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## NOTES

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# THEY BEG FOR OUR PROTECTION AND WE REFUSE: U.S. ASYLUM LAW'S FAILURE TO PROTECT MANY OF TODAY'S REFUGEES

*Laura Isabel Bauer\**

### INTRODUCTION

Alvaro Morales fled for his life when he left his native Colombia. After participating in a peaceful protest at the Colombian Consulate in August of 2001, Morales feared retaliation by paramilitary groups and sought protection for himself, his wife, and his child.<sup>1</sup> He found safety in Australia, but the Refugee Review Tribunal rejected his asylum petition.<sup>2</sup> Desperate and unable to return home, Morales left his

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\* Candidate for Juris Doctor, Notre Dame Law School, 2004; B.A., Rhodes College, 2001. I would like to thank Professor Mike LaRosa for his guidance in my undergraduate studies, his patience with a "future lawyer," and his suggestions regarding this Note topic. I would also like to thank Professor Barbara Szveda and Rebecca Houghton for their invaluable guidance at the Notre Dame Immigration Clinic, where I have had the opportunity to work with asylum-seekers first hand and argue their cases before the Chicago Immigration Court. My deepest appreciation goes to Jeremy Gayed, Justin Lemaire, Chad McTighe, and especially Gregory Ripple for their comments and criticism—as well as to the entire staff of the *Notre Dame Law Review* for all of their hard work throughout the publication process. Finally, I would like to thank my parents, Bruce and Carol, for their encouragement and support.

1 COALITION FOR THE PROTECTION OF ASYLUM SEEKERS, DEPORTATION CASE STUDIES, at [http://www.refugeeaction.org/deportation/deportation\\_studies.htm](http://www.refugeeaction.org/deportation/deportation_studies.htm) (last modified May 26, 2003) [hereinafter DEPORTATION CASE STUDIES].

2 Cynthia Banham, *This Man Asked for Our Help—Now He's Dead*, SYDNEY MORNING HERALD, Oct. 9, 2002, at 1, available at 2002 WL 101206256; Linda McSweeney & Sharon Mathieson, *Federal Government Denies Responsibility for Fate of Colombian*, AUSTL. ASSOCIATED PRESS GEN. NEWS, Oct. 9, 2002, available at 2002 WL 100319629; *Rejected Refugee Killed After Deportation, Says Australian Opposition*, AGENCE FR.-PRESSE, Oct. 9, 2002, available at 2002 WL 23620487 [hereinafter *Killed After Deportation*].

wife and baby in Australia and applied for asylum in Argentina, but there too he was denied.<sup>3</sup> Argentina deported Moralez and forced him to return to Colombia.<sup>4</sup> Following his arrival, Moralez was shot dead by paramilitaries near his parents' home.<sup>5</sup> The assassins riddled his chest with bullets.<sup>6</sup> When reports of Moralez's death made newspaper headlines, Australia quickly denied culpability.<sup>7</sup> Australian Attorney-General Daryl Williams defended the government's actions, saying: "He went (to Argentina) voluntarily and what occurred after that was really his own responsibility."<sup>8</sup> Williams failed to acknowledge, however, that the Australian government gave Moralez only one other choice: deportation to Colombia.<sup>9</sup>

Today, a four-decade-long conflict in Colombia continues to increase in intensity and devastation.<sup>10</sup> Yet, every year the United States refuses to grant thousands of applications from Colombians seeking asylum within our borders and forces refugees to return to the dangers from which they fled—back to situations in which they may very well lose their lives. Alvaro Moralez never made it to the United States to ask for asylum. If he had, it is unlikely that the law would have done anything to protect him.<sup>11</sup> In 2002, 7967 of Moralez's fellow citizens placed themselves upon the mercy of the U.S. federal government.<sup>12</sup> Only thirty-seven percent of those asylum petitions were approved.<sup>13</sup> Moralez's story is unique only because it was documented. We remain blissfully ignorant of how many individuals—returned to Colombia after being denied asylum in the United States—suffer a fate similar to that of Alvaro Moralez. This treatment of Colombian

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3 DEPORTATION CASE STUDIES, *supra* note 1.

4 *Id.*

5 Banham, *supra* note 2; McSweeney & Mathieson, *supra* note 2; *Killed After Deportation*, *supra* note 2.

6 DEPORTATION CASE STUDIES, *supra* note 1.

7 McSweeney & Mathieson, *supra* note 2.

8 Meaghan Shaw, *Australia Denies Blame for Asylum Seeker's Death*, AGE, Oct. 10, 2002, at <http://www.theage.com.au/articles/2002/10/09/1034061256063.html>.

9 DEPORTATION CASE STUDIES, *supra* note 1.

10 *See infra* notes 106–14 and accompanying text.

11 Like the United States, *see infra* note 29 and accompanying text, Australia adopted the 1951 U.N. Convention definition for "refugee," and Australia's officials concluded that Moralez failed to meet that definition. Shaw, *supra* note 8. For the many reasons set forth in this Note, U.S. officials likely would have done the same.

12 OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2002 YEARBOOK OF IMMIGRATION STATISTICS 71 (2003), available at <http://uscis.gov/graphic/shared/aboutus/statistics/Yearbook2002.pdf> [hereinafter 2002 YEARBOOK].

13 *Id.*

refugees, however, is only one example of a greater failure in U.S. asylum law.

Part I of this Note examines the public policy and history behind U.S. asylum law, outlines the standards by which today's asylum applicants are judged, and discusses the ramifications for modern refugees of the discretionary procedure currently in place. Part II presents a case study of the issues faced by today's asylum-seekers by focusing on the Colombian conflict. A brief overview of the parties and motives involved in the civil war is followed by an examination of currently declining rates of asylum approvals for an increasing number of Colombian refugees in the United States. Part II concludes with a look at how U.S. law has been applied in court cases involving Colombian asylum-seekers and addresses other factors that likely affect the decisions of immigration officers and judges. The primary complications for Colombians and other sincere refugees fleeing similar violence in their homelands are the narrow and unrealistic demands of an asylum law that refuses to acknowledge many current conflicts as political and does not recognize the realities of persecution in today's world. Part III suggests that while Temporary Protected Status is a welcome solution for those already present on U.S. soil, adopting a completely new definition of "refugee" is a bold step forward that can both update our law to take into account changing world conditions and reinforce this nation's conviction that all people have the right to live life free from oppression and fear. In the words of President George W. Bush, "American values and American interests lead in the same direction: We stand for human liberty."<sup>14</sup> Yet, U.S. asylum law does not sufficiently protect many refugees who flee persecution as a result of political violence and seek liberty and shelter in the United States.

#### I. U.S. ASYLUM LAW: A SERIES OF INSTITUTIONAL BARRIERS FOR TODAY'S REFUGEE

Asylum or refugee status is often the only means of legal entry into this country for immigrants without familial ties or offers of employment in the United States. For those fleeing killings, torture, destruction of their towns or villages, and upheaval in their native lands, asylum status is a matter of life and death. The United States, however, is selective in whom it will shelter. Admission is not easy. Policy-makers justify harsh entry requirements by pointing to the "broad rights granted to asylees, and [the] concern that many people who

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<sup>14</sup> Address to the Nation on Iraq from the *U.S.S. Abraham Lincoln*, 39 WEEKLY COMP. PRES. DOC. 516, 517 (May 5, 2003).

apply for asylum do not actually qualify for it.”<sup>15</sup> As a result, Congress has been careful to control “*which* individuals can find refuge in the United States, by regulating, restricting or enhancing the access of such individuals to the protection of U.S. laws.”<sup>16</sup> Currently, asylum applicants confront an exacting standard of proof and a discretionary system established to fulfill political goals. All of these factors combine to function as a series of institutional barriers that make it extremely difficult for those who flee today’s world conflicts to prevail on their asylum claims.

### A. *Foundations and Motivations: Political Origins and Practice*

Domestic refugee and asylum law in the United States was established to address political concerns and has been utilized since its inception as an instrument of national self-interest. Prior to 1948, the United States did not have a refugee or asylum policy.<sup>17</sup> Aside from discriminatory laws limiting immigration from Asia, few restrictions governed the entry of foreign nationals.<sup>18</sup> Asylum came to be viewed as a political institution that would be unnecessary in the modern world. This manner of thinking was exemplified in a 1932 Presidential campaign speech by Herbert Hoover. “With the growth of democracy in foreign countries,” Hoover stated, “political persecution has largely ceased. There is no longer a necessity for the United States to provide an asylum for those persecuted because of conscience.”<sup>19</sup>

This assertion was rejected, however, after the atrocities of the Second World War came to light. In 1948, Congress passed the Displaced Persons Act<sup>20</sup> and provided for “eligible Displaced Persons” to enter the United States.<sup>21</sup> The Act was a political move that granted shelter solely to those fleeing their countries for political reasons; “Displaced Persons” included only those refugees oppressed by the new Communist governments in Czechoslovakia, and Austrians, Germans, and Italians forced to leave their homes by Nazi or Fascist

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15 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.05[1] (rev. ed. 2003).

16 KAREN MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 4 (2d ed. 2002).

17 CENTER FOR CIVIL AND HUMAN RIGHTS, ADMISSION OF REFUGEES AND ASYLEES UNDER THE LAW (1980), reprinted in MUSALO ET AL., *supra* note 16, at 63.

18 *Id.*

19 9 INTERPRETER RELEASES 260, 261 (1932), quoted in STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 854 (3d ed. 2002).

20 Act of June 25, 1948, ch. 647, 62 Stat. 1009.

21 *Id.* at 1010.

regimes.<sup>22</sup> Although some members of Congress argued that the Act was necessary for “moral and compassionate reasons,”<sup>23</sup> many more in Congress viewed the Act as a political tool—a “form of psychological warfare” in the emerging conflict between the United States and the Soviet Union.<sup>24</sup> Legislators hoped that encouraging refugees to leave Communist areas and defect to the United States would undermine Soviet leaders.<sup>25</sup> Other members of Congress pointed out that alleviating the strain on western European nations caused by millions of uprooted peoples “would make those countries stronger bulwarks against Communism.”<sup>26</sup>

In the end, political rhetoric trumped humanitarian ideals in both the enactment and subsequent implementation of the new refugee law. The Act aided those who fled Communist-dominated regions, but failed to protect many of the Jewish victims of Nazi persecution.<sup>27</sup> In 1957, Congress maintained the political emphasis of refugee law and continued to define “refugees” by geographic and political terms—limiting admission to individuals fleeing “Communist, Communist-dominated, or Communist occupied area[s]” and Middle Eastern nations.<sup>28</sup>

It was not until 1968 that the United States indicated that it might deviate from a politically oriented refugee and asylum law. In that year, Congress ratified the United Nations Protocol Relating to the Status of Refugees of 1967.<sup>29</sup> The Protocol included the nationality-neutral definition of “refugee” adopted by the United Nations 1951 Convention Relating to the Status of Refugees<sup>30</sup> and prohibited state

22 *Id.* at 1009–10.

23 LEGOMSKY, *supra* note 19, at 857.

24 Kathryn M. Bockley, Comment, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT'L L. & COM. REG. 253, 262 (1995).

25 *Id.*

26 LEGOMSKY, *supra* note 19, at 857.

27 Bockley, *supra* note 24, at 262.

28 Act of September 11, 1957, Pub. L. No. 85-316, § 15(c)(1)(a), 71 Stat. 639, 643.

29 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267.

30 *Id.* art. I, ¶ 2, 19 U.S.T. at 6225, 606 U.N.T.S. at 268. Article 1 of the 1951 Convention defined a refugee as an individual who:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such a fear, is unwilling to return to it.

signatories from “expelling or returning a refugee to a country where his or her life or freedom would be threatened on account of . . . protected characteristic[s]”<sup>31</sup>—regardless of country of origin or the identity of the persecutor.

Yet, despite its written commitment to the Protocol, the United States did not make any significant changes in the administration of its refugee and asylum laws. In 1979, Senator Edward Kennedy asked the Library of Congress to evaluate U.S. asylum and refugee admission procedures for compliance with the Protocol.<sup>32</sup> The subsequent report revealed that asylum policy had not abandoned its political orientation and bias. The review stated that contrary to the politically neutral standard it agreed to follow in the 1967 Protocol, the United States continued to limit entry “ideologically, to aliens who have fled from communism, or geographically, to aliens who have fled from the Middle East.”<sup>33</sup> The report recommended that Congress, in order to comply with its international obligation under the Protocol, “incorporate the United Nations definition of ‘refugee.’”<sup>34</sup>

Congress followed this suggestion and passed the Refugee Act of 1980, which adopted a definition of “refugee” similar to that of the United Nations and formally eliminated the idea that a refugee must flee a particular kind of government. Asylum thus became officially available to *all* individuals who feared returning to their home countries because of past persecution and/or a well-founded fear of future persecution on account of race, nationality, political opinion, religion, or social group.<sup>35</sup> The Refugee Act was lauded by some policymakers

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Convention Relating to the Status of Refugees, July 28, 1951, art. 1, 19 U.S.T. 6259, 6259, 189 U.N.T.S. 137, 152.

31 U.S. Citizenship & Immigration Servs., *History of the United States Asylum Officer Corps*, at <http://uscis.gov/graphics/services/asylum/history.htm> (last modified Sept. 9, 2003).

32 MUSALO ET AL., *supra* note 16, at 65.

33 CONG. RESEARCH SERV., 96TH CONG., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 15 (Comm. Print 1979) (outlining research prepared at the request of Sen. Kennedy, Chairman, Comm. on the Judiciary).

34 *Id.*

35 Susan Bibler Coutin, *The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence*, 26 LAW & SOC. INQUIRY 63, 65 (2001). The Refugee Act of 1980 reads:

The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such spe-

as "one of the most important pieces of humanitarian legislation ever enacted by a United States Congress,"<sup>36</sup> and it appeared once again that the United States was willing to abandon its political bias through a "politically and geographically neutral adjudication standard."<sup>37</sup>

Unfortunately, political motives persist in the administration of U.S. asylum and refugee law.<sup>38</sup> Because even a nationality-neutral definition of "refugee" requires a conclusion that another government has actively persecuted or failed to prevent persecution, an asylum grant involves criticism of a nation's actions or inactions. Since 1980, the U.S. government has catered to the plea of the refugee who "advance[s] American political objectives."<sup>39</sup> After Communist countries, significant refugee admissions typically include "foreign policy adversar[ies]."<sup>40</sup>

The world today, however, is different than it was in 1980 when Congress adopted its definition for "refugee." The Cold War is over, and political "stalemates" between great superpowers are no longer

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cial circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, indicted, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42) (2000).

36 126 CONG. REC. 1523 (1980).

37 U.S. Citizenship & Immigration Servs., *supra* note 31.

38 One of the most notable examples of the influence of political foreign policy on the determination of asylum claims involved Guatemalan and Salvadoran applicants in the 1980s. U.S. policy favored and supported the national governments of both Guatemala and El Salvador, and as a result, most asylum applicants from those countries were denied. See Robert M. Cannon, Comment, *A Reevaluation of the Relationship of the Administrative Procedure Act to Asylum Hearings: The Ramifications of the American Baptist Church's Settlement*, 5 ADMIN. L.J. 713, 727 n.68 (1991). In *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991), the U.S. government conceded that "foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution," *id.* at 799, and granted Salvadorans and Guatemalans *de novo* review of their asylum cases. *Id.*

39 Bockley, *supra* note 24, at 256.

40 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, 928 (1990).



the norm.<sup>41</sup> Now, "identity-based conflicts built around religion, ethnicity, nationality, race, clan, language or region" abound.<sup>42</sup> These conflicts often take place within a country's borders instead of on an international scale, and warring factions target civilians instead of each other.<sup>43</sup> Today's archetypal oppressor for modern refugees is not the Communist or Fascist superpower whose political goals are established, easily articulated, and clearly contrary to U.S. policy. Perhaps he is not even a member of a nation's government. Instead, he is a neighbor who belongs to a different tribe, a masked guerilla soldier, or a stranger's threatening voice on the phone—and his political goals may be unclear or easily misunderstood as mere greed or prejudice.

The political foundations and motivations underlying U.S. asylum law place today's asylum-seekers in a difficult situation. If refugees are more likely to prevail when their admission advances U.S. political objectives, today's asylum-seeker must try to convince the U.S. government that it should care that rebel forces have threatened her family, a neighbor wants her dead, or that the identity of a caller is not as important as the fear it inspires. For the asylum-seeker who flees a government the United States supports or a conflict in which the United States does not want to get involved, this can be a near impossible task.

*B. Exacting Standards: "Well-Founded Fear" and  
"Particularized Persecution"*

The law's demand that an asylum-seeker fulfill strict standards of proof also makes establishing a valid claim of asylum extremely difficult for today's refugee. Under section 101(a)(42) of the Immigration and Nationality Act (INA), an asylum applicant must prove that she (1) suffered persecution in the past, or (2) has a "well-founded fear" of future persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>44</sup> Proof of past persecution creates a presumption of a well-founded fear of future persecution,<sup>45</sup> but that presumption may be rebutted by

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41 See OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, THE STATE OF THE WORLD'S REFUGEES: FIFTY YEARS OF HUMANITARIAN ACTION 275 (2000), available at <http://www.unhcr.ch/pubs/sowr2000/sowr2000toc.htm> [hereinafter STATE OF THE WORLD'S REFUGEES].

42 *Id.*

43 *See id.*

44 8 U.S.C. § 1101(a)(42) (2000).

45 *See* Immigration and Naturalization Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); *Ratnam v. INS*, 154 F.3d 990, 994 (9th Cir. 1998); *Fergiste v. INS*,

proof that fundamental changes in country conditions have eroded the basis for future fear.<sup>46</sup>

The definition of “well-founded fear,” has never been definitively established. In *INS v. Cardoza-Fonseca*,<sup>47</sup> the U.S. Supreme Court reasoned that “[t]here is obviously some ambiguity in a term like ‘well-founded fear’ which can only be given concrete meaning through a process of case-by-case adjudication.”<sup>48</sup> The only real guidance the Court provided was its conclusion that the standard of “well-founded fear” must have a “focus on the individual’s subjective beliefs.”<sup>49</sup> After *Cardoza-Fonseca*, the Board of Immigration Appeals (BIA) proposed guidelines it believed were consistent with the Supreme Court’s holding.<sup>50</sup> First, an asylum applicant must show that a “reasonable person in [the applicant’s] circumstances would fear persecution.”<sup>51</sup> Then, a court should consider objective evidence, such as whether “the country at issue . . . has a history of persecuting people in circumstances similar to the asylum applicant’s.”<sup>52</sup>

Subsequent federal court decisions have established that, at the very least, the “well-founded fear” standard includes both a subjective and objective component: an applicant must prove that her fear is (1) subjectively genuine, and (2) objectively well-founded.<sup>53</sup> The objective component of the test “requires a showing ‘by credible, direct, and specific evidence in the record, that persecution is a reasonable possibility.’”<sup>54</sup>

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138 F.3d 14, 18 (1st Cir. 1998); *In re C-Y-Z*, 21 I. & N. Dec. 915 (1997); *In re H-*, 21 I. & N. Dec. 337 (1996).

46 8 C.F.R. § 208.13(b)(1)(i)(A) (2003).

47 480 U.S. 421 (1987).

48 *Id.* at 448.

49 *Id.* at 431.

50 *In re Mogharrabi*, 19 I. & N. Dec. 439 (1987).

51 *Id.* at 445.

52 *Id.* at 446.

53 See *Fisher v. INS*, 79 F.3d 955, 960 (9th Cir. 1996); *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991); *Cuadras v. INS*, 910 F.2d 567, 570 (9th Cir. 1990); *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986); OFFICE OF THE U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 38 (1992), available at <http://www1.umn.edu/humanrts/instree/refugeehandbook.pdf>. [hereinafter HANDBOOK ON THE 1951 CONVENTION AND 1967 PROTOCOL].

54 *Meza-Manay v. INS*, 139 F.3d 759, 763 (9th Cir. 1998) (quoting *Singh v. Ilchert*, 63 F.3d 1501, 1506 (9th Cir. 1995)). This showing may be established through “the production of specific documentary evidence or by the credible and persuasive testimony of the applicant.” *Id.*

This objective requirement dooms many sincere asylum-seekers to failure. When an individual flees past or prospective persecution, she rarely has the time or resources to collect and carry evidence validating that persecution or fear.<sup>55</sup> Sometimes that evidence may not even exist or be available—especially when an oppressor acts in a covert manner.<sup>56</sup> How does a refugee prove that a guerilla came to his home and made verbal threats on his life? How does an asylum-seeker prove that he was imprisoned for months by a police force that does not advertise its wrongdoings? Persecutors rarely write down the atrocities they commit and give reasons for their actions. In the words of one rejected and exasperated asylum applicant, “What documentary proof is there of rape and murder?”<sup>57</sup> Because an asylum-seeker faces these kinds of complications, the Office of the U.N. High Commissioner for Refugees urges giving asylum applicants the “benefit of the doubt.”<sup>58</sup> Yet, in our politicized and discretionary asylum system, the “benefit of the doubt,” may be conveniently disregarded. Today, when concerns regarding terrorism and national security after September 11, 2001, have led to “tightened immigration and asylum policies” in the United States,<sup>59</sup> many asylum applicants will never see an officer or judge who will give them the “benefit of the doubt”—and as a result, many genuine asylum-seekers will be rejected.

A 1992 decision by the U.S. Supreme Court in *INS v. Elias-Zacarias*<sup>60</sup> added an additional, and often impossible, hurdle for modern refugees who now seek asylum in the United States. Elias-Zacarias, a native of Guatemala, claimed he fulfilled the requirements for asylum because armed guerillas threatened him at his home.<sup>61</sup>

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55 See *Abankwah v. INS*, 185 F.3d 18, 26 (2d Cir. 1999) (emphasizing that “a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation”); see also HANDBOOK ON THE 1951 CONVENTION AND 1967 PROTOCOL, *supra* note 53, ¶ 196 (stating that “a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents”).

56 See *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (“Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.”).

57 Sonia Verma, *Desperate for Refuge as Border Closes*, TORONTO STAR, Dec. 7, 2002, at A1, available at 2002 WL 103588813 (describing the situation of an asylum applicant in Canada—yet, the applicant’s frustration is one shared by many asylum-seekers in the United States).

58 See HANDBOOK ON THE 1951 CONVENTION AND 1967 PROTOCOL, *supra* note 53, ¶ 203.

59 Arthur C. Helton & Dessie P. Zagorcheva, *Globalization, Terror, and the Movements of People*, 36 INT’L LAW. 91, 94 (2002).

60 502 U.S. 478 (1992).

61 *Id.* at 479.

The guerillas ordered Elias-Zacarias and his parents to join their organization, and when he and his parents refused, the rebels told them "that they would be back, and that they should think it over about joining them."<sup>62</sup> Afraid of retaliation by the guerillas—and by the government if it found out that he had communications with the guerillas—Elias-Zacarias fled to the United States. He later proffered evidence that the guerillas returned to his home twice after his departure in an effort to recruit his services.<sup>63</sup> Resisting recruitment, he asserted, was an expression of a political opinion for which he had a well-founded fear of future persecution if he returned to Guatemala.<sup>64</sup>

The Supreme Court disagreed with Elias-Zacarias. The Court held that when an asylum applicant claims that he has been persecuted because of a political opinion, the political opinion in question is the "victim's political opinion, not the persecutor's,"<sup>65</sup> and refusing to join a guerilla organization is not proof of a political opinion.<sup>66</sup> This conclusion alone dooms many genuine asylum applicants who fled their countries due to fear of conscription by rebel forces. The Court also emphasized, however, that the fact guerilla organizations have political goals does not mean their forced recruitment practices constitute "persecution on account of . . . political opinion."<sup>67</sup> "[T]he mere existence of a generalized 'political' motive underlying the guerillas' forced recruitment," the Court held, "is inadequate to establish . . . the proposition that Elias-Zacarias fears persecution *on account of* [his] political opinion."<sup>68</sup> Even if Elias-Zacarias could establish that he had a political opinion, the Court determined that he must also prove that he had a well-founded fear "that the guerrillas will persecute him *because of* that political opinion, rather than because of his refusal to fight with them."<sup>69</sup> It does not appear that the Court understood that, for Elias-Zacarias and the guerillas who came to his home, those two issues were one and the same.

As a result of the Supreme Court's holding in *Elias-Zacarias*, under the current definition of "refugee," an asylum applicant must not only show that he has a political opinion or belongs to a particular race, religion, nationality, or social group, but he must also show that it is *because of* that political opinion, race, religion, nationality, or so-

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62 *Id.*

63 *Id.* at 480.

64 *See id.*

65 *Id.* at 482.

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.* at 483.

cial group, that he suffers persecution. Asylum-seekers must establish *particularized* persecution to fulfill the “on account of” language of the current law. They must “prove that they were individually targeted because of being somehow ‘different’ from the population at large,”<sup>70</sup> and they must show “how and why *their* actions [have] placed them at risk.”<sup>71</sup> When multiple political groups are at war in one’s native country, however, and political violence leads to widespread killing and destruction, many genuine asylum applicants simply cannot prove that they were individually targeted, let alone the reasons behind such persecution.<sup>72</sup>

### C. *The Power to Grant Asylum: A Discretionary System*

The discretionary authority of immigration officers and judges provides yet another hurdle for today’s genuine asylum applicant. Asylum-seekers<sup>73</sup> must file their applications within one year of their arrival in the United States.<sup>74</sup> An asylum-seeker who has not been ar-

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70 Coutin, *supra* note 35, at 64.

71 *Id.* (emphasis added).

72 *See id.* at 65; *see also Elias-Zacarias*, 502 U.S. at 489 (Stevens, J., dissenting) (“It does not matter to the persecutors what the individual’s motivation is. The guerillas . . . do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause.”) (quoting *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1287 (9th Cir. 1984)).

73 There is a distinction in domestic law between a refugee and an asylum-seeker. “Refugee” is often used to refer to “overseas refugees” who must apply for status from outside the United States. LEGOMSKY, *supra* note 19, at 851. Asylum-seekers, on the other hand, must be physically present in the United States. INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (2000) (“A[n] alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien’s status, may apply for asylum . . .”). Confusion often results, however, from the fact that the statutory definition of “refugee” does not specify whether the noncitizen is overseas or in the United States. *See* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). In fact, to be eligible for asylum, a noncitizen must first qualify as a “refugee” under section 101(a)(42) of the INA. INA § 208, 8 U.S.C. § 1158(b)(1). (For the definition of “refugee,” *see supra* note 35; the standards required for this qualification are discussed *supra* Part I.B.) Thus, according to the letter of the law, every asylum-seeker is technically a “refugee.” LEGOMSKY, *supra* note 19, at 851. Applicants for asylum, however, are not subject to statutory quotas; refugees, by contrast, are so restricted. INA § 207(a), 8 U.S.C. § 1157(a).

74 INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B); 8 C.F.R. § 208.4(a)(2) (2003). Only two exceptions to this rule exist: (1) changed country conditions that “materially affect the applicant’s eligibility for asylum,” and (2) “extraordinary circumstances” causing delay. INA § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D). The application may be filed with the Department of Homeland Security (DHS) or with an immigration judge (IJ). Gloria Goldman & Frank K. Lipiner, *Asylum and Withholding of Removal*, in *SELECTED FUNDAMENTALS OF IMMIGRATION LAW AND PRACTICE* 461, 472 (Stephanie L.

rested by the Department of Homeland Security (DHS) or referred to an immigration court files her “affirmative” application with DHS and appears before an asylum officer to tell her story.<sup>75</sup> If the asylum officer chooses not to grant asylum, the applicant is referred to an immigration judge (IJ) for a full hearing.<sup>76</sup> At all times, the burden of proof rests solely with the applicant.<sup>77</sup>

Yet, even if an asylum-seeker proves every aspect of her claim, an asylum officer or immigration judge can deny her asylum as a matter of discretion.<sup>78</sup> Because only one in five decisions by an asylum officer are reversed in court, most asylum decisions are made at the level of officer hearings.<sup>79</sup> No cameras or recording devices are allowed at these hearings, and the entire process is “closed and confidential.”<sup>80</sup> This lack of documentation on the part of asylum officers easily hides discriminatory motivations or arbitrary decisions from concerned investigators. The U.S. General Accounting Office found this to be true when it examined differing approval rates for asylum applicants in

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Browning ed., 2003). The correct forum depends largely on whether DHS has initiated proceedings to remove the noncitizen from the country. *Id.*

75 See 8 C.F.R. §§ 208.2, 208.4.

76 See *id.* § 208.2. Immigration judges are a part of the Executive Office for Immigration Review (EOIR), which falls under the Department of Justice. See *id.* § 3.0; Executive Office of Immigration Review, 68 Fed. Reg. 9830 (Feb. 28, 2003) (to be codified at 8 C.F.R. pt. 1003) (transferring 8 C.F.R. § 3.0 to 8 C.F.R. pt. 1003). If the applicant has lawful status in the United States, however, the immigration court lacks jurisdiction “unless and until that individual is deportable, excludable, or removable.” Goldman & Lipiner, *supra* note 74, at 472. Asylum applicants who have been arrested by DHS or referred to an immigration court file their applications directly with an IJ. See 8 C.F.R. §§ 208.2(b), 208.4(b)(3). Individuals who are detained at airports or other ports of entry with fraudulent documents or no documents face “expedited removal.” Following an interview with a DHS inspector, the individual will be removed from the United States immediately unless he or she “indicates either an intention to apply for asylum under § 208 or a fear of persecution.” INA § 235 (b)(1)(A), 8 U.S.C. § 1225(b)(1)(A). Those who indicate a desire for asylum are detained until their interview with a DHS asylum officer. INA § 235(b)(1)(B)(ii), (iv), 8 U.S.C. § 1225(b)(1)(B)(ii), (iv). At this interview, the individual must convince the officer that he or she has a “credible fear of persecution,” or that person will be removed from the United States. INA § 235(b)(1)(B)(iii), 8 U.S.C. § 1225(b)(1)(B)(iii).

77 8 C.F.R. § 208.13(a).

78 8 C.F.R. § 208.14(a)–(b); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987); 3 GORDON ET AL., *supra* note 15, § 33.05[3][b][iii]. Asylum, as interpreted by the courts, is not an “intrinsic right of a persecution victim.” Coutin, *supra* note 35, at 72; see also *United States v. Aguilar*, 883 F.2d 662, 678–79 (9th Cir. 1989) (affirming the decision of the federal district court, which held that asylum is a discretionary government action and not the right of a persecution victim).

79 WELL-FOUNDED FEAR (The Epidavros Project 2000).

80 *Id.* .

1987. Attributing decisions to bias, the agency reported, was next to impossible because Immigration and Naturalization Service (INS) officers<sup>81</sup> “generally did not document the reasons why applications [we]re approved or denied.”<sup>82</sup>

Discretionary authority lays the foundation for a system that can effortlessly refuse assistance to the most needy applicants. In the words of one asylum officer, “If you’re an [asylum] applicant, you play asylum officer roulette here. Your chances of getting a grant depend on who you get as much as what your claim is.”<sup>83</sup> Not only does today’s refugee have to prove particularized persecution that is consistent with U.S. political objectives, she must also pray that a sympathetic asylum officer hears and believes her story.

## II. COLOMBIAN REFUGEES SEEKING ASYLUM IN THE UNITED STATES: A CASE STUDY

Asylum-seekers fleeing the current conflict in Colombia offer a poignant example of the failures of our asylum system to provide sufficient protection for the modern refugee. The nation of Colombia emerged from the collapse of the larger “Gran Colombia” in 1830,<sup>84</sup> and the country has been “marked by political and social violence” since its formation.<sup>85</sup> Today, Colombia is the oldest democracy in Latin America,<sup>86</sup> and the United States has invested billions of dollars to ensure the current government’s stability.

In 1998, the United States gave Colombia \$43 million to support counternarcotic operations, \$14 million for helicopter upgrades, \$21 million for aviation support, and \$41 million in equipment and ser-

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81 On March 1, 2003, the INS transitioned into the United States Citizenship and Immigration Services (USCIS) under the Department of Homeland Security (DHS). U.S. Citizenship & Immigration Servs., *This is USCIS*, at <http://uscis.gov/graphics/aboutus/thisisimm/index.htm> (last modified Nov. 19, 2003). The procedural effects of this change have been minimal. For instance, USCIS offices are located in former INS locations, and official forms and documents issued by the INS are still valid and accepted by the USCIS. *Id.*

82 U.S. GEN. ACCOUNTING OFFICE, UNIFORM APPLICATION OF STANDARDS UNCERTAIN I (1987).

83 WELL-FOUNDED FEAR, *supra* note 79.

84 U.S. CENTRAL INTELLIGENCE AGENCY, *Colombia*, in THE WORLD FACTBOOK (2003), available at <http://www.odci.gov/cia/publications/factbook/geos/co.html>. Venezuela and Ecuador were also formed from the collapse. *Id.*

85 U.N. ESCOR, 54th Sess., Agenda Item 3, ¶ 12, U.N. Doc. E/CN.4/1998/16 (1998).

86 146 CONG. REC. H1053 (daily ed. Mar. 15, 2000).

vices.<sup>87</sup> In 1999, the United States planned to give approximately \$203 million to the Colombian government, including an estimated \$96 million for six Black Hawk helicopters.<sup>88</sup> Such support made Colombia the third largest recipient of U.S. assistance.<sup>89</sup> On July 13, 2000, President Bill Clinton signed Public Law 106-246,<sup>90</sup> which included \$1.3 billion in aid to Colombia as part of a design called “Plan Colombia.” Almost eighty percent of the money was allocated for counternarcotic efforts, and the funds financed military equipment—including \$400 million for more Black Hawk helicopters—and training for two counternarcotic battalions.<sup>91</sup> In 2002, President George W. Bush signed Public Law 107-115<sup>92</sup> to increase U.S. aid to Colombia. The new package included a grant of \$625 million, most of which would “be spent on security assistance to the Colombian military.”<sup>93</sup>

The U.S. government considers Colombia a nation of political importance as the eighth largest producer of U.S. oil and the supplier of eighty percent of the cocaine that enters this country.<sup>94</sup> Through assistance to the Colombian government, the United States has also become, in effect, a contributor and facilitator of the violence and devastation suffered by Colombian citizens. In response to U.S. aid in 2001, the situation in Colombia got worse—not better. Guerilla groups launched attacks throughout the country, paramilitaries and the army fought back, and violence and killings intensified.<sup>95</sup> Some of those killings are the result of American-made weapons and American-funded militias.<sup>96</sup> The United States thus has a political—and arguably moral—interest in the Colombian conflict. Yet, Colombian

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87 Luz Estella Nagle, *U.S. Mutual Assistance to Colombia: Vague Promises and Diminishing Returns*, 23 FORDHAM INT’L L.J. 1235, 1270 (2000).

88 *Id.*

89 *Id.* Only Israel and Egypt ranked higher. *Id.*

90 Military Construction Appropriations Act, Pub. L. No. 106-246, 114 Stat. 511 (2001).

91 U.S. COMM. FOR REFUGEES, PROPOSED US AID PACKAGE TO COLOMBIA (2000), at [http://www.refugees.org/news/crisis/colombia\\_aid.htm](http://www.refugees.org/news/crisis/colombia_aid.htm) (last visited Feb. 11, 2004).

92 Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 107-115, 115 Stat. 2118 (2002).

93 COLOMBIA CERTIFICATION CONSULTATION, BRIEFING PAPER: EXECUTIVE SUMMARY 1 (2002), available at <http://www.hrw.org/press/2002/02/certification3.pdf>.

94 146 CONG. REC. H1053-54 (daily ed. Mar. 15, 2000).

95 See AMNESTY INT’L, *Colombia*, in AMNESTY INTERNATIONAL REPORT 2001 (2001), available at <http://web.amnesty.org/web/ar2001.nsf/webamrcountries/COLOMBIA?OpenDocument>.

96 See Jeffrey Cohan, *Student Still Seeks Answers in Bombing of His Village*, PITT. POST-GAZETTE, Nov. 25, 2002, at A1, available at 2002 WL 101484928.



citizens fleeing those dangers and applying for asylum in the United States are currently rejected in increasing numbers.

### A. *The Conflict: A Forty-Year Struggle*

#### 1. The Actors: Guerillas, Paramilitaries, and Government Forces

In 1957, the two traditional political parties in Colombia, the Liberals and the Conservatives, created an arrangement by which all other political groups were denied power or influence in the nation's "democratic" system.<sup>97</sup> Opposition to this exclusionary agreement between Colombia's two main political parties fueled a new movement, and guerilla groups rose to prominence in the 1960s.<sup>98</sup> The guerillas initially fought for control of land—forcing civilians off their property to strengthen rebel presence throughout the 1960s and 1970s.<sup>99</sup> Today, two large guerilla groups remain active: the Ejército de Liberación Nacional (ELN), or the National Liberation Army, and the Fuerzas Armadas Revolucionarias de Colombia (FARC), or the Revolutionary Armed Forces of Colombia.<sup>100</sup> Both the FARC and the ELN are Marxist organizations that continue to "seek to overthrow the government and establish socialism in Colombia."<sup>101</sup>

Frustrated by guerillas' threats to their land and insufficient government protection, a number of Colombian landowners formed "self-defen[s]e" groups in the 1970s.<sup>102</sup> The "best-known regional paramilitary organization" is the Autodefensas Campesinas de Córdoba y Urabá (ACCU), or the Peasant Self-Defense for Córdoba and Urabá.<sup>103</sup> The ACCU, however, has strong ties to the notorious national paramilitary organization, Autodefensas Unidas de Colombia (AUC), or the United Colombian Self-Defense Organization.<sup>104</sup> The "stated objective" of the AUC is to "rid Colombia of the guerillas," and

97 U.S. CENTRAL INTELLIGENCE AGENCY, *supra* note 84.

98 *Id.*

99 See Liliana Obregón & Maria Stavropoulou, *In Search of Hope: The Plight of Displaced Colombians*, in *THE FORSAKEN PEOPLE: CASE STUDIES OF THE INTERNALLY DISPLACED* 399, 412 (Roberta Cohen & Francis M. Deng eds., 1998).

100 *Id.*

101 U.S. COMM. FOR REFUGEES, *Colombia*, in *WORLD REFUGEE SURVEY 2003 COUNTRY REPORT*, at [http://www.refugees.org/world/countryrpt/amer\\_carib/2003/colombia.cfm](http://www.refugees.org/world/countryrpt/amer_carib/2003/colombia.cfm) (last visited Feb. 11, 2004) [hereinafter 2003 COUNTRY REPORT].

102 U.N. ESCOR, 51st Sess., Agenda Item 11(d), addendum pt. 1, ¶ 22, U.N. Doc. E/CN.4/1995/50/Add.1 (1994).

103 *Third Report on the Human Rights Situation in Colombia*, Inter-Am. C.H.R. ch. I, ¶ 45, OEA/ser.L/V/II.102, doc. 9 rev. 1 (1999), available at <http://www.cidh.oas.org/countryrep/Colom99en/table%20of%20contents.htm>.

104 *Id.* ¶ 46.

it has become the most dangerous of all Colombian organizations—generating the majority of the killings and forced displacement throughout the nation since 1995.<sup>105</sup>

For forty years now, a civil war between guerilla forces, paramilitary groups, and the national military and police has devastated Colombia.<sup>106</sup> In recent years, the violence has only gotten worse. In the year 2000:

[M]ore than 4,000 people were victims of political killings, over 300 “disappeared”, and an estimated 300,000 people were internally displaced. At least 1,500 people were kidnapped by armed opposition groups and paramilitary organizations; mass kidnaps of civilians continued. Torture—often involving mutilation—remained widespread, particularly as a prelude to murder by paramilitary groups. . . . [and] “[d]eath squad”-style killings continued in urban areas.<sup>107</sup>

Since 2000, the average number of victims per year has continued to rise, and the traditionally rural violence has become increasingly urban.<sup>108</sup> Colombia suffers the “world’s highest number of politically motivated killings and kidnappings,”<sup>109</sup> and “could now have the second largest internally displaced population in the world, after Sudan.”<sup>110</sup> At the start of 2003, it was estimated that nearly three million people were displaced by political violence.<sup>111</sup> In 2002, an estimated one thousand Colombians fled their homes<sup>112</sup> and twenty people died every day as a result of the political and social violence.<sup>113</sup> Fifteen of

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105 2003 COUNTRY REPORT, *supra* note 101.

106 NORWEGIAN REFUGEE COUNCIL, PROFILE OF INTERNAL DISPLACEMENT: COLOMBIA 7 (2003).

107 AMNESTY INT’L, *supra* note 95.

108 See HUMAN RIGHTS WATCH, *Colombia*, in PRINCIPAL CONCERNS OF HUMAN RIGHTS WATCH FOR THE 58TH SESSION OF THE UN COMMISSION ON HUMAN RIGHTS (2002), at <http://www.hrw.org/un/unchr58.htm>.

109 Press Release, U.S. Comm. for Refugees, Colombia Violence Leaves 2.1 Million Internally Displaced; For Many, Refuge is Elusive (June 19, 2001), available at [http://www.refugees.org/news/press\\_releases/2001/Colom061901.cfm](http://www.refugees.org/news/press_releases/2001/Colom061901.cfm); see also Jacob H. Fries, *Refugees from Colombia Make Plea for United States Asylum*, N.Y. TIMES, July 15, 2002, at B5 (“There is a greater risk of being kidnapped in Colombia than in any other country in the world.”).

110 NORWEGIAN REFUGEE COUNCIL, *supra* note 106, at 8.

111 *Id.*; see also 2003 COUNTRY REPORT, *supra* note 101 (estimating a similar number).

112 NORWEGIAN REFUGEE COUNCIL, *supra* note 106, at 8; *Colombia-Refugees NGO: 1,000 a Day Forced to Flee Homes in Colombia*, EFE NEWS SERV., July 5, 2002, available at LEXIS, Nexis Library, News Group File.

113 *Colombia-Refugees NGO*, *supra* note 112.

these twenty were “killed in their homes, work places or as they commute[d] to and from work.”<sup>114</sup>

## 2. Political Violence

The displacement suffered by Colombian citizens is not just a by-product of armed conflict. Rather, as in many modern conflicts throughout the world, forced displacement is a “deliberate strategy of war.”<sup>115</sup> Direct confrontation between armed groups is rare.<sup>116</sup> Instead, “parties to the conflict settle scores by attacking civilians suspected of sympathizing with the ‘other’ side.”<sup>117</sup> “The chaos, vulnerability, and terror inspired in the population are part of a *modus operandi*.”<sup>118</sup> Armed groups use killings and death threats to dispose of perceived enemies, to take over property, to influence judicial or administrative proceedings, and to motivate civilians to leave the country or the area.<sup>119</sup> Neither the paramilitaries nor the guerillas are innocent of atrocities. In the words of AUC leader Carlos Castaño: “The methods used by the self-defense forces . . . were no less violent and disgusting than those used by [the guerillas] . . . . We copied the guerillas’ methods and confronted them with the same tactics.”<sup>120</sup>

Colombian civilians are singled out for persecution based on their actions or inactions. The difference between life and death can be as simple as living on the wrong piece of land. For instance, in November of 1998, President Andrés Pastrana gave the FARC a “Switzerland-sized” demilitarized area of Colombia as part of his negotia-

114 *Id.*

115 HUMAN RIGHTS WATCH, *Colombia: Human Rights Developments*, in *WORLD REPORT 2001*, at <http://www.hrw.org/wr2k1/americas/colombia.html> (last visited Feb. 11, 2004).

116 WORLD FOOD PROGRAMME, *PROTRACTED RELIEF AND RECOVERY OPERATION—COLOMBIA 6139.00: ASSISTANCE TO PERSONS DISPLACED BY VIOLENCE IN COLOMBIA 5 (1999)*, available at [http://www.wfp.org/country\\_brief/projects/613900.pdf](http://www.wfp.org/country_brief/projects/613900.pdf).

117 NORWEGIAN REFUGEE COUNCIL, *COLOMBIA UPDATE FROM THE GLOBAL IDP PROJECT (2002)*, at <http://www.reliefweb.int/w/Rwb.nsf/0/2B7A08515C240D3885256BDB00538014?OpenDocument>.

118 *Third Report on the Human Rights Situation in Colombia*, *supra* note 103, at ch. VI, ¶ 62.

119 See U.N. ESCOR, 58th Sess., Agenda Item 3, ¶¶ 144, 188, U.N. Doc. E/CN.4/2002/17 (2002).

120 MAURICIO ARANGUREN MOLINA, *MI CONFESIÓN: CARLOS CASTAÑO REVELA SUS SECRETOS [MY CONFESSION: CARLOS CASTAÑO REVEALS HIS SECRETS]* 224 (2001) (“Los métodos utilizados por las Autodefensas . . . no fueron menos violentos y despreciables que los empleados por el EPL y las FARC . . . . Copiamos los métodos de la guerilla y así la enfrentamos.”).

tions for peace.<sup>121</sup> After talks failed in January of 2002, however, the government re-took the demilitarized zone.<sup>122</sup> Although the citizens living in the zone were never asked whether they wanted to live in FARC-controlled territory, they were “stigmatized as ‘FARC collaborators’” because they stayed.<sup>123</sup>

Within weeks, paramilitaries flooded the area to “hunt down ‘guerilla sympathizers.’”<sup>124</sup> As in many other areas of the country where paramilitaries, guerillas, and government forces fight for control, civilians are in a “lose-lose situation.”<sup>125</sup> If the civilians in the area had attempted to leave when the FARC took control, they would have been perceived as government sympathizers and subjected to persecution by the guerillas. “The very fact of having fled typically heightens suspicions of allegiance to a particular armed actor and intensifies the risk of being targeted.”<sup>126</sup> Yet, because they remained silent and chose not to leave, they are persecuted as FARC sympathizers. “Whether [the civilians] remain or flee, their actions are interpreted [by one faction or another] as a *political choice*, for which they sometimes pay with their lives.”<sup>127</sup>

#### B. *The Numbers: Colombians Applying for Asylum in the United States*

The increase in the number of Colombian nationals that have filed applications for asylum in the United States in just the past few years is a symptom of the severity of the recent escalation in violence in Colombia. Between 1992 and 1999, the number of applications filed by Colombians ranged from a high of 1343 in 1994, to a low of 371 in 1998.<sup>128</sup> The rate of approval for those applications remained

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121 *Chronology of the Strained Colombia-FARC Peace Process*, AGENCE FR.-PRESSE, Jan. 10, 2002, available at 2002 WL 2313250.

122 NORWEGIAN REFUGEE COUNCIL, *supra* note 106, at 8.

123 Press Release, Amnesty Int'l, Colombia: Civilians Once More at Imminent Risk (Jan. 11, 2002), available at <http://www.amnesty.org.uk/deliver/document/13026>.

124 Press Release, Catholic Agency for Overseas Development, Colombians Cut Off from the World Face New Fears (Mar. 13, 2002), available at <http://www.cafod.org.uk/archive/latinamerica/colombia20020312.shtml>.

125 NORWEGIAN REFUGEE COUNCIL, *supra* note 106, at 8.

126 U.N. ESCOR, 58th Sess., Agenda Item 12(a), addendum pt. 3, ¶ 63, U.N. Doc. E/CN.4/2002/83/Add.3 (2002).

127 NORWEGIAN REFUGEE COUNCIL, *supra* note 106, at 9 (emphasis added).

128 *Asylum Applications Filed with the INS by Colombian Nationals*, 22 REFUGEE REP., Jan. 2001, at 16 [hereinafter *Asylum Applications Filed 2001*]. The total number of applications filed in the years 1992 to 1999 are as follows: 1992: 584; 1993: 1303; 1994: 1343; 1995: 768; 1996: 396; 1997: 538; 1998: 371; 1999: 427. *Id.*

largely in the teens, with highs of twenty-six percent in 1992 and thirty-nine percent in 1999.<sup>129</sup>

In 2000, however, the number of applications increased to over eight times the number received in 1999.<sup>130</sup> While only 334 applications were filed in 1999,<sup>131</sup> 2728 applications were filed in the year 2000.<sup>132</sup> Surprisingly, according to INS, an impressive sixty-five percent of those Colombian applicants received asylum in 2000.<sup>133</sup>

If a trend toward a higher approval rate continued, it might be argued that U.S. asylum law is adequate to protect those who flee Colombia's increasingly devastating political conflict. This, however, has not been the case. The number of Colombian asylum applications has continued to rise dramatically, multiplying nearly two and a half times from the year 2000 to 2001.<sup>134</sup> The rate of approval for applications in 2001, however, decreased by nearly ten percent to a rate of fifty-six percent.<sup>135</sup> In 2002, a record 7967 Colombians requested asylum, but the approval rate dropped to a mere thirty-seven percent.<sup>136</sup>

Although the objective number of applicants granted asylum has gone up in recent years, the fact of the matter remains that the conflict in Colombia has only gotten worse.<sup>137</sup> When violence, killings, and persecution are on the rise in a country, logic dictates that the percentage of asylum applicants—even if the pool is a large one—with

129 *Id.* The approval rates for years 1992 to 1999 are as follows: 1992: 26%; 1993: 11%; 1994: 13%; 1995: 14%; 1996: 17%; 1997: 12%; 1998: 19%; 1999: 39%. *Id.*

130 IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 102 (2002), available at <http://uscis.gov/graphics/shared/aboutus/statistics/Yearbook2000.pdf> [hereinafter 2000 STATISTICAL YEARBOOK]; IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 102 (2002), available at <http://uscis.gov/graphics/shared/aboutus/statistics/FY99Yearbook.pdf> [hereinafter 1999 STATISTICAL YEARBOOK].

131 1999 STATISTICAL YEARBOOK, *supra* note 130, at 102.

132 2000 STATISTICAL YEARBOOK, *supra* note 130, at 102.

133 *Id.*

134 IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 104 (2002), available at <http://uscis.gov/graphics/shared/aboutus/statistics/Yearbook2001.pdf> [hereinafter 2001 STATISTICAL YEARBOOK]; Alfonso Chardy, *Strife in Colombia Increases Emigrants*, MIAMI HERALD, Apr. 5, 2002, at 1B, available at 2002 WL 16464906.

135 2001 STATISTICAL YEARBOOK, *supra* note 134, at 104; Chardy, *supra* note 134.

136 2002 YEARBOOK, *supra* note 12, at 71. By comparison, applicant approvals from other countries were as follows: Afghanistan: 63%; China: 52%; India: 48%; Iraq: 67%; Kuwait: 67%; Ethiopia: 68%; Sudan: 64%; Cuba: 64%. *Id.* at 69–71.

137 See *Colombia—Refugees: Colombian Refugee Problem Worsening*, EFE NEWS SERV., June 18, 2002, available at LEXIS, Nexis Library, News Group File; Press Release, U.S. Comm. for Refugees, Violence and Displacement on the Increase in Colombia (2002), at [http://www.refugees.org/news/press\\_releases/2002/040602.cfm](http://www.refugees.org/news/press_releases/2002/040602.cfm).

valid asylum claims would increase and not decrease. Yet, the U.S. government continues to send increasing numbers of Colombian citizens back to a situation that is more dangerous every day.

C. *A Look at the Cases: Asylum Law Applied to Colombian Refugees*

The current legal standards for exclusion are harsh and unforgiving for modern refugees given the realities of today's world. Colombians especially struggle to establish a valid asylum claim under the requirement of "particularized persecution" set forth in *Elias-Zacarias*. A look at several immigration cases reviewed by U.S. Courts of Appeals gives us a glimpse of how the law has been applied to Colombians in recent years.<sup>138</sup>

1. Asylum for a Politician in 1999

In 1999, the U.S. Court of Appeals for the Ninth Circuit reviewed the BIA's reversal of an IJ's decision to grant asylum to Carlos Eduardo Reyes-Guerrero and his wife, both of whom were Colombian citizens.<sup>139</sup> *Reyes-Guerrero v. INS* was a standard political asylum case that had little to do with the conflict between armed groups in Colombia. Reyes-Guerrero was a member of the Conservative Party, one of the two main political parties in Colombia.<sup>140</sup> Involved in the investigation and prosecution of a number of crimes, he was assigned to investigate the "White Collar Scandal" in 1980 that led to the arrest and conviction of eighteen members of the opposition party, the Liberal Party.<sup>141</sup> Reyes-Guerrero received death threats and bribes throughout the investigation and prosecution, but the threats continued after the convictions. Even though he "changed vehicles, residences, offices, and phone numbers,"<sup>142</sup> the threats did not cease, and

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138 Because asylum is discretionary, *see supra* note 78 and accompanying text, a court of appeals "reviews determinations of the BIA under the highly deferential standard of substantial evidence." *Acosta v. INS*, No. 98-70299, 1999 U.S. App. LEXIS 34503, at \*4 (9th Cir. Dec. 28, 1999) (O'Scannlain, J., dissenting); *see also* *Singh v. INS*, 134 F.3d 962, 966 (9th Cir. 1998) ("We review the BIA's decision that Petitioner has not established eligibility for asylum under the substantial evidence standard."). The BIA's decision "must be affirmed unless the petitioner can establish 'that the evidence she presented was so compelling that no reasonable factfinder could fail to find [eligibility for asylum].'" *Acosta*, 1999 U.S. App. LEXIS 34503, at \*4 (O'Scannlain, J., dissenting) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992)).

139 *Reyes-Guerrero v. INS*, 192 F.3d 1241 (9th Cir. 1999).

140 *Id.* at 1243.

141 *Id.*

142 *Id.* at 1244.

he was warned that he would not “get away with the damage he caused the Liberal Party.”<sup>143</sup>

In its discussion of the case, the Ninth Circuit asserted that the BIA erred in reducing the threats to “nothing more than attempts by criminal defendants to disrupt the criminal process.”<sup>144</sup> Interestingly, the court noted that “[d]ue to insufficient police and judicial resources to investigate and prosecute most killings and the frequently overlapping violent forces at work, it is often difficult to differentiate political from non-political murders.”<sup>145</sup> The court also recalled that it had previously held that “death threats by people on one side of a civil war against a person suspected of being on the other side constitute [ ] persecution on account of political opinion.”<sup>146</sup>

Reyes-Guerrero, however, was not a civilian threatened by guerillas or paramilitaries. He was a politician—well-off in his native country and able to give the court what it wanted: (1) evidence that he had a political opinion—politics was his job, after all; (2) evidence that his persecutors knew of his political opinion because he was a public figure; and (3) evidence that he was singled out from the general population because of his political actions. As for fear of future persecution, the court quoted the U.S. State Department’s Country Profile for Colombia: “Magistrates, judges, attorneys, and prosecutors have been suborned, threatened, assassinated, or had family members killed in connection with certain cases.”<sup>147</sup> Simply stated, Reyes-Guerrero was able to show “particularized persecution,” and the Ninth Circuit decided that the evidence was strong enough to “compel” the conclusion that that he and his wife were eligible for asylum.

## 2. Asylum for a Peasant in 1999

Later that same year, the Ninth Circuit reviewed the case of *Acosta v. INS*.<sup>148</sup> Adalgiza Acosta and her ten year old daughter, natives of Colombia, were denied asylum by both an IJ and the BIA.<sup>149</sup> Unlike *Reyes-Guerrero*, the *Acosta* case did involve alleged persecution by a guerilla group involved in the civil conflict raging throughout Colombia. According to Acosta, she “belonged to a peasant group specifically formed to thwart the guerillas,” and as a result of her ac-

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143 *Id.* at 1243–44.

144 *Id.* at 1245.

145 *Id.* (quoting U.S. DEP’T OF STATE, 1994 COUNTRY PROFILE FOR COLOMBIA).

146 *Id.* (quoting *Gomez-Saballos v. INS*, 79 F.3d 912, 917 (9th Cir. 1996)).

147 *Id.* at 1246.

148 No. 98-70299, 1999 U.S. App. LEXIS 34503 (9th Cir. Dec. 28, 1999).

149 *Id.* at \*2.

tions, members of a guerilla organization repeatedly harassed her.<sup>150</sup> On one occasion, the guerillas kidnapped Acosta and several others from the field where they were working, and two women were raped.<sup>151</sup> Acosta reported that she complained to police regarding the harassment, but later saw the police socializing with those same guerillas.<sup>152</sup>

The Ninth Circuit determined that “[a] reasonable factfinder would have to infer that the guerillas imputed a political opinion to Acosta because of her known organizational and accusatorial activity and at least in part on that account treated her with extraordinary brutality constituting persecution.”<sup>153</sup> The Ninth Circuit decided there was enough evidence to compel a reversal and remanded the case to the BIA.<sup>154</sup>

Judge O’Scannlain, however, disagreed with the majority’s conclusion. In his dissent, O’Scannlain outlined a number of facts that were not mentioned in the majority’s short decision. “Although there can be no doubt that Acosta suffered horribly at the hands of these guerillas,” he wrote, “there can also be no doubt that she did so simply because she refused to grow marijuana and poppies for them.”<sup>155</sup> Judge O’Scannlain indicated that the peasant group “to which Acosta belonged was not a political entity so much as a rural cooperative,” and noted that the “record [did] not reveal any incidents of political activity on the part of [her] group.”<sup>156</sup> “The guerillas abducted everyone in the field that day—oblivious to anyone’s membership in the peasant organization,” he concluded, “[and t]hese men were indifferent to any political opinion Acosta or their other victims may have held. Refusal to grow illegal drugs for guerillas is not an enumerated ground on which to base asylum.”<sup>157</sup>

Judge O’Scannlain saw Acosta’s situation as similar to that of *Elias-Zacarias*. In his opinion, Acosta could not show that she had a real political opinion, and mere refusal to do what the guerillas wanted her to do did not constitute a political opinion. The majority, on the other hand, took Acosta at her word. She was able to provide them with enough of what they wanted to see: (1) evidence that she had a political opinion through membership in a political organiza-

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150 *Id.* at \*3.

151 *Id.* at \*6 (O’Scannlain, J., dissenting).

152 *Id.* at \*3.

153 *Id.*

154 *Id.* at \*2.

155 *Id.* at \*6 (O’Scannlain, J., dissenting).

156 *Id.* at \*5 (O’Scannlain, J., dissenting).

157 *Id.* at \*6 (O’Scannlain, J., dissenting).



tion; (2) some likelihood that the guerillas knew of her membership in this organization; and (3) a story of how her group was singled out for persecution by the guerillas because of the mission of that organization. Acosta's case was weaker than the one presented in *Reyes-Guerrero*, but the court gave her the benefit of the doubt.

### 3. No Asylum for a Potential Recruit in 2001

Nearly two years later, in 2001, the Ninth Circuit considered the case of *Mondragon-Hernandez v. INS*.<sup>158</sup> Luis Mondragon-Hernandez, a native of Colombia, petitioned the court for a review of the BIA's denial of his asylum request.<sup>159</sup> According to Mondragon-Hernandez, N-19 guerillas attempted to recruit him to fight with them, but he refused.<sup>160</sup> He received a threatening letter from the N-19, and he fled, fearing reprisal.<sup>161</sup> To establish that he had a political opinion and a reason to fear the N-19, Mondragon-Hernandez testified that he did not like guerilla organizations and did not "agree with the N-19 as a political group."<sup>162</sup> Mondragon-Hernandez also submitted evidence that two of his brothers served in the national military—suggesting that the N-19 would be even more likely to believe that he had political opinions contrary to their organization.<sup>163</sup>

In the end, the Ninth Circuit concluded that Mondragon-Hernandez failed in his burden of proof because he could not show his persecution was "particularized." The court determined that there was no evidence "the N-19 was aware of an actual political opinion held by Mondragon-Hernandez or that it targeted Mondragon-Hernandez on account of his political opinion."<sup>164</sup> While just two years prior, the court had been quite liberal in concluding that guerillas knew of Acosta's political opinion when she refused to accede to their demands, the Ninth Circuit read the facts much more narrowly in *Mondragon-Hernandez*.

Although the political opinion in question for an asylum case is the victim's political opinion, and not the persecutor's,<sup>165</sup> the court wanted to see evidence that the guerillas in this situation acted the way they did because they were *aware* of Mondragon-Hernandez's political opinion. The court did not, as it did in *Reyes-Guerrero*, make note of

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158 11 Fed. Appx. 911 (9th Cir. 2001) (unpublished opinion).

159 *Id.* at 912.

160 *Id.*

161 *Id.* at 912–13.

162 *Id.* at 912.

163 *Id.*

164 *Id.*

165 *See supra* note 65 and accompanying text.

the fact that it is difficult to differentiate between political and nonpolitical actions in Colombia today.<sup>166</sup> The court did not consider that the moment a guerilla asks a civilian to join their ranks and the civilian refuses, that person has made a choice not to support one faction of a very complicated political civil conflict. The court did not mention its previous holding that “death threats by people on one side of a civil war against a person suspected of being on the other side constitute[ ] persecution on account of political opinion.”<sup>167</sup> Instead, the court concluded that a threatening letter from the N-19 was not sufficient evidence to show particularized persecution because the guerillas did not explain *why* they were making their threat.<sup>168</sup> Mondragon-Hernandez, for this court, was just another Elias-Zacarias. He could not show, to the court’s satisfaction, that he (1) had a political opinion; (2) that the guerillas knew of that opinion; or (3) that he was singled out for persecution because of his opinion.

#### 4. No Asylum for a Journalist in 2002

In March of 2002, the Ninth Circuit examined yet another petition for review of the BIA’s decision to deny a Colombian asylum. In *Roman-Fernandez v. INS*,<sup>169</sup> Alvaro Roman-Fernandez claimed that he feared persecution if he returned to Colombia because his ex-wife “‘worked for a political candidate’ and as a result, each member of the family had received death threats from the other side.”<sup>170</sup> He also asserted that he had worked as a “Radio DJ” and “TV talk show host”—positions in which he had “spoken out against the Colombian government and the drug cartels.”<sup>171</sup>

The court concluded, however, that Roman-Fernandez had not met his burden of proof for asylum. The evidence, the court explained, was “too vague,” and “consisted of general articles about Colombia that have nothing in them specifically related to the Romans themselves.”<sup>172</sup> Because Roman-Fernandez was unable to show *who* would persecute him and *why* they would know of his political beliefs, he failed to establish a well-founded fear of “particularized persecution,” and the court was unwilling to give him the benefit of the doubt.

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166 See *supra* note 145 and accompanying text.

167 *Gomez-Saballos v. INS*, 79 F.3d 912, 917 (9th Cir. 1996).

168 *Mondragon-Hernandez*, 11 Fed. Appx. at 913.

169 34 Fed. Appx. 553 (9th Cir. 2002) (unpublished opinion).

170 *Id.* at 555.

171 *Id.*

172 *Id.*

D. *Forcing the Asylum-Seeker into a Legal Mold*

The courts' treatment of Colombian asylum-seekers exemplifies the ways in which U.S. asylum law fails to recognize many current conflicts as political and is unable to acknowledge the realities of today's world for the modern refugee. Requiring Colombians fleeing political civil conflict to prove "particularized persecution," or (1) that they were individually targeted for persecution based on their political opinion, and (2) how and why they were targets for that persecution, is a legal standard that many, no matter how genuine their claim, simply cannot meet. The violence that devastates Colombia is politically motivated. The persecutors are political groups whose every action is intended to strengthen their standing and agenda or harm the opposition. Yet, our courts say that the political opinions of the persecutor are not relevant to an asylum adjudication, and a victim cannot prove persecution unless the persecutor had some knowledge of the victim's own political beliefs.<sup>173</sup> Then, somehow the asylum-seeker has to have real evidence for the immigration officer or judge that will convince him or her that the persecutor acted on, and as a result of, that knowledge.

U.S. asylum law fails to take into account that every action or inaction by a Colombian civilian—or other similarly situated refugees throughout the world—can lead to repercussions at the hands of one or more armed groups as an action or inaction that has political meaning.<sup>174</sup> Daily life becomes politicized and "render[s] entire populations politically suspect."<sup>175</sup> Guerillas and paramilitaries identify those who support the "other side" through open or concealed surveillance, and an "either/or mentality" leaves "no room for neutrality."<sup>176</sup> Asylum officials want to know why a particular asylum-seeker is at risk for persecution or suffered persecution, not why all the members of that asylum-seeker's family or village are at risk—but for many applicants, "these two issue[s] are] inseparable."<sup>177</sup>

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173 See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

174 See Coutin, *supra* note 35, at 75–76. Coutin quotes a Guatemalan woman who suffered a similar war in her country:

Suppose that a guerrilla member asks you for a glass of water. You give it to him, because you don't know what type of person he is. And suppose that another person sees you, then [that person] can denounce you . . . . One doesn't know from night to day if one is going to survive.

*Id.*

175 *Id.* at 74.

176 See *id.* at 75.

177 *Id.* at 86.

The law also fails to take into account that, given the complexity of the situation in their native land, modern refugees themselves may not know the identity of their persecutors. Often, threats and violence are attributed to a “mysterious ‘they.’”<sup>178</sup> One Colombian woman recounted the circumstances surrounding the death of her husband, who was shot dead by four men as the couple took a walk together: “They told me he was killed because he was an informant . . . I don’t know if they were paramilitaries or rebels. I just buried my husband and left the next day because I didn’t want to wait for them to come back.”<sup>179</sup>

Even if one can identify his persecutors, however, oppressors rarely stop to ask their victims about their political beliefs or opinions. Proving knowledge or the intent of the persecutor can be next to impossible for many Colombian asylum-seekers and other similarly situated refugees. As one family in El Salvador, a country brutalized by similar violence for twelve years beginning in the 1980s, described: “[P]eople who do these things don’t go around verifying who’s involved in what.”<sup>180</sup> The showing of “particularized persecution,” required by the Supreme Court in *Elias-Zacarias*, is an unrealistic requirement for many of those fleeing political violence in the world today.

#### *E. Other Factors that Play a Role in the Denial of Asylum Status*

In addition to the application of harsh and unforgiving legal standards that fail to adequately address current conflicts involving political violence, modern asylum-seekers also face underlying assumptions and beliefs on the part of asylum administrators caused by the “contemporary realities”<sup>181</sup> of refugee flight in today’s world. The discretionary system currently in place allows these factors to strongly influence, if not determine, the denial of an applicant—even if she is able to establish a valid asylum claim under the law.<sup>182</sup>

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178 See *id.* at 77.

179 Sandra Hernandez, *Poor Town Hit Hard by Colombian Crisis*, SUN-SENTINEL, Dec. 26, 2001, at 29A, available at 2001 WL 29963532.

180 Coutin, *supra* note 35, at 77.

181 Editorial, *Seeking Protection’s ‘Holy Grail,’* REFUGEES, No. 132, 2003, at 2, 2, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=MEDIA&id=3f68317d4&page=publ>.

182 See *supra* note 78 and accompanying text.

Today, the world is plagued with “messier, internal crises,”<sup>183</sup> but because of “improved communications[,] the world, almost overnight, has grown smaller.”<sup>184</sup> More and more refugees are finding ways to leave the persecution in their homelands and find a way to the United States. Government officials, however, regard large influxes of refugees with suspicion.<sup>185</sup>

When the number of asylum applications from Colombians exploded in the year 2000, U.S. government officials realized that many Colombians were applying for asylum after arriving in U.S. airports while in transit to another country.<sup>186</sup> In order to deter Colombian asylum-seekers from entering the United States, beginning April 2, 2001, Colombians with a layover in the United States while on their way to a third country were required to present U.S. visas before boarding any U.S.-bound flight.<sup>187</sup> Applicants for these visas were forced to wait fourteen months for an appointment with the U.S. Consulate in Bogotá.<sup>188</sup>

Immigration officers may simply deny Colombian applicants asylum because they believe the United States cannot or should not take responsibility for so many people. Although approvals for Colombians increased in the year 2000, the sudden influx of applications in 2001 may have scared many officials in the system into enforcing more strictly an already harsh burden of proof for Colombian applicants. In a discretionary system, immigration officials and judges also begin to compare claims when there are increasing numbers of applicants from the same country.<sup>189</sup> A deserving asylum petition may be turned down simply because it is not as dire as the Colombian case the IJ

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183 Ray Wilkinson, *Old Problems . . . New Realities*, REFUGEES, No. 132, 2003, at 6, 9, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=MEDIA&id=3f68317d4&page=publ>.

184 *Id.* at 6.

185 See STATE OF THE WORLD'S REFUGEES, *supra* note 41, at 155.

186 *New Visa Requirement for Colombians Transiting the United States*, M2 PRESSWIRE, Apr. 2, 2001, available at 2001 WL 17451943.

187 Prior to April 2, 2001, Colombians could stay in the United States for a short time without a visa while they were en route to their country of destination. *Id.*; James Wilson, *Europe & Latin America: Closed Doors Replace Welcome Mat for Colombians*, FIN. TIMES (London), Apr. 10, 2001, at 3, available at LEXIS, News & Business Library, All News File. European countries joined with the United States in imposing these restrictions. See Maria Isabel Garcia, *Population: U.S., Europe Restrict Entry by Colombians*, INTER PRESS SERV., Apr. 3, 2001, available at 2001 WL 4803347.

188 Chardy, *supra* note 134.

189 See WELL-FOUNDED FEAR, *supra* note 79 (quoting asylum officers discussing the difficulty of assessing asylum claims when they hear more and more people from the same country telling the same story of persecution).

heard the day or week before, or because another applicant was able to give the officer a more detailed story.<sup>190</sup> Many immigration officials also take a mental tally of the cases they have granted, and although asylum-seekers are not subject to statutory numerical limitations,<sup>191</sup> the officers may nevertheless find that a number of applicants fall outside their internally regulated “quota.”<sup>192</sup>

Large influxes of refugees also arouse suspicion that most asylum-seekers are “simply seeking a better life elsewhere.”<sup>193</sup> The conflict in Colombia has had a devastating effect on both the landscape of the country and its citizens. From 1999 to 2002, “urban poverty grew from 55 to 59 percent, while in rural areas it rose 1 point in that period to 80 percent.”<sup>194</sup> Some Colombians do indeed seek to escape the economic crisis caused by war,<sup>195</sup> but economic harm alone is not one of the five grounds of persecution outlined in INA § 101(a)(42). If an immigration officer or judge believes that an asylum-seeker came to the United States not for fear of any particular political group or individuals, but because she feared losing her possessions or not being able to feed her family, that asylum-seeker will be summarily denied.<sup>196</sup> Yet, when genuine persecution forces a refugee to flee her country because she has lost all of her possessions and cannot feed her family, the ability to distinguish a valid asylum claim from an economic one is blurred.<sup>197</sup>

### III. OPTIONS FOR IMPROVEMENT

The United States cannot accommodate everyone that faces danger in his or her native country. Yet, if the U.S. government touts itself as a compassionate superpower, advocate of human liberty,<sup>198</sup> and a staunch supporter of human rights,<sup>199</sup> action should be taken in

190 *See id.*

191 *See supra* note 73.

192 *See* WELL-FOUNDED FEAR, *supra* note 79 (quoting an asylum officer who states that “[y]our chances of getting a[n asylum] grant depend on who you get as much as what your claim is—simply because, you know, everybody has got their own threshold . . .”).

193 Wilkinson, *supra* note 183, at 8.

194 Yadira Ferrer, *Colombia: Poverty Deepens, with Peace Still Distant*, INTER PRESS SERV., Jan. 15, 2003, available at 2002 WL 6913807.

195 *See* Wilson, *supra* note 187.

196 *See* WELL-FOUNDED FEAR, *supra* note 79 (“A lot of people would like to come here to better their lives, but it’s not grounds for asylum.”).

197 *See* STATE OF THE WORLD’S REFUGEES, *supra* note 41, at 280.

198 *See supra* note 14 and accompanying text.

199 *See* U.S. DEP’T OF STATE, SUPPORTING HUMAN RIGHTS AND DEMOCRACY: THE U.S. RECORD 2002–2003 (2003), available at <http://www.state.gov/g/drl/rls/shrd/2002/>.

order to protect genuine refugees who have fled political conflicts and are already present on U.S. soil. The United States agreed to terms mandating that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened”<sup>200</sup> on account of protected characteristics when it ratified the U.N. Protocol Relating to the Status of Refugees in 1967. Currently, the United States is not meeting that obligation.<sup>201</sup>

### A. *Temporary Protected Status: The “Quick Fix”?*

“Temporary Protected Status” (TPS) is one way in which current U.S. law may be used to protect the lives of modern refugees already present in the United States and facing genuine danger if they were to return to their home country. TPS was first created in 1990 to “provide temporary protection to people who lacked legal status in the United States [and] who, if returned to their home countries, would face ‘a serious threat to their personal safety.’”<sup>202</sup> The U.S. Attorney General, under INA § 244(b)(1), may designate a country or region for TPS, after consulting “appropriate” government agencies, under one of three conditions: (1) ongoing war or armed conflict poses a serious threat to citizens returning to their country; (2) a country cannot accommodate the return of its citizens because of an earthquake, flood, drought, or other environmental disaster; or (3) citizens cannot safely return to their country because of “extraordinary and temporary conditions” and U.S. national interests are not compromised by allowing them to stay.<sup>203</sup> The Attorney General designates the time period during which TPS is in force—a period between six and eighteen months,<sup>204</sup> and INA § 244(b)(3) provides for periodic review of country conditions and allows the Attorney General to extend the original time period if necessary.<sup>205</sup>

For modern refugees in the United States who seek asylum but are denied status by immigration officials and judges because they

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200 Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 137, 176.

201 See *supra* notes 29–30 and accompanying text.

202 *TPS for Colombians Gaining Support*, in *WORLDWIDE REFUGEE INFORMATION* (U.S. Comm. for Refugees ed., 2002), available at [http://www.refugees.org/world/articles/tps\\_rr01\\_7.htm](http://www.refugees.org/world/articles/tps_rr01_7.htm).

203 INA § 244 (b)(1), 8 U.S.C. § 1254(a) (2000). Recent countries that have been designated for TPS are Liberia, Somalia and Herzegovina, Lebanon, and Kuwait. MUSALO ET AL., *supra* note 16, at 930.

204 INA § 244(b)(2), 8 U.S.C. § 1254(a).

205 INA § 244(b)(3), 8 U.S.C. § 1254(a).

cannot show particularized persecution, TPS is a dream come true. TPS allows specifically enumerated asylum-seekers from specified nations or regions to remain in the United States during the period of protection *and* obtain employment authorization.<sup>206</sup> This would be a blessing for many of today's refugees who have been denied asylum status but remain in the United States, eluding removal—as well as for those who have been afraid to apply for asylum, terrified that their claim would be denied.<sup>207</sup> TPS serves as a net to catch those who have fallen through the cracks of the failures of our asylum law.

Currently, Colombians are being considered for TPS protection. In recent years, a number of advocates, horrified by the situations Colombian refugees faced in their native country, lobbied for TPS for Colombians residing in the United States.<sup>208</sup> The Colombian government also joined in this request,<sup>209</sup> along with the U.N. refugee agency<sup>210</sup> and several members of Congress.<sup>211</sup> On May 5, 2003, Senator Harry Reid introduced the Colombian Temporary Protected Sta-

206 INA § 244(a)(1), 8 U.S.C. § 1254(a).

207 See *TPS for Colombians Gaining Support*, *supra* note 202 (“[T]he majority of Colombians in the United States do not apply for asylum fearing that if they are unable to prove their asylum claims they will be deported.”).

208 See, e.g., Jacob H. Fries, *Refugees from Colombia Make Plea for United States Asylum*, N.Y. TIMES, July 15, 2002, at B5; Ralph R. Ortega, *Colombians Seeking Shelter: Refugees from War Zones Appeal for Protection*, DAILY NEWS (N.Y.), Sept. 11, 2001, at 2, available at 2001 WL 23592660; Miguel Perez, *Colombians Rally in N.J. for Special U.S. Protection*, RECORD, June 22, 2002, at A13, available at 2002 WL 4662667 (“For more than two years, Colombians have been actively seeking 18-month temporary legal stays granted to foreign nationals who have been forced to flee their countries due to armed conflicts, war, or natural disasters.”); Timothy Pratt, *Colombians Search for Safe Haven*, LAS VEGAS SUN, Apr. 5, 2003, at 14, available at 2003 WL 7820126; Yolanda Rodriguez, *Colombians: Strife at Home Should Merit Special Status*, ATLANTA J.-CONST., Jan. 8, 2003, at F2, available at 2003 WL 8962132; *TPS for Colombians Gaining Support*, *supra* note 202 (“[M]ore than 100 U.S.-based nongovernmental organizations (NGOs), including faith-based groups, human rights organizations, humanitarian and relief groups, and Colombian-American organizations, wrote to all members of Congress encouraging them to support [temporary protected status for Colombians].”); José Miguel Vivanco, *U.S. Should Grant Special Status to Undocumented Colombians: Letter to Attorney General John Ashcroft*, HUMAN RIGHTS NEWS, Dec. 23, 2002, available at <http://www.hrw.org/press/2002/12/colombia1223ltr.htm>.

209 Wilson, *supra* note 187 (“Bogota has asked the US to provide temporary relief from deportation for the hundreds of thousands of illegally resident Colombians, fearing that mass repatriation could exacerbate the country's acute problems.”).

210 *Refugee Agency Urges US to Protect Colombian Refugees*, AGENCE FR.-PRESSE, Nov. 15, 2002, available at 2002 WL 23650286.

211 *TPS for Colombians Gaining Support*, *supra* note 202.



tus Act of 2003 on the Senate floor.<sup>212</sup> Citing a “particularly pressing yet overlooked crisis . . . taking place right here in this hemisphere,” Senator Reid proposed TPS as a “purely humanitarian act that enjoys plenty of precedent.”<sup>213</sup> His fellow Democrat, Representative James McGovern, introduced TPS for Colombians in the House on July 24, 2003.<sup>214</sup>

Yet, TPS is a *temporary* solution. It is a “short-term strategy to secure the immediate physical safety of refugees.”<sup>215</sup> If TPS becomes a reality for Colombians in the United States, it will protect only those who are “continuously physically present” in the United States from the time Colombia is designated for TPS status to the time the beneficiary submits his or her application.<sup>216</sup> The Colombian Temporary Protected Status Act of 2003, as proposed by Senator Reid, designates a time period of one year.<sup>217</sup> Even assuming that extensions are made, the dangers of a forty-year war are unlikely to fade in the near future. TPS will not protect family members Colombian refugees have left behind, and it will not protect those who arrive after the day on which TPS becomes a reality. In just two to three years, the United States will face yet another situation in which large numbers of Colombians are, in the words of Senator Reid himself, “forcibly deport[ed] . . . placing them in danger of being tortured, kidnap[p]ed, or even murdered upon their return to their war-torn homeland.”<sup>218</sup>

TPS is also a slow moving and highly politicized solution. It is, in effect, a reversion to the days when Congress officially defined refugees entitled to asylum protection by nationality or geographic location. TPS may be regarded as the ideal “quick fix” for Colombians currently in the United States that fear removal, but in the hands of politicians, making TPS a reality for those in need has been anything but “quick.” Although the war in Colombia has ravaged the country for decades, and the violence and dangers have increased in recent

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212 S. 986, 108th Cong. (2003); 149 CONG. REC. S5730–31 (daily ed. May 5, 2003) (statement of Sen. Reid); see also *Recently Introduced Legislation: Senate Legislation*, WASH. UPDATE (Am. Immigration Lawyers Assoc.), AILA Doc. No. 03051940, May 19, 2003, at 8, available at <http://www.aila.org>.

213 149 CONG. REC. 5730, 5731 (daily ed. May 5, 2003) (statement of Sen. Reid).

214 H.R. 2853, 108th Cong. (2003); see also *Recently Introduced Legislation: House Legislation*, WASH. UPDATE (Amer. Immigration Lawyers Assoc.), AILA Doc. No. 03081113, Aug. 11, 2003, at 13, available at <http://www.aila.org>.

215 Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT’L L. 279, 280 (2000).

216 See 149 CONG. REC. S5730, 5731 (daily ed. 2003) (statement of Sen. Reid) (reading S. 986 into the record).

217 *Id.*

218 *Id.*

years, no Attorney General designated Colombia for TPS status, and no member of Congress introduced a bill for that purpose until August 1, 2002.<sup>219</sup> In the hands of politicians and policymakers, any TPS future for Colombians will depend upon whether U.S. legislators think that this status will have adverse effects on American laborers, open the border to refugees fleeing economic hardship instead of physical danger, or make the United States a “magnet” for floods of refugees that would cause difficulties for national security.<sup>220</sup> And, the same procedure will have to be followed with every group of modern refugees who face similar conflicts in their homelands. While Congress debates these issues year after year, more and more asylum-seekers will be sent back to the dangers of current conflicts in their native lands.

### B. *Recognizing a New World: A New Definition of “Refugee”*

TPS relieves refugees from having to meet the stringent standards imposed by immigration officials and judges, but on a more fundamental level, TPS merely “relieve[s] the *state* from granting asylum.”<sup>221</sup> The United States adopted a definition of “refugee” similar to that of the United Nations in 1980 in order to “harmonize U.S. law with its international obligations,”<sup>222</sup> but it has applied this definition blindly. When international law has moved “beyond the confines of the definition of a refugee found in . . . [the] 1967 Protocol, American legal scholarship often [remains] wedded to that definition.”<sup>223</sup> Immigration officials and judges have ignored the realities of present conflicts and have exhibited an unwillingness or inability to adapt our law to these conditions. The definition created in the 1960s and adopted by the United States for the world of 1980 is not protecting those who flee from today’s political violence—including Colombians.

As early as 1969—just two years after the U.N. Protocol of 1967—African nations realized that the definition adopted by the 1967 Protocol would not be adequate to protect their citizens. In an effort to

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219 S. 2856, 107th Cong. (2002).

220 All of these issues were considered by Congress in 1989 while legislators debated whether or not to create TPS status. See Ari Weitzhandler, *Temporary Protected Status: The Congressional Response to the Plight of Salvadoran Aliens*, 64 U. COLO. L. REV. 249, 262 (1993).

221 MUSALO ET AL., *supra* note 16, at 929.

222 *Id.* at 66 (citing Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 9 (1981)).

223 James A.R. Nafziger, *A Commentary on American Legal Scholarship Concerning the Admission of Migrants*, 17 U. MICH. J.L. REFORM 165, 174 (1984).

“‘Africanize’ the then existing international definition of refugee,”<sup>224</sup> the Organization of African Unity (OAU), a political umbrella organization, broadened its definition. The new definition of “refugee” included “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part o[r] the whole of his country of origin or nationality, is compelled to leave his [or her] place of habitual residence in order to seek refuge . . . .”<sup>225</sup> Thirty-five African countries have ratified this definition in the Convention on Refugee Problems in Africa.<sup>226</sup> The OAU’s intent to create a regional definition “ultimately predicted the course of the world’s refugee problems.”<sup>227</sup>

The OAU definition incorporates several modifications of the international and U.S. definition of “refugee” that acknowledge the circumstances surrounding modern conflicts throughout the world. First, the new definition explicitly recognizes that a government’s loss of authority and inability to control groups within its borders creates a situation for human rights abuses that are “no less wrong” than if the harm was inflicted “by the government of that state *per se*.”<sup>228</sup> The OAU definition also legitimizes flight from generalized political violence and extends protection to those who seek to escape serious disruptions of the public order in only part of the country—recognizing the reality that while a citizen may flee to a “safer” part of the country, that “‘safe’ region today may be dangerous tomorrow.”<sup>229</sup> Perhaps most importantly for Colombians and other similarly situated refugees, the OAU definition allows for the “possibility that the basis or rationale for [the persecution suffered] may be *indeterminate*.”<sup>230</sup> The definition focuses on the “compulsion” of the refugee to leave his or her place of residence and seek shelter, and not on the motivations of those who cause that individual to flee—which can be nearly impossible for an asylum-seeker to prove.

The OAU is not the only organization to develop a more modern definition of refugee. In 1984, ten Latin American countries banded together in the Cartagena Declaration to fashion a new definition of refugee that would address the increased violence throughout Central

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224 Isabelle R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 13 FORDHAM INT’L L.J. 35, 47 (1989).

225 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. 1, ¶ 2, 1001 U.N.T.S. 45, 47.

226 Gunning, *supra* note 224, at 46–47.

227 *Id.* at 48.

228 JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 17 (1991).

229 *Id.* at 19.

230 *Id.* at 18 (emphasis added).

and South America.<sup>231</sup> Adopted by the 1985 General Assembly of the Organization of American States (OAS), this new regional definition is similar to the OAU definition. It bestows additional protection to “persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed the public order.”<sup>232</sup> The OAS definition goes beyond the OAU definition to include those who seek to escape “massive violations of human rights,” but it retains the old requirement that applicants must prove they have been threatened.<sup>233</sup> This proof requirement allows the government to consider the dangers of social and political turmoil while limiting protection to those who can “show that there is some real risk of harm to persons *similarly situated* to the refugee claimant.”<sup>234</sup> The proof requirement, however, does *not* require that the refugee show individual particularized persecution.

Both the OAU and OAS definitions offer alternatives that take into account the current conditions that are forcing many refugees throughout the world—and Colombia—to flee their homes for shelter in a distant land. Instead of focusing on the identity and motives of the persecutor, these definitions place greater emphasis on the experience of the *persecuted*. A new definition for “refugee” would be a bold move for the United States, but it is a move that is necessary when the current law fails to recognize and adapt to changing international conditions.

#### CONCLUSION

American asylum law is ill suited to protect those who flee today’s world conflicts. Asylum-seekers in the United States not only find themselves at the whim of a politically motivated and discretionary system that allows an officer or judge to reject even the most deserving refugee, but they also face strict legal standards that force an applicant to fit unrealistic requirements given the characteristics of modern violence. U.S. asylum law demands that an asylum-seeker prove why she has been individually singled out for persecution on account of her

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231 Colloquium on the Int’l Protection of Refugees in Central America, Mexico, and Panama, *Cartagena Declaration on Refugees*, in 2 OFFICE OF THE U.N. HIGH COMM’R FOR REFUGEES, COLLECTION OF INTERNATIONAL INSTRUMENTS AND OTHER LEGAL TEXTS CONCERNING REFUGEES AND DISPLACED PERSONS 206, 208 (1995).

232 *Id.* at 208.

233 See HATHAWAY, *supra* note 228, at 50.

234 *Id.* at 51 (emphasis added).

political opinion. The law fails to recognize, however, that the actions or inactions of a civilian caught in the midst of generalized political violence can be construed as having a political significance for which there are very real—and sometimes deadly—consequences. The experience of Colombian asylum-seekers in the United States demonstrates that the current system of law is, in fact, flawed.

While TPS would provide welcome relief for many refugees in the United States who cannot meet the standards for asylum but genuinely fear for their lives if they are forced to return to their home countries, it is a highly political and protracted process whose effects are only temporary. In order to implement an effective and enduring asylum procedure that adequately addresses the realities of today's world, a new definition for "refugee" should be considered and implemented. The OAU and OAS definitions for "refugee" both offer alternatives that properly place their focus on the experience and genuine fear of the asylum-seeker—and place less emphasis on the identity and motives of the persecutor. The Refugee Act of 1980 was hailed as "one of the most important pieces of humanitarian legislation ever enacted by a United States Congress,"<sup>235</sup> but narrowly defined national interests and harsh outdated standards have produced a current system of law that fails to live up to that name. Only a decision by Congress to implement a new definition of "refugee" that recognizes the realities of modern world conflicts will suffice to protect today's genuine asylum-seekers. That truly would be "humanitarian."