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Unconventional Actors

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I. Introduction

Asylum cases involving domestic violence or gang-related violence already had high burdens to overcome, but in the summer of 2018, their underlying theories were inverted and pulled out from underneath them with the former Attorney General Jefferson Sessions's decision in *Matter of A-B-*.[1] The case involved a woman who had sought asylum in the United States for persecution by her ex-husband on account of her being a member of the particular social group of "El Salvadoran women who are unable to leave their domestic relationships where they have children in common."[2] The

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1 Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018).

2 *Id.* at 321.

respondent was denied asylum in Immigration Court on several grounds, including that she had failed to show that the "group in which she claimed membership did not qualify as a 'particular social group' under 8 U.S.C. § 1101(a)(42)(A)," and that she had not shown that the Salvadoran "government had been unable or unwilling to help her."[3] On appeal, the Board of Immigration Appeals (BIA) found that the Immigration Court had clearly erred in making its findings and reversed and remanded the case.[4] The Immigration Court, in August 2017, administratively returned it to the BIA "in light of intervening developments of law[,]" which prompted then Attorney General Jefferson Sessions to take the case for his own review under 8 C.F.R. § 1003.1(h)(1)(i).[5] The resulting decision in *Matter of A-B-* narrowed the possible protected grounds for asylum and overruled BIA precedent that recognized certain survivors of gender-based domestic violence as meriting asylum.[6] This decision also departed from precedent to severely restrict who would be recognized as persecutors.[7]

United States' asylum law was originally designed to protect against persecution committed by a government actor.[8] However, it has long included that someone fleeing harm by a nongovernment actor could be granted asylum, assuming she met the other elements

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[3] *Id.*

[4] *Id.*

[5] *Id.* at 322–23.

[6] *Id.* at 319 (overruling Matter of A-R-C-G-, 26 I. & N. Dec. 388, 389 (BIA 2014) as being wrongly decided).

[7] *See Matter of A-B-*, 27 I. & N. Dec. at 319–20, 337.

[8] Philosophical questions are embedded into *Matter of A-B-* as well as in our current asylum law: whom should be protected and from whom? Although I am sure I disagree with the former Attorney General as to their answers, I agree that these are important questions for our policymakers. As is discussed below, the U.S.'s current asylum and refugee law arose to protect a very particular type of harm following World War II. But it does not adequately provide for current harms, including civil unrest, environmental harm, or economic harms. *See, e.g.*, Matthew J. Lister, *The Place of Persecution and Non-State Action in Refugee Protection*, *in* THE ETHICS AND POLITICS OF IMMIGRATION: CORE ISSUES AND EMERGING TRENDS 2–6 (Alex Sager, ed., 2016) (summarizing some of the debates in asylum law as to whether persecution is a necessary element). *See also* Elizabeth Keyes, *Unconventional Refugees*, 44 N.C. J. INT'L L. 461 (2019); Elizabeth Ferris, *Climate Change, Migration, Law and Global Convergence*, 44 N.C. J. INT'L L. 425 (2019). Both of these Articles enter this philosophical conversation only to illuminate how our current law could more thoroughly address and thereby protect those who have suffered persecution at the hands of non-government actors.

of asylum, if she could demonstrate that her home country's government was *unable or unwilling* to protect her from this nongovernmental harm.[9] *Matter of A-B-* purportedly raised that "unable or unwilling" standard to require that a government had "condoned" the nongovernmental or private harm or had demonstrated a "complete helplessness" to protect against it.[10] This much more stringent standard concluded with the general proposition that "claims by aliens pertaining to domestic violence or gang violence perpetrated by non-government actors will not qualify for asylum."[11] This Article explores cases and policies that challenge Attorney General Sessions's claims and suggests ways to demonstrate when actions and harms by nongovernment actors are not individual private crimes but products of systemic and cultural norms that are at the very least tolerated by the home country's government.

Part II of this Article provides the legal backdrop to when persecution by nongovernment actors warrants asylum. Part III analyzes the *Matter of A-B-* opinion, examining how it conflated conflicting standards for evaluating nongovernmental harm and how it disrupted how asylum cases are being and will be adjudicated. Part IV provides an analytical framework for the future. It builds on the historical factors used to evaluate cases involving nongovernment actors and also sets out new and more robust factors for advocates and adjudicators to evaluate nongovernmental harm and a government's ability and willingness to protect its populace against this kind of harm. Many of these factors are aimed at evaluating whether a nongovernment actor had some *de facto* power of the government, either by having usurped

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9 This Article is only addressing the element that to be granted asylum an applicant must show that she was persecuted by her home government or by an actor that government is unable or unwilling to control. Additionally, to have the chance of being granted asylum, an applicant for asylum has the burden to prove that she suffered that persecution or has a well-founded fear of persecution on account of one of the five protected grounds. *See* 8 U.S.C. §§ 1101(a)(42), 1158(b); 8 C.F.R. § 1208.13. Each case should be evaluated on a case-by-case basis. *See* Crespin-Valladares v. Holder, 632 F.3d 117, 128–29 (4th Cir. 2011) ("Whether a government is 'unable or unwilling to control' private actors . . . is a factual question that must be resolved based on the record in each case.") (quoting Menjivar v. Gonzales, 416 F.3d 918, 921 (8th Cir. 2005)); *see also* Kaplun v. Att'y Gen. of United States, 602 F.3d 260, 270 (3d Cir. 2010).

10 *See Matter of A-B-*, 27 I. & N. Dec. at 337; *see also* Section II, *infra*.

11 *Id.* at 320.

that power or by having had the government delegate or abdicate that power.

II. Persecution by Nongovernment Actors: The Conventional Backdrop

Our current asylum law takes root in both the United Nations 1951 Convention Relating to the Status of Refugees (Convention), which was drafted by the United Nations to address and provide international protection to the thousands of displaced persons following World War II who had been persecuted and the subsequent 1967 Protocol Relating to the Status of Refugees (Protocol).[12] The United States acceded to both the Convention and the Protocol and ratified the Protocol in 1968. Ratifying the Protocol bound the United States to Articles 2 through 34 of the Convention, which grant certain rights to refugees.[13] To fully comply with the Protocol, the United States enacted the Refugee Act of 1980,[14] defining "refugee" as:

> Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, 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 of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[15]

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12 *See* U.N. HIGH COMM'R FOR REFUGEES, THE CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 2–3, *available at* https://www.unhcr.org/3b66c2aa10 [https://perma.cc/47TT-883G]; *see also* Deborah Anker, *US Immigration and Asylum Policy: A Brief Historical Perspective*, *in* 13 IN THE DEFENSE OF ALIEN 74, 78–80 (1990) (explaining the history of the U.S. asylum law as not only deriving from these international treaties following World War II but also out of the Cold War).

13 *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Protocol Relating to the Status of Refugees]; *see also* Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L LAW 1, 1 (1997).

14 Refugee Act, Pub. L. No. 96-212, 94 Stat. 102; 8 U.S.C. § 1158.

15 8 U.S.C. § 1101(a)(42) (2016). This language essentially mirrors that defining refugees in the Convention and Protocol. *See* Protocol Relating to the Status of Refugees, *supra* note 13, at art. 1; Convention Relating to the Status of Refugees, July 28, 1951, 19

Although neither the Convention nor the Protocol specify that government actors need to be the persecutors, they were contemplated to protect against a particular harm: "persecution committed by states" or government actors.[16] Nongovernment persecutors are thus seemingly un-Conventional. Likewise, people fleeing persecution by nongovernment actors may seemingly be excepted from the refugee protection arising out of the Convention and Protocol.

However, the underlying rationale for offering protection to people fleeing persecution "is not simply the need to give shelter to those persecuted by the state, but, more widely, to provide refuge to those whose home state cannot or does not afford them protection from persecution."[17] The "agent of persecution need not be the state, but there must be a failure of state protection."[18] This rationale has long permeated both international law and domestic law. Both have recognized that where a government is unable or unwilling to control a certain set of nongovernment actors within its boundaries, people persecuted by those nongovernment actors may still be afforded protection as a refugee.[19]

Guidance by the *United Nations High Commissioner for Refugees Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, first published in 1979,[20] provided that while "[p]ersecution 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

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U.S.T. 6259, 189 U.N.T.S. 150.

16 Lister, *supra* note 8.

17 Deborah Anker, *Refugee Status and Violence Against Women in the Domestic Sphere: The Non-State Actor Questions*, 15 GEO. IMMIGR. L.J. 391, 394 (2001) (quoting Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 716–17).

18 *Id.* (discussing how Canada, the United Kingdom, Australia, and New Zealand have all recognized persecution by non-state actors when a state has failed to protect its people, particularly in gender-based asylum cases).

19 *See, e.g.*, UNHCR, HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, U.N. Doc. HCR/1P/4/ENG/REV.3, 15 ¶ 65 [hereinafter UNHCR HANDBOOK], *available at* https://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html [https://perma.cc/8CFX-DJGV]; *see also* Matter of Acosta, 19 I. & N. Dec. 211, 222 (BIA 1985), *overruled in part by* Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987).

20 UNHCR HANDBOOK, *supra* note 19, at 1 (providing guidance to state-members for interpreting the Convention and Protocol).

country concerned."[21] It explained that "[w]here 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."[22]

United States law has mirrored the expansion of protection to those fleeing persecution "at the hands of individuals not connected with any government" as long as "the government concerned was either unwilling or unable to control the persecuting individual or group."[23] Neither its statutes nor its regulations explicitly provide that the persecution must have been perpetrated by a government actor or a nongovernment actor the government is unable or unwilling to control.[24] However, the regulations implicitly acknowledge both state and non-state persecutors. They distinguish between the two in assessing the risk of persecution if an asylum applicant were to relocate elsewhere in the home country, stating that when "the persecutor is a government or is government-sponsored . . . it shall be presumed that internal relocation would not be reasonable[.]"[25]

The BIA has affirmed persecution by nongovernment actors, finding that even before the Refugee Act of 1980, persecution "had to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control."[26] It has since repeatedly recognized persecution by nongovernment actors as being legitimate under asylum law when the home country was unable or unwilling to control those actors.

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21 *See id.* at ¶ 65.

22 *See id.*

23 *See* Matter of Pierre, 15 I. & N. Dec. 461, 462 (BIA 1975) (citing Matter of Tan, 12 I. & N. Dec. 564 (BIA 1967)).

24 *See* 8 U.S.C. §§ 1101(a)(42), 1158(b) (2016); 8 C.F.R. § 1208.13.

25 *See* 8 C.F.R § 1208.13(b)(3)(i)-(ii) (providing guidance for determining whether an asylum applicant can reasonably relocate internally within her home country and differentiating the risk of harm depending on whether "the persecution is by a government or is government-sponsored" or not).

26 Matter of Acosta, 19 I. & N. Dec. 211, 223 (BIA 1985) ("Our presumption is reinforced by the fact that in 1978, 2 years before enacting the Refugee Act of 1980, Congress chose not to define the word 'persecution' when using it in other provisions of the Act because the meaning of the word was understood to be well established by administrative and court precedents."); 8 U.S.C. §1101(a)(42).

For example, the BIA has recognized, among others, certain paramilitary groups,[27] nationalist groups unconnected to the government,[28] criminal or terrorist groups acting as though they were governments,[29] ethnic tribes,[30] and even abusive fathers[31] as nongovernment actors whose governments were unable or unwilling to control.

Likewise, all of the Circuit Courts of Appeal have granted asylum to people fleeing persecution by nongovernment actors, and all have well-established precedent acknowledging asylum would be appropriate, provided the other elements are met, if the home country government had been shown to be unable or unwilling to control.[32] The United States Supreme Court has similarly

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27 *See, e.g.*, Matter of Villalta, 20 I. & N. Dec. 142, 147 (BIA 1990) (holding that the respondent from El Salvador merited asylum when he had been threatened by paramilitary "Death Squads," who had also killed his brother, and when the Salvadoran government "appear[ed], at a minimum, to have been unable to control the paramilitary 'Death Squads,' whose mission was to annihilate suspected political opponents").

28 Matter of O-Z- & I-Z-, 22 I. & N. Dec. 23, 24, 26 (BIA 1998) (holding that when the respondents, who were Jewish nationals of Russia and lived in the Ukraine, were persecuted by an anti-Semitic, pro-Ukrainian independence and nationalist group and had "reported at least three of the incidents to the police, who took no action beyond writing a report . . . that the Ukrainian Government was unable or unwilling to control" the respondents' persecutors).

29 *See, e.g.*, Matter of McMullen, 19 I. & N. Dec. 90, 93–94 (BIA 1984) (recognizing the Provisional Irish Republican Army as a clandestine terrorist organization that was acting as a government, and which the Irish government was unable and unwilling to control even in denying the respondent asylum because he had also persecuted others).

30 *See, e.g.*, Matter of Kasinga, 21 I. & N. Dec. 357, 365, 368 (BIA 1996) (holding that the respondent from Togo had merited asylum when she feared female genital mutilation at the hands of her Tchamba-Kunsuntu tribe, whom the Togolese government was unable or unwilling to control).

31 *See, e.g.*, Matter of S-A-, 22 I. & N. Dec. 1328, 1335 (BIA 2000) (holding that the respondent from Morocco merited asylum when "the source of the respondent's repeated physical assaults, imposed isolation, and deprivation of education was not the government, but her own father," but also where evidence showed that the Moroccan authorities "would have been unable or unwilling to control her father's conduct").

32 *See, e.g.*, Rosales Justo v. Sessions, 895 F.3d 154, 162-63 (1st Cir. 2018); Kamar v. Sessions, 875 F.3d 811, 818 (6th Cir. 2017); Pan v. Holder, 777 F.3d 540, 543 (2d Cir. 2015); Hernandez-Avalos v. Lynch, 784 F.3d 944, 950-53 (4th Cir. 2015); R.R.D. v. Holder, 746 F.3d 807, 809 (7th Cir. 2014); Gathungu v. Holder, 725 F.3d 900, 906–07 (8th Cir. 2013); Doe v. Holder, 736 F.3d 871, 873, 877–78 (9th Cir. 2013); Garcia v. Attorney Gen. of U.S., 665 F.3d 496, 503 (3d Cir. 2011); Lopez v. Attorney Gen. of U.S., 504 F.3d 1341, 1345 (11th Cir. 2007); Tesfamichael v. Gonzalez, 469 F.3d 109, 113 (5th Cir. 2006); de la Llana-Castellon v. I.N.S., 16 F.3d 1093, 1097 (10th Cir. 1994).

recognized this standard, albeit indirectly.[33] For example, in *I.N.S. v. Elias-Zacharias*, although the court denied the asylum applicant's claim for asylum, because he had not shown he was persecuted on account of one of the protected grounds, the court did not question that harms caused by a guerilla group that could not be controlled by the Guatemalan government could amount to persecution for asylum.[34] Similarly, in his dissent to *Negusie v. Holder*, Justice John Paul Stevens distinguished the Convention Against Torture ("CAT") from asylum and withholding of removal under section 1231(b)(3)(B) of the United States Code by pointing out that CAT permits a "narrower class of actors": those who are a "public official" or who are "acting in an official capacity."[35] He went on to acknowledge that "asylum and withholding of removal are available to victims of harm inflicted by private actors, without regard to state involvement."[36]

An applicant for asylum has in the past been able to show that her home government was "unwilling" to protect her if she could show that it shared or did not wish to oppose the private actor's views about the applicant's race, religion, or other protected ground, or that it was unwilling to intervene in what it perceived to be family

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33 *See* I.N.S. v. Elias-Zacarias, 502 U.S. 478, 481–84 (1992); Negusie v. Holder, 555 U.S. 511, 536 n.6 (2009) (Stevens, J., dissenting).

34 *See I.N.S. v. Elias-Zacarias*, 502 U.S. at 481–84; *see also* 8 C.F.R. § 208.16 (describing the procedure for withholding removal under Section 241(b)(3)(B) of the Immigration and Nationality Act and withholding of removal under the Convention Against Torture).

35 *Negusie v. Holder*, 555 U.S. at 536 n.6. For CAT claims, torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflcted on a person . . by or at the instigation of or with the consent or *acquiescence* of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1) (emphasis added). A public official or a government may acquiesce to the torture if that official or government is aware of the tortuous activity or the potential for the tortuous activity before it happens and that entity breaches its "legal responsibility to intervene to protect" from that torture. *Id.* at § 1208.18(a)(7). Recently, the Fourth Circuit recognized that a state may acquiesce to torture by gangs in El Salvador when evidence showed that the respondent seeking relief under CAT had reported to Salvadoran police and other public officials that her son's life had been threatened by the gangs and that the Salavadoran officials had turned a blind eye. Cabrera Vasquez v. Barr, No. 18-1226 (4th Cir. 2019), *available at*

www.ca4.uscourts.gov/opinions/181226.P.pdf [https://perma.cc/835H-RA8X]. Thus, even CAT claims may allow for claims by non-state actors.

36 *Id.*

disputes or intra-tribal disputes.[37] A government might be "unable" to protect the asylum applicant during times of civil war and also when it cannot exert influence or authority over the nongovernment actor.[38] For example, failure to investigate reported violence or crimes or a refusal to make a report could constitute evidence that the home government was unable or unwilling to control the nongovernment actor.[39] As with all aspects of an asylum claim, though, an applicant's testimony must be corroborated by country condition evidence that shows similarly-situated persons would be treated similarly as the applicant.[40]

III. The Nonconventional Disruption

The standard for proving that the home government was unable or unwilling to protect someone from persecution by nongovernment actors has always been high, but in the summer of 2018, Attorney General Sessions suggested that this standard should even be higher.[41] In his *Matter of A-B-* opinion, the Attorney General wrote that an asylum applicant seeking to establish persecution by a nongovernment actor "must show that [her home] government condoned the private actions or 'at least demonstrated complete helplessness to protect the victims.'"[42] He also wrote that

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37 *See* UNHCR HANDBOOK, *supra* note 19, ¶¶ 65, 98–99; U.S. CITIZENSHIP & IMMIGRATION SERVS., *Asylum Officer Basic Training Course Participant Workbook: Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution*, VII.B.4, 46 (2009) [hereinafter AOBTC MANUAL].

38 *See* AOBTC MANUAL, *supra* note 37, at VII.B.5, 47; *see also* Matter of H-, 21 I. & N. Dec. 337, 345 (BIA 1996) (noting that, even in the presence of UN peacekeepers, many people within the asylum-seeker's country of origin were beyond the "rule and protection of recognized law and social order"); Matter of Villalta, 20 I. & N. Dec. 142, 147 (BIA 1990) (recognizing that the government in the asylum-seeker's country of origin appeared to, "at a minimum, control the paramilitary 'Death Squads' whose mission was to annihilate suspected political opponents").

39 *See* Matter of H-, 21 I. & N. Dec. 337, 345 (BIA 1996); *Matter of Villalta*, 20 I. & N. at 147.

40 *See id.*

41 *See* Matter of A-B-, 27 I. & N. Dec. 316, 337 (A.G. 2018).

42 *See id.* (quoting Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000)). This language of condoning or demonstrating complete helplessness reflects language in a few cases out of the Seventh and Eighth Circuit Courts of Appeal, all of which applied the "unable or unwilling" to control standard, despite articulating that the home government must have condoned the action by the nongovernment actor or demonstrated that it was completely helpless to prevent those actions. *See* Galina v. INS, 213 F.3d at 958; Hor v. Gonzalez,

when "the persecutor is not part of the government," the adjudicator must not only consider "the reason for the harm inflicted" but also "the government's role in sponsoring or enabling such actions."[43]

In framing the standard as one of government condonation or complete helplessness, *Matter of A-B-* first inverts the standard, emphasizing not a government's ability to protect from certain harms but its willingness. This inversion, itself, might not significantly impact how asylum cases with non-state actor harm are analyzed. However, the shift in language from "unwilling" to prevent or protect against certain harms to "condoning" those harms likely raises an asylum seeker's burden of proof. Unwilling encompasses a tolerance of the harm or a passive reluctance by the state to get involved. Condonation, however, might include a willful blindness, but definitely suggests that the state forgives or even approves of such harm.

For example, police officers may resist confronting gang members who threatened someone's life because they, themselves, are on the gang's payroll, but they may not approve of the gang harming the person bringing the charge. An asylum applicant could more readily show the former by her own account of seeking help and having it denied coupled with country reports showing that the police in that area of the country were corrupted by the gangs. She would have a much more difficult time showing that the police forgave or approved of this conduct by the gangs. Similarly, a standard of "complete helplessness" is not merely semantic; it invokes a higher burden than showing that a government was "unable" to control the non-state actor or prevent these harms.

Matter of A-B- did not provide any reason for departing from the "unable or unwilling" standard for evaluating harms committed by nongovernment actors.[44] Nor did it provide an analytical

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421 F.3d 497, 501 (7th Cir. 2005); Menjivar v. Gonzalez, 416 F.3d 918, 921 (8th Cir. 2005). None of these cases rationalized why they departed from their jurisdiction's precedent of evaluating only whether the home government was unable or unwilling to control the nongovernment actor. *See Galina v. INS*, 213 F.3d at 958; *Hor v. Gonzalez*, 421 F.3d at 501; *Menjivar v. Gonzalez*, 416 F.3d at 921. Moreover, all have been succeeded by cases confirming the "unable or unwilling" to control standard. *See, e.g.*, R.R.D. v. Holder, 746 F.3d 807, 809 (7th Cir. 2014); Gathungu v. Holder, 725 F.3d 900, 909 (8th Cir. 2013).

43 *Matter of A-B-*, 27 I. & N. Dec. at 318.

44 *See id*.

framework for evaluating cases under this heightened standard.[45] In fact, despite including rhetoric suggesting a heightened standard, *Matter of A-B-* actually only applied the the "unable or unwilling" to control standard, thereby muddying how harms by non-government actors should be evaluated. Along with the heightened standard, the opinon stated that the "harm or suffering must be 'inflicted either by the government of a country or by persons or an organization that the government was *unable or unwilling* to control.'"[46] And then, *Matter of A-B-* only reviewed the underlying facts and the BIA's initial review of the case under the "unable or unwilling" to control standard.[47] The decision thus only purported to heighten the standard—in dicta.

Nevertheless, this rhetoric of condonation or complete helplessness has, in practice, made asylum harder to seek and harder to receive.[48] Almost immediately after *Matter of A-B-* was issued, the United States Department of Homeland Security (DHS)[49] promulgated policies that reflected this heightened standard.[50] DHS instructed its officers to use this heightened standard when handling

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45 *See id*. at 318, 320, 337–38.

46 *Id.* at 337 (quoting Matter of Acosta, 19 I. & N. Dec. 211, 222 (BIA 1985)) (emphasis added).

47 *Id*. at 344 ("The persistence of domestic violence in El Salvador, however, does not establish that El Salvador was unable or unwilling to protect A-B- from her husband, any more than the persistence of domestic violence in the United States means that our government is unwilling or unable to protect victims of domestic violence.").

48 Jeffrey S. Chase, *A Better Approach to "Unable or Unwilling" Analysis*, JEFFREYS.CHASE.COM (Apr. 21, 2019), *available at* https://www.jeffreyschase.com/blog/2019/4/21/a-better-approach-to-unable-or-unwilling-analysis [https://perma.cc/7JPV-JGAA] ("Asylum is supposed to afford protection to those who are fleeing something horrible in their native country. Somehow, our government has turned the process into an increasingly complex series of hoops for the victim to jump through in order to merit relief.").

49 The Department of Homeland Security houses both the United States Citizenship and Immigration Services and the United States Immigration and Customs Enforcement agencies, among others.

50 *See* Grace v. Whitaker, 344 F. Supp. 3d 96, 109–10 (D.C. 2018) (finding that "[t]wo days after the Attorney General issued *Matter of A-B-*, USCIS issued Interim Guidance instructing asylum officers to apply *Matter of A-B-* to credible fear determinations" and that "USCIS issued final guidance to asylum officers for use in assessing asylum claims and credible fear determinations in light of *Matter of A-B-* [in July 2018]") (citing USCIS Policy Mem., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*, July 11, 2018 (PM-602-0162) [hereinafter USCIS Policy Mem.]).

credible fear interviews and asylum and refugee applications.[51] These policies were subsequently challenged as violating the Administrative Procedure Act, the Immigration and Nationality Act, and case law, and were then permanently enjoined by the D.C. District Court from being enforced in *Grace v. Whitaker*.[52] Following this injunction, DHS guidance has since been altered to again reflect the "unwilling or unable" standard.[53] However, the scope of the injunction and the effect of the changed DHS guidance is limited to credible fear interviews and credible fear review hearings, which are conducted by DHS officers.[54] The scope does not extend to removal proceedings, which are the purview of the Executive Office of Immigration Review in the United States Department of Justice.[55] Attorneys for the Office of Chief Counsel of the United States Immigration and Customs Enforcement, Immigration Judges, and the BIA still use and argue for the higher standard to be applied when asylum applicants have suffered harm at the hands of nongovernment actors.[56] And many asylum cases are being denied under this erroneous and heightened standard.[57]

In addition to the risk of having this heightened standard of condonation or complete helplessness continue to be used, argued for, and applied, there is also the risk that any ensuing analysis will be too cursorily curtailed. Although it employed the "unable or unwilling" standard in its own analysis of the underlying facts, *Matter of A-B-* refrained from providing a detailed framework for analyzing when a government is unable or unwilling to protect its citizens from harms by nongovernment actors. Rather, it

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51 *See Grace v. Whitaker*, 344 F. Supp. 3d at 109–10; *see also* USCIS Policy Mem., *supra* note 50.

52 *See Grace v. Whitaker*, 344 F. Supp. 3d at 136–41, 145–46.

53 *See* Email from John Lafferty, U.S. Citizen and Immigration Services, Asylum Director, to Asylum Field Office Staff (Dec. 19, 2018) (on file with *NCILJ*); Email from Mary Beth Keller, Chief Immigration Judge, U.S. Department of Justice, to Executive Office for Immigration Review (EOIR) Judges (Dec. 19, 2018) (on file with *NCILJ*).

54 *See* 8 U.S.C. § 1225(b)(1); 8 C.F.R. §§ 208.30(d), 1208.30(g).

55 *See Grace v. Whitaker*, 344 F. Supp. 3d at 110–12.

56 *Matter of A-B-* and *Grace v. Whitaker* are being appealed, so at the writing of this Article, this question is far from resolved. In the meantime, however, based on anecdotal evidence and information on professional listservs, the higher standard of requiring applicants to show that their home countries condoned or were completely helpless to protect victims is regularly employed.

57 Chase, *supra* note 48.

pronounced that "[n]o country provides its citizens with complete security from private criminal activity, and perfect protection is not required."[58] It, likewise, provided that police not acting on "a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States," and that asylum applicants need to show more than that a "crime has gone unpunished, but that the government is unwilling or unable to prevent it."[59]

This reasoning, in focusing on protection not needing to be perfect, bypasses the analysis of whether the government protection is effective.[60] It is infused with the idea that acknowledging that a government cannot protect each citizen from every single harm does not mean that it is unable or unwilling to protect its people from persecution by a nongovernment actor or that its citizens should be offered asylum. Undoubtedly, as a result of this reasoning, asylum applicants will have the burden to show that their home country's inability or unwillingness to protect them is not simply a failure to protect in one individual instance, but rather ineffective protection that is a part of a larger systemic acquiescence or fallibility. Below, this Article provides factors for determining when an asylum applicant has met that burden and shown that a government is unable or unwilling to protect her against nongovernment harm.[61]

IV. The Interventional Framework

Prior to 2017, the United States Citizenship and Immigration Services (USCIS) publicly proffered a set of four factors to evaluate when a government was unable or unwilling to control a

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58 *See* Matter of A-B-, 27 I. & N. Dec. 316, 343 (A.G. 2018).

59 *Id.* at 337–38. Attorney General Sessions opines in dicta that both domestic violence and gang-related violence are private crimes, motivated by greed or vendettas, that generally "will not qualify for asylum." *Id.* at 320, 337. Evaluating the motivation for the persecution goes to the nexus element: showing that the persecution was on account of one of the protected grounds. *Matter of A-B-* also confuses what is required for proving the nexus element, but analyzing the nexus element is beyond the scope of this Article.

60 *See* Anker, *supra* note 17; *see also supra* Section II discussion.

61 Although, as is discussed in Sections I and II, the heightened standard offered in *Matter of A-B-*, suggesting that a government must *condone* the persecution goes against the previously accepted "unable or unwilling" standard. The factors in Section III may often show how the home country condoned the nongovernmental harm, at least implicitly.

nongovernment actor.[62] Asylum adjudicators and advocates evaluated the following to see when an asylum applicant's home "government was unable or unwilling to control the actor that harmed the applicant"[63]:

> a) whether there were reasonably sufficient governmental controls and restraints on the action[s] that harmed the applicant;
>
> b) whether the government had the ability and will to enforce those controls and restraints with respect to the entity that harmed the applicant;
>
> c) whether the applicant had access to those controls and constraints; and
>
> d) whether the applicant attempted to obtain protection from the government and the government's response, or failure to respond, to those attempts.[64]

These factors, as well as other guidance about how asylum claims would be adjudicated, were removed from the USCIS website sometime in March or April of 2017.[65] In fairness, we do not know that these factors are no longer being used, but there is no longer the transparency to show that they are being used, and none of them were mentioned or applied in *Matter of A-B-*.[66] Nevertheless, these factors are only part of the analysis to show that government is unable or unwilling to control a nongovernment actor who has committed harms against an asylum applicant. A more

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62 The factors were listed in the United States Citizenship and Immigration Services Asylum Officer Basic Training Course Participant Workbook: *Asylum Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution* VII.B.1 at 44, which was made available on the www.uscis.gov website. However, all of the modules that were included as part of this Asylum Officer Basic Training Course were removed from the USCIS website sometime between March and April 2017. *See Removal of 26 Documents for the Asylum Officer Training from the USCIS Website*, SUNLIGHT FOUNDATION (May 29, 2018) [hereinafter *Removal of 26 Documents*], http://sunlightfoundation.com/wp-content/uploads/2018/05/AAR-6-USCIS-Asylum-Training-Materials-180529.pdf [https://perma.cc/8VNU-DQWN].

63 *See, e.g.*, DREE K. COLLOPY, AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 177 (7th ed., 2015).

64 AOBTC MANUAL VII.B.1, *supra* note 37, at 44.

65 *See Removal of 26 Documents*, *supra* note 62, at 1.

66 *See* Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018).

robust set of factors is needed.[67]

A central question in evaluating whether a government was unable or unwilling to control a nongovernment actor is whether the nongovernment actor has some *de facto* power of the state.[68] If a nongovernment actor can be shown to have some de facto power of the state, then any harm or violence that actor perpetuates are not the product of individual private crimes but rather endemic to and enabled by the system, culture, and state.[69] Matthew Lister of Deakin University in Australia identifies two types of de facto power by a nongovernment actor that might warrant asylum: first, when "the authority and power of the state has been usurped by another power"; or second, "when the state has (implicitly or explicitly) delegated its power or authority" to nongovernment actors.[70] When the authority of a state has been usurped, governments are unable to protect its citizens and nationals by another power.[71]

Likewise, a government might be shown to have been unwilling to protect certain citizens and nationals when it has delegated some of its authority—even implicitly.[72] Lister does not address when a state abdicates some of its power. Implicitly delegating power could encompass a government abdicating some of its power. But conceptualizing this power shift as an abdication—which suggests a failure to fulfill a duty—may be more accurate than thinking of it as a delegation of power, which suggests a proactive, even if

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[67] Jeffrey Chase, a former Immigration Judge, offers a *Res Ipsa Loquitur* test as a new and better way to conduct the "unable and unwilling" analysis, which would be "to create a rebuttable presumption of asylum eligibility by allowing the asylum applicant to establish that the persecution would not ordinarily have occurred if the government had been able and willing to provide the protection necessary to have prevented it from happening." Chase, *supra* note 48. For example, "when a seven year old girl is kidnapped, raped, and beaten," the government would be presumed to have been unable to provide the necessary effective protection. *Id.* DHS would then have the burden "to prove that the government had the effective ability and will to prevent the persecution from happening in the first place (as opposed to prosecuting those responsible afterwards) by satisfying whatever complex, multi-level inquiry the courts want to lay out for them." *Id.* Assuminng that this proposed test is not in our immediate future, this Article offers a set of factors and a framework for the current "unable or unwilling" analysis.

[68] *See* Lister, *supra* note 8, at 6–7.

[69] *See, e.g.*, Anker, *supra* note 17.

[70] *Id.* at 2.

[71] *See id.* at 7.

[72] *See id.* at 9.

implicit, conveyance. Building off of the work by Lister, Part A explores factors to consider, both in country conditions and in individual cases, for evaluating when a nongovernment actor has usurped power of the state. Part B then does the same for cases involving a state's abdication or delegation of power. Both sections offer factors that can help analyze when a government not only is unable or unwilling to protect against harms committed by a nongovernment actor but also when that government condones that harm or is completely helpless to prevent it.

A. Usurpation of Power: Gang-Related Violence

When a government's authority has been usurped by a nongovernment actor, the government may be unable to protect those harmed by that nongovernment actor.[73] Such cases often involve situations where a group has effective control over certain parts of the home country, such as in cases involving civil war or rebel groups.[74] Similarly, though, asylum applicants fleeing gang-related violence in Central America may be able to show that the gangs, like MS-13 and Barrio 18, have usurped power and act like de facto governments. The gangs pervade many Central American countries and the region: "they are able to impose their will and effectively threaten those who oppose them without significant fear or expectation that the government of the country will be able to stop or significantly impede them, or even to offer protection to those endangered."[75]

To evaluate whether a nongovernment actor, like a gang, has usurped state power requires looking at both the country conditions and the individual applicant's facts and asking the following:

- Whether the nongovernment actor serves functions of the government for the territories it controls or where it operates. Does it, for example, provide its own form of services, benefits, or protection? Does it collect a form

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73 *See id.* at 7.

74 *See id.* at 7–8; *see, e.g.*, Espinoza-Cortez v. Att'y Gen. of the United States, 607 F.3d 101 (3d Cir. 2010).

75 Lister, *supra* note 8, at 8 (citing Jeffrey D. Corsetti, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L.J. 407, 409–16 (2006)).

of taxes, like extortion fees?[76] Does it provide its own security or have its own militia or armed forces?

- Whether the nongovernment actor has infiltrated the government or corrupted the government. Does the government pay or receive payments from the nongovernment actor? Is there a history of nongovernment groups being connected to the government, like paramilitary groups? Or a history of human rights abuses by groups sanctioned by the government that are now the nongovernment actors?[77] How recently? Are there members of the nongovernment actor working in or for the government? Or vice versa? Are the nongovernment actors and government actors viewed differently by the public or intermingled and indistinct in the public's eye?
- Whether the government had reasonable "controls and restraints" over the nongovernment actors and whether it enforced those controls.[78] Are nongovernment actors punished for their crimes or are they treated with impunity? Were they punished in the individual asylum applicant's case?

The more of these factors that tilt toward the nongovernment actors having usurped authority of the government, the more they are a de facto or quasi-government, and the more likely that an asylum applicant should be able to show that her home government was unable, or even completely helpless, to protect her from harms inflicted by these nongovernment actors. Of course, she would still have to show that in her individual case she attempted to obtain protection and was refused, or the government failed to respond to

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76 *See* Lauren Gilbert, *Gender Violence, State Action, and Power and Control in the Northern Triangle*, *in* FROM EXTRACTION TO EMANCIPATION: DEVELOPMENT REIMAGINED 261 (Raquel Aldana & Steven Bender eds., 2018) (discussing how both MS-13 and Barra 18 impose a "war tax" on the residents and businesses in their territories).

77 *See id.* at 260 (discussing how in the Northern Triangle countries of Central America the same actors who were once a part of the paramilitary groups, "death squads and civil defense patrols with nebulous links to the police, military, and ruling class" during the countries' civil wars "have reorganized themselves into new structures of repression . . . but still with the private-state collaboration or acquiescence").

78 *See* AOBTC MANUAL VII.B.1, *supra* note 37, at 46.

her attempts,[79] or that seeking assistance from authorities would have been futile.[80] Yet the more intertwined the government and nongovernment actor are, or are perceived to be, the more futile, and potentially dangerous, seeking assistance from the government for harms caused by the nongovernment actor would be. Similarly, the more the nongovernment actor can act with impunity, the more futile it will be for someone to go to the government for protection.

The above factors allow for an applicant, advocate, and adjudicator to show the home government is not merely allowing a crime to go unpunished,[81] but rather that the nongovernment actor has usurped some of the government's power and the government is unable to protect someone from the harm.

B. Abdication or Delegation of Power: Gender-based Violence

When a government has abdicated or delegated its power (or some of its power) to nongovernment actors, the government may demonstrate that it is unwilling to protect its citizens or nationals against harm by those nongovernment actors.[82] It is an easier case when the government has explicitly delegated its authority, but that rarely happens.[83] However, the same may be true when the government has delegated some of its authority implicitly or has failed to fulfill its duty, abdicating some of its power. In these cases, the government "*could* plausibly provide protection, but it does not."[84] Professor Lister asserts that a state may implicitly delegate "its power or authority over certain populations or parts of life because it expects or wishes others to act with authority in these areas."[85] Traditionally, he notes, these cases involved "ethnic or religious violence[,]" but now the "dominant cases have involved

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79 *See id.* at 46.

80 *See, e.g.*, Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1058 (9th Cir. 2006) (exempting an applicant from having to show that she sought assistance from her home government, if she can "convincingly establish that doing so would have been futile or have subjected [her] to further abuse").

81 *See* Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018).

82 *See* Lister, *supra* note 8.

83 *See id*.

84 *Id.* at 9 (emphasis in original).

85 *Id*.

gender:"[86]

> In such cases we see societies where control over certain classes or groups of women—wives, unmarried daughters, and the like—is largely delegated to particular groups of males—fathers, husbands, sometimes older brothers, and similar figures . . . . Examples here include the enforcement of modesty and chastity, female genital cutting or mutilation, and domestic violence. It is important to see that, in these cases, the state is not merely unable to protect the people subjected to harm, but has made a decision to allow others, typically closely related males, to exercise authority in these areas of life.[87]

In some countries, it may be that the state has implicitly delegated this authority over its female citizens, which would help to show that a country was not only unwilling to protect its females from private gender-based harm but also that it has condoned that violence. In other countries, however, the power shift may be more accurately one of abdication. If a historically machoistic[88] country has new more equitable laws and if its cultural and societal norms are changing, the state may not be actively giving its males some of its authority. Rather, it may be so accustomed to abdicating its power to protect its female citizens that it will continue to fail in this duty. For instance, a government that does not enforce its laws against female genital mutlation or domestic or sexual violence and allows its male citizens and nationals to act with impunity demonstrates that it is unwilling to protect its female citizens and nationals from this type of nongovernment harm.[89] It likewise may be overlooking, and thereby passively condoning, this harm. In these situations, gender-based harm is not merely caused by a

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86 *Id*.

87 *Id.* (internal citations omitted).

88 The following questions may help evaluate whether a country had or has a machoistic culture: Does evidence suggest that males in the country are (or were) preferred over females? Are females viewed as property of their male counterparts? Were they in the past? Are females viewed as inferior? Unlike the factors included below for evaluating whether a state has abdicated or delegated some of its authority, these questions do not directly address actions by the state. However, they may be useful nonetheless for analyzing and framing asylum claims.

89 Lister, *supra* note 8, at 10.

private actor, but rather by a system and culture that enables such violence.[90]

To evaluate whether a government has abdicated or delegated some of its authority, particularly with regard to control over certain persons of one gender by another gender, requires looking at the country's laws, the country conditions, and the individual applicant's facts and weighing the following:

- Whether the country has laws criminalizing domestic or intimate partner violence and femicide or laws promoting gender equality. Not only do these kinds of laws exist, but also what is the history of those laws? How recent are they and in what context were they made? Are there or were there previously laws condoning violence against wives or children? Are there or were there laws of coverture? How recently?
- Whether the home country enforces its laws criminalizing gender-based violence or promoting gender equity. Are reports of domestic or intimate partner violence generally investigated? Are they prosecuted? Are they punished? How often? What portions of the national budget or local budgets are devoted to enforcing these laws? What funding is spent on training police officers, prosecutors, and judges about gender-based violence?
- Whether the government offers resources and support services to survivors of gender-based violence. What services are offered and where? How accessible are these resources and services? For example, are there shelters for survivors or gender-based violence agencies? Where are they located? How many people do they serve? What

90 *See* Matter of A-B-, 27 I. & N. Dec. 316, 318 (A.G. 2018) (providing that the analysis of whether nongovernment harm amounts to persecution for the purposes of asylum needs to evaluate "the government's role in sponsoring or enabling such actions"); *see also* Anker, *supra* note 17 ("In many countries where protection is not available, 'it is the very inattention and inaction by the state in relation to battering that tacitly condones and sustains it as a systematic practice. In other words, the fact that [a] state does not adequately protect women from domestic and sexual violence is both an institutional manifestationof the degraded social status of women and a cause of its perpetuation'") (quoting Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 48 (1998)).

funding is devoted to providing and promoting these services? Was the nongovernmental harm punished in the applicant's case? Was it handled in a similar manner to other similar acts of harm in the country?

- Whether the country has a history of using gender-based violence as part of state-sponsored terrorism.[91] Is there a history of a repressive government? Is there a history of the state using rape and other human rights violations as tactics in war or by paramilitary groups affiliated with the government? How recently?

When the factors in any individual case suggest that the government has abdicated or delegated some of its power or authority to a portion of its population, an asylum applicant will be more able to show that her government was unwilling to protect her from harms by that nongovernment actor.[92] As with showing that a nongovernment actor usurped state power, the applicant must show that she sought help from the government but did not receive it or that doing so would be futile or subject her to more harm.[93] Each asylum case is fact-based and should be decided on a case-by-case basis,[94] but the more these factors weigh in favor of there being a systematic subjugation of a particular gender, the more they demonstrate that the government has abdicated or delegated its authority, and the more futile it will be for a female citizen or national of the country to seek assistance from the government. In

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91 *See* Gilbert, *supra* note 76, at 261.

92 In discussing this project with people, some have questioned whether these factors will lead to everyone from a particular country who have suffered similar harms by nongovrnmental actors being granted asylum (i.e., the floodgates argument). Given how high the burden is to proving and prevailing on an asylum claim beyond the element of when a non-state actor might be the persecutor, I think the chance of opening floodgates is low. Moreover, that numerous people may be eligible for asylum from a particular country is not an issue in evaluating claims based on persecution on account of their race, religion, or nationality, so it should not be when the protected ground is membership in a particular group or when that harm is perpetrated by a non-state actor that the home government is unable or unwilling to control.

93 *See, e.g.*, Rosales Justo v. Sessions, 895 F.3d 154, 166 (1st Cir. 2018) (reversing the BIA's decision that the Immigration Judge had erred in finding that the Guatemalan government was unable to protect the respondent seeking asylum when "evidence in the record [demonstrated] that such a report would be futile or even dangerous"); *see also* Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1058 (9th Cir. 2006).

94 Even *Matter of A-B-* acknowledges that cases are to be assessed a case-by-case basis. *See* Matter of A-B-, 27 I. & N. Dec. 316, 329, 331 (A.G. 2018).

turn, it will be more likely that the person fleeing this harm will be able to show that she merits protection in the form of asylum.

V. Conclusion

Demonstrating eligibility for asylum has always been difficult. The laws for proving some of the most disputed and dynamic elements were made even more complex and complicated with the *Matter of A-B-* opinion issued in the summer of 2018. This opinion raises philosophical questions about whom our asylum system should be protecting and from whom, as well as how our laws might better protect people from contemporary harms. One particularly polemical and philosophically fraught question it raises is when does our asylum law protect those who a fleeing persecution perpetrated by a nongovernment actor? The factors set forth in this Article are meant to give applicants, advocates, and adjudicators an intervening framework for navigating and evaluating systemic issues surrounding persecution by nonstate actors and to give light to when a home government is unable or unwilling to protect its own citizens and nationals from nongovernmental harm.