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

Matter of A-B-,	**A#: [NOT PROVIDED]**
Respondent	

AMICUS INVITATION No. [NOT PROVIDED]

BRIEF OF *AMICUS CURIAE* DAVID B. GARDNER

INTRODUCTION

In Matter of A- B, 27 I&N Dec. 247 (A.G. 2018), the Attorney General requested briefing on a purely legal question to assist his review of that case:

> Several Federal Article III courts have recently questioned whether victims of private violence may qualify for asylum under section 208(b)(1)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(i) (2012), based on their claim that they were persecuted because of their membership in a particular social group. If being a victim of private criminal activity qualifies a petitioner as a member of a cognizable "social group," under the statute, the briefs should identify such situations. If such situations do not exist, the briefs should explain why not.

Amicus presents the following argument through the lens of claims for Asylum Status based on Anti-Semitism. This example highlights the importance of preserving a framework for asylum protection which can be applied to many other vulnerable groups.

AMICUS

Amicus David B. Gardner, on behalf of Law Offices of David B Gardner, Inc., is an attorney Certified by the State Bar of California as a specialist in Immigration Law and submits this brief as a private practitioner. Amicus has more than 22 years of experience representing individuals before the Immigration Court, Board of Immigration Appeals and Circuit Courts of Appeals in matters involving Asylum and related relief.

Amicus submits this brief to support a finding that victims of criminal activity attributable to private actors may form part of a cognizable social group. Moreover, such a

finding falls well within the scope of International Treaties and Conventions governing treatment of refugees as has been adopted by the United States into domestic law.

Amicus has an interest in the outcome of the Board's review of Matter of A- B to the extent that the subject matter and legal issues address the issues of present and prospective clients. Amicus has no direct stake in the outcome of the present litigation.

BACKGROUND-ASYLYM CLAIMS BASED ON ANTI-SEMITISM

The history of the Nazi treatment of the Jews reflected persecution on account of Jews being members of a social group viewed as socially distinct. Anti-Semitism takes on many forms and seeking protection under the particular social group ground is necessary to include those anti-Semitic attacks where Jews either self-identify or are identified by others by their social and cultural affiliation with other Jews. In many cases, attacks on Jews have been made solely because of their social identity regardless of religious commitment, political opinion, or classification as a nationality. For example, the noted Jewish Author and Historian Cecil Roth writes in his preface to "The Jewish Contribution to Civilization" that:

> *Persons in whose veins there runs the blood of a single Jew as far as three great-grandparents back- of one traceable Jewish great- grand-parent, that is are officially penalized on that account to-day in Nazi Germany, on the plea that their stock is alien and ipso facto harmful to German, "Nordic" and European cultural life. The Jewish people, moreover is consistently blamed for the actions of persons of Jewish origin, who not only have cut themselves off from Jewish life, but even have professed markedly anti- Jewish sentiments—My use of the term Jew etc., in the following pages hence denotes a person whose immediate ancestors professed the Jewish Religion.*

In 2016, the United States Department of State adopted the following non-legally binding working definition of antisemitism, "*Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.*"[1]

The following examples of anti-Semitism are contained in the same statement:

> *To guide IHRA in its work, the following examples may serve as illustrations: Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as anti-Semitic. Antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for "why things go wrong." It is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits.*
>
> *Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:*
>
> • *Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.*
>
> • *Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective — such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.*
>
> • *Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.*
>
> • *Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust[])]*
>
> • *Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.*

[1] *See* U.S. Department of State Defining Anti-Semitism May 26, 2016, https://www.state.gov/s/rga/resources/267538.htm

• Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.

• Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
• Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.

• Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.

• Drawing comparisons of contemporary Israeli policy to that of the Nazis.

• Holding Jews collectively responsible for actions of the state of Israel.

Anti-Semitic acts are criminal when they are so defined by law (for example, denial of the Holocaust or distribution of anti-Semitic materials in some countries).

Criminal acts are anti-Semitic when the targets of attacks, whether they are people or property – such as buildings, schools, places of worship and cemeteries – are selected because they are, or are perceived to be, Jewish or linked to Jews.

Anti-Semitic discrimination is the denial to Jews of opportunities or services available to others and is illegal in many countries.[2]

The above examples include anti-Semitic criminal acts which are conducted by private actors against individuals who could be included as members of a cognizable particular social group of Jews. The legal issues in determining whether conduct by private actors included in the State Department's definition of anti-Semitism are purely criminal or involve State action are necessarily fact driven. In the case of anti-Semitism, a legal analysis of individual criminal acts requires circumstance specific information in the context of the criminal action, the laws of the State in question and the willingness and ability of the Government to enforce such laws. For, example, a Jewish victim of a criminal attack by a private actor in Nazi Germany would most likely meet the definition of a refugee under current Asylum law. The current spate of attacks on

[2] *Id.*

Jews in Germany requires an analysis of the existence of German State laws outlawing Anti-Semitism and the German Government's ability to control anti-Semitic individuals and groups in that country.[3]

The recent upsurge in anti-Semitism in Europe and worldwide reflects the actions of private actors. These crimes by private actors take place notwithstanding the existence of laws which would purport to protect Jews and other minority groups from "hate crimes." The inability or limited ability of States to counter or protect Jews as a group from such actions is a legal issue that can only be determined by fact specific and expert country condition evidence.

The historical background to contemporary Asylum law as applied to cases involving anti-Semitism can serve to highlight the importance of including claims of persecution by private actors which might otherwise be considered criminal activity against other particular social groups.

I. History of Modern Asylum Law

Modern Asylum law was established more than 66 years ago by the 1951 Refugee Convention[4] as a response to the refugee crisis resulting from the Holocaust. However, while the genocide against Jews and other groups was perpetrated by the Nazi Germany regime, there is nothing in the language of the Convention and subsequent statutes and regulations adopted into United States law which confined the grant of Asylum to refugees fleeing persecution as a result of direct State action.

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[3] *See e.g* "In Berlin, a Show of Solidarity Does Little to Dampen Jewish Fears," New York Times, Apr. 26, 2018, available at https://www.nytimes.com/2018/04/25/world/europe/anti-semitism-germany-jews-kipa-solidarity.html

[4] "Convention Relating to the Status of Refugees," Jul. 28, 1951, United Nations, Treaty Series, vol. 189, p. 13 ("the Refugee Convention").

The definition of a refugee is found at Article 1A (2) of the Refugee Convention:

> *[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is to return to it.*

The United States adheres to Articles 2 through 34 of the 1951 Refugee Convention by virtue of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 ("the Protocol"), to which the United States acceded on November 1, 1968.

The official English version of Article 33 of the Refugee Convention provides in part:, "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." 19 U.S.T. at 6276.

The Refugee Act of 1980, (18 Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in various sections at 8, U.S.C. and at 22 U.S.C. § 2601) amended the Immigration and Nationality Act of 1952 (the "INA"). It provides a comprehensive framework for the admission of refugees into the United States. The definition of "refugee" in INA section 101(a) (42), grants "refugee" status to any person who has fled their native country under a "*well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*"

The Refugee Convention and the Refugee Act as incorporated into the INA do not make a specific distinction between persecution by private and Government actors.

Section 243(h) of the INA, generally known as the withholding of deportation provision, closely parallels the provisions of non-refoulement as set forth in Article 33 of the U.N. Convention. Section 243(h) provides that the Attorney General "*shall not deport or return any alien . . . to a country if the Attorney General determines such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political.*"

The use of the language "would be threatened in such country" without limitation also supports a finding that withholding of deportation is not confined to actions by State actors but can include persecution by private actors provided that such persecution is on account of a protected ground.

In Stevic v. U.S., 467 U.S. 407, 414–21 (1984), the Supreme Court recounted the modern history of U.S. Asylum law and confirmed that in its present form, Congress intended U.S. Asylum to be consistent with International law as set forth in the U.N. Convention. The Stevic Court determined that the congressional motivation for the enactment of the Refugee Act was to revise and standardize the procedures governing the admission of refugees into the United States. The Court emphasized that the legislative history of the Act demonstrated the congressional intent to interpret the term "refugee" in conformity with the Protocol.[5]

The Supreme Court has also acknowledged the significance of the United Nations High Commissioner for Refugees Handbook[6] as an aid in the task of interpretation and concluded that

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[5] *See id.* at 436-38.

[6] United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979).

the Refugee Act framework was consistent with the U.S. obligations under the Convention and the Protocol.[7]

II. Gender Based Asylum Claims and Private Activity

The Ninth Circuit has addressed the issue presented by the Attorney General in the context of Gender based persecution in Mexico. See Bringas-Rodriguez v. Sessions, 850 F.3d 1051 (9th Cir. 2017) finding that:

> *The concept of persecution by non-state actors is "inherent" in the definitions of persecution in the 1951 Convention and the Refugee Act of 1980. Anker, supra, at § 4:8. Indeed, the 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees stated that persecution included "serious discriminatory or other offensive acts . . . committed by the local populace . . . if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." Anker & Posner, supra, at 67 (quoting UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (1979)). 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. See Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971); Matter of Eusaph, 10 I. & N. Dec. 453, 454 (BIA 1964).*

III. Anti-Semitism and Private Criminal Activity

In Matter of O-Z and A-Z, 22 I & N Dec. 23 (BIA 1998), the Board examined a case involving anti-Semitic persecution by private actors in the Ukraine. While the applicants suffered from official acts of discrimination when Ukraine was part of the Soviet Union, this case addressed events that took place after Ukraine became an independent State in 1991.The Board found that the cumulative acts which included physical attacks and humiliation by private actors rose to the level of persecution as defined in the INA. The Board found the acts to be on account

[7] *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 438-41(1987)

of the Applicants' Jewish Nationality and that despite complaints to the Police, the "Ukrainian Government was unable or unwilling to control the respondent's attackers and protect him or his son from the anti-Semitic acts of violence. The Board took administrative notice of country conditions in Ukraine noting that the evidence supported the "*respondent's assertion that the local police refused to investigate the instances of violence perpetrated by ultra-nationalists against him and his son, but it also supports their well-founded fear of persecution in Ukraine despite the national expansion of Jewish rights.*"

O-Z and A-Z, is illustrative of the importance of noting facts on the ground where persecution takes place by private actors because the applicants were unable to obtain protection from persecution on account of a protected ground, notwithstanding that "anti-Semitism ceased to be a government policy" in the Ukraine.

The Ninth Circuit in Bringas supra cited to O-Z and A-Z as well as the Circuit Court's decision in Korablina v. I.N.S., 158 F.3d 1038 (9th Cir. 1998):

> *In Korablina, the petitioner, a Jewish native of Russia and citizen of the Ukraine, was the victim of harassment and beatings perpetrated against Jewish citizens. Id. at 1041–42. Korablina was fired from the job she had held for twenty-eight years by a new boss who was a member of an ultranationalist and anti-Semitic group. Id. at 1041. After searching for six months for a new job, she found work as a clerical secretary to a Jewish man. Id. at 1042. In that new position, she saw three men attack her boss and thereafter return monthly to the office to extort money. Id. Though she and her fellow employees reported the beating to the police, the officers never appeared, and when Korablina sought help from a friend at the municipal city hall, the friend disappeared. Id. Korablina then began receiving anti-Semitic death threats that warned of retaliation if she reported the threats to anyone. Id. Soon thereafter, two men violently attacked Korablina and left her barely breathing, telling her she "could not . . . conceal her Jewish origin."*

The attacks on the Respondents in O-Z and A-Z and the Petitioner in Korablina, were attributable to the victim's social identity as Jews. These attacks were criminal acts perpetrated by private actors in States, where anti-Semitism was no longer an official government policy. In each case, the government was either powerless or indifferent to this form of criminal conduct and was unable to provide protection to members of a vulnerable group of society.

IV. Inability or Unwillingness of the State to Control acts of Private Individuals

A comprehensive overview with citations from the Board and different Circuit Courts may be found in a 2014 Department of Justice publication,[8]

> *Persecution "always implies some connection to government action or inaction," generally in the form of direct government action or government supported action. See, e.g., Aldana-Ramos v. Holder, 757 F.3d 9, 17 (1st Cir. 2014) (internal quotation marks and citation omitted).*
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> *However, the Board of Immigration Appeals and the Federal circuit courts of appeals universally acknowledge that for purposes of asylum and withholding of removal under the Act "persecution" may involve a "government's inability or unwillingness to control private conduct."1 See id. (emphasis added) (citation omitted); see also Malu v. U.S. Att'y Gen., No. 13-10409, 2014 WL 4073115, at *8 (11th Cir. Aug. 19, 2014); Paloka v. Holder, 762 F.3d 191, 195 (2d Cir. 2014); R.R.D. v. Holder, 746 F.3d 807, 809 (7th Cir. 2014); Constanza-Martinez v. Holder, 739 F.3d 1100, 1102 (8th Cir. 2014); Doe v. Holder, 736 F.3d 871, 877–78 (9th Cir. 2013); Karki v. Holder, 715 F.3d 792, 801 (10th Cir. 2013); Garcia v. Att'y Gen. of U.S., 665 F.3d 496, 503 (3d Cir. 2011); Kante v. Holder, 634 F.3d 321, 325 (6th Cir. 2011); Crespin-Valladares v. Holder, 632 F.3d 117, 128 (4th Cir. 2011); Tesfamichael v. Gonzales, 469 F.3d 109, 113 (5th Cir. 2006); Matter of Pierre, 15 I&N Dec. 461, 462 (BIA 1975) (formalizing the "unwilling or unable" to control standard for non-governmental persecution in the context of a claim made under former section 243(h) of the Act, 8 U.S.C. § 1253(h) (1970)).*

[8] Hassell, Joseph, "Persecutor or Common Criminal? Assessing a Government's Inability or Unwillingness to Control Private Persecution," Immigration Law Advisor, A Legal Publication of the Executive Office for Immigration Review , U.S. Department of Justice Executive Office for Immigration Review Immigration Law Adviser, Sep. 2014. Vol. 8 No. 7, https://www.justice.gov/sites/default/files/eoir/legacy/2014/10/03/vol8no7.pdf.

CONCLUSION

The example of anti-Semitism is equally applicable to individuals that can form a member of a particular social group based on gender and gang-based claims. Such claims are in many, if not most cases, perpetrated by non-state actors in countries where the government is either weak or allows such conduct to be conducted with impunity. The above examples and case authority are submitted as examples of the importance of maintaining the framework of existing case law from the Circuit Courts as well as the Board's own precedent decisions when determining under what specific circumstances Asylum may be granted on the basis of membership in a particular social group.

Date: April 26, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2018, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via Fedex to:

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Dated: April 26, 2018

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