

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
BOARD OF IMMIGRATION APPEALS**

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In the Matter of: )  
NAME REDACTED )  
In Removal Proceedings )

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File No. AREDACTED

**BRIEF OF AMICI CURIAE  
AMNESTY INTERNATIONAL U.S.A.,  
CENTER FOR GENDER & REFUGEE RIGHTS, AND  
MINNESOTA ADVOCATES FOR HUMAN RIGHTS  
IN SUPPORT OF RESPONDENT'S MOTIONS TO  
RECONSIDER AND TO REOPEN**

## INTRODUCTION

Amici curiae,<sup>1</sup> Amnesty International USA, the Center for Gender and Refugee Studies, and Minnesota Advocates for Human Rights, all promote the recognition and enforcement of international human rights law, including its application to U. S. immigration law. The United States, in accordance with its own traditions and international obligations, has a commitment to protect human rights. In the matter at bar, however, the Department of Justice, through the Board of Immigration Appeals, has condoned the decision of an immigration judge ("IJ") premised upon unsupportable notions—for example, that a claim of rape lacks credibility if the victim is "only" raped and not killed or maimed—which runs afoul of U. S. and international human rights law. While amici cannot independently corroborate the veracity of the Respondent's assertions, we submit this brief because of our deep concern about the manner in which the executive branch of the U.S. government has treated a woman's claims of persecution through rape.

Amici also submit that the IJ disregarded the clear regulatory provision which creates an "exceptional circumstance" exception to the one-year filing rule set forth in section 208(a) of the Immigration and Nationality Act.<sup>2</sup> By virtue of her lawful nonimmigrant status as a student, Respondent clearly met this "exceptional circumstance" exception. Notwithstanding her timely application for asylum, the IJ, without any basis in fact or law, drew a negative credibility inference about her motivations for seeking asylum, based upon the timing of the application. This negative credibility finding is contrary to law.

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<sup>1</sup> See Statements of Interest of Amici Curiae, *infra*.

<sup>2</sup> 8 U.S.C. 1158 §208(a)(2)(B)

In evaluating Respondent's claim that she was raped as a form of persecution, the IJ impugned her testimony with adverse credibility findings that have no basis in fact, are contrary to widely accepted learning about the nature and effect of sexual violence, and are incompatible with international human rights law. The IJ indulged in archaic, disproven, and stereotypical presumptions that the Respondent's claim of rape lacked credibility because: she was only raped, not maimed or killed by her assailants; she did not report the rape and kidnapping to the police authorities (the IJ did not believe her fear of reprisal); rapists would not have assailed her religion or utilized rape as a form of warning to other members of her religion; and Respondent would not, out of shame concerning her loss of virginity and loss of status in the community, have been deterred from reporting the rape to other members of the community.<sup>3</sup>

Amici submit that Respondent's motions to reconsider and to reopen should be granted and her application evaluated in light of U.S. and international law.

## **BACKGROUND**

### **A. Respondent.**

Respondent NAME REDACTED ("Respondent") first arrived in the United States in DATE REDACTED on a student visa. (Transcript of proceedings on June 23, 2003, "Tr." at 54.) Respondent was born in the Republic of REDACTED, Russia, and is a member of the REDACTED ethnic group. (Tr. at 34.) According to Respondent, members of this ethnic group have historically been Muslim; however, she attests that she and her mother are Baptist. (Tr. at 34-35.)

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<sup>3</sup> Amici have limited their focus to these two issues because of their broad human rights implications. There are, however, other important issues addressed by Respondent in her motions to reconsider and reopen.

Respondent testified that after the fall of the Soviet Union the Republic of REDACTED turned into a very "severe Muslim society." (Tr. at 40.) Before the break up of the Soviet Union, she and other Baptists were persecuted by local authorities. After the disintegration of the Soviet Union, it was not only the authorities but members of the local population that persecuted them as well.<sup>4</sup> *Id.* Members of her church, she testified, were objects of hatred. *Id.* She asserts that members of the local population saw Baptists as "traitors of the Muslim religion". *Id.* Members of her community received threats almost every day and were afraid to leave their homes, she says. *Id.*

The war in neighboring Chechnya caused the situation to worsen and "brought us lots of cruelties, lots of crimes we hadn't seen before." (T. at 42.) Many Caucasians were supporting the Chechen separatists, *Id.*, some of whom declared the war a religious war— a "holy war against the infidels." *Id.* Respondent testified that the situation is graver for people whose ethnic groups (like her own) are mainly Muslim, but who like Respondent and her family, are not themselves Muslim. *Id.* "Our family was severely persecuted." *Id.* According to Respondent, Muslims threatened to exterminate every Christian in the city because it was a "shame for their city and for the religion." (Tr. at 45.)

Respondent testified that on September 15, 1998, as she was returning to her home from a library, she was attacked by three men. (Tr. at 46.) When she tried to escape, one of them hit

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<sup>4</sup> As the U.S. State Department has reported, there has been a great deal of violence against Protestants in the North Caucasus area of Russia, motivated by religious as well as political animus. *See, e.g.*, the 2002 International Religious Freedom Report of the U.S. Department of State, attached as Ex. 5 at 8, 21, 22 to Respondent's Brief on Motion to Reconsider. The North Caucasus area (including the Republic of REDACTED) has also seen growing violence, tragically epitomized by the October 2004 siege at a school in Beslan. (*See, e.g.*, "School Siege Intensifies Russia's Terrorism Fight; Officials Aim to Avoid Civil War in the South," by Dave Montgomery, Knight Ridder Newspapers, *Detroit Free Press*, October 13, 2004,) included in Respondent's Compendium in Support of Motion to Reopen at page 59.

her on the head and said, "Shut up, Baptist bitch!" (Tr. at 46-47.) They then raped her, one after the other, and told her that "every Baptist girl" would experience the same retributory punishment. (Tr. at 47.)

After consulting with her mother, Respondent said, she decided not to go to the hospital. She feared that if she went to the hospital, the authorities would make her provide an affidavit. (Tr. at 47-48.) She was "100% sure that the militia wouldn't do anything about it anyway." (Tr. at 49.) Her accusation of rape would also be considered a "big shame" in her region. *Id.* "A girl who loses her virginity, loses her life." *Id.* Respondent testified that no one would marry her, and she would be subject to mocking, and suggestions that she performed the acts voluntarily. *Id.* Respondent's mother obtained help from one of their neighbors, also a nurse. (Tr. at 50.)

Respondent testified that she was again victimized, shortly after the abduction and rape, when her house was ransacked. (Tr. at 50-51.) "They were threatening us. They said either we leave their Republic voluntarily," or Respondent and her family would be harmed. *Id.* Respondent and her mother reported the attack to the militia, but the militia said they were unable to help – they could not guarantee the security of Respondent and her mother as Baptists because "it's in a Muslim area." *Id.* According to Respondent, the police in her city are REDACTED; the majority of them are Muslims. (Tr. at 72.)

Respondent returned to Russia for approximately one month in March 2001 to visit her seriously ill mother. (Tr. at 54.) Respondent returned to the United States on April 9, 2001—her last entry into the country prior to filing her application for asylum/withholding of removal. (Tr. at 55.) The application was filed July 14, 2002, approximately one month after she completed her studies at a community college. (Tr. at 59.)

**B. The Oral Decision of the Immigration Judge and Summary Affirmance by the BIA**

At the conclusion of the evidentiary hearing on June 23, 2002, the IJ issued his oral decision ("Decision"). The IJ concluded that Respondent failed to meet her burden of proof for asylum, withholding of removal or protection under the Convention Against Torture. (Decision at 14.) The IJ further found that "Respondent's testimony with respect to material and relevant matters in this case related to her applications was not credible," and went on to state that the "lack of credibility" was a "critical factor" in the Court's decision. *Id.*

The IJ did not deny Respondent's application for asylum for being untimely filed. Instead, the IJ states: "The Court finds the circumstances of the respondent's application in this case to be curious and raises issues as to the credibility of the respondent's claim of past persecution or a well-founded fear of future persecution..." (Decision at 21.) "The fact that [she] waited until she graduated from school in the United States suggests to the Court that she was motivated to file the application as a basis to stay in the United States rather than as a result of any actual past persecution or well-founded fear of future persecution." (Decision at 22.)

The IJ also found that Respondent's testimony on the subject of the three rapes lacked credibility based upon the IJ's assessment of the seriousness (or lack) of Respondent's injuries: "There is no reason why they would have simply let the respondent live without any apparent serious injuries after such an attack." (Decision at 17.) The IJ also stated that it "was not likely that they would have seized her, taken her to an isolated location and then left her alive to presumably file a complaint against them and possibly identify them to the police." (Decision at 17-18.)

The IJ rejected Respondent's testimony regarding the profound shame and humiliation she felt from being raped. "The Court does not believe the respondent's testimony with respect that after suffering such a horrific act she did not go to the hospital because she was ashamed as

a result of the associated loss of virginity and the fact that she would be diminished in the eyes of her community for having been a victim in a sexual attack." (Decision at 18.) To the contrary, concluded the IJ, since other members of Respondent's religious community had also been raped, it was "not likely that a person who suffered such an attack would not share the information with the other members of her community who had obviously shared similar attacks and experiences with respondent. The respondent in the view of the Court would have not been viewed as a person to be embarrassed or ashamed of loss of virginity under these circumstances and quite likely would have been viewed sympathetically..." *Id.* "Consequently, the respondent's claim that she did not report the incident because of embarrassment and loss of status in the community does not appear to the court to be either plausible or credible." *Id.*

The IJ also found incredible Respondent's testimony that her attackers called her a "Baptist bitch" and warned her that "every Baptist girl" would meet the same fate. The IJ simply stated that it was "not likely that [the assailants] would have made such statements to her." (Decision at 17.) Respondent's testimony that she did not report the kidnapping and rape to the police was also found lacking in credibility. According to the IJ, Respondent presented no credible evidence to show that the police would not have "acted appropriately" in response to her report of a public kidnapping and rape. (Decision at 18-19.) The IJ thus ignored or rejected Respondent's testimony that the police had on another occasion told her that they could not guarantee her safety because she was a Baptist in a Muslim area. (Tr. at 50-51.)

The Board of Immigration Appeals affirmed the decision of the IJ in a summary affirmance without opinion issued on November 4, 2004. This amicus brief is filed in support of Respondent's motion to reconsider filed on or about December 4, 2004 and her motion to reopen filed on or about February 2, 2005.

## ARGUMENT

### A. Legal Standard

A credibility finding must be supported by substantial, legitimate reasons for it. *See Gao v. Ashcroft*, 299 F.3d 266, 276 (3d Cir. 2002) ("[t]he reasons must be substantial and bear a legitimate nexus to the finding"); *Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000) (holding that minor and isolated disparities in testimony need not be fatal to credibility, especially when they do not concern material facts); *Bandari v. INS*, 227 F.3d 1160 (9th Cir. 2000) (subjective views and beliefs of an immigration judge cannot form the basis of an adverse credibility determination).

Amici submit that the negative credibility findings of the IJ must be reversed—the IJ's finding regarding Respondent's motivation for seeking asylum, as well as his rejection of her testimony concerning the rape—are based only upon the IJ's subjective views and opinions. There is no factual or reliable basis for the findings and they must be disregarded.

### B. Under the Guise of Credibility Findings, the IJ Imposes a *De Facto* One-Year Time-Bar On Applications for Asylum, in Derogation of Law and Fundamental Human Rights

Although the IJ paid lip service to the "extraordinary circumstances" exception to the one-year filing deadline of section 208(a) of the Act, the IJ imposed his own *de facto* time-bar by transforming Respondent's timely application into an adverse credibility finding. The IJ found the timing of Respondent's application—that she waited until she graduated from school to file her application—to be "curious," and stated that it "raises issues as to the credibility of the respondent's claim of past persecution or a well-founded fear of future persecution...." (Decision at 21.) According to the IJ, this "suggested" that she was "motivated to file the application as a basis to stay in the United States rather than as a result of any actual past persecution or well-founded fear of future persecution."



The IJ, however, disregarded 8 C.F.R. § 208.4(a)(5)(iv), which specifically authorizes asylum applicants to file within a reasonable period after the expiration of their lawful immigration status, such as Respondent's F-1 student status. The provision states:

The term "extraordinary circumstances" in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1- year deadline. Such circumstances may excuse the failure to file within the 1- year period as long as the alien filed the application within a reasonable period given those circumstances.... Those circumstances may include but are not limited to:

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(iv) The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application;

8 C.F.R. § 208.4(a)(5)(iv).

The IJ penalized Respondent for filing her application within the time-period permitted by the regulation—the penalty inflicted being an adverse credibility finding. (Decision at 21.) Respondent was penalized for doing precisely what the law permits—maintaining lawful status and then promptly filing an asylum claim.<sup>5</sup>

The law was written this way, at the request of the Department of Justice, for an important policy reason: to prevent people from filing too early for asylum, in case conditions in their countries improved and they did not, after all, need asylum. As the U.S. asylum officers' training manual explains, "The Department of Justice included [this exception] on the list of possible extraordinary circumstances to avoid forcing a premature application for asylum in cases in which an individual believes circumstances in his country may improve. For example,

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<sup>5</sup> Respondent's F-1 student status continued for at least 60 days beyond the conclusion of her program in June, 2002 (Tr. at. 59) *i.e.*, until approximately August 2002 or later. 8 C.F.R. § 214.2(f).

an individual admitted as a student... ." See 65 Fed. Reg. 76121, 76123 (December 6, 2000).<sup>6</sup> Likewise, the Immigration and Naturalization Service(INS),<sup>7</sup> in explaining the inclusion of "maintenance of status" in the list of "extraordinary circumstances," voiced this precise concern: "The Department does not wish to force a premature application for asylum in cases in which an individual believes circumstances in his country may improve. The Department would expect a person in that situation to apply for asylum, should conditions not improve, within a very short period of time after the expiration of her status..." See explanatory comments preceding the regulation at 65 Fed. Reg. 76122 ff. If left intact, the IJ's rationale would violate the regulations, and promote premature filing of asylum applications.

Indeed, there is nothing unique about Respondent's reliance on the "exceptional circumstance" provision. If filing within the permitted period constituted undue delay for Respondent, it would constitute delay for all those similarly situated. Anyone who maintained lawful student status and then promptly filed upon its expiration would be subject to the same adverse credibility finding and consequent loss of asylum protection. The IJ should not be allowed to erect such barriers to asylum in the United States, in derogation of the regulation, the guidelines of theINS, and of the international legal obligations of the United States to protect refugees. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S.

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<sup>6</sup>The One Year Filing Deadline, Asylum Office Basic Training Course Manual, Immigration Officer Academy, March 15, 2001, at 15.

<sup>7</sup> Under the enabling act for the Department of Homeland Security ("DHS") the laws and regulations that governed INS before the creation of DHS are now binding upon the DHS bureaus charged with the former INS functions.

<sup>9</sup> In the ad hoc International Criminal Tribunals convened to prosecute genocide and war crimes in Rwanda and the former Yugoslavia, rape has been held or identified as a form of torture. See *Prosecutor v. Furndzija*, Case No. IT-95-17/1-T (Judgment Dec. 10, 1998); *Prosecutor v. Celebici*, Case No. IT-96-21-T (Judgment Nov. 16, 1998); and *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Judgment Sept. 2, 1998).

150 ("1951 Refugee Convention"); and Protocol Relating to the Status of Refugees, art. 1, Jan. 13, 1967, (" 1967 Protocol") 606 U.N.T.S. 267, entered into force by the United States (by accession) on Nov. 1, 1968 (obligating states parties to "apply articles 2 to 34 inclusive of the [1951 Refugee Convention]").

There is another reason for rejecting the IJ's conclusion about Respondent's motivation for seeking asylum. It cannot stand because it is premised only upon the subjective views of the IJ, an impermissible basis for an adverse credibility finding. *See Bandari*, 227 F.3d at 1160 (subjective views and beliefs of an immigration judge cannot form the basis of an adverse credibility determination). A similar situation arose in *Paramasamy v. Ashcroft*, 295 F.3d 1047 (9th Cir. 2002), wherein the applicant testified that she fled persecution by the Sri Lankan soldiers who had sexually assaulted her because she was a Tamil. The applicant testified to the assault only at the hearing and not during previous interviews. In reversing the decision of the BIA, the Court concluded that the immigration judge "speculated" that "general fear of unsettled conditions in Sri Lanka and the anticipation of better job opportunities" as well as the desire to leave the country to get married were more likely the reasons for applicant's flight from the country. *Id.* at 1052. Such personal speculation of an immigration judge as to an applicant's motives, stated the Court, "cannot be substituted for objective and substantial evidence." *Paramasamy*, 295 F.3d at 1050. In the case at bar, the IJ's skepticism about Respondent's motives for seeking asylum should likewise be viewed for what it is—nothing more than the IJ's personal speculation, unsupported by objective, substantial evidence or the law.

**C. Under the Guise of Credibility Findings, the IJ Relied Upon Erroneous, Archaic Presumptions in Evaluating Respondent's Persecution Claim**

Sexual violence infringes upon basic national and international human rights. Congress has stated that gender-based violence "not only wounds physically, it degrades and terrorizes,

instilling fear and inhibiting the lives of all those similarly situated," and recognized this violence "for what it is – a hate crime." S. Rep. No. 103 at 49 (1993) (internal quotation marks and citations omitted.) The international community also condemns gender-based violence. The 1993 Declaration on the Elimination of Violence Against Women, adopted by the General Assembly of the United Nations ("Declaration"), recognizes violence against women "as both a per se violation of human rights and as an impediment to the enjoyment by women of other human rights."

The Department of Justice, through the INS, recognizes that gender-based claims present special considerations. In May, a new approach to gender-related claims was announced by the INS Field Operations Office of International Affairs in the Department of Justice. Memorandum from Phyllis Loven, Office of International Affairs, to all INS Asylum Officers and Headquarter Coordinators (May 26, 1995), ("Gender Guidelines"). *Reprinted at 72 Interpreter Releases* 781 (June 5, 1995) at 1. The Gender Guidelines are put forward as "*required reading* for all interviewing and supervising Asylum Officers". Gender Guidelines at 18 (emphasis in original). Training in the Gender Guidelines is required in order to enhance the ability of Asylum Officers "to make informed, consistent and fair decisions." *Id.* at 19. Supervisors of Asylum Officers are to be held accountable "for assuring that Asylum Officers fully implement this guidance." *Id.*

The Asylum Officers are instructed that claims must be analyzed under the laws of the United States "but gender-related claims can raise issues of particular complexity, and it is important that United States asylum adjudicators understand those complexities and give proper consideration to gender-related claims." *Id.* at 8. The Gender Guidelines note that female applicants "may...have had experiences that are particular to their gender," citing, as an example, rape (including mass rape), as a form of persecution primarily directed at girls and women and

stating that "they may serve as evidence of past persecution on account of one or more of the five grounds." *Id.* at 4. The Gender Guidelines continue on to note that "women who have been raped...may be seriously stigmatized and ostracized in their societies. They may also be subject to additional violence...because they are viewed as having brought shame and dishonor on themselves, their families, and their communities." *Id.* at 5. According to the Gender Guidelines, women who have been subject to sexual abuse may be "psychologically traumatized," and the trauma may have a certain "significant impact on the ability to present testimony." *Id.*

It is well-established that rape is a harm grave enough to constitute persecution. *See, e.g., Matter of D-V-*, Int. Dec. 3252 (BIA 1993) (rape is a form of "grievous harm" constituting persecution); *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 or sexual assault ... may constitute persecution.") Indeed, rape has 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. *Lopez-Galarza v. INS*, 99 F.3d 954, 962-63 (9th Cir. 1996) (reversing BIA decision and holding rape of prisoner by government officials to be "atrocious" persecution allowing for grant of asylum in the absence of a well-founded fear of future persecution).

Rape has also been recognized by the BIA as a tool of persecution on account of religious and political beliefs. *See, e.g., In Matter of D-V-*, Int. Dec. 3252 (BIA 1993) (granting asylum to a woman from Haiti who was raped in reprisal for her religious beliefs and political activities). Further, the assailant's motivation need not be *exclusively* the victim's beliefs or opinions. *See e.g. Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994) ("The plain meaning of the phrase

'persecution on account of the victim's political opinion' does not mean persecution *solely* on account of the victim's political opinion.")

The harm inflicted by rape includes its psychological effects. *See LAL v. INS*, 255 F.3d 998, 1007, n. 6 (9th Cir. 2001) (noting that "as a matter of empirical medical fact, many women who survive sexual assault suffer long-term psychological effects." ) The pain of rape is so acute that rape can be utilized as an instrument of torture, with similar horrific effects on the victim:<sup>9</sup>

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.'

*Lopez-Galarza*, 99 F.3d at 963 (9th Cir. 1996.)

Notwithstanding the instructions of the INS itself, that gender-based claims can raise issues of "particular complexity," that victims may be "seriously stigmatized and ostracized" in their societies, and notwithstanding the extensive body of knowledge regarding the nature of rape and the effects of rape on its victims, the IJ based his credibility determinations and his rejection of Respondent's application on his mistaken and unfounded personal beliefs.

**1. The IJ Diminished Respondent's Testimony That She Was Persecuted by Rape Because She Was (Merely) Raped, Not Killed or Maimed**

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The IJ concluded that "there is no reason why they would simply let the Respondent live without any apparent serious injuries after such an attack..." (Decision at 17). Under the reasoning employed by the IJ, rape, without other forms of abuse, torture, or even killing, would not be a tool of persecution. The IJ expressed his disbelief: "According to Respondent, the individuals who attacked her were Muslims who were against her for religious or ethnic reasons, and in the view of the Court it is not likely that they would have seized her, taken her to an isolated location and then left her alive to presumably file a complaint against them and possibly

identified them to the police." (Decision at 17-18). There is no support, in the record or elsewhere, for the IJ's presumption that rape constituting persecution must be accompanied by death or maiming. There is no basis for the IJ's rejection of Respondent's testimony of the statements of the assailants that "other Baptist girls" would meet similar fates, simply because Respondent was "only" raped.

Moreover, the IJ seems to have misunderstood the psychological purpose of rape. Rape and sexual assault are generally understood today not as sexual acts born of sexual attraction, but as acts of violent aggression that stem from the perpetrator's desire to feel 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"); The Office of the United Nations High Commissioner for Refugees ("UNHCR"), *Sexual Violence Against Refugees: Guidelines on Prevention and Response*, (Geneva 1995) ("Sexual Violence Against Refugees") ("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). (Section 1.1, *Sexual Violence Against Refugees*.)

**2. Without Any Basis in Fact, The IJ Was Dismissive Of Respondent's Claim That Rape Was a Tool of Persecution**

This "desire for power and domination" and motivation to "hurt, control and humiliate," (*Id.*) is precisely why sexual violence is so prevalently used as a tool of persecution and war. Contrary to the IJ's rejection of the possibility that Respondent's assailants would use rape as a

tool of persecution, it is well-documented that rape has been used for political purposes, domination, torture and "ethnic cleansing" throughout history. 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..."); Susan Brownmiller, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 31-32 (1993) (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 (referring to 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 not only to torture women, but to destroy the will of an entire people and to send a political message).

The motive of the rapists can include persecution on account of political opinions or religious beliefs, as this Board has held. *See, e.g., In Matter of D-V-*, Int. Dec. 3252 (BIA 1993). (granting asylum to woman who was persecuted on account of religious and political beliefs). UNHCR has stated that sexual violence in the country of origin may have a political motive, for example where mass rape of populations is used to dominate, control and/or uproot, or where sexual torture is used as a method of interrogation. Sometimes sexual violence is used as a



weapon of warfare, to humiliate or cause the disintegration of a community, as a part of 'ethnic cleansing.'" Sexual Violence Against Women, section 1.6.

**3. In Dismissing Respondent's Testimony Because She Did Not "Report" the Rape, The IJ Engaged in Improper Speculation Contrary To Accurate Understanding of Rape Victims' Behavior**

The IJ engaged in baseless speculation in rejecting as incredible Respondent's testimony that shame, humiliation, and fear kept her from reporting the rapes to the police:

The Court does not believe the Respondent's testimony with respect that after suffering such a horrific attack she did not go to the hospital because she was ashamed as a result of the associated loss of virginity and the fact that she would be diminished in the eyes of her community for having been a victim in a sexual attack.

(Decision at 18). To the contrary, stated the IJ, the "Respondent would not have been viewed as a person to be embarrassed or ashamed of loss of virginity under these circumstances." *Id.* As a result of the IJ's assumption that being raped and losing her virginity would not result in feelings of embarrassment or shame to Respondent, the IJ rejected her explanation of why she did not report the rape to the community or to the police. "Consequently," the IJ concluded, "Respondent's claim that she did not report the incident because of embarrassment and loss of status in the community does not appear to the Court to be either plausible or credible." *Id.*

Yet gross and widespread under-reporting of sexual assault is well-documented. ~~Even~~ In the United States where the stigma of rape may be less than in traditional societies such as those of the Caucasus, "[r]ape ... is severely underreported to law enforcement authorities because of its stigmatizing nature." H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 380 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1854. A study by Bonnie S. Fisher et al., Nat'l Inst. of Justice, U.S. Dept. of Justice, *The Sexual Victimization of College Women*, found that fewer than 3% of completed or attempted sexual contacts not amounting to rape, and fewer than 5% of completed

rapes, of U.S. college women are reported to the police. *See also, e.g.*, David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. Crim. L. & Criminology 1194, 1221 (1997) (discussing underreporting of sexual abuse in the U.S., noting that "[s]ome rape victims are too upset, or too embarrassed at the prospect of answering a stranger's intimate questions about the incident, or so ashamed that they do not want anyone, even their friends, to know about it".) Internationally, according to the UNHCR, "many, and perhaps most, incidents of sexual violence remain unreported for reasons including shame, social stigma and fear of reprisal or the case going to trial." (UNHCR, Foreword, *Sexual Violence Against Refugees*.)

Among the reasons for underreporting is the victim's fear of further trauma from the justice system: "victims of rape are often further victimized by a criminal justice system that is insensitive to the trauma caused by the crime...." H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 380 (1994), reprinted in 1994 U.S.C.C.A.N. 1839, 1854. Congress' concern that rape victims are often "further victimized" by the legal system is all too well justified by Respondent's case before the Immigration Court.

Courts have taken heed of the well-known reluctance to report rape. For example, the Ninth Circuit has refrained from drawing an adverse inference from late reporting of rape. As the Court stated: "the assumption that the timing of a victim's disclosure of sexual assault is a bellwether of truth is belied by the reality that there is often delayed reporting of sexual abuse." *Paramasamy*, 295 F.3d at 1047.

#### **4. The Erroneous Presumptions of the IJ Are an Improper Basis for Credibility Determinations**

The IJ's personal beliefs regarding the nature of rape and the effects of rape on its victims permeate the Decision and resulted in the IJ's denial of Respondent's application for asylum. These personal views are an improper foundation for the IJ's findings of fact, which must be

supported by "substantial evidence." *See Saleh v. United States Dep't of Justice*, 962 F.2d 234, 238 (2d Cir. 1992). "Substantial evidence" is more than a "scintilla of evidence." *Perez v. Chater*, 77 F.3d 41, 45 (2d Cir. 1996). Speculation and ill-informed personal views are no substitute for evidence and rational evaluation.

In a similar matter, the IJ's personal beliefs were found insufficient to support an adverse credibility determination. In *Kaur v. Ashcroft*, No. 02-71986, 2003 WL 22474596 (9th Cir. Oct. 30, 2003), applicant testified that the police slapped her, "gave [her] beatings with their hands," and raped her at gunpoint. *Id.* at \*1. In granting applicant's petitions for review of the BIA decision, the Ninth Circuit noted that it had "repeatedly held that it is error to rest a decision denying asylum on speculation and conjecture," (citing *Shah v INS*, 220 F.3d 1062, 1069 (9th Cir. 2000) and *Maini v. INS*, 212 F.3d 1167, 1175 (9th Cir. 2000) (rejecting the IJ and BIA's conclusion that the record did not show persecution because it was based on "conjecture and speculation" regarding how the alleged persecutors would have acted)). *Kaur* at \*2.

In *Kaur*, the Ninth Circuit noted that many of the reasons for finding the applicant incredible were neither legitimate nor substantial, including the IJ's statement that the applicant did not adequately explain "how she was beaten and tortured, as well as being raped." *Id.* at \*1. "Similarly," stated the Court, "the IJ's skepticism that [applicant] would have gone to her in-laws' home, rather than her clinic, after the rapes, that she would have access to medicine, and that she would be hesitant to file a complaint against the police, is based on speculation. *Id.* at \*2, n. 2.

Here too, the skepticism of the IJ is based upon nothing more than his personal speculation and should not serve as a basis for denying asylum to Respondent.

**D. The Decision is Inconsistent With the Obligations of the United States Under International Law**

The IJ's rejection of Respondent's application for asylum, withholding of removal and claims under the Convention against Torture was predicated upon his own personal beliefs rather than "substantial evidence," depriving Respondent of a fair and rational evaluation of her claim of persecution based on sexual violence. This arbitrary and capricious approach falls far short of protecting Respondent's rights under international human rights law as well as national law.

**1. International Law is Part of the National Law**

International customary law and treaties are part of our national law. Under the Constitution, international treaties are the supreme law of the land. U.S. Const. art. VI, cl. 2 ("all Treaties, made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"). And the United States Supreme Court has consistently affirmed the principle that customary international law is part of the "laws" of the United States within the meaning of Article III. *See The Paquete Habana*, 175 U.S. 677, 700-701 (1900): "[i]nternational law [which includes customary law] is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction...."

Even in the absence of a treaty or controlling legislative act, executive act or judicial decision, "resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat." *Id. See also Filartiga v. Pena-Irala*, 630 F. 2d 876, 885 ("the law of nations ... has always been a part of federal common law") and *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995). *See also, Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-24 (1964); *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *United States v. Arjona*, 120 U.S. 479, 484-85 (1887); *Kadic v.*

*Karadzic*, 70 F.3d 232 (2nd Cir. 1995), *cert. denied*, *Karadzic v. Kadic*, 518 U.S. 1005 (1996); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987).<sup>10</sup>

## **2. International Human Rights Standards Must Be Met**

With respect to human rights standards, in particular, courts in the United States have increasingly looked to "international human rights standards as law in the United States or as a guide to United States law." *Restatement (Third) Of Foreign Relations Law Of The United States* § 701, Reporter's Note at ¶7 (1987). The U.S. government acknowledges the international roots of U.S. asylum law, including the 1951 Refugee Convention and 1967 Protocol. The 1951 Refugee Convention in Article 33(1) and the 1967 Protocol prohibit State parties from deporting an individual whose life or freedom would be threatened on ground of race, religion, nationality, political opinion, or membership in a particular social group. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2d Cir. 1980). The 1951 Refugee Convention and the 1967 Protocol are executed by the Immigration and Nationality Act.

International treaties and declarations also guide our legal understanding of gender-based violence. As asylum offices are told: "The evaluation of gender-based claims must be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations." Gender Guidelines at 2. Among these international human rights instruments are the 1979 Convention on the Elimination

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<sup>10</sup> The reasoning underlying the principle stated by the Supreme Court in *The Charming Betsy*, 6 U.S. (2 Cranch) U.S. 64, 118 (1804) that "an act of Congress ought never be construed to violate the law of nations, if any other possible construction remains," also supports constitutional interpretations that are consistent with international law and allow Congress to meet international obligations. *See also, Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986) ("To the extent possible, courts must construe American law so as to avoid violating principles of public international law").

of All Forms of Discrimination Against Women ("CEDAW") and the 1993 Declaration on the Elimination of Violence Against Women,<sup>11</sup> ("Declaration on Violence"), which recognizes violence against women "as both a per se violation of human rights and as an impediment to the enjoyment by women of other human rights." Gender Guidelines at 2.

Freedom from sexual violence is recognized as a fundamental human right. For example, Art. 2(1) of the International Covenant on Civil and Political Rights ("ICCPR") obligates the State to both "respect and to ensure to all individuals within its territory ... the rights recognized in the [ICCPR] without distinction of any kind, such as ... sex ...." ICCPR at art. 2. The Declaration on Violence interprets the ICCPR to require states to guarantee the right to be free from gender-based violence. Declaration on Violence at Preamble.

### **3. The Arbitrary and Capricious Standards of the IJ Do Not Ensure Compliance with International Obligations**

The U.N. Convention Against Torture and the 1951 Refugee Convention and the 1967 Protocol restrict the United States from deporting non-citizens based on the grave harms they might face in the country to which they are returned. To ensure compliance with international protections afforded persons who flee persecution, evaluation of asylum claims must be based upon impartial, sound procedures, and, of particular import here, adherence to those procedures. The adjudicatory process of the IJ in this case fell far short of assuring protection of Respondent's basic human rights. First, contrary to U.S. law, the IJ imposed a *de facto* time limitation on Respondent's right to file her application for asylum. In doing so, the IJ transformed the timing issue into one of credibility, with disastrous consequences to Respondent.

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<sup>11</sup> The Declaration on Violence was unanimously approved by the U.N. General Assembly. U.N. GAOR Res. 104, 48th Sess., U.N. Doc. A/Res/48/104 (1994).

Second, the IJ failed to adjudicate properly by relying, not on substantial evidence, but on his own personal beliefs and assumptions regarding the nature of rape and its effects on victims. By adjudicating Respondent's claim in such an arbitrary and capricious manner, the IJ eviscerated the protections from persecution afforded by international and U.S. law. The process employed by the IJ fell far short of meeting even minimally acceptable standards for resolving Respondent's claim of persecution. In the absence of adherence to a process which provides objective and sound analysis of asylum claims predicated on sexual violence, the U.S. cannot comply with its obligations under international law.

### **CONCLUSION**

Based on the foregoing, amici respectfully request that Respondent's Motions to Reopen and to Reconsider be granted.

### **STATEMENT OF INTEREST OF AMICI CURIAE**

Amnesty International USA is the U.S. Section of Amnesty International, a Nobel Prize-winning, human rights activist movement with more than 1.8 million members, supporters and subscribers in over 150 countries and territories throughout the world. Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights. Amnesty International is privately funded and is independent of any political ideology or economic interest - and has recently launched an international campaign to diminish violence against women.

The Center for Gender & Refugee Studies (CGRS), based at the University of California, Hastings College of the Law, has a direct and serious interest in the development of immigration law and in the issues under consideration. Founded in 1999, CGRS provides legal expertise and

resources to attorneys representing women asylum-seekers fleeing gender-related harm. As recognized experts on asylum issues regarding persecution specific to women and with an interest in the development of U.S. jurisprudence consistent with relevant domestic and international refugee and human rights law, the questions under consideration implicate matters of great consequence to amicus, involving important principles of jurisprudence and statutory construction, with broad ramifications for the uniform administration of the laws.

Minnesota Advocates for Human Rights ("Minnesota Advocates") conducts a broad range of innovative programs to promote human rights, including investigating fact finding, direct legal representation, education and training, and publication. Minnesota Advocates has produced more than 50 reports documenting human rights practices in more than 20 countries and has provided legal representation to more than 1,000 asylum seekers. Minnesota Advocates is the recipient of the 1991 American Immigration Lawyers Association Human Rights Award and of the 2003 Berger Award from the National Immigration Project of the National Lawyers Guild. Minnesota Advocates has a strong interest in the areas of asylum and women's human rights. For over 20 years Minnesota Advocates has provided pro bono representation of asylum seekers. Since 1993, Minnesota Advocates has partnered with organizations in Central and Eastern Europe, the Commonwealth of Independent States, Nepal, Mexico and Haiti, to document such violations of women's rights as domestic violence, rape, employment discrimination, sexual harassment in the workplace and trafficking in women and girls for commercial sexual exploitation.



Respectfully submitted,

DATED: \_\_\_\_\_

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