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# Providing Protection from Torture by “Unofficial” Actors

## A NEW APPROACH TO THE STATE ACTION REQUIREMENT OF THE CONVENTION AGAINST TORTURE\*

### I. INTRODUCTION

In the period since World War II, the use of child soldiers in armed conflict has risen dramatically.<sup>1</sup> It is estimated that over 300,000 children are currently participating in armed conflicts.<sup>2</sup> This increase in the use of child soldiers reflects dramatic changes in the nature of warfare since World War II, changes that have made the protection of children and civilians an ever more daunting

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<sup>1</sup> For the purposes of this paper the term “child soldier” refers to persons under the age of eighteen who are involved in armed conflicts. This term also includes those who are now over the age of eighteen but were either forcibly or voluntarily recruited into military service prior to turning eighteen. This definition takes into account the fact that the Convention on the Rights of the Child (CRC) and the 1977 Additional Protocols to the Geneva Conventions set fifteen as the minimum age for recruitment into military service. See Convention on the Rights of the Child, *opened for signature* Sept. 2, 1990, U.N. Doc. A/RES/44/49, Art. 38 [hereinafter CRC]; Additional Protocol I, Art. 77(2). However, Article 1 of the CRC states that “a child means every human being under the age of eighteen years.” Furthermore, Graca Machel’s Report on the Promotion and Protection of the Rights of Children contends that eighteen should be the minimum age for military recruitment. See *Report of Graca Machel, Expert of the Secretary General of the United Nations, Impact of Armed Conflict on Children*, ¶ 49, U.N. Doc. A/51/150 (1996) [hereinafter *Machel Report*].

<sup>2</sup> See Human Rights Watch, *Stop the Use of Child Soldiers!*, available at <http://hrw.org/campaigns/crp/index.htm> [hereinafter *Stop the Use of Child Soldiers*]. See also Rachel Brett & Margaret McCullin, CHILDREN: THE INVISIBLE SOLDIERS 19 (1998); *Machel Report*, *supra* note 1, ¶¶ 1-5.

task.<sup>3</sup> Forced<sup>4</sup> into service both by insurgent groups and the governments charged with their protection, child soldiers witness horrible atrocities, and many who ultimately manage to escape are left physically disabled and psychologically traumatized.<sup>5</sup>

One of the most significant factors contributing to the increased use of child soldiers is the fact that interstate conflicts are no longer the norm.<sup>6</sup> Many countries have emerged from periods of colonial domination only to be plagued by economic, political and social upheaval.<sup>7</sup> This disintegration of societal order has resulted in a surge of internal conflicts between governments and rebel forces and has left states struggling for control over their populations and territories.<sup>8</sup> Indeed, the majority of conflicts in the world today are internal conflicts fought on religious, ethnic, and nationalistic grounds.<sup>9</sup> In 1998 alone, there were violent conflicts in at least twenty-five countries, twenty-three of which were internal conflicts.<sup>10</sup> These internal conflicts "pit neighbour against neighbour, compatriot against compatriot"<sup>11</sup> and, in doing so, blur the line

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<sup>3</sup> See Brett *supra* note 2, at 20; Amy Beth Abbott, Note, *Child Soldiers: The Use of Children as Instruments of War*, 23 SUFFOLK TRANSNAT'L L. REV. 499, 508 (2000).

<sup>4</sup> There are numerous cases of children joining military forces voluntarily. In areas ravaged by internal conflict, societal norms have broken down to such an extent that many children view membership in an armed group as their best chance for survival. Furthermore, many children who have witnessed the murder of family and friends join out of a sense of revenge. See *Stop the Use of Child Soldiers*, *supra* note 2. However, despite this technically voluntary membership, the choice to join rebel or government forces is not exercised freely and is instead controlled by a number of other factors such as poverty and psychological trauma. See *Machel Report*, *supra* note 1, ¶ 38.

<sup>5</sup> See *Stop the Use of Child Soldiers*, *supra* note 2.

<sup>6</sup> See Brett, *supra* note 2, at 20. Another significant factor has been recent technological developments that have resulted in a proliferation of automatic weapons and lightweight arms. Abbott, *supra* note 3, at 510. See also *Stop the Use of Child Soldiers* *supra* note 3.

<sup>7</sup> See *Machel Report*, *supra* note 1, ¶ 22.

<sup>8</sup> See *id.*, at ¶¶ 22-23.

<sup>9</sup> See Abbot, *supra* note 3, at 508.

<sup>10</sup> See CLAUDE BRUDERLEIN, CENTER FOR HUMANITARIAN DIALOGUE, THE ROLE OF NON-STATE ACTORS IN BUILDING HUMAN SECURITY: THE CASE OF ARMED GROUPS IN INTRA-STATE WARS 6 (2000) [hereinafter BRUDERLEIN]. See also Brett, *supra* note 2, at 21 ("[A]t any one time in recent years there have been anything up to fifty armed conflicts in the world, but in no more than two or three of these have the major protagonists been the armed forces of two sovereign states.").

<sup>11</sup> BBC News, World: *Africa, The Child Victims of War*, available at <http://news.bbc.co.uk/1/hi/world/africa/378017.stm>. See also Brett, *supra* note 2, at 20; BRUDERLEIN, *supra* note 10, at 6.

between combatants and civilians.<sup>12</sup> Thus, there is no longer any definitive barrier to children serving in armed forces; the battles occur in their homes and villages and it is from these traditional sanctuaries that children are abducted and forced into service.<sup>13</sup> In response to this awful reality, the international community has struggled to develop a mechanism for their protection.

For those children who have fallen victim to the internal conflicts that have come to dominate modern warfare, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) stands as a possible source of protection and relief.<sup>14</sup> Adopted by the United Nations in 1984 as a response to the world-wide problem of torture, the CAT aims to protect the inherent dignity of all individuals and prohibits "any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person."<sup>15</sup> The CAT places an affirmative obligation on state parties to prevent and investigate acts of torture within their own territory and, most significantly, prohibits states from returning individuals to another state where there are "substantial grounds" for believing that they might be subjected to torture.<sup>16</sup> However, the scope of the CAT is limited to acts of torture "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."<sup>17</sup>

This state action requirement has generally been strictly interpreted by the United States courts, an interpretation that fails to account for the reality of modern warfare where individuals are often subject to torture by rebel forces. Moreover, this strict interpretation is out of place both with the intent and purpose of the CAT and with United States practice in interpreting similar conventions. In particular, the Refugee Act of 1980 (Refugee Act or Act)<sup>18</sup> was enacted for the

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<sup>12</sup> See *Machel Report*, *supra* note 1 ¶ 22; Brett, *supra* note 2, at 21.

<sup>13</sup> See *Machel Report*, *supra* note 1, ¶ 37; see also Abbott, *supra* note 2, at 509 (stating that today's wars occur where recruiters take children from buses, schools, churches, and their villages).

<sup>14</sup> See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter CAT].

<sup>15</sup> *Id.* at art. 1.

<sup>16</sup> *Id.* at arts. 3-5.

<sup>17</sup> *Id.* at art. 1.

<sup>18</sup> Refugee Act of 1980, 8 U.S.C. § 1101.

purpose of providing asylum to victims of persecution<sup>19</sup> and, in keeping with the intent and purpose of the Act, U.S. courts have interpreted its state action requirement to allow protection to individuals who have been persecuted by non-state actors where the state is either unwilling or unable to provide protection.<sup>20</sup> While the Refugee Act and the CAT provide protection in different circumstances, the two are closely related, and individuals often seek relief under both conventions.<sup>21</sup> Given the similarities between the two, it follows that the CAT, like the Refugee Act, should be interpreted in accordance with its purpose of allowing for protection from torture by non-state actors.

The stories of Bernard Lukwago and Randall Sackie, two former child soldiers, highlight the failure of the U.S. courts to adequately protect those who face future torture by non-state actors. Forced into combat by rebel groups in their respective countries of Uganda and Liberia, both were victims of horrific violence at the hands of non-state actors. Their appeals for relief under the CAT, and the different outcomes of their appeals, demonstrate the failure of the U.S. courts to adequately address the increasing problem of torture by "unofficial" actors.

This Note examines the state action requirement of the CAT and contends that the requirement should be deemed satisfied in cases where the state is either unwilling or unable to prevent acts of torture. Part II of this Note sets forth the particular facts and details of the *Lukwago* and *Sackie* cases. Part III evaluates the history and purpose of the CAT and the way in which U.S. courts have struggled between a formalistic interpretation of its state action requirement and a more flexible interpretation that takes into account its purpose and intent. Part IV provides a brief overview of U.S. asylum law and the way in which the state action requirement of the

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<sup>19</sup> Unlike the CAT, relief under the Refugee Act does not require a finding of torture. Instead, a refugee is defined as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). For a discussion of the Refugee Act, see *infra* Part IV.

<sup>20</sup> See *infra* Part IV.

<sup>21</sup> For example, both Bernard Lukwago and Randall Sackie sought relief under the Refugee Act and the Convention Against Torture.

Refugee Act has been interpreted to allow for protection from persecution by non-state actors. Despite this more expansive interpretation of the state action requirement, the Refugee Act nevertheless fails to adequately protect victims of unofficial torture. In conclusion, Part V suggests that the state action requirement of the CAT should be interpreted in a manner similar to that of the Refugee Act in order to provide protection to individuals like Lukwago and Sackie who have been tortured by non-state actors. An interpretation such as this will serve to harmonize U.S. international treaty obligations while simultaneously ensuring that the treaties are enforced in accordance with their intent and purpose.

## II. THE CASES OF BERNARD LUKWAGO AND RANDALL SACKIE

### A. *Bernard Lukwago*

Bernard Lukwago was born on April 11, 1982 in a remote village in Northern Uganda, just four years before the Ugandan government became locked in a battle with the Lord's Resistance Army (LRA), a rebel group committed to overthrowing the government.<sup>22</sup> From the start of the conflict, children have been targeted by the LRA forces.<sup>23</sup> Taken from their homes, their schools, and the streets, the children abducted by the LRA are "frequently beaten, and forced to carry out raids, burn houses, beat and kill civilians, and abduct other children."<sup>24</sup> Those children who fail to follow the orders of their abductors are severely beaten and even killed.<sup>25</sup> The children are also threatened with death if they attempt to escape and are often forced to beat to death those children who have attempted to escape.<sup>26</sup> The Ugandan government has been unable and even unwilling to control the violence in the North,

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<sup>22</sup> See Melissa Dribben, *Freeing a Former Child Soldier*, PHILA. INQUIRER, Aug. 3, 2002, [www.philly.com/mld/inquirer/3787909.htm?template=contentModules/printstory.jsp](http://www.philly.com/mld/inquirer/3787909.htm?template=contentModules/printstory.jsp). See also *Hostile to Democracy: The Movement System and Political Repression in Uganda* (Human Rights Watch, New York, N.Y.), Section V, Aug. 1999, at [www.hrw.org/reports/1999/uganda](http://www.hrw.org/reports/1999/uganda) [hereinafter *Hostile to Democracy*].

<sup>23</sup> See *Stolen Children: Abduction and Recruitment in Northern Uganda* (Human Rights Watch, New York, N.Y.), March 2003, Vol. 15, No. 7(A) 2 [hereinafter *Stolen Children*]. An estimated 20,000 children have been abducted by the LRA.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

and the population remains susceptible to raids by LRA forces.<sup>27</sup>

The LRA soldiers raided Lukwago's village in August of 1997, when Lukwago was just fifteen years old.<sup>28</sup> The rebels attacked his home and shot his parents to death in front of him.<sup>29</sup> Lukwago was then captured and taken to a rebel camp along with three other individuals from his village.<sup>30</sup> Lukwago remained under the rebels control for the next several months during which time he was forced to perform heavy manual labor, engage in fights against government forces, and accompany the LRA soldiers as they raided other villages.<sup>31</sup>

Lukwago testified that while he was in captivity at least one child was killed nearly every day.<sup>32</sup> Repeatedly, Lukwago and the other children were told that they would be killed if they tried to escape, and two children who attempted to escape were shot by the rebels in front of the entire camp.<sup>33</sup> One day, Lukwago and his close friend Joseph, whom he had met at the camp, were ordered to carry stolen weapons and clothing back to the camp.<sup>34</sup> Joseph became too tired to continue and, after severely beating Joseph, the rebels forced Lukwago to place a heavy boulder on Joseph's chest and sit on it until his friend stopped breathing.<sup>35</sup> Two weeks later, while collecting firewood, Lukwago escaped.<sup>36</sup>

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<sup>27</sup> See *The Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (Human Rights Watch Africa/Human Rights Watch Children's Project, New York, N.Y.), at <http://www.hrw.org/reports97/Uganda/>, § I, Background (page numbers not available for this source). Note also that the Ugandan government itself has resorted to the recruitment of child soldiers and the children are used to fight against the LRA. See *Stolen Children*, *supra* note 23, at 2. Furthermore, despite an official amnesty policy towards former rebel fighters, there is evidence that the Ugandan government regularly detains former child soldiers for several months at a time and that the Ugandan military uses former child soldiers to help find LRA landmines. See U.S. DEP'T. OF STATE, COUNTRY REPORT: UGANDA (2000), available at <http://www.state.gov/drl/rls/hrrpt/2000/af/847pf.htm>.

<sup>28</sup> See *Lukwago v. Ashcroft*, 329 F.3d 157, 164 (3<sup>rd</sup> Cir. 2003); Dribben, *supra* note 22.

<sup>29</sup> *Id.* at 164. The court emphasized that none of the other three individuals taken from Lukwago's village on the night of his abduction were children. *Id.* at 173. However, the record does not indicate how old the other abductees were.

<sup>30</sup> See *id.* at 164; Dribben, *supra* note 22.

<sup>31</sup> See *Lukwago*, 329 F.3d at 164. Lukwago participated in at least ten battles. At the end of each battle, he and other captive children were forced to remove clothing from the bodies of dead government soldiers.

<sup>32</sup> See Dribben, *supra* note 22.

<sup>33</sup> See *Lukwago*, 329 F.3d at 164.

<sup>34</sup> See *id.* at 164; Dribben, *supra* note 22.

<sup>35</sup> See *Lukwago*, 329 F.3d at 164; Dribben, *supra* note 22.

<sup>36</sup> See *Lukwago*, 329 F.3d at 164; Dribben, *supra* note 22.

On November 22, 2000, Lukwago arrived at New York's Kennedy airport after being denied asylum in the Netherlands.<sup>37</sup> Upon his arrival, Lukwago was taken into custody by immigration officials.<sup>38</sup> Lukwago applied for relief under both the Refugee Act of 1980 and the CAT. For the next three years, Lukwago was mired in litigation surrounding his asylum claim and on several occasions was threatened with a forced return to Uganda.<sup>39</sup>

The initial judgment of the immigration judge, rendered on August 17, 2001, denied Lukwago's application for asylum and his application for withholding of removal.<sup>40</sup> Nevertheless, the immigration judge granted Lukwago's request for withholding of removal under the CAT.<sup>41</sup> Relying on expert testimony and the Department of State's Special Advisory Opinion, the judge determined that Lukwago would likely suffer persecution at the hands of the Ugandan government if he was returned as the evidence suggested that "former child soldiers are punished, detained in pits, and used to clear minefields."<sup>42</sup> The decision of the immigration judge was appealed by both Lukwago and the Immigration and Naturalization Services (INS).<sup>43</sup>

On appeal, the Board of Immigration Appeals (BIA) denied Lukwago's application for asylum, his request for withholding of removal, and his request for protection under

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<sup>37</sup> See *Lukwago*, 329 F.3d at 164; Dribben, *supra* note 22. There is some indication that the asylum proceedings in the Netherlands failed to provide Lukwago with an opportunity to truly explain his situation. He was initially interviewed by someone who spoke little more English than himself. Although Lukwago asked for an interpreter who spoke his native language, none was provided. Dribben, *supra* note 22.

<sup>38</sup> See *Lukwago*, 329 F.3d at 165; Dribben, *supra* note 22.

<sup>39</sup> See *Lukwago*, 329 F.3d at 165.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* See also 8 C.F.R. § 208.18 (codification of the Convention Against Torture (CAT)). Under the CAT, torture is defined as "[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such 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." (Emphasis added.)

<sup>42</sup> *Lukwago*, 329 F.3d at 165. Again, while the Ugandan government has an official amnesty policy towards former rebel fighters, there is evidence that former fighters, including children, are imprisoned for several months and used to locate landmines.

<sup>43</sup> See *id.*



the CAT.<sup>44</sup> In denying Lukwago relief under the CAT, the BIA acknowledged that the LRA's treatment of Lukwago constituted torture,<sup>45</sup> but held that the CAT provides protection only against torture by government entities or actors, not against actions by groups that are outside of the government's control.<sup>46</sup> The BIA subsequently ordered Lukwago's deportation to Uganda, and Lukwago appealed to the Court of Appeals for the Third Circuit.<sup>47</sup>

The Third Circuit affirmed the BIA determination that Lukwago did not qualify for protection under the CAT.<sup>48</sup> It stated that the standard of acquiescence is applicable where a public official has awareness of acts of torture and thereafter breaches his or her duty to intervene.<sup>49</sup> The court held that Lukwago had not met this standard of proof and that the evidence in the case established that the Ugandan government did not acquiesce in the LRA's activities, but rather was in continuous opposition to the LRA.<sup>50</sup> However, the Court of Appeals did remand the case for further consideration under the Refugee Act to determine whether Lukwago qualified as a refugee due to a well-founded fear of future persecution.<sup>51</sup> On remand, the BIA granted Lukwago political asylum.<sup>52</sup>

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<sup>44</sup> See *id.* at 166. With regards to Lukwago's asylum application, the BIA found that Lukwago had failed to establish that he had either suffered past persecution or had a well-founded fear of future persecution by the Ugandan government or LRA forces on account of one of the five enumerated grounds outlined in the Refugee Act. See *id.*

<sup>45</sup> INS v. Lukwago, Case No. A-78-420-780, 1, 6-7 (M.D. Pa. Feb 21, 2002) [hereinafter BIA Decision I]. [On file with author.]

<sup>46</sup> BIA Decision I, at 6. With regards to Lukwago's claim that he would be tortured by the Ugandan government, the BIA relied on the Ugandan government's amnesty policy towards former rebel fighters to find that Lukwago would not face future persecution by the Ugandan government. However, there is evidence that Uganda does in fact persecute former child soldiers. See *supra* note 23, at 2. As to the claim of torture by the LRA, the court held that Lukwago had produced no evidence that the Ugandan government acquiesced in the activities of the LRA. The Board did not provide any explanation of how it interpreted the term "acquiescence."

<sup>47</sup> See *Lukwago*, 329 F.3d at 166.

<sup>48</sup> See *id.* at 183.

<sup>49</sup> See *id.* (quoting 8 C.F.R. 208.18(a)(7)(2004)).

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> INS v. Lukwago, Case No. A78-420-780, 1, 1-2 (M.D. pa. Aug. 21, 2003).

Lukwago was granted political asylum on the grounds that Lukwago had a well-founded fear of persecution as a member of the particular social group of former child soldiers who have escaped from the LRA and on the basis of the political opinion that would be imputed to him as an escaped LRA soldier.

*B. Randall Sackie*

Like Lukwago, Randall Sackie was forced into service and subjected to untold horrors by a rebel unit operating within his country. Sackie was born in 1976 in the midst of an intense power struggle between the Liberian government and two rebel groups, the National Patriotic Front of Liberia (NPFL) and the Independent National Patriotic Front of Liberia (INPFL).<sup>53</sup> At the age of fourteen, Sackie, along with several others from his village, was abducted at gunpoint by INPFL rebels.<sup>54</sup> Some individuals in his village resisted capture and were immediately shot by the rebel forces.<sup>55</sup> After being taken to the rebel camp, Sackie's arm and back were cut as part of an initiation rite, and he was selected to join a group charged with sweeping newly claimed areas.<sup>56</sup> Sackie was trained in the use of a machine gun for two weeks, sent out on missions, and told that his group would be fighting against government forces.<sup>57</sup> On two or three occasions, Sackie was ordered to kill women and children.<sup>58</sup>

While in INPFL captivity, Sackie witnessed violence against both his fellow captives and civilians on a daily basis.<sup>59</sup> He and the other children were threatened with death if they failed to follow the orders of their captors. The INPFL reinforced its control over the children by regularly placing cocaine in their food and giving them alcohol and marijuana.<sup>60</sup> Approximately one year after his capture, Sackie witnessed the kidnapping and violent murder of the Liberian President Samuel Doe.<sup>61</sup>

Sackie remained with the INPFL forces until a cease fire was reached in 1993, at which time a West African organization called the ECOMOG sent troops into Liberia to disarm the rebel forces.<sup>62</sup> Afraid that he would be killed if captured, Sackie fled to Guinea, where the United Nations

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<sup>53</sup> See U.S. DEPT OF STATE, BUREAU OF AFRICAN AFFAIRS, BACKGROUND NOTE: LIBERIA, available at <http://www.state.gov/r/palei/bgn/6618.htm> (June 2004).

<sup>54</sup> See *Sackie v. Ashcroft*, 270 F. Supp. 2d 596, 601 (E.D. Pa. 2003).

<sup>55</sup> *Id.*

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See *Sackie*, 270 F. Supp. 2d at 601.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 598.

helped him to contact his father in the United States.<sup>63</sup> He was ultimately granted permanent resident status pursuant to a family petition and emigrated to the United States in May of 1995.<sup>64</sup>

In July of 2000, the INS initiated removal proceedings against Sackie, alleging that he had been convicted six different times since his arrival for charges ranging from receipt of stolen property to providing false information to police officers.<sup>65</sup> Sackie denied the charges and applied for asylum and withholding of removal under the CAT.<sup>66</sup> The immigration judge found that Sackie had a well-founded fear of persecution. Further, the judge concluded that Sackie had neither participated in the persecution of others<sup>67</sup> nor been convicted of an aggravated felony while in the United States and thus granted Sackie asylum without considering his CAT claim.<sup>68</sup> On appeal, the BIA agreed that Sackie had not participated in the persecution of others but held that he had failed to meet his burden of establishing a well-founded fear of future persecution on the basis of one of the enumerated grounds.<sup>69</sup> However, as the immigration court had not addressed Sackie's claim for relief under the CAT, the BIA remanded the case for further consideration.<sup>70</sup>

On remand, another immigration judge determined that Sackie was not eligible for CAT relief because he had not established that it was more likely than not that he would be subjected to torture if returned to Liberia.<sup>71</sup> The immigration judge ordered his deportation.<sup>72</sup> The BIA affirmed the immigration judge's ruling without opinion.<sup>73</sup> In response, Sackie filed a habeas corpus petition with the District Court for

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<sup>63</sup> *See id.*

<sup>64</sup> *See Sackie*, 270 F. Supp. 2d at 597.

<sup>65</sup> *See id.*

<sup>66</sup> *See id.*

<sup>67</sup> Under the Immigration and Nationality Act, individuals who have participated in the persecution of others based on one of the five enumerated grounds are barred from gaining asylum. 8 U.S.C. § 1253(h)(2)(A). Furthermore, individuals who have been convicted of aggravated felonies and are considered a danger to the United States community will not be granted asylum. 8 U.S.C. § 1253(h)(2)(B).

<sup>68</sup> *See Sackie*, 270 F. Supp. 2d at 600.

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.* at 601.

<sup>73</sup> *See Sackie*, 270 F. Supp. 2d. at 601.

the Eastern District of Pennsylvania, seeking asylum and withholding of removal under the CAT.<sup>74</sup>

On appeal, the District Court granted Sackie relief under the CAT, citing the torture he might face due to the unstable conditions in Liberia caused by the civil war.<sup>75</sup> The court recognized the numerous rebel groups active in Liberia and their practice of recruiting child soldiers.<sup>76</sup> In particular, the court emphasized that Charles Taylor, the President of Liberia, had himself come to power through the successful campaign of his own rebel force which had utilized child soldiers.<sup>77</sup> Moreover, the court stressed that as a child soldier for INPFL, Sackie had fought directly against Taylor's NPFL and bore physical markings that would distinguish him as an INPFL member.<sup>78</sup> While commenting that Sackie would clearly be threatened by Taylor's NPFL government as a result of his former "membership" in the INPFL, the court also noted that the government of Liberia had virtually no control over the country and itself was guilty of numerous human rights violations.<sup>79</sup> Emphasizing its lack of control, the court observed that the Liberian government had "virtually no power to prevent the crimes against humanity which are currently ongoing throughout the country."<sup>80</sup> Thus, unlike the court in *Lukwago*,<sup>81</sup> the *Sackie* court read the state action requirement of the CAT to include behavior by private actors where the government is either unwilling or unable to protect its citizens from the infliction of torture by non-state actors.<sup>82</sup>

### III. THE CONVENTION AGAINST TORTURE

The universal prohibition against torture is a *jus cogens* norm of international law from which no derogation is permitted.<sup>83</sup> Indeed, the Universal Declaration of Human

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<sup>74</sup> See *id.* at 597.

<sup>75</sup> See *id.* at 601.

<sup>76</sup> See *id.* at 601.

<sup>77</sup> See *id.* at 601.

<sup>78</sup> See *Sackie*, 270 F. Supp. 2d at 602.

<sup>79</sup> See *id.*

<sup>80</sup> *Id.*

<sup>81</sup> See *Lukwago*, 329 F.3d at 183.

<sup>82</sup> See *Sackie*, 270 F. Supp. 2d at 602.

<sup>83</sup> See Dawn J. Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 299 (2003); see also Winston P. Nagan & Lucie

Rights, adopted by the United Nations in 1948, expressly states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>84</sup> This prohibition against torture is similarly stated in the International Covenant on Civil and Political Rights,<sup>85</sup> the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>86</sup> the African Charter on Human and Peoples' Rights,<sup>87</sup> and the American Convention on Human Rights,<sup>88</sup> and is reflective of a newfound recognition of the individual as an independent subject of international law.<sup>89</sup> In the midst of the widespread recognition of the prohibition against torture, the CAT stands as the "most important U.N. treaty for controlling, regulating, and prohibiting torture and related practices."<sup>90</sup> Nevertheless, by refusing to extend the protection of the CAT to cases where the state is either unwilling or unable to provide protection from torture by unofficial actors, U.S. courts have failed to recognize the CAT's inherent intent and purpose and have left individuals like Lukwago without relief.

#### A. *The Scope of the CAT and the State Action Requirement*

The U.N. adopted the CAT to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."<sup>91</sup> Although the

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Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 88 (2001).

<sup>84</sup> Universal Declaration of Human Rights, Dec. 10, 1948, U.N. Doc. A/810, art. 5 [hereinafter UDHR].

<sup>85</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N.T.S. 171, art. 7 [hereinafter ICCPR].

<sup>86</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 71, art. 3 [hereinafter European Convention].

<sup>87</sup> African Charter on Human and People's Rights, June 26, 1981, O.A.U. Doc. CAB/LEG/67/3, art. 5 [hereinafter African Charter].

<sup>88</sup> American Convention on Human Rights, Nov. 22, 1969, art. 5, 144 U.N.T.S. 123, 146 [hereinafter American Convention].

<sup>89</sup> See Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 101. See also MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 249 (3d ed. 1999). For examples of international treaties and declarations that recognize the inherent rights of individuals, see the ICCPR *supra* note 83, CRC *supra* note 1, and UDHR *supra* note 84.

<sup>90</sup> See Nagan, *supra* note 83, at 97.

<sup>91</sup> CAT, *supra* note 14, preamble.

United States took well over a decade to ratify the treaty,<sup>92</sup> its passage was characterized by the Senate as "an important step in the continuing battle to end man's inhumanity to man."<sup>93</sup> In the aim of fulfilling its purpose of bringing an end to the use of torture internationally, the CAT places two important affirmative obligations on its signatory states. First, under Article 2, "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."<sup>94</sup> This obligation to prevent acts of torture is absolute and "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."<sup>95</sup> Second, and most important for the purposes of this Note, states are prohibited under Article 3 from returning any individual to a country where there are "substantial grounds" for believing that he or she would be in danger of being tortured.<sup>96</sup>

In determining whether an individual is subject to protection by virtue of Article 3, a determination must first be made as to whether or not that individual is in danger of being subjected to torture if returned to his or her native country. While numerous international instruments expressly prohibit the use of torture, the CAT is the first international instrument to set forth a definition of torture.<sup>97</sup> According to Article 1 of the CAT, torture is defined as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is

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<sup>92</sup> The United States signed the CAT in 1988 and the Senate granted its consent to ratification in October of 1990. However, the U.S. did not become a full party to the treaty until the Clinton Administration deposited the ratification with the U.N. in 1994. See Kristen B. Rosati, *The United Nations Convention Against Torture: A Viable Alternative for Asylum Seekers*, Vol. 74, No. 45 INTERPRETER RELEASES 1773, 1774 (1997).

<sup>93</sup> See 136 CONG. REC. 36,196 (1990) (statement of Senator Moynihan).

<sup>94</sup> CAT *supra* note 14, art. 2.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at art. 3. See also Rosati, *supra* note 92, at 1774.

<sup>97</sup> See generally ICCPR, UDHR, African Charter, American Convention, European Convention; see also David Weissbrodt and Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 10 (1999).

suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such 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.<sup>98</sup>

From this definition, three requirements emerge that must be met in order to have a viable claim under Article 3 of the CAT.<sup>99</sup> First, the act must involve the infliction of severe physical pain or mental suffering.<sup>100</sup> An important caveat to this requirement is that torture does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions."<sup>101</sup> Second, the torturous act must be intentional and must be done with a certain purpose or objective.<sup>102</sup> For this reason, there is some debate as to whether pain inflicted for purely sadistic reasons can qualify as torture.<sup>103</sup> However, it is generally understood that such acts would necessarily contain an element of punishment or humiliation and, as such, would qualify as acts of torture.<sup>104</sup>

Finally, and most significantly, the CAT expressly states that its protection is limited to those acts of torture that are "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."<sup>105</sup> While this limitation emphasizes states as the primary agents of torture, the inclusion of the term "acquiescence" necessarily allows for a finding of torture by non-state actors or entities.<sup>106</sup> Indeed, to read the definition of torture as limited to acts of state would conflict with the broad

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<sup>98</sup> CAT, *supra* note 14, art. 1. Article 3 of the CAT holds that no state may return an individual to another state when there are "substantial grounds" for believing that person will be subjected to torture. While Article 3 does not contain any state action language, the UNHCR General Comment to the Convention states that "Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention." *Office of the High Commissioner of Human Rights, Implementation of article 3 of the Convention in the Context of article 22, CAT General Comment 1*, U.N. Doc. A/53/44, annex IX (Nov. 21, 1997), <http://www.unhcr.ch/tbs/doc.nsf/0/13719f169a8a4ff78025672b0050eba1?Opendocument> [hereinafter *General Comment*].

<sup>99</sup> See Weissbrodt, *supra* note 97, at 10. See also Rosati, *supra* note 92, at 1775.

<sup>100</sup> See Weissbrodt, *supra* note 97, at 10. See also Rosati, *supra* note 92, at 1775.

<sup>101</sup> CAT, *supra* note 14, art. 1(1).

<sup>102</sup> See Weissbrodt, *supra* note 97, at 10. See also Rosati, *supra* note 92, at 1775.

<sup>103</sup> See Weissbrodt, *supra* note 97, at 10. See also Rosati, *supra* note 92, at 1775.

<sup>104</sup> See Weissbrodt, *supra* note 97, at 10.

<sup>105</sup> CAT, *supra* note 14, art. 1(1).

<sup>106</sup> See Moore, *supra* note 89, at 94.

obligation placed upon states in Article 2 to prevent and punish all acts of torture occurring within their jurisdiction.<sup>107</sup> Such a restrictive interpretation would also conflict with the vast majority of modern human rights treaties, all of which recognize the obligation of states to protect individuals from abuses by non-state agents.<sup>108</sup> It is apparent from the *travaux preparatoires* that the CAT was intended to protect against acts of torture by non-state actors.<sup>109</sup> The *travaux preparatoires* indicate that the CAT's framers envisioned a liberal system in which official acquiescence would be implied unless the state took appropriate action against cases of torture.<sup>110</sup> Under the system envisioned by the framers, the omission or failure of the state to act in cases of torture would allow for a finding of state responsibility.<sup>111</sup>

Such a definition of torture is also consistent with the customary international law doctrine of imputability, which holds that "[a]n act or omission which produces a result which is on its face a breach of a legal obligation gives rise to responsibility."<sup>112</sup> While the doctrine of imputability does not automatically attach state responsibility for the actions of individuals not acting on behalf of the state, state responsibility will attach if it is determined that the state failed to take appropriate action.<sup>113</sup> For example, if a government is aware that tribal elders within its territory are performing female genital mutilation but fails to take action to

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<sup>107</sup> CAT, *supra* note 14, art. 1. Note that under the Vienna Convention on the Law of Treaties, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31.

<sup>108</sup> See Moore, *supra* note 89, at 92-93. For examples, see the International Covenant on Civil and Political Rights which denies to "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 or freedoms" recognized by the Covenant. ICCPR, *supra* note 85, art. 5(1). Also see the Convention on the Elimination of Racial Discrimination, which requires states party to the treaty to "prohibit and bring an end to racial discrimination by any persons, group or organization." ICERD, opened for signature March 7, 1966, art. 2(1)(d), 660 U.N.T.S. 195, 216-18.

<sup>109</sup> See Miller, *supra* note 83, at 104. See also Samuel L. David, *A Foul Immigration Policy: U.S. Misinterpretation of the Non-Refoulement Obligation Under the Convention Against Torture*, 19 N.Y.L. SCH. J. HUMN. RTS. 769, 785-86 (2003).

<sup>110</sup> See Miller, *supra* note 83, at 104. See also David, *supra* note 109, at 785-86 (2003).

<sup>111</sup> See Miller, *supra* note 83, at 304.

<sup>112</sup> Miller, *supra* note 83, at 304. See also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 439 (4<sup>th</sup> ed. 1990) [hereinafter BROWNLIE].

<sup>113</sup> See Miller, *supra* note 83, at 305.



prevent these acts or punish the perpetrators, then the state will be liable for its non-feasance.<sup>114</sup> The focus is on what action by the state would have been appropriate under the circumstances.<sup>115</sup> Whether the government is in fact capable of controlling the action is irrelevant; instead what matters is whether the government is taking action to bring an end to the acts of torture.<sup>116</sup> Building upon these established notions of state responsibility, this Note further contends that state responsibility might also be found where the state has taken some steps to prevent against private acts of torture, but nevertheless remains unable to fulfill its obligation as a government to adequately protect its citizens.

Despite the broad interpretation of the state action requirement that is encouraged by the CAT itself and basic principles of international law, both the Committee Against Torture, the adjudicatory branch established by the CAT, and courts in the United States have largely failed to extend the CAT's protection to instances where the state acquiesces through its inability or unwillingness to prevent private acts of torture. Such a failure contradicts the very purpose and intent of the CAT and leaves individuals vulnerable to torture in an era in which non-state actors have become increasingly powerful.

*B. International Interpretation of the CAT: Cases from the Committee Against Torture*

Under Article 17 of the CAT, the Committee Against Torture (Committee) is charged with oversight of the CAT and is authorized to hear complaints by individuals against states for alleged violations of the treaty.<sup>117</sup> In three cases, the Committee has heard complaints by individuals seeking relief under Article 3 from torture by non-state actors.<sup>118</sup> In one of the

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<sup>114</sup> *Id.*

<sup>115</sup> *See id.*

<sup>116</sup> *See BROWNLIE, supra note 112, at 439.*

<sup>117</sup> CAT, *supra* note 14, art. 17. *See also* David, *supra* note 109, at 773. While Committee decisions are not binding on any states party to the CAT, the Committee's decisions nevertheless serve as important points of reference for state parties as they enforce the CAT domestically.

<sup>118</sup> *See G.R.B v. Sweden*, CAT/C/20/D/83/1997 (May 15, 1998); *Elmi v. Australia*, CAT/C/22/D/120/1998 (May 25, 1999); *S.V. v. Canada*, CAT/C/26/D/49/1996 (May 15, 2001).

three decisions, *Elmi v. Australia*,<sup>119</sup> the Committee found that a valid claim under the CAT existed absent a fear of torture by state actors. The decisions of the Committee as to the question of torture by unofficial actors highlight the struggle between a formalistic interpretation of the CAT and a more flexible interpretation that takes into account its intent and purpose.<sup>120</sup>

In the earliest case concerning non-state actors, *G.R.B. v. Sweden*, which was decided in 1998, the Committee reviewed a Peruvian citizen's claim that she would be subjected to torture by both governmental and non-governmental entities if returned to Peru.<sup>121</sup> G.R.B. and her family were active in the Communist Party of Peru. Her parents had been arrested and imprisoned by state authorities, during which time they were beaten and tortured.<sup>122</sup> On a visit to Peru, G.R.B. was herself tortured when she was raped by members of Sendero Luminoso, a rebel group operating in Peru.<sup>123</sup> G.R.B. claimed that, if returned to Peru, she would be subjected to torture at the hands of the Peruvian government and the Sendero Luminoso.<sup>124</sup> While rejecting her claim for relief on all counts, the Committee expressly addressed the issue of torture by the Sendero Luminoso, a non-state group. The Committee held that "expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention."<sup>125</sup>

One year later, however, in *Elmi v. Australia*, the Committee approved a claim for relief where the torture feared was by non-state actors.<sup>126</sup> The claimant was a member of the Shikal clan in Somalia who had witnessed the execution of his father and the torture of his brother and sister by members of a private militia group, the Haiwye, after his father had refused to provide the militia with financial support.<sup>127</sup> After the execution of his father, Elmi was himself threatened by members of the Haiwye on several occasions and he claimed he

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<sup>119</sup> See *Elmi*, CAT/C/20/D/83/1997 (May 17, 1998).

<sup>120</sup> See David, *supra* note 109, at 777.

<sup>121</sup> See *G.R.B.*, ¶¶ 2.1-2.5.

<sup>122</sup> See *id.* at ¶ 2.2.

<sup>123</sup> See *id.* at ¶ 2.3.

<sup>124</sup> See *id.* at ¶ 2.1-2.5.

<sup>125</sup> See *id.* at ¶ 6.5.

<sup>126</sup> *Elmi*, CAT/C/22/D/120/1998 (May 25, 1999).

<sup>127</sup> See *id.* at ¶ 2.3.

would be tortured by the Haiweye militia if returned to Somalia.<sup>128</sup> In particular, Elmi alleged that the Haiweye militia was in control of the Somali airports and that he would be immediately detained and tortured upon arrival.<sup>129</sup> Australia countered that Article 3 was not meant to apply to cases of torture by non-governmental actors. Over the objections of Australia, the Committee granted Elmi relief, emphasizing the lack of any official government in Somalia and the de facto control exercised by rebel forces within Somalia.<sup>130</sup> According to the Committee, the exercise of basic government functions by the Haiweye meant that its actions fell within the scope of the phrase "public officials or other persons acting in an official capacity" found in Article 1 of the CAT.<sup>131</sup>

Although *Elmi* seemed to signal a willingness on the part of the Committee to read the state action requirement of the CAT more liberally and in accordance with its purpose, the Committee returned to its reasoning in *G.R.B.* in the recent case *S.V. v. Canada*.<sup>132</sup> The claimants in *S.V.* were Tamils from Sri Lanka and were members of a political party that advocated the formation of a separate Tamil state.<sup>133</sup> Amidst the struggle for power in Sri Lanka during the late 1980s, the claimants were victims of torture at the hands of the Liberation Tigers of Tamil Elam (LTTE), a rebel group seeking control in the Tamil region of Sri Lanka.<sup>134</sup> The claimants alleged that, if returned, they would be tortured by members of the LTTE. The Committee denied the claimants relief and stated that the claimants' allegation that they would be tortured by the LTTE, a non-governmental organization, was outside of the Committee's jurisdiction.<sup>135</sup>

The three cases on torture by non-state actors brought before the Committee demonstrate the inadequacy of the CAT when it is strictly interpreted to apply to torture by official actors only. While the Committee did grant relief where the non-state entity accused of torture was in fact exercising de facto control, the Committee has not recognized the doctrine of

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<sup>128</sup> See *id.* at ¶ 3.1.

<sup>129</sup> See *id.* at ¶ 3.1.

<sup>130</sup> See *id.* at ¶ 6.5.

<sup>131</sup> See *Elmi*, at ¶ 6.5.

<sup>132</sup> See David, *supra* note 109, at 776-77.

<sup>133</sup> *S.V.*, CAT/C/26/D/49/1996 (May 15, 2001), ¶ 2.1, 2.2.

<sup>134</sup> See *S.V.*, ¶ 2.1-2.5.

<sup>135</sup> See *S.V.*, ¶ 9.5.

imputability and has refused to extend the CAT's protection to cases where a government has failed to properly address cases of torture occurring within its own territory. Accordingly, the Committee has failed to follow the CAT in accordance with its goal of eradicating torture.

C. *Domestic Interpretation: The Meaning of State Acquiescence*

The U.S. courts, like the Committee, have been confronted with cases of individuals seeking relief under Article 3 from torture by non-state actors. In ratifying the CAT, the United States set forth a number of qualifications in its implementation of specific articles.<sup>136</sup> As to the state action requirement of Article 1, the U.S. enactment of the CAT defines the term "acquiescence" as requiring that a "public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity."<sup>137</sup> The United States has further stated that actual knowledge of torture by private actors is not required and that cases of "willful blindness" will be considered to fall within the scope of the term acquiescence.<sup>138</sup> The courts, however, have applied a strict interpretation of these qualifications and, contrary to Congressional intent, have required a finding of "willful acceptance" by the state before the state can be said to have acquiesced in acts of torture by private actors. As a result, the courts have failed to extend protection to instances where the state is either unwilling or unable to protect against private acts of torture.

In *In re S-V-*, the BIA denied relief under Article 3 to a native of Colombia and permanent resident of the United States, who claimed that if returned he would be in danger of being subjected to torture by non-governmental guerilla forces and paramilitary groups.<sup>139</sup> The respondent alleged that guerilla

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<sup>136</sup> See Miller, *supra* note 83, at 305. See also U.S. State Department, *Initial Report of the United States of America to the UN Committee Against Torture*, submitted by the United States to the Committee Against Torture, October 15, 1999 [hereinafter *Initial Report*].

<sup>137</sup> See *Initial Report*, ¶ 98.

<sup>138</sup> See *id.*

<sup>139</sup> See *In re S-V-*, 22 I. & N. Dec. 1306 (2000) (publication page references not available). The claimant lived in the United States as a lawful permanent resident since he was approximately six months old. The United States initiated exportation

forces would presume that he had money based on his former residency in the United States and his inability to speak Spanish fluently and that he would, therefore, be a natural target for robbery and kidnapping.<sup>140</sup> In denying relief, the BIA turned the principle of government acquiescence on its head. The BIA indicated that in cases of torture by non-state actors the claimant must show that the state is "willfully accepting" of such acts.<sup>141</sup> The BIA then held that regardless of any determination as to whether or not the respondent was in fact in danger of being tortured, he failed to establish that the Colombian government was "willfully accepting" of the activities of rebel forces within its territory.<sup>142</sup> In addition, the BIA explicitly held that Article 3 "does not extend protection to persons fearing entities that a government is unable to control."<sup>143</sup>

The concurring and dissenting opinions in *In re S-V* disagreed with the majority's narrow interpretation of state acquiescence and indicated that a state may be liable where it is unable to control acts of torture by private actors. Indeed, the dissent stated that there is an "open question as to when . . . the loss of internal control by an existing government can amount to 'acquiescence' that invokes the protection of the Convention Against Torture."<sup>144</sup> Thus, according to the concurring and dissenting opinions, the determination of whether relief can be granted under Article 3 where a government is unable to control the commission of torture by private actors is not settled and is open for an interpretation different from that reached by the majority.

The reasoning employed by the BIA in *In re S-V* was reaffirmed in two subsequent CAT cases, *In re Y-L*, *A-G*, *In re*

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proceedings after the respondent was convicted for committing grand theft. Under the CAT, unlike the Refugee Convention, relief will not be denied where a person has been convicted of a crime.

<sup>140</sup> See *id.* at 1307-10.

<sup>141</sup> See *id.* at 1312.

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> *In re S-V*. (Board Member Villageliu, concurring). In his concurring opinion, Board Member Villageliu pointed out that for immigration purposes, the BIA interpreted the term "government" quite liberally to include political organizations exercising power over people within a territory. He then pointed out that the rebel forces in Colombia exercised substantial control over people within their regions. As such, he contended that there was some argument that the rebel groups were exercising *de facto* control. This follows the line of reasoning already established in the Committee decision, *Elmi*, CAT/C/22/D/120/1998.

*R-S-R*,<sup>145</sup> and *Amanfi v. Ashcroft*.<sup>146</sup> In *In re Y-L*, Attorney General Ashcroft denied relief under Article 3 to three criminal aliens who faced deportation. A-G-, a citizen of Jamaica, argued that his life had been threatened by a group of individuals involved in the drug trade in Jamaica and that he would be murdered upon his return.<sup>147</sup> In the initial proceeding, the immigration judge determined that the Jamaican government “cannot or will not control those who wish to persecute the respondent” and, on this basis, found a government role in the feared torture and granted A-G- relief under Article 3.<sup>148</sup> In reversing this finding, the BIA held that the Jamaican government did not bear any liability. Instead, the BIA reiterated the holding of *In re S-V* concerning torture by private actors, stating that the relevant inquiry is whether the government is willfully accepting of atrocities occurring within its jurisdiction. In this case, the Jamaican government had undertaken efforts at reform and the BIA concluded that these efforts demonstrated that the government was not willfully accepting of private acts of torture by drug cartels within its territory.

While A-G-, a convicted drug dealer, may indeed have made a weak case for protection under the CAT, the reasoning of *In re S-V* was also employed in more sympathetic settings in *Amanfi v. Ashcroft*. Amanfi, a native and citizen of Ghana, claimed that he had been tortured by “macho men”<sup>149</sup> who had been hired by members of his ethnic group when they discovered that he was homosexual.<sup>150</sup> He argued that if returned to Ghana he would again be subjected to torture at the hands of “macho men” and that such action would go unabated by the Ghanaian police force.<sup>151</sup> The court denied Amanfi’s petition for relief under the CAT, siding with the INS contention that “macho men are private actors not associated

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<sup>145</sup> *In re Y-L*, *In re A-G*, *In re R-S-R*, 23 I & N Dec. 270 (B.I.A. 2002).

<sup>146</sup> *Amanfi v. Ashcroft*, 328 F.3d 719 (2003).

<sup>147</sup> See *In re Y-L* at 281.

<sup>148</sup> *In re Y-L* at 282. The immigration judge emphasized the corruption that plagued the Jamaican police force and the connection between corrupt police and drug cartels in the region. In particular, the immigration judge emphasized that the drug dealers would be capable of bribing Jamaican officials to arrest A-G- on false pretenses and then seek their revenge.

<sup>149</sup> *Amanfi*, 328 F.3d at 724. The court adopted the definition of “macho men” utilized by the State Department and stated that macho men are private security guards hired by individuals to settle disputes.

<sup>150</sup> *Id.* at 721-23.

<sup>151</sup> *Id.* at 725.

with the government of Ghana.”<sup>152</sup> Moreover, the court held that the Ghanaian authorities could only be held liable for the actions of “macho men” if Amanfi established that Ghanaian officials were aware of the actions and breached their legal responsibility to intervene.<sup>153</sup> Thus, the *Amanfi* court followed the precedent set by *In re S-V-* and held that state responsibility cannot be found in cases where the state is unable to stop acts of torture.

In contrast to the BIA rulings in *In re S-V-* and its progeny, the Ninth Circuit Court of Appeals in its recent decision, *Zheng v. Ashcroft*, returned to an interpretation of the state action requirement that is consistent both with Congressional intent in enacting the CAT and with the very purpose and intent of the CAT itself. Zheng, a citizen of China, was smuggled into the United States at the age of sixteen by “snakeheads,” seamen engaged in the field of human smuggling.<sup>154</sup> The snakeheads constitute a powerful organization in China and have engaged in the worst forms of torture, including dismemberment of individuals who fail to pay debts owed.<sup>155</sup> Zheng alleged that if returned to China he would face torture at the hands of the snakeheads and that the Chinese government would fail to provide any protection as their existence was not recognized by the government of the People’s Republic of China (PRC).<sup>156</sup>

In its decision granting Zheng relief under the CAT, the court expressly rejected the reasoning employed by the BIA in *In re S-V-* and found that the requirement of willful acceptance by the government was too restrictive, impermissibly narrow, and ignored clear Congressional intent.<sup>157</sup> The court instead returned to the language utilized by the Senate in enacting the CAT and found that the proper inquiry is whether public officials have awareness of acts of torture and turn a “blind eye” to its occurrence.<sup>158</sup> The reasoning employed by the *Zheng* court, like that employed by the *Sackie* court, adheres closely to the intent and purpose of the CAT and the intent of Congress in enacting the treaty. Read together, *Zheng* and *Sackie* allow

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<sup>152</sup> *Id.* at 725.

<sup>153</sup> *See id.* at 726.

<sup>154</sup> *See Zheng v. Ashcroft*, 332 F.3d 1186, 1189 (9th Cir. 2003).

<sup>155</sup> *See id.* at 1189.

<sup>156</sup> *See id.*

<sup>157</sup> *See id.* at 1194.

<sup>158</sup> *Id.* at 1196.

for an interpretation of the CAT that escapes the unrealistic and restrictive BIA approach. These judicial opinions would allow individuals facing torture by non-state actors to seek its protection either where the government is unwilling, as was the case in *Zheng*, or unable, as was true in *Sackie*, to provide protection.

#### IV. U.S. ASYLUM LAW AND THE STATE ACTION REQUIREMENT: A MODEL FOR THE INTERPRETATION OF THE CONVENTION AGAINST TORTURE

As discussed above, several decisions concerning the CAT have adopted a strict interpretation of its provisions on state accountability. In doing so, the courts have largely ignored both the purpose of the CAT and clear Congressional intent and have denied protection to those individuals who have fallen victim to torture by non-state actors. To bring U.S. jurisprudence regarding the CAT into compliance with its purpose and with Congressional intent, the state action requirement of the CAT should be read to include those cases where the state is either unwilling or unable to provide protection. Court should utilize the Refugee Act, and its similar requirement of a state nexus, as an example of how to interpret the state action requirement of the CAT to include private acts of torture.

##### A. *The Refugee Convention of 1951 and U.S. Adoption of the Refugee Act of 1980*

In the aftermath of World War II, the international community and the newly-formed United Nations were forced to develop a comprehensive solution to the refugee problem; a solution that would provide a clear definition of “refugee” and afford such an individual broad protections.<sup>159</sup> To that end, the office of the United Nations High Commissioner for Refugees (UNHCR) was established in 1950 and charged with resolving the refugee problem.<sup>160</sup> In 1951, delegates from twenty-six

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<sup>159</sup> See *The Wall Behind Which Refugees Can Shelter: The 1951 Geneva Convention*, United Nations High Commissioner on Refugees (2001) at 11 [hereinafter *The Wall*].

<sup>160</sup> See *id.* at 8. It was initially hoped that the refugee crisis could be resolved quickly and the UNHCR was therefore only given a three-year mandate. However, such a quick resolution proved impossible and the UNHCR remains the principal



participating countries convened in Geneva and hammered out the Refugee Convention of 1951.<sup>161</sup> Article 1 of the Refugee Convention, together with its 1967 Protocol, defines a refugee as someone who is outside of his country of origin and who as a result of having a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" is either unable or unwilling to "avail himself of the protection of that country."<sup>162</sup>

The definition of refugee currently in force in the United States was established through the passage of the Refugee Act of 1980.<sup>163</sup> Although the Act was substantively characterized as a reflection of "one of the oldest themes in America's history—welcoming homeless refugees to [its] shores,"<sup>164</sup> procedurally it served the purpose of bringing United States refugee law into conformity with the Refugee Convention. Indeed, bringing the United States into conformance with the Refugee Convention is widely regarded as one of the primary purposes of the Act.<sup>165</sup> With some minor deviations, the Refugee Act of 1980 expressly adopts the definition outlined in the Refugee Convention.<sup>166</sup> Under the Act, a refugee is defined as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race,

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agency of the United Nations concerned with refugees. See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 4 (1983).

<sup>161</sup> See *The Wall*, *supra* note 159, at 8. See also GOODWIN-GILL, *supra* note 160, at 12.

<sup>162</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter the Refugee Convention] at Article 1. The Refugee Convention was initially viewed as a quick solution to the refugee problem, and therefore included only those individuals who qualified as refugees as a result of events occurring before January 1, 1951. Refugee Convention Art. 1. However, in 1967, the Protocol Relating to the Status of Refugees entered into force and the time restraint was lifted. Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 269.

<sup>163</sup> See Pub. L. No. 96-212, §201(a), 94 Stat. 102 (codified as amended 8 U.S.C. §1102(a)(42)(A)).

<sup>164</sup> Pub. L. No. 96-212, Sen. Rep. 96-256, 1980 U.S.C.C.A.N. 141, July 23, 1979

<sup>165</sup> See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987); see also Karen K. Jorgensen, *The Role of the U.S. Congress and Courts in the Application of the Refugee Act of 1980*, in *REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES* 129 (Greenwood Publishing Group, Ved P. Nanda 1989).

<sup>166</sup> See *Cardoza-Fonseca*, 480 U.S. at 436; Jorgensen, *supra* note 165, at 129; Moore, *supra* note 89, at 101.

religion, nationality, membership in a particular social group, or political opinion.<sup>167</sup>

Thus, regardless of whether the purpose of the Act was to further traditional American goals of providing aid to the needy or was simply regarded as a necessary step in bringing U.S. asylum law into compliance with international standards, the definition is formulated along the same lines as the Refugee Convention and brings with it the same requirements for a finding of persecution.

### *B. The Refugee and the State Action Requirement*

The definition of refugee that is outlined both in the Refugee Convention and in the Refugee Act requires that the individual claiming refugee status be either unable or unwilling to avail him or herself of the protections of his or her country of origin.<sup>168</sup> Thus, in both documents, there is a strong emphasis on the lack of state protection.<sup>169</sup> However, despite the seeming emphasis on the failure of the state to protect the individual from persecution, neither document expressly requires that the state itself be the agent of the persecution feared.<sup>170</sup> Instead, it is largely understood, both internationally and domestically, that where an individual has suffered persecution on one of the five enumerated grounds and where protection from future harm is not available in the country of origin, he or she should be eligible for refugee status regardless of who is responsible for the persecution.<sup>171</sup>

Extending the protection of the Refugee Convention to individuals who have been persecuted by non-state actors is also consistent with the interpretation of the Convention promulgated by the United Nations High Commission for Refugees in its Handbook of guidelines for interpreting the

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<sup>167</sup> 8 U.S.C. § 1101(a)(42)(A) (2000).

<sup>168</sup> Refugee Act of 1980, 8 U.S.C. § 1101(a)(42)(A) (2000); Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 189 U.N.T.S. 137, 152.

<sup>169</sup> See Moore, *supra* note 89, at 102.

<sup>170</sup> See *id.* at 102.

<sup>171</sup> See GOODWIN-GILL, *supra* note 160, at 42 (stating that the concept of persecution is not limited to government actors and their agents). See also *The Wall*, *supra* note 158, at 17 ("The origin of the persecution ... should not be decisive in determining whether a person is eligible for refugee status. What is important is whether a person deserves international protection because it is not available in the country of origin."). However, while decidedly in the minority, Austria, France, Germany and the Netherlands have all refused asylum to those individuals who fear persecution by non-state agents. See Moore, *supra* note 89, at 108.

Convention.<sup>172</sup> The Handbook addresses the various elements of the refugee definition and expressly recognizes that agents of persecution need not themselves be agents of the state.<sup>173</sup> According to Paragraph 65 of the handbook, "[w]here serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."<sup>174</sup> A state is considered unwilling to provide protection when it is complicit in, or at least tolerant of, the persecution that is feared by the individual.<sup>175</sup> A state is considered unable to provide protection when the state apparatus has been compromised or rendered dysfunctional by internal conflict.<sup>176</sup> Thus, according to Paragraph 65, a person who has a well-founded fear of persecution by non-state actors on the basis of one of the enumerated grounds is eligible for refugee status when the state of origin is either unwilling or unable to protect that individual from the type of harm that is feared.<sup>177</sup>

While the Handbook guidelines are not binding on any of the states party to the Refugee Convention, the Handbook is widely utilized by states in enforcing their own refugee laws.<sup>178</sup> The Handbook has provided "significant guidance" in construing U.S. obligations under the Refugee Convention, and it is regularly relied on by the courts in determining whether an individual qualifies for refugee status.<sup>179</sup> For example, in *McMullen v. INS*, the Court of Appeals for the Ninth Circuit granted asylum to a former member of the Provisional Irish Republican Army (PIRA), an anti-government organization, who feared reprisals from the PIRA due to his refusal to participate in their terrorist activities.<sup>180</sup> In setting out the requirements for refugee status, the court held that McMullen had the burden of proving persecution either by the

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<sup>172</sup> See UNITED NATIONS OFFICE OF THE HIGH COMM'R 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; Reedited 1992) [hereinafter UNHCR Handbook].

<sup>173</sup> See *id.*

<sup>174</sup> *Id.*

<sup>175</sup> See Moore, *supra* note 89, at 103.

<sup>176</sup> See *id.*

<sup>177</sup> See *id.* See also Moore, *supra* note 89, at 103.

<sup>178</sup> See Moore, *supra* note 89, at 102.

<sup>179</sup> See *Cardoza-Fonseca*, 480 U.S. at 439 n. 22.

<sup>180</sup> *McMullen v. INS*, 658 F.2d 1312 (1981).

government or "by a group which the government is unable to control."<sup>181</sup> In doing so, the court expressly recognized that state action is not a requirement for refugee status and that the Refugee Act protects against persecution by non-state actors.

Since *McMullen*, U.S. courts have consistently held that persecution within the meaning of the Refugee Act includes persecution by non-governmental groups that the government is either "unwilling or unable to control[.]"<sup>182</sup> In particular, courts have recognized that fear of persecution from anti-government guerilla groups can constitute persecution within the meaning of the Refugee Act.<sup>183</sup> In *Bolanos-Hernandez v. INS*, the Court of Appeals for the Ninth Circuit held that an individual who had alleged persecution on the basis of his political opinion by an anti-government guerilla group was eligible for asylum.<sup>184</sup> For the purposes of this analysis, it is significant that the court emphasized that the INS made no contention that the government of El Salvador was either willing or able to protect Bolanos from feared persecution and, as such, he was eligible for relief under the Refugee Act.<sup>185</sup> In another case concerning a refugee fleeing guerilla violence in El Salvador, the Court of Appeals for the Ninth Circuit, while remanding the case to the BIA for further review, noted that the threat of persecution need not come from the government but can also come from anti-government guerilla organizations.<sup>186</sup> As applied by a number of courts in the United States, the Refugee Act does not require state action and instead grants relief to those individuals whose country of origin is either unwilling or unable to protect them from persecution by non-state actors.

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<sup>181</sup> *Id.* at 1315.

<sup>182</sup> *Id.* at 1315 n. 22. See also *Arteaga v. INS*, 836 F.2d 1227, 1231 (1988); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1284 (1985).

<sup>183</sup> See *Vasquez v. INS*, 177 F.3d 62 (1999); *Arteaga*, 836 F.2d 1227; *Bolanos-Hernandez*, 767 F.2d 1277.

<sup>184</sup> See *Bolanos-Hernandez*, 767 F.2d 1277.

<sup>185</sup> See *id.* at 1284.

<sup>186</sup> See *Arteaga*, 836 F.2d at 1231. Note, however, that while persecution by non-government actors does in fact qualify as persecution within the meaning of the Refugee Act, the individual seeking asylum must demonstrate that the harm threatened is widespread and not confined to one area or region of the country. Thus, if relocation in another part of the country would in itself protect an individual from persecution by non-state actors, asylum will not be granted. See *Matter of Fuentes*, 19 I. & N. Dec. 658 (BIA 1988).

C. *The Failure of the Refugee Act to Adequately Protect Victims of Persecution by Non-State Actors*

Although U.S. courts have generally held that persecution by non-state actors qualifies an individual for relief under the Refugee Act, they have also developed a very strict approach to determining whether persecution occurs on the basis of one of the enumerated grounds.<sup>187</sup> Some commentators argue that such a "[s]trict standard[] of causation [] tend[s] 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."<sup>188</sup> In *INS v. Elias-Zacarias*, the Supreme Court denied asylum to a native of Guatemala who fled his country in order to escape forced conscription by anti-government guerillas.<sup>189</sup> While not denying that persecution by non-government guerilla forces could constitute persecution, the Supreme Court nevertheless held that Elias-Zacarias failed to demonstrate that the guerillas persecuted him on account of *his* political opinion rather than on the basis of his refusal to join their ranks.<sup>190</sup> While this strict standard of causation is applied to all asylum applicants, it puts a greater burden on those fleeing persecution by non-state actors as definitive proof of their motivations is more elusive.<sup>191</sup> The difficulty of finding persecution based on one of the enumerated grounds where the persecutor is a non-state entity was precisely the problem faced by the BIA and the Third Circuit Court of Appeals in determining whether Lukwago had in fact suffered persecution on account of his membership in a political group or his political opinion. The inability of the Refugee Act to adequately protect victims of unofficial torture highlights the necessity for a reading of the CAT that provides for greater protection from persecution by non-state actors.<sup>192</sup>

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<sup>187</sup> See Moore, *supra* note 89, at 111.

<sup>188</sup> See *id.*

<sup>189</sup> *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) [hereinafter *Zacarias*].

<sup>190</sup> *Id.* at 483. The *Zacarias* decision "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." See Moore, *supra* note 89, at 112.

<sup>191</sup> See Moore, *supra* note 89, at 114. Note also that such a strict causation requirement conflicts with Paragraph 81 of the UNHCR Handbook which recognizes that "it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant." UNHCR Handbook, *supra* note 172, ¶ 81.

<sup>192</sup> *Lukwago v. Ashcroft*, 329 F.3d 157, 182-83 (3d Cir. 2003).

The Refugee Convention as enacted both domestically and internationally recognizes the reality of the modern world and grants protection to those who have been tortured by non-state entities. In determining whether an individual qualifies for relief under the Convention, the proper inquiry requires a determination of whether the state is either unwilling or unable to protect the individual from persecution. However, the requirement that the persecution be committed on the basis of one of the five enumerated grounds unnecessarily burdens those who have been victims of unofficial torture. As such, the Refugee Act should not be viewed as an alternative form of relief for individuals who have been tortured by non-state actors. As demonstrated above, the Refugee Act fails to provide absolute protection to victims of unofficial persecution and it is therefore of critical importance that the CAT be interpreted to grant relief in instances where a state is either unwilling or unable to provide protection. To do otherwise contravenes the purpose of the treaty and denies relief to the very individuals that it was created to protect.

## V. CONCLUSION

In recent years, internal conflicts have come to dominate the lives of countless individuals. The lines between civilians and soldiers, children and adults, have become blurred, and in the process innocent children have fallen victim to unspeakable forms of torture. The CAT was established for the purpose of eradicating torture internationally.<sup>193</sup> In ratifying the treaty domestically, the United States thereby committed itself to "the international fight against torture"<sup>194</sup> and to enforcing the CAT in accordance with its purpose and intent.<sup>195</sup> However, the United States has failed to fulfill its obligations as a party to the treaty and has consistently denied protection to individuals such as Lukwago who are victims of torture at the hands of non-state actors.

That the CAT was intended to cover cases of torture by unofficial actors is evident in the *travaux preparatoires* for the treaty, which indicate the intent of the drafters to include acts of torture by non-state actors.<sup>196</sup> Moreover, the very language of

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<sup>193</sup> CAT, *supra* note 14, preamble.

<sup>194</sup> See *Initial Report*, *supra* note 137.

<sup>195</sup> Vienna Convention, *supra* note 107, Art. 31.

<sup>196</sup> See Miller, *supra* note 83, at 104; see also David, *supra* note 109, at 785-86.

the statute implementing the CAT in the United States allows its protection to extend to acts of private torture.<sup>197</sup> Under U.S. law, acquiescence does not require a finding of willful acceptance and instead requires only that the state have "awareness" of acts of torture and that it thereafter breach its duty to intervene to stop such activity.<sup>198</sup>

In *In re S-V-* and its progeny, however, the U.S. courts have ignored clear congressional intent and have imposed their own judicially created requirement of "deliberate acceptance."<sup>199</sup> This unduly restrictive interpretation contradicts the purpose and intent of the CAT and fails to recognize U.S. obligations as a signatory to the CAT.

Looking to the Refugee Act as a model, the U.S. should extend the protection of the CAT to instances where the state is either unwilling or unable to provide protection. The decisions reached in *Sackie v. Ashcroft*<sup>200</sup> and *Zheng v. Ashcroft*<sup>201</sup> present a move towards an interpretation that is more consistent both with the purpose of the CAT and with the reality of modern warfare. Read together, the two cases allow for an interpretation of the CAT that will provide protection where the state is either unwilling, as in *Zheng*, or unable, as in *Sackie*, to provide protection. Such an interpretation follows along the same lines as the interpretation given to the state action requirement in the Refugee Act and is consistent with the purpose and intent of the CAT.

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<sup>197</sup> 8 C.F.R. § 208.18 (a)(7).

<sup>198</sup> *Id.*

<sup>199</sup> See Part III, *supra*.

<sup>200</sup> See *Sackie*, 270 F. Supp. 2d at 596.

<sup>201</sup> See *Zheng*, 332 F.3d at 1186.

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