Spring 2008

Is the U.S. Fulfilling Its Obligations under the 1951 Refugee Convention - The Colombian Crisis in Context

Elizabeth A. James

Follow this and additional works at: https://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: https://scholarship.law.unc.edu/ncilj/vol33/iss3/3

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Is the U.S. Fulfilling Its Obligations under the 1951 Refugee Convention - The Colombian Crisis in Context

Cover Page Footnote
International Law; Commercial Law; Law

This comments is available in North Carolina Journal of International Law: https://scholarship.law.unc.edu/ncilj/vol33/iss3/3
Is the U.S. Fulfilling Its Obligations Under the 1951 Refugee Convention? The Colombian Crisis in Context†

I. Introduction ............................................................................................................ 456

II. History and Current Country Conditions .......................................................... 460
    A. Origins of the Conflict: Early Political Turmoil ............................................. 460
    B. “Los Guerrilleros”: The FARC and ELN ..................................................... 462
    C. The Paramilitaries: The AUC ....................................................................... 465
    D. External Influences: The Role of the United States in the Colombian Conflict ................................................................. 468
    E. Caught in the Crossfire: Effect on Civilian Population ........................................ 472

III. Overview of U.S. Relief Available to Victims .................................................. 475
    A. Colombian Cases in Context ........................................................................ 475
        1. Persecution .................................................................................................. 478
        2. Colombians, Generalized Violence, and the Persecution Standard .......... 480
        3. Reforming what Constitutes ‘Persecution’ ................................................. 485
    B. Grounds of Persecution .................................................................................. 486
        1. The Political Opinion Nexus Ground .......................................................... 487
           a. Neutrality .................................................................................................. 487
           b. Imputed Political Opinion .................................................................... 488
        4. Colombian Cases in Context-political Opinion ........................................ 489
        5. Membership in a Particular Social Group .................................................. 492
        6. Colombians and Membership in a Particular Social Group (MPSG) .......... 494

IV. Rediscovering Convention Purposes: Reformulating the Nexus Requirement ............................................................................................... 498
    A. Political Opinion and Proving the Causal Connection .................................... 499
    B. Membership in a Particular Social Group ....................................................... 501

V. Conclusion ............................................................................................................ 506

† The author would like to thank Professor Hiroshi Motomura for his support throughout law school, in addition to his invaluable comments on this piece. Many thanks also to my editors, Michael Shumaker and Rebekah Goncarovs Grafton, the tireless staff of the Immigrant Legal Assistance Project at the North Carolina Justice Center for first introducing her to the challenges facing asylum-seekers from Colombia; and final thanks to her friends and family, particularly her grandmother Ann James, for their constant encouragement and support.
I. Introduction

When one thinks of hundreds of thousands of refugees fleeing the violence of armed militias, of internally displaced persons who suffer from starvation, extreme poverty, and re-victimization at the hands of those who prey upon vulnerable populations, the first country to come to mind might be Sudan. Although the crisis in Darfur has received the lion’s share of media attention, this description fits not only the distant land in Africa, but it also fits a country much closer to home, right here in the Americas. Colombia is second only to Sudan in numbers of internally displaced persons, creating a refugee crisis that has grown in severity in recent years. Those lucky enough to be able to leave Colombia in search of protection in the United States face an asylum system that fails to recognize the reality of today’s refugee. Instead of fleeing a government that overtly engages in the persecution of its population, today’s refugee is more often fleeing violence perpetrated by non-state actors. Yet, “[d]espite broad recognition of abuses attributable to non-state agents, internal conflict, and failed states, international human rights law is scrambling to keep up with the changing context of repression, persecution, and brutality throughout the world.”

This new reality has led to a divergence in asylum theory.

In evaluating the Colombian asylum crisis, one must first understand the two competing theories that frame asylum law; as

---


4 Id. at 86.
either a humanitarian concept, or as a political concept.\textsuperscript{5} Advocates of the humanitarian view would argue that "those forced to flee their homelands because they lack protection from generalized violence or severe economic hardship have as strong a moral claim to asylum as people targeted for violence by their state."\textsuperscript{6} This view would advocate for widening the definition of asylum to focus on the asylum seekers' need for protection, and not on the causes of their plight.\textsuperscript{7} Humanitarians argue that the 1951 Convention Relating to the Status of Refugees\textsuperscript{8} was developed for a different political reality, and that a new theory of asylum that more readily recognizes insurgencies and non-state actors as perpetrators of persecutory violence (even if seemingly indiscriminate) is necessary.\textsuperscript{9} The humanitarian construct has been formally adopted in some regions where civil war and widespread violence required a new approach to asylum law.\textsuperscript{10}

\textsuperscript{5} See generally Matthew E. Price, Persecution Complex: Justifying Asylum Law's Preference for Persecuted People, 47 HARV. INT'L L.J. 413 (2006) (describing the "persecution complex" in terms of a humanitarian or political concept); Tahl Tyson, Comment, The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns From Competing Interests, 65 WASH. L. REV. 921, 929-30 (1990) (arguing that competing interests of foreign policy, special interest group pressure, and domestic concerns override what should be the primary concern: humanitarian goals).

\textsuperscript{6} Price, supra note 5, at 417-18.

\textsuperscript{7} Id. at 421.


\textsuperscript{9} Price, supra note 5, at 419-21. See also Laura Isabel Bauer, They Beg For Our Protection and We Refuse: U.S. Asylum Law's Failure to Protect Many of Today's Refugees, 79 NOTRE DAME L. REV. 1081, 1087-88 (2004).

The political conception of asylum, which requires the persecution criterion and judges "the legitimacy of, and the state's culpability in, the asylum seeker's exposure to harm" generally supports the status quo and rejects expansion of asylum under the aforementioned humanitarian law principles. The primary support for preserving the political concept of asylum comes from the perception that asylum is an expressive practice, as "it reflects a judgment that the asylum seeker was being abused, not merely that she was suffering." Providing asylum to a citizen of a sovereign state intervenes in the internal relationship a nation has with its citizen, and expresses "condemnation of the asylum seeker's state of origin."

Those who frame the asylum question in political terms would argue that in this respect, asylum is qualitatively different from refugee status, in that other forms of foreign assistance can be offered to refugees. Persecuted refugees in camps abroad can still be referred to the U.S. for asylum. Other refugees who are suffering as a result of natural disaster, generalized violence or armed conflict, and those suffering severe economic hardship such as starvation would still have access to "in situ aid [in the form of] temporary protection, military intervention, and overseas resettlement programs." While a full exploration of these competing theories is beyond the scope of this paper, assume for


11 Price, supra note 5, at 418 (emphasis in original).
12 See id. at 423-424.
13 Id. at 425 (emphasis in original).
14 Id. (further arguing that a state "deserves condemnation for being unwilling to protect its citizens; it does not deserve condemnation for being unable to do so." Id. at 460.). Where the Colombian government would fall on this continuum is a matter of considerable debate.
15 Id. at 426.
16 Id. Temporary protection is described as refugee camps in safe areas or border countries. Id. Overseas resettlement programs under the political conception would include forms of relief such as Temporary Protected Status and Withholding of Removal, which are temporary in nature and stop short of asylum, which grants membership in the third country in the form of permanent residence. Id.
17 For further discussion related to these theories, see David Cole, The Idea of Humanity: Human Rights and Immigrants' Rights, 37 COLUM. HUM. RTS. L. REV. 627
the purpose of this discussion that advocates of the political conception (more or less the status quo) are right. Accepting this argument means that 1) asylum is a special expressive practice that must be preserved as a separate entity; 18 2) that the persecuted represent the highest moral obligation of receiving countries, even if their danger is not as imminent as some other forced migrants19 and 3) that the 1951 Convention is still relevant in today’s geopolitical reality.20 The question then becomes: has the United States so narrowed its reading of the definition of refugee under the Convention that, as a matter of practice, it has made the Convention irrelevant in addressing victims of non-state actors and those fleeing civil war?21

Using Colombia as an example, this comment will address this question. It is important to note that while this comment focuses on Colombia, it is applicable to any region where generalized violence, terrorism, civil war, and government impotency combine (2006) (addressing immigrants’ rights generally through appealing to international human rights, calling for self-executing human rights laws to give them force in the immigration context); James C. Hathaway, Reconceiving Refugee Law as Human Rights Protection, 4 J. REFUGEE STUD. 113 (1991) (introducing a formal humanitarian concept of refugee law); Inna Nazarova, Comment, Alienating “Human” from “Right”: U.S. and UK Non-Compliance with Asylum Obligations Under International Human Rights Law, 25 FORDHAM INT’L L.J. 1335 (2002) (arguing that post-9/11 restrictions on asylum should not interfere with the humanitarian principles that united the world after World War II); Daniel J. Steinbock, The Qualities of Mercy: Maximizing the Impact of U.S. Refugee Resettlement, 36 U. MICH. J. L. REFORM 951 (2003) (addressing tension of competing theories for determining who should benefit from the refugee resettlement program).

18 See Price, supra note 5, at 443-44.

19 See id. at 465 (noting however that while the persecuted have the highest moral claim to asylum, “they may not have the strongest claim to assistance,” advocating for a blend of temporary protection and in situ aid).


21 Joan Fitzpatrick, Temporary Protection of Refugees: Elements of a Formalized Regime, 94 AM. J. INT’L L. 279, 292-93 (2000). Ways in which states with high asylum caseloads have narrowed the definition of refugee especially as related to victims of internal armed conflict include “holding that violence associated with armed conflict is generalized and nonpersecutory; that only asylum applicants who are individually singled out fall within that definition; that harm threatened against an individual by government forces to overcome perceived opposition during internal armed conflict or civil strife is not motivated by persecutory animus; and that only government agents are legally capable of engaging in persecution.” Id. at 292-93.
to create a mass forced migration. This comment first provides necessary context by giving the reader an overview of the complex historical conditions that have led to the current crisis in Colombia, covering in-depth the actors in this violent struggle that have displaced thousands of innocent victims.\footnote{Practitioners who ignore or mischaracterize this context do so at their client's peril. Asylum cases are incredibly dependent on the facts not only of what happened to the individual seeking asylum, but also to the country conditions in the specific geographic area inside the country of origin. See generally Luz E. Nagle, \textit{Colombian Asylum Seekers: What Practitioners Should Know About the Colombian Crisis}, 18 GEO. IMMIGR. L.J. 441 (2004) (giving background information about the turmoil in Colombia and the factors that should lead to asylum status being granted).}

The second section introduces the asylum system in the United States as it has interpreted its obligations under the 1951 Convention and the 1967 Protocol. The focus will be on how these interpretations have impacted Colombian asylum-seekers using specific case analysis, which highlights the challenges in establishing asylum that Colombian nationals face under the current construct. Finally, the comment proposes possible solutions that have broad applicability not only to victims of internal violence and civil wars in Colombia, but to all similarly situated persons.

\section*{II. History and Current Country Conditions}

\subsection*{A. Origins of the Conflict: Early Political Turmoil}

The current crisis in Colombia dates back to the 1960s when the first leftist guerrilla groups were organized for the primary purpose of establishing economic and social justice through land reform.\footnote{See Arturo Carrillo-Suarez, \textit{Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict}, 15 AM. U. INT'L L. REV. 1, 10 (1999).} However, the root of the conflict goes back to the country's founding in the 1820s, and grew out of the ongoing power struggle between the Conservative and Liberal Parties that reflects the social stratification that plagues Colombia to this day.\footnote{See \textit{id.} at 10; Nagle, \textit{supra} note 22, at 444.}

The Conservative party draws its support from the upper strata of Colombian society, "namely the affluent cosmopolitan elite, the absentee owners of vast landholdings, mining operations, plantations and ranches, [and] the ruling 'patrician' families in
rural areas.” There is also a racial element to this alignment, where most members of this social group can trace their ancestry directly to Spain. “[T]oday one’s name and bloodlines are of paramount importance among the families of the traditional elite.” In contrast, the Liberal Party represents merchants, the working class, rural farmers, and leftist reformers, who often identify with the indigenous people of the region. The first workers’ unions grew out of this party, and when communism gained in popularity, a more radical leftist wing of the party emerged.

The struggle for power grew violent in the late 1940s and 1950s, in a period known as ‘la Violencia’, which greatly intensified after the assassination of the charismatic leader of the Liberal Party, Jorge Eliécer Gaitán on April 9, 1948. While estimates to the number of deaths during this period vary, numbers range from 80,000 to as many as 400,000. A military coup by General Gustavo Rojas Pinilla in June 1953 was the result of divisions within the ruling Conservative Party, and was initially designed to put an end to the violence that had swept throughout the country. While initially successful in quelling the violence, it soon returned, and when Rojas Pinilla showed no signs of returning to democratic rule, the Liberal Party and members of the Conservative Party attempted to remove him from power. This controversy resulted in a power sharing agreement between the Liberal and Conservative Parties known as the National Front, established in 1958. The agreement provided that the presidency

25 Nagle, supra note 22, at 444.
26 See id.
27 Id. at 444-45 (describing Colombia’s highly class conscious society as “caste-like” in its intensity).
28 See id. at 445.
29 See id.
30 John C. Dugas, Colombia, in POLITICS OF LATIN AMERICA: THE POWER GAME 497, 506 (Harry E. Vanden & Gary Prevost eds., 2006).
32 See Dugas, supra note 30, at 507.
33 See id.
34 See id. at 507-08.
would alternate between the two parties every four years during the sixteen year period the agreement covered.35 "It created a political regime that was civilian in character but not particularly democratic in nature."36 Third parties were prohibited, and socialist organizations and other leftist groups were shut out of the process.37 Although the National Front ended the partisan conflicts of la Violencia, more militant groups evolved in response to their disenfranchisement from the political process, leading to an upsurge in other sources of violent conflict.38 Though many groups have come and gone, the Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia, or FARC) and the Ejercito Nacional de Liberacion (National Liberation Army, or ELN) have survived to this day, and are the most enduring guerrilla organizations in the Americas.39

B. "Los Guerrilleros": The FARC and ELN

"The FARC guerrillas are the oldest, largest, and strongest guerrilla movement in Colombia."40 Originally guided by agrarian-communist ideology, the FARC's origins rose out of the peasantry, and it has supported land reform in order to create a society of small property owners and to improve the conditions for agricultural workers.41 Though initially organized loosely as self-defense units, the guerillas became decidedly more cohesive and aggressive in 1964 after the Colombian military, assisted by the United States government, attacked five communist-held municipalities.42 Although the attack was successful in military terms, it had the effect of reinforcing popular support for the group

35 See id. at 508.
36 Id.
37 See Nagle, supra note 22, at 446.
38 See id.; Dugas, supra note 30, at 508.
39 See Nagle, supra note 22, at 446.
40 Carrillo-Suarez, supra note 23, at 13.
41 SAFFORD & PALACIOS, supra note 31, at 354.
42 See STEVEN DUDLEY, WALKING GHOSTS: MURDER AND GUERRILLA POLITICS IN COLOMBIA 9-10 (2004) (arguing further that modern U.S. Colombia relations were shaped by this first U.S. intervention in the spread of communism in the Americas at the height of the Cold War).
that would emerge as the FARC two years later.\textsuperscript{43}

Heavily influenced by the Cuban revolution, the Communist Party in Colombia advocated a policy of advancing their agenda through a "combinación de todas formas de lucha"; in other words, the party advocated the use of violence for political gain while at the same time pursued change through legitimate political channels.\textsuperscript{44} In the 1980s, after a peace agreement with the government recognized the FARC as political protagonists, the FARC split from the Communist Party and formed their own political party, the Unión Patriótica or UP.\textsuperscript{45} Although there was great hope that a legitimate political party would allow the leftist guerrillas the opportunity to lay down their arms, shortly after the party was formed, its members were murdered by paramilitaries and Colombian security forces, effectively exterminating the party and providing the only excuse the FARC needed to continue their violent struggle indefinitely.\textsuperscript{46} Although other political parties have tried to fill the void, they continue to be easy targets for those that seek to limit the democratic left.\textsuperscript{47}

The rise of narcotics processing and trafficking in Colombia has blurred the lines between what once made the FARC revolutionaries instead of merely petty criminals.\textsuperscript{48} The fall of communism has contributed to the sentiment that the FARC has all but abandoned their political and social ideology in favor of

\textsuperscript{43} See id. at 10.

\textsuperscript{44} See id. See also MARIA CLEMENCIA RAMIREZ, ENTRE EL ESTADO Y LA GUERRILLA: IDENTIDAD Y CIUDADANIA EN EL MOVIMIENTO DE LOS CAMPESINOS COCALEROS DEL PUTUMAYO 70 (2001).

\textsuperscript{45} DUDLEY, supra note 42, at 10 (comparing UP to the Palestinian Liberation Organization or Sinn Fein as the political arm of armed insurgent groups); SAFFORD & PALACIOS, supra note 31, at 356.

\textsuperscript{46} See DUDLEY, supra note 42, at xvii (documenting the rise and fall of the Union Patriótica through in-depth interviews with surviving members of the party, the FARC, and other protagonists in the demise of the party).

\textsuperscript{47} See id. at 175-78 The first to follow the UP was the Bolivarian Movement, a clandestine political party under the 'protection' of the FARC, likened to "martyrs in the making," a future sacrificial lamb in the FARC's efforts towards political dominance. Id. at 209-16. The Frente Social y Político followed. One of their candidates for Congress, Wilson Borja, survived one assassination attempt in 2000 prior to his election in 2002 and still travels with a large security detail. Id.

\textsuperscript{48} See RAMIREZ, supra note 44, at 66.
military and economic motives. Though they fund their operations with money obtained through kidnapping, extortion, and "taxing" the cultivation and processing of narcotics in FARC-controlled areas, it would be overly simplistic to say the FARC are now 'narco-guerrillas' without a political agenda. Organized militarily, the FARC are estimated to have anywhere from 10,000 to 15,000 troops. Although their dominance has dwindled in recent years, they still operate multiple fronts and their presence is felt in all regions of the country, particularly in the south.

Although the ELN is the smaller of the two guerrilla groups, they still number 5,000 members strong. Founded in 1964 by university students strongly influenced by the Cuban revolution, the ELN seems to have held onto its ideological roots, at least in theory. Its area of influence lies in the northern departments of Colombia near the Venezuelan border, where it funds its operations primarily through extortion and kidnapping.


50 See id.; DUDLEY, supra note 42, at 217 (estimating that these FARC activities bring in about $700 million (U.S.) every year).

51 See generally Jorge L. Esquirol, Can International Law Help? An Analysis of the Colombian Peace Process, 16 CONN. J. INT'L L. 23, 30 (2000) (arguing that although the end of the Cold War has diluted their ideology, the FARCs political pronouncements for a "New Colombia" are based on "principles of social justice and economic self-determination . . . [including] broad political participation, more state control over the economy, and land redistribution through expropriation.")


54 See Esquirol, supra note 51, at 30 (noting the strong liberation theology that came from their leaders' roots as ex-Catholic priests, who have made appeals to international humanitarian law and made pronouncements against the drug trade). However, a more radical faction with fewer ethical qualms has recently gained more control. Id. at 30-31.

transport of oil, Colombia's principal export.” When the companies refuse to pay, the ELN engages in sabotage of the petroleum infrastructure. However, this funding source has been affected by state-provided security to the oil industry. The ELN's strength in recent years has abated partially due to the actions of paramilitary organizations that operate in many of the areas traditionally held by the ELN. It has also made overtures towards demobilization, and engaged in talks with the Colombian government in early 2002, but those talks ceased when the ELN resumed violence. Talks resumed again in 2004, but rather than progressing towards a peaceful resolution, the ELN has moved in the opposite direction, talking of joining forces with the FARC.

C. The Paramilitaries: The AUC

The Autodefensas Unidas de Colombia (United Self-Defense Groups of Colombia or AUC) was born of diverse origins. Some of its membership grew out of several private armies that were organized by wealthy land-owners to protect their interests against the guerrilla groups. “The paramilitary groups traditionally were- and continue to be-financed by drug traffickers, large landowners (“hacendados”) and cattlemen (“ganaderos”).” Other groups were born directly from strategies used by Colombian military leaders to combat the guerrillas, including a 1968 law that authorized the distribution of weapons to local peasants by the military to confront the guerrillas, a practice that ended in 1989. But in 1994, the Colombian government, overrun by guerrilla fighting, once again allowed the organization of these private security services for purposes of self-defense, known as the “Convivir.” In the early part of the government’s war on the

56 Carrillo-Suarez, supra note 23, at 15-16.
58 See id.
60 See UNHCR (2006), supra note 54, at 187.
62 See Dugas, supra note 30, at 512.
63 Luz Estella Nagle, Survey: Solving Problems Facing International Law Today: Global Terrorism in Our Own Backyard: Colombia's Legal War Against Illegal Armed
guerrilla movements, paramilitary groups were often used in advance of the regular forces to clear the area of guerrilla activity, but they were notoriously indiscriminant, with complete disregard for the international laws requiring armed forces to distinguish between combatants and civilians.64

Recognizing that "it had created a monster by legalizing paramilitary groups" the government attempted to shut down the groups in 1997, but it was too late.65 Organized in much the same way as their guerrilla counterparts, the AUC modus operandi is to attack and kill the guerrillas by targeting their support networks and any civilian seen as sympathetic to their cause.66 Their methods are notoriously brutal, and include torture, death threats, summary executions, and forced disappearances; some estimates put the percentage of AUC involvement in total human rights abuses in Colombia as high as seventy percent.67 Although the government has attempted to distance itself from the AUC, the government security forces continue to be implicated in their actions, which is further complicated by ongoing judicial impunity.68 The AUC entered into a demobilization program with the Colombian government, which the Colombian government claims to have completed at the end of 2006, with more than 30,000 paramilitaries turning in their arms.69 Aside from further exacerbating the perceptions of judicial impunity for their actions,70 many question whether the demobilization process truly

---

64 See id. at 18-19.
65 Id. at 19.
66 Dugas, supra note 30, at 512.
67 See Esquirol, supra note 51, at 34.
68 See Carrillo-Suarez, supra note 23, at 18 (stating that "[the paramilitary’s] links with the Colombian armed forces are notorious, and the two continue to operate in frequent coordination"); Nagle Survey, supra note 63, at 19 (noting that investigations by Colombia Internal Affairs implicated some 59 police and military personnel in human rights violations when acting alongside members of the paramilitary group MAS (Muertos al Secuestrados) or ‘Death to Kidnappers’). See also Elizabeth F. Schwartz, Comment, Getting Away With Murder: Social Cleansing in Colombia and the Role of the United States, 27 U. MIAMI INTER-AM. L. REV. 381 (1995).
dismantled the paramilitaries’ criminal and financial networks.\textsuperscript{71} There continued to be serious breaches of the ceasefire in 2005 and 2006, resulting in executions and other human rights violations.\textsuperscript{72} There are also some indications that new paramilitary groups are being formed.\textsuperscript{73} In areas where paramilitary groups have not disbanded, violence has increased.\textsuperscript{74}

“It should be pointed out that serious violations do not arise from any deliberate policy on the part of the Government.”\textsuperscript{75} However, security forces continue to be implicated in human rights violations.\textsuperscript{76} “[T]rustworthy complaints filed in 2005 more often reported the direct involvement of members of the security forces. In several cases, the actions of paramilitaries implicated State responsibility due to action or omission by government officials.”\textsuperscript{77} The Center for Popular Research and Education (CINEP) attributed 92 unlawful killings perpetrated by security forces in the first six months of 2006.\textsuperscript{78} “There continued to be


\textsuperscript{74} See Report on the Situation of Human Rights in Colombia, supra note 70 at 10.

\textsuperscript{75} Id. at 9.


\textsuperscript{77} See Report on the Situation of Human Rights in Colombia, supra note 70, at 9. “Some cases were recorded in which the [military] commanders themselves allegedly agreed to dress up the victims in guerrilla clothing in order to cover up the facts and simulate death in action.” Id. at 10.

\textsuperscript{78} See U.S. Department of State Country Reports on Human Rights Practices 2006:
credible reports that some members of the security forces cooperated with illegal paramilitaries in violation of orders from the president and the military high command.... Such collaboration often facilitated unlawful killings and sometimes may have involved direct participation in paramilitary atrocities." Thus, it cannot be ignored that while the Colombian government is officially attempting to dismantle paramilitaries, it is also complicit in the actions of the paramilitaries, either through direct involvement or through willful blindness and by failing to prosecute those guilty of atrocities.

D. External Influences: The Role of the United States in the Colombian Conflict

When analyzing the different actors in the Colombian struggle, the impact and influence that United States policy towards Colombia has had in shaping the conflict is worthy of exploration, especially as we evaluate U.S. responsibility owed to the victims of the struggle. The first major chapter in U.S. - Colombian affairs was written when the Canal Zone was established in the Isthmus of Panama, which until 1903 was Colombian territory. The U.S. originally established a treaty to establish the Canal Zone with the Colombian government, but after the Colombian Senate balked at the amount of payment and concerns over subjugation of Colombian sovereignty to U.S. interests, they rejected the treaty. Furious, President Theodore Roosevelt worked to encourage secessionist forces in Panama, and intervened to prevent the Colombian military from putting down the insurrection. After quickly recognizing the legitimacy of the new Panamanian government, the U.S. entered into a new canal treaty with them to establish the Canal Zone. After years of bitter dispute over the region, the U.S. agreed to pay Colombia $25 million for their role in the loss of Panama. This was the first in major expenditures that the United States would make to ensure their own self-

---

79 Id. at § 1a.
80 See Safford and Palacios, supra note 31, at 217-21.
81 See Dugas, supra note 30, at 505.
82 Id.
83 Dudley, supra note 42, at 9.
interests were protected in Colombia, at times to the detriment of
the people of Colombia.

The Cold War was the next impetus for United States
intervention that would go far to shape the current conflict. As
mentioned previously, after la Violencia ended, the Communist
Party of Colombia loosely held five municipalities in the Tolima
province. President Kennedy’s “Alliance for Progress,” an
economic development plan for Latin America, consisted of a
“carrot and stick” approach to deterring the growth of
communism. Kennedy’s plan provided economic incentives for
those that turned away from communism, and then applied a large
stick to combat further growth of communism militarily. With
the help of the U.S. military, the Colombian government defeated
these ‘independent republics’ but the unintended consequence was
a resurgence of the “Southern Tolima Bloc” into the stronger
entity that exists today: the Revolutionary Armed Forces of
Colombia, or the FARC.

The end of the Cold War and the subsequent loss of military
and economic support for the guerrilla groups forced them to look
to other funding sources, most notably, the trafficking of illegal
narcotics. As the United States was the primary market for this
product, the U.S. again asserted its influence on Colombian
internal affairs in its ongoing “War on Drugs.” Continuing with
its ‘carrot and stick’ approach, U.S. aid to Colombia to fight the
war on drugs has consisted largely of military training of
Colombian and paramilitary forces, weapons, and large scale
fumigation of coca and marijuana crops. In the 1980s, in the
face of an intense government crackdown on drug trafficking, the

84 Dugas, supra note 30, at 506.
86 Id.
87 Id. at 10.
89 Id. at 15-16 “[T]he declaration of the war on drugs by the U.S. government ... [led to] a bloodbath between the Colombian government and the notorious drug cartels who struggled to prevent extradition to the United States and spawned a new form of terrorism: narco-terrorism.” Id. at 15.
90 Dudley, supra note 42, at 170, 201.
Medellin cartel declared war on the Colombian Government.91 "The cartel began a campaign of terror that shook Colombian society with its blatant violations of international humanitarian law and whose principal weapons were intimidation, dynamite attacks, car bombs, kidnappings, and assassinations, primarily of civilians."92 The George H. W. Bush administration responded to President Barco's plight by announcing a five year, $2.2 billion Andean Initiative, aid that was primarily "military in nature."93 Under the Gaviria Administration, Pablo Escobar, the infamous leader of the Medellin cartel, turned himself in under a highly beneficial deal in which he was able to continue directing his trafficking activities from jail.94 When a transfer to a more secure prison was ordered, Escobar escaped, leading to another upswing in drug-related violence until his death in 1993.95 The Cali Cartel quickly stepped into the void left by the demise of the Medellin Cartel.96 The Samper Administration, mired in a drug scandal where he was accused of taking millions of dollars of campaign contributions from the Cali cartel (for which he was later exonerated), nevertheless resulted in U.S. action to try and force the Colombian President's resignation.97 Colombia was decertified in the Clinton Administration's review of international cooperation with the "War on Drugs," which led to a cancellation of U.S. aid to Colombia, and Samper's visa was cancelled by the U.S. State Department in 1996.98 The effect of the Colombian government's preoccupation with fighting the drug cartels was to leave the guerrilla groups and right-wing paramilitary groups unchecked, allowing them to grow in strength during this period.99

The election of conservative Andrés Pastrana led to another period of increased U.S. involvement in the internal affairs of Colombia. In an effort to negotiate peace with the FARC,

91 Dugas, supra note 30, at 512.
92 Id. at 512.
93 Id. at 512-13.
94 Id. at 515.
95 Id.
96 Id.
97 Dugas, supra note 30, at 515-16.
98 Id. at 515.
99 Id. at 516.
Pastrana established a demilitarized zone, a move criticized by the U.S. government, as they saw the FARC as nothing more than narco-traffickers and the demilitarized zone as a dangerous haven for the unchecked growth of illicit crops in the zone. Pastrana acted to appease the United States by submitting to “Plan Colombia,” a “multifaceted program designed to eradicate illicit crops, support a negotiated settlement with the guerrilla movements, revive the moribund Colombian economy, and provide aid for judicial institutions, human rights, and alternative development.” In reality, most U.S. resources went towards militarizing the counter-narcotics forces of the Colombian security forces, pushing the fight into FARC controlled areas.

The current Colombian President, Álvaro Uribe, “has stated on numerous occasions that he shares the viewpoints of both the Bush and Clinton Administrations that drugs are at the center of the terrorism problem in Colombia.” Under George W. Bush’s administration, efforts have focused on crop eradication, an effort which has been successful at reducing nearly 163,000 acres of coca crops to fewer than 12,000 acres in three years. However this measure of “success” has been matched by an escalation of violence during this same period. Although the U.S. State Department conditioned the granting of $700 million in aid to Colombia in 2004 on compliance with human rights protection, it has “twice granted certification for Colombia to receive a total of more than $61 million in aid without holding Colombia accountable for the defense of human rights.”

Critics of the U.S. War on Drugs argue that if the primary goal of the administration is to halt the production of coca, the money currently being used to militarize the eradication efforts would be
better spent by simply paying cultivators to halt production. There are perhaps other forces at work preventing this simple solution, namely the business interests of the private corporations who produce the necessary chemicals for coca refinement, as "[a] successful war on drugs would simply put them out of business." Other critics call for U.S. involvement in the Colombian peace process, but argue that the only successful approach would be to focus less on the aspects of the drug trade that contribute to violence in the country, and instead on redistributing economic wealth across society, and political enfranchisement of excluded parties. "It must be remembered that drug-trafficking is not the root cause of political violence – even if it does help to finance it."

E. Caught in the Crossfire: Effect on Civilian Population

As these forces battle for control and influence, it is the civilian population that suffers. Civilians live in constant fear for their lives and the lives of their loved ones as they struggle to remain invisible to the various violent actors in a battle where all sides demand allegiance. "Although the number of killings and kidnappings in some parts of the country fell, serious human rights abuses committed by all parties to the conflict remained at critical levels." The paramilitary groups, who have been under a ceasefire since 2002, still had more than 3,000 killings and

107 Nagle Survey, supra note 63, at 16 (citing Disrupting the Market: Implementation, and Results in Narcotics Source Countries: Hearing on International Narcotics and Law Enforcement Affairs Before the H. Comm. On Government Reform, 107th Cong. (2003) (statement of Paul E. Simmons, Acting Asst. Sec. of State, Int’l Narcotics and Law Enforcement)). See also Esquirol, supra note 51, at 24 (arguing that U.S. focus on a militarized solution to the war on drugs simply begets more violence in the guerrilla war, and that putting the drug war ahead of the peace process is a questionable strategy).


109 Id. at 83.

110 Id. at 83.


disappearances attributed to them between 2002 and 2006.\textsuperscript{113} Paramilitary groups have been implicated in ""social cleansing' killings of prostitutes, drug users, vagrants and gang members" in areas under their control, and are also known to target indigenous and Afro-Colombian members of the population.\textsuperscript{114} Their methods are notorious and particularly gruesome.\textsuperscript{115} Human rights activists, journalists, and indigenous community leaders are also known targets to the paramilitary organizations.\textsuperscript{116} Mass graves continue to be uncovered, two of them on former AUC ranches in the Sucre Department containing 72 bodies.\textsuperscript{117} Numerous kidnappings of persons suspected of collaboration with guerilla groups were conducted by the AUC in 2005. One effective tactic in terrorizing the local populations has been to control or prevent the delivery of food and supplies into towns and regions considered to be sympathetic to guerrilla groups, resulting in forced displacement.\textsuperscript{118} Child recruitment in both paramilitary groups and guerrilla forces is another serious human rights concern. "At least one of every four irregular combatants in Colombia is under eighteen years of age. Of these, several thousand are under the age of fifteen, the minimum recruitment age permitted under the Geneva Conventions."\textsuperscript{119}

Guerrilla forces are suspected of committing close to 400 terrorist attacks during the first eight months of 2005.\textsuperscript{120} That pace has only increased in 2006, with guerrillas suspected of


\textsuperscript{114} Id.

\textsuperscript{115} Id. An autopsy report of twelve Afro-Colombian youth showed their bodies had been burnt with acid and they received gunshots to the head. See id.

\textsuperscript{116} Id. at Intro.

\textsuperscript{117} Id. at § 1.g.

\textsuperscript{118} Id. at §§ 1.g; 2.d.

\textsuperscript{119} HUMAN RIGHTS WATCH, COUNTRY SUMMARY: COLOMBIA 3 (2006), http://hrw.org/wr2k6/pdf/columbia.pdf (noting that 80% of forced child recruits fight for the FARC or ELN, the remaining 20% for paramilitary groups).

\textsuperscript{120} Colombia 2006, supra note 113, at § 1.g.
committing 646 terrorist acts during 2006. While the FARC and ELN tend to target politicians, local leaders, priests and members of security forces, they are also guilty of indiscriminate killings of civilians. A 2003 bombing of a club in Bogota by the FARC killed 36 people. The FARC is suspected of a grenade attack on a daycare center that killed one child in an attack "directed against the families of recently demobilized paramilitaries." Both groups are suspected of numerous kidnappings, many of them either politically motivated to gain the release of guerrilla leaders, or to collect ransom as a source of revenue. The Colombian government suspects that there are anywhere from 70 thousand to 100 thousand landmines deployed throughout the nation, with the guerrillas responsible for about seventy-five percent. Victims are often civilians. Guerrillas have also been responsible for forcibly displacing persons to clear key drug and weapon routes. The FARC has blockaded towns, effectively cutting off food and supplies to villages suspected of holding paramilitary or government collaborators. "The internal armed conflict was the major cause of internal displacement [in Colombia]." The CIA World Factbook places the number of internally displaced persons at somewhere between 1.8 million and 3.8 million, putting the Colombian internal displacement crisis second only to Sudan in severity. Over 300,000 have fled to neighboring states, creating a humanitarian

121 U.S. Dep't of State Bureau of Democracy, Human Rights, and Labor, Colombia, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES § 1.g (Mar. 6, 2007), http://www.state.gov/g/drl/rls/hrrpt/2006/78885.htm [hereinafter Colombia 2007].
122 Id. The FARC is suspected of killing nearly 400 members of public security forces in 2006. See id.
123 Id.
124 Id.
125 Nagle, supra note 22, at 446-52.
126 Colombia 2006, supra note 113, at § 1.g.
127 Id.
128 Id.
129 Id. at § 2.d.
131 HUMAN RIGHTS WATCH, supra note 119, at 4. See also supra note 2.
crisis along the borders, especially along the southern border with Ecuador. Many of the displaced have moved from their rural homes to urban centers. They suffer from extortion and their children are pushed into prostitution or into gangs. Even worse, they sometimes fall prey again to persecution from the same irregular armed groups they fled from in the first place. The result is that many people are forced to displace again, sometimes within the same city.

From this historical backdrop and illustration of the current human rights crisis in Colombia, we turn to an overview of the relief that is available to victims of terror and persecution in the United States, specifically in the area of U.S. Refugee and Asylum law.

III. Overview of U.S. Relief Available to Victims and Colombian Cases in Context

A. Overview of US Asylum Law

The overarching premise to granting relief to victims of torture and persecution in the United States is the doctrine of nonrefoulement. The 1951 Convention Relating to the Status of Refugees is the foundation of this doctrine, and “provides two guarantees: 1) no refugee may be returned to a land where her life or freedom would be threatened, and 2) those refugees who have been lawfully admitted to the receiving state are guaranteed equal treatment in exercising enumerated civil and political rights.”


134 Id.

135 Nonrefoulement is defined as a “refugee's right not to be expelled from one state to another, especially to one where his or her life or liberty would be threatened.” BLACK'S LAW DICTIONARY 1038 (8th ed. 2004).

U.S. Asylum Law is derived from the 1951 Convention, the substantive provisions of which were included in the 1967 Protocol Relating to the Status of Refugees.\textsuperscript{137} After becoming a party to the Protocol in 1968, the United States became bound by the doctrines concerning protection of refugees, which, aside from providing the definition of 'refugee' that would later be incorporated into U.S. domestic law, also provided for "the absolute prohibition under Article 33 against return of a person whose life or freedom would be threatened in the country s/he fled."\textsuperscript{138} Apart from returning an applicant to a third country, the minimum benefit under U.S. immigration laws that accomplishes the objectives of Article 33 is withholding of removal. ""Withholding of removal' is usually a companion form of relief to asylum... an application for asylum generally also is considered an application for withholding of removal."\textsuperscript{139} A third provision that provides protection is found under the Convention Against Torture. In 1984, the United Nations adopted the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), to which the U.S. became a full party in 1994.\textsuperscript{140} Article 3 of the CAT provides the basis for relief by imposing a nonrefoulement obligation on all state parties, stating that "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."\textsuperscript{141} While Article 33 of the 1951 Convention and Article 3 of the CAT impose a mandatory obligation on member states not to return certain victims of persecution and torture, the Convention does not \textit{require} a country to grant asylum status. This form of relief is discretionary, and the benefits are

\textsuperscript{137} \textit{Id.} (citing 1951 Convention and 1967 Protocol Relating to the Status of Refugees).

\textsuperscript{138} \textit{See} Ira J. Kurzban, \textit{Immigration Law Sourcebook} 341 (10th ed. 2006). This protection is also known as nonrefoulement. \textit{See} Black, supra note 136, at 1038. \textit{See also} Martin, et al., \textit{supra} note 136, at 73 (pointing out that Art. 33 only requires protection from return, and does not require states to provide work authorization or other benefits).

\textsuperscript{139} Deborah E. Anker, \textit{Law of Asylum in the United States} 5 (1999).

\textsuperscript{140} \textit{Id.} at 466.

\textsuperscript{141} Martin et al., \textit{supra} note 136, at 449.
more substantial.142

Although the United States became party to the Protocol Relating to the Status of Refugees in 1967, it did not enact legislation to implement the Protocol until 1980.143 "The Refugee Act of 1980 adopted from the [1951 Refugee] Convention the definition of 'refugee,' which lies at the core of both asylum and refugee status, and the Convention's fundamental obligation of protection against return."144 U.S. Statute under the act defines a refugee as:

[A]ny person who is outside any country of such person's nationality... 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...145

How this definition has been interpreted in subsequent regulation, agency determinations and court decisions has led some to question whether the United States can still claim to be a member to the treaty.146 This paper will now discuss ways that terms like "persecution," "on account of," "political opinion," and "membership in a particular social group" have been construed in U.S. courts, giving some credence to the belief that the U.S. has violated the Convention.

142 See Anwen Hughes, Asylum and Withholding of Removal-A Brief Overview of the Substantive Law, in BASIC IMMIGRATION LAW 308 (Stephen W. Yale-Loehr ed. 2006). Asylum benefits grant full membership including eligibility for permanent residence, travel, right to petition for family members to join, and refugee benefits. See id.

143 MARTIN ET AL., supra note 136, at 72-73.

144 ANKER, supra note 139, at 3-4.


1. Persecution

"There is no universally agreed upon definition of persecution."147 Article 33 of the 1951 Convention states that no contracting member will return someone to his home country where "his life or freedom would be threatened."148 This threat does not have to be physical in nature.149 "Tyranny over the mind and spirit of a person has been demonstrated as more fearsome than the ancient methods of torture."150 Judge Posner defined persecution as "punishment for political, religious or other reasons that our country does not recognize as legitimate."151 A preceding Board of Immigration Appeals (BIA) decision defined persecution as meaning "the infliction of suffering or harm in order to punish an individual for possessing a particular belief or characteristic the persecutor seeks to overcome."152 These vague definitions may leave one with the impression that the court is imposing a "we know it when we see it" standard, but case law has developed a set of certain acts or forms of abuse that amount to persecution.153 "Mere harassment or discrimination... does not rise to the level of persecution."154 Nor do generalized and widespread conditions of hardship or violence.155

The first step to establishing an asylum claim is to demonstrate past persecution or a well-founded fear of future persecution.156

---

149 See Kovac v. I.N.S., 407 F.2d 102, 105-07 (9th Cir. 1969) (noting § 243(h) of the Immigration and National Act was amended, deleting the adjective "physical" from the original. Court held that under the amended statute, a "probability of deliberate imposition of substantial economic disadvantage upon an alien for reasons of race, religion, or political opinion is sufficient . . . to withhold deportation").
150 Id. at 107.
151 Osaghae v. I.N.S., 942 F.2d 1160, 1163 (7th Cir. 1991).
154 Id. at 30 (citing specific examples in note 108).
155 Id. at 30.
156 See 8 C.F.R. § 208.13(b)(1) (2001); I.N.A. § 208(b); GERMAIN, supra note 154,
To claim past persecution as a basis for asylum, an applicant must prove an incident that "(1) rises to the level of persecution; (2) is on account of one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either unable or unwilling to control." If the applicant has thus established past persecution, a well-founded fear of future persecution is presumed unless there have been substantial changes in the home country.

In the absence of past persecution, an applicant must "establish a 'well-founded fear of persecution,' [showing] that a reasonable person in the same circumstances would fear persecution if removed to his or her home country." In the landmark case INS v. Cardoza-Fonseca, the Supreme Court noted that there was no minimum percentage probability that had to be proved, but that fear could be well-founded "even if there is only a slight, though discernible, chance of persecution." Courts have held that fear must be genuine but also reasonable, as irrational apprehension is insufficient to establish a well-founded fear of persecution.

In Matter of Mogharrabi, the BIA established four elements that must be shown to establish a well-founded fear of persecution. First, the applicant must possess a belief or characteristic sought to be overcome by means of punishment of some type. Second, the persecutor must be aware or could become aware that this person possesses this belief or characteristic. Finally, the persecutor must have both the capability and the inclination to punish the applicant. It is crucial to note that if a person has the ability to avoid persecution by moving to another part of his or her country, it is considered at 21.

157 Knezevic v. Ashcroft, 367 F.3d 1206, 1211 (9th Cir. 2004).
158 See 8 C.F.R at § 208.13(b)(1)(i).
161 Knezevic, supra note 158, at 1213; Bhatt v. Reno, 172 F.3d 978, 981 (7th Cir. 1999).
162 Gonahasa v. I.N.S., 181 F.3d 538, 541 (4th Cir. 1999).
163 Mogharrabi, 19 I & N at 446.
164 GERMAIN, supra note 153 at 26. See also Mogharrabi, 19 I & N at 446.
reasonable to expect the applicant to do so under all circumstances.\footnote{8 C.F.R. at § 208.13(b)(2)(ii).}

2. Colombians, Generalized Violence, and the Persecution Standard

There are three areas where Colombian applicants tend to fail the first requirement of asylum: establishing persecution. All three are related to the general issue of how the asylum laws deal with the problem of generalized violence. The first area is the requirement for particularized violence, the second is the internal relocation requirement, and the third is in establishing that their victimization rises to the level of persecution.

"The Board and most courts have rejected claims based exclusively on general civil strife or widespread, random violence."\footnote{ANKER, supra note 139, at 68.} Rather, asylum applicants must establish that they face a particularized threat specific to the applicant.\footnote{Id. at 68-69. The "similarly situated persons" requirement was codified at 8 C.F.R. § 208.13(b)(iii).} Although a strict reading of the "singled out for persecution" approach has been rejected, one must still prove the persecution suffered was particular to him or to those similarly situated.\footnote{Id. at 68-69. The internal relocation requirement was codified in regulations adopted in 2001 at 8 C.F.R. § 208.13(b)(2)-(3).} Proving one is similarly situated relates back to establishing membership in a group likely to be targeted, which for reasons we will see later can be problematic in itself. Further related to the issue of widespread violence is the internal relocation requirement.

Before one can be granted asylum in the United States, applicants must convince the Immigration Judge that there was no safe alternative for relocation within the home country.\footnote{Id.} Judges have been quick to assume that because there are zones where the FARC, ELN, and AUC do not have complete control, there exist alternatives for safe relocation within Colombia. However, successfully hiding one’s new whereabouts is extremely difficult in Colombia. "Domestic servants, taxi drivers, and security guards
spy on their employers” to inform the various armed groups on the new location of their targets.\textsuperscript{170} Corruption amongst those that work with the government is rampant, and internal controls on movement of the population through specific zones of conflict provide a documentary trail for corrupt officials to sell to guerrillas and paramilitaries.\textsuperscript{171} And even though a group may not be particularly active in a specific region, both guerrilla and paramilitary organizations have well-developed intelligence networks that effectively span all areas of the country.\textsuperscript{172} However, even if an individual has established that he has been particularly targeted, and has convinced a court that internal relocation is not reasonable, he must still establish that the harms perpetrated against him rise to the level of persecution.

The record is littered with cases where Colombian applicants were denied asylum because the actions perpetrated on them were not seen as rising to the level of persecution under the exacting standards of U.S. asylum laws.\textsuperscript{173} Sepulveda and Silva are two cases in this area that provide some insight. Joana Claudia Sepulveda was a member of a university group that organized political debates, marches, and demonstrations.\textsuperscript{174} After the “la Maria” kidnapping, perpetrated by members of the ELN, Sepulveda and other members of her group assisted with the coordination of negotiations between the kidnappers and the

\textsuperscript{170} Nagle, supra note 22, at 460.

\textsuperscript{171} \textit{Id.} at 462 (noting that citizens traveling through zones of conflict must officially register with the government).

\textsuperscript{172} \textit{Id.} at 463 (describing a professor from Bogotá who fled the FARC by moving to a northern university, but whose students aligned with the FARC informed on him within weeks of his arrival).


\textsuperscript{174} Sepulveda v. U.S. Att’y Gen., 401 F.3d 1226, 1229 (11th Cir. 2005).
hostages’ families. After beginning her involvement, Sepulveda received “three threatening telephone calls at her home. The callers, identifying themselves as ELN members, called Sepulveda by name, used profanity, directed her to stop her peace activities, and made death threats.” One day, shortly after she finished her shift, a bomb placed in the mailbox at her restaurant exploded. Her brother was threatened on account of her activities as well. Although the court found Sepulveda’s testimony to be credible, they still held that the threats and bombing did not rise to the level of persecution to support her claim for asylum. The court noted that while there is no precise definition of persecution, courts have held that “‘persecution’ is an ‘extreme concept,’ requiring ‘more than a few isolated incidents of verbal harassment or intimidation,’ and that ‘[m]ere harassment does not amount to persecution.’” Since the actions of the ELN did not rise to the level of persecution, the court decided that “[a]lthough Sepulveda may subjectively fear returning to Colombia at this time, her fear [was] not objectively reasonable based on the record evidence.” The bombing may have satisfied the court as rising to the level of persecution, but it failed on nexus grounds.

The second case is Silva v. U.S. Att’y Gen. Luz Marina Silva sought political asylum due to persecution by the FARC. While working on a political campaign, Silva received a written death threat signed by the FARC. She characterized the note as

---

175 Id. To facilitate communication with the kidnappers during negotiations, the group set up “mailboxes” in restaurants, one of which was placed in the restaurant where Sepulveda worked. Id.

176 Id.

177 Id.

178 Id.

179 Id. at 1231.

180 Sepulveda, 401 F.3d. at 1231 (citing Gonzalez v. Reno, 212 F.3d 1338, 1355 (11th Cir. 2000)).

181 Id. at 1232 (citing Al Najjar v. Ashcroft, 257 F.3d 1262, 1289 (11th Cir. 2001)).

182 Sepulveda, 401 F.3d at 1231. “Although the evidence may permit a conclusion the restaurant bombing was directed at Sepulveda on account of her political activity, it does not compel such a conclusion.” Id. (citing I.N.S. v. Elias-Zacarias, 502 U.S. 478, 481, n.1 (1992)).

183 Silva v. U.S. Att’y Gen., 448 F.3d 1229 (11th Cir. 2006).

184 Id. at 1234.
a “condolence note” that read, “Luz Marina Silva rest in peace for doing what she shouldn’t be doing in the wrong place.” 185 After that, the FARC started calling her daily at her house and restaurant, and then on October 9, 1999, three weeks after receiving the note, two men on motorcycles shot at her car while she was driving and hit the rear window. Silva was uninjured in the shooting incident. 186 She received a call that night warning her not to report the shooting to the authorities. 187 Silva left for the U.S. in November of 1999, but returned within a few months to visit a dying relative. 188 Although Silva hoped that enough time had elapsed that she could go back safely, she started receiving anonymous phone calls “daily.” 189

In the last call she received prior to leaving for the United States for the second time, the caller states that she had been missed on October 9, but warned her not to provoke them again stating, “we are not going to miss a second time, we’re going to kill you.” 190 In the opinion, the court stressed that none of the “new anonymous telephone calls referenced her political activity, and there is no evidence that Silva engaged in any political activity in 2000. Apart from the anonymous phone calls, Silva did not have any problems in Colombia after she returned.” 191

Citing their decision in Sepulveda, the court concluded that “the ‘condolence note’ Silva received was on account of her political activity, but this one incident is not sufficient to entitle Silva to asylum.” 192 The court assumed for the sake of argument that the shooting would rise to the level of persecution, but dismissed it. “Silva testified [before the Immigration Judge] that

185 Id.
186 Id.
187 Id.
188 Id.
189 Silva, 448 F.3d at 1234.
190 Id.
191 Id. at 1235.
192 Id. at 1237. The court similarly discounted the anonymous telephone calls on nexus grounds, stating “[a]lthough the timing of the telephone calls supports an inference that the calls were related to Silva’s political activity, the evidence also supports an inference that the calls were unrelated to that activity,” as none of the calls explicitly referenced her political activity. Id.
she did not know who shot at her car or why." The court then used the language found in Elias-Zacarias, stating that "although the timing of the shooting would allow an inference that it was related to the 'condolence note,' the record does not compel that conclusion." And in language which has been followed in more than twenty-five cases in the Eleventh Circuit following the decision in Silva, "only in a rare case does the record compel the conclusion that an applicant for asylum suffered past persecution or has a well-founded fear of future persecution."

The court then discussed the generalized violence in Colombia as a more probable reason for the shooting incident. "[T]he shooting incident . . . did not distinguish her from the majority of Colombians who are also subject to the general conditions of violence and criminal activity in Colombia." Further illuminating is the court's finding that "Colombia is a place where the awful is ordinary, but we must state the obvious: if four out of every ten murders are on account of a protected ground, six out of ten are not." While the court did not find Silva lacked credibility, the court did note that her testimony was "full of holes."

Of note in this case was a vigorous dissent by Judge Carnes. "Only in the majority's imagination do would-be killers wear name tags or drive around on motorcycles with vanity plates displaying the name of their terrorist organization." The dissent

193 Id. at 1238.
194 Id. See also Elias-Zacarias, 502 U.S. at 483.
195 Silva, 448 F.3d at 1239 (emphasis added).
196 Id. at 1238.
197 Id. at 1242. This statement seems to ignore the holding in Cardoza-Fonseca requiring no minimum percentage of probability of persecution. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).
198 Id. at 1239. It is important to note that Silva appeared pro se before the Immigration Judge. This is a common occurrence in immigration proceedings. It is impossible to know whether the outcome would have been different with the benefit of counsel at the time of her initial hearing. See generally Andrew I. Schoenholtz & Jonathan Jacobs, The State of Asylum Representation: Ideas for Change, 16 GEO. IMMIGR. L.J. 739 (2002) (noting that "represented asylum cases are four to six times more likely to succeed than pro se ones"). See also Beth J. Werlin, Note, Renewing the Call: Immigrants' Right to Appointed Counsel in Deportation Proceedings, 20 B.C. THIRD WORLD L.J. 393 (2000).
199 Silva, 448 F.3d at 1246.
also took issue with the majority's reliance on a "widespread terror exception to asylum laws" noting if the existence of indiscriminate violence is allowed to destroy an otherwise approvable asylum claim on recognized grounds "no one from Colombia would ever be eligible for asylum."\textsuperscript{200}

3. Reforming what Constitutes 'Persecution'

The abuses of the FARC, ELN and AUC often start with threats or intimidation. The evidence shows, however, that these groups often make good on their threats, especially in the face of noncompliance with their demands.\textsuperscript{201} It would seem that the statutory definition of persecution, which does not allow "mere harassment or intimidation" to rise to the level of persecution would require one to actually experience physical harm before asylum would be granted.\textsuperscript{202} "It is much easier for the adjudicator to decide that a certain act does not amount to persecution than for the claimant to convince a court that it does, unless the act is manifestly atrocious and barbaric by nature."\textsuperscript{203}

Requiring an asylum seeker to actually experience physical violence before extending refuge is not a morally conscionable requirement. As such, the first step towards fixing asylum law for persons who have suffered harm, especially at the hands of non-state actors, would be for courts to recognize that there may be few warnings before serious harm or death occurs. A reasonable person whose collective experience in their community has demonstrated that guerrilla and paramilitary groups make good on their threats, and then flees his or her country due to that very real threat, should be able to establish a well-founded fear of

\textsuperscript{200} Id. at 1248. The dissent goes on to fault the highly deferential standard of review heavily relied upon by the majority, stating that "[t]he majority opinion refers to the often-mentioned, but never sighted, 'rare case' in which the facts are so compelling that we will reverse an immigration judge's finding ... No published opinion of this Court has ever found that rare case, and today's decision indicates that such a case, like the fabled unicorn, exists only in our imagination." Id. at 1248-49. See also discussion of judicial review infra pp. 498-99.

\textsuperscript{201} See discussion supra pp. 472-75.

\textsuperscript{202} Kidane, supra note 10, at 140.

\textsuperscript{203} Id. It is indeed a strange paradox in asylum practice to feel a sense of elation that your client endured actual physical harm, not because one is happy that the client suffered, but because it means one can more easily prove persecution.
persecution in U.S. Courts. This threshold change would not 'open the floodgates' to asylum claims, because the applicants must still run the rest of the asylum gauntlet by establishing the persecution they have suffered was on account of a recognized ground.

B. Grounds of Persecution

Persecution will not trigger protection in an asylum case unless it can be established that it was "on account of one of five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion." This is often referred to as the nexus requirement. The phrase 'on account of' requires that there is a relationship between the harm inflicted and one of the five enumerated grounds; unfortunately, the courts have interpreted that relationship in substantially different ways. In the 1980s, the BIA set about interpreting the nexus requirement, deciding that 'on account of' required proof that the persecutor was motivated to punish the victim because of a characteristic covered by one of the five grounds. The Ninth Circuit adopted a more liberal approach, focusing on the effect of persecution on the victim rather than proof of the persecutor's motivation. The Supreme Court attempted to resolve the inconsistency between the BIA and the Ninth Circuit by addressing the nexus issue in INS v. Elias-Zacarias. The court rejected the Ninth Circuit position that "political entities should be presumed to have political motives in relation to harm or threatened harm of victims" requiring instead a "causal, motivational link between victim and persecutor." The Court also addressed the evidentiary issues raised due to the difficulty of providing proof of a persecutor's motives. The Court responded to this concern by stating that they

205 See ANKER, supra note 139, at 268-90; GERMAIN supra note 153, at 32-34; MARTIN ET AL., supra note 137, at 190.
206 MUSALO ET AL., supra note 147, at 285.
207 Id.
208 Id. at 286.
210 ANKER, supra note 139, at 274.
do not require direct proof of a persecutor’s motives, but that one “must provide some evidence of it, direct or circumstantial.”

1. The Political Opinion Nexus Ground

While all grounds for asylum are deserving of detailed coverage, the two that figure most prominently to the discussion of Colombian asylum claims are political opinion and membership in a particular social group. Two concepts under the political opinion ground that have grown as a result of armed insurrections, civil wars, and terrorism are neutrality and imputed political opinion. “At one end of the spectrum, neutrality can be the result of apathy - of lack of any political opinion. At the other end, neutrality can be an articulated political view that expressly rejects the political aims of warring factions.”

a. Neutrality

*Matter of Acosta* addresses neutrality as a lack of political opinion. Acosta, a member of a taxi cooperative in San Salvador, El Salvador, refused to participate in work stoppages led by anti-government guerrillas. Acosta received anonymous death threats, taxis were seized and burned, and ultimately five drivers were killed. Later, Acosta was beaten in his cab by three men he thought to be members of the guerilla group. Although the court did not doubt his credibility, it did not find the persecution was on account of his political opinion because he offered no facts showing that the guerrillas were aware of his political opinion nor sought to punish him for it. The court noted that “the requirement of ‘persecution on account of political opinion’ refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes

---

211 *Elias-Zacarias*, 502 U.S. at 483.
212 *MARTIN* ET AL. supra note 136, at 191.
213 *Id.* at 192.
215 *Id.* at 216.
216 *Id.* at 216-17.
217 *Id.* at 217.
218 *Id.* at 235.
him to be the object of the persecution."219 But the Ninth Circuit did not rule out that a refusal to join a particular side "represent[s] a conscious political choice."220 In Bolanos-Hernandez v. INS, the court found that declining to take a particular side by "refus[ing] to join [the guerillas'] cause and infiltrate the government on their behalf" made him just as likely to be considered their political opponent as "if he had spoken out publicly in opposition to their cause or tactics."221

b. Imputed Political Opinion

Closely related to the concept of neutrality as a per se political opinion is imputed political opinion. "Persecution on account of imputed political opinion is persecution on account of what the persecutor believes the victim's political opinion to be, regardless of the victim's actual political opinion."222 Regardless of whether or not the victim holds a political opinion, if the persecutor believes that the victim is opposing its own position, a political opinion is imputed on the victim, for which there is a ground for asylum.223 The Supreme Court touched on the matter of imputed political opinion when they established the nexus requirement in INS v. Elias-Zacarias without endorsing or rejecting it. Referring to Elias-Zacarias' testimony concerning his reasons for not joining the guerrilla army, the court said "[n]or is there any indication (assuming, arguendo, it would suffice) that the guerrillas erroneously believed that Elias-Zacarias' refusal was politically based."224 Although the court's statement implies a certain skepticism regarding the doctrine of imputed political opinion, the Ninth Circuit and the BIA have recognized imputed political

219 Id. at 234-35.
221 Id. at 1286.
222 MARTIN ET AL., supra note 136, at 199 (emphasis added).
223 Id. at 199. See also Hernandez-Ortiz v. I.N.S., 777 F.2d 509, 517 (9th Cir. 1985) (noting when a government or group possesses particular beliefs about a victim's views or loyalties, "his actual political conduct, be it silence or affirmative advocacy, and his actual political views, be they neutrality or partisanship, are irrelevant; whatever the circumstance, the persecution is properly categorized as being 'on account of . . . political opinion' ").
opinion as viable.\footnote{Canas-Segovia v. I.N.S., 970 F.2d 599 (9th Cir. 1992); In re S-P-, 21 I. & N. Dec. 486 (B.I.A. 1996).} Apart from finding an imputed political opinion based on the persecutor’s belief of the victims’ political views, particular political views can also be imputed as a result of associations, such as familial association, organizational association or governmental association.\footnote{See generally ANKER, supra note 139, at 331-48.}

2. Colombian Cases in Context-Political Opinion

Although the context of the violence in Colombia is extremely political, it is often difficult to prove that the persecution experienced was ‘on account’ of a political opinion. Several cases highlight how the exacting standards of Acosta and Elias-Zacarias often prove fatal to Colombian asylum claims based on account of political opinion.

Henry Tamara-Gomez, who had served in the Colombian Air Force, was later a civilian employed as a helicopter mechanic as part of a U.S. program to provide assistance to Colombian law enforcement in Bogotá.\footnote{Tamara-Gomez v. Gonzales, 447 F.3d 343, 345 (5th Cir. 2006).} In July of 2001, he accompanied the Colombian National Police on a mission to recover the bodies of five CNP officers killed by FARC.\footnote{Id. at 345 (noting that on ride-alongs, he was required to wear a CNP uniform).} Upon landing, he noticed they were being filmed by FARC members, only one of whom was captured.\footnote{Id. at 345-46.} One month after that incident, Tamara-Gomez began receiving threatening calls referencing the July 2001 mission.\footnote{Id. at 346.} They called his cell phone and his home, threatening his life and those of his family members. He moved his family to another house, but within weeks the calls resumed.\footnote{Id.} “In January 2002, a bicycle bomb exploded in [their] new neighborhood, killing five.”\footnote{Id.} After repeated kidnapping and death threats, and the CNP unable to offer protection, Tamara-Gomez sent his family to the United States on visitor visas. Shortly after learning the FARC had tracked down and murdered the other participants in
the July 2001 recovery mission, Tamara-Gomez fled to join his family in the U.S. A few weeks later, the Tamara-Gomez home was broken into and the words "Sapa Regaldo" (meaning "two-bit snitch") and the letters "FARC" were spray painted on the walls.\footnote{Tamara-Gomez, 447 F.3d at 346.}

The Immigration Judge reduced all of this to generalized violence in Colombia that did not rise to the level of persecution, noting that neither Tamara-Gomez nor any member of his family were "beaten, shot at, kidnapped, or otherwise physically harmed."\footnote{Id. at 348. Perhaps this was because they were able to flee, unlike the other unfortunate members of the rescue mission. Regardless, the Fifth Circuit overruled the Immigration Judge’s finding on that point, noting that his testimony, backed by over 200 pages of documentary evidence regarding the activities of the FARC, "made a compelling case of persecution." \textit{Id.}} In their analysis denying petition for review of the BIA’s affirmation, the Fifth Circuit pointed out that while the Immigration Judge was correct to consider the lack of actual physical violence carried out against Tamara-Gomez, "physical harm is not always a requirement for asylum."\footnote{Id. at 349 (citing Aguilera-Cota v. I.N.S., 914 F.2d 1375 (9th Cir. 1990). Although the court here overturned the Immigration Judge by finding persecution, they signaled that it is always correct to consider actual physical violence in determining whether persecution occurred. \textit{See supra, pp. 485-86.}} However, the ultimate decision to deny review, in effect upholding the denial of asylum, was due to a lack of nexus between the persecution and a statutory ground, in this case, political opinion.\footnote{Tamara-Gomez, 447 F.3d at 349.} Tamara-Gomez asserted he was persecuted on account of imputed political opinion, arguing "his association with the CNP has caused FARC to attribute to him the political opinions and beliefs of the Colombian government, or at least to view him as a political opponent."\footnote{Id.} The Circuit Court agreed that the FARC targeted Tamara-Gomez not because of his political opinion, but because they thought he was part of the CNP.\footnote{Id. (noting that dangers faced by military combatants (and policemen) arise "from the nature of their employment and domestic unrest rather than ‘on account of’ immutable characteristics or beliefs within the scope of [8 U.S.C. § 1158(b)]" (citing \textit{In re Fuentes}, 19 I & N. Dec. 658, 661 (B.I.A. 1988))). This argument ignores the fact that his membership in the police was imputed by the FARC because of the requirement of wearing a CNP uniform, even though he was a civilian employed under a U.S. contract.}

\footnote{Tamara-Gomez, 447 F.3d at 346.}

\footnote{Id. at 348. Perhaps this was because they were able to flee, unlike the other unfortunate members of the rescue mission. Regardless, the Fifth Circuit overruled the Immigration Judge’s finding on that point, noting that his testimony, backed by over 200 pages of documentary evidence regarding the activities of the FARC, "made a compelling case of persecution." \textit{Id.}}

\footnote{Id. at 349 (citing Aguilera-Cota v. I.N.S., 914 F.2d 1375 (9th Cir. 1990). Although the court here overturned the Immigration Judge by finding persecution, they signaled that it is always correct to consider actual physical violence in determining whether persecution occurred. \textit{See supra, pp. 485-86.}}

\footnote{Tamara-Gomez, 447 F.3d at 349.}

\footnote{Id.}
Fifth Circuit expressed sympathy for Tamara-Gomez and his plight on return to Colombia, it denied his asylum claim concluding "that the required nexus between the persecution and a statutory ground for asylum has not been established." 239

Although the violence in Colombia has political underpinnings at every level, many claims fail because of an unwillingness on the part of the courts to acknowledge that refusing to cooperate with one of these groups makes you an enemy of their cause, not just a target for retribution. 240 In Londono v. U.S. Att’y Gen., the victim, her father, and her brother all worked for a non-profit radio band (ACBC) whose purpose was to increase communication between local government and citizens in rural areas. 241 After discovering the FARC had pirated access to the radio band, the brother cut off their access. 242 The FARC contacted them soon after, demanding renewed access and the codes and serial numbers to the radios of all their subscribers, with the purpose of using that information to track down those who had informed the government of their activities. 243 The father refused and soon after the brother’s car was shot at, causing him to crash. 244 They both left for the United

---

239 Id. at 349-50. The court also denied his request for withholding of removal, and relief under the Convention Against Torture. One does not have to establish a nexus to prove a CAT claim, but the court said that even if he could prove a likelihood of torture on return to Colombia, he could not claim that the state had acquiesced to torture since after sending his family away he lived on a military base under protection of the Colombian military. Id. at 350-51.

240 While some are quick to define the FARC, ELN and AUC as narcotics traffickers, and some as “narco-terrorists,” one cannot deny the political motive of these groups in the face of FARC press releases targeting elections. See Jeremy McDermott, Colombia Guerrillas Target Elections, BBC NEWS, (Mar. 10, 2002), http://news.bbc.co.uk/1/hi/world/americas/1864267.stm. See also Frank Walsh, Note, Synchronizing Colombian Narcoterrorism Policy With the War on Terror: The Legality of Military Deployment by the United States and the Organization of American States, 4 GEO. J.L. & PUB. POL’Y 453 (2006) (advocating direct military intervention consistent with the U.S. War on Terror, even though characterizing the FARC, ELN and AUC as nothing more than “violent criminal organizations”).


242 Id. at *2.

243 Id.

244 Id.
States soon after this incident. Soon, Diana received a call from the FARC, demanding access to their subscriber codes and information or she would be killed. Although she reported the incidents to the police, she was told they could not protect her, so she fled to the United States with her sons a few days later. Londono based her asylum claim on imputed political opinion by the FARC, her affiliation with the radio station, and kinship ties to her brother. "Whatever FARC’s purpose for using ACBC’s propriety information, it was the information that Londono possessed, and not her viewpoint on Colombian politics or any other subject, that caused Londono to suffer FARC’s wrath." Cases similar to this abound.

3. Membership in a Particular Social Group (MPSG)

“Membership in a particular social group” continues to be a nebulous and shifting ground for asylum, but one of the first cases to address this issue brings us back to the Matter of Acosta. Apart from political opinion, Acosta tried to establish that he was a member of a particular social group, in this case, taxi drivers who refused to strike. The court examined the other grounds listed in

245 Id. at *2-3. The brother, Fernando was granted asylum, but the father Diego died during the asylum process. Id.

246 Id. at *3. Two months later, two men threatened her with a gun demanding what her father refused to give. Id. Interrupted by onlookers, the gunmen fled after hitting her over the head with the gun. Id. That night she received another call telling her she should thank God for saving her life. Id. at *3-4.


248 Id. Regarding her claim of imputed political opinion, although the court recognized the validity of imputed political opinion generally, it stated “[i]mputed or otherwise, it is the political opinion of the victim, and not the persecutor, that matters for asylum claims.” Id. at 7 (citing Ruiz v. U.S. Att’y Gen., 440 F.3d 1247, 1257-58 (11th Cir. 2006)).

249 Id. at 7-8.

250 See generally Giraldo v. U.S. Att’y Gen., No. 06-12133, 2006 U.S. App. LEXIS 28061 (11th Cir. 2006) (persecution of the father was not on account of protected ground, but FARC’s motivation to obtain financial information about a bank’s clients to which he had access); Berrio-Barrera v. Gonzales, 460 F.3d 163 (1st Cir. 2006) (substantial evidence supported IJ’s finding that kidnapping was based not on protected ground, but instead to extort money); Rocha v. Gonzales, No. 04-4226-ag NAC, 2006 U.S. App. LEXIS 5062 (2d Cir. 2006) (finding that a victim of extortion by guerrillas did not provide evidence that victimization was on account of protected ground).

251 Acosta, 19 I. & N. Dec. at 234.
the Refugee Act, "race," "religion," "nationality," and "political opinion" and determined that each of those grounds addressed an immutable characteristic: "a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." Applying the doctrine of *ejusdem generis*, the court then interpreted the phrase "persecution on account of membership in a particular social group" to mean

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a *shared past experience* such as former military leadership or land ownership.

Working as a taxi driver who refused to participate in work stoppages was not held to be an immutable characteristic, for while keeping someone from earning any type of livelihood has been held as rising to the level of persecution, "the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice." The problem with this analysis is that even if Acosta were to change his job, his affiliation with COTAXI had become an immutable characteristic as a result of being a "shared past experience" which the same court said might give rise to an immutable characteristic. But this internal inconsistency is indicative of the courts struggle to define this ground for relief.

A split between several federal courts regarding whether it is the internal characteristics of the group that qualify it as a particular social group or rather the external or visible characteristics of the group that matter continues to mire jurisprudence in confusion. In attempting to clarify this ground,

---

252 Id. at 233.
253 Id. (emphasis added).
254 ANKER, supra note 139, at 235-43.
255 Acosta, 19 I. & N. Dec. at 234.
256 See MUSALO ET AL., supra note 147, at 560 n.3. See generally Acosta, 19 I. & N. Dec. at 233.
257 See ANKER, supra note 140, at 378. "An over-emphasis on a group's internal
the United Nations High Commissioner for Refugees defined 'particular social group' as: "a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of human rights." 258

As IN re C-A-, a case emerging from the strife in Colombia, has defined the interpretation of a particular social group by relying on the UNHCR’s definition of a particular social group, this comment will focus on this recent change in interpretation. 259

4. Colombians Cases in Context - MPSG

We see issues of immutability play out repeatedly in the particular social group ground. Londono also relied on her membership in a particular social group to provide the nexus necessary for her asylum claim. 260 Although Londono was a volunteer with the radio station in addition to her full-time job, the court refused to give weight to this fact when evaluating her asylum claim under the membership in a particular social group ground. 261 Instead, they decided that since she "allowed ACBC to wither away" after her father and brother’s departure it was "not so fundamental to Londono’s identity or conscience that she could not continue on in Colombia without it" 262 And although many circuits have firmly established kinship ties as grounds for finding characteristics has confused the jurisprudence of the Ninth Circuit . . . [however] [a]n excessively externalist approach . . . can result in groups being circularly defined by their common victimization.” Id. (referencing the Ninth Circuit’s holding in Sanchez-Trujillo v. I.N.S., 801 F.2d 1571 (9th Cir. 1986)).


259 See infra text accompanying notes 261-85.


261 See id. at *10.

262 Id. at *9 (ignoring the possibility that abandoning the station may have been motivated by the violence her family suffered at the hands of FARC, not a lack of passion or conviction).
a particular social group, the Eleventh Circuit did not feel the need to do so, assuming that this ground had been adequately considered by the Immigration Judge at trial. Thus, the court denied her kinship ties with her brother as qualifying her for membership in a social group, refusing to see the persecution was a 'but for' cause of her connection to her brother, even though the FARC specifically mentioned her father and brother in their threats to her.

In 2006, the BIA issued a new precedent decision on membership in a social group, *In re C-A*. The respondents and their two children sought asylum on account of imputed political opinion and membership in a particular social group. Diego Castillo-Arias owned a bakery in Cali, the home of the infamous Cali Drug Cartel. A former police officer fired for corruption became the chief of security for the Cartel and would come to the bakery and brazenly speak in detail of the Cartel’s exportation of narcotics, disclosing the “extent, location and size of the assets of the Cali cartel” in and outside of Colombia. Castillo-Arias, over the period of four years, relayed this information to his friend, Vladimir Martinez Meza, who investigated and prosecuted the traffickers in Cali. On May 15, 1995, three men armed with pistols tried to force Castillo-Arias into their car, and when he refused, they pushed him to the ground and beat him. His son was pistol-whipped in the face, requiring extensive reconstructive surgery to his mouth and jaw. The men fled, warning Castillo-Arias that things would only get worse for him and his family.

---

263 See id. at *12.
264 See id. at *11-13.
266 See id. at 952. See generally supra, pp. 469-72 (discussing Colombian drug cartels).
267 Castillo-Arias v. U.S. Att’y Gen., 446 F.3d 1190, 1191 (11th Cir. 2006). The Eleventh Circuit had remanded the question of whether noncriminal informants working against the Cali drug cartel constitute a ‘particular social group’ under the I.N.A. After receiving the lower court’s decision that it does not, the circuit court denied Castillo-Arias’ asylum appeal. See id.
268 See id.
269 See id.
270 See id. at 1191-92.
271 See id. at 1191.
The family moved to another part of Cali, but he could not rent his bakery because potential lessees were intimidated and harmed when they refused to give information regarding his whereabouts. Meza suggested Castillo-Arias go into hiding, and leave for the U.S. as soon as he could. The Immigration Judge in the original asylum hearing denied asylum because “the threat to the Castillos was based on ‘retaliation’ or ‘retribution’ due to Castillo-Arias’ voluntary decision to be an informant against the cartel” rather than on account of imputed political opinion, which the Eleventh Circuit affirmed.

The crux of the case comes out of the BIA’s discussion of whether “noncriminal drug informants working against the Cali drug cartel [can] constitute a ‘particular social group’ [under the INA].” The court reaffirmed the definition of ‘a particular social group’ set forth in Matter of Acosta. To the formulation in Acosta, the BIA looked to the recent guidelines of UNHCR that “combine elements of the Acosta immutable or fundamental characteristic approach, as well as the Second Circuit’s ‘social perception’ approach.” The very act of being an informant was one characterized by the BIA as being ‘invisible’ or as something taking place out of the public view. “Recognizability or visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members.”

272 See Castillo-Arias, 446 F.3d at 1192.
273 See id. at 1192. Meza himself fled for Spain. See id. at 1192, n.2. Castillo-Arias’ parents and two sisters fled to Germany. See In re C-A-, 23 I. & N. Dec. at 953.
274 Castillo-Arias, 446 F.3d at 1192-93.
275 In re C-A-, 23 I & N Dec. at 961.
276 See id. at 955. See discussion supra pp 482-93.
277 Id. at 956. The Second Circuit required that a voluntary associational relationship be externally distinguishable. See Gomez v. I.N.S., 947 F.2d 660, 664 (2d Cir. 1991). See also supra note 259 for UNHCR guidelines concerning ‘particular social group.’
278 In re C-A-, 23 I. & N. Dec. at 960. But see Perafan-Saldarriaga v. Gonzales, 402 F.3d 461 (4th Cir. 2005). A DEA informant who was linked to another informant whose cover was blown by a U.S media outlet and picked up by Colombian press was denied his asylum claim on account of political opinion. See id. The court viewed his informant actions as a self-serving attempt to remain in the U.S. rather than a politically motivated action against the cartel. See id. The court did not address the matter of membership in a particular social group, that group being his known ties to a DEA informant who was
The BIA went on to address past experiences as an immutable characteristic that would qualify for membership in a particular social group. "A past experience is, by its very nature, immutable, as it has already occurred and cannot be undone. However, that does not mean that any past experience that may be shared by others suffices to define a particular social group for asylum purposes." Referencing Matter of Fuentes, where persons exposed to the risks associated with employment in police or military occupations were not considered members of a social group, the BIA analogized a person agreeing to work as a government informant as someone who "takes a calculated risk and is not in a position to claim refugee status should such risks materialize." The BIA was further unmoved by the fact that Castillo-Arias was not a paid informant, but acted out of a sense of moral duty or civic obligation. The court voiced concern that even paid informants often act out of some sense of duty, many of whom could "plausibly claim that their primary motivation was a sense of civic duty and the compensation alone would not have provided sufficient incentive to undertake the risks involved."

A concerning aspect of this case for all situations in Colombia is the BIA's discussion of actions directed to the general population. In this case, the Court specifically speaks of the Cali Cartel and "other drug cartels" that direct harm against "anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises." The Court cites a Department of State country report that indicated "[n]arcotics traffickers frequently resorted to terror in attempts to intimidate the Government and the general population". The court concluded that it is therefore difficult to see any particular "group" as being targeted by the cartels that is narrower than the general population. This conclusion has grave implications for victims of
guerrilla and paramilitary forces, whose attacks may seem indiscriminant other than targeting those that get in their way.  

IV. Rediscovering Convention Purposes: Reformulating the Nexus Requirements

An unfortunate legacy of Elias-Zacarias, as evidenced in the review of Colombian decisions, is the narrowing of judicial review of asylum cases. Although Congress has since codified the standard of review after Elias-Zacarias, 285 at the time the new requirement that successful appeals must demonstrate "that the evidence not only supports [a] conclusion, but compels it" 286 was considered an extra-legal restriction on judicial review that was seen as "rewriting the statute [and] overturning over 50 years of settled case law." 287 Although Justice Scalia's "compelling evidence' standard" 288 only appeared in a note to a relatively short opinion that never signaled its intention to change important doctrine of judicial review, 289 it has nevertheless resulted in circuits now "describing an asylum-seeker's overall burden on appeal in sweeping, restrictive language that appears all but insurmountable." 290 Aside from how courts have restrictively viewed the individual nexus grounds, this standard of review for asylum decisions is particularly harmful in light of new BIA


285 See 8 U.S.C. § 1252(b)(4)(B) (2000) (stating that “the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”).


289 See id. at 139.

290 Id. at 133. This statement was reinforced by the Eleventh Circuit's holding in Silva v. U.S. Att’y Gen., 448 F.3d 1229 (11th Cir. 2006). Discussed supra pp. 482-85.
291 Now that the BIA allows for "single-judge, single-sentence affirmances without opinion . . . [where the BIA] no longer performs its role as a formal appellate body and check on immigration judge error," it has created a growing disaster that threatens continued U.S. conformance with Convention requirements. 292 The first step towards ensuring U.S. compliance with the 1951 Convention is to uniformly reject this unreasonable restriction on judicial review that is contrary to administrative review of other executive agencies. 293

1. Political Opinion and Proving the Causal Connection

While the definition of what constitutes membership in a particular social group is still rapidly evolving, the concepts of what constitutes a political opinion are relatively settled. 294 Neutrality and imputed political opinion have been accepted in principle in a significant number of circuit courts. 295 However, with the exception of the Ninth Circuit, few cases have granted relief based on these concepts. 296 This trend is likely due more to a failure in proving the causal link between the victim’s plight and the persecutor’s intent rather than an unwillingness to recognize the legal reality of neutrality and imputed political opinion. 297

The 1980 Refugee Act represented the first in a long line of restrictions the United States adopted that limited their duties under the treaty without violating outright their treaty obligations. 298 Many commentators indicate that replacing the original more passive version of the Convention’s causal link, “for reasons of,” with “on account of” has created a focus on the

291 See id. at 152.
292 Id. at 152.
293 See id. at 151-52. The Supreme Court’s decision in Elias-Zacarias spoke to agency deference to findings of fact. For discussion of how fact-finding in the cross-cultural context of asylum law presents special due process concerns. See Ilene Durst, Article, Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative, 53 RUTGERS L. REV. 127 (2000).
294 See, e.g., Durst, supra note 293.
295 See MUSALO ET AL., supra at 147, at 342-68.
296 See id.
298 See id. at 242.
“persecutors’ motive, rather than the refugee’s predicament.” In turn, this shift in focus has led to proof problems in which a victim must prove what was in the mind of her persecutor. "[When] the causal connection is between a Convention ground and the applicant’s well-founded fear . . . the focus should . . . be on the applicant’s predicament” and not on the motive of the persecutor. Although INS v. Elias-Zacarias did not require direct evidence of a persecutor’s motives, courts have continued to make this evidence a required element of any successful asylum claim. As a result, proving the nexus requirement has been more fatal to claims based on political opinion grounds than how the ground itself has been interpreted. With regard to the nexus requirement, courts have tended to draw on concepts rooted in ascertaining criminal or civil liability, where courts would instead do better to “[focus] on the object and purpose of the Convention, which is concerned with providing international protection to persons at serious risk of harm.” To bring the United States back in line with the purpose of the Convention, courts should recognize that asylum adjudications are unique, as the rule of law comes not from domestic legislation, but from international treaty. When reading international treaties, courts should interpret the treaty language in a broad manner rather than rely exclusively on domestic legislation.

299 See id. (arguing that the difference in statutory language should not change U.S. obligation under the Convention, where “[a]s a signatory to the Protocol, the United States agreed to apply the Convention’s non-derogable definition of a ‘refugee’”).

300 See id. at 230-31.

301 UNHCR, Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in the matter of Michelle Thomas et al, 15 (Jan. 2007).

302 See Cook supra note 297, at 232-33.

303 Michelle Foster, Causation in Contexts: Interpreting the Nexus Clause in the Refugee Convention, 23 MICH. J’L. 265, 292 (2002). An example of causation elements brought over from other areas is the “but for” test commonly seen in tort law. See id. at 291-933. This test was used to deny the kinship claim of Londono. See Londono v. U.S. Att’y Gen., No. 05-16249, 2006 U.S. App. LEXIS 27876, *12 (11th Cir. 2006).

304 See Foster, supra note 303, at 298, 334-35.

305 See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). See also UNHCR in its amicus brief to the BIA, discussed supra note 301. See, e.g., Grunfeder v. Heckler, 748 F.2d 503, 509 (9th
did not establish a strict causation requirement, nor did it establish that a Convention ground had to be a "central" or "essential" part of an asylum claim,\footnote{See Foster, supra note 303, at 336-37.} any attempt to require otherwise is in defiance of treaty obligations. Returning to the treaty's original principles would allow the Convention to retain its relevance in cases like Colombia, where it is often not a pure political motive but a mixed motive that may include retaliation for non-cooperation or financial motives such as extortion. "Current law is in wide agreement that in a case where a persecutor has mixed motives, a protected characteristic need only be one of the motivations."\footnote{Comments of the Lawyers Committee for Human Rights on Proposed Rule INS. NO. 2092-00; Att'y Gen. ORDER NO. 2339-2000 Asylum and Withholding Definitions, 9, (Jan. 20, 2001), available at \url{http://www.humanrightsfirst.org/asylum/gender_comments.pdf} (citing case law supporting this analysis).} The United Nations High Commissioner for Refugees, the central body responsible for interpreting the 1951 Convention, also supports this conclusion, stating "there is no requirement in the Convention, Protocol, Handbook or Executive Committee documents that one of the protected grounds be central to the persecutor's motivation."\footnote{INS No. 2092-00, Comments on Proposed Rule Regarding Asylum and Withholding Definitions of the UNHCR, Regional Office for the United States of America and the Caribbean, ATT'Y GEN. ORDER NO. 2339-2000, at 7 (Jan. 22, 2001).} As a result, if an asylum applicant is able to establish substantial evidence that a convention factor was "one factor" or "in part" the motivation for his persecution, the Convention requires that it suffice to establish the nexus between his persecution and a Convention ground.\footnote{See Foster, supra note 304, at 337.} To demand more than the Convention requires is not only against the spirit of the Refugee Convention, but also puts the U.S. dangerously close to violating their duty as a member to the treaty.

2. Membership in a Particular Social Group

Attempts to define the membership in a particular social group ground have been particularly strained, largely because of the oft
expressed concern of ‘opening the floodgates’ in asylum claims should the MPSG ground be construed too liberally.\textsuperscript{310} This concern unnecessarily plagues courts’ decisions as some worry that if the ground is applied too broadly, membership in a particular social group will effectively swallow up the other grounds of asylum, and allow large classes of people to gain access to asylum.\textsuperscript{311} One commentator argues that the floodgates concern is based on a misconception of membership in a particular social group.\textsuperscript{312} She argues that “these same concerns apply equally to other grounds” such as race and nationality,\textsuperscript{313} and yet floodgate fears have not hindered development of legal doctrine on those grounds. “[M]PSGs frequently encompass large groups, but their size does not, by any means, require that all members of the group receive asylum status.”\textsuperscript{314} The other requirements of asylum that form the nexus requirement “serve as significant additional filters on eligibility for classification as a refugee and for asylum eligibility.”\textsuperscript{315} Anker states the immutable characteristic requirement for MPSGs keeps this ground from becoming a ‘catch-all’ for asylum claims.\textsuperscript{316} While the immutability requirement of an MPSG has been relatively settled, recent confusion regarding a ‘visibility’ or ‘social perception’ requirement has led to much recent debate.

When immutable traits are not readily identified, some argue that the perception of society in defining the group is an important component in establishing membership in a particular social group.\textsuperscript{317} T. Alexander Aleinikoff, Dean of the Georgetown

\textsuperscript{310} See Deborah Anker, Membership in a Particular Social Group: Recent Developments in U.S. Law, in 38th ANNUAL IMMIGRATION & NATURALIZATION INSTITUTE 119; 128 PLI Corp. Law & Practice, Course Handbook Series No. B-1514 (2005).

\textsuperscript{311} See id. at 127-28 (citing the “unfortunate Ninth Circuit decision [in] Sanchez Trujillo v. I.N.S., 801 F.2d 1571 (9th Cir. 1996)”).

\textsuperscript{312} See id. at 128 (stating that “[u]nderlying MPSG interpretive dilemmas, and particularly inhibiting the development of gender-based MPSG jurisprudence, is a concern that the MPSG ground necessarily embraces numerically large groups and will allow an unmanageably high number of asylum claims.”).

\textsuperscript{313} Id. at 128.

\textsuperscript{314} Id. at 124.

\textsuperscript{315} Id. at 124-25.

\textsuperscript{316} See Anker, supra note 310, at 128.

\textsuperscript{317} See T. Alexander Aleinikoff, Protected Characteristics and Social Perceptions:
University Law Center and former General Counsel and Executive Associate Commissioner for Programs at the I.N.S., argues that while some traits may not establish themselves as fundamental or immutable characteristics that bind a group, or traits that are deemed "important or worthy," "the triviality, or not, of the shared group characteristic . . . ought not to be relevant for Convention purposes . . . As human history makes clear, persecutors choose groups and victims for a variety of reasons, not simply based on the fundamentality of the trait that defines the group."\(^{318}\)

The UNHCR used Aleinikoff's arguments in formulating its guidelines on social membership which were partially relied upon in In re C-A-. As discussed, the BIA excerpted one paragraph in the UNHCR's Guidelines on International Protection that seems to give the court a means of determining, in the absence of an established and recognized social group, that groups whose only shared characteristic appears to be "their risk of being persecuted" will not qualify as a social group for purposes of protection under the 1951 Convention and 1967 Protocol.\(^{319}\) This threshold constitutes a potentially dangerous limitation that might allow courts to avoid the complex work of determining what qualifies as membership in a particular social group by simply concluding the only cohesive factor is their risk of persecution. The effect is making it all too easy for the court to dismiss the application of the ground entirely. However, when the court is willing to conduct a thorough analysis of the immutable characteristics set forth by an applicant, it can reach a positive result for all involved.

The Tapiero case indicates what can result through a thorough analysis of immutable characteristics. In this case, the court found that "educated, wealthy, landowning, cattle-farming Colombians" were established as members of a particular social group meeting the Acosta test precisely because of a nuanced understanding of Colombian society.\(^{320}\) The judge noted evidence showing that this privileged class was among the FARC's preferred victims not


\(^{320}\) See Tapiero de Orejuela v. Gonzales, 423 F.3d 666, 671-72 (7th Cir. 2005).
merely because of their wealth, but because of their education and their attendant "social position as cattle farmers."321 A particular characteristic that defines a social group within a society such as education, manner of speech, or profession may be more mutable than one's race, ethnicity, or religion, but these traits are nevertheless distinguishing markers within a given society that are not easily changed or hidden."322 This case was decided before In re C-A-, so any confusion that C-A- has contributed to MPSG analysis was not a factor in this case. However, there is growing support for a determination that the BIA got their analysis of the MPSG ground completely wrong in In re C-A-.

In an amicus brief submitted in an appeal to the BIA, the UNHCR took issue with the BIA's interpretation of their guidelines regarding the MPSG ground.323 The DHS attorneys were interpreting In re C-A- as establishing a new dual requirement for the MPSG ground, adding to the "immutable or fundamental" requirement established in Acosta a "social visibility" requirement under C-A-.324 The UNHCR firmly rebukes this understanding, stating that their guidelines, which the BIA used in adopting C-A-, represent alternate requirements, not dual requirements.325 "This secondary analysis for cognizable groups applies only where the social group trait is not immutable and would not be needed in the case of a social group based in whole or part on a "protected characteristic."326 Further, support for this analysis can be found elsewhere in the UNHCR Guidelines that was not cited by the BIA in their determination in C-A-. "[I]f a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."327 This section was relied upon in a House of Lords decision in the UK regarding membership in a

321 Id. at 672.
322 Id. at 672.
323 See UNHCR, Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in the matter of Michelle Thomas et al (Jan. 2007).
324 See id. at 7.
325 See id. at 6-7.
326 Id. at 9 (emphasis added).
327 UNHCR Guidelines, supra note 259, at no. 13 (emphasis added).
particular social group, which stated "that persecutory action towards a group may be a relevant factor in determining the visibility of a group in a particular society."328

Although some scholars have suggested that the visibility element of the In re C-A- decision "appear[ed] to be on more solid ground,"329 the UNHCR put that determination to rest by further clarifying its definition of "social perception."330 The UNHCR stated that it does not follow that a group must be visible to society at large for a group to be perceived as such in society.331 "[T]he members of a group need not be easily recognizable to the general public in order for the group as a whole to be perceived by society as a particular social group."332 As an example, UNHCR cites homosexuals in Cuba. Individual homosexuals may not be visible to the general public, yet social ostracism of the group as a whole has led to their establishment as a particular social group under asylum law.333 With this clarification, it may still be that non-criminal drug cartel informants would not qualify under the Convention as a particular social group. However it is clear that the decision in In re C-A- should not be read as requiring visibility to qualify as a particular social group.

Therefore the decision in In re C-A- may have been shortsighted in failing to recognize that it may indeed be the persecutory action against a group that makes them a particular social group for purposes of asylum if the targeting of the group helps to establish the group identity when no immutable trait is readily apparent. This is an important distinction, and the BIA has an opportunity to correct their holding in In re C-A- when deciding this appeal.

328 K v. Secretary of State for the Home Dep't, [2006] UKHL 46, [2007] 1 A.C. 412, 432 (House of Lords). A decision in which UNHCR also submitted a brief, stating "The question to be established is whether the particular social group is "cognizable" as a group, viewed objectively in terms of the relevant society . . . [as] "set apart," for cultural, social, religious, or legal factors." UNCHR Brief, supra note 324, at 8.

329 Martin, supra note 284, at 1894 (citing Second Circuit precedent and the UNHCR guidelines as support).

330 See UNHCR Brief, supra note 323, at 9.

331 See id. at 9.

332 Id. at 9.

333 See id. at 9 (citing Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990)).
V. Conclusion

"Colombians now constitute a high percentage of asylum claimants... [and] reported judicial cases often include, as in In re C-A-, rejection of claims that are quite sympathetic, and several circuits have approved narrow doctrine that could result in excluding many Colombians from protection."  

However, it is clear that protection is available under the Convention for victims of non-state actors and areas of generalized violence if the asylum construct is allowed to return to its original formulation under the Convention.

In answering the central question of whether the Convention is still relevant in addressing the needs of today’s victims of persecution, the answer is yes. Although the Convention has been criticized for its “vagueness and manipulability of one of its key provisions, the refugee definition,” its ability to adapt to the changing requirements of protection is also its core strength. The Convention itself can respond to protect those displaced by civil war and armed insurgency, but only if the Convention itself is protected. We must not allow “[n]ational authorities [to] have discretion to tighten the criteria of eligibility, either consciously and visibly for deterrent aims, surreptitiously, or even in subconscious reaction to fears of opening floodgates.”

In the end, the political dimension of asylum is not so different from the humanitarian conception of asylum, for after all both views have at their origin in the 1951 Convention. If the United States could return to the original concept of the 1951 Convention and 1967 Protocol, discarding the increasingly restrictive case law that has threatened to place the United States in violation of its obligations under the treaty, the expressive practice of asylum as a political conception could merge with the humanitarian conception of asylum. By returning to the spirit and letter of the Convention, the United States would not need the ‘new’ system of asylum proponents of the humanitarian conception advocate to address the special challenges internal conflict creates.

334 Martin, supra note 284, at 1894 (2006) (citing Silva v. Att’y Gen., 448 F.3d 1229 (11th Cir. 2006)).


336 Id. at 242.
The United States has a moral obligation to expand its interpretation of the Convention to bring its jurisprudence back into compliance with the treaty. In addition, expanding its interpretation would constitute both a humanitarian and political response to the human rights crisis in Colombia, a crisis the United States continues to play a significant role in creating.  

Our current system of asylum does not adequately address these concerns, not because the Convention itself is obsolete but because U.S. interpretation of the Convention has threatened compliance with it. Floodgate concerns continue to be exaggerated given the complex formula one must meet to be granted asylum, and implementing the changes suggested above will not make asylum a ‘catch-all’ for migrants motivated by non-persecutory purposes. Current anti-immigration sentiment should not be allowed to shirk our duties as parties to the Convention, or as a responsible actor in our own hemispheric affairs. Implementing changes that preserve asylum as a special “expressive” practice but that also recognize the realities of internal conflict are appropriate measures to satisfy our obligation and reclaim our status as a credible moral authority in the realm of international human rights.

ELIZABETH A. JAMES

---

337 See discussion supra pp.468-72.