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Gender & Refugee
STUDIES

Amicus Brief Filed by CGRS in *R-G-M-*

Overview of the Attached Brief

The attached amicus brief was filed by the Center for Gender & Refugee Studies (CGRS) to the United States Court of Appeals for the Ninth Circuit on August 25, 2003 in the matter of *R-G-M-*. All identifying information has been redacted in accordance with the wishes of the applicant. The brief addresses rape as persecution and rape as a weapon of war. It argues that the applicant, a Guatemalan woman who was gang raped by Guatemalan soldiers during the civil war, was persecuted on account of imputed political opinion.

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No. 02-74068

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REDACTED, Petitioner,

vs.

JOHN ASHCROFT, Attorney General, Respondent.

On Appeal from the Board of Immigration Appeals

BRIEF OF AMICUS CURIAE FOR REVERSAL

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INTRODUCTION¹

Petitioner *REDACTED* grew up during Guatemala's civil war in a village targeted by the government for military reprisals due to the residents' suspected sympathy for the rebel guerrilla forces. Ms. *REDACTED* lived in a small community, comprised of two hundred to three hundred people in twenty to twenty-five families. Petitioner's Excerpts of Record ("ER.") at 150, 164. The guerrillas began coming to the town around the early 1980s, seeking to augment their forces by kidnapping young men to fight with them. ER. at 4, 133-34. Over time, the guerrillas had taken at least one man per family in her town. ER. at 165. Ms. *REDACTED*'s own brother was taken by the guerrillas in 1984. ER. at 4, 134, 150.

The Guatemalan military began coming to the town in 1985 or 1986. ER. at 9, 137-38. Ms. *REDACTED* testified that, because so many families had men who had gone with the guerrillas, the soldiers assumed that the town was "on the side of the guerrillas." ER. at 138. She stated that "the Guatemalan military soldiers started coming to my village in retaliation to punish the people in my village for helping the guerillas...." ER. at 10. Ms. *REDACTED* testified that year after year, on a monthly or twice-monthly basis, Guatemalan

¹ Amicus adopts Petitioner's Statement of Facts and Procedural History.

soldiers came to attack her village. ER. at 152. Ms. *REDACTED* testified how the military would “beat men, women, children,” ER. at 133, and how “they raped the women.” If a person reported the attacks to the police, she stated, “[t]he soldiers would return to the person’s house and they would kill them.” ER. at 153. *Id.* Ms. *REDACTED* repeatedly testified that the reason the military mistreated the people of her town was because the military imputed a pro-guerrilla political opinion to its members. *See, e.g.*, ER. at 137, 142, 158. In 1993, Ms. *REDACTED* became a victim of the military reprisals against her town when she was gang-raped by three soldiers. ER. at 10, 140-43.

In the face of this credible and undisputed record evidence, an Immigration Judge denied Ms. *REDACTED* asylum, principally on the basis that the gang rape was a mere “criminal act” not linked to any of the five grounds for asylum. IJ Decision (“IJ Dec.”) at 11. The Board of Immigration Appeals summarily affirmed, without opinion. ER. at 3.

As detailed below, the Immigration Judge’s ruling is contrary to the law of this Circuit, as well as overwhelmingly against the “reasonable, substantial, and probative evidence in the record.” *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003). The evidence in the record and the settled law compel the conclusion that Ms. *REDACTED*’s village was attacked in order to punish the

villagers for their presumed support for the guerrillas; that the group of soldiers who attacked and gang-raped Ms. *REDACTED* was an instrument of the Guatemalan government; and that the harm that was inflicted upon her was inflicted on account of her imputed political opinion and/or her membership in a particular social group.

ARGUMENT

I) Ms. *REDACTED* has established persecution on account of her imputed political opinion and/or or her membership in a particular social group

It is well-established law that rape is a harm grave enough to constitute persecution.² Rape has also been held to be atrocious harm sufficient to merit a grant of asylum even in the absence of a well-founded fear of future persecution.³ Thus, the only issue in determining Ms. *REDACTED*'s

² See, e.g., *Shoaf v. INS*, 228 F.3d 1070 (9th Cir. 2000) (rape by government official); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) (rape by police officers); *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996); *Matter of D-V-*, 21 I & N. Dec. 77 (BIA 1993); *Lazo-Majano v. INS*, 813 F.2d 143 (9th Cir. 1996), *overruled on other grounds*, *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (*en banc*).

³ *Lopez-Galarza v. INS*, 99 F.3d at 962-63 (reversing BIA decision and holding rape of prisoner by government officials to be “atrocious” persecution

eligibility for relief is whether there is a nexus between the harm she suffered and one of the five statutory grounds for asylum.

A) The Immigration Judge’s Nexus Ruling Conflicts with Established Ninth Circuit Case Law

The immigration judge denied Ms. *REDACTED* asylum because she found no nexus between Ms. *REDACTED*’s gang-rape at the hands of government soldiers and any one of the five statutory grounds for asylum. The immigration judge ruled that Ms. *REDACTED*’s gang-rape by soldiers was merely a “criminal act that was committed against her by a soldier.” IJ Dec. at 11.⁴ Yet the fact that the act of rape is a crime under the law does not preclude it

allowing for grant of asylum in the absence of a well-founded fear of future persecution). The court noted:

The effects of rape appear to resemble the effects of torture. A recent article compared the psychological sequelae of rape survivors to the psychological distress endured by survivors of abuse constituting torture under international law, and concluded that ‘the suffering of rape survivors is strikingly similar in intensity and duration to the suffering endured by torture survivors.’

Id. at 963 (citation omitted).

⁴ Note that the Immigration Judge erred in describing the central fact of Ms. Garcia-Martinez’s claim to asylum – that she had been *gang*-raped by three soldiers. The judge repeatedly referred to the rape as involving an attack by a single individual. *See* IJ Dec. at 11 (attack was “a criminal act that was

from being held to be persecution on account of one of the five statutory grounds.⁵

Persecution must be shown to be inflicted on account of the victim's race, religion, nationality, membership in a particular social group, or political opinion. *Sangha v. INS*, 103 F.3d 1482, 1486 (9th Cir 1997); 8 USC § 1101(a)(42)(A). An asylum applicant's credible testimony as to the motive of the persecutor can establish nexus. *Shoafera v. INS*, 228 F.3d 1070 (9th Cir. 2000); *see also* 8 C.F.R. §208.13(a) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration"). Motive may be established by direct or circumstantial evidence. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *Sangha*, 103 F.3d at 1486-87. A persecutor may have mixed motives, as long as one motive is related to an enumerated ground. *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000); *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999) (en banc); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 349 (5th Cir.

committed against her by *a soldier*."); *id.* ("no evidence" to show that her rape "is an act condoned by the government or that *the individual* that attacked her is that a [sic] force that is unable or unwilling to be controlled by the Guatemalan government.") (emphases added).

⁵ *See, e.g.*, cases cited at note 2, above.

2002); *Velasquez-Valencia v. I.N.S.*, 244 F.3d 48, 51 (1st Cir. 2001); *Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996).

Here, Ms. *REDACTED*'s credible and unchallenged testimony, supported by the extensive literature regarding the use of rape as a weapon of war by the Guatemalan military, compels the conclusion that she was persecuted on account of a political opinion imputed to her by the government and/or on account of her membership in a particular social group of women from a village perceived to be sympathetic to the guerrillas. In fifty pages of transcript, Ms. *REDACTED* testified no less than three times that the reason the military targeted her village for reprisals and mistreated its residents – the reason she was raped – was because the military imputed a pro-guerrilla political opinion to the town's residents, and to her family particularly. ER. at 138 (the military “thought that the people from the town were on the side of the guerrillas”); *id.* at 142 (“I think they were attacking us because the guerrillas had taken my brother away, so they thought we were in favor of the guerrillas.”); *id.* at 158 (“I think it was because the guerrillas took my brother away and then the military soldiers saw, thought we were in agreement with the guerrillas.”). Ms. *REDACTED*'s compelling, credible testimony in this case provides reasonable, substantial and probative evidence that she was gang-raped by soldiers in order to punish her,

her family and her village for this imputed political opinion or for her membership in a particular social group. *See Shoafera*. The Immigration Judge's conclusion to the contrary, by contrast, is unsupported by the record in this case.

In addition, the Immigration Judge and BIA ignored established law in this Circuit that when a government acts militarily against an individual or a group within its population, and there is no evidence that the individual or group has engaged in any activity to provide a legitimate basis for that action, the most reasonable presumption is that the government's actions are politically motivated. *Navas*, 217 F.3d at 661 (inferring political motivation from killings and other acts of violence inflicted on members of the same family by government forces) (citing *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985)); *Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995) (where there is "no evidence of a legitimate prosecutorial purpose for a government's harassment of a person ... there arises a presumption that the motive for harassment is political."); *Hernandez-Ortiz*, 777 F.2d at 516.

Here, the evidence is clear that the Guatemalan government repeatedly targeted Ms. *REDACTED*'s village for violent retribution over the course of a decade. The military assumed that the villagers supported the guerrillas. *See, e.g., ER.* at 10, 138. Year after year, on a monthly or twice-monthly basis,

Guatemalan soldiers came to the village “to punish the people in my village for helping the guerillas....” *Id.* at 10. The military would “beat men, women, children,” and “they raped the women.” *Id.* at 133, 152-53. Townspeople who reported the attacks to police were later targeted and killed by soldiers. *Id.* at 153. On such a record, the circumstantial evidence establishing the political motivation of the government's actions is so clear that no other conclusion can be reached. *Navas*, 217 F.3d at 661. No other conclusion finds any support in the record; thus, under the case law of this Circuit, the record compels the conclusion that Ms. *REDACTED* was persecuted on account of imputed political opinion. *See Navas; Shoafera; Singh*. The Immigration Judge’s unsupported ruling that Ms. *REDACTED* had failed to demonstrate a nexus between the persecution she suffered and any of the five statutory grounds for asylum must be reversed.

B) Ms. *REDACTED* Was Targeted for Rape as Part of a Deliberate Campaign of Sexual Violence as a Weapon of War

The ruling by the Immigration Judge implicitly places Ms. *REDACTED*’s gang-rape by soldiers in a particular context. The judge’s ruling describes a situation in which soldiers commit criminal acts against civilians – taking regrettable actions outside of their military mission and for

which they face criminal liability – and in which Ms. *REDACTED* could invoke governmental protection against these past and future threatened violent crimes. That context is not only without support in the record, it is in fact simply unrecognizable in the extensive literature regarding the nature of rape during war,⁶ and particularly its use by the Guatemalan military during war.

⁶ It is well-documented that rape has been used in war throughout history. Susan Brownmiller, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 31-32 (1993). There is growing recognition that rape is not a random act by marauding soldiers, but a calculated strategy of war to destroy the enemy.

Numerous scholars have written about the use of rape as a weapon of war. *See, e.g.*, Rhonda Copelon, “Surfacing Gender: Reconceptualizing Crimes against Women in Time of War,” *in* Alexandra Stiglmayer, ed., *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 205 (1994) [“Mass Rape”] (rape “is a weapon of war where... it is used against women to destabilize the society....”); Brownmiller, *above*, at 49 (In the Second World War, “[r]ape for the Germans ... played a serious and logical role in the achievement of what they saw as their ultimate objective: the total humiliation and destruction of ‘inferior peoples’ and the establishment of their own master race.”); Alexandra Stiglmayer, “The Rapes in Bosnia-Herzegovina,” *in* Mass Rape, *above*, at 85 (referencing Helsinki Watch’s analysis of rape with “a political purpose – to intimidate, humiliate, and degrade her and others affected by her suffering[.]” and to “ensure that women and their families will flee and never return.”); Roberto Rodriguez & Patrisia Gonzales, *RAPE AS AN INSTRUMENT OF WAR IN THE MEXICAN STRUGGLE* (1995) (discussing the use of rape as a calculated strategy intended to not only torture women, but to destroy the will of an entire people and to send a political message).

This view of rape is entirely consistent with the parallel legal evolution that has repudiated the characterization of rape as an act of lust and desire, and has clearly identified it as one of violence and aggression. *See, e.g.*, *Zubeda v. Ashcroft*, 333 F.3d 463, 2003 U.S. App. LEXIS 12699, *24 (3d Cir. 2003).

The military use of rape by the Guatemalan government has been documented in horrifying detail, most notably by the United Nations Historical Clarification Commission for Guatemala.⁷ Established by the Oslo Accord of June 23, 1994, in order to clarify the human rights violations and acts of violence connected with the armed conflict in Guatemala, the Commission was

Rape and sexual assault are generally understood today not as sexual acts born of attraction, but as acts of violent aggression that stem from the perpetrator's power over and desire to harm his victim. *See, e.g., United States v. Powers*, 59 F.3d 1460, 1465-66 (4th Cir.1995) (collecting authorities), cert. denied, 516 U.S. 1077, 116 S.Ct. 784, 133 L.Ed.2d 734 (1996); *United States v. Hammond*, 17 M.J. 218, 220 n. 3 (C.M.A.1984) (one of the "common misconceptions about rape is that it is a sexual act rather than a crime of violence."); United Nations High Commissioner for Refugees ("UNHCR"), *Sexual Violence Against Refugees: Guidelines on Prevention and Response*, at 1 (Geneva 1995) ("Perpetrators of sexual violence are often motivated by a desire for power and domination. Given these motivating forces, *rape is common in situations of armed conflict and internal strife....* Like other forms of torture, it is often meant to hurt, control and humiliate, violating a person's innermost physical and mental integrity.") (emphasis added).

Angoucheva v. INS, 106 F.3d 781, 792 n.2 (7th Cir. 1997) (Rovner, J., concurring). *See also* David Buss and Neil Malmuth, eds., *SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSPECTIVES* 127 (1996) (Rape is a pseudosexual act, a pattern of sexual behavior that is concerned much more with status, hostility, control, and dominance than with sensual pleasure or sexual satisfaction).

⁷ UN Historical Clarification Commission, *GUATEMALA: MEMORIA DEL SILENCIO* (1st ed. June, 1999) ["UN Historical Commission"] (summary of conclusions available in English at:

charged with making the facts of Guatemala's recent past part of the historical record.⁸

At the heart of the Commission's findings is the fact that rape was used by the Guatemalan military as a deliberate and calculated strategic weapon of war:

Sexual violence was a generalized and systematic practice carried out by agents of the State in the framework of the counter-insurgency strategy, which came to constitute a true weapon of terror in grave infringement of human rights and international humanitarian law.... The rapes caused profound suffering and consequences in the direct victims as well as their families, spouses and entire communities.⁹

Far from being an unfortunate but capricious act, "[r]ape of women was a practice included in the military training."¹⁰ The UN Commission documented that the sexual violence was the most common form of violence used against women: "This went as far as gang rape, because it caused the women a lot of pain."¹¹

Testimonies taken from members of the Army bolster the idea that the rapes constituted a habitual and even systematic practice, to the extent that

<<http://shr.aaas.org/guatemala/ceh/report/english/toc.html>>; full text at: <http://shr.aaas.org/guatemala/ceh/gmds_pdf/index.html> (Spanish)).

⁸ *Id.*, Prologue.

⁹ 3 UN Historical Commission, Ch. 13, ¶ 2351.

¹⁰ *Id.* at ¶ 2397.

¹¹ *Id.* at ¶ 2223.

in certain instances it was ordered by the higher commanders before entering a community, with precise instructions as to how to conduct them....¹²

The Guatemalan military did not subject women to widespread rape at random. Women were raped on account of specific political and or ethnic reasons, in order to “subjugate and debilitate” communities that differed in a way that the government deemed offensive.¹³ The UN Commission documented that violence against women was used to punish men that were deemed “enemies” by the government, and that women in families where men were collaborators of the guerrillas were often raped:¹⁴

Women were used to punish men that the security forces had deemed enemies, in this way extending the punishment not only to the activists, but also to their partners. For this reason, women in families where there were men accused of collaborating with the guerillas were victims of sexual violence; without distinction their mothers, wives, girlfriends, daughters, sisters, or even neighbors were raped.¹⁵

“Sexual violence was used during the armed conflict in Guatemala[,]” the Commission found, “as another way to eliminate any political or military

¹² *Id.* at ¶ 2404.

¹³ *Id.* at ¶ 2445.

¹⁴ *Id.* at ¶ 2473.

¹⁵ *Id.*

opposition to the established regime.”¹⁶ The UN Commission was hardly alone in this finding. The International Center for Human Rights Research at the American Association for the Advancement of Science, for example, found that “[r]ape also served a counterinsurgency function: humiliating, emotionally injuring and breaking the resolve of survivors to discourage further collaboration with the rebel movement.”¹⁷

Finally, the UN Commission conclusively verified that perpetrators of these abuses faced no criminal or civil consequences for their gross human rights violations. Far from providing any semblance of state protection or redress to victims, the UN Commission found that there was “absolute impunity” for military perpetrators of rape during the conflict.¹⁸ This is hardly

¹⁶ *Id.* at ¶ 2472.

¹⁷ Patrick Ball, Paul Kobrak, and Herbert F. Spierer, *STATE VIOLENCE IN GUATEMALA, 1960–1996: A QUANTITATIVE REFLECTION*, Chapter 15; available at <<http://shr.aaas.org/guatemala/ciidh/qr/english/>>.

¹⁸ 3 UN Historical Commission, *supra* note 7, Ch. 13, ¶ 2383; *see also id.* at ¶ 2458. This impunity only “increase[d] the women’s sense of insecurity” *Id.* at ¶ 2383.

surprising, since it was the higher commanders who were ordering the violations.¹⁹

CONCLUSION

The Immigration Judge's ruling is without support in the law or the record. To the contrary, the law of this Circuit, as well as the overwhelming weight of the evidence, compels the conclusion that Ms. *REDACTED* was persecuted on account of her imputed political opinion, and/or on account of her membership in a particular social group. This Court should vacate the ruling below to the contrary, and rule that Ms. *REDACTED* has been persecuted on account of her imputed political opinion, and/or on account of her membership in a particular social group.

DATED: August 25, 2003.

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¹⁹ See, e.g., 3 UN Historical Commission, Ch. 13, ¶ 2404.