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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:	)
A-M-R-C- 28 I. & N. Dec. 7 (A.G. 2020)	)

REQUEST TO APPEAR AS AMICUS CURIAE
AND
BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE

REQUEST TO APPEAR AS AMICUS CURIAE

The Immigration Reform Law Institute respectfully requests leave to file this *amicus curiae* brief at the invitation of the Attorney General. *See Matter of A-M-R-C-*, 28 I. & N. Dec. 7 (A.G. 2020).

INTEREST OF AMICUS CURIAE

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including: *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

INTRODUCTION

The Immigration and Nationality Act ("INA") provides the Attorney General ("AG") with discretion to deny an otherwise eligible asylum applicant in cases where "there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. § 1158(b)(2)(A)(iii). The INA further provides that, under what is commonly referred to as the "persecutor bar," the AG *must* deny an otherwise eligible application for asylum in cases where the applicant "[o]rdered, incited, assisted,

or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R. §1208.13(c)(2). These rules reflect Congress's intention that criminal aliens, especially those who persecute others based on a protected category, not be granted discretionary admission into the United States.

Due to the redactions in the underlying opinion from the Board of Immigration Appeals ("BIA"), it is difficult to gauge respondent's specific actions as they relate to the serious nonpolitical crime and persecutor bars to asylum. It is clear from the opinion, however, that respondent was somehow involved in the 1975 military coup d'état (the "1975 coup") that took place in Bangladesh, and that he was later charged and convicted of crimes in connection with that participation. BOARD OF IMMIGRATION APPEALS, *Matter of A-M-R-C- Decision and Order*, https://www.justice.gov/eoir/amicus-briefs, at 12 (stating that respondent was unquestionably involved). Publicly available information regarding the 1975 coup describes a violent ouster during which innocent civilians were murdered—clearly a crime irrespective of any political objectives. These public accounts detail a violent event during which many innocents lost their lives. *See, e.g.* New York Times, *Bangladesh: A Day of Killings*, Aug 23, 1975, https://www.nytimes.com/1975/08/23/archives/bangladesh-coup-a-day-of-killings-account-depicts-how-young.html (last accessed July 21, 2020) (reporting how more than 20 members of the ousted Sheik's family, including women and young children, were murdered by those participating in the coup); New York Times, *Mujib Reported Overthrown and Killed in a Coup by the Bangladesh Military*, August 15, 1975, https://www.nytimes.com/1975/08/15/archives/mujib-reported-overthrown-and-killed-in-a-coup-by-the-bangladesh.html (last accessed July 21, 2020) (describing how Mujib was "the hero of the struggle for independence" and that his own cabinet

members and aides took over by murdering Mujib and his family while they slept in their homes in the middle of the night).

In 1998, the leaders of the coup, including respondent, were charged, tried, and convicted for these murders following the repeal of a law that had previously protected coup participants from prosecution. *See, e.g.,* Inter Press Service Agency, *Bangladesh: Death Verdict for 1975 Coup Leaders Sparks Hope*, http://www.ipsnews.net/1998/11/bangladesh-death-verdict-for-1975-coup-leaders-sparks-hope/ (last accessed July 20, 2020) (discussing the positive reception of the ruling in Bangladesh; "[t]he judgment is largely viewed as a leap forward in establishing the rule of law in the country since the case was conducted in an ordinary law court in public view"). Respondent had already entered the United States at that time—illegally it seems, although that too is unclear from BIA's opinion—and was thus not present for the trial. His conviction *in absentia*, however, satisfied Due Process, and therefore should have been considered in determining respondent's eligibility for asylum.

QUESTIONS PRESENTED

The questions presented in this Amicus Invitation are:

1. Would the delay in my referral of this case cause the respondent to suffer any "prejudice from any inability to prove his defenses," *Costello v. United States*, 365 U.S. 265, 283 (1961), or otherwise prevent me from reviewing the Board's decision in this matter?

2. Did the Board err in determining as a matter of its discretion that there was not probable cause that the respondent had committed a "serious nonpolitical crime"? 8 U.S.C. § 1158(b)(2)(A)(iii). In making such a determination, did the Board correctly conclude that the crime of which the respondent had been convicted in absentia was not "disproportionate to the objective" or "of an atrocious or barbarous character"? *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Op. O.L.C. 1, 23 (1989) (internal citation omitted).

3. Did the Board err in determining that the persecutor bar at 8 C.F.R. § 1208.13(c)(2)(i)(E) did not apply to respondent's asylum claim?

4. Did the Board apply the correct legal standard in concluding that the respondent's in absentia trial suffered from due process problems even though the Department of State had found that the trial had satisfied due process?

ARGUMENT

I. THE BOARD ERRED IN CONCLUDING THAT NO SERIOUS NONPOLITICAL CRIME WAS COMMITTED

Determination of "what constitutes a serious nonpolitical crime is not susceptible of rigid definition." *Deportation Proceedings for Joseph Patrick Thomas Doherty,* 13 Op. O.L.C. 1, 23 (1989). This discretionary bar is applied when an applicant is alleged to have committed a crime that is not political in nature. Whether a crime is not political in nature is determined by asking: (1) whether "genuine political motives existed; (2) [w]hether the act was directed toward modification of the political organization of the state; (3) [w]hether a causal link exists between the crime and political purpose; and; (4) a balance of the political nature of the act with whether it was disproportionate to its objective or of an atrocious or barbarous nature." *Efe v. Ashcroft,* 293 F.3d 899, 905 (5th Cir. 2002). *See also McMullen v. INS*, 788 F.2d 591, 598 (9th Cir. 1986) ("We conclude, therefore, that . . .random acts of violence against . . . ordinary citizens . . . are not sufficiently linked to the[] political objective and, by virtue of their primary targets, so barbarous, atrocious and disproportionate to their political objectives that they constitute serious nonpolitical crimes"). This bar to asylum requires no more than finding a "serious reason to believe" that the applicant committed the crime in question, a standard that is equivalent to probable cause. *McMullen*, 788 F.2d at 598-99. *See also Sindona v. Grant*, 619 F.2d 167, 174 (2d Cir. 1980) (holding that judges do not need to find anything more than a "substantial basis" in the record for prosecution in a foreign court).

Conspiracy and murder are serious nonpolitical crimes for which respondent was tried and convicted *in absentia* prior to his arrival in the United States. As the *McMullen* court explained, these crimes are sufficient to warrant application of this asylum bar because violence and other crimes against civilians do not have a sufficient connection to political objectives and are both barbarous and atrocious. The reprehensible nature of such behavior is why Congress empowered the AG to bar individuals who commit these serious crimes from receiving asylum.

a. BIA erred in not finding probable cause.

Once it is established that a serious nonpolitical crime was committed, it must be determined whether there are serious reasons to believe that the applicant was involved in that crime. The standard for finding serious reasons to believe that an asylum applicant committed a serious nonpolitical crime is a lower standard than either beyond a reasonable doubt or preponderance of the evidence and does not require a finding of direct involvement in the alleged crime. The adjudicator "need only find that there is probable cause to believe" that a serious nonpolitical crime was committed by an asylum applicant. *Doherty*, 13 Op. O.L.C. at 25. *See also Guo Qi Wang v. Holder*, 583 F.3d 86, 90 ("The [s]erious reason to believe standard is the equivalent of probable cause") (internal citation omitted). Probable cause does not require the same evidence a court would need to establish guilt, but it does require more than a good faith belief. *See Henry v. United States*, 361 U.S. 98, 102 (1959) ("Probable cause exists if the facts and circumstances . . . warrant a prudent man in believing that the offense has been committed."); *Carroll v. United States*, 267 U.S. 132, 161 (1925) ("The substance of all definitions is a reasonable ground for belief in guilt"). It is a broad and objective standard that can be met if the crime charged is different from the crime that gave rise to reasonable belief. *District of Columbia v. Wesby*, 138 S.Ct. 577, 584 n.2 (2018) ("Because probable cause is an objective standard, an arrest is lawful if

the officer had probable cause to arrest for any offense"). Probable cause is a determination based on the totality of the circumstances, *Illinois v. Gates*, 462 U.S. 213, 230 (1983), and on probabilities, not bright line tests or rules, *Brinegar v. United States*, 338 U.S. 160, 176 (1949) ("These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."). *See also United States v. Cortez*, 449 U.S. 411, 418 (1981) ("The process does not deal with hard certainties, but with probabilities.").

In this case, despite finding that "it was undisputed that respondent took part in the [1975] military coup," the BIA did not find probable cause to hold respondent responsible for his participation in the serious nonpolitical crimes of conspiracy and murder. BOARD OF IMMIGRATION APPEALS, *Matter of A-M-R-C- Decision and Order*, at 12. Although the facts here are redacted, it is hard to fathom a role "limited" enough to absolve an alien from participation in the serious nonpolitical crimes of conspiracy and murder incident to a coup in which he took part. Evidence was presented sufficient to prove that a crime was committed, and that respondent was involved. *See McMullen*, 788 F.2d at 599 ("BIA need not find as a matter of fact that [an alien] was directly involved in the unprotected acts, either beyond a reasonable doubt or by a preponderance of the evidence"); *Doherty*, 13 Op. O.L.C. at 25-26 ("[M]embership and participation in, aiding of, and assistance . . . is sufficient to constitute probable cause to believe that respondent has committed unprotected criminal acts, and therefore sufficient basis upon which to conclude there are serious reasons to believe that respondent has committed serious nonpolitical crimes"). Respondent's allegedly limited role does not absolve him from responsibility under the law. *McMullen*, 788 F.2d at 599 (stating that the court was "unmoved by the pleas of a terrorist that he should not in any way be held responsible for the acts of his fellows; acts that, by his own admission, he aided . . .

and otherwise abetted and encouraged. . . . [T]he only reasonable interpretation of the exception is that it encompasses those who provide . . . physical and logistical support").

Furthermore, according to various publicly available news sources, the plot was organized from within the government, took place in the middle of the night, and involved the shooting and killing of the Sheik and his family in their home. It stretches credulity to imagine a role limited enough to support respondent's arguments that he is not in any way culpable for the actions of his co-defendants.

b. BIA erred in finding respondent's crime was not disproportionate in objective nor atrocious or barbarous in character.

The Supreme Court has explained that whether the crime in question is a serious nonpolitical one is determined "by weighing the political nature of an act against its common-law or criminal character." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 423-424 (1999) (internal citations omitted). *See also, McMullen*, 788 F.2d at 595 ("[Conduct] should be considered a serious nonpolitical crime if the act is disproportionate to the objective."). In fact, "[e]ven in a case with a clear causal connection, a lack of proportion between means and ends may still render a crime nonpolitical." *Aguirre-Aguirre, supra*, at 432. The serious nature of a crime is evident where the questioned "conduct involved a substantial risk of violence and harm to persons." *Matter of W-E-R-B-,* 27 I. & N. Dec. 795 (B.I.A. 2020). *A fortiori*, murder is generally considered a "serious" crime. *Matter of Ballester-Garcia*, 17 I. & N. Dec. 592, 595 (B.I.A. 1980). Additional considerations in determining the seriousness of a crime include "[t]he carefully plotted manner in which the crime was planned." *Id.* at 595-96.

The specifics of respondent's conviction are not clear from the BIA's redacted opinion. What is clear, however, is that he played a role in the 1975 coup, that innocents were murdered during the coup, and that the court in Bangladesh convicted respondent for his participation in

these events. Here, no "direct causal link between" the murder of the Sheik's family "and its alleged political purpose and object" was shown. *McMullen*, 788 F.2d at 595 (internal citations omitted). The BIA pointed to no "genuine political motive . . . directed toward the modification of the political organization or . . . structure of the state," *id.*, to support its finding that the crimes of which respondent was convicted were not disproportionate in nature nor atrocious or barbarous. There was no evidence presented to explain how or why these murders should be deemed political other than the fact that they were part of a coup d'état, a fact that alone is insufficient to "outweigh their common law character." *Id*. As the BIA itself noted when discussing the IJ's determination, "capital punishment would not be disproportionate to the crime," respondent was convicted of *in absentia.* BOARD OF IMMIGRATION APPEALS, *Matter of A-M-R-C- Decision and Order*, at 9.

Although a coup d'état involves political motives, it does not necessarily follow that any and all actions taken during a coup are consistent with its political objectives. *See, e.g., Singh v. Holder*, 533 F. App'x 712, 714-15 (9th Cir. 2013) ("[The] argument that his crimes were political in nature because they occurred in the context of a military conflict is unavailing"). Where "political dissatisfaction manifest[s] itself disproportionately in . . . assaults on civilians," such actions are considered serious nonpolitical crimes. *Aguirre-Aguirre,* 526 U.S. at 431. Therefore, even an event such as the military coup d'état in Bangladesh could involve serious nonpolitical crimes, especially in this case where the alleged victims are the civilian members of the deposed ruler's family.

By its plain meaning, a coup can be expected to be a violent event. *See, e.g. Britannica.com* (defining a coup d'état as "the sudden *violent* overthrow of an existing government by a small group) (emphasis added), *https://www.britannica.com/topic/coup-detat; Merriam-Webster* (defining coup d'état as "a sudden decisive exercise of force in politics *especially* the *violent*

overthrow or alteration of an existing government by a small group) (emphasis added), *https://www.merriam-webster.com/dictionary/coup%20d%27%C3%A9tat*. *See also Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 513 (B.I.A. 1988) (explaining that "[h]istorically, civil wars or revolutions have always contained strong currents of violence, threats, destruction, intimidation, and indeed ruthlessness"). Such expectation of violence, however, does not translate to an acceptance of all violence that may occur during a coup as an expected aspect of the event; when that violence extends to innocent civilians it can no longer said to be an anticipated or protected part of the coup.

In *Singh v. Holder,* the Ninth Circuit upheld "BIA's conclusion that Singh's participation in the capture and beating of . . . Bangladeshi civilians was disproportionate to the stated political objective." *Singh*, 533 F. App'x at 714-15. The court was not moved by the argument that crimes occurring during a military conflict are inherently political in nature. *Id. See also Efe v. Ashcroft*, 293 F.3d 899, 905-06 (5th Cir. 2002) (rejecting Efe's "argument that the killing was political simply by virtue of the fact that it took place during a political demonstration in which officers beat peaceful protestors."); *Chay-Velasquez v. Ashcroft*, 367 F.3d 751, 753 (8th Cir. 2004) (finding "the criminal nature of the[] acts outweighed the political. . . The fact that the alien targeted police officers during some of the riots rather than civilians did not convert his acts into political offenses.").

In cases where the applicant's actions are in "opposition to government corruption," it must be determined "whether the applicant's actions were directed toward a governing institution, or only against individuals whose corruption was aberrational[.]" *Manzur v. United States Dep't of Homeland Sec.*, 494 F.3d 281, 294 (2d Cir. 2007) (internal citation omitted). Although the actions of a group may have "had an overall political objective . . . [if] its disruptive acts were not directed

at deterring oppressive action of a ruling governmental entity," its actions cannot be protected as a political crime. *Matter of E-A-*, 26 I. & N. Dec. 1, 6 (BIA 2012). It is essential to remember that "[e]xceptions for political crimes w[ere] established to protect acts that are directed at the State itself, and not to protect every criminal act that in some sense contributes to the political goal of those committing it." *McMullen*, 788 F.2d at 597 (internal quotations omitted).

The BIA erred by concentrating its analysis on the political nature of the coup as an absolution for respondent's conduct. Use of atrocious or barbarous means to achieve a political objective cannot lead to a finding that "the political aspect of [an] offense . . . predominate[s] over its criminal character." *Aguirre-Aguirre*, 526 U.S. at 430. Violence and other crimes against civilians during a coup d'état or other political event are "not sufficiently linked to the[] political objective, and, by virtue of their primary targets, [are] so barbarous, atrocious and disproportionate to their political objectives that they constitute serious nonpolitical crimes." *McMullen* 788 F.2d at 598. *See also Singh*, 533 F. App'x at 714 (finding "targeting and beating of civilians" atrocious).

It is important to note, however, that a crime need not be atrocious in order to be a serious nonpolitical crime. This is because, "[a]s a practical matter, if atrocious acts were deemed a necessary element of all serious nonpolitical crimes, the Attorney General would have severe restrictions upon her power to deport aliens who had engaged in serious, though not atrocious forms of criminal activity." *Aguirre-Aguirre*, 526 U.S. at 430. Rather, the AG is meant to have discretion to consider the conduct of asylum applicants when determining whether to grant such applications.

c. The BIA erred when it did not consider respondent's *in absentia* charge, trial, and conviction as a serious reason to believe he committed a serious nonpolitical crime.

As will be further discussed, the BIA's decision to accord no weight to respondent's *in absentia* conviction was incorrect. In fact, because the serious reasons standard is equivalent to probable cause, sufficient support can include an arrest, evidence from a police investigation, eyewitness testimony, and warrants. *See, e.g., Khouzam v. Ashcroft*, 361 F.3d 161, 166 (2d Cir. 2004) (finding fingerprints, eyewitness evidence, and physical evidence, as well as evidence that suggested motive, sufficient); *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1306 (2003) (noting record before IJ included warrant from Interpol); *Pronsivakulchai v. Holder*, 646 F.3d 1019, 1022 (7th Cir. 2011) (finding police testimony implicating respondent, arrest warrants, and respondent's own admissions sufficient). Serious reasons do not require an admission or affirmation of participation by the asylum applicant. *Silva-Pereira v. Lynch*, 827 F.3d 1176, 1189 (9th Cir. 2016) (holding that the probable cause "standard can be met without an explicit admission of guilt"). In fact, all the government need do to meet its burden is "present[] some evidence from which a reasonable factfinder could conclude that one or more grounds for mandatory denial of the application may apply." *Matter of W-E-R-B-,* 27 I. & N. Dec. 795 (B.I.A. 2020) (internal quotations omitted).

Despite the redaction of most of the facts, it is clear that there was sufficient evidence to find that the crimes respondent was charged with were committed during the 1975 coup and that there were serious reasons to believe respondent played some role in the events. The alleged trial problems—recommendation against prosecution, weak evidentiary case, witness tampering—do not bear on the pre-trial probable cause analysis. The procedural infirmities that may or may not have existed cannot erase the fact that there is evidence connecting respondent to the crimes. *See Silva-Pereira v. Lynch*, 827 F.3d 1176, 1189 (9th Cir. 2016) (explaining that "the Guatemalan

indictment provides strong reason to believe that Silva was involved"). Finally, because evidence of conviction is a higher standard than what is required, *see Matter of Ballester-Garcia*, 17 I. & N. Dec. 592, 595 (BIA 1980) ("[W}e need not necessarily determine whether an alien has actually committed a serious nonpolitical crime: it is enough to find there are 'serious reasons for considering' that he has committed such a crime"), the BIA erred by ignoring the charges and conviction proceedings in Bangladesh.

II. THE BOARD ERRED IN DETERMINING THAT THE PERSECUTOR BAR DID NOT APPLY

Applications for asylum filed before April 1, 1997, are subject to a mandatory persecutor bar, which prohibits a grant of asylum where the applicant "ordered, incited, *assisted or otherwise participated* in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 C.F.R. § 1208.13(c)(2)(i)(E)(ii) (emphasis added). In the event of such a finding, the burden is on the alien to "prov[e] by a preponderance of the evidence that he or she did not so act." *Id.*

The persecutor bar was enacted as part of the Refugee Act of 1980, § 201(a), 94 Stat. 102-103, 8 U.S.C. 1101(a)(42), through which Congress implemented certain treaty obligations relating to refugees. *See* UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES, July 28, 1951, 189 U.N.T.S. 150, reprinted in 19 U.S.T. 6259, and the 1967 UNITED NATIONS PROTOCOL RELATING TO THE STATUS OF REFUGEES, January 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (requiring members not to "expel or return ('refouler') a refugee . . . where his life or freedom would be threatened on account of" a protected ground). The persecutor bar was included to reflect the treaty's exceptions to these nonrefoulement obligations allowing countries to refuse asylum to certain applicants. H.R. REP. NO. 96-608, at 18 (explaining that the persecutor bar is

based on "exceptions . . . provided in the Conventions relating to aliens who have themselves participated in persecution").

There are four recognized factors that should be considered when reviewing whether the persecutor bar applies to a particular applicant for asylum:

> (1) whether the alien was involved in acts of persecution by ordering, inciting, or actively carrying out the acts; (2) whether there is a nexus between the persecution and a protected ground; (3) whether the alien's actions, if not outright involvement under the first factor, amount to assistance or participation in persecution; and (4) whether the alien was culpable, i.e., whether [he] had sufficient knowledge that [his] actions might assist in persecution.

Wang v. Lynch, 662 F. App'x 94, 96 (2d Cir. 2016) (internal quotations omitted). When the applicant is accused of assisting in persecution rather than directly conducting persecution, the court must conduct "a particularized evaluation of two separate requirements: personal involvement and purposeful assistance." *Budiono v. Lynch*, 837 F.3d 1042, 1048 (9th Cir. 2016) (internal citation omitted).

Although the terms of the statute "indicate active involvement," *Haddam v. Holder*, 547 F. App'x 306, 310 (4th Cir. 2013), they do not require the applicant be the direct persecutor. An applicant who has otherwise participated in an event can be held responsible for his knowledge of the persecutory acts of his peers. *See Castañeda-Castillo v. Holder,* 638 F.3d 354, 358-59 (1st Cir. 2011) (holding that an "asylum seeker [who] ha[s] prior or contemporaneous knowledge that the effect of his or her actions is to assist in persecution" will be excluded from asylum eligibility) (internal quotations omitted). *See also Balachova v. Mukasey*, 547 F.3d 374, 385 (2d Cir. 2008) ("[N]otwithstanding the fact that the persecutor bar does not include a voluntariness requirement, the alien must have sufficient knowledge that his or her actions may assist in persecution to make those actions culpable."). In fact, "the persecutor bar applies to an alien who knowingly and

willingly aided in persecution," even where he "did so without a persecutory motivation." *Alvarado v. Whitaker,* 914 F.3d 8, 13 (1st Cir. 2019). The persecutor bar can also apply to "an alien with command responsibility [who] knew or should have known that his subordinates committed unlawful acts . . . and failed to prove that he took reasonable measures to prevent or stop such acts or investigate in a genuine effort to punish the perpetrators." *Matter of M--B--C--*, 27 I. & N. Dec. 31, 36 (BIA 2017) (internal citation omitted). The persecutor bar should be applied in cases where the "applicant [wa]s not a mere bystander . . . and was not simply a group member who was absent and disengaged . . . [but where h]is involvement and participation in the group's criminal acts" can be said to have "materially contributed" to the persecutory acts of his cohorts/co-conspirators. *Matter of E-A-,* 26 I. & N. Dec. 1, 7 (BIA 2012).

A court considering an applicant's culpability should look to the "intent, knowledge, and the timing of the individual's alleged assistance." *Haddam*, 547 F. App'x at 312. As the *Haddam* court explained, even "after-the-fact behavior might rise to the level of assistance. Examples include an individual who knowingly . . . helps a murderer evade being discovered." *Id*. This provides the AG broad discretion to exclude aliens who claim an inactive role in the crime in question. In fact, it is even possible to apply the asylum bar to non-physical persecution. *Higuit v. Gonzales*, 433 F.3d 417 (2006) (holding that alien's conduct as an intelligence operative in the Philippines was sufficient to warrant application of the persecutor bar).

Congress intended the persecutor bar to be broadly applied. Due to its plenary powers with respect to immigration, *see Boutilier v. INS,* 387 U.S. 118, 123 (1967) ("It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden"), Congress has established immigration rules based on its determinations of "the best interest of the government." *Brice v*

Pickett, 515 F.2d 153, 154 (9th Cir. 1975) (internal citation omitted). Congress has made clear, through its enactment of statutory bars to asylum, that there are certain persons whose presence is not welcome here and who the government has the power to deport or otherwise restrict. 8 C.F.R. § 1208.13(c)(2)(i) (establishing mandatory denials for applicants for certain behaviors, including terrorist activity, serious crimes, persecution, and other national security threats). *See also, Kleindienst v. Mandel,* 408 U.S. 753, 761-62, (1972) ("We thus have almost continuous attention on the part of Congress since 1875 to the problems of immigration and of excludability of certain defined classes of aliens. The pattern generally has been one of increasing control with particular attention, for almost 70 years now").

In fact, Congress's intent to exclude direct and indirect participants from a grant of asylum is evident through the inclusion of the persecutor bar in immigration legislation even before international obligations arose under the above-mentioned U.N. treaties. For example, after World War II, Congress passed the Displaced Persons Act of 1948 ("DPA"), 62 Stat. 1009, to aid European refugees while specifically excluding those who assisted the Nazis in persecution from eligibility for this new refugee status. The statute was amended in 1950 to include "any person who advocated or assisted in the persecution of any person because of race, religion, or national origin." 64 Stat. 227. Subsequent enactments, *see, e.g.,* 8 U.S.C. §§ 1182(a)(3)(E) (further excluding those *associated* with Nazis who had also "ordered, incited, assisted, or otherwise participated in the persecution of a person because of race, religion, national origin, or political opinion"), reflect the same intent of Congress to exclude certain individuals from the United States. As BIA itself has explained,

> Case law teaches that (1) these terms are to be given broad application; (2) they do not require direct personal involvement in the acts of persecution; (3) it is highly relevant whether the alien served in a leadership role in the particular organization; and (4) in

> certain circumstances statements of encouragement alone can suffice. It is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies.

In re A---H--- , 23 I. & N. Dec. 774, 784-785 (B.I.A. January 26, 2005).

Although respondent's direct involvement here is unclear due to redaction, what is clear is that his allegedly limited participation does not preclude the application of the persecutor bar to his case. In accepting "respondent's claim that he was not personally involved in the deaths . . . and . . . had no advance knowledge that the killings of government officials or their family members were planned or expected," the BIA ignored other relevant conduct, such as respondent's actions following the murders and his other support for the coup and applied the persecutor bar narrowly rather than broadly. BOARD OF IMMIGRATION APPEALS, *Matter of A-M-R-C- Decision and Order*, at 10. Its decision goes against established law and the intent behind the discretionary asylum bars at issue in this case.

III. THE BOARD DID NOT APPLY THE CORRECT LEGAL STANDARD WITH RESPECT TO THE ALIEN'S *IN ABSENTIA* TRIAL & DUE PROCESS CLAIMS

The BIA should have deferred to the State Department's determinations regarding the court system in Bangladesh, because the President, through the State Department, is primarily responsible for diplomatic and other foreign relations. *See e.g., First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) ("[T]his Court has recognized the primacy of the Executive in the conduct of foreign relations"). It is important that the BIA not delve into the procedures of foreign courts because even in countries where it is alleged to be "virtually impossible to get a fair trial . . . [some] justice can be had." *Silva-Pereira*, 827 F.3d at 1188. For example, when co-defendants are tried and acquitted, it can be concluded that justice was served. *Id.* (explaining that justice was properly served in Silva's case because his mother-in-law and wife

were acquitted of most charges against the three of them). Finally, it is essential to remember that federal law does not require "that the foreign proceedings . . . conform to American concepts of due process." *Gallina v. Fraser*, 278 F.2d 77, 78 (2d Cir. 1960).

Evidence cited by the BIA indicates that Bangladesh was a country going through instability and upheaval for several years, and the Department of State determined that the courts that conducted respondent's trial, though not up to American standards, provided sufficient process to respondent. News sources also supported public opinion in favor of the conviction of respondent and his co-defendants. *See* Inter Press Service Agency, *Bangladesh: Death Verdict for 1975 Coup Leaders Sparks Hope*, http://www.ipsnews.net/1998/11/bangladesh-death-verdict-for-1975-coup-leaders-sparks-hope/ (last accessed July 20, 2020) ("The judgment is largely viewed as a leap forward in establishing the rule of law in the country since the case was conducted in an ordinary law court in public view"). Because of the Department of State's principal role in the conduct of diplomatic relations, the BIA should have deferred to the Department's determination that respondent's trial *in absentia* satisfied due process requirements.

The BIA erroneously relied on the fact that the probative value of an applicant's *in absentia* conviction can be rebutted by a showing of "sufficiently compelling" evidence in derogation of its "fundamental fairness." *Esposito v. INS*, 936 F.2d 911, 914 (7th Cir. 1991). *Esposito* explains that where the foreign "criminal justice system is so lacking in due process protections that the BIA ought not to have considered . . . *in absentia* convictions in the waiver calculus," the conviction cannot be considered. *Id*. at 915. Here, however, respondent's self-serving allegations of procedural infirmities did not reflect conditions as reported by the State Department. They therefore should not be considered as sufficient evidence to bar the BIA from weighing the trial *in absentia*.

The BIA's reliance on *Esposito* is also misplaced because it discusses *in absentia* convictions in terms of *extradition* cases and not applications for asylum. Asylum is a *discretionary* grant of relief, 8 U.S.C. § 1158(b)(1)(A) (providing that the AG "*may* grant asylum"); *see also E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 849 (9th Cir. 2020) (explaining that the AG has "broad discretion to deny asylum to aliens who are eligible for asylum"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987) ("[A]n alien who satisfies the applicable standard . . . does not have a right to remain in the United States; he or she is simply eligible for asylum, if the Attorney General, in his discretion, chooses to grant it."). Aliens who are seeking initial entry or who have entered illegally and are seeking relief are entitled only to what due process Congress has deemed appropriate. *See, e.g., Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1963-64 (2020) ("[T]he Court long ago held that Congress is entitled to set the conditions for an alien's lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause.") (internal citations omitted); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 688 (6th Cir. 2002) ("Whatever process the government affords them, no matter how minimal, illusory, or secret, is the due process of law, beyond the scope of judicial review.") (internal citations omitted). Where there is evidence connecting respondent to certain undesirable acts, the AG is within his authority to deny the asylum application.

It is well established that an alien's "contact with the criminal justice system," *Matter of Thomas*, 21 I. & N. Dec. 20 (BIA 1995), is relevant to his application for discretionary immigration relief. *See also Esposito v. INS*, 936 F.2d 911, 915 (7th Cir. 1991) ("[A]t the very least, *in absentia* convictions properly constitute probable cause to believe that the petitioner is guilty of the crimes in question"). In fact, the BIA "does not have to wait for the disposition of pending criminal

charges," *Parcham v. INS*, 769 F.2d 1001, 1005 n.2 (4th Cir. 1985), to consider such charges in connection with an application for relief. Courts have even considered charges a respondent has been acquitted of, charges that have been dismissed, and charges that have been expunged. *See, e.g., Villanueva-Franco v. INS*, 802 F.2d 327 (9th Cir. 1986) ("[D]enial of relief was premised on . . . past criminal acts"); *White v. INS*, 17 F.3d 475 (1st Cir. 1994) (holding that the B.I.A. properly relied on evidence of alien's conduct in connection with charges filed against him); *Delgado-Chavez v. Immigration & Naturalization Serv.*, 765 F.2d 868, 869 (9th Cir. 1985) (holding that the AG may consider convictions and other conduct when exercising discretion); *Parcham v. Immigration & Naturalization Serv.*, 769 F.2d 1001, 1005 (4th Cir. 1985) ("Evidence of an alien's conduct, without a conviction, may be considered in denying the discretionary relief"). Therefore, regardless of whether there were issues with his conviction, the evidence presented, which was sufficient for the BIA to determine respondent did in fact participate in the 1975 coup, should also be sufficient to be considered in terms of discretionary relief.

Finally, it should be noted that the *Esposito* court confirmed that it was not proper to "retry the particulars of [a] case" conducted in another country, in that case Italy. *Esposito*, 936 F.2d at 915. Here, DHS presented evidence in the form of letters from the State Department that "demonstrated that the respondent received due process . . . [and] the prosecution presented credible evidence that the applicant participated in the conspiracy that led to these multiple, politically motivated murders." BOARD OF IMMIGRATION APPEALS, *Matter of A-M-R-C- Decision and Order*, at 6. Just as the court is not empowered to retry respondent's *in absentia* conviction, the BIA is not empowered to disregard the findings of the State Department regarding due process in a foreign country.

CONCLUSION

For the foregoing reasons, the BIA's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on September 29, 2020, I caused to be submitted the foregoing Request to Appear and *amicus curiae* brief, with three copies, to the Attorney General at the following address:

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