of *Z.T v. Norway* (2000)¹⁸ the Committee recommended that the state party ‘undertake measures to ensure that asylum seekers are duly informed about all domestic remedies available to them, in particular the possibility of judicial review before the courts and the opportunity of being granted legal aid for such recourse’ (at §7.4). It is worth adding that the more complicated the procedural system, the more onerous the burden on the states parties to adequately inform asylum seekers of their procedural rights.

With the exception of the two communications filed against Norway and another communication filed against Denmark and Finland respectively dismissed on their merits,¹⁹ all communications under the CAT filed against a Nordic state party have involved Sweden. Sweden has been found in breach of Article 3 on nine separate occasions and there are several cases pending.²⁰ The family members of one of the expelled Egyptian nationals discussed above also made an individual complaint, but their application was eventually turned down by the Committee.²¹

The reason for this high number of decisions against Sweden, as elaborated in the Committee’s decisions, would appear to be that the Swedish authorities often require a high degree of evidentiary certainty in the asylum applicant’s story.²² A number of cases which have come up before the Committee demonstrate that the immigration authorities often disregard or find as unconvincing evidence showing past torture.²³

¹⁷ Communication nos. 127/1999 (CAT/C/23/D/127/1999) and 121/198 (CAT/C/23/D/121/1998).

¹⁸ Communication no. 127/1999, UN Doc CAT/C/23/D/127/1999.

¹⁹ Communication no. 143/1999, UN Doc CAT/C/24/D/143/1999 (against Denmark), CAT/C/30/1997/2002 of 15 May 2003 (against Finland).

²⁰ One pending case against Sweden concerns one of the expelled Egyptians, Mr Ahmed Hussein Mustafa Kamil Agiza, and indeed his individual communication was admitted by the Committee in a decision rendered on 1 June 2004 (Communication no. 233/2003). At the time of writing the Committee indicated that it would deal with this matter at its 33rd session in November 2004. See note 11 *supra*.

²¹ Communication no. 199/2002. The grounds for the application were *inter alia* that the Egyptian expellee’s wife and five minor children, as family members of an accused Islamic militant, would face a real and foreseeable risk of torture if returned to Egypt notwithstanding any ‘guarantees’ provided by the Egyptian authorities in respect of the expellee and his family. The Committee decided against the applicant and her children in concluding that ‘there is not, *at this time*, a substantial personal risk of torture of the complainant in the event of her return to Egypt’. (CAT/C/31/D/199/2002 of 24 Nov 03, *at* para. 12.3, *emphasis added*).

²² See Brian Gorlick, ‘Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status’, 15 *International Journal of Refugee Law*, no. 3 (2003), at p 369.

²³ Brian Gorlick, ‘The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees’, 11 *International Journal of Refugee Law*, no. 3 (1999).

Moreover the Swedish authorities have placed limited importance on an applicant's political activities and the consequences of such in the country of origin for other members of his or her family. Swedish NGOs have expressed concerns regarding asylum determination in Sweden, and in an alternative report to the Committee they pointed to what appeared to be a 'general reluctance to believe in the statements of asylum seekers' and that the 'Swedish authorities have a tendency to spend more time discussing the credibility of the applicant than considering the need of protection'. The NGOs concluded that 'these cases show a problem of attitude among the Swedish authorities'.²⁴

In asylum cases evidence of past torture is only relevant to the extent that it can lend credibility to the assertion that the asylum seeker risks future or prospective torture or ill-treatment. States parties should concentrate more on putting the claim of the asylum seeker into context, rather than on the presence or absence of physical or mental scars from past torture or mistreatment. Support for this assertion is found in the statements made by Committee member Ms Illiopoulos-Strangas during the oral presentation of Denmark's third periodic report. There she commends the initiative taken by Denmark to give suspected torture victims a more detailed examination, but sees appropriate to 'emphasize that Article 3 of the Convention [does] not require such medical examinations. For Article 3 to apply, it was not necessary for a person under threat of expulsion to have been tortured'.²⁵

During the oral presentation of Sweden's fourth report, the Swedish government representative noted that no decisions had been rendered against Sweden in the European Court of Human Rights under Article 3 of the European Convention, with provisions similar to Article 3 of the CAT, despite that 'more than 100 applications [had been] filed against Sweden under that Article'.²⁶ This echoes the concern expressed by the state party in the case of *I.A.O. v. Sweden* (1998) before the Committee²⁷ 'about a possible development of different standards under the two human rights instruments of essentially the same right'. Sweden feared that such a development would 'create serious problems for states which have declared themselves bound by both instruments'. Counsel for the applicant cut through this argument by stating that 'if a different standard is applied by the two bodies, all the state party has to do is to apply the stricter of the two'. Sweden has reportedly used the same argument in another communication²⁸ and this has led at least one NGO commentator to conclude that Sweden is not open to receiving criticism from the UN human rights treaty bodies in general and the Committee against Torture in particular.²⁹

In actual fact Sweden has taken note of the expressed concerns by UN bodies and other actors in applying these human rights standards in cases of rejected asylum seekers, and the Swedish Aliens Appeals Board has issued a 'guidance paper' for

²⁴ 'Alternative Report to the Committee against Torture regarding Sweden's Fourth Periodic Report (2001).

²⁵ UN Doc CAT/C/SR.287.

²⁶ UN Doc CAT/C/SR.507) (§25).

²⁷ Communication no. 65/1997, UN Doc CAT/C/20/D/65/1997.

²⁸ Communication no. 83/1997, UN Doc CAT/C/20/D/83/1997.

²⁹ Anna Wigenmark, 'International criticism disregarded in Sweden', Swedish NGO Fund for Human Rights Newsletter, Issue 1, 2002.

asylum cases where allegations of torture are raised.³⁰ The Swedish Migration Board has organised training seminars for case handling officers and decision-makers on these human rights issues with participation of representatives of UNHCR, the Office of the UN High Commissioner for Human Rights and Swedish NGOs including Amnesty International and the Swedish Red Cross. Hopefully, the effort will pay off in a change of approach in applying these fundamental human rights principles to the adjudication of asylum claims.

Fair procedure

The nature of appeal

Related to the above discussion are a number of questions about the adequacy of the procedures used to determine the status of asylum seekers. In the Nordic countries, with the exception of Finland where appeals are heard by the Helsinki Administrative Court, asylum appeals are dealt with by quasi-judicial administrative bodies (with the possibility of reviewing, if leave is granted, the *legality* of the decisions before a court of law). This sets them apart from the common law world where judicial review of an administrative decision is generally available and often rigorously applied. Furthermore, *viva voce* hearings at the appeals level in asylum cases are not systematically provided for in the Nordic countries and the concern has been expressed that this may undermine the administrative fairness of the determination procedure.

In Sweden a protracted debate is ongoing as to whether the second instance Aliens Appeals Board should be abolished and replaced by three of Sweden's twenty-four Regional Administrative Courts which would only deal with appeals in asylum and immigration cases and detailed proposals for reform have been put forward.³¹ In their alternative report to the Committee against Torture concerning Sweden's fourth periodic report,³² Swedish NGOs have been critical of the inadequate reasoning in decisions rendered by the Appeals Board. It was noted that 'in many cases it is impossible for the asylum seeker to extract which elements have been crucial when deciding substantial grounds for the risk of torture'. The NGOs are also critical of the weight given to confidential reports from Swedish embassies with country information which, because they are considered classified documents, are not disclosed to the asylum seeker or his or her legal counsel, and therefore the information cannot be properly tested or refuted. The Swedish Helsinki Committee³³ is of the opinion that 'since cases of asylum are of such a grave and life-determining character, trial by court is the only possible way forward'. They are further encouraged by the prospect of a standardised *inter partes*, or adversarial, procedure where the Migration Board would have to present its arguments and have them questioned by the asylum seeker represented by legal counsel.

³⁰ 'Handledning vid prövning av utlänningsärenden där uppgifter finns om tortyr eller annan omänsklig eller förnedrande behandling', Utlänningsnämnden, Rev. Maj 2000 (on file with the authors).

³¹ 'Utlänningslagstiftningen i ett domstolsperspektiv', SOU 2004:74, Stockholm 2004, available on-line at: www.riksdagen.se

³² 'Alternative Report to the Committee against Torture regarding Sweden's Fourth Periodic Report' (2001).

³³ Swedish Helsinki Committee Annual Report 1999.

As a general observation, even though the competence of the members and staff of the respective Nordic appeals boards may not be questioned, asylum determination by a court of law should be less likely to be affected by the policies and views of the government. A court should also be more receptive to the opinions of other judicial and/or quasi-judicial bodies dealing in this specific area of law. Having said this one can only speculate as to whether the proposed changes to the Swedish asylum system will result in related changes in assessing claims to refugee status, particularly as regards recognition rates.

'Safe country concepts'

A practice which has drawn considerable criticism from the Committee against Torture is Finland's use of the so-called 'safe third country' principle. In its concluding observations to Finland's second periodic report, the Committee expressed its concern 'about the absence of sufficient legal protection of the rights of persons who are denied asylum through the use of a list of safe countries'.³⁴ According to Committee country rapporteur, Mr Yakovlev, 'if the applicant was a national of a country on that list, his [or her] request would be rejected immediately'.³⁵ During the oral examination of Finland's third periodic report the Finnish representative explained that a 'safe third country' was one which is a party to the main human rights treaties 'and [in compliance] with them'.³⁶

According to the answers provided by the government representative during examination of Finland's fourteenth periodic report to the Committee on the Elimination of all Racial Discrimination in 1999,³⁷ Finland had recently moved from a policy of safe third countries of *origin*, to one of safe third countries of *asylum*. Under the current *Aliens Act* both concepts are applicable. The Finnish authorities maintain there is no longer a safe country list, but that individual assessments are made. If this is the practice in Finland then it conforms to UNHCR's position. However, return of an asylum seeker without an adequate and fair individual assessment of whether it would be safe to return the concerned individual would be an infringement of the non-derogability of Article 1(A) of the 1951 Refugee Convention and would be contrary to established protection principles.³⁸

Erroneous repatriations

A recurring problem that asylum countries have to deal with is that of asylum seekers refusing to divulge their country of origin. In Sweden the Migration Board regularly makes use of linguistic tests to try to establish the provenance of asylum seekers, which may be relied upon to return the concerned individual to his or her alleged

³⁴ UN Doc A/51/44 (§131).

³⁵ UN Doc CAT/C/SR.249 (§22).

³⁶ UN Doc CAT/C/SR.397 (§7).

³⁷ UN Doc CERD/C/SR.1309.

³⁸ Return of an asylum seeker to a so-called 'safe' first asylum country would require that concerned states would ensure protection of the asylum seeker from *refoulement*; that the asylum seeker would be permitted to seek asylum in the country he or she is being returned to; for the purposes of seeking asylum, the concerned individual would be entitled to a fair refugee status determination procedure; and that the asylum seeker would be treated in accordance with general principles of international human rights law.

country of origin following the rejection of the asylum claim. The NGO alternative report to the Committee against Torture on Sweden's fourth periodic report is critical of the procedure that the NGOs believe has led to 'refugee-dumping'. Media reports have indicated that it seems not to be infrequent practice to send rejected asylum seekers, or those refused entry to Sweden on safe-country grounds, from West Africa to Ghana from where they are 'redirected'. According to the NGOs the redirection process 'might result in a person's return to a country, where he or she is at risk of torture', and there are reports that 'some persons who have been subject to the "redirection" process have . . . been imprisoned and ill-treated for long periods of time in Ghana and at least one person has "disappeared"'.³⁹

In its concluding observations⁴⁰ the Committee expressed its concern at the 'allegation that some foreigners have been expelled or sent back to a country with which they have no significant ties on the basis of *inter alia* linguistic criteria which are sometimes unsystematic, unreliable, and could lead to a breach of Article 3 of the Convention'. During oral examination of the report, the Swedish government representative stated that these criticisms had 'related more to the ethical and legal aspects of the system than to the risk that the expelled alien could be exposed to torture or ill-treatment'.⁴¹ Apparently the system is based on the right to 90 days of free residence that citizens of the Economic Community of West African States (ECOWAS) enjoy in each other's countries. Moreover, Ghana has reportedly accepted against remuneration to receive expelled West Africans from Europe. Given the serious consequences of such practices by Sweden and possibly other states, it appears warranted that the Committee should continue to monitor these alleged practices.

Circumscription of Article 22 CAT?

A general concern that seems to hover over almost any deportation policy is when the decision to deport should be executed. In its concluding observations to Denmark's fourth periodic report, the Committee against Torture expressed concern over proposed amendments to the Danish *Aliens Act* which would require aliens who are refused a residence permit to leave the country immediately. The Committee was concerned that the provision, if strictly applied, would 'frustrate the effectiveness of Article 22 of the Convention'.⁴² During the oral presentation of the report the Danish government representative merely stated that all provisions on expulsion would be applied in conformity with the requirements of Article 3 of the CAT. In connection with the current Danish government's stated objective to tighten immigration laws and policies,⁴³ the Committee and other concerned actors may be well-advised to keep a close eye on expulsion practices so that procedural safeguards under international law are respected.

³⁹ 'Alternative Report to the Committee against Torture regarding Sweden's Fourth Periodic Report (2001).

⁴⁰ UN Doc CAT/C/XXXVIII/CONCL.1.

⁴¹ UN Doc CAT/C/SR.507.

⁴² UN Doc CAT/C/XXVIII/CONCL.3 (§6(c)).

⁴³ See Danish government policy paper of 17 January 2002: 'A New Policy for Foreigners', and 'UNHCR's comments on the Draft Bill on amending the Aliens Act, the Marriage Act and Other Acts (Ref: 2001/7310-81)', Geneva, 18 March 2002, available on-line at: <www.unhcr.org>.

Timeliness of the determination procedure

Although it is understood that growing numbers of asylum seekers strain domestic refugee determination systems, UNHCR has on numerous occasions expressed concern over the time refugee status determination procedures take in the Nordic countries. UNHCR and other commentators have noted that extreme delays in receiving an answer on an asylum claim can have a serious negative psychological impact on an asylum seeker and their family members. Refugee status determination processing times in all the Nordic countries can run up to years in some circumstances. UNHCR is of the view that it is possible to combine fairness with efficiency and has advocated that the two goals are inextricably linked. UNHCR emphasises the need to strengthen first-instance decision making procedures by providing sufficient resources at the front-end of the determination process. Their reasoning is that if the interview and fact-finding procedure is thoroughly and competently conducted in the first-instance the propensity to appeal will decrease, or at least the tendency to have cases overturned on appeal would be lessened.⁴⁴

UNHCR and NGOs have also brought to the attention of various UN human rights committees the problem of asylum centres being located in remote areas, an issue primarily encountered in Finland. Even though the asylum seekers enjoy freedom of movement, they may have nowhere to go with resulting feelings of isolation which in some cases leads to stress-related health problems, especially given the long waiting periods involved in processing asylum claims.

Role of UNHCR in individual decisions

UNHCR is regularly requested by government decision-makers and legal representatives to submit recommendations and opinion letters in individual cases and in principle UNHCR's views are considered to weigh quite heavily.⁴⁵ When presenting Sweden's fourth periodic report to the Committee against Torture, the national representative stated that 'UNHCR recommendations on individual asylum cases were taken carefully into account in each decision, although they had no legal status'.⁴⁶ However, it is less certain how this is adhered to in practice. In *B.M. v. Sweden* (2002) the UNHCR Regional Office in Stockholm made a written submission recommending the non-return of a Tunisian opposition activist. Apparently the state party, and by consequence the Committee, did not place much credence in UNHCR's opinion. On the contrary the decision concluded that 'there is nothing to indicate that the UNHCR has applied any kind of "foreseeable, real and personal risk" test in its assessment'.⁴⁷ Considering the worldwide presence of UNHCR and the field-

⁴⁴ See, for example, 'UNHCR's Recommendations for the Italian Presidency of the EU (July–December 2003), p 6, available on-line at: <www.unhcr.org>.

⁴⁵ Of course if UNHCR chooses to determine mandate refugee status under its Statute, then the legal consequence of such a decision would be of a binding legal quality. Re: *Statute of the Office of the UNHCR*, General Assembly Resolution 428 (V) of 14 December 1950. See Volker Türk, 'UNHCR's supervisory responsibility', Working paper no. 67, UNHCR New Issues in Refugee Research (October 2002), available on-line at: <www.unhcr.org>.

⁴⁶ UN Doc CAT/C/SR.507 (§26).

⁴⁷ Communication no. 179/2001, UN Doc CAT/C/28/D/179/2001, at §4.8.

expertise thereby acquired, it may not be misplaced for UNHCR's opinions to be deemed generally credible and authoritative.⁴⁸

'Non-status'

One of the consequences of the larger scope of Article 3 of the CAT as compared to Article 33 of the Refugee Convention is that there may be individuals who fall within the protection of the CAT, but not the Refugee Convention, nor any kind of subsidiary protection category. This is a problem mainly encountered in Denmark. The Danish Institute for Human Rights has explained that 'if a foreigner has been expelled from Denmark, but has not been deported from the country because there is a risk that he or she will be prosecuted or tortured in his or her home country', the individual will be granted 'indefinite tolerated residence in Denmark'.⁴⁹ In the corresponding report from 2000 the Danish Institute states that 'there are no rules which regulate the legal consequences of a tolerated residence, nor the conditions under which such persons live. These persons are therefore prevented from enjoying basic rights such as the right to work, housing, etc'.⁵⁰ The basis seems to be that since they have been *de jure* expelled from the country, although the expulsion decision cannot be executed the concerned persons are legally no longer considered present in the country.

The European Court of Justice disavowed a similar legal fiction in *Yiadom (2000)*⁵¹ and one is bound to agree with the Danish Institute when it states that 'the system is probably not in compliance with a number of Denmark's international obligations'. Curiously there is no mention of these 'tolerated residents' in any concluding observations from the UN human rights treaty bodies although the issue has reportedly been brought to their notice. It cannot be the intention of Article 3 of the CAT that those individuals whose deportation is prevented by its provisions, should be deprived of fundamental entitlements under international and national law and permitted to reside in the territory of a state party in a sort of 'quasi-recognised' existence. An obvious solution would be the one adopted in Sweden where 'the *Aliens Act* . . . [provides] that aliens [can] be granted a residence permit by decision of the Aliens Appeals Board even after an expulsion order [has] been issued'⁵² on the basis *inter alia* of a ruling by the Committee against Torture.

Detention

Detention of asylum seekers is a general concern expressed by the UNHCR, the NGO community and refugee advocates. Indeed states parties have a difficult balance to strike between the competing interests of providing a fair and efficient asylum procedure and the risk that individual asylum seekers may abscond or fail to cooperate with the authorities as a result of a negative decision. Concerns with

⁴⁸ See Saul Takahashi, 'Recourse to Human Rights Treaty Bodies for Monitoring for the Refugee Convention', 20/1 *Netherlands Quarterly of Human Rights* (2002); and Volker Türk, *op cit*.

⁴⁹ 'Human Rights in Denmark, Status 2001', Report of the Danish Institute of Human Rights, Copenhagen (2002).

⁵⁰ 'Human Rights in Denmark: Status 2000', Danish Institute for Human Rights (2001).

⁵¹ Case no. C-357/98.

⁵² CAT/C/SR.507 (§24).

controlling the entry of foreigners for security reasons are also voiced as a motivation by states to resort to detention practices, especially in the post 9/11 environment.

In this context an example of successful intervention by the human rights treaty bodies is the case of the former Finnish practice of detaining asylum seekers in common jails. Although detention of asylum seekers in Finland is not an overly common practice, the use of remand jail facilities is considered unacceptable for asylum seekers.⁵³ In its concluding observations to Finland's fourth periodic report the Human Rights Committee expressed its concern with regard to this practice.⁵⁴ The criticism was not as severe as could be expected, but on the other hand it appears from the summary records of Finland's second and third periodic reports to the Committee against Torture that Finland was well aware of the Committee's concern.⁵⁵ For a considerable time it was the ambition of the Finnish authorities to transfer detained aliens to 'detention facilities especially intended for that purpose as soon as possible'.⁵⁶ This matter was finally addressed in 2002 when Finland established a separate detention facility for foreigners in a refurbished jail in central Helsinki and a separate new detention facility should be opened in 2004, which are positive developments.

The Danish Institute for Human Rights has expressed criticism of Danish 'problems of honouring the basic principle of proportionality on which both the human rights and Danish law is based'. An example of this being that 'the rules on detention of asylum seekers and administrative expulsion have been tightened so that today it is possible to make unnecessarily widespread use of detention instead of focusing on a reduction of the examination time'.⁵⁷ UNHCR expressed its concern about Danish rules granting administrative bodies not connected to law enforcement the power to detain asylum seekers pending refugee status determination upon mere suspicion of minor offences such as shoplifting.⁵⁸ As pointed out by UNHCR in its written comments on an earlier law proposal, this provision may violate the principle of non-discrimination as custodial sentences are normally not handed down for the same offences committed by Danish nationals.

With respect to Denmark and Sweden UNHCR has also expressed concern about the lack of a maximum time of detention for asylum seekers. Even though there are review procedures for detention cases in both countries, there is nothing preventing a detention order from being perpetually renewed. Administrative detention should never be used lightly and these practices, which particularly impact on asylum seekers and refugees, require close review and should be subject to stringent tests of proportionality and alternative means.

53 See generally the 'UNHCR Guidelines on the Detention of Asylum Seekers', Geneva (1999), available on-line at: <www.unhcr.org>.

54 UN Doc CCPR/C/79/Add.91.

55 UN Doc CAT/C/SR.249 and CAT/C/SR.397.

56 UN Doc CAT/C/SR.397 (§16).

57 Re: 'Human Rights in Denmark, Status 2000'.

58 UNHCR commentary on changes to Danish Aliens legislation, 2002, on file with the author.

Discrimination, xenophobia and racism

Discrimination

An initial observation concerning the Nordic countries is that discrimination exists, but only *de facto* and not *de jure*. This is borne out in the criticism levelled at the Nordics by the various human rights bodies. An example is the wording found in the concluding observations to Finland's fourth periodic report by the Human Rights Committee (HRC), which expressed its concern at the 'increase in negative attitudes and *de facto* discrimination toward immigrants among some of the Finnish population'.⁵⁹ Similar formulations are to be found in the concluding observations to Sweden's thirteenth through sixteenth reports by the Committee on the Elimination of Racial Discrimination (CERD) which *inter alia* took note of the 'increasing incidence of racial discrimination in restaurants, other public places, and with regard to access to services', in addition to concerns that few of the reported hate 'crimes have led to prosecutions' which means that the 'relevant domestic legal provisions are rarely applied'.⁶⁰

A problem which plagues all the Nordic states and can for present purposes serve as a general benchmark is the fact that unemployment is several times higher among refugees and immigrants than among the 'native' populations. UNHCR and other actors have consistently brought the problem of discrimination on the labour market to the attention of the various treaty bodies and the committees regularly highlight these issues in their concluding observations. An example can be found in the concluding observations to Denmark's third periodic report to the Committee on Economic, Social and Cultural Rights (CESCR) where the Committee noted that despite the 'recent decrease in the percentage of the population who are unemployed, it is still concerned that the level of unemployment remains high, especially among foreign nationals, immigrants and refugees'.⁶¹

As with any social problem of which the states parties are fully aware, the respective committees may feel ill positioned to criticise too heavily. One example is the approach taken by the HRC in its concluding observations to Norway's fourth report where it noted 'that the unemployment rate for immigrants is still substantially higher than for the rest of the population', while '[commending] the new legislation and the

⁵⁹ UN Doc CCPR/C/79/Add.91 (§16). A Finnish government report from 2002 noted that: 'The experiences of racism and discrimination suffered by immigrants and the associated consequences for their psychological welfare were investigated in 2002. The findings . . . indicate that experiences of racism and discrimination are fairly common among immigrants both at work and in everyday life more generally. Nearly one third of the immigrant surveyed reported that they had been subject to verbal abuse, threats, crimes of property or other racist offences on at least one occasion during the preceding year . . . According to the study, 73% of the victims of racist offences and 86% of immigrants who had experienced discriminatory treatment had at no stage reported this to the police, either because they regarded the offence as too trivial or because they felt that reporting the matter would result in no further measures being taken . . . The more frequently immigrants reported experiencing racism and discrimination, especially in their everyday lives, the more often they also suffered from anxiety, depression and psychosomatic disorders.', Government Report on Implementation of the Integration Act, Government report no 5 of 2002, Finland, at pp. 68–69 (on file with the authors).

⁶⁰ UN Doc CERD/C/304/Add.103 (§17), and CERD/C/64/CO/8 (§8).

⁶¹ UN Doc E/C.12/1/Add.34 (§18).

plan of action, both seeking to promote equality in the labour market'.⁶² Although none of the states parties would acknowledge that discrimination is to blame for the all of the existing disparities in the employment field, which seems perfectly justified, they do acknowledge its contribution. Or, as the Norwegian representative stated during the oral presentation of Norway's fifteenth report to the CERD, 'it cannot be excluded that some discrimination occurred'.⁶³

Without delving too deeply into this complex matter, mention should be made of some factors that have been highlighted by various monitoring bodies. The European Commission against Racism and Intolerance (ECRI) prepares reports on the status of racism in all the member states of the Council of Europe. In its second report on Finland the ECRI noted that 'difficulties in gaining recognition of qualifications gained abroad, and the requirement that workers in certain sectors speak both Finnish and Swedish, have proved a serious barrier to persons of immigrant origin seeking employment'.⁶⁴ This type of inhibiting structural rigidity is also noted with respect to the other Nordic states. In its second report on Norway the Commission stated that 'the arrangements for recognition of education and professional experience are inadequate'.⁶⁵ In its second report on Denmark, after having noted that trade unions are instrumental in negotiating the collective agreements which constitute the backbone of the Danish labour market, the Commission noted that they 'have been widely criticised for not paying sufficient attention to the phenomenon of discrimination'.⁶⁶

Xenophobia, racism and the current political climate

More difficult is the question of how to counteract the discrimination stemming from people's negative attitudes towards foreigners and refugees. Societal attitudes are often nothing more than instinctive reactions to difference, which have a tendency to increase in times of economic difficulty. Or, as the Danish representative explained to the CERD: '[Denmark] did distinguish between racial discrimination in the strict sense of the word and everyday expressions of hostility towards aliens, which could be heard everywhere, particularly during times of unemployment'.⁶⁷ The distinction may not be so clear-cut in that high levels of unemployment may exacerbate these negative attitudes and as a result, those holding such opinions may be able to apply their hostility by denying employment opportunities to immigrants.

CERD acknowledged that the economic climate can impact on the level of hostility towards foreigners in Nordic society when it concluded in observations to Sweden's twelfth periodic report that the 'recession has had serious consequences for the state party . . .', and that its 'consequences . . . have been most felt in the labour market situation of refugees and immigrants, who have been found worse off than Swedes in most areas of society'.⁶⁸

⁶² UN CCPR/C/79/Add.112 (§6).

⁶³ UN Doc CERD/C/363/Add.3 (§13).

⁶⁴ Report reference no. CRI (2002) 20.

⁶⁵ CRI (2000) 33.

⁶⁶ CRI (2001) 4.

⁶⁷ UN Doc CERD/C/SR.1138 (§26).

⁶⁸ UN Doc CERD/C/304/Add.37 (§3).

A number of human rights NGOs and UNHCR have similarly observed the ‘emerging trend towards intolerance’ in Europe.⁶⁹ An alternative report to the CERD on the situation in Sweden stated that ‘many immigrants experience Sweden as a sealed society. A society in which it is difficult to find your place and be accepted’.⁷⁰ A year later the CERD gave credence to such views in expressing concern at ‘a recent upsurge in racism and xenophobia’.⁷¹ In Finland the CERD noted that it was ‘concerned . . . that a significant percentage of Finns declare themselves to be racist or partially racist’.⁷² More recently after concluding its examination of Finland’s sixteenth periodic report, the CERD maintained its concern about ‘the significant number of allegations which have been brought to its attention reflecting the existence of racist and xenophobic attitudes among some sectors of the population, notably among the young’.⁷³

Denmark has occupied a prominent position in the debate about the hardening climate for foreigners. The ECRI stated that it was ‘deeply concerned that extreme right political parties, such as the right-wing Danish People's Party (which opinion polls estimate currently has the support of 15-20 per cent of the population) have become increasingly prominent on the Danish political scene, promoting racist and xenophobic ideas’.⁷⁴ UNHCR also expressed its concern that the ‘government policy proposals concerning refugees [might feed] into perceived prejudices and generalisations about immigrants’.⁷⁵

These concerns are justified. On 17 January 2002 the Danish government released a policy-paper entitled ‘A New Policy for Foreigners’. The document can be seen as an expression of this attitude as the tone and content of the paper display distrust towards foreigners. For example, with respect to refugees, the document states that ‘refugees travelling to their country of origin on holiday will automatically have their cases reassessed’ and ‘if they are no longer persecuted in their countries of origin their residence permits must be revoked’. This type of reasoning runs counter to the government’s stated goal of improving the integration of foreigners into Danish society by manifesting a will to get rid of them at the first opportunity. Other suggestions in the document include increased use of the ‘manifestly-unfounded procedure’ and the removal of the representative from the Danish Refugee Council (DRC) from the second-instance Refugee Board, a presence which has been commended by UNHCR as a ‘model’ aspect of the Danish asylum system. A long section in the document on social benefits conveys the image of refugees as nothing more than resource-draining burdens on society.

⁶⁹ Concluding observations to Denmark’s third periodic report to the CESCR, UN Doc E/C.12/1/Add.34 (§15).

⁷⁰ ‘Information to the CERD Committee’, Joint NGO Report (2000), on file with the authors.

⁷¹ Concluding observations to Sweden’s thirteenth and fourteenth periodic reports, UN Doc CERD/C/304/Add.107 (§16).

⁷² Concluding observations to Finland’s fifteenth periodic report, UN Doc CERD/C/304/Add.107 (§16).

⁷³ UN Doc CERD/C/63/CO/5 of 22 August 2003 (§13).

⁷⁴ CRI (2001) 4.

⁷⁵ UNHCR’s preliminary comments on ‘A New Policy for Foreigners’ as communicated by the government of Denmark, UNHCR Regional Office, Stockholm (2002). *Also see* Report of Mr Alvaro Gil-Robles, Commissioner for Human Rights, Council of Europe, after his visit to Denmark on 13-16 April 2004 (Strasbourg, 8 July 2004)

Yet again it would appear as though refugees are made to suffer for the partial failures of Scandinavian integration policies. The fact that the Danish policy paper was later transposed into legislation in the form of a revised *Aliens Act* has created serious problems, many of which have been identified by the Committee on the Elimination of All Forms of Discrimination against Women, UNHCR and the NGO community.⁷⁶

In Denmark, the political party identified by the ECRI and various human rights bodies as being responsible for this new rhetoric, is the Danish People's Party (*Dansk Folkeparti* or DPP). Although the DPP does not form part of the government, its impact on the Danish political scene is considerable. This development is regrettable, even more so as Denmark has traditionally been one of Europe's strongest supporters of refugees and it can pride itself on being the first state party to the 1951 Refugee Convention.

A similar development has taken place in Norway where the Progress Party (*Fremskrittspartiet*) has flourished using anti-immigrant rhetoric. In 1997 the CERD stated that 'the fact that a Norwegian political party promotes racial discrimination is

⁷⁶ As noted, the Danish policy document resulted in introduction of a revised *Aliens Act* which came into force on 1 July 2002. UNHCR and the Danish NGO community were highly critical of the new law (see UNHCR's comments on the *Aliens Act*, available on-line at: www.unhcr.org)

The Committee on the Elimination of Discrimination against Women, in its consideration of the fourth and fifth periodic reports of Denmark (CEDAW/C/DEN/4 and CEDAW/C/DEN/5 and Add. 1 and Corr. 1) highlighted an extraordinary number of issues in the new *Act* and under 'Principal areas of concern and recommendations' noted the following:

341. The Committee is concerned that the *Aliens Act*, which although gender-neutral, indirectly discriminates against women.
342. *The Committee recommends that the state party review the Aliens Act and revoke those provisions that are incompatible with the provisions of the Convention, particularly article 2, which prohibits direct and indirect discrimination.*
343. The Committee expresses concern about the situation of migrant, refugee and minority women in Denmark, including discrimination in education and employment and at gender-based discrimination and violence they may experience.
344. *The Committee urges the State party to take effective measures to eliminate discrimination against migrant, refugee and minority women. It encourages the State party to be proactive in its measures to prevent discrimination against migrant, refugee and minority women, both within their communities and in society at large, to combat violence against them, and increase their awareness of the availability of social services and legal remedies.*
345. The Committee regrets the introduction in new legislation of an increase in the age limit for spousal reunification from 18 years to 24 years of age in order to combat forced marriage.
346. *The Committee urges the State party to consider revoking the increase in the age limit for family reunification with spouses, and to explore other ways of combating forced marriages.*
347. The Committee is concerned that the situation of foreign married women with temporary residence permits who experience domestic violence will worsen when the amendment to the *Aliens Act* enters into force on 1 July 2002, which will increase the required number of years of residence from three to seven before a permanent residence permit may be obtained. The Committee is also concerned that these women's fear of expulsion will be a deterrent to their seeking assistance or taking steps to seek separation or divorce.
348. *The Committee recommends that revocation of temporary residence permits of foreign married women who experience domestic violence, and legislative changes on residency requirements should not be undertaken without a full assessment of the impact of such measures on these women.*
349. The Committee is concerned that, under the amended *Aliens Act*, some women who do not have refugee status might be forcibly repatriated to where they had been subjected to rape and/or other atrocities and may face the threat of further persecution. The Committee urges the State party to refrain from forcibly repatriating such women and to ensure that repatriation in these circumstances is voluntary . . .' (emphasis in the original).

a source of serious concern'.⁷⁷ At the parliamentary elections in 2000 the Progress Party increased its vote to 15 per cent, but no mention of this or related concerns were made by the CERD in its concluding observations to Norway's fifteenth periodic report.⁷⁸ While issues of xenophobia and racism are widely discussed in Norway, hostile attitudes that would have been considered inconceivable several years ago are nowadays not uncommon.

The fact that many European countries including ones with strong human rights traditions such as the Nordic countries have seen a growing popularity of political movements and parties which promote an anti-immigrant agenda, has had a strong negative effect on the domestic refugee debate. When attitudes towards foreigners harden, discriminatory behaviour in general becomes more prevalent. Arguably the worst kind of discrimination is that which affects people's everyday lives. Discriminatory attitudes have been noted by most of the UN human rights treaty bodies, but a concrete example raised by the CERD is that of restrictive 'entry policies' to restaurants and clubs.⁷⁹ The humiliation this and similar treatment amounts to is known to be a powerful destructive force to any attempts at integration.

The Article 4(b)-conundrum in relation to the Convention on the Elimination of All Forms of Racial Discrimination

It is on the issue of the implementation of Article 4(b) of the Convention on the Elimination of All Forms of Racial Discrimination that one of the few unveiled conflicts between Nordic states parties and a UN human rights committee exists. Article 4(b) provides that states parties 'shall *declare illegal and prohibit organisations*, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law' (emphasis added). The CERD has consistently 'emphasised that Article 4 is one of the key articles of the Convention'.⁸⁰ As none of the Nordic countries have entered a reservation against Article 4(b), legally they are bound to respect and implement it. Other states parties such as France and the UK have made sure to enter reservations in order to avoid having this precise disagreement with the CERD.⁸¹

⁷⁷ Concluding observations to Norway's twelfth, thirteenth and fourteenth periodic reports, UN Doc CERD/C/304/Add.40 (§13).

⁷⁸ UN Doc CERD/C/304/Add.88.

⁷⁹ UN Docs CERD/C/304/Add.88 (concluding observations to Norway's fifteenth periodic report, 2001) (§17) and CERD/C/304/Add.103 (concluding observations to Sweden's thirteenth and fourteenth periodic reports, 2001) (§17).

⁸⁰ UN Doc CERD/C/SR.1032 (§28).

⁸¹ France: 'With regard to Article 4, France wishes to make it clear that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the States parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts.'

UK: '[The United Kingdom] interprets Article 4 as requiring a party to the Convention to adopt further legislative measures . . . only in so far as it may consider with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of the Convention (in particular the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association) that some legislative addition to or variation of existing law and

The Nordic countries have made the point ‘that a general rule expressly prohibiting organisations such as those described in that article was unnecessary and would raise complex issues in relation to other human rights guaranteed by the constitution, such as free speech and freedom of association’.⁸² The CERD has refused to accept this line of argument with one member stating that he found it ‘disturbing that some European countries attached more importance to freedom of expression than to Article 4 of the Convention’.⁸³ The Convention dates from 1965, and in the context of its inception the prohibition in Article 4(b) is understandable. Shocked by the distasteful politics of fascism in Europe and apartheid in South Africa, Article 4(b) was the world’s way of saying that in the future it would do its utmost to nip such tendencies in the bud.

The CERD has not shied away from suggesting that the introduction of prohibitions and other criminal law measures is an acceptable approach to combating the serious problem of xenophobia and intolerance. During the oral presentation of Denmark’s fourteenth periodic report a CERD member stated that the fact that none of the politicians which in his mind had made ‘insulting’ statements about Africans and Asians had been prosecuted, ‘demonstrated that the authorities and political leaders held attitudes that encouraged racist statements’. In response to this remark the Danish representative stated that ‘it was not always easy to strike an acceptable balance between respect for freedom of expression and action against racist propaganda and incitement to racial hatred’, and that ‘in a democracy, it should also be possible on occasion to make statements that were offensive or shocking’.⁸⁴

In relation to the Norwegian Progress Party some CERD members have done all but call for the prohibition of the party as well as similar political movements.⁸⁵ During the oral presentation of Sweden’s eleventh periodic report one CERD member expressed deep concern at the emergence of the right wing party New Democracy (*Ny Demokrati*) and criticised the ‘apparent laxity shown by the Swedish authorities in dealing with the problem’.⁸⁶ The surge in so-called ‘hate-crimes’ in the Nordics generally, as noted by various UN and other actors, makes for a frightening

practice in those fields is necessary for the attainment of the end specified in the earlier part of Article 4.’

⁸² UN Doc CERD/C/SR.1032 (§6).

⁸³ UN Doc CERD/C/SR.1032 (§64).

⁸⁴ UN Doc CERD/C/SR.1378 (§3 & 32). *Also see* report of Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on his visit to Denmark *op cit*.

⁸⁵ UN Doc CERD/C/SR.1232 (§25).

⁸⁶ UN Doc CERD/C/SR.1018 (§72). In March 2004, in its concluding observations to Sweden’s fifteenth and sixteenth periodic reports the Committee noted the fact that Sweden ‘continues to uphold its interpretation of the provisions of Article 4 of the Convention, maintaining that criminal acts committed by the members or supporters of a racist organisation may be prohibited and penalised by law, but not the existence of, and participation in racist organisations.’ The Committee drew Sweden’s attention to ‘its General Recommendation XV according to which all provisions of Article 4 of the Convention are of a mandatory character, including declaring illegal and prohibiting all organisations promoting and inciting racial discrimination, as well as recognising participation in such organisations as an offence punishable by law. Accordingly, the Committee recommends that the State Party reconsider its position and adopt the necessary legislation in order to ensure full compliance with Article 4(b) of the Convention.’ (UN Doc CERD/C/64/CO/8 (§10)).

development, the countering of which necessitates increased law enforcement and judicial activity.⁸⁷

It appears that the differences of opinion and approach of the CERD and the Nordic countries on this particular issue will not be easily resolved. More concerted action by the Nordic authorities to curb the activities of racist organisations and in appropriate cases rigorously prosecute those responsible for race and hate-related crimes, would be a positive development.⁸⁸ For its part the CERD could continue to focus on the need for states to adopt best practices to counter the phenomenon of racism and to promote democratic ideals and tolerance in schools as well as in public institutions through public education, the media and promoting an active politics of integration. All of these measures may be sharper tools to counter racism and intolerance than the blunt approach of prohibition and criminalisation. Then again, the Nordics would do well to adhere to all of their treaty obligations or adopt formal reservations in respect of Article 4.

Refugee children

Any crisis situation disproportionately affects the weakest individuals. That children need special protection seems self-explanatory, but even today fifteen years after the adoption of the Convention on the Rights of the Child (CRC) which affords special protection on the child seeking refuge, the impression in many quarters is that ‘asylum-seeking children are not seen [nor] heard’.⁸⁹ The reasons for this are manifold. Before delving into substantive provisions, there are two preliminary points relating to the availability and applicability of the Convention that the Committee on the Rights of the Child (the Committee) has consistently expressed.

Convention availability

In its concluding observations to Finland’s second periodic report in 2000, the Committee ‘encourage[d] the state party . . . [to make] the Convention available in the languages of the main immigrant groups’.⁹⁰ UNHCR made a similar point when commenting on separated asylum seeking children in Denmark in 2002, and Swedish Save the Children has advocated that ‘the rights of children to have knowledge and

⁸⁷ See e.g. CERD/C/304/Add.93 (concluding observations to Denmark’s 14th periodic report) (§10), CERD/C/304/Add.60 (concluding observations to Finland’s 13th and 14th periodic reports) (§8), CERD/C/304/Add.40 (concluding observations to Norway’s 12th and 13th periodic reports) (§12), CERD/C/304/Add.103 (concluding observations to Sweden’s 13th and 14th periodic reports) (§10).

As concerns Finland, a 2002 report notes that ‘there has been a slight rise in the number of reported offences with racist overtones in recent years. While 368 racist offences were reported in 1999, the corresponding figure for the year 2000 was 402. As these accounts are based on information procured from the police register of reported offences, the figures given are only a guide to the true situation’, Government Report on the Implementation of the Integration Act, op cit, p. 68.

⁸⁸ It is noteworthy that in 2002 criminal charges were brought against several Danish political party officials and private persons for offences relating to incitement of hatred against an ethnic group. Whether this initiative has been spurred on by CERD’s criticisms, as well as attention from the liberal media and other commentators is a relevant consideration.

⁸⁹ The Norwegian Commission for Church Asylum (1996) quoted in the parallel report to the Committee on the Rights of the Child by the Forum for the Convention on the Rights of the Child (FCRC), Norway, concerning Norway’s second periodic report (2000).

⁹⁰ UN Doc CRC/C/SR.626.

information about the Convention have not yet been met', and proposed 'that the Convention be made available . . . in various immigrant languages'.⁹¹ This point was also raised in the Committee's concluding observations to Norway's initial report in 1994, and when the same matter arose during examination of Norway's second periodic report in 2000 the representative affirmed that 'the Convention on the Rights of the Child had been translated and published . . . in some of the languages most commonly spoken by immigrants settled in Norway'.⁹²

The above is another example of where attention by a human rights treaty body is likely to have precipitated a direct improvement in the practice of a state party. The utility of the measure resides not so much in the use that could possibly be made of the CRC by refugee children themselves, but that the translation process necessitates an active commitment by the state party that may lead to a change in attitudes. In the words of the Finnish Central Union for Child Welfare, 'even professionals working with children are not aware of the Convention and its contents well enough'.⁹³ Another NGO, the Norwegian Forum for the Convention on the Rights of the Child (FCRC) has remarked that 'the Convention is almost never referred to by lawyers or the authorities processing deportation cases'.⁹⁴ UNHCR has raised this point in its discussions with the Committee. Issues of information and access run parallel with the obligation of states parties to 'ensure the rights set forth in the present Convention'⁹⁵ and provide that in all actions concerning children 'the best interest of the child shall be a primary consideration'.⁹⁶

Convention applicability

A further complication in the Nordic context is that international human rights treaty provisions cannot be automatically invoked before national courts and administrative tribunals. Most of the Nordic countries adopt a dualist approach to international treaties, whereby they must be incorporated by making existing legislative provisions compatible with treaty obligations. Alternatively international treaties can be adopted into national law by a specific act of parliament. The latter is rare, but has occurred as illustrated by Denmark and Norway introducing the European Convention of Human Rights into national law. With respect to a proposal to adopt the CRC into Norwegian domestic law, the Norwegian Save the Children noted that the CRC was not included as it was considered a 'special Convention'.⁹⁷ Save the Children even asked the Committee to put the question to the Norwegian government and the matter was duly noted in the Committee's concluding observations, although no action been take to adopt this recommendation.⁹⁸

⁹¹ Parallel report to the Committee on the Rights of the Child concerning Sweden's second periodic report (1998).

⁹² UN Doc CRC/SR.626.

⁹³ Parallel report to the Committee on the Rights of the Child concerning Finland's second periodic report (2000).

⁹⁴ Parallel report to the Committee on the Rights of the Child by the FCRC concerning Norway's second periodic report (2000).

⁹⁵ Convention on the Rights of the Child, Article 2.

⁹⁶ *Ibid*, Article 3.

⁹⁷ Parallel report to the Committee on the Rights of the Child concerning Norway's initial report (1994).

⁹⁸ UN Doc CRC/C/15/Add.23 (1994) (§8).

In the concluding observations to Norway's second periodic report the Committee expressed its concern that 'the provisions of and principles of the Convention are not entirely respected with regard to asylum-seeking children'.⁹⁹ Clarification on this point is provided in the parallel reports by the respective national Save the Children organisations concerning Norway and Sweden. Referring to the obligation stated in Article 3 of the CRC in discussing asylum procedures, the Norwegian Save the Children concluded that 'the authorities seldom put much emphasis on the child's situation and needs, and to a very little extent take into consideration what the situation will be like for the child on return to their country'. It further found '[standard] formulations' in decisions along the lines of 'taking the child's situation into consideration does not legitimise the family's stay in Norway', and that these decisions 'often lack both reasoning and evaluation of the child's situation'.¹⁰⁰

This situation appears not to have changed dramatically, because in its parallel report to Norway's second periodic report the FCRC stated that: 'humane consideration, association with Norway through having other family members in the country who have previously been granted residence, somatic problems and serious psychological trauma after persecution, had no influence whatsoever on the outcome of asylum applications where the decision arrived at was rejection. Precedence was always given to government immigration policy'.¹⁰¹ Its Swedish counterpart found similar standard formulations holding that 'the requirements of Article 3 in the Convention . . . are not absolute' and that regard must be had to 'other important interests'. Swedish Save the Children has noted that: 'An example of such an important overall interest that may be weighed against the best interests of the child to stay in Sweden is stated to be the interest of society in controlling immigration'.¹⁰²

The above examples illustrate the apparent failure to treat asylum-seeking children as individuals with particular protection needs. Rather, in many cases, refugee children are often subsumed under what is considered as their parents' interests and/or in the case of separated asylum-seeking children policy imperatives geared towards limiting the number of refugee children being able to remain in an asylum country. Although the wording of Article 3 lays down that 'the best interests of the child shall be *a primary consideration*' (emphasis added), states parties tend to emphasise the relativity of this provision. And in the absence of an individual complaints procedure under the CRC it is important that the Committee remind states parties of their obligations under Article 3 in relation to asylum applications, in addition to clarifying the scope and purpose of this provision as it applies to foreigners more generally.

Even before the procedure has reached the stage of a final decision it appears from both the Committee's observations and other reports that national asylum procedures are not adequately adapted to deal with children, irrespective of whether they come alone or as part of a family. UNHCR has advocated that police, immigration officials and lawyers who are involved with children should receive special training on identifying, communicating with, and interviewing separated children.

⁹⁹ UN Doc CRC/C/15/Add.126 (2000) (§48).

¹⁰⁰ Parallel report to the Committee on the Rights of the Child concerning Norway's initial report (1994).

¹⁰¹ Parallel report to the Committee on the Rights of the Child by the FCRC concerning Norway's second periodic report (2000).

¹⁰² Parallel report to the Committee on the Rights of the Child concerning Sweden's second periodic report (1998).

In its concluding observations to Finland's second periodic report in 2000, the Committee recommended 'that the state party ensure adequate resources for the training of the officials who receive refugee children, in particular in child interviewing techniques'.¹⁰³ Of note, in 2001 the Finnish Directorate of Immigration organised a series of training programmes for officials and NGO caseworkers on how to conduct interviews and otherwise deal with separated asylum-seeking children. The Finnish authorities also adopted guidelines for interviewing unaccompanied refugee children which has served as a model for other countries.¹⁰⁴

Similarly in the other Nordic countries, in recent years the immigration authorities have made efforts to train staff on child-appropriate interviewing techniques in addition to making arrangements for asylum-seeking children to have access to the determination procedure and appropriate social and legal representation in the case of unaccompanied minors. However, quoting a 1998 survey, the Norwegian FCRC concluded that 'observations of the police interrogation/interview of asylum seekers . . . show that the police reports/interrogation forms are not suitable for assessing the situation for children in asylum cases'; and further, that 'children are still not interviewed about their experiences, their background for fleeing and the child's subjective feelings about persecution and the risk of being returned'.¹⁰⁵ This in spite of an assurance given by the Norwegian delegation during presentation of Norway's initial report that 'any child would be able to express its views and to have a separate interview if it so wished'.¹⁰⁶

With growing numbers of asylum seekers and separated asylum-seeking children arriving in the Nordic countries these procedural guarantees may be increasingly difficult to ensure. It is noteworthy however that improvement can still be made, and cooperation between state actors, the NGO community and UNHCR to this end should remain a priority.

Detention

Commenting on Sweden's initial report in 1993, the Committee stated that it was 'concerned by the practice of taking foreign children into custody under the *Aliens Act*, and noted that this practice is discriminatory in so far as Swedish children generally cannot be placed in custody until after the age of 18'.¹⁰⁷ During the oral presentation of Sweden's second periodic report in 1999, the Swedish representative stated that 'a number of measures had . . . been taken as a result of the concluding observations of the Committee on the Rights of the Child on Sweden's initial report'.¹⁰⁸ Among these measures was an amendment of the law relating to the detention of foreign minors, making the rules previously applicable to under-16 year olds applicable to under-18 year olds with the result that, in the opinion of the Swedish delegation, 'current legislation and practice were in conformity with the

¹⁰³ UN Doc CRC/C/15/Add.132 (§52).

¹⁰⁴ Guidelines for Interviewing Separated Minors, Directorate of Immigration, Finland, November 2001.

¹⁰⁵ Parallel report to the Committee on the Rights of the Child by the FCRC concerning Norway's second periodic report (2000).

¹⁰⁶ UN Doc CRC/C/Sr.150 (1994) (§21).

¹⁰⁷ UN Doc CRC/C/15/Add.2 (§9).

¹⁰⁸ UN Doc CRC/C/SR.521 (§5).

Convention'. This view is to be contrasted with Swedish Save the Children which, while noting that this reform was a 'positive government step', was of the view that since the revised law still provides for the possibility of detaining under-18 year olds, 'it is discriminatory that children under 18 years of age can be deprived of their liberty as if they were criminals'.¹⁰⁹

When the Danish delegation was faced with the question of what Denmark did to avoid detaining asylum-seeking children whose applications had been rejected, it produced a written reply describing the procedure that only provided for detention as a measure of last resort.¹¹⁰ The Committee would do well to continue to closely monitor the practice of detaining minors in view of deportation, and in this respect ask, in the words of Norwegian Save the Children, 'if not other and more humane measures could have been used'. Moreover the use of detention in such circumstances should be subject to a stringent test of proportionality and alternative means.¹¹¹

Family reunification

A general remark about administrative procedures involving refugee children is that they often end up being delayed. This is particularly a criticism levelled at the Nordic states in relation to processing applications for family reunification. Article 10 of the CRC states that 'applications . . . for the purpose of family reunification shall be dealt with by States parties in a *positive, humane and expeditious manner*'. An example of this would be, in the words of the FCRC, that 'as a result of long periods of time in handling these applications, many children have almost reached the age of 18 years when a decision is reached and the reason for refusal has been that the child no longer needs a mother!'.¹¹²

The same problem was found in Finland but, to their credit, the Finnish authorities revised the family reunification procedures so that 'the length of the procedure may not influence the possibilities to reunite a family'.¹¹³ The Committee nonetheless criticised the national procedures for family reunification when considering the second periodic reports of Finland¹¹⁴ and Norway,¹¹⁵ but similar criticism was also levelled at other states parties. Danish Save the Children noted that in Denmark a distinction is made between children with a 'humanitarian residence permit' who do not have a legal claim to family reunification, and children with refugee status who do. Besides being a questionable distinction under the non-discrimination provision in

¹⁰⁹ Parallel report to the Committee on the Rights of the Child concerning Sweden's second periodic report (1998).

¹¹⁰ UN Doc CRC/C/8/Add.8.

¹¹¹ Re: Articles 37(a) and (b) of the CRC; Articles 7 & 9 of the ICCPR; Articles 3 & 5 of the European Convention on Human Rights, in addition to *UNHCR's Guidelines on Protection and Care of Refugee Children*, Geneva (1994) which *inter alia* note that: 'It is UNHCR's policy that refugee children should not be detained. Unfortunately, refugee children are sometimes detained or threatened with detention because of their own, of their parents', illegal entry into a country of asylum. Because detention can be very harmful to refugee children, it must be 'used only as a measure of last resort and for the shortest appropriate period of time . . .' (pp. 86–88).

¹¹² Parallel report to the Committee on the Rights of the Child by the FCRC concerning Norway's second periodic report (2000).

¹¹³ Written reply to UNHCR questionnaire on the implementation of the CRC (2000), on file with the authors.

¹¹⁴ UN Doc CRC/C/15/132 (§37).

¹¹⁵ UN Doc CRC/C/15/Add.126 (§32).

Article 2 of the CRC, the criteria for family reunification for children with refugee status are so strict that ‘separated children meet none of these requirements’. Save the Children has further noted that ‘[an] application for family reunification is automatically refused, without undergoing an individual procedure, if the . . . requirements are not met’. And if the parents apply for family reunification in Denmark from another country ‘there is a risk that the residence permit will be withdrawn and the child sent back to [his or her] parents’.¹¹⁶

Swedish Save the Children has similarly noted that ‘processing takes a long time’ and that ‘it is often practically difficult to effect a family reunification’. Furthermore ‘the formal requirements and paperwork required by the Migration Board are in the majority of cases very difficult to satisfy’.¹¹⁷ As can be deduced from various reports, provisions for family reunification appear to be strictly applied. Even within the national authorities charged with these matters there seems to be a concerted fear of abuse of the system.¹¹⁸ Political trends in this area seem to be going in the direction of even stricter rules for family reunification. The above-noted Danish policy paper under the heading ‘Fewer family reunifications in Denmark’ notes the concern of so-called ‘anchor-children’ arriving in the country; a concern which is not supported by the statistics since according to the authorities only a few hundred asylum applications are annually lodged by unaccompanied minors in Denmark.

The precise opposite of family reunification has been known to happen as well. In its parallel report on Norway’s initial report, Norwegian Save the Children noted the occurrence of ‘separation of family members in connection with deportations when an application of asylum is rejected’.¹¹⁹ When asked about this by the Committee, the Norwegian delegation answered that an expulsion procedure was only used if the rejected applicants failed to leave the country voluntarily and that ‘the policy was not to split up families, and at all times the utmost effort was made to avoid doing so’.¹²⁰ The parallel report of the FCRC nonetheless notes that there are ‘approximately 30 children each year’ who ‘lose their right to be with/have contact with one of their parents, as a result of a deportation order because of a criminal offence [committed by the parent]’. This is also reportedly a problem in Sweden which affects some 200 children a year. A reference group under the Ministry of Justice has suggested that the authorities making the background profile of an individual in view of possible deportation be legally bound to take into account the existence of, and repercussions

¹¹⁶ Parallel report to the Committee on the Rights of the Child concerning Denmark’s second periodic report (2000).

¹¹⁷ Parallel report to the Committee on the Rights of the Child concerning Sweden’s second periodic report (1998).

¹¹⁸ An example is provided by FCRC of two unaccompanied Somali boys, nine and thirteen years old, who came to Norway to apply for asylum and subsequently family reunification with their mother. The application was rejected by the Directorate of Immigration because there were discrepancies between the asylum interviews with the children upon arrival, and the interview conducted with the mother in Mogadishu in respect of where they had lived. It did not seem as if the boys were aware that they had at times lived in Ethiopia which perhaps is not so strange since, according to reports, the nine-year-old was unaware of the concept of a ‘border’. Cited in the Parallel report to the Committee on the Rights of the Child by the FCRC concerning Norway’s second period report (2000).

¹¹⁹ Parallel report to the Committee on the Rights of the Child concerning Norway’s initial report (1994).

¹²⁰ UN Doc CRC/C/SR.159 (§22).

for, any eventual children with the aim of safeguarding the child's right of access to both parents.¹²¹

Children in hiding

Another example of what appears to be a restrictive interpretation of international legal obligations is found in relation to children whose asylum applications have been rejected but who remain illegally in the country, often in hiding. Article 2 of the CRC enjoins states parties to confer the benefits of the Convention on *all* children, irrespective of status.

In its parallel report to the Committee, Swedish Save the Children pressed the issue of children of rejected asylum seekers in hiding who have very little access to the social welfare assistance they are guaranteed under the Convention.¹²² The government response was that 'the Swedish authorities did not tolerate illegal communities and such persons were expelled to their country of origin. Should they fail to comply with the expulsion order and go into hiding they were not entitled to rights under the Convention'.¹²³ In its concluding observations the Committee 'noted with concern that the principle of non-discrimination is not fully implemented for children of illegal immigrants'.¹²⁴

Clearly the Committee has set the bar high on this issue. However there is evidence that the tactic bears fruit. For example, in its concluding observations to Denmark's initial report the Committee expressed its view on the then state of affairs that 'all children who have had their asylum requests rejected but who remain in the country have had their rights to health care and education provided *de facto* but not *de jure*' was 'not fully compatible with the provisions and principles of Articles 2 and 3 of the Convention'.¹²⁵ At the time the Danish Aliens Act was amended so as to provide that 'children of school age who applied for asylum' would be given the same educational and health benefits as Danish children 'so long as they were in Denmark, regardless of whether their requests were pending or had been rejected'.¹²⁶ Similar legislative proposals are being promoted in Sweden which is a positive development.

Refugee women

Similar to the priority given to refugee children, UNHCR has focussed considerable attention to the plight of refugee and asylum-seeking women. UNHCR has developed numerous guidelines, training materials and operational practices to ensure that the protection and assistance needs of this group of beneficiaries are met. In its advocacy activities with UN human rights mechanisms, UNHCR has developed close links with the specialised human rights treaty bodies and Commission on Human Rights-based special rapporteurs. In particular, the work of the Committee on the Elimination of

¹²¹ See Swedish government series DS 2002:41, 'The child's perspective in deportation due to crime'.

¹²² Parallel report to the Committee on the Rights of the Child concerning Sweden's second periodic report (1998).

¹²³ UN Doc CRC/C/SR.521.

¹²⁴ UN Doc CRC/C/15/Add.101 (1999) (§11).

¹²⁵ UN Doc CRC/C/15/Add.33 (§14).

¹²⁶ Oral presentation of Denmark's second periodic report: UN Doc CRC/C/SR.699 (§43).

Discrimination Against Women (CEDAW) has proven valuable in raising issues of concern to refugee and asylum-seeking women.

In the concluding observations to Sweden's fourth and fifth periodic reports the CEDAW 'commends the government [of Sweden] for passing legislation that provides residence permits to individuals who have a well-founded fear of persecution on the basis of sexual orientation or gender, particularly in cases that involve discrimination against women'.¹²⁷ This would seem to be a positive development, and indeed is one in relative terms, but the 1997 provision has two serious drawbacks, both of which are noted in the alternative report prepared by a group of Swedish NGOs. The first limitation is that, according to statistics, the provision has 'rarely been applied'. The second, and perhaps more fundamental problem is that '[b]enefits afforded under the category . . . fall short of those under the 1951 Refugee Convention relating to the Status of Refugees'. The NGOs felt that 'an additional provision of this kind serves no constructive purpose. It can even be argued that the provision would impair equality in regard [to] asylum and protection, since the provision offers inferior protection compared to other, more favourable categories'.¹²⁸

UNHCR has a clear standpoint on the issue. In its policy paper from 2000 the UN refugee agency states that '[t]he refugee definition in the 1951 Refugee Convention . . . has to be interpreted with such an understanding – in a gender sensitive way – in order for it to be properly interpreted',¹²⁹ i.e. including gender within the ambit of 'a particular social group' in the refugee definition. In UNHCR's view '[w]hile gender is not specifically referenced in the definition, it should be accepted that it can influence, or dictate, the type of persecution or harm suffered and that reasons for this treatment'.

This doctrinal approach has been endorsed during the UNHCR Global Consultations process which resulted in the issuing of new protection guidelines.¹³⁰ These guidelines *inter alia* call for procedural provisions to deal with the special needs of refugee women, and they stipulate that women are to be considered a 'particular social group' for the purpose of Article 1 of the 1951 Refugee Convention. UNHCR has consistently made this point to the CEDAW in relation to the Nordic countries and has raised this matter in its discussions with government counterparts.

On the whole, refugee or other protection status is scarcely granted in the Nordic countries on the grounds of gender-based persecution. Although the Norwegian government published gender-related persecution guidelines in consultation with UNHCR in 1998, they have been exceptionally implemented in individual cases by respective decision-making authorities. According to information received from the Norwegian Organisation for Asylum Seekers, asylum-seeking women who risk being subjected to gender-related persecution are frequently rejected or only provided with subsidiary protection.

¹²⁷ UN Doc A/56/38 (§334).

¹²⁸ Report to the CEDAW with respect to Sweden's commitments under the Convention on the Elimination of All Forms of Discrimination Against Women (2001).

¹²⁹ UNHCR Position paper, 'Gender-related persecution', UNHCR Geneva (January 2000).

¹³⁰ 'Guidelines on international protection: gender-related persecution within the context of Article 1A(2) of the 1951 Refugee Convention and its 1967 Protocol relating to the Status of Refugees', UNHCR Geneva (7 May 2002).

Similarly in Denmark, the Danish Refugee Council has advised that the authorities are restrictive in cases where an asylum seeker fears persecution due to membership of a particular social group. In fact, the praxis appears to be that membership of a particular social group is not considered sufficient as an individual ground for refugee status. Notwithstanding what may appear an inconsistent approach to assessing gender-related persecution, statistics from January 2000 to February 2003 indicate that the second instance Danish Refugee Board decided 168 cases concerning fear of persecution due to ‘membership of a particular social group’, out of which 41 were granted *de facto* refugee status, 14 Convention refugee status and the rest received a negative answer.¹³¹

Another issue has been the frequent rejection of cases by the Nordic authorities regarding trafficked women. A large number of cases have been considered manifestly unfounded even where use of force has been alleged. Trafficking in women has generally been regarded as a criminal offence by the Nordic asylum authorities and therefore outside the scope of the Refugee Convention. This notion is held despite UNHCR’s view that appropriate cases involving trafficking can support a claim to refugee status.¹³²

As concerns the specific incorporation of ‘gender-related’ grounds as a basis for recognition of refugee status an obvious solution would be to amend the 1951 Refugee Convention. But enthusiasm for such a venture is tempered by the seemingly insurmountable difficulties in gaining acceptance by states for any such change. Thus, the preferred approach is to lobby for a more holistic interpretation of the 1951 Refugee Convention.¹³³ Arguably there is a need for a purposive reinterpretation of the refugee definition as there is a strong case to be made that the very definition of a refugee in Article 1(A) of the 1951 Refugee Convention, as presently formulated, is discriminatory. In the words of Radhika Coomaraswamy, the former UN Special Rapporteur on Violence against Women, the 1951 Refugee Convention ‘fail[s] to provide for the particularities of women’s experiences as refugees, the most notable of which is the difficulties women face in meeting the legal criteria for persecution established by the Convention which is due primarily to the fact of their exclusion from public life’.¹³⁴

A simple comparison can be made between the primarily male problem of being drafted to fight in a conflict which ‘manifestly violates international norms’ for which refugee-status may be granted, and women fleeing genital mutilation for which, in the countries under review, some kind of ‘in need of protection’ status may be granted.¹³⁵ This runs counter to the current trend of including this type of gender-related

¹³¹ Statistical and related information received from the Danish Refugee Council in March 2003.

¹³² The ‘UNHCR Guidelines on International Protection: Gender-related persecution’ note that: ‘some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death . . . or can be considered a form of torture and cruel, inhuman or degrading treatment . . . In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the state has been unable or unwilling to provide protection against such harm or threats of harm’. (§18).

¹³³ Re: UNHCR Guidelines on international protection: Gender-related persecution.

¹³⁴ UN Doc E/CN.4/1998/54.

¹³⁵ This example is found in the document: ‘Refugee Protection – A Guide to International Refugee Law’, UNHCR and the Inter-Parliamentary Union, Geneva, 2001.

persecution within the 1951 Refugee Convention definition prevalent in several industrialised countries. Although it is foreseen that with greater awareness of the plight of refugee women and specific gender-based forms of persecution, as well as proposed legislative changes the Nordic countries will also formally grant refugee status on gender-related grounds, the question remains of when and how they intend to incorporate these changes¹³⁶

Commendably the CEDAW often takes note of and expresses its concern over the fact that refugee women suffer from ‘double discrimination, based on both their sex and ethnic background’¹³⁷ in areas such as ‘education and employment’, and even from ‘gender-based discrimination and violence ... in their own communities’.¹³⁸ In this connection the so-called ‘honour killings’ which have taken place in Sweden in recent years¹³⁹ has brought home to governments the consequences of hiding behind an excuse of ‘cultural relativism’ and not taking forceful preventive as well as judicial action to guard against these tragic crimes.

As highlighted in the case of refugee children, women asylum seekers also require special reception procedures. UNHCR has noted the importance of providing training and information to personnel dealing with refugees so that they can recognise and deal with the specific needs of female asylum applicants. The importance stems from the fact that flight situations are experienced differently by women, and sometimes the type of persecution which causes the flight of a woman makes telling her story very difficult. A female asylum seeker can face particular difficulties in presenting her story, especially where it involves acts of sexual violence. UNHCR has recommended a series of procedural requirements which should be instituted for dealing with the asylum claims of refugee women.¹⁴⁰

In its examination of periodic reports the CEDAW has occasionally touched upon issues concerning the integration of refugee women. The Committee noted that the authorities need to especially target refugee women with information regarding their rights and opportunities in the host country, lest the isolation referred to by the UN

¹³⁶ It is especially noteworthy that in March 2004 an expert committee appointed by the Swedish government released a 150-page report entitled ‘Refugee Status and Gender-Related Persecution’ (SOU 2004:31) which recommends that persons seeking international protection as refugees on gender-related grounds should be recognised as such under Swedish law. The government will now review the report and it is expected that legislative amendments will be prepared to formally introduce gender-related claims within Sweden’s interpretation of the 1951 Convention refugee definition as adopted in the *Aliens Act*. This initiative, which is arguably long overdue, should establish a positive precedent for the Nordic region and Europe more generally. The report is available on-line at: <www.humanrights.gov.se>.

At the EU level, the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (ASILE 23 – 8043/04, 27 April 2004), would provide for the grant of refugee status under the 1951 Convention definition grounded on gender or sexual-orientation related persecution. Article 9(2)(f) of the Directive provides that “Acts of persecution can inter alia take the form of: acts of a gender-specific or child-specific nature”.

¹³⁷ Quote taken from the concluding observations to Finland’s third and fourth periodic reports, UN Doc A/56/38 (§305).

¹³⁸ Taken from the concluding observations to Sweden’s fourth and fifth periodic reports, UN Doc A/56/38 (§356).

¹³⁹ Concluding observations to Sweden’s fifth periodic report, UN Doc CCPR/CO/74/SWE.

¹⁴⁰ See UNHCR Guidelines on international protection: Gender-related persecution, at Section III (Procedural Issues).

Special Rapporteur on Violence against Women perpetuates itself in the asylum country. For example, in its concluding observations to Denmark's third periodic report the Committee expressed its concern over '[t]he inadequacy of culturally and gender-sensitive measures and programmes for immigrant and refugee women to enable them to benefit from legal and social services available in Denmark'.¹⁴¹ The CEDAW has also recommended that Iceland 'intensify further its information programmes among migrant women, in particular those that pertain to the rights of women in Iceland'.¹⁴²

In view of recent political developments in the area of refugee and migration policy in Europe and in the Nordic countries in particular, the cautionary words of the Ms Coomaraswamy should be given close consideration: 'Strict anti-immigration policies, which reduce opportunities for legal migration and thereby encourage migrants to turn to third parties for assistance in migrating and to rely on false promises of legal migration, serve to provide an ever-growing number of clients to the increasing number of underground networks of immigrant smugglers.'¹⁴³ The former UN Special Rapporteur pointed to a connection between restrictive immigration policies and trafficking in women, and stated that the phenomenon is 'less likely to develop in situations in which opportunities exist for legal migrant work'. In the opinion of the Special Rapporteur it is imperative that '[m]easures designed to limit women's legal entry into countries of destination should be carefully weighed against their disadvantages as they pertain to potential immigrants and women'.¹⁴⁴

The CEDAW may wish to follow this reasoning and request that states parties make an express consequence analysis concerning the impact of such measures on immigration in general, and migrant and refugee women more specifically.

Concluding comments

As a sub-region the Nordics represent an important recipient of asylum seekers and refugees in Europe, and they remain important supporters of the international refugee regime and UNHCR. In addition to significant financial support these countries account for about one-quarter of UNHCR's standby arrangements for seconded staff in emergency operations, half the countries that establish annual resettlement quotas and virtually all of UNHCR's protection-related emergency resettlement capacity world-wide. There are approximately 280,000 refugees and asylum seekers in the Nordic region.

¹⁴¹ UN Doc A/52/38 (§263).

¹⁴² UN Doc A/51/38 (§100). An example of a positive practice in helping resettled refugees adapt to their new societies and thus facilitating integration generally is found in Iceland. In cooperation with the Icelandic Red Cross, the authorities match native Icelandic families with newly resettled refugee families in order to assist the refugees to integrate into their new environment. The main beneficiaries of the scheme have been refugee women. The Swedish media have reported on similar, spontaneous arrangements in small towns that have been very successful in integrating newly arrived refugees. There seems to be no reason why these examples could not be promoted as policy approaches in other countries.

¹⁴³ Report of the UN Special Rapporteur on violence against women, its causes and consequences, UN Doc E/CN.4/2000/68/ (§62).

¹⁴⁴ *Ibid* (§111).

The common perception of the Nordic protection regimes is that they represent model asylum systems. There is much truth in this assertion as the Nordics' overall grant of various categories of protection remains relatively generous. But things may be changing. Despite advances in linking refugee protection with human rights protection, global refugee policy in the developed world is still seriously affected by two linked yet discernible trends. One of them is the growth of racism and xenophobia and the other is the preoccupation with security which was a fact even before the tragic events of 11 September, but which now seems to take priority over most everything else in international relations.

Gorlick has identified both of these concerns. He considers that 'the alarming impact of racism and xenophobia on popular culture in Western societies' is central to any analysis of the 'current state of international refugee affairs'.¹⁴⁵ He cites Chimni who, much prior to 11 September, noted that a consequence of the 'increasing involvement [of the UN Security Council and NATO] in refugee matters is that refugee protection will be "couched in the language of security"'. Another commentator, Ryszard Cholewinski, noted that the importance of defending the cardinal principles of international refugee law such as the principle of *non-refoulement* 'has become more pressing with the risks posed to established refugee principles by national and multilateral efforts to combat the threat of international terrorism'.¹⁴⁶

The repercussions of these developments on refugee advocacy and human rights in general have not been lost on the institutional actors in the field. In his report to the 57th session of the UN General Assembly, Maurice Glèbè-Ahanhanzno, Special Rapporteur of the Commission on Human Rights paints a grim picture: 'Combined with the security measures designed to combat terrorism, the measures against immigration now give the impression that an iron curtain is falling between the North and the South of the planet.'¹⁴⁷ The Special Rapporteur further noted 'the inhospitable climate with which human rights promotion and protection have had to contend since the tragic events of 11 September 2001'.¹⁴⁸

In November 2001 UNHCR issued a policy document entitled 'Addressing Security Concerns without Undermining Refugee Protection'. UNHCR stated that while it 'shares the legitimate concern of states to ensure that there should be no avenue for those supporting or committing terrorists acts to secure access to territory, whether to find a safe haven, avoid prosecution, or to carry out further attacks', it nevertheless has two concerns: 'that *bona fide* asylum seekers may be victimised as a result of public prejudice and unduly restrictive legislative or administrative measures, and that carefully built refugee protection standards may be eroded'. UNHCR concluded that 'dealing with the terrorist threat in the context of asylum does not require amendment of the principles on which refugee protection is based, but should benefit from a

¹⁴⁵ Brian Gorlick, 'Refugee Protection in Troubled Times: Reflections on Institutional and Legal Developments at the Crossroads', in Niklaus Steiner, Mark Gibney and Gil Loescher (eds.), *Problems of Protection: The UNHCR, Refugees and Human Rights* (Routledge, New York and London, 2003).

¹⁴⁶ Ryszard Cholewinski, 'Protecting Human Rights in the Context of Developing EU Law and Policy on Immigration and Asylum and EU Accession', Centre for European Law and Integration, Faculty of Law, University of Leicester, UK, concept paper for the Regional Seminar on the Protection of Human Rights in the Context of Asylum Seeking and Migration, 25–26 April 2002, Tallinn, at p. 17 (on file with the authors).

¹⁴⁷ UN Doc A/57/70/Rev 1 (§22).

¹⁴⁸ *Ibid.* (§8).

review and tightening of procedural security measures where necessary'.¹⁴⁹ Indeed, Article 1F of the 1951 Refugee Convention excludes from protection persons undeserving of refugee protection, *e.g.* serious criminals and terrorists.¹⁵⁰ In this regard there is nothing faulty with international refugee law.

At a time when some states are making calls for drastic measures to amend the international refugee regime in view of this perceived 'new' situation,¹⁵¹ Joanne van Selm provides a useful clarification. She notes that although border crossings by immigrants do constitute a security risk, finding the 'terrorists' among the honest immigrants is:

. . . a needle in a haystack search . . . Twenty of the border crossings into the US in 2000-2001 are known to have been made by terrorists. There are estimated to be 500 million border crossings each year. 20 out of 500 million: the odds of finding these people through the immigration system seem relatively small. And none of them were refugees or asylum seekers.¹⁵²

As opposed to tightening the asylum channel, as some states are doing, there is a strong case to be made for the proposition that facilitating access to the developed world through legal channels and a liberal policy of access to asylum determination in the West will have the added benefit of actually preventing the growth of terrorism since 'many of the Taliban and al Qaeda members who turned to radicalism and terror campaigns learned their trade, and developed their hatreds within the confines of refugee camps in the developing world'.¹⁵³ A point to be made is that increased security for the West must fairly address increased burden-sharing with the developing world in relation to refugees.

Finally, van Selm provides us with an appropriate endnote:

Ultimately, the real question is: do states want to sacrifice the right to seek and enjoy asylum and the principle of *non-refoulement* on the combating terrorism pyre? If they are serious about fighting terrorism and maintaining democratic, just and humanitarian principles, I would suggest that this is a sacrifice they should not make.¹⁵⁴

In the increasingly confused place the world has become after 11 September, it appears necessary to remind governments of their international legal obligations to protect and promote human rights, which includes those of refugees. When this is forgotten, rash and ill-advised measures that undercut our civil liberties, and in the

¹⁴⁹ 'Addressing Security Concerns without Undermining Refugee Protection: UNHCR's Perspective', UNHCR Geneva (November 2001), p. 1, available at: <www.unhcr.org>.

¹⁵⁰ See 'UNHCR Guidelines on the application of the Exclusion Clauses' (4 September 2003), UNHCR Doc HCR/GIP/03/05, at: <www.unhcr.org>.

¹⁵¹ See, for example, Mathew Paris, 'This foolish Convention on refugees must be scrapped', *The Times*, 29 June 2002; See also Alan Travis, 'Shifting a problem back to its sources – Would-be may be sent to protected zones near homeland'; Seumas Milne and Alan Travis 'Safe haven plan to slash asylum seekers', *The Guardian*, 5 February 2003.

¹⁵² Joanne van Selm, 'Refugee Protection in Europe and the US after 9/11', in *Problems of Protection*, *op cit*, pp. 238–239.

¹⁵³ *Ibid.*, p. 261.

¹⁵⁴ *Ibid.*

end do more harm than good may be adopted.¹⁵⁵ Despite the increasingly difficult political climate which is challenging the institution of asylum, an approach that refugee advocates have been using with positive effect is to situate refugee protection within a human rights framework. Although some may argue that there is a creeping distrust of international legal principles being exhibited by some powerful states, it is the combination of strengths demonstrated by international refugee and human rights law that provides grounds for optimism that the rule of law and the institution of asylum will be maintained.

In achieving the overall objective of promoting and maintaining high protection standards, the role played by the UN human rights mechanisms in raising concerns and making recommendations is of great importance. The attention by the treaty bodies and Commission on Human Rights-based mechanisms to human rights issues which affect asylum seekers and refugees not only complements advocacy by UNHCR, NGOs and other actors, but helps establish legal benchmarks and augments political pressure on states to comply with international protection standards. The importance of even-handedness, consistency and follow-up on the observations and recommendations of the UN human rights mechanisms should not be underestimated. Neither should it be taken for granted that states will willingly comply with maintaining high protection standards in an environment where the institution of asylum is being seriously questioned and, as some states would have it, may be subject to radical modification.

This essay has surveyed the current state of play on key issues that affect asylum policies and practices in the Nordic sub-region. A short concluding comment is that there is room for improvement, and it is suggested that the Nordic countries be held accountable for shortcomings in their asylum policies, laws and practices. The Nordic countries have historically prided themselves as being strong supporters of the international system of human rights protection, and they have strong traditions of granting asylum to persons in need. Moreover the 'export value' of the Nordics' policies and practices in the asylum field must be recognised.

The sanctity of the global system of human rights protection, which includes refugee protection as an integral part, may experience further challenges in the present political climate. Thus far refugees and foreigners are becoming the focus of more restrictive laws and practices in many states. To challenge these developments and maintain a law-based system of international protection requires devoted, vigilant and principled attention by the principal institutions and other actors in cooperation with states themselves. The international refugee protection regime, as enshrined by the 1951 Refugee Convention and other international and regional refugee and human rights instruments, has served us well for over 50 years and millions of individuals have benefited from its provisions. It should continue to serve us well in the future.

¹⁵⁵ See, for example, the discussion on the UK *Anti-Terrorism, Crime and Security Act 2001* in Adam Tomkins, 'Legislating against Terror: the Anti-Terrorism, Crime and Security Act 2001', wherein Tomkins' notes that the: 'Act contains measures so coercive and draconian that the UK had to enter a formal derogation from Article 5(1) (i.e. liberty and security of the person; lawful arrest and detention) of the European Convention on Human Rights', p. 2, unpublished manuscript (on file with the authors).