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COMMITTEE AGAINST TORTURE
Twentieth session
(4-22 May 1998)

VIEWS

Communication No. 83/1997

Submitted by:	G.R.B. (Name withheld) [represented by counsel]
Alleged victim:	The author
State party:	Sweden
Date of communication:	2 June 1997
Date of adoption of views:	15 May 1998

[See annex]

* Made public by decision of the Committee against Torture.

Annex

VIEWS OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22, PARAGRAPH 7, OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT - TWENTIETH SESSION

concerning

Communication No. 83/1997

Submitted by:	G.R.B. (name withheld) [represented by counsel]
Alleged victim:	The author
State party:	Sweden
Date of communication:	2 June 1997

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

Meeting on 15 May 1998,

Having concluded its consideration of communication No. 83/1997, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication, her counsel and the State party,

Adopts its Views under article 22, paragraph 7, of the Convention.

1. The author of the communication is GRB, a Peruvian citizen born in 1966, currently residing in Sweden, where she is seeking asylum. She claims that her forced return to Peru would constitute a violation by Sweden of article 3 of the Convention against Torture. The author also claims that a deportation per se would constitute a violation of article 16 of the Convention. Ms. GRB is represented by counsel.

Facts as presented by the author

2.1 The author states that she belongs to a politically active family in Palcamayo in the Department of Junin. Her parents were sympathizers of the legal Communist Party of Peru and party meetings were frequently held in their home. The author also became a supporter of the party. From 1983 to 1985, the author studied to become a nurse in Tarma, another town in the same department, and she was at that time actively involved in the party's activities. From 1985 to 1992, the author, who had been granted a scholarship, studied medicine in the Soviet Union.

2.2 On 9 May 1991, the author left Ukraine to visit her parents, and she arrived in Peru on 11 May 1991. She intended to stay in Peru until August 1991. When arriving in Palcamayo she learnt from her family that her parents' house had been searched by government soldiers in February the same year. The soldiers had confiscated books and magazines, some of which had been sent by the author from Ukraine. The author's parents had been taken to a prison, where the father had been severely beaten and tortured before they were released. Her father told the author that she should return to Ukraine as soon as possible since it was dangerous for her to stay in Peru. She nevertheless decided to stay a couple of days with relatives in Tarma.

2.3 On 16 May 1991, the author took a bus from Tarma to Palcamayo, in order to visit her parents. According to the author, the bus was stopped on the way by two men belonging to the Sendero Luminoso. They forced the author off the bus and she was raped and held as a prisoner for one or two nights before she managed to escape. Her parents reported the matter to the police, but according to the author they did not show any interest in the matter. The author then returned to Ukraine on 19 May 1991.

2.4 A short time after her return to Ukraine, explosives went off at the doorstep of her parents' house, wounding an aunt and a cousin. According to the author, the explosion was a revenge for her escape.

2.5 The author arrived in Sweden on 12 March 1993 and requested asylum two weeks later. On 27 January 1994, the Swedish Immigration Board rejected her application, considering that there were no indications that she was persecuted by the Peruvian authorities, and that the acts by Sendero Luminoso could not be considered as persecution by authorities, but criminal activities. The Aliens Appeal Board rejected the author's appeal on 8 June 1995, adding that the risk of persecution from non-governmental entities like Sendero Luminoso could in exceptional cases constitute a ground for granting refugee status, but that an internal flight alternative existed in the author’s case. A new application, based on the alleged rape and medical evidence showing that the author suffered from a Post Traumatic Stress Disorder, was turned down by the Board on 19 April 1996. On 10 February 1997, a second application, invoking humanitarian reasons, was rejected by the Aliens Appeal Board. A third application, based on a letter to the Board from the Human Rights Watch and further medical evidence to support her claim, was turned down on 23 May 1997.

The complaint

3.1 The author considers that there exists a substantial risk for her to be subjected to torture both by Sendero Luminoso and the State authorities, for which internal flight is no safe solution.

3.2 The author further claims that, in view of her fragile psychiatric condition and the severe Post Traumatic Stress Disorder from which she is suffering as a result of her having been raped by Sendero Luminoso members, the deportation as such would constitute a violation of article 16 of the Convention.

State party's observations

4.1 On 1 August 1997, the Committee, through its Special Rapporteur, transmitted the communication to the State party for comments and requested the State party, under rule 108, paragraph 9, of the rules of procedure, not to expel the author while her communication was under consideration by the Committee.

4.2 By submission of 30 September 1997, the State party informs the Committee that, following its request under rule 108, paragraph 9, the Swedish Immigration Board has decided to stay the expulsion order against the author while her communication is under consideration by the Committee.

4.3 As regards the domestic procedure, the State party explains that the basic provisions concerning the right of aliens to enter and to remain in Sweden are found in the 1989 Aliens Act, as amended on 1 January 1997. For the determination of refugee status there are normally two instances, the Swedish Board of Immigration and the Aliens Appeal Board. In exceptional cases, an application is referred to the Government by either of the two boards. In this context, the State party explains that the Government has no jurisdiction of its own in cases not referred to it by either of the boards. Decisions to refer a given case to the Government are taken by the boards independently. The State party clarifies that the Swedish Constitution prohibits any interference by the Government, the Parliament or any other public authority in the decision-making of an administrative authority in a particular case. According to the State party, the Swedish Board of Immigration and the Aliens Appeal Board enjoy the same independence as a court of law in this respect.

4.4 As of January 1997, the Aliens Act has been amended. According to the amended Act (chapter 3, section 4, in conjunction with section 3), an alien is entitled to a residence permit if he or she experiences a well-founded fear of being subjected to the death penalty or to corporal punishment or to torture or other inhuman or degrading treatment or punishment. Under chapter 2, section 5 (b) of the Act, an alien who is refused entry, can reapply for a residence permit if the application is based on circumstances which have not previously been examined in the case and if either the alien is entitled to asylum in Sweden or if it will otherwise be in conflict with humanitarian requirements to enforce the decision on refusal of entry or expulsion. New circumstances cannot be assessed by the administrative authorities ex officio, but only upon application.

4.5 Chapter 8, section 1 of the Act, which corresponds to article 3 of the Convention against Torture, has been amended and now provides that an alien, who has been refused entry or who shall be expelled, may never be sent to a country where there are *reasonable grounds* (previously firm reasons) to believe that he or she would be in danger of suffering capital or corporal punishment or of being subjected to torture *or other inhuman or degrading treatment or punishment* (text in italics added in the revised text), nor to a country where he is not protected from being sent on to a country where he would be in such danger.

4.6 As to the admissibility of the communication, the State party submits that it is not aware of the same matter having been presented to another international instance of international investigation or settlement. The State party explains that the author can at any time lodge a new application for re-examination of her case to the Aliens Appeal Board, based on new factual circumstances. The State party draws the attention to the fact that a fourth new request for a residence permit is currently pending before the Aliens Appeal Board. However, since the new circumstances invoked do not mainly relate to the risks faced by the author if deported, but to humanitarian reasons to let her remain in Sweden, the Government is not making a formal objection that domestic remedies are not exhausted, but leaves this question to the discretion of the Committee. Finally, the State party contends that the communication is inadmissible as being incompatible with the provisions of the Convention, since the author's claim lacks necessary substantiation.

4.7 As to the merits of the communication, the State party refers to the Committee's jurisprudence in the cases of Mutombo v. Switzerland [1] and Ernesto Gorki Tapia Paez v. Sweden [2], and the criteria established by the Committee, first, that a person must personally be at risk of being subjected to torture, and, second, that such torture must be a necessary and foreseeable consequence of the return of the person to his or her country.

4.8 The State party reiterates that when determining whether article 3 of the Convention applies, the following considerations are relevant: (a) the general situation of human rights in the receiving country, although the existence of a consistent pattern of gross, flagrant or mass violations of human rights is not in itself determinative; (b) the personal risk of the individual concerned of being subjected to torture in the country to which he would be returned; and (c) the risk of the individual of being subject to torture if returned must be a *foreseeable and necessary consequence*. The State party recalls that the mere possibility that a person be subjected to torture in his or her country of origin does not suffice to prohibit his or her return for being incompatible with article 3 of the Convention.

4.9 As to the current general situation of human rights in Peru, the State party reiterates that for members of Sendero Luminoso, MRTA or similar terrorist organizations who are wanted by the Peruvian authorities, the risk of torture or ill-treatment cannot be disregarded. However, it adds, with respect to persons not belonging to any of the categories above, there is in general no reason of concern. According to the State party, although the human rights situation is far from satisfactory, no pattern of gross flagrant or mass violations exists in Peru.

4.10 As regards its assessment of whether or not the author would be personally at risk of being subjected to torture when returned to Peru, the State party relies on the evaluation of the facts and evidence made by the Swedish Board of Immigration and the Aliens Appeal Board, showing that there are no substantial grounds for believing that the author personally would be at risk. On 27 January 1994, the Swedish Board of Immigration rejected the author's application on the basis that there were no indications that she at present was of interest to the Peruvian authorities, inter alia because she had not been politically active since 1985 and had been able to visit the

country twice without encountering difficulties with the authorities. As to persecution by the Sendero Luminoso, the Board of Immigration stressed that such persecution should be considered as criminal activities non-attributable to the national authorities and was therefore not a reason to grant residence permit in Sweden. On 8 June 1995, the Aliens Appeal Board maintained that no sufficient grounds for asylum existed on account of risk for persecution from the Peruvian authorities, adding that as to the threat from Sendero Luminoso, this was considered to be of local character and an internal flight alternative would therefore be possible.

4.11 On 19 April 1996, the Aliens Appeal Board rejected a new application for a residence permit by the author, based on the newly presented circumstances that she had been abducted and raped by members of Sendero Luminoso and medical certificates from a psychologist and psychotherapist regarding the author's present state of health. The Aliens Appeal Board considered that rape in itself did not represent grounds for asylum and pointed out that for asylum to be granted, such an crime must, inter alia, have been perpetrated or sanctioned by the authorities, or the situation must be such that sufficient protection against such an act cannot be provided by the authorities. The Board did not consider that the circumstances in the present case indicated that this was the situation and maintained that there existed an internal flight alternative. As to the humanitarian reasons invoked by the author, the Board did not consider them to be sufficient to grant a residence permit.

4.12 On 10 February 1997, the Board rejected a second new application for residence permit, based on further medical evidence of the author's state of health. The Board considered that in accordance with established practice, a residence permit could only be granted on humanitarian grounds in exceptional cases, such as when the applicant suffers from a life-threatening disease for which treatment is not available in the country of origin or where the person suffers from an exceptionally serious disability. The humanitarian reasons for asylum were not considered to be sufficient in the present case. On 23 May 1997, a third new application was rejected, in which the author invoked the Committee's decision in the case Ernesto Gorki Tapia Paez v. Sweden, a letter from the Human Rights Watch and further new medical evidence. The Board did not consider that the information invoked in the application revealed any new circumstances that would entitle the author to remain in Sweden.

4.13 With reference to the decisions by the Swedish authorities, accounted for above, the State party reiterates the main elements in the author's story which indicate that she does not risk persecution by Peruvian authorities. The author states that at the time when Sendero Luminoso started their terrorist acts in the region, she and her family, being supporters of the legal Communist Party, were accused of having committed acts of terrorism. However, the author has not been politically active since 1985 when she left Peru to study in the Soviet Union. Further, the author has visited Peru in both 1988 and 1991, without experiencing any difficulties with the authorities. In 1993, the author obtained a valid passport without any problems from the Peruvian embassy in Moscow. Adding the author's own statement that her family reported her abduction by the Sendero Luminoso to the police, there is nothing to indicate that the authorities were particularly interested in her or her relatives in Peru. In this connection,

the State party recalls that the author did not apply for asylum until after two weeks in Sweden, indicating that she was not in immediate need of protection.

4.14 As regards the persecution that the author fears from the Sendero Luminoso, the State party stresses that the acts of Sendero Luminoso cannot be attributable to the authorities. Nevertheless, the State party recognizes that, depending on the circumstances in the individual case, grounds might exist to grant a person asylum although the risk of persecution is not related to a Government but to a non-governmental entity. However, the State party's view in the present case is that, even if there is a risk of persecution from Sendero Luminoso, it is of local character and the author could therefore secure her safety by moving within the country.

4.15 The State party concludes that the information provided by the author about her political affiliation and experiences of abuse by the guerilla movement does not demonstrate that the risk of her being tortured is a foreseeable and necessary consequence of her return to Peru. An enforcement of the expulsion order against the author would therefore not constitute a violation of article 3 of the Convention.

4.16 Finally, as regards the question of whether there are any humanitarian grounds to let the author remain in Sweden, the State party shares the assessment of the Aliens Appeal Board, that there were not sufficient reasons to grant residence permit on such grounds at the time of the decisions. It is once again stressed that a fourth new application based on humanitarian grounds is pending before the Board.

4.17 By way of conclusion, the State party notes that the Committee has found violations of article 3 in all the cases against Sweden which it so far has examined on the merits. In this context, the State party points out that its immigration authorities have a considerable experience, involving difficult assessments as regards the credibility of the information submitted. Moreover, they have a considerable knowledge about the human rights situations in different countries. The State party also recalls that the test applied by the European Commission of Human Rights under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is in principle the same as the one applied by the Committee under article 3 of the Convention against Torture. However, the European Commission has declared inadmissible most complaints against Sweden as manifestly ill-founded. The State party expresses its concern about a possible development of different standards under the two human rights instruments of essentially the same right. The State party argues that diverging standards in this respect would create serious problems for States which have declared themselves bound by both instruments. Problems would arise when States attempt to adapt themselves to international case law, if this case law is inconsistent. According to the State party, inconsistent case law may also have serious detrimental effects on the overall credibility of the human rights protection system at international level.

Counsel's comments

5.1 In a letter dated 2 December 1997, counsel informs the Committee that the author's fourth new application to the Aliens Appeal Board has been withdrawn.

5.2 In his comments on the State party's submission, counsel refutes the statement of the State party that except for members of Sendero Luminoso, MRTA or similar terrorist organizations who are wanted by Peruvian authorities, there is no reason to express concern about the use of torture or ill-treatment in Peru. The author draws the attention of the Committee to the case of the Peruvian asylum seeker Napoleon Aponte Inga who was deported from Sweden and immediately arrested by Peruvian authorities at the airport, detained and tortured for a period of three months.

5.3 As to the risk of being subjected to torture by Peruvian authorities, counsel further points out that the reason why the author did not encounter any problems with the authorities during her visit in Peru during 1988 was simply that at that time the guerilla movement was hardly present in the Department of Junin and the situation was therefore fairly calm. Counsel states that it is not correct to say that the author did not have any difficulties with the authorities during her visit in 1991. In fact, and as pointed out earlier, due to her fear of the authorities she did not even dare to stay with her parents, but preferred to live with other relatives in another town.

5.4 Counsel refutes the argument of an existing internal flight alternative, since the author has seen the faces of the members of Sendero Luminoso who abducted and raped her and for that reason is not safe anywhere in the country.

5.5 Counsel further states that the fact that the author did not apply for asylum immediately at the Swedish border does not indicate anything about the author's need of protection. She was simply tired after a long journey, in a very bad mental condition and under severe stress.

5.6 Counsel concludes that there are substantial grounds for believing that the author would be subjected to torture if returned to Peru.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement. The Committee also notes that a fourth new application previously pending before the Aliens Appeal Board has been withdrawn and that all domestic remedies have been exhausted and finds that no further obstacles to the admissibility of the communication exist. Since both the State party and the author's counsel have provided observations on the merits of the communication, the Committee proceeds immediately with the consideration of the merits of the communication.

6.2 The issue before the Committee is whether the forced return of the author to Peru would violate the obligation of Sweden under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Before the Committee is also the issue of whether, pursuant to paragraph 1 of article 16, the forced return per se would constitute cruel, inhuman or degrading treatment or punishment not amounting to torture as defined in article 1.

6.3 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger of being subject to torture upon return to Peru. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; specific grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

6.4 The Committee notes that the facts on which the author's claim are based, are not in dispute. The Committee further notes that the author has never been subjected to torture or ill-treatment by the Peruvian authorities and that she has not been politically active since 1985 when she left Peru to study abroad. According to unchallenged information, the author has been able to visit Peru on two occasions without encountering difficulties with the national authorities.

6.5 The Committee recalls that the State party's obligation to refrain from forcibly returning 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 is directly linked to the definition of torture as found in article 1 of the Convention. For the purposes of the Convention, according to article 1, "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*". The Committee considers that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention.

6.6 The Committee notes with concern the numerous reports of torture in Peru, but recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned. On the basis of the considerations above, the Committee is of the opinion that such risk has not been established.

6.7 The Committee must further decide whether, pursuant to paragraph 1 of article 16, the author's forced return would constitute cruel, inhuman or degrading treatment or punishment not amounting to torture as defined in article 1, in view of the author's poor state of health. The Committee notes the medical evidence presented by the author demonstrating that she suffers severely from Post Traumatic Stress Disorder, most probably as the consequence of the abuse faced by the author in 1991. The Committee considers, however, that the aggravation of the author's state of health possibly caused by her deportation would not amount to the type of cruel, inhuman or degrading treatment envisaged by article 16 of the Convention, attributable to the State party.

7. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the facts as found by the Committee do not reveal a breach of article 3 or article 16 of the Convention.

[Done in English, French, Russian and Spanish, the English text being the original version].

Notes

1.Communication No. 13/1993 (CAT/C/12/D/13/1993), Views adopted on 27 April 1994.

2.Communication No. 39/1996 (CAT/C/18/39/1996), Views adopted on 7 May 1997.
