THE POLITICS OF DEATH IN MEXICO: DISLOCATING HUMAN RIGHTS AND ASYLUM LAW THROUGH HYBRID AGENTS[1]

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Abstract: In 2006 Mexico's then-president Felipe Calderón declared war on drug trafficking. The human toll was devastating with the loss of over 95,000 lives and the forced disappearance of more than 27,000 people. In addition, two percent of the Mexican population was displaced with families forced to flee their homes in the face of criminal violence. This article offers an explanation of how death, forced disappearances, persecution and exile are in essence the specific effects of governmentalization of the Mexican state. This governmentalization includes the shared use, by criminals and authorities, of techniques for dominating the population and controlling the conduct of citizens through the practices of death, that is, by employing the politics of death (necropolitics). The article goes on to discuss how the objectives, rationality and governmentalization of the State serve to dislocate human rights discourse in such a way that its truth politics excludes people suffering serious human rights violations, such as Mexican asylum seekers. This is accompanied by a new mode of subjectivity produced by Mexico's politics of death – the Endriago subject – which operates as a hybrid perpetrator of human rights violations.

Keywords: hybridity, human rights, asylum, biopolitics, necropolitics.

INTRODUCTION

In 2006 Mexico's then-president Felipe Calderón declared war on drug trafficking[2]. The choice of words was not simply metaphorical as Calderón ordered the deployment of over 45,000 soldiers to areas where drug cartels were most active. By 2012, militarization was widespread – with over 70,000 soldiers occupying northern and central Mexico –, and so was death. Shootouts, people trapped in crossfire, decapitations and car bombings involving government authorities and rival gangs were rife, while kidnappings, extortion, forced disappearances and executions involving civilians became daily occurrences. The human toll of Calderón's war on drugs was devastating: the loss of over 95,000 lives and the forced disappearance of more than 27,000 people (Redacción 2013; Zúñiga M. 2012). As for displacement, two percent of the Mexican

ISSN 2283-7949
GLOCALISM: JOURNAL OF CULTURE, POLITICS AND INNOVATION
2013, 1, DOI: 10.12893/gjcpi.2013.1.4
Published online by "Globus et Locus" in www.glocalismjournal.net

population was forced to flee their homes as a result of criminal violence (Benavides & Patargo 2012)[3].

Death, forced disappearances, persecution and exile are effects of the specific governmentalization of the Mexican state, one that includes the shared use, by criminals and authorities, of population domination techniques in order to control the conduct of the Mexican population through death practices (forced disappearances, murder, torture, and persecution). This governmentalization uses the war against drug trafficking as its main apparatus and militarization as its key strategy. Human rights violations such as executions, torture, forced disappearances and displacement could therefore be considered a consequence of the politics of death or necropolitics in its Mexican version (Valencia 2010). The perpetrator is therefore neither criminal nor law-enforcement. It is both, it is a hybrid. This hybridity dislocates human rights discourse as a tool for protection against suffering.

The main purpose of this article is to address the issue of the dislocation – and more importantly – the effects of such dislocation for Mexicans seeking political asylum in El Paso, Texas as the result of persecution in the Valle de Juárez[4]. At the same time I examine how this dislocation brings human rights discourse into the biopolitical machinery of migration regulation in the United States.

The article will therefore first discuss how biopower and the governmentalization of the State work, how both constitute biopolitics, how the third-world expression is necropolitics, and how biopolitics and necropolitics form part of the same regulatory machinery. Secondly, it will discuss how the objectives, rationality and governmentalization of the State, as well as the mode of subjectivity derived from Mexican necropolitics – the Endriago subject (Valencia 2010) –, which operates as a hybrid human rights violator, serve to dislocate human rights discourse in such a way that its truth politics excludes people suffering serious human rights violations, such as Mexicans asylum seekers. By describing the new narratives of persecution derived from Mexican necropolitics, the article will then analyze how dislocation transforms human rights into a discourse of the US migration apparatus. Conclusions will provide clues to the possible transformations of human

ISSN 2283-7949
GLOCALISM: JOURNAL OF CULTURE, POLITICS AND INNOVATION
2013, 1, DOI: 10.12893/gjcpi.2013.1.4
Published online by "Globus et Locus" in www.glocalismjournal.net

rights interpretation that could advance the struggles of social subjects in the face of domination.

BIOPOLITICS AND NECROPOLITICS: COMPLEMENTARY PHENOMENA

It was not the intention of Michel Foucault to write a theory of power, but he did venture an analytical philosophy of power that, while not attempting to define it, does establish how it works and its powers of subjection (Castro 2004). This analytical work focuses on differentiation systems, instrumental modalities and how power is institutionalized. For Foucault, power is the control of conduct, that is, power is not exercised directly on people but by inducing, facilitating, hindering, limiting, and preventing their actions. Power relations become relations of domination when they are transformed into blocks through techniques that permit the complete domination of the actions of others. The ideal vehicles of power are discourses – elements or tactical blocks used in the relations of force that construct subjectivities (Castro 2004) –, and they operate through apparatuses (*dispositifs* or the non-discursive instruments linked to discourses) maintained through a variety of strategies. In the course of his intellectual work, Foucault identified the use of three types of power in European history: sovereign power, disciplinary power and biopower. In this typology historical types of power do not replace each other but overlap (Castro 2004; Foucault 2000, 2004, 2006a; Foucault et al. 2007). Whereas sovereign power is exercised through the legal apparatuses and disciplinary methods, biopower is enforced through a very different set of objectives, objects, rationality, apparatuses, strategies and struggles or resistances (Castro 2004).

Biopower modifies the sovereign's right to let live and make die, essentially inverting the relationship: instead of *letting live* and *making die,* the State now exercises the right to *make live* and *let die*. Through the use of these techniques the State does not replace disciplinary power but manages to incorporate it and take it to another level or sphere of action where different devices are used. While disciplinary power is focused on individual bodies (anatomopolitics), biopower focuses on processes that are

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Published online by "Globus et Locus" in www.glocalismjournal.net

specific to life itself, such as birth, death, reproduction, migration and disease, while the technologies used are also different: medicine, statistics, birth control, and policy, in fact anything intended for use as a means of population control (Castro 2004; Foucault 2004, 2006a; Foucault et al. 2007). As Foucault has indicated, it is in fact "indirect murder" since without killing intentionally, entire populations die as a consequence of the state not doing anything on their behalf (Foucault 2006a). The biological field controlled by power is fragmented into a hierarchy of races with those at the bottom being left to die[5].

The rationality of biopower is governmentality, which refers to the set of institutions, analyses, calculus and tactics that focus on population as the main objective while political economy gives it shape and security apparatuses are its main instrument (Castro 2004). Governmentality is not exclusive to the state since these techniques control the possible actions of other subjects, or self-directed actions for the domination of pleasures and desires. In order to differentiate political governmentality from other types of governmentality, Foucault referred to the first as "Governmentalization of the state". This is the type of government in play in the West and it is the result of a process that combines techniques of domination and techniques of the self, i.e. people are forced to have private health insurance or to obsess about fitness, spirituality, lifestyles and other practices of self-care. This process has turned the justice State – the sovereign State ruled by law – into the managerial State, or more precisely, the governmentalized State (Castro 2004).

Scholars from Africa and Latin American have pointed out that biopolitical analysis does not operate in the same way everywhere. In fact, they believe that biopolitics is inadequate for assessing the politics of life in the Third World, where criminal violence and the governmentalization of the State are not intended to regulate life but death. In other words, the third world faces a *politics of death*, a form of *necropolitics* (Mbembe 2011; Valencia 2010). In the view of scholars from peripheral countries, while biopolitics is a fundamental starting point for the analysis of relations of domination, in the context of the Third World it proves inadequate because the apparatuses, techniques, practices and strategies used in the relations of domina-

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tion have very different and radical effects, such as the consequences of Calderon's war on drug trafficking. This is not to say that biopolitics and necropolitics are in opposition, but it is important to make a distinction between them since this will allow us to identify their specific objectives – the regulation of life and the regulation of death, respectively – and clearly establish how their apparatuses and strategies become intertwined in situations such as that of Mexicans applying for asylum in the Juárez-El Paso border region.

The most important necropolitics thinker is Cameroon-born philosopher Achille Mbembe (2011), who argues that biopolitics is not enough in itself to establish an understanding of how life becomes subordinated to the power of death in Africa. He claims that the proliferation of weapons and the existence of worlds of death – where people are so deprived that they in fact become the living dead – indicate that a politics of death (necropolitics) rather than a politics of life (biopolitics) is in operation, as Foucault argued with reference to the holocaust. Mbembe examines how the sovereign's right to kill is reformulated in societies where states of exception and sieges are permanent. He argues that military operations and the right to kill are no longer exclusive to the governmentalized State and that the regular army is not the only means that can be used to exercise the right to kill. The new actors in this scenario are urban militias, private armies, and private security officers who have access to the techniques and practices of death. The proliferation of necroempowered entities, together with widespread access to sophisticated technologies of destruction and the consequences of neoliberal socioeconomic policies, makes concentration camps, ghettos and plantations unnecessary disciplinary devices since they can be substituted by massacres, which can take place anywhere and at any time (Mbembe 2011).

Mbembe's African reading of Foucault's biopolitics has heavily influenced other scholars writing from the perspective of the periphery about the role of governmentality in the generation of violence. For example, Valencia agrees with Mbembe in his reinterpretation and radicalization of Foucault's biopolitics, and like them believes that today death rather than life is at the center of biopolitics which effectively transforms it into necropolitics. How-

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ever, she moves beyond Mbembe to say it is not enough to simply introduce analysis of the deadly impact of neoliberalism and the activities of private necroempowered entities. She claims that necropolitics has to be geopolitically and context specific, and offers a reflection on necropolitics in hyper-consumer societies, particularly Mexico, where extreme violence and hyper-consumerism serve as structuring elements in the construction of dissident – although illegal – subjectivities resisting state power (Valencia 2010).

She argues that if biopolitics controls life processes, capitalist demands have transformed life and all associated processes – such as death – into commodities. In hyper-consumerist societies bodies become a commodity, and their care, conservation, freedom and integrity are related products. As a commodity, life is more valuable when subject to threats, kidnappings, and torture. For Valencia, illegal drug corporations wield a parallel power of oppression and have effectively become a parallel state that reconfigures biopolitics and uses technologies called necropractices – radical actions designed to inflict pain, suffering and death through the use of murder, torture and kidnapping – to seize, retain and profit through exercising the power of making die. Just like the legitimate State, this criminal counterpart seeks control over territory, public security and the general population, that is, it seeks *to govern* through the exploitation of national resources, the sale of private security, and the control of the population. Drug cartels control the bodies of citizens by using them as commodities to be exchanged or as consumers of the merchandise sold on the narco-market. In Valencia's Mexican interpretation of the politics of death, necropolitics is only part of a larger cultural and socioeconomic interpretative framework designed to explain the internal dynamics of violence in Northern Mexico, specifically in border cities such as Tijuana, Baja California (or Ciudad Juárez, Chihuahua, in the case analyzed here) where forced displacement and asylum seeking are endemic. Valencia calls this framework 'Gore Capitalism'[6].

Of all the approaches to necropolitics, Valencia's best describes the status of life and death in the governmentalization of the Mexican state, although I do not share her interpretation of the role of criminal gangs. Considering

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Foucault's definition of governmentality, I believe that criminal gangs do not necessarily represent a parallel state, although at times and at different levels they do use the same techniques, practices and apparatuses of the governmentalized state, leading to a form of hybrid State as regards the use of security techniques for the regulation of death[7]. This is to say that the necropolitics of the governmentalized Mexican state involves the sharing – between the state and criminal gangs – of techniques and practices for dominating the population such as public displays of violence for the purposes of intimidation, and the subjection of bodies to extreme violence (torture, executions, disappearances, and persecution), in order to regulate not the life of the population, but its death. This necropolitics uses the war against drug trafficking as its central apparatus and militarization as its core strategy.

The specific subjectivity of Mexican necropolitics could be defined in terms of what Valencia has called the Endriago subject, which is the result of the sociocultural dynamics of Gore Capitalism. According to Valencia, Gore Capitalism's cultural patterns build on the subversion of the meaning of work derived from the Post-Fordist organization of labor. Valencia argues that the Post-Fordist contempt for labor culture and the working class in general subverts the traditional processes of capitalist reproduction, replacing labor as a meaningful social activity with consumption, even in extremely deprived and marginalized areas and regions. Social pressure for consumption, together with widespread frustration among young people who cannot reach socially-demanded levels of consumption, make the criminal economy and the use of violence as a market tool viable options. Given that work is not socially valued, young men who need to feel competent as providers in the dynamic of hyper-consumption seek "work" in the gore industry of killing, drugs, kidnapping, and the sex trade. Due to widespread pressure for consumption, and because of the frustration among young people who cannot reach such levels of consumption, the criminal economy and the use of violence as a marketing tool have become an alternative for them (Valencia 2010).

Necropolitical relations serve to induct subjects to the necropractices offered in the biomarket. The subjectivity

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that emerges from this induction is what Valencia has called the Endriago subject, a subjectivity that, as we shall see later, operates as the main agent of persecution in the asylum cases of Mexicans. The *Endriago* is a mythical character from the medieval romance *Amadis of Gaul*. The Endriago is a monster, a hybrid of man, hydra, and dragon. It is a tall, strong and agile beast that inhabits infernal lands and produces great fear in its enemies (Valencia 2010). Valencia borrows the term Endriago to conceptualize the subjectivity of men who use violence as a means of survival, a mechanism of self-affirmation, and a tool of work. Valencia claims that Endriagos do not only kill and torture for money but also for dignity and self-affirmation; given the prevailing social and cultural conditions in Mexico, it should come as no surprise that Endriagos use gore practices to meet the demands of consumerism since they are used to subvert the feelings of failure caused by material frustration. Valencia argues that Endriagos achieve social legitimation by means of three phenomena linked to the dynamics of gore capitalism: market pressure, the media, and hegemonic masculinity, which in this article are interpreted as the production, signification and domination techniques that sustain the State's governmentalized apparatuses and strategies, specifically the war against drug trafficking and militarization, respectively.

For Valencia the Endriago is therefore a dissident subjectivity that resists power. Resistance, however, doesn't mean legitimate resistance: Endriagos continue to be business-men who take neoliberalism to its ultimate consequences, resisting the neoliberal state but in a dystopian way. According to Valencia, Endriagos do not dispute the state as such, but biopolitical power, that is, control of the population, territory and security through necropractices. As mentioned previously, I do not believe that criminals constitute a parallel state because they often work together with authorities. As a consequence, Endriagos do not replace state agents; the Endriago represents the subjectivity emerging from the governmentalized State in Mexico, which is, as stated previously, a mixture of criminal gangs and government institutions at different levels and to varying degrees. Endriago subjects hired by criminal gangs are usually former sportsmen, soldiers, law enforcement

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Published online by "Globus et Locus" in www.glocalismjournal.net

officials and private security guards, and in many cases their links to the government are unclear.

Necropolitics and its core subjectivity – the Endriago subject – allow us to identify specific practices of the governmentalized Mexican State that, as can be seen below, are conducive to relations of domination that force people to flee and become asylum seekers in the United States, a country that in turn subjects them to the truth politics of asylum discourse, which serves the migration apparatus in the US. At the same time, power relations derived from necropolitics will transform human rights – in its role of complementary means of protection for asylum seekers – into a discursive practice that not only fails to challenge the governmentalized State's domination strategies, but also becomes a technique and practice of signification that maintains the regulatory functions of asylum law.

HYBRID AGENTS AND NECROPOLITICAL DISLOCATION OF HUMAN RIGHTS DISCOURSE

In the writings of Foucault, discourses are elements or blocks of tactics used in relations of force and they are designed to construct subjectivities (Castro 2004). By the same token, a *dispositif* or apparatus is a set of social relationships that are built around a discourse: institutions, laws, policies, disciplines, scientific and philosophical statements, concepts and moral propositions (Castro 2004). As a discourse, human rights has truth effects, that is, it establishes subjectivities, objects and concepts that divide the false from the true. In order to create these truth effects it relies on other true discourses such as law and criminology, and it is produced and distributed under the control of large political and economic apparatuses such as courts, NGOs, and the ombudsman. Human rights have truth effects over what constitutes a violation of physical integrity and life, a victim and a context of widespread abuse. Human rights discourse has constructed a truth regime in which the definition of state attribution, responsibility, victim and context exclude many subjectivities, objects and concepts derived from contemporary, necropolitical relations of domination, such as necropractices.

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Published online by "Globus et Locus" in www.glocalismjournal.net

Human rights construct *true* narratives in which state actors are always the main perpetrators and are responsible for human rights violations such as executions, forced disappearances, and persecution. As Douzinas explains:

> Human rights are the way people speak about the world and their aspirations; the expression of what is universally good in life. They have become ingrained in the new world order, their claims adopted, absorbed and reflexively insured against challenge. Assent and critique, approbation and censure are part of the same game, both contributing to the endless proliferation and to the colonialism of rights (Douzinas 2007, 33).

However, the hybrid character of the governmentalization of the Mexican state and its necropolitics subvert the politics of truth in human rights discourse because it is based in the philosophical assumption of an alleged division between the public and the private – typical of liberal legal systems – that in the Mexican context becomes even more blurred. Ernesto Laclau's concept of *dislocation* may be helpful in understanding this subversion. Dislocation refers to those social processes or events that cannot be represented or symbolized within a particular system of identities and consequently lead to a disruption of the structure itself (Laclau 1990, 1996). Or as Panizza explains it:

> *Dislocation* is caused by events beyond the control of the hegemonic forces that cannot be symbolized by the existing discursive order and therefore cannot be integrated within its political, cultural and institutional boundaries (Panizza 2002, 66).

Necropolitics has dislocated human rights discourse because it generates new subjectivities that challenge the assumption of the public/private division, such as: the emergence of the Endriago subject, whose state attribution is often blurry (are *sicarios* state employees or do state employees also play the role of *sicarios*?); crime as an element of the Mexican governmentalized state; and the domination – on behalf of the governmentalized state – of new socio-political actors (business families and people speaking out against crime, corruption and impunity, among others). According to Foucault, truth leans on institutional devices and other discourse within apparatuses (Castro 2004); in the case of human rights a support discourse is law, which from its very early stages established that the

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government (the public, political sphere) should not interfere in the personal and social realms (the private sphere) where individuals are to fulfill their goals through self-realization, property ownership and the family. The public/private divide is a key feature of liberal thought and permeates legal systems, both domestic and international. Feminist legal scholars such as Chinkin (1999), Gal (2005), and Owens (2008) argue that the public/private dichotomy in law is artificial, constructed through language, and serves ideological purposes because it is "politically consequential: it disguises power relations, evokes characteristic anxieties, and sometimes shapes novel political imaginings" (Gal 2005, 25). For Gal, this separation is therefore artificial and has economic objectives. According to Owen, to

> define an economic activity as 'private' liberates processes of wealth accumulation and circulation and separates them from democratic regulation. Similarly, powerful states can organize force in a manner that appears to be 'private' and/or foreign because this reduces political scrutiny (Owens 2008, 987).

Chinkin believes that the divide has important consequences for international law, especially human rights law, because it defines a state-centric view of responsibility and attribution (Chinkin 1999).

Through its main subjectivity, the Endriago, necropolitics has dislocated the public/private dichotomy in human rights law because what used to belong clearly to the private sphere (business and crime) is now intertwined with politics because of the criminal co-optation of the state and the appearance of new political hybrid entities, such as Endriagos. This dislocation is slightly different to the feminist critique discussed above in terms of the definition of attribution, perpetrator and context in the framework of women's rights and labor rights, because the main issue is not the public or private character of crime, but the hybrid character of power, which is defined by the specificities of the governmentalization of the Mexican state whereby the distinction between state and criminal domination is incommensurable.

Consequently, responsibility, attribution and context in the most straightforward of liberal human rights are dislocated, such as the right to life and to physical integrity, because Endriago subjects – in the name of a partly

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criminal governmentalized state – carry out executions, torture, forced disappearances, and persecution. In typical or *true* human rights narratives these activities would be considered simple crimes due to the objects they are related to (extortion, murder and assault during kidnappings, kidnappings), the subjects involved (Endriagos whose links with the state are blurry and always denied), and the people subjected (business people, families with small businesses or property, witnesses to the activities of Endriagos, average citizens seeking justice for their loved ones or who resist crime). Since the truth politics of human rights discourse excludes these elements it cannot be considered an instrument for opposing power and in fact becomes an instrument of domination since the result is the exclusion of victims of necropower who seek protection.

Foucault argued that as a consequence of the development of biopower there is an increasing strategic use of law in biopolitics, with norms becoming more important than the judicial system of law (Castro 2004, 219). This does not mean that law or its institutions tend to disappear but that increasingly law works as a norm – norms are intended to impose conformism, to homogenize –, and that judicial institutions are more integrated into a continuum of apparatuses (medical, administrative) that have regulatory functions (Castro 2004, 219). It is a regulatory mechanism in the politics of life and death. Human rights instruments play a normative role, that is, they are used to impose conformity and homogeneity; they become regulatory devices in the politics of death, and life, as we shall see later. Douzinas (2007) and Odysseos (2009) have pointed out that human rights have become tools of biopower in different settings, from the war on terror and humanitarian intervention, to the delivery of social services through human rights NGOs. Douzinas argues that in their capacity to contribute to the creation of human identities, human rights have become tools of public power and the expression of individual desires, claiming that:

> people are divided into rulers, ruled and excluded. Human rights both record and uphold this hierarchy (…) Rights offer defenses against power. But they also increasingly target and regulate parts of the body becoming major tools for the biopolitical operation of power (Douzinas 2007, 7-8).

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Because human rights have been co-opted by governments, "they have lost much of their critical force and their initial aim and role has been reversed" (Douzinas 2007, 24). Douzinas argues that human rights become biopolitical tools because they are enforced as administrative law intended for management and not for justice.

For her part, Odysseos claims that:

> Once in place as legal instruments (human rights) become more a tactic of governmental power in that they assist in the organization and management of 'freedoms' – the structural conditions or parameters- which the new art of 'frugal' government requires. The language of rights, therefore, is at the same time both an articulatory and regulatory device: it describes the subject to itself as a rights holder; it provides the legal and political frameworks and language through which to make claims about social and political issues. Furthermore, it directs governmental practice itself to respond to such claims within the same rights language and frameworks" (Odysseos 2009, 18).

Following Douzinas and Odysseos and their argument that human rights play a biopolitical role, I believe that the necropolitical dislocation of human rights discourse makes it a biopolitical tool in asylum law since the legal foundations are based on a radical division between the public and the private that has now been dislocated by necropolitical agents whose attribution is hybrid. Such dislocation has practical consequences for litigation in asylum cases in the US since human rights become a part of the asylum apparatus due to the fact the politics of truth excludes new narratives of persecution and victimization thus blocking – rather than facilitating – a new politics of truth for persecution in terms of asylum law.

THE NEW NARRATIVES OF PERSECUTION: NECROPOLITICAL DISLOCATION AND THE BIOPOLITICS OF HUMAN RIGHTS IN ASYLUM LITIGATION

Migration authorities in El Paso, Texas – located across the border from Ciudad Juárez, which is a region particularly affected by necropolitical violence – systematically reject the asylum claims of Mexicans based on new narratives of persecution even when their cases are clearly humanitarian issues[8] that lead to a steady increase in asylum figures[9]. Authorities usually reject their cases due to the truth effects in human rights discourse that exclude new

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subjectivities and objects emerging from relations of domination in necropolitics; human rights argumentation is key in arguing persecution in asylum litigation[10].

Asylum discourse in the United States – through its legal texts – serves as a tactic for the regulation of migration, which in turn has economic and political objectives: to defend US territory from the threat of unwanted migration (in this case Mexicans) and to maintain the credibility of security cooperation (between Mexico and the US, in this particular case). There are several legal categories in asylum discourse that serve to prevent the entrance of subjects suffering from persecution in general, and these are codified in various legal texts: asylum is defined in terms of the United Nations Convention Relating to the Status of Refugees (1951) and its Protocol (1967); withholding of removal implements the obligation of *non-refoulment* established in the Convention of Refugees; and prevention of deportation due to a well-founded fear of being the subject of torture, enforced as complementary means of protection under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Based on the Immigration and Nationality Act (INA), asylum discourse in the migration apparatus of the US excludes a subject a priori if they: have participated in the persecution of others in connection with one or more of the five protected grounds; have stayed in the US for over a year at the time of the application; or have resettled successfully in another country. Once a person proves eligible for asylum, their claim will be successful if they manage to prove, in terms of the politics of truth of asylum discourse that: they have a well-founded fear of persecution because of the government's unwillingness or inability to protect the victim from their persecutors; and that this persecution is motivated by the victim's race, nationality, religion, political opinion, or membership of a particular social group (INA 101[a] [42]).

These two concepts – the government's unwillingness or inability to protect, and motivation – establish the terms of inclusion and exclusion in the politics of truth of asylum law, which in turn leans on the politics of truth of human rights discourse, that is, a discourse that establishes that law enforcement officials or other state agents are involved in the persecution of journalists, human rights

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defenders, law enforcement deserters, and activists due to their political opinions and membership of a particular group. In these narratives, the state is clearly unable, or lacks the will, to protect them. In fact, the few cases for which asylum has been granted are typical human rights narratives of the political domination of journalists and human rights activists. For example, in September 2010 the US government granted political asylum to journalist Jorge Luis Aguirre, director of *La Polaka.com*. Aguirre managed to flee Ciudad Juárez just a few hours after the execution of journalist Armando "Choco" Rodríguez and after having received an anonymous phone call warning him: "you're next". Another case is that of human rights activist Cipriana Jurado who managed to demonstrate she was being persecuted by Army officials due to her activism in favor of a family seeking justice for two of its members – two women – reported as missing in Valle de Juárez in 2009. She was granted political asylum in June 2011.

However, these concepts exclude the objects of new narratives of persecution due to the emphasis placed on state attribution in human rights discourse, which is key to the politics of truth. Asylum claims based on new narratives include local government authorities such as mayors and councilors from all political parties who flee after colleagues and/or relatives are killed in Ciudad Juárez or some of the small towns of the Valle de Juárez. They are also police officers who refuse to participate in drug-related corruption; journalists the Mexican government is unable or unwilling to protect; human rights and women's rights activists who are persecuted by both criminals and state authorities; average citizens who witness atrocities perpetrated by the Army or gangs; women threatened by former partners who work as drug traffickers; and small business owners and families from the Valle de Juárez who publically refuse to pay extortion; and victims of crime who demand justice and an end to impunity.

In most cases persecutors and victims are atypical because their activities are related to the necropolitics of the Mexican governmentalized state and not state-centric, mainstream – true – human rights narratives. This is due to the fact that in necropolitics Endriagos have links to both the state and criminal gangs, either because they work for the cartels or they are *sicarios* protected by the

ISSN 2283-7949
GLOCALISM: JOURNAL OF CULTURE, POLITICS AND INNOVATION
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Published online by "Globus et Locus" in www.glocalismjournal.net

state, which is penetrated by criminals at certain levels of political government. Consequently thousands of Mexicans have been the victims of crimes that in the politics of truth of human rights discourse would constitute human rights violations – forced disappearances, executions, torture, and persecution – if state attribution and responsibility were clearer. Nevertheless the almost non-existent line dividing the political and the criminal government in the necropolitics of the governmentalized Mexican state dislocates such definitions. The rejection of new narratives of persecution from human rights discourse facilitates the exclusion of Mexicans from the migration apparatus because human rights law works as a complementary means of protection in asylum discourse, which is central to how the apparatus operates. Human rights law is in fact the basis for objective proof of the context of persecution and the subjective experience of harm, as indicated by the Executive Committee of the UNHCR which:

> (c) Recognizes that refugee law is a dynamic body of law based on the obligations of State Parties to the 1951 Convention and its 1967 Protocol and, where applicable, on regional refugee protection instruments, and which is informed by the object and purpose of these instruments and by developments in related areas of international law, such as human rights and international humanitarian law bearing directly on refugee protection (Executive Committee of the United Nations High Commissioner on Refugees 2005).

Given the key role of human rights, the necropolitical dislocation of the philosophical assumption of a public/private divide in the politics of truth of this discourse makes it an obstacle for proving the Mexican state's unwillingness or inability to protect victims from their persecutors and that this persecution is motivated by the victim's race, nationality, religion, political opinion, or membership of a particular social group. These two central concepts of the definition of refugees are fundamentally compromised by the necropolitical dislocation of human rights discourse since victims must provide evidence that there is a serious human rights problem in their country. The scope of human rights violations in any given country support the objective grounds of an asylum claim (the proof), specifically the proof for "willingness" and "unwillingness" and qualifications for the "social group" and "political opinion"[11] of victims. This proof must be in the

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form of general human rights reports, police reports and human rights complaints. While in most cases the identity of the perpetrator is unclear, even when state involvement is clear the victim cannot present evidence because the judicial system has been infiltrated by criminal gangs and it is impossible to obtain a police report.

As a discourse supporting the politics of truth of asylum discourse in the American apparatus of migration, human rights become a technique of exclusion when defining the concepts and fixing the meaning in new narratives of persecution[12]. This is particularly true in the case of the following three concepts: 1) the responsibility of the state for the purposes of a state "unwilling" or "incapable" of protecting its citizens; 2) the characteristics of persecutors (attribution) for the purposes of "acquiescence of the state" in protection under CAT; and 3) the context of the persecution for the purposes of establishing "political opinion" and "membership of a particular social group".

STATE RESPONSIBILITY IN TERMS OF THE STATE THAT IS "UNWILLING" OR "UNABLE" TO CONTROL PERSECUTORS

In terms of asylum law, the difficulty of proving the Mexican government's unwillingness or inability to protect its citizens is linked to the fact that while the federal government enforces anti-crime policies, at the local and mid-levels of government law enforcement officials are often on the payroll of drug cartels. The Mexican government spends billions of dollars on security and the militarization of the war on drug trafficking, as evidenced by the Merida Initiative (2008) through which the United States transferred resources for law enforcement and the anti-drugs, anti-terrorism and border security program. As a consequence of this policy for drug trafficking, evidence of the state's unwillingness or inability to protect citizens pursuant to human rights law is problematic since it would appear to judges and migration officials that the state does in fact make an effort to fight criminal gangs. However, while the state fights crime with this type of policy there are cases in which cartels have been set up by former Army members or are operating with the help of the police whose members are Endriago sub-

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jects engaged in persecution[13]. The lawyers of Mexican asylum seekers submit recommendations from Mexican human rights commissions or news clippings reporting that law enforcement officials or soldiers linked to these or other cartels have directly participated in, or ignored, murders related to their cases, although such proof is not always available. In response, authorities empowered to grant asylum provide evidence of Mexican or bilateral policies aimed at fighting drug trafficking such as the Mérida Initiative.

A case illustrating this is that of a woman we shall refer to as *Miss Bala*[14]. Miss Bala lost her husband in April 2010 when he was abducted, murdered and his body dumped in the streets of Ciudad Juarez. Miss Bala believes this was due to his refusal to pay extortion. In order to support her children, Miss Bala started working as a waitress in a bar in Ciudad Juarez. In 2011 a group of federal police officers visited the bar to conduct a routine inspection, which turned out to be far more extensive than previous inspections. Five minutes after they left, with the police vehicles still parked outside, heavily armed men entered the premises and opened fire on customers. Miss Bala found herself on the floor with the bodies of dead customers and workers piled on top of her. She didn't get up to leave until she smelled burning. Local police attempted to enter the building but were prevented by federal police who were still present, so she took advantage of the confusion and left. Although she managed to escape police identified her car and a week later a colleague rang her to say five Federal police officers were looking for the surviving waitresses. Two weeks after the massacre a car tried to bump her off the road while she was transporting her children. The next day she fled to El Paso and requested asylum. However, a few months later she learned that a group of armed men had broken into her home, where her uncle had been living since she had left Ciudad Juarez. Members of her family were then beaten until they revealed the whereabouts of Miss Bala's father. These men went to her father's home and, since he refused to reveal her whereabouts, forcibly removed him. The man is still missing. Criminals told Miss Bala's mother that if her daughter failed to return to Juarez they

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would eliminate the entire family. Today the whole family is seeking asylum.

ATTRIBUTION FOR THE PURPOSES OF TORTURE WITH STATE "ACQUIESCENCE" UNDER THE PROTECTION OF CAT

The participation of non-state actors in persecution is not the main problem facing Mexican asylum applicants since judges can apply the broad perspective of persecution[15]. It is a problem, however, when dealing with a person who has a criminal record or no apparent motivation based on one of the protected grounds for the protection of CAT since this protection applies only to people who could face torture by state agents or with the consent of the state. Protection under CAT (INA 208 16-18) is a human rights-based means of complementary protection by which immigration judges determine whether there is a "credible" and "reasonable" fear not necessarily of persecution but of torture in the terms of the Convention against Torture and not the Convention on Refugees. Unlike asylum and withholding of removal, CAT protects people with criminal records and applies even if persecution on account of the five protected grounds is not proved (Roitman Rosenmann 2005). According to CAT, torture is not determined by the ends – to intimidate or punish a person- but by the perpetrator, who must be a state agent (Chinkin 1999). Torture is state-centric in the Convention (Art. 1):

> torture means any 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 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights (United Nations 1985).

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The consequences of the private/public divide are found in international human rights law through the principles of attribution for the purposes of state responsibility to delineate the area reserved from international intrusion, among other things (Chinkin 1999). Chinkin argues that, based on the public/private divide, "the concept of state responsibility rests upon distinguishing acts and omissions that can be attributed to the state from those that cannot, for it is axiomatic that private conduct is not in principle attributable to the state" (Chinkin 1999, 387-388), because "attribution does not depend upon a functional classification of activities but upon the characterization of the actor as a state organ, acting in that capacity" (United Nations 1985, 388).

In narratives of fear of torture in the context of necropolitics, attribution is frequently unclear because the torturer could be an Endriago working for a criminal gang linked to the governmentalized state. A case that clearly illustrates this is that of Juan T. In October 2010 law enforcement officials from a border city working for a cartel began to extort Juan T. with two police officers lying in order to arrange a meeting with him. Once he arrived at the expected business interview, these officers –they were even wearing their badges – demanded he pay a "quota" if he wanted his business to continue and informed him he had three days to pay 380,000 pesos. He paid them the money but three months later he received a call from the same police officers demanding he meet them again. Before hanging up they warned him not to call the federal authorities or they'd kill him and his family, making it clear they knew every single detail concerning his family. He was too scared not to show up and when he arrived at the agreed place the officers – still wearing their badges – pulled out AK-47 machine guns and demanded a 120,000 peso quota. They gave him an hour to get the money from his personal deposit box and on this occasion he managed to pay on time.

In June 2011 Juan T. received another extortion call from the same officers. He met with them again at the same place where they demanded another 120,000 pesos, although this time they made him ring his wife to bring the money or they wouldn't release him. His business wasn't doing very well at this point given the quotas he

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had to pay, so his wife only managed to bring half the amount they demanded. The police officers then warned him not to leave the city. Two months later one of the extortionists was killed and a month after that Juan T. was riding his bike when a car cut him off. Two men got out of the car and knocked him off his bike. One of these men was the surviving extortionist, now accompanied by another police officer, who told him he still hadn't paid the remaining 60,000 pesos of his quota before shooting him in the foot. No police report was prepared despite the fact the officers gave him first aid. The victim was too scared to lodge a complaint against the police officers in question.

A few days later, Juan T. was with some friends at a local park when four armed men approached him, one of whom was the police officer who had extorted him previously. This man came up to him and said he was tired of playing games. Then they hacked off both his feet. As the extortionist left, he warned him not to leave town or hide because he'd find him and kill his family. When the police had left his friends came back and took him to hospital, where he remained for 10 days. No special security was provided during his time in hospital even though it is customary for incidents such as this. A few hours after Juan T. was admitted to hospital, two police officers from the office of the police officer extorting him arrived to take his statement. The very same police department that chopped his feet off was asking him whether he wanted to press charges. He said he would, but didn't give names. He was too scared. As soon as he left hospital he headed to El Paso, Texas, to seek asylum.

CONTEXT OF PERSECUTION FOR THE PURPOSES OF ESTABLISHING "POLITICAL OPINION" AND "MEMBERSHIP OF A PARTICULAR SOCIAL GROUP"

Because of the nature of persecution in Mexico – the necropolitics of Endriago subjects whose state attribution is not always clear –, Mexicans seeking asylum cannot argue persecution on the grounds of their nationality, religious beliefs or ethnic origin. This leaves them with just two options: persecution on account of political opinion and membership of a particular social group. In order to

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prove motivation on one of these two grounds, the claimant has to demonstrate their case involves human rights. According to Hathaway[16], there are three orders of human rights violations determining persecution. First and foremost there are direct violations of the rights included in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Secondly, there are violations of the rights included in the ICCPR, which are derogated in the case of a national emergency. Thirdly, there are violations of the rights included in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which "have been routinely marginalized and this is partly the reason why membership of a social group has been much more controversial" (Pickering 2005, 148).

Because of the nature of the governmentalized state, necropolitics occurs in the state political realm but also in the socioeconomic arena due to the issues it involves, such as the extortion of business people. Not only that, the existence of necropolitics leads to new sociopolitical antagonisms and thus to new confrontations between these new political subjectivities. The most prevalent political subjectivity in the Narco-Nation is that of the Endriago subject, who clashes with the subjectivities of people resisting necropractices and the pressures of the biomarket, such as business people resisting necropolitical control and people seeking justice for the victims of necropower, among others. While these victims of necroempowered individuals face persecution for their resistance of necropolitics, immigration officials and judges refuse to recognize that the issues leading to their persecution constitute a political opinion or that business families could constitute a particular social group. A case illustrating these new antagonist political subjectivities is that of the *Morín Brothers*. Since 1989 the Morín brothers have owned a public transport company in Ciudad Juárez, Chihuahua, and shortly after its founding they joined a PRI-affiliated union confederation. In addition to the three brothers, another five family members became involved in the business. In 1997 they operated 10 buses and by 2005 they had received another 10 bus concessions. From that moment on they began to hire drivers since prior to that they had done the driving themselves.

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In June 2008 a drug cartel began to extort them, making death threats and warning them their homes would be set on fire and their buses incinerated if they failed to pay the cartel the sum of 5,000 pesos a week. The brothers tried to organize union members in order to avoid making these payments and to stage a public protest. However, they were warned that if they continued to organize others against the cartel's interests their buses would be incinerated. One of the brothers suggested the group organize a general strike and refuse to provide bus services, thereby exerting pressure on the police. The union members present agreed to take action but ultimately were afraid so no group action was taken at the meeting. A phone call was later received saying that a bus had been set on fire and that if he continued to advocate strikes and resist extortion the cartel would kill a family member. Shortly after, the son of one of the brothers was executed in a Juárez bar and in March 2011 the Morín family fled to El Paso. Calling publically on others to organize a united front against extortion qualifies as political opinion, according to lawyer Carlos Spector, who also believes that the Morín family was not persecuted on an individual basis but as a family with strong political opinions. However, the Morín family has been denied affirmative asylum and find itself in defensive proceedings.

CONCLUSIONS: TOWARD A NEW POLITICS OF TRUTH IN HUMAN RIGHTS DISCOURSE

This article has developed three important theses for assessing the protective capacity of human rights discourse in a context of extreme violence where state attribution is hybrid due to the politics of the governmentalization of the Mexican state, characterized here as necropolitcs. These ideas are not only relevant for persecution but also for torture and enforced disappearance, among other serious human rights violations. The first thesis is that necropolitics is the third-world counterpart of biopolitics in first world countries like the United States. The second is that necropolitics has dislocated the pillars of the politics of truth in human rights discourse, specifically the public/private divide. The third thesis is that the disloca-

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tion of human rights – as an *episteme* supporting asylum discourse in the US migration apparatus – allows for its use in biopolitical domination practices in first world countries that have made asylum law part of the migration regulation *dispositif*, such as the US.

NOTES

[1] The fieldwork for this article, which is also part of a wider research project (*Human Rights and Biopolitics: the Case of Mexican Asylum Seekers in the US and Canada*), was made possible thanks to funding from the Mexican Association of International Studies (AMEI) as part of its Research Fund 2012.

[2] Former president Felipe Calderón finished his term in office in December, 2012. New president Enrique Peña Nieto made it very clear he would adopt a similar strategy concerning drug trafficking from the moment he took office. In fact, in December 2012 and during the first months of 2013 violence remained at the same levels. Although these trends indicate that drug-related violence is likely to continue with the new presidential administration, this article will focus exclusively on the Calderon administration. See: Archibold (2013).

[3] The reader can obtain the descriptive details of Mexico's war on drug trafficking in the national media as well as in Stratfor's Mexico Security Memos: http://www.stratfor.com/. For an account of the human rights consequences of the war, see: Estévez (2012).

[4] El Paso has been used as a case study since it shares a border with Ciudad Juárez, a Mexican city that can be considered the epitome of necropolitcs. In addition, El Paso has received a considerable number of asylum cases and its judges have shown a clear and steady pattern of rejection in the Fifth Circuit migration courts of Texas, thereby supporting the hypothesis that human rights serve as an obstacle rather than as a support for the litigation of asylum cases.

[5] Evidently a discussion on biopolitics and its complex relationship with the historical development of capitalism and liberalism should be wider and more sophisticated, however such a discussion is beyond the scope of this article. The interested reader should go to more extensive and specific sources such as: Castro (2004); Foucault (1985, 1988, 1997, 1998a, 2002, 2004, 2006a, 2006b); Foucault, Senellart, Davidson (2007).

[6] Valencia borrows the term Gore from a movie genre focused on extreme and graphic violence to describe the Third World's current stage of capitalism in which blood, corpses, mutilated bodies, and captive lives are used as the tools of capital reproduction. According to Valencia, this economy simultaneously destroys bodies and produces capital, the reproduction of which is based on speculation which uses bodies as merchandise and violence as investment. Valencia characterizes Gore Capitalism's political, cultural, economic and power dynamics in terms of the Narco-state, hyper-consumption, drug-trafficking, and necropolitics. While at the empirical level all the analytical dimensions of Gore Capitalism operate together, for the purposes of this article it is sufficient to focus on two of them: necropolitics and a new subjectivity derived from hyper-consumption and violence, which is in fact the final operator of necropolitics: the Endriago subject. These will be described in detail later in the text. (Valencia 2010).

[7] It is not the purpose of this article to demonstrate the relationship between organized crime and the Mexican state. This issue has been addressed primarily in journalistic work that shows the uneven existence of such links at the different levels of government (local, state, federal). See: Bowden (2011); Bowden, Molloy (2011); Grillo (2012); Hernández (2010). There is also the documentary *El Sicario* at: http://www.youtube.com/watch?v=KmHF7ALrjJI (in Spanish with subtitles in German) and http://www.youtube.com/watch?v=

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Published online by "Globus et Locus" in www.glocalismjournal.net

ZsQd5nxZGps (a teaser with subtitles in English). This link has also been studied in academic literature such as: Flores Pérez (2012). Here, the author maintains that the Mexican state fails to function as a proper state due to the dominance of circuits and institutional areas by criminal interests which are often sponsored by public servants responsible for ensuring collective interests. He argues that the implementation of these interests in institutions has obstructed their functions and generated serious deviations from what was initially expected of them. This process of state cooptation is considered from the perspective of "co-opted State Reconfiguration" in which a group of public and non-public actors with shared interests of an illicit nature employ different strategies to use state resources to their benefit, thereby determining or hindering institutional design and operation. The implementation of this interest in institutions has obstructed their functions and led to serious deviations from what was initially expected of them. In addition, in asylum cases many witnesses and applicants claim that law enforcement officials have been present before or after murders and disappearances. The argument developed in this article assumes that these testimonies as well as journalistic and academic reports are credible.

[8] There are over 700,000 displaced persons in the country, 230,000 of these from the Valle de Juarez in Chihuahua alone. 150,000 of these displaced persons from the Valle de Juarez are now in the US with hundreds of them seeking asylum. While in 2001 there were just 50 cases of Mexicans requesting asylum in the United States, by 2007 the number had increased to 1,830. In 2008 the number increased to 2,487 before dropping slightly to 2,422 in 2009. In 2010 the figure increased by almost 100 percent in relation to the previous year – from 2,422, it rose to 4,225. By 2010, Mexico was responsible for one of the highest numbers of asylum requests in the United States, second only to China, and followed by Haiti, Guatemala and El Salvador. The United States Department of Justice (2011), UNHCR (2007, 2008, 2009, 2010, 2011, 2012).

[9] According to the Transactional Records Access Clearinghouse (TRAC), in 2012 over a third of the court backlog of asylum applications were those of Mexicans - 113,829 of a total of 305,556 -, followed only by China, Honduras, El Salvador, and Guatemala. Except for the courts in Guam, in 2012 every American state processed applications from Mexicans with 60% of the cases being recorded in just four states: California, Texas, Illinois and Arizona. Acceptance rates are shockingly low, and we may even say non-existent: in 2010, only 143 of 2,320 cases of affirmative asylum were granted (6.2%). The number of successful affirmative cases suffered an overall decrease between 2008 and 2010 with 176 in 2008; 191 in 2009; and 143 in 2010. In 2010, asylum was granted in just 49 of the 3,231 cases (1.5%). With respect to defensive asylum, the number of successful applications also dropped between 2008 and 2010 with 72 in 2008; 62 in 2009; and 49 in 2010. A total of 85% of the total asylum claims lodged between 2008 and 2010 have been denied. Dzubow (2012). Transactional Records Access Clearinghouse (2012a, 2012b, 2012c).

[10] In their rejection or acceptance letters migration authorities do not explicitly state their reasons. However, the researcher had access to the files as well as details of the oral exchanges with judges and officials through interviews.

[11] A well-founded fear of persecution is not necessarily determined by human rights law, although there are certain extralegal issues involved. For instance, the result of the claimant's credible fear interview depends entirely on the biased perception of the judge.

[12] The researcher had access to the legal files for these cases. The details provided here are accurate with respect to the testimonies provided in sworn affidavits and applications (forms I-589). However, the names have been changed in order to protect their identities.

[13] See: Bowden (2011) Bowden, Molloy (2011).

[14] *Miss Bala* is a Mexican film about a woman kidnapped by police linked to a criminal gang after she witnesses a massacre in the bar where she works. I call the woman in this case *Miss Bala* due to the way her story resembles that of the film. See *Miss Bala* trailer at: http://www.youtube.com/watch?v=FQ28EpGSC2w

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Published online by "Globus et Locus" in www.glocalismjournal.net

[15] According to the UN Asylum Handbook, persecution could be by the state or could take place due to the inability of the state to restore the criminality of non-state actors. There are two interpretations of persecution by non-state agents against which the state is willing but unable to protect. One, the protection view which extends the definition to cover situations where the state of origin is unable to provide necessary protection; and two, the accountability view, which establishes that only when persecution is by the state can the person be a refugee. See: Bruin (2002); García (2011); Pickering (2005).

[16] Cited in: Pickering (2005).

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ISSN 2283-7949
GLOCALISM: JOURNAL OF CULTURE, POLITICS AND INNOVATION
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Published online by "Globus et Locus" in www.glocalismjournal.net

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ISSN 2283-7949
GLOCALISM: JOURNAL OF CULTURE, POLITICS AND INNOVATION
2013, 1, DOI: 10.12893/gjcpi.2013.1.4
Published online by "Globus et Locus" in www.glocalismjournal.net