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From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents

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I. INTRODUCTION

In her seminal 1951 work *The Origins of Totalitarianism*, the political philosopher Hannah Arendt examined historical developments in Europe during the period between the two World Wars and declared that "the transformation of the state from an instrument of the law into an instrument of the nation had been completed."[1] While Arendt focused on threats to individual and minority rights posed by the repressive "nation-state," her critique also identified the complicity of an international legal system that accorded undue deference to sovereign prerogative.[2] The collapse of the League of Nations, the ascendancy of the Nazi Party in Germany, and the ravages of the Holocaust in the 1930s and 1940s graphically demonstrate the legal, political and human costs of totalitarian nationalism. Within this historical framework, the brutal tendencies of fascism are exposed: the totalitarian state dedicates its leadership, its institutions, and particularly its security forces to the annihilation of those who do not belong to the "nation." But is fascism, conceived as state-centered ultranationalism, the ultimate threat to human rights, or are non-state-sponsored abuses of human dignity of comparable concern?

In the 1950s, in the aftermath of World War II and the Nuremberg Trials, it is perhaps not surprising that for Arendt and other scholars and international observers, the all-powerful and repressive nation-state was the archetypal abuser of human rights. Nor is it incidental that Nuremberg was the catalyst to a flowering of international organizations and treaties that promoted a vision of individual rights as limitations on state power. Nevertheless, the latter half of the twentieth century has been characterized by a proliferation of centripetal and centrifugal forces in global affairs, both of which have challenged prevailing concepts of state sovereignty and national hegemony, with profound and various impacts on human rights.

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1. Hannah Arendt, The Origins of Totalitarianism 275 (World Publishing Company 1973) (1951).

2. Arendt points out that the Minority Treaties, adopted within the framework of the League of Nations, ironically may have served to marginalize national origin minorities within a particular state by perpetuating the view that the state existed to protect the members of one particular national group. *See* Arendt, *supra* note 1, at 269–90, 282 ("[M]inority treaties did not necessarily offer protection but could also serve as an instrument to single out certain groups for eventual expulsion.").

Forces of convergence have tended to create international, supra-national, and regional institutions, such as the United Nations, the European Union, and the Organization of American States,[3] each with its own human rights enforcement mechanisms applicable to member states. However, countervailing forces have tended to split pre-existing states into sub-national entities: whether they be new states, aspiring states, or conflicted states. Examples of such devolutionary trends include the breakup of the Soviet Union, the creation of the Palestinian Authority, and recent or ongoing civil strife in the Balkans, Afghanistan, Somalia, Sierra Leone, and the Democratic Republic of the Congo (the DRC). The various international human rights organizations would appear to face special challenges in responding to human rights abuses at the sub-national level, especially when internal conflict compromises the governing institutions of member states.

As a result of centrifugal or devolutionary global trends in recent decades, individual and group rights are increasingly threatened by non-state agents,[4] whether death squads, paramilitary forces, insurgent armies, organized criminal entities, family-based political cliques, clans, or sub-clans.[5] Death squads constitute a category of non-state agents that may be active in time of peace or war. Typically, a death squad operates with at least tacit government approval under

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3. In addition to the Organization of American States, two other regional organizations with comparable treaty-based human rights mechanisms are the Council of Europe and the Organization of African Unity. *See* Richard B. Lillich & Hurst Hannum, International Human Rights: Problems of Law, Policy, and Practice 684–766, 826–32 (3d ed., Little, Brown and Company 1995).

4. Over the past four decades, international law scholars increasingly have been concerned with the phenomenon of non-state agents of persecution, starting with Atle Grahl-Madsen and Guy S. Goodwin-Gill in their influential treatises on international refugee law published in 1966 and 1983, respectively. *See* Atle Grahl-Madsen, The Status of Refugees in International Law (A.W. Sijthoff-Leyden 1966); Guy S. Goodwin-Gill, The Refugee in International Law (1st ed., Oxford Univ. Press 1983). The focus on non-state agents has continued through the 1990s, with James Hathaway's comparative text on refugee law published in 1991, and the second edition of Goodwin-Gill's treatise published in 1996. James C. Hathaway, The Law of Refugee Status (Butterworths Canada Ltd. 1991). *See infra* notes 61–65 and accompanying text.

5. A particularly challenging non-state agent from the perspective of international human rights law is the individual who brutalizes members of his or her own family or community in a protection vacuum created by implicit tolerance or calculated neglect on the part of the state. See *infra* note 94 for an overview of barriers under U.S. law to the effective protection of refugees who fear domestic violence.

an unofficial policy of widespread repression—a so-called "dirty war," in which both state and non-state agents carry out disappearances, torture, and arbitrary executions against actual and perceived members of the popular opposition movement. In contrast, the activities of other non-state agents, such as insurgent forces, are limited to times of civil war or acknowledged internal armed conflict. When rebel soldiers commit human rights abuses in the context of an insurgency, the primary victims will often be individuals they believe to be associated with or supportive of the state. Finally, an even more limited subset of non-state agents including, but not limited to, clan-based political cliques commit human rights abuses in what might be termed a governance vacuum. This latter context, sometimes referred to as a "failed state," comes about when the formal administrative structures of the government cease to function as a result of internal armed conflict.[6]

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6. "Failed states" have been defined as "states which are *incapable* of protecting individuals within their territories," and should be contrasted with those that are unwilling, though able, to provide such protection, or those which actively deny protection through affirmative violations of human rights. Karen Musalo, Jennifer Moore & Richard A. Boswell, Refugee Law and Policy 988 & n.4 (Carolina Acad. Press 1997). The phenomenon of state dysfunction has been addressed by international human rights advocates, civil servants and scholars with particular intensity over the course of the past decade. *See* Bertram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 Stan. J. Int'l L. 347, 401 & n.239 (1998); Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 Cornell Int'l L.J. 301, 306 (1995); Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, Foreign Policy, Winter 1992–93, at 3; *see also* Julie Mertus, *The State and the Post-Cold War Refugee Regime: New Models, New Questions*, 20 Mich. J. Int'l L. 59, 71–72 (1999) and *infra* text accompanying note 65.

Sadako Ogata, the United Nations High Commissioner for Refugees, spoke in 1993 of the compelling need for international protection of individuals displaced by conflicts characterized by the "destruction of state power" or "statehood degenerat[ion]." Sadako Ogata, United Nations High Commissioner for Refugees, Address at the Norwegian Government Roundtable Discussion on United Nations Human Rights Protection for Internally Displaced Persons (February 1993), *excerpted in* Musalo Moore & Boswell, *supra* note 6, at 987. *See also* Goodwin-Gill, *supra* note 4, at 76 (describing Somalia as a conflict in which "competing clans, sub-clans and factions compete amongst themselves, but none emerges as an authority in fact"); Pierre Hassner, *From War and Peace to Violence and Intervention: Permanent Moral Dilemmas Under Changing Political and Technological Conditions*, *in* Hard Choices: Moral Dilemmas in Humanitarian Intervention 11 (Jonathan Moore ed., Rowman & Littlefield Publishers, Inc. 1998) (commenting on the ascendance of "domestic and transnational anarchy" in contemporary global affairs).

Thus, the contexts in which non-state agents may violate human rights can be thought of as concentric circles of decreasing size: (1) time of war or peace; (2) time of internal conflict; and (3) state dysfunction. Moreover, the three contexts differ with respect to the essential relationship between the non-state agents and the state. In the first, and potentially broadest, context, while non-state agents may act in opposition to the state, they also may be *tolerated* by the state or even serve state interests, as with death squads in the context of a dirty war. In the second, more limited, situation of civil war, non-state agents will often be engaged in armed struggle *against* the state. And in the third, most limited, context of the failed state, non-state agents will tend to fight *other* non-state agents. An essential commonality is that claims to protection from violations of human dignity are raised in all three settings.

As a result of the rising global incidence of both internal conflict and state dysfunction throughout the 1990s, popular repression by an all-powerful state is no longer the primary context or metaphor for human rights abuses. Countries embroiled in armed conflict, including failed states, also set the stage for violations of human dignity. Thus, overly "successful" and brutally repressive states—such as Chile under Pinochet or Cambodia under Pol Pot—must share the spotlight with equally violent and conflicted states such as Yugoslavia under Milosovic and the DRC under Kabila, both of which recently have faced armed opposition movements. Similarly, conflicted yet still-functional states must divide global attention with "unsuccessful" or failed states such as parts of Somalia under General Mohammed Farah Aideed and regions of Sierra Leone, controlled until last summer's peace accord by Foday Sankoh's Revolutionary United Front.

Nazi Germany was the archetype of institutionalized state repression at the center of Hannah Arendt's moral and historical analysis of "totalitarianism."[7] Somalia might well be the new archetype for a contrasting tendency toward *partialitarianism*. If it is somewhat premature to conclude that the abuses of consolidated state power have been eclipsed by the abuses of failed states spinning out of con-

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7. *See* Arendt, *supra* note 1, at viii (in confronting "the totalitarian attempt at global conquest and total domination," Arendt demands that her readers "face and understand the outrageous fact that . . . the Jewish question and antisemitism could become the catalytic agent for first the Nazi movement, then a world war, and finally the establishment of death factories . . . .").

trol, it is nonetheless appropriate to watch for the signs of this ascendant partialitarianism. Certainly guerrilla insurgencies and warlords, as well as autocrats, are responsible for significant waves of human rights abuses at the dawn of the twenty-first century. And to the victims of widespread brutality, it would appear to matter little whether their oppressors are heads of state, rebel commanders, or clan leaders.

Despite broad recognition of abuses attributable to non-state agents, internal conflict, and failed states, international human rights law is scrambling to keep up with the changing context of repression, persecution, and brutality throughout the world. To a still-significant degree, the state is seen as the abuser *par excellence* of individual and group rights.[8] More problematically, state agency has, in certain limited contexts, been deemed essential to a successful claim to international protection from such violations.[9] Defining human dignity solely in terms of freedom from state-sponsored or state-tolerated abuses acts as a barrier to the fullest possible promotion, enforcement, and enjoyment of human rights in all contexts. A state-centered definition of human rights violations also has the potential to create global second-class citizens due to the non-state character of their abusers.

In the face of both convergent and devolutionary trends in world politics and economics, international law is recognizing that state identity and "nationalism" are dynamic concepts that embrace

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8. Acccording to the German federal constitutional court, political persecution under the German federal constitution is basically persecution by the state. *See* BVefGE 80, 315 [federal constitutional court], decision of July 10, 1988, 2 BvR 502/86, 1000/86, 961/86 (discussing refugee status of Sri Lankan Tamils); Grundgesetz [federal constitution] [GG] art. 16a(1) (F.R.G.) (article 16a(1), formerly art. 16(2)(2), provides that "the politically persecuted enjoy the right to asylum"; amendments to this article substantially restrict the constitutional right to political asylum, *see* Gesetz zur Änderung des Grundgesetzes of June 28, 1993 (BGBl I 1002)).

9. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1(1), 1465 U.N.T.S. 85 (1984) (entered into force June 26, 1987) [hereinafter Torture Convention] (defining torture as certain forms of suffering inflicted by or with the acquiescence of a public official); *see also* BVerfGE 80, 315 [federal constitutional court], decision of July 10, 1988, 2 BvR 502/86, 1000/86, 961/86 (Sri Lankan Tamil Case); *infra* note 23 and accompanying text. *But see* International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 5(1), 999 U.N.T.S. 171 [hereinafter ICCPR] (declaring that civil and political rights may not be denied by states, groups, or individuals); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 2(1)(d), 660 U.N.T.S. 195 [hereinafter CERD] (declaring that states must eradicate discrimination by any persons or groups).

numerous political arrangements characterized by distinct relationships between the state and other entities and individuals. Such relationships increasingly include those in which the state itself is not the central player. Thus, if nationalism denotes a spectrum of differing tendencies, from supra-nationalism to sub-nationalism, and from state protection to state repression to state dysfunction, we are left with a fundamental question. How can international human rights law effectively respond to the current realities of state power, in all its various forms and capacities for abuse and neglect?

This Article identifies and explores some of the contemporary challenges posed by non-state violators of human rights in the context of evolving norms of public international law. The inquiry begins in Section II with an overview of modern human rights and the protections it accords individuals, including those victimized by non-state agents. This section concludes with the identification of asylum and non-extradition as particularly effective forms of relief. Against this backdrop, Section III turns to international refugee law and practice. The analysis contrasts the international definition of the refugee, which is neutral as to the agent of persecution, with restrictive trends in both European and U.S. asylum jurisprudence, which limit to varying extents the full enjoyment of international protection by refugees who fear "unofficial" persecution. Section IV focuses on contrasting interpretations by regional human rights bodies that fully recognize unofficial human rights abuses as a basis for international protection.[10] Finally, the conclusion calls for the fuller realization of an international legal regime capable of protecting victims from repressive, conflicted, and failed states alike.

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10. While this Article focuses on expanding protections against abuses by non-state agents under international human rights and refugee law, analogous developments can be seen in international humanitarian law as well. *See* Brown, *supra* note 6 (arguing that protections against grave breaches under the 1949 Geneva Conventions should apply to insurgent forces and national armies in the context of civil wars, as well as to international armed conflicts). The parallel trends in human rights, refugee, and humanitarian law toward fuller protections for victims of unofficial abuses are worthy of more thorough analysis.

II. AN OVERVIEW OF MODERN HUMAN RIGHTS AND REFUGEE LAW

A. Individuals as Subjects of International Law

To many scholars, the era of modern human rights law commenced in 1945 with the birth of the United Nations and a transformative vision of human beings as ends in themselves. Individuals, once considered mere objects of sovereign will, were deemed subjects of international law with transcendent claims to protection from state tyranny.[11] To other analysts, the "state-centric" view of pre-1945 international law has been vastly overstated, and overlooks the substantial precursors to modern human rights law, including the norm of humanitarian intervention, the recognition of slavery as a crime against humanity, and rules protecting individuals in time of war.[12]

Without denying or reconciling the vital differences between state-centered and individualist models of international law in the period prior to the United Nations, broader accord can perhaps be found in the following characterization of international legal develop-

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11. *See* Louis Henkin et al., International Law: Cases and Materials 597 (3d ed., West Publishing Co. 1993) ("Real, full-blown internationalization of human rights came in the wake of Hitler and World War II."); *see also* Mark Janis, An Introduction to International Law 249 (3d. ed., Aspen Law and Business 1999) ("[I]ndividuals . . . are now to be properly considered subjects . . . of public international law.").

Janis makes the important point that the traditional law of nations *was* applicable to both individuals and states. However, by 1789 and the publication of Jeremy Bentham's Introduction to the Principles of Morals and Legislation, individuals had been relegated to a secondary status under the newly coined term "international law." *Id.* at 235–36. Consistent with the positivist conception that international norms reflect the will of sovereign states, public international law was defined as "law for states alone" for one hundred and fifty years. *Id.* at 234. *See also* Lillich & Hannum, *supra* note 3, at 5 (explaining that after the Second World War "the individual now becomes a subject of international law . . . ."); *id.* at 35 (exploring early antecedents to modern human rights law).

It was not until 1945, with the drafting of the Charter of the United Nations and the convening of the International Military Tribunal at Nuremberg, that modern international law recognized "international legal rights that individuals could assert against states." Janis, *supra*, at 245–48.

12. *See* Jordan Paust, *Individual Criminal Responsibility for Human Rights Atrocities and Sanctions Strategies*, 33 Tex. Int'l L.J. 631, 633–35 & nn.17, 22, 24 (1998) (reviewing Steven R. Ratner & Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy (Clarendon Press 1997)); *see also* Lillich & Hannum, *supra* note 3, at 34.

ments in the mid-twentieth century. A prodigious body of customary human rights norms dating back several centuries reached a certain critical mass after World War II, resulting in a powerful crystallization period in international law, marked by the proliferation of conventional human rights norms protecting individuals from repression.

The international community has drafted numerous multilateral human rights treaties that have been adopted and entered into force in the four decades following the creation of the United Nations. The recognition of the inherent dignity and legal status of human beings under international law is enshrined in both the United Nations Charter[13] and the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948.[14] The international legal personality of individuals is also the bedrock of more than ten major human rights conventions that have been adopted by international and regional organizations over the past fifty years. Five of these treaties focus on specific substantive areas of human rights, including civil and political rights; economic, social, and cultural rights; freedom from racial discrimination; the elimination of gender-based discrimination; and the prohibition against torture and inhuman treatment.[15] Three other conventions promote and protect human rights in three particular regions of the world—Europe, the Americas,

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13. *See* U.N. Charter art. 1, para. 3 ("Purposes of the United Nations [include] . . . promoting and encouraging respect for Human Rights and for Fundamental Freedoms . . . .").

14. *See* Universal Declaration of Human Rights, preamble, para. 1, G.A. Res. 2171A (III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) ("[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.").

15. *See* ICCPR, *supra* note 9. The ICCPR recognizes "that these rights derive from *the inherent dignity of the human person* . . . ." *Id.*, preamble (emphasis added). International Convention on Economic, Social and Cultural Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 3 [hereinafter ICESCR]. The ICESCR, like the ICCPR, recognizes that human rights flow from "*the inherent dignity of the human person* . . . ." *Id.*, preamble (emphasis added). CERD, *supra* note 9. The CERD considers that "*all human beings are equal before the law* and are entitled to equal protection of the law against any discrimination . . . ." *Id.*, preamble (emphasis added). Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1429 U.N.T.S. 13 [hereinafter CEDAW]. The CEDAW emphasizes "the dignity and worth of the human person and . . . *the equal rights of men and women* . . . ." *Id.*, preamble (emphasis added). Torture Convention, *supra* note 9. The Torture Convention recognizes "*the inherent dignity of the human person*" and reiterates the ICCPR provision that "no one shall be subjected to torture . . . ." *Id.*, preamble (citing ICCPR, art. 7) (emphasis added).

and Africa.[16] Finally, three additional treaties define protections for particularly vulnerable groups of individuals—children, refugees, and civilians in time of war.[17]

In 1953, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter European Convention) became the first major human rights treaty to enter into force that included significant enforcement mechanisms for individuals.[18] The European Convention empowers an individual to bring claims against a government for human rights violations before the European Commission and Court of Human Rights, assuming the relevant state has made the necessary declarations under the provisions of the

16. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, Europ. T.S. No. 5. [hereinafter European Convention]. The European Convention reaffirms a commitment to "*those Fundamental Freedoms which are the foundation of justice and peace* in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights on which they depend . . . ." *Id.*, preamble (emphasis added). American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S 123 [hereinafter American Convention]. The American Convention reaffirms a regional commitment to "consolidate . . . a system of personal liberty and social justice based on *respect for the essential rights of man* . . . ." *Id.*, preamble (emphasis added). African Charter on Human and Peoples' Rights, *adopted* June 17, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5 (1981) [hereinafter Banjul Charter]. The Banjul Charter recognizes that "*fundamental human rights stem from the attributes of human beings*, which justifies their international protection . . . ." *Id.*, preamble (emphasis added).

17. *See* Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 53 [hereinafter CRC]. The CRC recognizes "*the inherent dignity . . . of all members of the human family* . . . [and] that the child should be fully prepared to live an individual life in society . . . ." *Id.*, preamble (emphasis added). Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The Refugee Convention upholds "the principle that human beings shall enjoy fundamental rights and freedoms without discrimination . . . ." and recognizes the efforts of the United Nations "*to assure refugees the widest possible exercise of these fundamental rights* . . . ." *Id.*, preamble (emphasis added). Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. The Fourth Geneva Convention provides that in a civil war situation, "*[p]ersons taking no active part in the hostilities . . . shall in all circumstances be treated humanely.*" *Id.*, art. 3 (1) (emphasis added). Furthermore, "*outrages upon personal dignity*, in particular humiliating and degrading treatment" are one of the enumerated acts which "*shall remain prohibited* at any time and in any place . . . ." with respect to such persons. *Id.*, art. 3(1)(c) (emphasis added).

18. *See* European Convention, *supra* note 16, arts. 25, 46, 48.

treaty.[19] As individuals were deemed competent to assert claims on the international stage, it was essential that their claims could be brought against states. Without the right of individual petition, human rights risked becoming empty vessels—claims without content.

Subsequent to the entry into force of the European Convention, five other international human rights treaties have been adopted that also allow for individual petitions, including: the Optional Protocol to the International Covenant on Civil and Political Rights; the Convention on the Elimination of Racial Discrimination; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the American Convention on Human Rights; and the African Charter on Human and Peoples' Rights.[20] Once the individual has exhausted available and effective remedies under the municipal law of the state concerned, she may then file a petition against that state.[21] The availability of individual petitions against

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19. *See id.*, art. 25 (signatory state may declare itself amenable to individual petitions before the European Commission of Human Rights); *id.*, art. 46 (state may make declaration recognizing the jurisdiction of the European Court of Human Rights).

20. *See* Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 1, 999 U.N.T.S. 302 ("recogniz[ing] the competence of the [Human Rights] Committee to . . . consider communications from individuals . . . ."); *see also* CERD, *supra* note 9, art. 14(1) (recognizing "communications from individuals . . . ."); Torture Convention, *supra* note 9, art. 22(1) (recognizing "communications from or on behalf of individuals . . . ."); American Convention, *supra* note 16, art. 44 (recognizing that "[a]ny person or group of persons . . . may lodge petitions . . . ."); Banjul Charter, *supra* note 16, art. 55(1) (recognizing "communications other than those of States Parties"). But see ICESCR, *supra* note 15; CEDAW, *supra* note 15; CRC, *supra* note 17; Refugee Convention, *supra* note 17; and Fourth Geneva Convention, *supra* note 17, which do not contain analogous provisions, and rely on state reporting provisions or inter-state petitions.

21. *See* European Convention, *supra* note 16, art. 26; Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 20, art. 2; CERD, *supra* note 9, art. 14 (7(a)); Torture Convention, *supra* note 9, art. 22 (5(b)); American Convention, *supra* note 16, art. 46 (1(a)); Banjul Charter, *supra* note 16, art. 56(5).

The exhaustion requirement ensures that international human rights protections are sought when they are truly needed—because municipal protection from abuses by state or non-state agents is either unavailable in principle or ineffective in practice. For this reason, the exhaustion requirement is qualified by the availability of meaningful procedural protections under the municipal law of the state and the feasibility of timely access to those procedures. *See* American Convention, *supra* note 16, art. 46(2) (stating that exhaustion is not required when "the domestic legislation of the state concerned does not afford due process of law[,] . . . the party alleging violation . . . has been denied access to the remedies[,] . . . or there has been unwarranted delay . . . ."); *see also* Velasquez Rodriguez Case, 4 Inter-Am. C.H.R. 61, paras. 80–81, 178–83,

governments in a broad range of international conventions is an important measure of the status accorded individuals under international law in both pragmatic and philosophical terms.

B. Non-State Agents as Violators of International Law

Notwithstanding the need and capacity for individuals to bring claims for international protection against states, the entities most competent to ensure enjoyment of individual rights, violations of rights may be causally attributed to a variety of sources, including other individuals, groups, opposition movements, and insurgent armies, as well as states. For this reason, when states become party to the European Convention, they obligate themselves *to "secure to everyone* within their jurisdiction the rights and freedoms defined herein."[22] In contrast to a mere prohibition against violations of human rights by the state, the state's obligation to "secure" rights suggests the dual requirement of signatories to refrain from human rights violations by their own agents, and to prevent or remedy such violations from other quarters. Similarly strong language regarding the "securing," "ensuring," or "enjoyment" of rights is included in six other human rights treaties adopted since 1949.[23]

The recognition of protection from abuses by non-state agents, implicit in the "secure/ensure" clauses of the aforementioned seven human rights treaties,[24] is also expressed explicitly in one of these

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OEA/ser. C./4 (1988), *reprinted in* 28 I.L.M. 291, 308–09, 326–27 (1989) (waiving the exhaustion requirement where the government was deemed responsible for the lack of a functioning legal system and the culture of impunity in Honduras); *infra* notes 98–100 and accompanying text.

22. European Convention, *supra* note 16, art. 1 (emphasis added).

23. *See* ICCPR, *supra* note 9, art. 2(1) ("to respect and to ensure to all individuals . . . . "); American Convention, *supra* note 16, art. 1 ("to respect . . . and to ensure to all persons . . . ."); Banjul Charter, *supra* note 16, art. 2 ("[e]very individual shall be entitled to the enjoyment of the rights and freedoms . . . ."); CRC, *supra* note 17, art. 2(1) ("States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind . . . ."); Refugee Convention, *supra* note 17, art. 3 ("The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin"); Fourth Geneva Convention, *supra* note 17, art. 1 ("The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances . . . .").

24. *See supra* notes 22–23.

treaties, the International Covenant on Civil and Political Rights (ICCPR), which denies the right of any "state, group or person . . . to engage in any activity . . . aimed at the destruction of any of the rights and freedoms recognized herein . . . ."[25] Thus, by the provisions of the ICCPR, non-state agents may not violate human rights, and states must remedy such unofficial violations when they occur.[26] Similar language is found in an eighth treaty, the Convention on the Elimination of Racial Discrimination, which requires that parties "prohibit and bring to an end . . . racial discrimination by any persons, group or organization."[27]

However, one major human rights treaty takes a very different approach to non-state-sponsored human rights abuses. Article 1(1) of the Torture Convention defines torture specifically in terms of the infliction of suffering by the state for particular ends:

> [T]he term "torture" means any act by which severe pain or suffering . . . is intentionally inflicted on a person . . . for such purposes as obtaining . . . a confession . . . when pain or suffering is inflicted *by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*[28]

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25. ICCPR, *supra* note 9, art. 5(1).

Moreover, the ICCPR is explicit in its prohibition against the erection of barriers to the enjoyment of human rights by discreet classes of individuals: "Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals* within its territory . . . the rights recognized in the present Covenant, *without distinction of any kind,* such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status." Id.*, art. 2(1) (emphasis added). If victimization by non-state agents is a discreet "status," the ICCPR's broad nondiscrimination language clearly prohibits the denial of protection to victims of non-state-sponsored violations of human dignity. *See id.*; *see also infra* note 26.

26. *See* ICCPR, *supra* note 9, arts. 5(1), 2(1). The obligation to "ensure to all individuals the rights recognized in the present Covenant" set forth in Article 2(1) of the ICCPR implies the duty to prevent or to remedy violations of such rights. Similar "ensure" language in Article 1 of the American Human Rights Convention was the basis for a damages judgment against the government of Honduras for the wrongful death of a Honduran national at the hands of a death squad. *See* Velasquez Rodriguez Case, 4 Inter-Am. C.H.R. 61, paras. 157–58, 168–83, OEA/ser. C./4 (1988), *reprinted in* 28 I.L.M. 291, 323, 325–27; *see also supra* note 21 and *infra* notes 98–100 and accompanying text.

27. CERD, *supra* note 9, art. 2(1)(d).

28. Torture Convention, *supra* note 9, art. 1(1) (emphasis added). *But see* ICCPR, *supra* note 9, art. 5(1); CERD, *supra* note 9, art. 2(1)(d).

In this provision, states are not only designated the guarantors of human rights protections; they are also defined as the necessary agents of one extreme form of abuse.[29]

While similar language of state agency is not present in the eight other aforementioned human rights treaties, the potential remains for such a requirement to be imposed inappropriately by states that seek to narrow the scope of the protections they provide to victims of human rights violations.[30] It is the erroneous conceptual leap from states as essential *vehicles* for protection, to states as exclusive *sources* of abuse, that has the dangerous capacity to create a class of individuals who are cut off from international protection: victims of non-state agents of repression.[31] And it is precisely these limitations

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29. *See* Torture Convention, *supra* note 9, art. 1(1).

30. Ironically, the human rights treaties' state remedy provisions themselves may be vulnerable to the application of an erroneous state agency requirement given the emphasis that they place upon the state as "guarantor" of human rights. *See* BVerfGE 80, 315 [federal constitutional court], decision of July 10, 1988, 2 BvR 502/86, 1000/86, 961/86 (denying asylum to Sri Lankan Tamils for lack of state persecution); *supra* notes 22–23 (regarding treaty language obligating signatories to "secure" or "ensure" respect or enjoyment of rights). Nevertheless, by the clear language of two international human rights treaties, the state's responsibility to prevent or remedy human rights violations encompasses abuses by state officials and private individuals alike. *See* ICCPR, *supra* note 9, arts. 5(1), 2(1) (regarding civil and political rights); CERD, *supra* note 9, art. 2(1)(d) (regarding freedom from racial discrimination).

31. The issue of state agency in international human rights law has a very rough municipal analogue in the concept of state action under U.S. constitutional law. U.S. state action theory concerns the availability of federal protections for individuals whose civil rights have been violated by or with the involvement of one of the fifty states of the United States. *See* Laurence H. Tribe, American Constitutional Law § 18-1, at 1688 (2d ed. 1988) ("Nearly all of the Constitution's self-executing, and therefore judicially enforceable, guarantees of individual rights shield individuals only from government action."). Although the complex relationship between state agency in U.S. and international law requires and merits much more extensive exploration, it may be useful to suggest one aspect of that relationship in the context of this analysis of non-state agents in international human rights law.

The U.S. constitutional law concept of state action has been open to a range of interpretations by U.S. federal courts since the nineteenth century. *See* Ronna Greff Schneider, *State Action: Making Sense Out of Chaos—An Historical Approach*, 37 U. Fla. L. Rev. 737 (1985). While lack of direct state action or state involvement in civil rights violations may certainly result in a denial of federal protection to victims of discrimination, this is not always the case. *See generally Civil Rights Cases*, 109 U.S. 3, 11 (1883).

During the post-World War II era in particular, the U.S. Supreme Court applied an expansive concept of state action, which resulted in state accountability for

that must be removed if human rights law is to remain and become more fully universal in application, without discrimination between classes of victims.

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certain instances of discrimination for which the direct agent was a private entity or individual. *See* Schneider, *supra*, at 746–71. One illustrative case of the expansive state action requirement is *Adickes v. Kress*, 398 U.S. 144 (1970). The facts of *Adickes* involved a restaurant that refused to serve a white woman in the company of a group of black students. The Supreme Court found that this conduct was actionable under section 1983 of the Civil Rights Act, 42 U.S.C. § 1983 (1982), if it was motivated by an enforced custom of racial segregation and could be deemed to have occurred under color of state law. *Adickes*, 398 U.S. at 170–71, 173–72, *analyzed in* Schneider, *supra*, at 771 & n.208. *Adickes* and other expansive U.S. state action decisions provide further support for broad international protections for victims of unofficial human rights violations.

Moreover, a crucial distinction needs to be made between the concept of state agency in U.S. constitutional law and state agency in international law. Under U.S. constitutional analysis, in the event that the lack of state agency destroys a federal cause of action, legal protection from "private" civil rights violations is still available under the laws of one of the fifty states of the United States. In contrast, under international law, where the "state" is a *nation*-state or United Nations member, limiting the applicability of human rights law to violations by state agents would preclude international protection in situations in which effective national protection is *not* available (as well as those in which it was). This gap in protection would be evident where the state tolerated or turned a blind eye to unofficial abuses. The protection gap would be even wider when the state was incapable of stopping abuses by unofficial entities, as in a civil war or failed state situation. Because internal conflict and state dysfunction are not an inherent part of U.S. municipal law, as they are on the international scene, the limited relevance of the U.S. concept of state action to international human rights law should be recognized.

On further consideration, it appears that the U.S. constitutional requirement of state action is more properly analogized to the *exhaustion* requirement under international human rights law, than to an international state action concept, given that state action is not generally a prerequisite for human rights protections under international law. *See supra* notes 22–27 and accompanying text. The requirement of exhaustion of municipal remedies ensures that international protection will only be available when nation-states refuse or are unable to provide human rights protection to those within their jurisdiction. *See supra* note 21 and accompanying text. Similarly, the U.S. state action requirement ensures that federal civil rights protections are only available when one of the fifty states is somehow implicated in violations of individual civil rights. In this sense, the international exhaustion principle, like the U.S. state action concept, is the gateway to the more transcendent form of protection. Moreover, both requirements may help ensure that the more transcendent form of protection (i.e., federal or international) is only available when the constituent form of protection (i.e., federated state or nation-state) is inadequate.

C. Asylum and Non-Extradition as Vehicles for Protecting Victims of Non-State Violators of Human Rights

With the notable exception of the Torture Convention,[32] in general, international human rights treaties assign responsibility to the signatory state for *all* human rights violations that occur within its jurisdiction, whether the state commits the abuses, tolerates them, refuses to prosecute, or fails to punish the perpetrators. The availability of protection from abuses by non-state agents in the eight aforementioned treaties may be inferred from their lack of state action requirements. Moreover, the affirmative obligation to provide such protection flows directly from specific provisions in each of the eight treaties that require states to "ensure," "guarantee," or "secure" the rights enumerated and to eradicate violations by private individuals.[33] For example, the African Charter for Human and People's Rights (hereinafter the Banjul Charter), provides that "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter."[34] Similarly, in the case of the European Convention, signatories are required to "secure to everyone . . . the rights and freedoms defined herein."[35]

Despite the international legal obligation imposed upon states to provide protection against human rights abuses carried out by official and unofficial agents in the country of origin, enforcement of state obligations is not always feasible. For example, in an internal conflict or a failed state situation where the state is compromised or dysfunctional, as a practical matter it becomes difficult if not impossible for the international community to hold accountable the state in which the violation occurred. Moreover, in instances where victims of human rights abuses flee the repressive jurisdiction, the most feasible form of relief from further violations is likely to involve surrogate protection

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32. *See supra* notes 28–29 and accompanying text.

33. *See supra* notes 22–23, 25, 27; see also *Velasquez Rodriguez Case*, 4 Inter-Am. C.H.R. 61, paras. 174–83, OEA/ser. C./4 (1988), *reprinted in* 28 I.L.M. 291, 326–27 (1989), in which the government of Honduras was found responsible for the torture, disappearance, and presumed murder of a Honduran national at the hands of a death squad. *But see* Torture Convention, *supra* note 9, art. 1(1) (defining torture as the infliction of suffering by a public official).

34. Banjul Charter, *supra* note 16, art. 2.

35. European Convention, *supra* note 16, art. 1.

from an alternate state in which the victim has sought refuge. Protection has been forthcoming in such instances when the surrogate state, or an international human rights tribunal with jurisdiction over it, has interpreted the requirement of "securing" rights to prohibit the surrogate state from returning the asylum-seeker to the state of origin in which her human rights would be violated.[36]

Thus, it appears that when either state or non-state agents violate an individual's human rights, there are two essential legal mechanisms through which the international community may respond, both of which involve the provision of a remedy by an individual state. If necessary, the international community will impose such a remedy through the mechanism of a ruling by a quasi-judicial body, such as the European Court of Human Rights, established under a treaty, such as the European Convention.[37] In such cases, the international court's judgment will be directed against either: (1) the state in whose jurisdiction the violation occurred; or (2) a state in whose jurisdiction the victim subsequently finds herself.[38] In the former case, the

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36. *See* Ahmed v. Austria, 24 Eur. H.R. Rep. 278, paras. 10–12, 47 (1996) (holding that Austria's deportation of Somali national to likely torture by rival clan members would violate Article 3 of the European Convention regarding freedom from torture); *infra* note 102; *see also* Chahal v. United Kingdom, 23 Eur. H.R. Rep. 413, paras. 79–107 (1996) (holding that England's deportation of Indian Sikh to likely torture by Punjab irregulars would violate Article 3 of the European Convention); *infra* note 105.

37. *See* European Convention, *supra* note 16, art. 38 (regarding establishment of the Court); *id.*, arts. 45, 48 (regarding the Court's jurisdiction to interpret obligations of states party to the Convention); *id.*, art. 50 (regarding the Court's power to afford just satisfaction to the injured party).

38. There is also a *third* mechanism for international legal response to human rights violations, which does not require state remediation, but rather imposes criminal or tort liability on the individual(s) responsible for the abuses. The question of international criminal liability for human rights violations defined as international crimes and perpetrated by non-state agents is beyond the immediate scope of this Article. However, it is a vital inquiry, which resonates powerfully with the issue of non-state agency in the determination of state responsibility under international human rights law. *See generally* Paust, *supra* note 12.

As for individual tort liability, since 1980, U.S. federal courts have considered claims for reparations brought by victims of human rights abuses against their abusers for violations which occurred in other countries under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) [hereinafter A.T.C.A.]. *See, e.g.*, Filártiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (holding that the A.T.C.A. establishes original federal district court jurisdiction over "all causes where an alien sues for a tort only [committed] in violation of the law of nations").

responsible state may owe reparations.[39] In the latter case, the subsequent state may be required to provide surrogate protection in the form of relief from deportation or non-extradition, in light of the persecution or mistreatment that the individual would be likely to suffer upon return to the country of origin.[40]

To put the issue in a practical context: In 1992, how might a human rights claim be brought by the surviving kin of a Somali arbitrarily detained, tortured, and executed by the followers of General Aideed in Mogadishu? Under the Banjul Charter, the African Commission on Human and Peoples' Rights is competent to consider claims of Charter violations brought by both states and individuals against states which are parties to the treaty.[41] Given that General Aideed was neither an African head of state (in 1992 or ever), nor a

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Joel and Dolly Filártiga brought a federal tort action in the Eastern District of New York against Americo Pena-Irala for torturing to death their then-seventeen-year-old son and brother, Joelito, in Paraguay. The District Court denied relief, but the Second Circuit reversed and remanded, holding that torture was a violation of customary international law and hence, an international tort for which the A.T.C.A. provided a remedy. *See id.* at 887, 890. On remand, the district court entered a ten million dollar punitive damage award against Pena-Irala. *See* Filártiga v. Pena-Irala, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

Filártiga is also an important precedent insofar as it illustrates the interdependence between the various mechanisms for relief under international and domestic human rights law. In order to pursue a claim for tort damages under the A.T.C.A. in a case involving human rights violations in another country, the victim (or her heirs) will need to be present in the United States under color of law. *See* Filártiga, 630 F.2d at 878 (Dolly Filártiga applied for political asylum before she and her father filed their A.T.C.A. action). Assuming that the victim of the human rights violation fled to the United States without an immigrant visa or eligibility for other permanent legal status, she will be vulnerable to removal. The United States then would be required to grant relief from removal, likely in the form of asylum or *non-refoulement*, in order for the victim to be in a position to receive a tort damage award. *See id.* at 878. (Dolly Filártiga came to the United States on a non-immigrant visitor's visa and subsequently filed for asylum).

39. *See* Velasquez Rodriguez Case, 4 Inter-Am. C.H.R. 61, paras. 80–81, 178–80, 182, OEA/ser. C./4 (1988), *reprinted in* 28 I.L.M. 291, 308–09, 326–27 (1989).

40. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at paras. 80, 111 (1989) (blocking England's extradition of a German national to the United States because Virginia's administration of the death penalty found to violate Article 3 of the European Convention); *infra* notes 44, 47. *See also* Ahmed v. Austria, 24 Eur. H.R. Rep. 278 (1996) (holding that torture by Somali clan members violates Article 3); Chahal v. United Kingdom, 23 Eur. H.R. Rep. 413 (1996).

41. *See* Banjul Charter, *supra* note 16, arts. 49, 55, 56.

signatory to the Banjul Charter, the Charter mechanisms are of little use against him. And the government of Somalia, though a signatory to the Charter, has been dysfunctional since January of 1991. It therefore lacks the capacity either to control the behavior of General Aideed's power bloc, or to take ameliorative action on its own, such as making reparations to the victim's next of kin.[42]

Despite any infirmities on the part of Somali governing institutions, if the Somali national were able to escape detention and flee to France, he might seek protection by the French authorities in the form of asylum in France, or at least protection against forced return to Somalia. His claim would be that he had a well-founded fear of persecution—specifically torture or summary execution—by Farah Aideed's faction upon return to Somalia.[43] Alternatively, if Somalia sought his return to face prosecution for alleged criminal acts, his fear of persecution upon return might constitute a defense to his extradition.[44] While reparations would likely not be available, non-return would prevent future violations in either case.

However, for France to grant relief to the Somali claimant in the form of non-extradition in the first instance, its municipal courts would need to define abuses by non-state agents in Somalia as violations of human rights.[45] Similarly, for asylum or relief from deportation to be available, France's municipal immigration adjudicators

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42. *See* Barry E. Carter and Phillip R. Trimble, International Law 1387 (2d ed., Little Brown and Co. 1995).

43. *See* Refugee Convention, *supra* note 17, art. 1(A)(2) (defining a refugee as someone outside his or her country of origin with "a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . . ."); *id.*, art. 33(1) (setting forth the international norm of *non-refoulement* or non-return, which prohibits states from returning a refugee to a country where his or her "life or freedom would be threatened"). The definition of refugee under international law is more fully analyzed *infra* in part III.A.

44. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at paras. 80 and 111 (1989) (blocking the extradition of a German national from the United Kingdom to the United States to face capital murder charges upon finding that the "death row phenomenon" constituted a violation of Soering's right to humane treatment under art. 3 of the European Convention).

45. *See* European Convention, *supra* note 16, art. 1 ("The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined [herein] . . . ."); *id.*, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment . . . ."); *see also* Ahmed v. Austria, 24 Eur. H.R. Rep. 278 (1996) (torture by Somali clan members violates Article 3); Chahal v. United Kingdom, 23 Eur. H.R. Rep. 413 (1996) (torture by Punjab irregulars violates Article 3).

would need to define violations by non-state agents in Somalia as persecution.[46] In either case, French adjudicators would be accountable to international standards regarding the problem of non-state agency, and if French authorities denied relief, the Somali could then bring a claim against France before the European Court of Human Rights.[47]

The hypothetical case of the Somali national seeking refuge in France highlights the need for alternative mechanisms for international protection from non-state human rights abusers. Essential to the provision of effective international protection from non-state violators is the extent to which victims of unofficial persecution are seen to merit asylum and relief from extradition in surrogate countries under international law. The remaining two sections of this Article will address the status of victims of non-state agents under international refugee law and regional human rights law, and conclude that they have a powerful claim to protection in both domains.

III. CONTEMPORARY CHALLENGES IN REFUGEE AND ASYLUM LAW

A. The International Definition of a Refugee and the Agent of Persecution

The international law definition of a refugee is set forth in Article 1 of both the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, signed and ratified by the United States in 1968.[48] A refugee is someone outside her country of origin with "a *well-founded fear of being persecuted* for reasons of race, religion, na-

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46. *See* Refugee Convention, *supra* note 17, arts. 1(A)(2), 33(1). *But see infra* Part III.B; Centre for Documentation and Research (CDR), United Nations High Commissioner for Refugees, Refugee Case Law (summarizing Case of Amina Ahmed Jamal (No. 264373), [Refugee Appeals Commission] (Feb. 28, 1995) (France) (CDR Catalogue Signature CAS/FRA/155)) (denying asylum to Somali applicant fearing persecution by rival clan given lack of *de facto* state agency). CDR international refugee case law summaries by country are available at <http://www.unhcr.ch/refworld/refworld/legal/refcas.htm>, *see* CDR, United Nations High Commissioner for Refugees, Refugee Case Law [hereinafter Refugee Case Law].

47. *See* Ahmed v. Austria, 24 Eur. H.R. Rep. 278 (1996); Chahal v. United Kingdom, 23 Eur. H.R. Rep. 413 (1996); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989).

48. Refugee Convention, *supra* note 17; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

tionality, membership of a particular social group or political opinion," who is either "*unable or*, owing to such fear, is *unwilling* to avail [her]self of the protection of that country."[49] The international definition was incorporated into the domestic law of the United States with the passage of the 1980 Refugee Act, amending the Immigration and Nationality Act.[50]

Signatories to the Refugee Convention and Protocol find assistance in interpreting the international refugee definition (also referred to as the Conventional refugee definition) in the *Handbook on Procedures and Criteria for Determining Refugee Status*, a document prepared in 1979 by the Office of the United Nations High Commissioner for Refugees (UNHCR).[51] UNHCR is the agency created in 1950 by the United Nations General Assembly with a mandate to provide protection and assistance to refugees.[52]

The Refugee Convention's Article 1 definition of a refugee contains one categorical limitation, insofar as it excludes individuals who have not fled the country in which they fear persecution.[53] Otherwise, the UNHCR Handbook stresses that the concept of the refugee under

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49. Refugee Convention, *supra* note 17, art. 1(A)(2); Refugee Protocol, *supra* note 48, art. I(2) (emphasis added).

50. *See* Pub. L. No. 96-212, § 201(a), 94 Stat. 102 (codified as amended at 8 U.S.C. § 1101(a)(42) (1970 & Supp. 1996)).

51. *See* U.N. Office of the High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (1979) [hereinafter UNHCR Handbook]. The UNHCR Handbook is accorded authoritative weight by states parties to the Refugee Convention and Protocol in its interpretation of treaty provisions. In particular, the U.S. Supreme Court has held that "the [UNHCR] Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform." INS v. Cardoza-Fonseca, 480 U.S. 421, 439 & n.22 (1987). *See also* Hathaway, *supra* note 4, at 66 n.7, 114 & n.123 (providing a favorable characterization of the Handbook's analysis of the refugee definition).

52. *See* Statute of the Office of the United Nations High Commissioner for Refugees, art. 6A(ii), G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N. Doc. A/1775 (1950) [hereinafter UNHCR Statute].

53. *See* Refugee Convention, *supra* note 17, art. 1(A)(2). In general, UNHCR is mandated by the U.N. General Assembly to provide protection and assistance to refugees as defined by Article 1 of the Refugee Convention and Protocol. *See* UNHCR Statute, *supra* note 52, art. 6A(ii), at 46. However, in exceptional circumstances, UNHCR has also acted on behalf of internally displaced persons under its "extended competence." So-called IDPs are defined as individuals in "refugee-like situations" inside the country of origin. *See* Hathaway, *supra* note 4, at 11–13.

international law is expansive, embracing individuals with a "well-founded fear" of persecution.[54] While the definition lists five separate grounds or causal foundations on which persecution may be based or rationalized, in individual cases "[i]t is evident that the reasons for persecution under these various headings will frequently overlap."[55] A defining characteristic of the international refugee definition is its utility as a vehicle for the international protection of those who lack effective national protection from persecution.[56]

Given the emphasis in Article 1 on the failure of state protection, it would appear significant that the conventional refugee definition does *not* identify the state as the necessary author or agent of the persecution feared. In fact, the text of Article 1 does not speak to the character of the persecution at all: the state is notable for its powerlessness in stopping persecution, rather than its status as persecutor per se.[57] Moreover, in interpreting the silence of the treaty on the issue of agency, Paragraph 65 of the UNHCR Handbook reads Article 1 to encompass non-state agents of persecution. The text states explicitly that "offensive acts . . . committed by the local populace . . . can be considered as persecution . . . if the authorities *refuse, or prove unable*, to offer effective protection."[58] Paragraph 65 of the UNHCR Handbook has been widely cited and utilized by states.[59]

Paragraph 65 has inspired a common sense approach to understanding a government's fundamental failure to provide effective protection from persecution by non-state agents which may underlie a claim to surrogate protection. Its language encompasses situations in which effective protection from unofficial abuses is lacking for one of two reasons: either the authorities *will not* or they *cannot* protect the

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54. *See* Refugee Convention, *supra* note 17, art. 1(A)(2); UNHCR Handbook, *supra* note 51, at para. 37.

55. Refugee Convention, *supra* note 17, art. 1(A)(2); *see* UNHCR Handbook, *supra* note 51, at para. 65 (enumerating the five grounds of "race, religion, nationality, membership of a particular social group or political opinion").

56. *See generally* Refugee Convention, *supra* note 17, art. 1(A)(2); UNHCR Handbook, *supra* note 51, at paras. 65, 98–100.

57. *See* Refugee Convention, *supra* note 17, art. 1(A)(2).

58. UNHCR Handbook, *supra* note 51, at para. 65 (emphasis added).

59. *See id.*; *see, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Adan v. Secretary of State for Home Department, [1997] 2 All E.R. 723; Zalzali v. Canada (Minister of Employment and Immigration) [1991] 3 F.C. 605 (Fed. Ct. App.).

individual with the well-founded fear. Situations in which the state "will not" provide protection generally involve complicity in, or at least tolerance of, human rights violations by a functional state, and fall within the outer ring of the conceptual framework established in the introductory section of this Article. In contrast, situations in which the state is "unable" to protect are often associated with internal armed conflict in which the state is either compromised or dysfunctional. These latter situations correspond to the intermediate ring or the central core of that framework, respectively.

Thus, under the UNHCR Handbook approach, the individual who fears persecution by non-state agents for an enumerated reason is entitled to refugee status, regardless of whether the national government "refuse[s]" or is "unable" to offer effective protection,[60] and re-

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60. One potential barrier to the provision of refugee status to otherwise eligible individuals lacking effective national protection in one part of a state's territory is the existence of a valid "internal flight alternative," signifying that effective national protection is available in a region of the country removed from that locality in which the asylum seeker resided and from which she or he fled. While "[t]he internal flight alternative has been used as a justification for not granting refugee status" to otherwise eligible individuals, UNHCR cautions that the appropriate use of the term is limited to a very narrow range of factual circumstances. Pirkko Kourula, Broadening the Edges: Refugee Definition and International Protection Revisited 98 (Martinus Nijhoff Publishers 1997).

The position of UNHCR is that refugee status should only be withheld on the basis of an internal flight alternative if: (1) the individual fears persecution by non-state agents, which (2) the state is unable to control and (3) *effective* national protection is available in another region of the country. *See* Memorandum from UNHCR Branch Office for Bonn, Germany para. bbb (July 12, 1993) (on file with author). By the same token, if the state is *unwilling* to provide protection from unofficial persecution, or if the state is directly involved in the persecution, the question of an internal flight alternative does not even arise. *See id.*

UNHCR is aware that the internal flight alternative is vulnerable to use as an inappropriate ground for status denial in situations where the conditions leading to the asylum-seeker's fear are less pronounced in one region of the country and more prevalent in another, but where effective protection is not in fact available anywhere. Thus, the Office is skeptical of the use of this concept in refugee status determination procedures, and only countenances its application where there is concrete evidence of meaningful administrative structures guaranteeing physical and legal protection in one region of the country despite a breakdown in competent governmental infrastructure in the area from which the petitioner fled. *See* Kourula, *supra*, at 100 ("The 'internal flight alternative' deals essentially with the same question as 'agents of persecution,' namely the ability of a State to maintain control over its territory and to uphold the human rights of its citizens. The application of the concept of 'internal flight alternative' places primary emphasis on the presumed physical safety of individuals.").

gardless of where along the radius of concentric circles—from order to conflict to failed state status—the government finds itself.

Scholarly analysis of the agency of persecution reinforces the UNHCR Handbook's approach, and confirms that refugee status is available to individuals fearing persecution by non-state as well as state agents. Prominent international jurists Atle Grahl-Madsen and Guy S. Goodwin-Gill attest that a central purpose of the Refugee Convention was to respond to the plight of refugees who flee situations in which there is no *de facto* protection, for whatever reason. Refugee status is triggered when "the government has the best of wills to prevent atrocities on the part of the public . . . but for some reason or other is unable to do this,"[61] or "where protection is in fact unavailable."[62]

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61. Grahl-Madsen, *supra* note 4, at 191 ("[E]ven if a government has the best of wills to prevent atrocities on the part of the public (or certain elements of the population), but for some reason or other is unable to do this, so that the threatened [sic] persons must leave the country in order to escape injury, such persons shall be considered true refugees."). *See also* Gary Evans, Agents of Persecution: A Question of Persecution 14 & n.31 (Refugee Law Research Unit, Osgoode Hall Law School, York University Discussion Paper No. 3, 1991) (on file with author) (citing Judge Stone's decision in the Canadian Refugee Determination Division's consideration of Rajudeen v. Canada (Minister of Employment and Immigration) [1984] 55 N.R. 129 (Fed. Ct. App.)).

In his analysis of persecution by non-state agents, Atle Grahl-Madsen links the dysfunctionality of the state to the validity of a claim to refugee status in the following manner: "If . . . disturbances continue over a protracted period, without the government being able to check them effectively, this may be considered such a 'flaw' in the organization of the State that it may justify distrust in the government . . . conceived . . . as the machinery which should secure tranquillity and order in the territory of the State." Grahl-Madsen, *supra* note 4, at 192.

62. Goodwin-Gill, *supra* note 4, at 42. *See also* Walter Brill, The 1951 Convention Definition of Refugee Status and the Issue of Agents of Persecution: A Comparative and Human Rights Based Analysis 14 & n.47 (1992) (unpublished graduate thesis, Institut Universitaire de Hautes Etudes Internationales, Universite de Geneve) (on file with author).

The Canadian jurist James Hathaway also emphasizes the centrality of the lack of effective national protection in his analysis of the claim to refugee status: "[R]efugee law is designed to interpose the protection of the international community . . . where there is no reasonable expectation that adequate national protection . . . will be forthcoming." Hathaway, *supra* note 4, at 124. *See also id.* at 125 & n.206 ("[T]he *travaux preparatoires* of the (Refugee) Convention do not establish any distinction between persecution at the hands of the government and persecution by private citizens" (citing J. van der Veen, *Does Persecution by Fellow-Citizens in Certain Regions of a State Fall Within the Definition of 'Persecution' in the Convention Relating to the Status of Refugees of 1951*?, 11 Netherlands Y.B. Int'l L. 167, 170 (1980))).

On the issue of agency in general, Goodwin-Gill is most adamant in stating that "it does not follow that the concept [of persecution] is limited to the actions of governments or their agents."[63] He further clarifies that "the issue of state responsibility for persecution . . . is not part of the refugee definition."[64] Goodwin-Gill is particularly eloquent in his condemnation of the exclusion from international protection of refugees who flee failed state situations. He cautions that "there is no basis in the 1951 [Refugee] Convention, or in general international law, for requiring the existence of effective operating institutions of government as a pre-condition to a successful claim to refugee status."[65]

It is this basic concern for effective national protection—and the refugee's claim to surrogate international protection when such protection is lacking—that lies at the heart of the refugee definition. International protection is required in the absence of effective municipal protection—whether the state persecutes, or non-state agents persecute in a legal vacuum created by the state's refusal or incapacity to act. The concept of effective protection requires that the international community recognize persecution by non-state agents as a basis for refugee status, if the refugee protection regime is to be logically consistent and true to its underlying values and goals.

A number of refugee scholars point to a growing willingness on the part of the international community to pierce the veil of state sovereignty in seeking to protect refugees. *See* Mertus, *supra* note 6, at 73–74 & n.80 (citing Leon Gordenker and Thomas Weiss, *Pluralizing Global Governance: Analytic Approaches and Dimensions*, 16 Third W.Q. 357, 360 (1995)). Certainly, such a trend is exemplified by recent humanitarian interventions in refugee emergencies involving the displacement of Kurds from Northern Iraq and ethnic Albanians from Kosovo. However, the current emphasis on heightened standards of state accountability under international law needs to be addressed in a broader context. There is an ironic but fundamental aspect of contemporary challenges to the so-called "statist paradigm," *id.* at 60, that must be appreciated if such challenges are to prevail. While the international community may seek to trump the sovereignty of those "bad" or repressive states that create refugees, it also will continue for the foreseeable future to rely on those "good" or progressive states willing and able to provide protection to individual refugees. And yet such state protection will only be forthcoming and adequate if individual *states* embrace a definition of refugee that encompasses victims of *non-state* agents of abuse. *See supra* Parts II.B. and II.C.

63. Goodwin-Gill, *supra* note 4, at 42 & n.112.

64. *Id.* at 73.

65. *Id.* at 73–74.

B. European Asylum Law and Restrictions Regarding State Agency

Despite international refugee law's embrace of victims of non-state persecutors, a significant minority of states are unwilling to grant protection to individuals within their territorial jurisdiction who may have fled abuses by non-state actors, especially in certain types of internal conflict. This trend is expressing itself in the municipal asylum jurisprudence of several European states that have denied refugee status to individuals fleeing failed states in which there is no competent governmental authority which either committed or tolerated the persecution feared. In effect, these states are limiting eligibility for asylum to individuals who were either: (a) persecuted by state actors, or (b) purposefully abandoned by state actors that had the capacity but failed to respond to acts of persecution by private actors. Such states deny eligibility for asylum to individuals persecuted by private actors where state actors were powerless to prevent such acts.

To this extent, Europe's restrictive jurisprudence regarding agency is still limited to the smallest of the three concentric circles laid out in the introductory section of the text. That is, only those individuals persecuted by non-state actors in the context of a dysfunctional state are currently excluded from the refugee definition. Victims of unofficial abuse continue to be protected if the non-state agents they fear operate in the intermediate zone of civil war, where the state has not yet descended into dysfunction, or the outer ring corresponding to times of peace. However, while no European state has yet declared an intention to deny asylum to all victims of non-state agents, the danger remains that the ripples of exclusion will continue to expand.

In Europe, Germany has been in the forefront of restrictive judicial trends disfavoring the granting of refugee status in cases involving persecution by a limited class of non-state agents. In 1989, the German Federal Constitutional Court denied asylum to a group of Sri Lankan Tamils who feared persecution at the hands of Tamil insurgents, ruling that political persecution under the German constitution means persecution by the state.[66] Subsequently, in two 1997 decisions,

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66. *See* BVerfGE 80, 315 [federal constitutional court], decision of July 10, 1988, 2 BvR 502/86, 1000/86, 961/86 (discussing refugee status of Sri Lankan Tamils).

Germany's Federal Administrative Court (FAC) clarified that refugee status requires persecution by the state or a "state-like" authority. In the first case, decided in April of 1997, the FAC affirmed the denial of refugee status to a group of Somali nationals after concluding that Somali "clans and clan-leaders who fight each other over influence do not exercise 'state-like' power in their respective areas of influence."[67] In the second case, decided in November of the same year, the FAC overturned grants of refugee status to a group of Afghan nationals fearing persecution by one of the civil war factions in their country of origin, on the grounds that to be cognizable as agents of persecution, state-like entities must "be lasting . . . forerunners of new or renewed state structures."[68] Both of these administrative decisions suggest a

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67. Memorandum from UNHCR Branch Office Bonn, Germany, May 1, 1997, para. 22 (summarizing Bundesverwaltungsgericht [BVerwG] 9 C 15/96, judgment of Apr. 15, 1997 and BVerwG 9 C 38/96, judgment of Apr. 15, 1997 [Federal Administrative Court] (F.R.G)) (on file with author).

68. Memorandum from UNHCR Regional Bureau for Europe, Feb. 2, 1998, para. 8 (summarizing BVerwG 9 C 34/96, judgment of Nov. 4, 1997) (on file with author).

In both 1997 decisions, the German Federal Administrative Court appeared willing to extend refugee status to individuals who fear persecution by non-state entities that resemble—or "act like"—states. This characterization is upheld by the FAC's own implication in the Afghan case, *see id.*, that if a rival army succeeded in controlling a significant proportion of national territory over a significant amount of time, such that a negotiated settlement of the military conflict on its own terms was more than a distant dream, then such an army might constitute a sufficiently "state-like entity" to establish a cognizable agent of persecution for purposes of refugee status. *See id.*

While there is little question that German courts are willing to *deny* protection to victims of persecution by non-state agents in civil war situations characterized by shifting sands of authority and control, what is perhaps all the more significant is the extent to which German administrative courts have applied the "state-like entity" standard with a *positive* result for the asylum seeker. In two cases from 1994 and 1990, German administrative courts found the asylum seekers eligible for refugee status in cases involving, respectively, anti-Muslim persecution by Serb forces in Bosnia and anti-Lebanese persecution by Syrian forces in Lebanon. *See* Refugee Case Law, *supra* note 46 (summarizing Verwaltungsgericht Würzburg W 9 K 92.30416 [Würzburg Administrative Court] (Mar. 15, 1994) (F.R.G.) (CDR Catalogue Signature CAS/DEU/126)) [hereinafter Bosnian Muslim Case] (ordering the [German] federal office for the recognition of refugees to grant asylum to Bosnian Muslim applicants). *See id.* (summarizing Verwaltungsgerichtshof Kassel 13 UE 1568/84 [Hessian Higher Administrative Court] (May 2, 1990) (F.R.G.) (CDR Catalogue Signature CAS/DEU/049)) [hereinafter Lebanese Case] (upholding the lower administrative court's grant of asylum to a Lebanese applicant). What these two lower German administrative decisions demonstrate, at the very least, is that where the persecutory agent constitutes the *de facto* occupying power (i.e., the Syrian Army in Lebanon), *see* Refugee Case Law, *supra* note 46, Bosnian Muslim Case, *supra*, or is effectively controlled by another state (i.e., the Yugoslavian

denial of protection to victims of non-state abusers in failed state situations.

Over the past decade, municipal courts in Austria, France, and the Netherlands have followed German tribunals in denying asylum to otherwise eligible refugees solely because they feared persecution by non-state agents in what were deemed to be failed state situations.[69] However, immigration courts in six other major asylum countries, notably Belgium, the United Kingdom, Canada, the United States, Australia, and New Zealand, continue to grant relief to victims of non-state-sponsored persecution from functional and dysfunctional states alike. Throughout the 1990s, tribunals of these six nations have found applicants from Lebanon, Sri Lanka, and Somalia eligible for refugee status.[70]

Army's oversight of Serb forces in Bosnia), *see* Refugee Case Law, *supra* note 46, Lebanese Case, *supra*, articulation of a well-founded fear of persecution carried out by such non-state agents may in fact result in the *granting* of refugee status.

69. AUSTRIA: *See* Who is a Refugee? A Comparative Case Law Study 44 & nn.184–85 (Jean-Yves Carlier et al. eds., 1997) [hereinafter Who is a Refugee] (citing VwGH 11.03.1993, 93/18/0083 (denying asylum to applicant who feared private persecution)).

FRANCE: *See* Refugee Case Law, *supra* note 46 (summarizing Case of Amina Ahmed Jamal (No. 264373) [Refugee Appeals Commission] (Feb. 28, 1995) (CDR Catalogue Signature CAS/FRA/155) (denying asylum to Somali applicant fearing persecution by warring clan deemed not to constitute *de facto* state authority)).

NETHERLANDS: *See* ARR v. S, Nov. 6, 1995, RO 93.4400 *M.N.S.*, Apr. 1996, at 9, *quoted in* Who is a Refugee, *supra*, at 513–14 (denying asylum to Somali applicant because "there can be no question of persecution if . . . there is no government") (footnote omitted).

70. BELGIUM: *See* Refugee Case Law, *supra* note 46 (summarizing Marazoglou Sahim Case, Commission Permanente de Recours des Refugies (Oct. 1, 1993) (CDR Catalogue Signature CAS/BEL/072) (Armenian applicant eligible for refugee status given finding that persecution includes acts that authorities tolerate or "against which [they are] incapable to [sic] offer protection")).

UNITED KINGDOM: Adan v. Secretary of State for Home Department [1997] 2 All E.R. 723, 736 (Somali applicants eligible for refugee status given Court's finding, citing UNHCR Handbook, *supra* note 51, that persecution includes acts "committed by the local populace" where authorities "refuse, *or prove unable*, to offer effective protection") (emphasis added, Simon Brown, L.J.).

CANADA: *See* Zalzali v. Canada (Minister of Employment and Immigration) [1991] 3 F.C. 605, 612 (Fed. Ct. App.) (Lebanese applicant found eligible for refugee status, given collapse of state authority in country of origin, in opinion citing UNHCR Handbook, *supra* note 51, at para. 65); *see also* Rajudeen v. Canada (Minister of Em-

What is most disturbing about even a minority trend toward a restrictive interpretation of agents of persecution by Refugee Convention signatories is that it is occurring in Europe in the context of the European Union's efforts to "harmonize" immigration and refugee policies in member countries. In 1996, the European Union adopted a Joint Position on a harmonized approach to interpretation of the refugee definition,[71] which suggested that "persecution" should be understood narrowly as human rights abuses that are state-sponsored or state-tolerated.[72] The resolution, while non-binding, nevertheless challenges efforts to provide protection for all individuals who fear persecution, in full compliance with the Refugee Convention and international refugee law.[73] If not contained by a strengthened commit-

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ployment and Immigration) [1984] 55 N.R. 129, 134 (Fed. Ct. App.) (Sri Lankan Tamils eligible for asylum where persecution by "'thugs' of the Sri Lanka majority").

UNITED STATES: *See* Bartesaghi-Lay v. INS, 9 F.3d 819, 822 (10th Cir. 1993) (recognizing eligibility for refugee status on the part of persons fearing persecution by "a non-government agency which the government is unwilling or unable to control" (citing McMullen v. INS, 658 F.2d 1312, 1315 & n.2 (9th Cir. 1981))); *see also* INS v. Elias-Zacarias, 502 U.S. 478, 479–84 (1992) (not even addressing the non-state agent issue in analysis of Guatemalan asylum claim alleging persecution by insurgent force).

AUSTRALIA: *See* "Applicant A" v. Minister for Immigration and Ethnic Affairs (1997) 142 A.L.R. 331, 334 (analysis of Chinese asylum claim led to finding that persecution must be "official, or officially tolerated or uncontrollable . . . .").

NEW ZEALAND: Re RS, Refugee Appeal No. 523/92 (Refugee Status Appeals Authority, Auckland, Mar. 17, 1995) (visited Oct. 14, 1999) <http://www.knowledge-basket.co.nz/refugee/rsaa/text/docs/523-92.htm> (refugee status demonstrated given "evidence of a state's inability to protect").

71. *See* Joint Position 96/196/JHA Defined by the Council on the Basis of Article K.3 of the Treaty of the European Union on the Harmonized Application of the Definition of the Term 'Refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the Status of Refugees, 1996 O.J. (L63/2) [hereinafter 1996 EU Joint Position]. *See generally* Refugee Convention, *supra* note 17, art. 1(A)(2).

72. Paragraph 5 of the 1996 EU Joint Position on the "Origins of Persecution," postulates that "[p]ersecution is *generally* the act of a State organ . . . ." 1996 EU Joint Position, *supra* note 71, at para. 5.1 (emphasis added). The Joint Position goes on to state that "[p]ersecution by third parties will be considered to fall within the scope of the Geneva Convention where it is . . . *encouraged or permitted* by the authorities. Where the authorities fail to act . . . [the adjudicator should determine] *whether* or not *the failure to act was deliberate. Id.* at para. 5.2 (emphasis added). Paragraph 5.2 of the Joint Position would appear to recognize eligibility for refugee status where the state is *unwilling* to protect, although not necessarily where it is *unable* to protect. *Compare id.* at para. 5.2, *with* UNHCR Handbook, *supra* note 51, at para. 65.

73. *See* Refugee Convention, *supra* note 17, preamble (stating that signatories seek to "assure refugees the widest possible exercise of these fundamental rights"); *id.*,

ment to the basic norms of refugee protection expressed in the preamble to the 1996 resolution,[74] harmonization policy may tend to create a "least common denominator" dynamic, in which individual EU members are increasingly reluctant to develop a more generous asylum policy than that promoted by the most restrictive bloc within the Union, and currently reflected in the jurisprudence of German administrative and constitutional tribunals.

The combined impact of European Union harmonization efforts and restrictive trends in the municipal asylum law of certain member states does not bode well for victims of unofficial human rights violations seeking refuge in Europe, at least those fleeing dysfunctional states. Until Germany and the other European states that follow its jurisprudence in this arena more fully recognize abuses by non-state agents, a dangerous and unprincipled protection gap will exist in these countries. While that gap is widest for refugees fleeing conflict situations in which durable state structures are lacking, it potentially threatens all those fleeing abuses by unofficial actors.

C. U.S. Asylum Law and Formalistic Approaches to the Logic of Persecution

In contrast to the gathering storm in European asylum law regarding state agency, U.S. courts continue to hold with consistency that the non-state character of the persecutor is not a barrier to asylum for the potential or actual victim of persecution. So long as the state is "unwilling or unable to control" the agent of persecution, and the other elements of the conventional refugee definition are met, victims of non-state abusers are eligible for protection.[75] Moreover, the

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art. 1 (stating that there is no state action requirement in the "well-founded fear of persecution" definition of a refugee); *id.*, art. 33 (stating that the norm of *non-refoulement* is not qualified by a state action requirement). *See also supra* note 40 and accompanying text.

74. Despite the apparent discontinuity between the European Union's 1996 Joint Position and the approach to agents of persecution reflected in paragraph 65 of the UNHCR Handbook, *supra* note 51, the non-binding resolution nonetheless reaffirms the members' commitment to the fundamental tenets of refugee law and their "*common humanitarian tradition* . . . [including] the importance of *guaranteeing appropriate protections for refugees* in accordance with the provisions of the [Refugee] Convention of July 28, 1951 . . . ." 1996 EU Joint Position, *supra* note 71, preamble (emphasis added).

75. *See* Bartesaghi-Lay v. INS, 9 F.3d 819, 822 (10th Cir. 1993) (citing McMullen v. INS, 658 F.2d 1312, 1315 & n.2 (9th Cir. 1981)). *See also supra* notes 49 and 70.

"unwilling or unable to control" standard under U.S. law tightly parallels the "refuse or prove unable to offer protection" language set forth in the UNHCR Handbook.[76] Under both frameworks, the U.S. recognizes refugee status where the state fails to provide protection against persecution by non-state agents.[77]

However, despite the apparent receptivity in U.S. asylum jurisprudence to victims of unofficial persecution, U.S. courts have established a significant qualification on the Conventional refugee definition that more subtly disfavors individuals fearing persecution by non-state agents. Specifically, asylum adjudicators in the United States take a restrictive approach to determining the causal foundation on which persecution rests, imposing an added dimension of proof not found in the international refugee definition.[78] While this enhanced burden of proof applies to all asylum applicants, the approach especially impacts those victims of non-state agents operating in civil war situations, the middle of the three concentric rings or circles set forth in the introductory section of this Article. Strict standards of causation will tend to disproportionately burden claims of persecution at the hands of non-state agents, whose motivations are often shrouded in uncertainty, and therefore difficult to prove.

In *Elias-Zacarias v. INS*, the Supreme Court denied asylum to a Guatemalan national who opposed the armed liberation movement in his country and fled his country in order to escape forced conscription by the guerrillas. Elias-Zacarias claimed to fear persecution on account of his political opinion against the insurgency. [79] However, he

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76. UNHCR Handbook, *supra* note 51, at para. 65.

77. *Compare McMullen*, 658 F.2d at 1315 & n.2, *with* UNHCR Handbook, *supra* note 51, at para. 65.

78. *See* Elias-Zacarias v. INS, 502 U.S. 478, 482–83 (1992) (interpreting "on account of" language in U.S. statutory definition of refugee to require that an applicant provide at least some proof that persecutor was motivated to persecute him or her for an identifiable reason enumerated in the statute).

While the "on account of" language in the U.S. statutory definition parallels the "for reasons of" language in the international definition, *compare* 8 U.S.C. § 1101(a)(42) (1970 & Supp. 1996), *with* Refugee Convention, *supra* note 17, art. 1(A)(2), the text of Article 1 contains no reference to proof of the persecutor's motives. *See* Refugee Convention, *supra* note 17, art. 1(A)(2).

79. *Zacarias*, 502 U.S. at 481. In its earlier favorable consideration of Zacarias' claim, the Ninth Circuit had found that "acts of conscription [by nongovernmental groups] are tantamount to kidnapping and constitute persecution." Zacarias v. I.N.S., 921 F.2d 844, 850 (9th Cir. 1990). The Supreme Court did not disagree with the proposi-

was found ineligible for refugee status because he had not demonstrated that "the guerrillas [would] persecute him because of that political opinion rather than because of his refusal to fight with them."[80] *Zacarias* has become synonymous with the so-called "nexus requirement" in U.S. asylum law, or the necessity that the applicant prove with great precision the basis for the persecution she fears.[81]

The *Zacarias* decision has been criticized on evidentiary grounds for requiring proof of the persecutor's motives that is neither available to the refugee nor required under international refugee law.[82] The reasoning of the Court has also been challenged for mandating a symmetrical relationship between the refugee's self-defined identity and the persecutor's view of her, which forces the refugee to rationalize the very irrationality of the persecution she fears.[83] Moreover, the formalistic approach of the Supreme Court is fundamentally out of step with the UNHCR Handbook's recognition that "it may not always be possible [for the applicant] to establish a causal link between the opinion expressed and the related measure suffered or feared."[84]

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tion that guerrilla conscription might constitute persecution, but rather held that the coerced conscription Zacarias feared was not "persecution on account of political opinion." *Zacarias*, 502 U.S. at 482.

80. *Zacarias*, 502 U.S. at 482–83. Zacarias reasoned that the Guatemalan insurgents would likely persecute him on account of his opposition to their political goal of overthrowing the Guatemalan government by force of arms. He was denied asylum by the U.S. Supreme Court, but not because his fear of persecution was deemed ill-founded, nor because his opposition to the guerrillas was deemed insincere. Rather, Zacarias was deemed not to be a refugee because he could not prove that the political opinion he professed was accurately perceived by his persecutors and that such opinion would have been the actual motivation behind their persecution of him. *Id.* at 483.

81. *See generally* Musalo, Moore & Boswell, *supra* note 6, at ch. 5.

82. *See* Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. Int'l L. 1 (1997); Jennifer Moore, *Restoring the Humanitarian Character of U.S. Refugee Law: Lessons from the International Community*, 15 Berkeley J. Int'l L. 51 (1997). *See also* Refugee Convention, *supra* note 17, art. 1(A)(2).

83. *See* Moore, *supra* note 82, at 60–61 ("In asking the refugee to understand the reasons for her persecution, we require her to penetrate the twisted logic of her persecutor, and to render it logical."). *See also* UNHCR Handbook, *supra* note 51, at para. 46 ("for psychological reasons" a refugee may have difficulty analyzing his claim in terms of the technical definition of a refugee).

84. UNHCR Handbook, *supra* note 51, at para. 81. *See also id.* at para. 66 ("[T]he applicant himself may not be aware of the reasons for the persecution.").

Since 1991, when the Supreme Court handed down its judgment in *Zacarias*, the federal courts of appeals have upheld denials of asylum in numerous cases because the applicants were deemed to have failed the strict causation test set forth in that landmark decision.[85] It is perhaps not surprising that these cases, like *Zacarias*, generally involved uncontroverted evidence of actual persecution or the fear of it.[86] What is less obvious, and perhaps more significant, is that the majority of the asylum claimants in the post-*Zacarias* cases also feared persecution by non-state agents in a civil war situation.[87] To look at the last two years alone, from 1997 to 1999, the federal circuit courts have issued five decisions in which the *Zacarias* nexus requirement has been the basis for a denial of asylum. Of these recent cases, only one involved an individual who alleged persecution at the hands of the state.[88]

Each of the other four post-*Zacarias* cases concerned non-state agents waging war against the state: an Indian alleging torture by Sikh separatists;[89] an ethnic Croat fearing execution by Croatian paramilitary forces in Bosnia-Herzegovina;[90] an Algerian claiming persecution by Islamic fundamentalists;[91] and a Salvadoran facing extra-judicial treatment by guerrilla forces.[92] In each of the four cases, the court of appeals found that the persecutor was not demonstrably motivated by a desire to punish the victim for the contrary political views he professed, and denied asylum on this basis. Each panel believed the persecutor acted for more general reasons independent of

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85. *See, e.g.*, Sangha v. INS, 103 F.3d 1482, 1486–87 (9th Cir. 1997) (citing Elias-Zacarias v. INS, 502 U.S. 478, 483 (1992)).

86. *Id.* at 1487 (Sangha presented credible evidence that he had received a direct death threat).

87. *See, e.g., id.* at 1487 (Sangha was an Indian national who feared persecution by members of a Sikh separatist group). With reference to the framework established in the introductory section of the text, non-state actors operating in the context of internal armed conflict fall within the second of the three concentric rings.

88. *See* Foroglou v. INS, 170 F.3d 68, 71 (1st Cir. 1999) (denying asylum to Greek conscientious objector to military service; the applicant unsuccessfully argued that state prosecution for draft evasion was persecution on account of political opinion) (citing *Zacarias*, 502 U.S. at 483).

89. *See Sangha*, 103 F.3d at 1486.

90. *See* Bradvica v. INS, 128 F.3d 1009, 1013 (7th Cir. 1997).

91. *See* Megueuine v. INS, 139 F.3d 25, 28 (1st Cir. 1998).

92. *See* Vasquez v. INS, 177 F.3d 62, 65 (1st Cir. 1999).

the victim's views or status: the Sikh separatists were concerned with obtaining information through interrogation; the Croatian paramilitary with conscripting fighters; the Islamic fundamentalists with terrorizing health care and government workers; and the Salvadoran guerrillas with increasing their ranks.[93]

Given *Zacarias*' tendency to disadvantage cases involving persecution by non-state agents, U.S. courts are supporting in practice a form of discrimination that some of their European counterparts state openly as a matter of principle. Whether in execution or by design, refugee victims of unofficial persecution enjoy less actual international protection in the United States than do refugee victims of state-sponsored oppression.[94]

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93. *See id.* at 65 (Salvadoran facing extra-judicial treatment by guerrilla forces unable to meet nexus requirement); *Megueuine*, 139 F.3d at 28 (Algerian claiming persecution by fundamentalist Muslims unable to meet nexus requirement); *Sangha*, 103 F.3d at 1490 (Indian alleging torture by Sikh separatists did not demonstrate fear of persecution on account of political opinion); *Bradvica*, 128 F.3d at 1013 (ethnic Croat fearing execution by Croatian paramilitary forces in Bosnia-Herzegovina unable to meet nexus requirement). *See also* Zacarias, 502 U.S. at 483 (finding that the guerrillas may have persecuted applicant because of his refusal to fight, rather than because of his political opposition to the guerrilla cause).

94. *Compare Zacarias*, 502 U.S. 478 and *Sangha*, 103 F.3d 1482, *with* the German Constitutional Court decision and related European cases discussed *supra* in notes 66–69 and accompanying text.

A particularly compelling and problematic example of unclear or mixed motivations by a non-state persecutor from the perspective of U.S. asylum jurisprudence is presented in an asylum claim based on the fear or experience of battery where the abuser is intimately related to the victim. In such a domestic violence claim, the U.S. Board of Immigration Appeals recently denied asylum to a Guatemalan woman who had been sexually assaulted by her husband over a period of many years. *See* In re R.A., Interim Decision 3403, at 3–5 (BIA 1999). Utilizing the reasoning of *Zacarias*, the Board found that because the applicant had not proven that her husband assaulted her specifically in order to punish her for holding a feminist political opinion against male domination, she did not qualify for asylum despite the brutality of his treatment and the lack of effective protection against spousal abuse of government officials in Guatemala. *See id.* at 4–6.

The Board rendered its decision in *In re R.A.* despite its protestations that "we struggle to describe how deplorable we found the husband's conduct to have been," *id.* at 5, and its determination that "the severe injuries sustained by the respondent rise to the level of harm sufficient (and more than sufficient) to constitute 'persecution.'" *Id.* at 10. The Board also found credible respondent's testimony that her appeals for protection to the Guatemalan police and a Guatemalan judge were met with inaction or an explicit refusal to "interfere in domestic disputes." *Id.* at 4–5.

With reference to the framework set forth in the introductory section of this Article, in Europe the explicit exclusion of non-state agents is confined thus far to the smallest concentric circle corresponding to failed state situations. In the United States, the more subtle disqualification of non-state agents extends an additional layer of exclusion, potentially encompassing all internal conflict situations, including those that have not resulted in the failure of the state. In both the European and U.S. contexts, the gap in effective international protection directly contravenes the letter and spirit of the Conventional refugee definition.[95] And if no national court has yet denied asylum to an individual because she claimed persecution by a non-state agent acting with the acquiescence of the state—a circumstance falling within the outer ring of the conceptual framework[96]—refugee law scholars and advocates cannot be complacent about the likelihood of such a development, given the statement of at least one constitutional court that persecution means persecution by the state.[97]

Applying *Zacarias*, the Board reasoned that the applicant had not experienced persecution "on account of" political opinion given the lack of evidence that her husband's behavior was influenced by his perception of her political views. *Id.* at 12–13. Further citing *Zacarias*, the Board also held that she had failed to demonstrate persecution on account of membership in a particular social group. *Id.* at 17.

In re R.A. stands as a painful example of the inappropriateness of the *Zacarias* Court's conception of persecution as flowing from a symmetrical causal relationship between the victim and the persecutor. The nexus requirement naturally disfavors refugees who fear unofficial forms of persecution. Adjudicators will almost always know less about the motivations of non-state agents that they do about the political and other goals of governments. Whether sexual assault in the context of an intimate relationship, or extra-judicial treatment by members of a separatist movement, a victim of unofficial outrages is uniquely challenged when she is required to prove that her persecutor explicitly sought to punish her for a reason enumerated in the refugee definition. *Compare id.* at 12–13, *with Sangha*, 103 F.3d at 1482.

95. *See* Refugee Convention, *supra* note 17, art. 1(A)(2); UNHCR Handbook, *supra* note 51, at para. 65.

96. *See* 1997 decisions of the German Federal Administrative Court, *supra* notes 67 and 68 (recognizing persecution by the state or a "state-like" entity). *See also* McMullen v. INS, 658 F.2d 1312, 1315 & n.2 (9th Cir. 1981) (recognizing persecution by "a non-governmental agency which the government is unwilling or unable to control"); U.S. cases cited *supra* note 71.

97. *See* BVerfGE 80, 315 [federal constitutional court], decision of July 10, 1988, 2 BvR 502/86, 1000/86, 961/86 (discussing refugee status of Sri Lankan Tamils).

Although an administrative decision, it is nevertheless troubling that *In re R.A.* would appear to fall within the outermost concentric circle in the conceptual framework of non-state agency. Given that the applicant had sought state protection

IV. REGIONAL HUMAN RIGHTS LAW AND PROTECTIONS AGAINST UNOFFICIAL ABUSERS

In contrast to restrictive developments in European and U.S. municipal asylum law, regional human rights tribunals, namely the European and Inter-American Courts of Human Rights, have made marked strides in expanding the scope of state accountability and international remedies for both state-sponsored and unofficial violations of human rights. A notable example is the *Velasquez-Rodriguez Case*,[98] where in 1988 the Inter-American Court found the government of Honduras liable for the disappearance, presumed torture, and arbitrary execution of a young Honduran man at the hands of a death squad. The court found that Honduras's failure to prevent Velasquez's disappearance, and its failure to punish the perpetrators, was a violation of its obligation to "ensure to all persons . . . the free and full exercise of . . . [Convention] rights and freedoms" under Article 1 of the American Convention on Human Rights.[99] While the court speculated that death squad violence likely occurred with government sponsorship, it held that regardless of official involvement, Honduras had a responsibility to prevent and punish such conduct, and its unwillingness to do so was a violation of its international legal obligations.[100]

The European Court of Human Rights arguably has gone even farther than the Inter-American Court by explicitly defining the scop

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from her abuser, and was denied it, the case is one in which the state was "unwilling" t provide protection, and hence acquiesced in the persecution. *See In re R.A.* at 4–5. Ur like the other post-*Zacarias* cases, *In re R.A.* involved a functional state in a non-conflic situation. *See* cases cited *supra* at notes 88–92 and accompanying text. If *In Re R.A.* i appealed, the U.S. federal courts may have occasion to determine how far along th spectrum of exclusion U.S. asylum jurisprudence lies with respect to the availability protection for victims of non-state agents.

98. 4 Inter-Am. C.H.R. 61, OEA/ser. C./4 (1988), *reprinted in* 28 I.L.M. 291 (1989)

99. *Id.*, paras. 161, 173, 174, 182, 28 I.L.M. at 323, 325–27. *See* American Conve tion, *supra* note 16, arts. 1, 5 (proclaiming in Article 5 the right to freedom from tortu and inhuman treatment); *see also* Jennifer Moore, *Simple Justice: Humanitarian La as a Defense Against Deportation*, 4 Harv. Hum. Rts. J. 11, 40–41 & nn.157–161 (1991 Godinez Cruz Case, Inter-Am. C.H.R. (Ser. C) No. 5, paras. 182, 192 (1989) (findin Honduras responsible for the disappearance of Godinez, the Court held that "[a]n illeg act which violates human rights and which is initially not directly imputable to State . . . because it is the act of a private person . . . can lead to international respons bility . . . because of the lack of due diligence to prevent the violation . . . .").

100. *See* Velasquez Rodriguez Case, 4 Inter-Am. C.H.R. 61, paras. 168–8 OEA/ser. C./4 (1988), *reprinted in* 28 I.L.M. 291, 325–27 (1989).

of international legal protection against human rights violations to cover abuses by non-state actors in a conflict situation in which there is no functional state of origin to hold accountable. In the 1996 case of *Ahmed v. Austria*, the court blocked the deportation of a Somali national whose refugee status had been revoked by the Austrian authorities.[101] The unanimous court held that Mr. Ahmed's involuntary return to Somalia would violate his right to humane treatment under Article 3 of the European Human Rights Convention[102] because, as a relative of actual and suspected members of the United Somali Congress, his deportation to his native country would likely result in his suffering torture or brutal treatment at the hands of an opposing faction led by General Aideed.[103] The opinion took note of the breakdown of civil society in Somalia, and characterized the conflict as a "fratricidal war between rival clans."[104]

Moreover, the European Court specifically addressed and rejected Austria's claim that Ahmed's likely abusers were not state agents and, hence, no relief should be granted under Article 3. After concluding that the prohibition against torture applies in expulsion cases, the Court held that "the absolute nature of Article 3" is not "invalidated by . . . the current lack of state authority in Somalia."[105]

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101. *See* Ahmed v. Austria, 24 Eur. H.R. Rep. 278, paras. 10–12, 47 (1996).

102. See *id.*, paras. 41–47.

103. *See id.*, paras. 10, 21.

104. *Id.*, para. 35

105. *Id.*, paras. 22 (Austria's contention that "all State authority had disappeared"); *id.*, paras. 40, 41, 46.

Earlier in 1996, the European Court reached a similar conclusion in *Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413, paras. 79–107 (1996). In that case, the Court blocked the deportation of an Indian Sikh separatist who had been denied asylum by the British authorities, on the grounds that his likely execution or torture at the hands of irregular members of the Punjab security forces would constitute a violation of his right to humane treatment under Article 3 of the European Human Rights Convention. *See id.*, paras. 80, 107. Judge Ryssdal, president of the Court and the author of the opinion, held that "the Convention prohibits in absolute terms torture or inhuman or degrading treatment, irrespective of the victim's conduct . . . . [N]o derogation from it is permissible [and] [t]he prohibition provided by Article 3 . . . is equally absolute in expulsion cases." *Id.*, paras. 79–80. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at paras. 90–91 (1989) (applying Article 3 as grounds for non-extradition). *See also* Paez v. Sweden, 56 Eur. Ct. H.R. at para. 30 (1997) (citing *Soering* and *Chahal* cases as continuing to define the scope of Article 3 obligations in extradition and expulsion cases).

Both the *Velasquez* and *Ahmed* cases shed light on the appropriate interpretation of the agents of persecution concept under international human rights and refugee law. These cases are notable not merely for their insistence on state accountability for abuses by death squads or rival clans, but also for their provision of international remedies and protection in the face of abuses by official and unofficial actors alike. For Velasquez-Rodriguez, the Inter-American Court ruling came too late to prevent his further suffering at the hands of death squad members, and hence the government of Honduras was ordered to pay damages to his next of kin.[106] But for Ahmed, the European Court decision served to block his deportation to Somalia,[107] granting him non-refoulement[108] and protection from further persecution by non-state agents affiliated with a rival clan in the Somali civil war. Both cases provide evidence of a customary norm of protection for victims of unofficial human rights abuses. The *Ahmed* case applies such protection more specifically to individuals fleeing armed conflict and failed state situations.

If individuals who flee persecution by non-state agents are to enjoy protection in countries of asylum, it will be necessary for these asylum states to define "refugee" and "persecution" expansively. Such an expansive asylum jurisprudence would be consistent with both the contemporary jurisprudence of regional human rights bodies regarding non-state agents and the concept of effective protection under international refugee law.[109]

V. CONCLUSION: A BROADENED EMBRACE OF INTERNATIONAL PROTECTION FROM HUMAN RIGHTS ABUSES

The opinions of jurists in the field of international refugee law, as well as the jurisprudence of regional human rights tribunals, provide powerful evidence that international law protects individuals fleeing unofficial human rights abuses in repressive, conflicted, and failed states alike. Such protections flow naturally from the text of

106. *See* Velasquez Rodriguez Case, 4 Inter-Am. C.H.R. 61, para. 192, OEA/ser. C./4 (1988), *reprinted in* 28 I.L.M. 291, 329 (1989).

107. *See* Ahmed v. Austria, 24 Eur. H.R. Rep. 278, paras. 10–12, 47 (1996).

108. *See* Refugee Convention, *supra* note 17, art. 33.

109. *See supra* Part III.A.

relevant international human rights treaties, whose provisions do not tolerate a distinction between victims on the basis of the state or non-state character of their abusers.

Since 1966, the International Covenant on Civil and Political Rights has provided a foundation in conventional law for the protection of victims of human rights violations by non-state agents. Article 5 reads that "[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein . . . ."[110] Moreover, Article 1 of both the 1951 Refugee Convention and its 1967 Protocol define a refugee as an individual with a "well-founded fear of being persecuted" without regard for the state or non-state persona of the agent of persecution.[111]

On a regional level, the initial articles of two human rights treaties also require their signatories to prevent or remedy human rights violations by both state and non-state agents. Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms are obligated to "respect" and "secure to everyone within their jurisdiction" the rights enumerated in the treaty.[112] Similarly, signatories to the American Convention on Human Rights must "respect" and "ensure to all persons" the rights set forth therein.[113] In both Europe and the Americas, the requirement of "respect" for rights is understood to prohibit state violations, and the obligations to "secure" or "ensure" rights are read to require that signatories prevent or remedy violations by non-state agents.[114]

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110. ICCPR, *supra* note 9, art. 5(1); *see also* CERD, *supra* note 9, art. 2(1)(d); *supra* notes 25–27 and accompanying text.

111. *See* Refugee Convention, *supra* note 17, art. 1(A)(2); Refugee Protocol, *supra* note 48, art. I(2); *supra* notes 48–49, 53–57 and accompanying text.

112. *See* European Convention, *supra* note 16, art. 1; *supra* note 22 and accompanying text.

113. *See* American Convention, *supra* note 16, art. 1; *supra* note 23 and accompanying text.

114. *See* Ahmed v. Austria, 24 Eur. H.R. Rep. 278, paras. 22, 40, 41, 46 (1996); *supra* note 103. *See also* Velasquez Rodriguez Case, 4 Inter-Am. C.H.R. 61, paras. 157–58, 168–83, OEA/ser. C./4 (1988), *reprinted in* 28 I.L.M. 291, 323, 325–27 (1989); *supra* notes 98–100 and accompanying text.

Claims to international protection from abuses perpetrated by non-state agents rest therefore on a three-pronged foundation of international legal authority: conventional law, international scholarly interpretation, and regional human rights case law. In addition to treaty-based recognition of unofficial persecution and human rights abuses, international jurists clarify that the term refugee includes individuals with a well-founded fear of persecution by non-state agents.[115] Finally, judicial decisions of regional human rights bodies provide remedies for human rights violations by non-state agents whether in the form of non-deportation or monetary compensation.[116]

Despite conventional and secondary sources of international law that recognize human rights abuses by non-state agents, national courts in Europe and the United States have denied asylum to victims of such unofficial violations, particularly in conflicted or failed state situations.[117] These decisions differ in the mechanism by which victims of non-state agents are excluded from protection. In some European countries, courts are moving toward an explicit requirement of state agency.[118] Perhaps more subtly but towards the same end, formalistic approaches to causation by U.S. courts mandate a quantum of proof of the persecutor's motivations that is typically unavailable when the abuser is a non-state agent.[119]

Clearly, significant work remains in the field of international law to ensure that protection from human rights abuses is enjoyed by all who seek it, regardless of the status of their abusers. Modern human rights law must embrace the full range of human experience and provide remedies for violations of human dignity by non-state and state actors alike. Only when the character of the persecutor becomes irrelevant will human rights law be able successfully to challenge the

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115. *See generally* Goodwin-Gill, *supra* note 4; Grahl-Madsen, *supra* note 4; *supra* notes 61–65 and accompanying text.

116. *See supra* Part IV.

117. *See* BVerfGE 80, 315 [federal constitutional court], decision of July 10, 1988, 2 BvR 502/86, 1000/86, 961/86 (discussing refugee status of Sri Lankan Tamils); *supra* notes 66–69 and accompanying text. *See also* Elias-Zacarias v. INS, 502 U.S. 478, 479–84 (1992); *supra* notes 78–94 and accompanying text.

118. *See* BVerfGE 80, 315 [federal constitutional court], decision of July 10, 1988, 2 BvR 502/86, 1000/86, 961/86 (discussing refugee status of Sri Lankan Tamils).

119. *See* Elias-Zacarias v. INS, 502 U.S. 478, 479–84 (1992).

various excesses of sovereignty: from totalitarianism and the abuse of state power, to partialitarianism and the failure of state protection.[120]

120. Meeting this challenge will entail a more expansive understanding of state "failure" and state "success": i.e., the recognition that states may fail not only when their governing institutions collapse, but also when they withhold surrogate protection from victims of repression, conflict and dysfunction in other parts of the world. Thus, the term "failed states," broadly construed, would encompass some insular and privileged states of the North and West, as well as certain conflicted and poor states of the South and East. Similarly, the success of states in resolving their own conflicts and internal repression would be linked to the willingness of other states to respond to those problems, and vice versa. *See generally* Jonathan Moore, Morality and Interdependence (The Nelson A. Rockefeller Center for the Social Sciences at Dartmouth College, Occasional Paper Series, No. 4, 1994).