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Gender & Refugee
STUDIES

Brief Filed by CGRS in X-L-

Overview of the Attached Brief

The attached brief was filed by the Center for Gender & Refugee Studies (CGRS or Center) to the United States Court of Appeals for the Ninth Circuit on January 21, 2003 in the matter of X-L-. Identifying information has been redacted in accordance with the wishes of the applicant. The brief argues that forced vaginal penetration during an involuntary pregnancy examination rises to the level of persecution.

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No.

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

Xu *, Xin *,

Petitioners,

A#*

v.

JOHN ASHCROFT,

Respondent

Petition for Review of an Order of
the Board of Immigration Appeals

**PETITIONERS BRIEF FOR REHEARING WITH A SUGGESTION FOR
REHEARING EN BANC**

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INTRODUCTION

This case involves two significant issues of first impression and exceptional importance. Fed. R. App. P. 35. As the panel recognized, its opinion is the first to address the meaning of the phrase other resistance to a coercive population control program in 8 U.S.C. § 1101(a)(42)(B). *Li v. Ashcroft*, No. 00-70157, slip op. at 10 (9th Cir. Dec. 5 2002) (Slip op.). The panel majority failed to recognize, however, that this case presents a second, related question of exceptional importance: whether forced penetration of the vagina during an involuntary pregnancy examination, in a custodial setting, rises to the level of persecution.

When she was in her late teens, Ms. * (Ms. Xu) met and fell in love with Mr. * (Mr. Xin). She began to spend a substantial amount of time with him in the village where they lived. A.R. 131. People in the village believed - incorrectly - that Ms. Xu and Mr. Xin were not only living together but were having sex. *Id.* On the basis of those rumors, they told local officials that Ms. Xu was pregnant. A.R. 131, 134. Shortly thereafter, a man from the village came to Ms. Xu s home, accused her of being pregnant, and told her to end her relationship with Mr. Xin. A.R. 131, 134, 146. Ms. Xu defiantly responded: I m going to have many babies . . . you have nothing to do with this. A.R. 136. In response, the villager threatened: you be careful . . . [y]ou will pay for this. A.R. 136.

Two days later, two government nurses took Ms. Xu from her home to the birth control department, where two men pinned her down on a bench while a doctor conducted a physically-invasive examination of her vagina. A.R. 147-48, 205-06. Ms. Xu was surrounded by at least four people during the half-hour examination. A.R. 147, 204. The purported purpose of the examination was to determine if Ms. Xu was pregnant. Ms. Xu, however, was never asked for a urine or blood sample, and as Judge Paez points out:

the only other means of diagnosing pregnancy before 17 weeks are to identify the presence of changes or signs and symptoms in the uterus, the cervix, and the vaginal mucosa. *See WILLIAMS OBSTETRICS...* The cervix is the opening to the uterus and it sits at the end of the vaginal canal inside the woman's body. Therefore, without a urine or blood sample, one method of physically diagnosing pregnancy and detecting the changes in the uterus and cervix is with one hand of the examiner on the abdomen and two fingers of the other hand placed in the vagina, the still-firm cervix is felt, with the elastic body of the uterus above the compressible soft isthmus, which is between the two.

Slip Op. at 20 n.2 (Paez, J., dissenting) (citations omitted). Thus, the examination to which Ms. Xu was subjected apparently involved penetration of her vaginal canal, up to her cervix.

Ms. Xu vehemently objected to the examination. She pleaded: I am still unmarried. I m still a girl. A.R. 205. She kicked and yelled in fear and cried for help. A.R. 147-48, 205-06. In response, a family planning official pressed on her

leg and threatened to subject her to ongoing invasive pregnancy examinations, immediate abortion, and forced sterilization. A.R. 147-48, 205-06. The official told her to stop yelling and warned: If you keep on doing this, we will take you back any minute we want to give you [another] examination. A.R. 147. And if you are found pregnant, then you are subject to abortion, and your boyfriend will also be...sterilized. A.R. 205-06, 212.

Ms. Xu found the examination unbearable. A.R. 211. After she had calmed down, she was released. A.R. 206. She returned home and lived in constant fear that they were coming to get me. A.R. 208. About two months later, she and Mr. Xin learned that a warrant for their arrest had been issued (presumably because word of their impending unapproved marriage had spread). A.R. 219-20. That very day, the couple fled from their village. *Id.* Thereafter, security bureau officials visited Ms. Xu's home every three to five days. A.R. 221. They also visited Mr. Xin's home many times. A.R. 155-56, 390. These visits have continued until the present time. A.R. 156.

In upholding the Board of Immigration Appeals' conclusion that Ms. Xu had not suffered persecution, the panel majority compared the treatment she suffered - forced manual penetration of her vagina up to her cervix - to the mistreatment (a single punch and a kick) suffered by the male respondent in *Prasad v. INS*, 47 F.3d

336 (9th Cir. 1995). In doing so, the panel majority overlooked and misapprehended significant points of law and fact. Fed. R. App. P. 40. As Judge Paez noted in his dissent, the appropriate comparison is not between a so-called pregnancy exam and a punch or kick, but between a forcible, invasive gynecological exam and other similar non-consensual sexual conduct:

In stark contrast to the majority's description of her experience, Li uses a more forceful characterization to describe her ordeal. She calls it rape-like. This is understandable in light of Li's refusal to consent, the way family planning officials held her down, and the doctor's physically invasive examination of her private parts ... Because rape is commonly defined as nonconsensual sexual conduct involving penetration committed by physical force, the analogy does provide some insight into her subjective experience...[T]his comparison graphically conveys the nature of her ordeal and the harm she suffered when she was forced to endure a physical pregnancy examination. Indeed, her experience shares several aspects of the experience of a rape victim, including the intrusion into her body, the forced physical submission, and the feelings of fear and humiliation. Even so, it is not necessary to rely on our asylum rape cases, *see e.g. Shoafra v. INS*, 228 F.3d 1070 (9th Cir. 2000), to conclude that Li suffered persecution when she was forced to endure a pregnancy examination by local family planning officials.

Slip Op. at 20-21 (Paez, J., dissenting) (footnote omitted).

REASON FOR GRANTING REHEARING

1. In Comparing the Forcible Penetration of Ms. Xu's Vagina to the Mistreatment in *Prasad*, the Panel Misapprehended the Law and

Overlooked Material Facts Demonstrating that Ms. Xu was Subjected to a Sexual Assault.

This Court should grant rehearing in this case because the panel majority erred in concluding that the forced penetration of Ms. Xu's vagina during a purported pregnancy examination, in a custodial setting, does not constitute persecution.

Persecution is defined as "the infliction of suffering or harm upon those who differ...in a way regarded as offensive." *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996) (quoting *Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995)).

Without question, rape and sexual assault constitute persecution. *Lopez-Galarza*, 99 F.3d at 963; *Shoaf v. INS*, 228 F.3d 1070 (9th Cir. 2000); *Matter of D- V-*, 21 I & N. Dec. 77 (BIA 1993). This is true even if the persecutor believes the harm he is inflicting is "good for" his victim, because the persecutor's benign motivation does not make it any less painful to his victim. *Pitcherskaia v. INS*, 118 F.3d 641, 648 (9th Cir. 1997). Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as "curing" or "treating" the victims. *Id.*

If the assault against Ms. Xu had been committed in the United States, the perpetrators would have been subject to prosecution for aggravated sexual

assault, which is defined as the forcible penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. The maximum punishment for such an offense is life in prison. 18 U.S.C. §§ 2241, 2246.

In concluding that the assault perpetrated against Ms. Xu did not rise to the level of persecution, the panel majority relied on *Prasad v. INS*, 47 F.3d 336 (9th Cir. 1995). The panel majority compared Ms. Xu's treatment to that inflicted upon Prasad—a Fijian of ethnic Indian descent who was detained by police for four to six hours, hit on his stomach and kicked from behind. Slip Op. at 12 (quoting *Prasad* at 339). The panel majority found that Ms. Xu's pregnancy examination . . . is hardly comparable to Prasad being hit and kicked[,] and added that Prasad was detained for between four and six hours while Xu was detained for only half-an-hour. Slip. Op at 12.

In light of the nature of the harm suffered by Ms. Xu - forced manual penetration of her entire vaginal canal - the panel majority's reliance on *Prasad* is misplaced. Without diminishing the severity of the maltreatment suffered by Prasad, the physical and psychological harm suffered by Ms. Xu is different in kind.

This Court need not rule that Ms. Xu has been raped in order to recognize

that the forcible penetration she suffered is reminiscent of the definition of rape set out by the International Criminal Tribunal for Former Yugoslavia, in that it involved (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator...; (ii) by coercion or force or threat of force against the victim or a third person. ¹

This definition follows a clear international trend towards the recognition that rape consists of bodily penetration by coercion or force. The *Furundzija* court noted that most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus. *Id.* at ¶181. In its guidelines for judges considering gender asylum cases, the Immigration Appellate Authority of the United Kingdom explains that rape has been defined by the International Criminal Tribunal for Rwanda (ICTR) as physical invasion of a sexual nature committed on a person under circumstances which are coercive... ²

The ICTR has held:

¹*Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (Int'l Crim. Trib. for Former Yugoslavia Trial Chamber II Dec. 10, 1998), ¶185, available at <<http://www.un.org/icty/furundzija/triale2/judgement/index.htm>> .

² Asylum Gender Guidelines, Immigration Appellate Authority, (November 2000) (United Kingdom), ¶ 2A.18.n.32, available at <<http://www.iaa.gov.uk/GenInfo/IAA-Gender.htm>>.

[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when 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.³

This progressive developing definition of rape recognizes the multiple purposes and damaging impact of such physically invasive acts upon an individual.

Moreover, while the refugee definition is gender neutral on its face, the past two decades have seen growing recognition that women's claims have often gone unrecognized or been denied because cases are decided within a male paradigm.

This fact led to the United Nations High Commissioner for Refugees (UNHCR) in 1985 to encourage parties to the Refugee Convention to give particular consideration to asylum claims from women fleeing gender-based violence.⁴

Canada, the United States, Australia, Norway, the Netherlands, Sweden, the United Kingdom, and other countries have responded with policy guidelines for gender

³ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Int'l Crim. Trib. for Rwanda Trial Chamber I Sept. 2, 1998), ¶597-98, available at <<http://www.ict.r.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>>.

⁴ *Conclusion on Refugee Women and International Protection*, UNHCR Executive Committee, 36th Sess., No. 39 ¶k (1985). Selected gender-related UNHCR documentation is available on the CGRS web site, at <<http://www.uchastings.edu/cgrs/law/unhcr.html>>

asylum cases.⁵ Most recently, UNCHR issued its own specific guidelines on gender persecution in May 2002.⁶

UNHCR and national guidelines recognize that women often suffer harms unique to their gender and that these harms sometimes are not properly recognized as persecution. UNHCR has advised that,

[w]hile female and male applicants may be subjected to the same sorts of harm, they may also face forms of persecution specific to their sex. International human rights law and international criminal law clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterisation as serious abuses, amounting to persecution.

UNCHR Guidelines, ¶19 (footnote omitted). The asylum gender guidelines published by the U.S. Department of Justice and the Immigration and Naturalization

⁵ Immigration and Refugee Board of Canada, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (March 1993); Immigration & Naturalization Service, Office of International Affairs, [Considerations for Asylum Officers Adjudicating Asylum Claims From Women](#) (1995); Australian Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996), available at <http://www.uchastings.edu/cgrs/law/guidelines/guidelines_aust.pdf>; The Netherlands Immigration and Naturalization Service (IND), *Work Instruction no. 148: Women in the asylum procedure* (UNHCR translation), reprinted in Thomas Spijkerboer, *Gender and Refugee Status Annex 7* (Ashgate 2000); Sweden Migration Board, Legal Practice Division, *Gender-based persecution: Guidelines for investigation and evaluation of the needs of women for protection* (28 March 2001); Immigration Appeal Authority (U.K.), *Asylum Gender Guidelines* (November 2000), available at <<http://www.iaa.gov.uk/GenInfo/Gender.pdf>>; National Consortium on Refugee Affairs, *Gender Guidelines for Asylum Adjudication* (South Africa), available <<http://www.web.net/~ccr/safr.PDF>>.

⁶ UNCHR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (HCR/GIP/02/01, 7 May 2002).

Service point out that female asylum seekers, while presenting similar situations to those of male asylum seekers, may also have had experiences that are particular to their gender. These guidelines direct immigration officers to recognize that female applicants may face unique gender persecution, which includes rape and sexual abuse... *Lopez-Galarza v. INS*, 99 F.3d 954, 963 (9th Cir. 1996) (quoting INS Guidelines at 9).

Although UNHCR declares that it is now an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status, the panel decision overlooked developing trends of gender asylum. It also misapprehended evolving norms having to do with the violation of a woman's physical integrity pertaining to non-consensual penetration.

The panel opinion misapprehended the developing international consensus towards recognition of the right to physical integrity, and condemnation of a range of violations which include digital penetration, unwanted touching of sexual areas, sexual harassment and threats. The degradation, humiliation, and invasion of privacy that accompany a forced vaginal/cervical exam is a recognized human rights violation and implicates numerous core international human rights instruments.

Directly relevant is the Convention on the Elimination of All Forms of

Discrimination Against Women (CEDAW).⁷ CEDAW's Committee on the Elimination of Discrimination against Women has condemned the practice of virginity examinations - a practice similar to pregnancy examinations - noting:

with the gravest concern the practice of forced gynaecological examinations of women in the investigation of allegations of sexual assault, including of women prisoners while in custody. The Committee emphasized that such coercive practices were degrading, discriminatory and unsafe and constituted a violation by state authorities of the bodily integrity, person and dignity of women.⁸

The Committee has also denounced under CEDAW the practice of forced vaginal examinations of suspected prostitutes by the Indonesian government.⁹ Such examinations, which are highly analogous to the treatment suffered by Ms. Xu, are a violation of bodily integrity upon the person and dignity of women.

Furthermore, in making recommendations on quality health care services for women, CEDAW has stated that,

[a]cceptable services are those which are delivered in a way that ensures that

⁷ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 194, U.N. Doc. A/34/830 (1979), reprinted in 19 I.L.M. 33 (1980)

⁸ Concluding Observations of the Committee on the Elimination of Discrimination against Women: Turkey, 23/01/97, A/52/38/Rev.1, ¶178, available at <<http://www.acpd.ca/compilation/1womenc6.htm#turkey>>.

⁹ Concluding Observations of the Committee on the Elimination of Discrimination against Women: Indonesia, 14/05/98, A/53/38, ¶298, available at <<http://www.acpd.ca/compilation/1womenc4.htm#indonesia>>.

a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. States parties should not permit forms of coercion, such as non-consensual sterilization, mandatory testing for sexually transmitted diseases or mandatory pregnancy testing as a condition of employment that violate women's rights to informed consent and dignity.¹⁰

Lin Guang Hi, a former deputy mayor with responsibility over Ms. Xu's home town, testified that cohabitation by an unmarried couple was considered a serious violation of the family planning laws, and that local authorities had discretion to determine the appropriate punishment, including forced pregnancy examinations. A.R. 183-84. Other evidence in the record indicates that women who do not cooperate with family planning authorities face being subjected to forcible pregnancy examinations as a result. *See, e.g.*, A.R. 894 (if a woman fails to appear, our supervision team will apprehend her and force her to have such examinations.). And the U.S. State Department confirms that local officials in Fujian, where Ms. Xu lived, are under intense pressure to meet family planning targets, and that poor supervision has resulted in abuses. A.R. 274-75.

The Universal Declaration of Human Rights (UDHR)¹¹ states that [n]o one

¹⁰ CEDAW, General Recommendation 24, UN GAOR, 1999, Doc. No. A/54/38/ Rev.1, ¶22.

¹¹ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. UDHR art. 5. A forced vaginal/cervical exam is cruel and degrading, and this is all the more true when the examination is performed in a custodial setting designed to intimidate and punish. Article 12 prohibits arbitrary interference with privacy and attacks on an individual's honor and reputation. A forced vaginal/cervical exam is a substantial intrusion upon a woman's privacy and when it is carried out in the context of questioning women's honor and reputation, it clearly violates Article 12. It is apparent from Ms. Xu's testimony that she felt the exam to be more than physically invasive: when asked by the Immigration Judge if she refused to be examined, she replied: "I'm still unmarried. I'm still a girl." A.R. 205.

Article 7 of the International Covenant on Civil and Political Rights (ICCPR)¹² states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his [or her] free consent to medical or scientific experimentation. General Comment 20, which further develops the meaning of Article 7, specifically states that the aim of Article 7 is "to protect both the dignity and the physical and mental

¹² International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

integrity of the individual.¹³ Article 7 relates not only to acts that cause physical pain, but also to acts that cause mental suffering to the victim. Forced vaginal/cervical exams compromise the dignity of a woman and violate her physical and mental integrity. Further, Article 17(1) states that, No one shall be subjected to arbitrary or unlawful interference with his [or her] privacy, family, home or correspondence, nor to unlawful attacks on his [or her] honor and reputation.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) requires states to prevent cruel, inhuman, or degrading treatment or punishment that does not amount to torture when committed by, at the instigation of, or with the acquiescence of a public official or other person acting in an official capacity.¹⁴ A forcible vaginal/cervical exam constitutes cruel and degrading treatment, regardless of whether it may strictly be construed as torture, and is thus strictly prohibited by the CAT.¹⁵

¹³ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRIGEN\1\Rev.1 at 30 (1994), available at <<http://www1.umn.edu/humanrts/gencomm/hrcom20.htm>>.

¹⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987, art. 16.

¹⁵ The CAT obligates State parties to take preventative steps, such as in the training of public officials and law enforcement personnel involved in any form of arrest and detention of individuals; States are obligated to ensure prompt and impartial investigation of violations, and to ensure protection to complainants. CAT arts. 10-12.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the panel decision be vacated, and that this Court grant rehearing and modify its decision to recognize the fact that a forced pregnancy examination of the nature involved in this case constitutes persecution.

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Respectfully submitted,

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