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OFFICE OF THE ATTORNEY GENERAL

Matter of A-B-,
Respondent

File No.: REDACTED

In Removal Proceedings

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The American Bar Association (“ABA” or “Association”) is one of the largest voluntary professional membership organizations and the leading organization of legal professionals in the United States. Its more than 400,000 members come from all fifty States, the District of Columbia, and the United States territories, and include attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments. Members also include judges, legislators, law professors, law students, and non-lawyer associates in related fields.¹

The ABA’s Commission on Immigration (“Commission”) leads the Association’s efforts to ensure fair treatment and full due process rights for immigrants, asylum-seekers, and refugees within the United States. Acting in coordination with other Association entities, as well as governmental and non-governmental bodies, the Commission advocates for statutory and regulatory modifications in law and governmental practice consistent with ABA policy; provides continuing education and timely information about trends, court decisions, and pertinent developments for members of the legal community, judges, affected individuals, and the public; and develops and assists the operation of pro bono programs that encourage volunteer lawyers to provide high quality, effective legal representation for individuals in immigration proceedings, with a special emphasis on the needs of the most vulnerable immigrant, asylum-seeking and refugee

¹ Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

populations.

Over the past seventy years, the ABA has devoted significant resources to the study, analysis, and practice of immigration law. In 2010, the Commission embarked on a comprehensive review of the current system for determining whether a noncitizen should be allowed to stay in the country or removed from the United States. The resulting report, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010) (*Reforming the Immigration System*),² identified more than two dozen proposals for reforming and improving the immigration enforcement and adjudication systems. Further, the ABA has established policy that urges that gender-based persecution be recognized as a ground for asylum and withholding from removal, and supports federal legislative and administrative action to ensure that “persecution” includes domestic violence, sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery and forced abortion.³

The ABA respectfully submits this brief to urge the Attorney General to keep intact the current Board of Immigration Appeals (“BIA”) precedents establishing that (1) victims of “private criminal activity” which their governments are unable or unwilling to control are subject to “persecution” under the Immigration and Nationality Act, and (2) victims subjected to such persecution or fear of persecution on account of a particular social group are eligible for asylum or withholding from

² Available at https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf.

³ Available at https://www.americanbar.org/content/dam/aba/directories/policy/2001_my_110.authcheckdam.pdf.

removal.

THE CERTIFIED QUESTION

On March 7, 2018, the Attorney General directed the BIA to refer its underlying decision in this case to him for review. *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018). As part of that review, the Attorney General specifically requested the parties and interested amici to submit briefing on the following question:

Whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable “particular social group” for purposes of an application of asylum or withholding of removal.

After a request for clarification of the question from the Department of Homeland Security, on March 30, 2018, the Attorney General reiterated his request for briefing on the foregoing question, but added the following:

If being a victim of private criminal activity qualifies a petitioner as a member of a cognizable “particular social group,” under the statute, the briefs should identify such situations. If such situations do not exist, the briefs should explain why not.

Matter of A-B-, 27 I&N Dec. 247 (A.G. 2018).

SUMMARY OF ARGUMENT

The Immigration and Nationality Act (“INA”) sets forth a specific statutory framework under which an individual can seek asylum and withholding from removal. Although the burdens of proof differ, under both scenarios, the individual must establish (1) persecution or fear of persecution (2) on account of membership in one of five statutorily-defined groups, including a “particular social group.” 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A), 1231(b)(3)(A). Circuit Court and BIA

decisions uniformly hold that a particular social group cannot be defined solely by the persecution the members suffer. Indeed, the underlying BIA decision in this matter did not recognize the particular social group based on the persecution suffered by its members. Instead, the BIA recognized the social group as “El Salvadoran women who are unable to leave their domestic relationships where they have children in common.” As such, whether an individual has been persecuted must be analyzed and decided separately from whether or not the individual is a member of a “particular social group.”

Circuit Court and BIA decisions establish that private criminal activity can rise to the level of “persecution” within the meaning of the INA when governments are unable or unwilling to protect the victims of the persecutors. Further, Circuit Court and BIA decisions have repeatedly found private criminal activity on account of membership in a particular social group to be sufficient to establish asylum and withholding of removal. Such cases include fact patterns involving very serious crimes, such as female genital mutilation, severe domestic violence (including repeated beatings and rape), and incest. Setting aside the inability of the Attorney General to overrule Circuit Court precedent,⁴ a reversal of long-standing BIA precedent involving persecution by private actors would further victimize those most in need of protection.

⁴ See *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (“Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”)

ARGUMENT

I. THE STATUTORY AND REGULATORY FRAMEWORK REQUIRE PROOF OF BOTH PERSECUTION AND MEMBERSHIP IN A PARTICULAR SOCIAL GROUP.

To establish eligibility for asylum, an individual must show that she is a “refugee,” as defined in the INA. *See* 8 U.S.C. § 1158(b)(1)(A). The INA, in turn, defines “refugee” in pertinent part, as follows:

[A]ny person who is outside any country of such person’s nationality, . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

8 U.S.C. § 1101(a)(42)(A). Thus, in order to establish herself as a “refugee,” an individual must prove three elements:

- (1) She is outside the country of her nationality;⁵
- (2) She is unable or unwilling to return to, and is unable or unwilling to avail herself of the protection of, that country because of persecution or a well-founded fear of persecution; and
- (3) The persecution is on account of race, religion, nationality, membership in a particular social group, or political opinion.

Accordingly, on the face of the statute, the “persecution” element is a separate element from the “particular social group” element.

Likewise, in order to establish a claim for withholding of removal under the INA, an individual must establish that her “life or freedom would be threatened in

⁵ If the person has no nationality, she must establish she is outside any country in which she last habitually resided. *See id.*

that country because of the individual's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). In order to satisfy this burden of proof, the individual must show either that (1) she had suffered past persecution based on a protected ground, or (2) it is more likely than not she would be persecuted based on a protected ground. *See* 8 C.F.R. § 208.16(b)(1),(2). Thus, just as in the asylum context, in withholding of removal proceedings, the elements of persecution and membership in a particular social group are separate elements of proof.

Therefore, the plain meaning of the statutory and regulatory framework of the INA indisputably establishes that an individual is required to prove persecution, membership in a particular social group, and that the persecution was on account of said membership. Case law precedent supports this statutory interpretation. *See Sisiliano-Lopez v. AG of the United States*, No. 16-3695, 2017 U.S. App. LEXIS 19862, at *15 (3rd Cir. Oct. 11, 2017) ("Establishing the existence of a nexus between persecution and one of the listed grounds of protection is a separate requirement from proving that a proposed group meets the requirements for being a particular social group."); *Escobar v. Holder*, 647 F.3d 537, 546 (7th Cir. 2011) ("we accept the proposition that a 'social group' cannot be defined solely by the fact that its members suffer persecution.")

Thus, in analyzing whether or not an individual is eligible for asylum or withholding of removal, the first question Courts and the BIA must answer is whether the harm at issue constitutes persecution. On that issue, the Circuit

Courts and the BIA agree that private criminal activity can rise to the level of persecution.

II. CIRCUIT COURT AND BIA DECISIONS AGREE THAT PRIVATE CRIMINAL ACTIVITY CAN ESTABLISH PERSECUTION FOR BOTH ASYLUM AND WITHHOLDING OF REMOVAL.

“The statutes governing asylum and withholding of removal protect not only against persecution by government forces, but also against persecution by non-governmental groups that the government cannot control “ *Ruiz v. United States AG*, 440 F.3d 1247, 1257 (11th Cir. 2006). Put another way, “[d]irect governmental action is not required for a claim of persecution. Private acts can constitute persecution if the government ‘is unable or unwilling to control it.’” *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014)(quoting *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2006)). Indeed, as recently recognized by the Ninth Circuit, persecution by private criminal actors is embedded in the foundation of the INA:

The concept of persecution by non-state actors is ‘inherent’ in the definitions of persecution in the 1951 [Refugee] Convention and the Refugee Act of 1980 Even under U.S. statutory definitions of persecution pre-dating the Refugee Act of 1980, a First Circuit opinion and a published, precedential BIA opinion suggested that persecution by non-state actors was cognizable as a predicate for relief.

Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1060-61 (9th Cir. 2017) (citations omitted).

Circuit Court cases are replete with examples of private criminal activity rising to the level of “persecution” under the INA. *See, e.g., Cruz v. Sessions*, 853 F.3d 122, 127-131 (4th Cir. 2017)(affirming threats from organized crime members

established persecution); *Alonzo-Rivera v. United States AG*, 649 F. App'x 983, 985-992 (11th Cir. 2016)(holding repeated rapes and beatings by a spouse could constitute persecution if the government was unable or unwilling to protect the victim); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014)(holding that private criminal activity – attempted murder by drug traffickers – is considered persecution when the government is unable or unwilling to protect the targets of the private violence); *Sarhan v. Holder*, 658 F.3d 649, 651-61 (7th Cir. 2011)(finding fear of “honor killing” by individual’s brother due to claim of adultery was sufficient to establish fear of future persecution in withholding of removal proceedings); *Gomez-Zuluaga v. AG of the United States*, 527 F.3d 330, 335-49 (3rd Cir. 2008)(finding escape from 8-day abduction wherein individual was chained to a bed and threatened by members of a leftist guerilla group established a well-founded fear of future persecution for purposes of asylum and withholding of removal); *Hassan v. Gonzales*, 484 F.3d 513, 517 (8th Cir. 2007)(holding female genital mutilation by tribal members constituted persecution); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1056-58 (9th Cir. 2006)(holding rape and beatings by family members and other private actors constitute persecution if the government was unable or unwilling to protect the victim); *Fiadjoe v. AG*, 411 F.3d 135, 138-42, 160-63 (3rd Cir. 2005)(sexual abuse of daughter by father constituted persecution if evidence established that the government was unwilling or able to control the sexual abuse).⁶

⁶ Notably, the cases cited by the Immigration Judge (“IJ”) in the underlying proceeding in his August 18, 2017 Order of Certification to the BIA do not refute or undermine the well-established precedent that private criminal activity can constitute “persecution.” See *Velasquez v. Sessions*, 866 F.3d 188, 193-96 (4th Cir. 2017)(assuming death threat and kidnapping of child amounted to persecution, but

The foregoing case law is consistent with BIA precedential decisions recognizing that private criminal activity can establish persecution for both asylum and withholding of removal. *See Matter of [Redacted]*, 2015 BIA LEXIS 36 (BIA 2015) (finding repeated beatings by former domestic partner was harm that “rises to the level of persecution”); *Matter of A-R-C-G, et al.*, 26 I&N Dec. 388 (BIA 2014) (finding regular physical beatings and rape by spouse “constituted past harm rising to the level of persecution”); (*Matter of S-A-K- & H-A-K-*, 24 I&N 464 (BIA 2008) (holding female genital mutilation by family members constituted “an atrocious form of persecution”); *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (finding severe and frequent beatings by father “established that she suffered past persecution in Morocco at the hands of her father”); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (finding tribal practice of female genital mutilation in Togo to be persecution and can be basis for claim to asylum).

determining that persecution was not “on account” of a particular social group but, instead, was a personal dispute over child custody); *Cardona v. Sessions*, 848 F.3d 519, 520-524 (1st Cir. 2017)(not addressing whether alien was “persecuted,” but instead finding that she did not fit within her own proposed particular social group of “women who are viewed as property by virtue of their positions within a domestic relationship,” and “Guatemalan women in domestic relationships who are unable to leave” because she had not been in a “domestic relationship.”); *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 850-53 (8th Cir. 2017)(not addressing whether alien had been persecuted, but rather, finding that she did not fit within her proposed social group of “Honduran women in domestic relationships who are unable to leave their relationships” because she had, in fact, left her relationship for five years, had freely traveled around Honduras, and had another relationship and child with another man without ever hearing from or seeing her abuser.); *Marikasi v. Lynch*, 840 F.3d 281, 284-292 (6th Cir. 2016)(finding substantial evidence supporting adverse credibility determination and, thus, no past persecution due to domestic violence, and finding alien was not a member of her proposed social group because she was able to leave her domestic relationship); *Vega-Ayala v. Lynch*, 833 F.3d 34, 36-40 (1st Cir. 2016)(finding that alien had failed to submit evidence that the Salvadoran government was unable or unwilling to control abuser’s conduct and no evidence that “Salvadoran women in intimate relationships with partners who view them as property” was “meaningfully distinguished from others within Salvadoran society.”).

Further support for defining “persecution” to include private criminal activity is found in the United Nations High Commissioner for Refugees’ (“UNHCR”) Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (“UNHCR Handbook”).⁷ Paragraph 65 of the UNHCR Handbook provides:

Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. . . **Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.**

(Emphasis added).

Additionally, in 1995, the United States issued guidelines for adjudicating asylum claims for women that further confirmed case and BIA precedent that “the persecutor can be either the government or a non-government entity that the government is unable or unwilling to control.” Memorandum from Phyllis Coven, U.S. Dep’t of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995), published in 72 No. 22 Interpreter Releases 771 (June 1995) (“Coven Memorandum”). The Coven Memorandum also noted that

⁷ The United States is a signatory to the Protocol Relating to the Status of Refugees, January 31, 1967 (“1967 Protocol”). Referred to as a “useful interpretive aid,” the Supreme Court and Circuit Courts recognize the UNHCR Handbook as persuasive authority in interpreting the scope of refugee status under domestic asylum law. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999); *see also Negusie v. Holder*, 555 U.S. 511, 536-37 (2009) (consulting UNHCR’s Handbook “to which the Court has looked for guidance in the past”); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 439 (1987) (UNHCR Handbook “provides significant guidance” and used to interpret “well founded fear” test); *Ndom v. Ashcroft*, 384 F.3d 743, 753 n. 4 (9th Cir. 2004) (relying on UNHCR Handbook as “persuasive authority” for interpretive guidance).

“rape . . . , sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five [statutory] grounds [set forth in the INA].”

In sum, well-established precedent supports defining “persecution” to include private criminal activity when the government is unable or unwilling to protect the victims thereof.

III. CIRCUIT COURT AND BIA DECISIONS HAVE REPEATEDLY FOUND PRIVATE ACTOR PERSECUTION OF AN INDIVIDUAL ON ACCOUNT OF MEMBERSHIP IN A PARTICULAR SOCIAL GROUP CAN WARRANT ASYLUM AND WITHHOLDING OF REMOVAL.

In determining asylum and withholding of removal matters, Circuit Court and BIA decisions must analyze whether the persecution suffered by the individual was on account of membership in a particular social group. The test for defining a cognizable particular social group is a three-part test requiring that the group must be:

- (1) composed of members who share a common immutable characteristic;
- (2) defined with particularity; and
- (3) socially distinct within the society in question.

Sisiliano-Lopez, 2017 U.S. App. LEXIS 19862, at * 13 (quoting *Matter of M-E-V-G-*, 26 I&N 227, 237 (BIA 2014)). Importantly, “[t]he immutable or fundamental characteristic might be membership in an extended family, sexual orientation, a former association with a controversial group, or membership in a group whose

ideas or practices run counter to the cultural or social convention of the country.” *Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013). Notably, “[m]embers of a social group need not be swimming against the stream of an embedded cultural norm.” *Id.* at 670. Rather, a “characteristic is immutable because a shared past experience or status has imparted some knowledge or labeling that cannot be undone.” *Id.*

A. Circuit Court Decisions.

Circuit Court decisions have repeatedly found that persecution of an individual by private actors on account of membership in a particular social group can warrant asylum and withholding of removal. *See, e.g., Sarhan*, 658 F.3d at 651-61 (finding substantial evidence supported withholding of removal based upon individual’s fear of honor killing by her brother on account of her membership in a particular social group, namely, “women in Jordan who have (allegedly) flouted repressive moral norms and thus who face a high risk of honor killing.”); *Hassan*, 484 F.3d at 518 (in an asylum proceeding, holding that individual, subjected to female genital mutilation, was “persecuted on account of her membership in a particular social group, Somali females,” and that the government, on remand, faced a “significant challenge” that she no longer had a well-founded fear of future persecution); *Cruz*, 853 F.3d at 124-31 (holding murder of husband and threats to individual were persecution on account of her membership in a particular social group, namely the “nuclear family members of Johnny Martinez,” and reversing BIA denial of asylum and withholding from removal); *Bringas-Rodriguez*, 850 F.3d at 1055-57, 1073-76 (finding child rape and physical abuse by family members and

neighbors constituted persecution on account of membership in a particular social group – gay men in Mexico – and remanding for the BIA to determine if the presumption of future persecution was rebutted for purposes of asylum and withholding of removal claims).

On this issue, the following cases involving the private-actor crimes of human trafficking, female genital mutilation, rape and incest are instructive.

1. Human Trafficking.

In *Cece v. Holder*, the Seventh Circuit held that a woman threatened with forced prostitution by a private actor on account of membership in a particular social group could be eligible for asylum. 733 F.3d at 666-77. In that case, petitioner was a young, single Albanian woman living alone who was targeted by a well-known local criminal gang leader for the purpose of forcing her into prostitution. *Id.* at 666-67. During the hearing before the immigration judge, petitioner presented expert testimony that human trafficking was pervasive in Albania, that single women would be “an ideal target for a trafficker, particularly if she had been such a target in the past,” and that the “Albanian judicial system does not adequately enforce laws against traffickers.” *Id.* The immigration judge granted petitioner asylum, which decision the BIA then vacated. *Id.* at 667-68.

On appeal, the Seventh Circuit addressed whether petitioner’s particular social group, namely, young Albanian women living alone and that are vulnerable to traffickers, was cognizable under the INA. *Id.* at 671. Initially, the court noted that, while petitioner could get married and, therefore, arguably obtain protection

from the traffickers, being single “is the type of fundamental characteristic change that we do not ask of asylum applicants.” *Id.* Further, the court rejected the BIA’s conclusion that the proffered social group was not cognizable because it was defined “in large part” by the harm inflicted: “[J]ust because all members of a group suffer persecution, does not mean that this characteristic is the only one that links them.” *Id.* at 671-72. Instead, the court held that the women in the group are “united by the common and immutable characteristic of being (1) young, (2) Albanian, (3) women, (4) living alone,” and, therefore, represent a “protectable social group under asylum law.” *Id.* at 672-73. Accordingly, the court held that petitioner “established that she belongs to a cognizable social group,” and remanded the case. *Id.* at 677.

2. Female genital mutilation.

In *Unreroro v. Gonzales*, the female petitioner was a native of Nigeria who was scheduled for genital cutting. 443 F.3d 1197, 1199-1200 (10th Cir. 2006). When her father warned her that if she were not a virgin she would be killed, petitioner confided in her mother that she was not a virgin, and her mother helped her escape from the village. *Id.* Thereafter, a “seemingly sympathetic police sergeant” took her in and physically and sexually abused her before returning petitioner to her village. *Id.* at 1200. Upon her return, and as punishment for her escape, she suffered the following atrocities: (1) she was beaten and locked in a dark room for two days; (2) she was tied to a tree, cut, black powder was inserted in her wounds, and she was forced to drink blood; and (3) she was left tied to the tree for three days without food or water. *Id.* at 1201. After the three days, the chief priest for the tribe told

petitioner that she would be subject to additional “cleansing” during the full moon, which would require the killing of a seven-day old baby, the bathing of petitioner in the baby’s blood, and the expulsion of petitioner to the “evil forest” for twenty-one days. *Id.* Before the full moon, however, petitioner learned that her father arranged for her to marry the chief priest after the “cleanse,” and that, in preparation for the marriage, she would be subjected to genital mutilation. *Id.*

In its decision, the Tenth Circuit affirmed its prior precedent that “FGM [female genital mutilation] qualifies as persecution based upon membership in a particular social group: ‘a female member of a tribe that subjects its females to FGM establishes . . . persecution on account of being a member of a social group defined by her gender and tribal membership.’” *Id.* at 1202 (internal citation omitted). Therefore, the court held that the BIA decision to deny petitioner asylum “was not supported by substantial evidence.” *Id.* at 1211.

3. Rape.

Ali v. Ashcroft addressed the issue of rape by private actors on account of membership in a particular social group. 394 F.3d 780 (9th Cir. 2005). In that case, Ali, the petitioner, had lived in Mogadishu, Somalia with her husband. 394 F.3d at 782. She and her husband were members of the Muuse Diriiye clan, the members of which are bound in servitude to noble Somali families “and are considered low-caste and subhuman by other Somali clans.” *Id.* In January 1991, six armed members of a militia group broke into Ali’s home and three of the members brutally gang-raped her while her husband and brother-in-law were bound and forced to watch. *Id.* at

783. During the rape, gang members told Ali that “she was ‘getting what [she] deserved’ because she and her family were Muuse Dirriye” *Id.* When Ali’s brother-in-law spit on the militia for raping her, he was shot dead. *Id.* The gang members then kidnapped Ali’s husband and held him for two weeks, during which time he suffered broken ribs and wrists. *Id.* Ultimately, Ali’s husband divorced her “as a result of the rapes and the fact that afterwards he no longer saw her as a wife.” *Id.*

The Ninth Circuit held, as it had many times before, that “rape rises to the level of persecution.” *Id.* at 787. Further, even though the militia members were “non-state actors,” the court, nevertheless held that Ali was subject to past persecution and, further, that it was “on account of,” at least in part, her membership in the Muuse Dirriye clan.⁸ *Id.* at 785-87. Further, the court found that the DHS had not rebutted the presumption of a well-founded fear of persecution because the relevant country report indicates that the persecution in the country was continuing. *Id.* at 789. Thus, the court held that Ali was entitled to asylum. *Id.* at 791.

4. Incest.

In *Fiadjoe v. AG*, petitioner was a member of the Ewe tribe in Ghana. 411 F.3d at 136. Her father was a Trokosi priest. *Id.* at 139. When petitioner was seven years old, pursuant to Trokosi practices, he sought to make his daughter his slave and sexually abused her for three months. *Id.* Her father’s sister objected to the

⁸ The court found that the persecution was also, at least in part, on account of Ali’s political opinion because he husband worked for the government. *Id.* at 785-87.

practices and took petitioner away to live with her family. *Id.* However, when her aunt died eleven years later, her uncle forced petitioner out of the house. *Id.* Having nowhere else to go, petitioner returned to her father's home. *Id.* Once there, she again became her father's slave and was subjected to beatings and rape. *Id.* Although her grandmother reported the beatings to police (she felt a report of the rapes would bring disgrace on the family), the police refused to intervene. *Id.* at 139-40. When petitioner became pregnant by a man she hoped to marry, her father beat her until she miscarried. *Id.* at 140. Ultimately, after her father shot and killed her fiancé, petitioner was able to flee to the United States. *Id.* at 140-41. As a result of Pre-Screening Interview, the Asylum Officer found that petitioner was a member of a particular social group defined as "unmarried women over 25 in Ghana." *Id.* at 137.

The Third Circuit held that, in light of (1) the failure of the police to intervene upon report of petitioner's grandmother, and (2) a State Department report finding that the Ghana government "has not prosecuted any practitioners of Trokosi," the BIA's finding that petitioner "failed to establish that the government of Ghana was either unwilling or unable to control her father's sexual abuse" was not supported by substantial evidence. *Id.* at 163. Further, the court found that the BIA's and IJ's adverse credibility determinations, which were based, in large part, on abusive questioning by the IJ in contravention of the Coven Memorandum, was also not supported by substantial evidence. *Id.* at 154-55, 163. In apparent recognition of the fact that petitioner's abuse could give rise to valid asylum and

withholding from removal applications, the court remanded the case for a new hearing, before a different IJ, for further evidence of the continuing Trokosi practices and the government attempts to protect the victims thereof. *Id.* at 163.

B. BIA Decisions.

Likewise, BIA decisions have consistently held that persecution by private actors on account of an individual's membership in a particular social group can warrant asylum and withholding of removal. For example, in *Matter of A-R-C-G*, it was undisputed that the regular physical beatings and rape by respondent's spouse constituted past harm rising to the level of persecution. 26 I&N Dec. at 389. It was also undisputed that the case involved mistreatment that was, for at least one central reason, on account of her membership in a cognizable social group of "married women in Guatemala who are unable to leave their relationship." Because there was insufficient analysis to determine whether the Guatemalan government was unwilling or unable to control the "private" actor, the BIA remanded the matter to the IJ to address that sole aspect of respondent's statutory eligibility for asylum. On remand, respondent was able to prove the government's failure to protect, and was granted asylum.

In a factually similar matter, asylum was granted to a respondent who suffered persecution on account of her membership in a particular social group of "women in El Salvador who are unable to leave their domestic relationship." *Matter of [Redacted]*, 2015 BIA LEXIS 36. Finding repeated beatings by a former domestic partner was harm that "rises to the level of persecution," the BIA found the respondent to be eligible for, and deserving of, asylum based on the finding of past

persecution on account of her membership in a particular social group, the un rebutted presumption of well-founded future persecution and demonstration that the Salvadoran government is unable or unwilling to protect her.

In *Matter of Kasinga*, 21 I&N Dec. at 365-66, the BIA found that the respondent was a member of a particular social group of young women of a certain tribe who had not been subjected to female genital mutilation and opposed the practice. The record contained objective evidence regarding the prevalence of mutilation in the society and the expectation that women in the tribe would undergo the procedure. Based on those facts, the BIA found that the practice of female genital mutilation can be the basis for a claim of persecution. The BIA also found that people in the Tchamba-Kunsuntu Tribe would generally consider women who had not undergone the procedure and opposed to the practice would be a discrete and distinct group that was set apart in a significant way from the rest of society. The BIA concluded such women would clearly understand their affiliation with this grouping, as defined by common characteristics that members of the group either cannot change or should not be required to change because such characteristics are fundamental to their individual identities. Finding that a reasonable person in her circumstances would fear country-wide persecution in Togo on account of her membership in a recognized social group, the BIA held that the respondent met her burden and asylum was warranted.

Therefore, ample Circuit Court and BIA decisions establish that persecution by private criminal actors on account of membership in a particular social group can

establish eligibility for asylum and withholding from removal. As the cases demonstrate, gender-based violence is frequently perpetrated by private criminal actors whom governments are unable or unwilling to control. Allowing gender-based violence as a ground for asylum and withholding of removal is critical to the advancement of human rights principles for women and girls, who will otherwise face life-threatening violence and abuse. The Department of Justice's own guidelines, in the form of the Coven Memorandum, recognize there are harms uniquely suffered by women or a subset of women.⁹ These harms can be systemic, and the Coven Memorandum publicly affirmed that asylum may be used in a fair and consistent manner to protect women and girls from systemic life-threatening human rights violations.

Reversing the BIA's well-established precedent allowing asylum to be granted when applicants are persecuted by private actors on account of membership in a particular social group will create a direct conflict with Circuit Court precedent on this issue, which cannot be overturned by the Department of Justice. It will also conflict with the Department's own guidelines, and be inconsistent with the spirit of treaties to which the United States is a signatory, including the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment and the International Covenant on Civil and Political Rights, both of which address the concerns raised in gender persecution asylum claims.¹⁰

⁹ See *supra*, p. 10.

¹⁰ See *Convention on Torture and Other Cruel, Inhuman or Degrading Treatment*, Dec. 10, 1984, 1465 U.N.T.S. 85; *International Covenant on Civil and Political Rights*, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.

CONCLUSION

For the foregoing reasons, the Attorney General should keep intact the current BIA precedents establishing that (1) victims of private criminal activity for which their governments are unable or unwilling to control are subject to “persecution” under the Immigration and Nationality Act, and (2) victims subjected to such persecution or fear of persecution on account of a particular social group are eligible for asylum or withholding from removal.

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Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Order No. 4090-2018, I hereby certify that this brief contains 5,650 words.

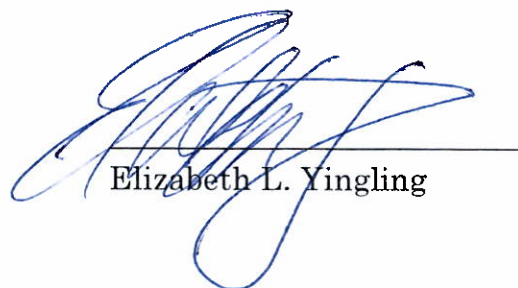


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CERTIFICATE OF FILING

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