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Colombia: The Ignored Humanitarian Crisis

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COMMENT

COLOMBIA: THE IGNORED HUMANITARIAN CRISIS

I. INTRODUCTION.....	440
II. FOR WHOM IS THE DOOR OPEN? WHOM DOES THE UNITED STATES CURRENTLY PROTECT WITH REFUGEE AND ASYLUM PROVISIONS?.....	441
A. OUTSIDE THE COUNTRY OF NATIONALITY.....	442
B. WELL-FOUNDED FEAR OF PERSECUTION.....	442
C. WELL-FOUNDED FEAR.....	442
D. GROUNDS OF PERSECUTION MOST APPLICABLE TO COLOMBIANS: PERSECUTION ON THE BASIS OF POLITICAL OPINION.....	443
III. WHY THE DOOR IS TOO NARROW FOR COLOMBIANS: ASYLUM LAWS THAT ADVERSELY AFFECT COLOMBIAN APPLICANTS.....	446
A. COLOMBIANS' DIFFICULTY IN MEETING THE GROUNDS OF PERSECUTION.....	446
1. COLOMBIA'S CIVIL WAR.....	447
A. THE GUERRILLAS.....	447
B. THE COLOMBIAN ARMY.....	449
C. PARAMILITARY GROUPS.....	450
B. DISQUALIFICATION OF GENERALIZED VIOLENCE & FEAR.....	453
C. FOREIGN POLICY AGENDA IN ASYLUM DECISION.....	454
IV. TEMPORARY SOLUTIONS: TEMPORARY PROTECTIVE STATUS.....	458
V. CONCLUSION.....	461

Give me your tired, your poor, huddled masses yearning to breathe free; the wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door.¹

I. INTRODUCTION

The right to asylum reflects one of the oldest themes of America's history welcoming homeless refugees to our shores. The United States has continually defined itself as a safe harbor, sensitive to the plight of those who flee their country when human rights are no longer respected. This alleged open door policy, however, carries with it the reality that certain criteria must be satisfied because refugee status cannot be afforded to all those who seek it. Thus, the Refugee Act of 1980 and the case law interpreting it attempt to define the width of the doorway to this country. Currently, the door is opened too narrowly, barring many Colombians from entering.

Imagine a place where death squads have destroyed towns and villages, killing innocent victims. Refugees, who have left their homes but cannot flee the country, search for safe havens, often stripped of identity and possessions. Many are women with children whose husbands were tortured, murdered, or disappeared. This is not Kosovo. This is Colombia. Little noticed by the outside world, a humanitarian disaster is underway in Colombia.

The internal displacement of Colombians is a long-standing and underreported crisis. Colombia's estimated 1 million internal refugee population in 1997 ranked below only Sudan, Angola and Afghanistan.² Since they cross no international borders, the plight of Colombia's internal refugees receives little media or international attention. The United States' policy toward Colombia, focused primarily, if not solely, on counter-narcotics efforts, has all too often ignored the human price of those internally displaced and those that muster the strength to reach

1. Emma Lazarus, inscription on the Statute of Liberty.

2. United States Department of State Country Conditions Report on Human Rights Practices for 1997. [hereinafter United States DOS Country Report 1997], at http://www.state.gov/www/global/human_rights/1997_hrp_report/colombia.html.

our shores seeking asylum.³

Though Kosovo helped focus the world's attention on human rights and refugee concerns, Colombia's crisis remains ignored. As the only Latin American country still caught in the torment of a civil war, Colombia should sharply stand out in a region now characterized by peaceful newfound democracies and developing economies.

II. FOR WHOM IS THE DOOR OPEN? WHOM DOES THE UNITED STATES CURRENTLY PROTECT WITH REFUGEE AND ASYLUM PROVISIONS?

To qualify for asylum in the United States, an alien must satisfy a set of basic criteria as set forth in the United States Immigration and Naturalization Act [INA].⁴ The individual must demonstrate that he or she fits within the statutory definition of a refugee and is eligible to apply for asylum.⁵

The United Nations Protocol defines "refugee" as a person who is unwilling or unable to return to her country of nationality based on a well-founded fear of persecution on account of one of five factors: 1) race, 2) religion, 3) nationality, 4) membership in a particular group or 5) political opinion.⁶ This definition was incorporated into the INA through the Refugee Act of 1980.⁷ Therefore, to qualify for protection under the INA, an individual must seek protection from outside her home country, and have a well-founded fear of persecution in the home country founded on

3. Proposed United States Aid Package to Colombia is primarily for weapons and training for the Colombian armed forces to counter narcotics. Elizabeth Becker, *Clinton to Offer Aid in Colombia Drug War*, The N.Y. Times, Jan. 11, 2000 at 1-2; Secretary of State Madeline K. Albright, Statement on United States Assistance to Colombia, (Jan. 11, 2000) (as released by the Office of Spokesman for United States Dept. of State); see also, United States Committee for Refugees, Country Report: Colombia 1999 [hereinafter USCR Country Report 1999](Reporting that during FY 1998, the United States only granted refugee status to 64 Colombians while denying 278)(last visited Jan. 1, 2000).

4. Immigration and Naturalization Act [hereinafter INA] 8 U.S.C. §1158(a) (1994). In order to be granted asylum the Attorney General must determine that an alien is a "refugee" as defined by 8 U.S.C. §1101 (a)(42)(A).

5. *Id.*

6. Convention Relating to the Status of Refugees, [hereinafter CRSR] July 28, 1951, 188 U.N.T.S. 150, 152.

7. Refugee Act of 1980, Pub.L. No. 96-212, 94 Stat. 102 (1980)(codified in 8 U.S.C. §1101-1158; the term refugee refers to someone outside the United States who meets the definition, while asylee refers to someone present in the United States who meets the definition.

the aforementioned five factors.⁸

A. Outside the country of nationality

An alien who applies for refugee status must do so from outside her home country.⁹ INA asylum relief is only limited to applicants inside the United States, within its borders, or at the ports of entry.¹⁰

B. Well-Founded Fear of Persecution

Persecution is a threat of unwarranted serious harm to life or freedom.¹¹ Serious physical harm generally constitutes persecution.¹² Punishment for failing to comply with ideas that are offensive to an individual's beliefs may amount to persecution. Persecution may also be the result of governmental action or action by a non-governmental entity that the government knowingly tolerates or is unable to control.¹³

C. Well-Founded Fear

A refugee's state of mind, corroborated by prevailing home-country conditions, will indicate whether he has a reasonable fear of persecution.¹⁴ Therefore, a reasonable fear must be demonstrated by subjective and objective evidence.¹⁵

The subjective component of a well-founded fear may arise

8. CRSR, *supra* note 6.

9. United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status [hereinafter UN Handbook] under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees ¶ 34 (Geneva, 2d ed. 1992) available at <http://www.unhcr.ch/refworld/legal/handbook/handeng/hbtoc.htm>.

10. They have been held not to apply to certain aliens intercepted on the high seas. See *Haitian Refugee Center v. Baker*, 502 U.S. 1084 (1992).

11. UN Handbook, paragraph 51. See also *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

12. *In re Kasinga*, Int. Dec. 3278 at 1 (BIA June 13, 1996)(holding that female genital mutilation is a form of persecution).

13. UN Handbook, *supra* note 9, ¶ 65. See *In re Kasinga*, Int. Dec. 3278 at 1 (BIA June 13, 1996)(granting asylum to a woman who belonged to a group which opposed female genital mutilation in a place where female genital mutilation was imposed and mandated).

14. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987).

15. UN Handbook, *supra* note 9, ¶ 38; see also, *Cardoza-Fonseca*, 480 U.S. at 430-31.

from the severe treatment of similarly situated persons.¹⁶ Persecution of an asylum applicant's family, associates, or other members of his race, religion, nationality, social or political group, may serve to show that the applicant may also become a victim of persecution, thereby indicating that the fear is well-founded.¹⁷

In addition, as the U.N. Handbook states, "[t]he applicant's statements cannot . . . be considered in the abstract, and must be viewed in the context of the relevant background. . . ."¹⁸ Objective evidence, such as evidence of general country conditions, including public records, newspaper articles and governmental information, is also important to support a claim for refugee status.¹⁹

D. Grounds of Persecution Most Applicable to Colombians: Persecution on the Basis of Political Opinion

Political opinion, like the other grounds of persecution, is not defined by statute. Consequently, courts have drafted their own interpretations of the elements necessary to demonstrate persecution on this ground.²⁰ Generally, a political opinion is a viewpoint held by an individual that the persecutor seeks to overcome.²¹ The persecutor must view the individual's opinion as a criticism or attack.²² If the persecutor knows the alien has such a view, or imputes such a view to the alien, then he or she may have a well-founded fear of persecution based on political opinion. One may express political opinion through actions as well as through words.

The Supreme Court in 1992, in *INS v. Elias-Zacarias*,

16. UN Handbook, *supra* note 9, ¶ 43.

17. *Id.*

18. UN Handbook, *supra* note 9, ¶ 42.

19. *See Singh v. Ilchert*, 63 F.3d 1501, 1506-09 (9th Cir. 1995)(noting that State Department's Country Reports on Human Rights Practices and Amnesty International Reports presented by the asylum applicant were entitled to substantial weight). The laws of the country of origin and how they are applied may also be useful, especially for trying to show that punishment under a foreign judicial system constitutes persecution or that persecution is established by governmental inaction or impunity. *See Id.* at n. 3.

20. *Sanchez-Trujillo*, 801 F.2d 1571, 1575-77 (9th Cir. 1986).

21. *Matter of Sanchez & Escobar*, 19 I.& N. Dec. 276, 284 (BIA 1985).

22. UN Handbook, *supra* note 9, ¶ 80.

however, narrowly construed the terms "persecution on account of political opinion."²³ The Supreme Court held that a guerrilla organization's coercion does not necessarily constitute persecution for asylum purposes because an alien's decision to remain neutral amidst a civil strife does not constitute a political opinion.²⁴ In that case, Jairo Elias-Zacarias testified during removal proceedings that he was subject to persecution if he returned to his native Guatemala. He described how guerrillas forced their way into his home and mandated that he and his parents join their organization. Elias-Zacarias and his family refused, and the guerrillas promised to return. Elias-Zacarias testified that he believed joining the organization would subject him to retaliation by the government.

In his opinion for the Court, Justice Scalia, reviewed the applicable standards for granting asylum. He noted, first, that the fear of persecution had to be such that a reasonable fact-finder would conclude that it existed.²⁵ Elias-Zacarias argued that failure to join the guerrillas was itself tantamount to expressing a political opinion. The Court was not persuaded, holding instead that Elias-Zacarias had failed to show evidence which compelled a reversal of the BIA decision.²⁶

Justice Stevens, in his dissent, stated that a political opinion could be expressed negatively as well as affirmatively.²⁷ In doing so, he espoused the prevailing Ninth Circuit case law at the time of the Supreme Court's decision.

In 1984, before the *Elias-Zacarias* Supreme Court decision, the Ninth Circuit in *Bolanos-Hernandez v. INS* held that refusal to join a guerrilla party because of a desire to be neutral in a civil war was an expression of political opinion, entitling the alien to political asylum.²⁸ In *Bolanos-Hernandez*, the Ninth Circuit reasoned that:

[w]hen a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one. A rule that one must identify

23. *Elias-Zacarias*, 502 U.S. 478 (1992).

24. *Id.* at 483.

25. *Id.* at 483-84.

26. *Id.* at 483-84.

27. *Id.* at 486.

28. *Bolanos-Hernandez*, 767 F.2d 1277, 1286 (9th Cir. 1984).

with one of two dominant warring political factions in order to possess a political opinion, when many persons may, in fact, be opposed to the views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980 – to provide protection to all victims of persecution regardless of ideology.²⁹

For neutrality to constitute a political opinion, an alien must have firmly established his neutrality by conduct or by speech.³⁰ Additionally, an alien must show that his wish to remain neutral would cause persecution by offering, for instance, proof of threats.³¹ Moreover, the Ninth Circuit held that “persecution on account of political opinion [can exist] where one party to a conflict insist[s] to the victim that the victim was aligned with the other side.”³²

The Ninth Circuit has recognized neutrality as a political opinion.³³ Other circuits, however, have been reluctant to adopt the neutrality doctrine. The First, Fourth and Eleventh Circuits have at times suggested that neutrality can constitute a political opinion yet none have granted asylum on this basis.³⁴ These

29. *Id.*

30. *Arriaga-Barrientos v. INS*, 925 F.2d 1177, 1179-80 (9th Cir. 1991).

31. *Id.*

32. *Reyes-Guerrero v. INS*, 192 F.3d 1241, 1245 (9th Cir. 1999)(citing *Singh v. Iichert*, 63 F.3d 1501 (9th Cir. 1995)); *see also* *Blanco-Lopez v. INS*, 858 F.2d 531, 533-34 (9th Cir. 1988)(holding that death threats by people on one side of a civil war against a person suspected of being on the other side constitutes persecution on account of political opinion); *Borja v. INS*, 175 F.3d 732, 736 (9th Cir. 1999)(holding that refusal to join guerrillas because they kill people, including women and children, constitutes political opinion); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987)(holding that a belief that Armed Forces are responsible for lawlessness, rape, torture and murder constitutes a political opinion); UN Handbook, *supra* note 9, ¶ 80 (stating that a government's persecution of persons to whom it attributes certain political opinions is persecution on account of political opinion.)

33. *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989); *Turcios v. INS*, 821 F.2d 1396 (9th Cir. 1987); *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985).

34. *Novoa-Umania v. INS*, 896 F.2d 1, 3 (1st Cir. 1990)(describing three situations in which neutrality would constitute a political opinion: 1) if the persecutor has targeted the alien out of dislike for neutrals; 2) if the persecutor has targeted the alien because the alien refused to adopt the persecutor's political opinion; or, 3) if the persecutor has targeted the alien because the alien holds the political opinion of an adversary, but upholding BIA denial of asylum.); *M.A. v. INS*, 899 F.2d 304 (4th Cir. 1990)(declaring the issue unclear and refusing to adopt the neutrality doctrine); *Perlera-Escobar v. INS*, 894 F.2d 1292 (11th Cir. 1990)(denying asylum on the basis of neutrality reasoning that interpretation of political opinion is a political question and stating its concern that the Ninth Circuit's view on neutrality as a political opinion in the context of civil war would “create a sinkhole that would swallow the rule.” *Id.* at 1298-99.

circuits more closely follow the Supreme Court's suggestion in *Elias-Zacarias* that political neutrality is not an expression of a political opinion for asylum purposes.³⁵ The Ninth Circuit, however, has prioritized the goals of the refugee statute above the narrow interpretations given to it by the Supreme Court.

III. WHY THE DOOR IS TOO NARROW FOR COLOMBIANS: ASYLUM LAWS THAT ADVERSELY AFFECT COLOMBIAN APPLICANTS

Refugee status represents a privileged form of migration. In the United States, not every alien who meets the definition of refugee is entitled to protection in the form of asylum.³⁶ Colombians have an uphill battle asking for political asylum for primarily three reasons:

A. *Colombians' Difficulty in Meeting the Grounds of Persecution*

Due to the violence in Colombia, many asylum applicants from that country claim persecution on account of political opinion.³⁷ However, as the low asylum rates for Colombians indicate, under the current system few Colombians can successfully prove persecution on account of political opinion.³⁸ The main reason for this is the Supreme Court's refusal to recognize political neutrality as an expression of political opinion for asylum purposes.

As mentioned above, due to *Elias-Zacarias* the existing Supreme Court precedent dictates that refusal to join a guerrilla subversive group that is coercing participation does not

35. See *Elias-Zacarias*, 508 U.S. at 482.

36. Because an alien who satisfies the definition of asylum must also be granted favorable discretion by an immigration judge before relief can be granted. See *INS v. Cardoza-Fonesca*, 480 U.S. at 430-31.

37. Yves Colon, *Miami: A Refuge From Violence: Growing Number of Middle Class Colombians*, *The Miami Herald*, May 23, 1999 at 2B.

38. *Id.* at 1B (stating that in 1996, for example, 250 requests for political asylum were filed by Colombians and only 92 were granted; According to United States Rep. Lincoln Diaz-Balart, Congressional Research Service data shows that countries such as Afghanistan are generating approval rates two and three times that of Colombia); USCR Country Report, *supra* note 3, (noting that during FY 1998, the United States granted refugee status to only 64 Colombians, denied 278 and at year's end was considering the claims of 745 others).

necessarily constitute a political opinion.³⁹ The Supreme Court held in *Elias-Zacarias* that guerrilla organization's coercion does not necessarily constitute persecution on account of political opinion for asylum purposes. This prohibits many Colombians from being awarded the asylum protection they so desperately need. Unlike the Ninth Circuit, the Supreme Court fails to recognize that in countries like Colombia failure to join the guerrillas is equivalent to expressing a political opinion against them.

1. Colombia's Civil War

Colombia is essentially a democracy under attack.⁴⁰ The principal participants in this civil strife include the Colombian armed forces, the right-wing paramilitary groups and the left-wing Marxist guerrilla groups. According to the United States Department of State's 1998 Country Report on Human Rights in Colombia, "paramilitary groups murdered, tortured and threatened civilians *suspected* of sympathizing with guerrillas in an orchestrated campaign. . . ."⁴¹ Similarly, guerrillas counterattacked the paramilitary by systematically murdering, torturing and threatening civilians who were *merely suspected* of supporting the paramilitary.⁴²

a. *The Guerillas*

The United States Department of State recognizes three distinct communist rebel guerrilla armies – the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia – FARC*), the National Liberation Army (*Ejercito de Liberacion Nacional – ELN*) and the Popular Liberation Army

39. See *Elias-Zacarias* 502 U.S. at 478.

40. United States Department of State, Colombia Country Report on Human Rights Practices for 1998 [hereinafter United States DOS Country Report 1998](stating that Colombia's government continues to face serious challenges to its control over the national territory)(last visited Jan. 1, 2000); John P. Leonard, Deputy Assistant Secretary for Western Hemisphere Affairs, Remarks before the Subcommittee on Western Hemisphere, Peace Corps, Narcotics and Terrorism, Senate Committee on Foreign Relations, Washington D.C. (March 24, 1999)(noting that Secretary Madeline Albright identified Colombia as one of the democracies most under attack).

41. United States DOS Country Report 1998, *supra* note 40.

42. USCR Country Report 1999, *supra* note 3; United States DOS Country Report 1998, *supra* note 40.

(*Ejercito Popular de Liberacion - EPL*) – “which reportedly command from 10,000 to 15,000 full-time guerrillas, operating on more than 100 fronts in an estimated 30 of the nation’s 32 departments.”⁴³ It is estimated that guerrilla fighters in effect control at least 40% of Colombia’s territory.⁴⁴ Their strategies or tactics in attaining control of the country include: extra-judicial killings, kidnapping, torture, targeting of civilian populations and forced recruitment.⁴⁵ For example, on October 18, 1998, just after midnight, a guerrilla group bombed a pipeline near Machuca, Antioquia.⁴⁶ The oil and gases released reached the nearby population where many residents depended on open flames for light and cooking. The mixture ignited, engulfing sixty-four dwellings and the sleeping families inside. Seventy-three people, among them thirty-six children, were killed.⁴⁷

FARC – Founded in 1966 by Manuel Velez and other members of the Communist Party’s central committee, it is Latin America’s largest and one of the most violent guerrilla armies.⁴⁸ Illustrative of their operations was the major attack launched against suspected paramilitary civilian supporters on December 28, 1998. The *FARC* guerrillas tortured, decapitated, dismembered and castrated the men, and shot the women and infants.⁴⁹

ELN – Established in 1965 under the leadership of Fabio Vasquez Castano, it adopted a doctrine of insurrection inspired by the Cuban Revolution.⁵⁰ Its most famous member was Camilo Torres, a Catholic priest who advocated a Christian Revolution to overthrow the existing government and was killed in a clash between *ELN* and the Colombian army in 1966.⁵¹ Manuel Perez currently leads the group.⁵²

EPL – It was founded in 1968 by the Colombian Communist

43. United Nations High Commissioner for Refugees, Background Paper on Refugees and Asylum Seekers from Colombia, March 1998 [hereinafter UNHCR Background Paper] available at <http://www.unhcr.ch/refworld/country/cdr/cdrcol.htm>.

44. USCR Country Report 1999, *supra* note 3.

45. United States DOS Country Report 1998, *supra* note 40.

46. Human Rights Watch: Colombia Report 1999 [hereinafter Human Rights Watch] available at <http://www.igc.apc.org/csn/199912/hrwcolombia1999.html>.

47. *Id.*

48. UNHCR Background Paper, *supra* note 44.

49. United States DOS Country Report 1998, *supra* note 40.

50. UNHCR Background Paper, *supra* note 44.

51. *Id.*

52. *Id.*

Party – Marxist-Lennist.⁵³ In January 1991, it signed a peace agreement with the Government of then-President Cesar Gaviria, in exchange for two seats in the Constituent Assembly.⁵⁴ By March of that year, 2,000 EPL members had handed over their weapons.⁵⁵ Subsequently, the group joined the political mainstream as the Hope, Peace and Liberty Party.⁵⁶ One dissident faction, however, remains. It retained the original name of the group and continues to terrorize the Colombian people in a plight to attain control, achieve economical reform and draw attention to the exploitation of Colombia's natural resources by foreign companies.⁵⁷

b. The Colombian Army

Charged with the debilitating task of ending the communist guerrilla insurrection and the right-wing paramilitary, the Colombian armed forces is composed of 146,300 soldiers, of whom 121,000 are in the Army, 27,000 in the Navy, and 7,300 in Air Force.⁵⁸ According to UN resources, the Army has created three specialized counter-insurgency brigades, known as Mobile Brigades, to counter guerilla offensives in different parts of the country.⁵⁹

The army itself, however, commits severe human rights atrocities in collaboration with the paramilitary groups since both have the same enemy – the guerrillas.⁶⁰ The army routinely assists the paramilitary in massacring the guerrillas and those civilians whom they believe to be affiliated with the guerrillas.⁶¹ The United States Department of State Human Rights Report

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. United States DOS Country Report 1998, *supra* note 40.

61. For instance, government investigators detailed direct collaboration between the Medellin-based Fourth Army Brigade and paramilitaries commanded by Carlos Castano. Repeatedly, paramilitaries killed those suspected of supporting guerrillas, then delivered the corpses to the army. In a process known as "legalization," the army then claimed the dead as guerrillas killed in combat while paramilitaries received their pay in weapons. See Human Rights Watch, *supra* note 47.

stated that at times the individual commanders and troops at local levels armed, coordinated action with, or shared intelligence with paramilitary groups; the Colombian armed forces condoned and directly assisted the paramilitaries. In May 1998, for example, the army formally disbanded the 20th Brigade (military intelligence), which had an egregious human rights record including the targeted killing of civilians and collaboration with the paramilitary.⁶²

c. Paramilitary Groups

Army-backed paramilitary groups are the third participants in this bloody civil war. Declared illegal in 1989, they, like the Colombian military, attack the guerrillas and anyone they believe to be tied to the guerrillas.⁶³ Despite reassurances and promises by successive Colombian governments to dismantle paramilitary forces, political killings and other human rights violations by these groups have increased dramatically.⁶⁴ "Strong evidence of continued Colombian armed forces' support for paramilitary organizations has emerged in official and independent investigations."⁶⁵ Often, they are illegally armed and trained by the Colombian Army brigade commanders. These paramilitary groups have employed a strategy of systematic terror, violence and intimidation against the civilian population in areas of guerrilla presence as a means of securing control of territory through the elimination of the guerrillas' real or perceived civilian support base.

The paramilitary groups have terrorized rural Colombia for more than 15 years, torturing, killing and then disappearing with virtual impunity.⁶⁶ Paramilitary groups were said to be responsible for 69% of all politically motivated extra-judicial killings committed during the first nine-months of 1997.⁶⁷ In 1999, paramilitaries were considered responsible for 78% of the total number of human rights and international humanitarian

62. United States DOS Country Report 1998, *supra* note 40.

63. Amnesty International Report, *Colombia: Just What Do We Have to Do to Stay Alive?*, AMR 23/48/97, 7 (October 1997)[hereinafter Amnesty Int'l. Report].

64. *Id.*

65. *Id.*

66. UNHCR Background Paper, *supra* note 44. (relying on Amnesty International data).

67. United States DOS Country Report 1998, *supra* note 40.

law violations.⁶⁸ Their victims usually include unarmed non-combatant civilians, such as teachers, labor leaders, town mayors, community activists, members of indigenous communities and peasants.⁶⁹ These people become targets for their ties or for their *perceived ties* to the guerrillas.⁷⁰ For instance, on May 16, 1998, armed paramilitary members entered the town of Barrancabermeja, Santander Department, and rounded up young adults and killed those people whom they suspected of sympathizing with the guerrilla.⁷¹

Paramilitary killings are extremely brutal. For example, in January 1999, paramilitaries reportedly dragged twenty-seven worshipers out of a church in Magdalena, then riddled their bodies with bullets.⁷² That same week, authorities registered over one hundred paramilitary killings, who mutilated their victims and dumped bodies into rivers in order to destroy evidence.⁷³

The United States Supreme Court follows a neutrality doctrine stating that the decision to remain neutral is not a political opinion. However, in a hostile civil war, where the participants are strategically targeting to torture, murder and threaten civilians merely imputed with a particular political opinion, i.e. siding with either the guerrilla or paramilitary/government, this is a fiction. The forces in conflict in Colombia do not recognize the neutrality of civilians. People have been drawn into the conflict against their will because both the guerrillas and government forces with their paramilitary auxiliaries demand support and collaboration. Giving support to one side of the hostility, even unwillingly, is frequently followed by reprisals from the opposing side. Refusing to support one side is automatically interpreted as an affiliation to the opposition.

Civilians in communities overrun by paramilitaries or guerrillas are given two stark choices: they are told they can either cooperate or die. Cooperation means not only surrendering the community's life to total control by the armed group, but also

68. Human Rights Watch, *supra* note 47.

69. UNHCR Background Paper, *supra* note 44.

70. *Id.*

71. United States DOS Country Report 1998, *supra* note 40. Just twelve days before the Barrancabermeja round-up, paramilitaries entered the town of Puerto Alvira and murdered residents whom they suspected of being guerrilla sympathizers. *Id.*

72. Human Rights Watch, *supra* note 47.

73. *Id.*

paying money to equip and arm the insurgency.⁷⁴ Many people are forced to join these groups and to accompany them on patrols, where they are usually compelled to witness and commit human rights violations against non-combatant civilians. Young children have reportedly been "recruited" to patrol with the armed insurgency.⁷⁵ As the paramilitary and guerrilla offensives extend throughout the country, an increasing number of Colombians are forced to flee in order to escape the growing violence.

Nevertheless, Colombians who flee to the United States and seek political asylum are prejudiced by the Supreme Court's legal myth that neutrality does not constitute a political opinion. This precedent debilitates the United States' commitment to human rights obligations, agreed upon with the signing of the 1967 Protocol.⁷⁶ On the other hand, the Ninth Circuit precedent, espousing the political neutrality and imputed political belief standards for determining the grounds for persecution on the basis of political opinion, relies heavily upon international law. This demonstrates a willingness by the Ninth Circuit to obligate the United States to the Protocol it signed in 1967.⁷⁷

Unfortunately, the Supreme Court has authority over the Ninth Circuit, and it will most likely attempt to further define the political opinion requirement, creating new tests and rigid standards with which circuits must comply. In the process, thousands of Colombian refugees will be sent back to the hands of their oppressors to be abused, tortured, and murdered.

74. United States DOS Country Report 1998, *supra* note 40.

75. *Id.* (noting that the Colombian army estimated that 3,000 children were guerrilla members).

76. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 6225.

77. The Handbook on Procedures and Criteria for Determining Refugee Status in the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224; *Canas-Segovia v. INS*, 970 F.2d 599 (9th Cir. 1992) (holding that a political belief imputed to the applicant by his persecutor is grounds for political asylum). In that case, the Ninth Circuit utilized the "imputed political belief" standard in *Barraza-Rivera v. INS*, 913 F.2d 1443, 1449 (9th Cir. 1990), where it held that punishment based on objection to participation in inhumane acts as part of forced military service is persecution within the meaning of the Refugee Act. The Ninth Circuit relied on the UN Handbook. The court found ample support in paragraph 167 of the Handbook, where it stated that punishment for desertion or draft evasion, in itself, does not constitute persecution on account of political opinion, but paragraph 169 provides that disproportionately severe punishment on account of a political opinion does constitute persecution. Importantly, the Handbook advises that an alien may qualify for refugee status after either desertion or draft evasion if he or she can show that military service would have required the alien to engage in acts contrary to the basic rules of human conduct. The Handbook became the Ninth Circuit's preferred resource for applying international law to the asylum provisions of the INA.

B. DISQUALIFICATION OF GENERALIZED VIOLENCE & FEAR

Second, the inquiry's specific focus on *individualized* persecution based on a particular factor has denied protection to many Colombians who fear situations of rampant violence in their home country. Colombia's situation exemplifies the difficulty people have in satisfying the claim of individually directed persecution in the context of a civil war. Individuals who are "war refugees" fleeing armed conflict are not entitled to protection as refugees in the United States.⁷⁸

Situations of general violence, while perhaps more perilous for the individual, nonetheless make it more difficult to meet the standard for political asylum. "If there is random violence in a country, such as civil war, it is of little consolation to an individual struck by a stray bullet that the person who pulled the trigger was aiming at someone else."⁷⁹ The Colombian situation reveals how a narrow construction of an already narrow definition of refugee leaves individuals who cannot satisfy the "individually targeted" requirement without any statutory right to asylum.⁸⁰ The case of *Martinez-Romero v. INS* addresses this point directly.⁸¹ In upholding the BIA's denial of asylum, the court stated:

If we were to agree with the petitioner's contention that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country in some way, to stay here indefinitely.⁸²

This case illustrates how asylum law is deficient in protecting individuals who face extremely real dangers if

78. *Matter of Medina*, 19 I. & N. Dec. 734 (BIA 1988) (acknowledging that although there is a growing international practice of granting persons fleeing armed conflict temporary refuge, this is not done on the basis of international law, and thus, the practice is not binding on the United States).

79. H.R. Rep. No. 100-627, 100th Cong., 2d Sess. at 5 (1988).

80. *Temporary Safe Haven Act of 1987*: Hearing on H.R.2922 Before the Subcomm. on Immigration, Refugees and Int'l Law, 100th Cong., 2d Sess. 70-71 (1988) (statement of Arthur Helton, Director, Political Asylum Project, Lawyers Committee for Human Rights). "An alien must satisfy the statutory definition of refugee in order to be eligible for asylum.... Aliens who do not satisfy the statutory definition of refugee are therefore not legally entitled to any protection in the United States."

81. *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982).

82. *Id.*

returned to their homeland. The United States, however, is far more amenable to individualized persecution, although the fear of generalized persecution is just as compelling. The common thread in all such cases is the fear of immediate violence.⁸³

However, Colombian civilians, unlike most in a civil war setting, are not collateral victims to the widespread violence in their country. They are being targeted; their deaths and torture are part of a strategic plan to eliminate civilian support for the opposing armed force. Therefore, although traditionally mere victims of civil war do not meet the definition of refugee, a vast number of Colombian civilians are, in fact, being individually targeted for persecution.

In Colombia, clashes between armed groups are rare.⁸⁴ In the majority of cases, paramilitary forces and the guerrillas have directed their attacks against sectors of the civilian population believed to support rival armed groups. They are not collateral victims and the United States should more readily recognize this, and not treat them as such, in order to afford Colombians the asylum protection that they need.⁸⁵

C. *Foreign Policy Agenda in Asylum Decision*

Third, the burden to attain asylum is especially difficult for those aliens from nations with a favorable relationship with the United States, nations which the United States would not want to label as "persecuting."

One commentator suggests that the problem with a standard based on a "well-founded fear of persecution" is that it enhances the willingness to grant refugee status and asylum protection to persons in flight from an unfriendly state.⁸⁶ Therefore,

83. Thomas Alexander Aleinikoff, Et.al., *Immigration And Citizenship: Process and Policy* (4th ed. 1998) (citing from Aristide Zolberg, Astri Suhrke, & Sergio Aguayo, *Escape From Violence: Conflict and the Refugee Crisis in the Developing World* 269 (1989)).

84. Amnesty Int'l. Report, *supra* note 64, at 11.

85. *Id.*

86. James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L. L.J. 129, 168-169 (1990):

It is unlikely that a state will grant refugee status to the nationals of a compatible state in other than the most patently egregious circumstances, because the threshold of

governments more frequently recognize the existence of persecution only in cases in which their own policies or political interests are not prejudiced by such recognition.⁸⁷

Inherent in a determination of "persecution" is some judgment regarding the legitimacy of the government. As a result, claims of genuine well-founded fear of persecution are evaluated with United States political objectives, sometimes over the protection of the individual. For instance, in the case of El Salvador, the United States government was reluctant for many years to acknowledge the dangerous conditions in the country. The Reagan Administration's support for El Salvador's government caused a resistance to grant political asylum to Salvadorans who faced persecution by their government.⁸⁸

An illustrative example of the disparate treatment is a comparison of claims for political asylum by Salvadorans and Iranians. In the case of a Salvadoran who feared persecution from both the insurgent guerrilla organization because of his refusal to join it, and from the Salvadoran government who believed he had joined the guerrilla organization, the BIA held that the guerrilla organization had a right to enforce established rules of military conduct, including a right to punish violators who resist induction.⁸⁹ The BIA also held that the government had a right to seek out that individual to determine if he was truly part of this insurgent organization.⁹⁰

Finally, the BIA found that although the individual was targeted by both groups, there was no proof that the individual's political opinion was the motivating factor, and thus it did not constitute persecution on account of political opinion.⁹¹ In contrast, when cases involved Iranian aliens, political asylum

tolerance will normally rise as a function of the general esteem in which the state of origin is held as well as its political importance.

Id. at 169.

87. *Id.*

88. See, e.g., Robert Rubin, Ten Years After: Vindication for Salvadorans and New Promises for Safe Haven and Refugee Protection, 68 Interpreter Releases 97, 98 (1991). In response to the low asylum approval rates for Salvadorans, the American Baptist Church brought a class action suit on behalf of Salvadorans alleging bias in the INS adjudication process. They were granted a settlement entitling them to de novo asylum interviews. American Baptist Church v. Thornburgh, 760 F.Supp. 796 (N.D. Cal. 1991).

89. *In re Matter of Maldonado Cruz*, 19 I. & N. Dec. 509 (BIA 1988), rev'd 883 F.2d 788 (9th Cir. 1989); see also, *Elias-Zacarias*, 502 U.S. at 482 (1992).

90. *In re Matter of Maldonado Cruz*, 19 I. & N. Dec. at 518.

91. *Id.*

claims were upheld with little proof of the individual's political activity. In these cases, the BIA did not even mention this government's right to enforce their laws against those in opposition. Instead, one decision merely stated that "[t]he Service does not dispute that opponents of the Ayatollah Khomeini are often persecuted for their opposition."⁹²

This comparison demonstrates that individual claims of asylum are influenced by the relationship of the United States with the nations involved. This is despite the passage of the Refugee Act of 1980, which was intended to deplete asylum adjudication of foreign policy consideration.⁹³ Therefore, the bias in foreign policy for or against a particular nation may make the threat of persecution seem less grave in countries to which the United States is more favorably disposed, and more serious in countries to which the United States has a more hostile attitude.⁹⁴

The United States, similarly, does not want to label Colombia as persecuting for reasons that advance the political agenda of the United States. The United States policy towards Colombia focuses mainly on counter-narcotics efforts and all too often forgets the Colombian people. Illustrative of this is President Clinton's \$1.28 billion proposed aid package to Colombia, the largest part of which would be spent on military hardware, to train and equip the Colombian army in order to more effectively fight against narcotic traders.⁹⁵ Such a package would make Colombia the third largest recipient of United States assistance in the hemisphere and the third after Israel and Egypt, globally.⁹⁶ Most of the money for this proposal would be under the direction of the State Department.⁹⁷ The same State Department that declared in its Human Rights Report for Colombia that:

The Government's human rights record remained

92. *Matter of Mogharrabi*, Interim Dec. 3028, slip op. (BIA June 12, 1987).

93. David A. Martin, *Reforming Asylum Adjudication: On Navigation the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247, 1262 (1990)(Congress replaced refugee provisions that made specific ideological references with a more politically neutral definition).

94. *Id.* at 1264.

95. See Becker, *supra* note 3.

96. Fact Sheet released by the Bureau for International Narcotics and Law Enforcement Affairs, April 23, 1999.

97. *Id.*

poor . . . Government forces continued to commit serious abuses, including extrajudicial killings The authorities rarely brought officers of the security forces and the police charged with human rights offenses to justice . . . [and][a]t times the Colombian security forces collaborated with the paramilitary groups that committed abuses.⁹⁸

In essence, the United States is proposing to provide the same army that aided the paramilitary, which committed 78% of the total number of human rights and international humanitarian law in 1999,⁹⁹ with billions of dollars worth of weapons. It seems ludicrous that the United States would offer a country as violent as Colombia more guns and ammunition with which to fuel more violence and death.

United States foreign policy affects the way asylum decisions are made because the United States does not want to label the very government it is funding with billions of dollars as “persecuting.” However, the stark reality is that the Colombian government’s army and police commit numerous human rights violations, including social cleansing.¹⁰⁰ Moreover, when military officers were tried, convicted and sentenced for human rights violations, they generally did not serve out their prison terms and in some cases even remained on active military duty; Colombia’s impunity rate is 97-98% for all crimes.¹⁰¹

The U.S. foreign policy agenda centers on the belief that Colombia’s violence is due to a drug war. Consequently, asylum decisions do not adequately reflect the political violence in Colombia, which hinders the plight of those victims seeking asylum on the basis of political opinion. The war in Colombia is not about drugs; the participants may economically benefit from drug money, but it is not a drug war. The guerrilla groups and the paramilitaries have a political agenda. According to the United States Ambassador to Colombia, “[t]he guerrilla groups in effect are arguing that Colombia has had an unjust society, has had insufficient economic development especially in rural

98. United States DOS Country Report 1998, *supra* note 40.

99. Human Rights Watch, *supra* note 47.

100. *Id.*

101. United States DOS Country Report 1998, *supra* note 40.

areas."¹⁰² The paramilitaries are a reaction against the guerrilla; they developed to protect their property against guerrilla attacks.¹⁰³ All of the paramilitary groups state that their actions are politically justified.¹⁰⁴ However, unlike guerrilla movements elsewhere in the world that have a certain degree of public support, documented scientific polls indicate that only about 4% of the Colombian population support the guerrillas.¹⁰⁵

As long as the United States continues to ignore the political nature of the war in Colombia and continues to call it a narco-war, thereby allowing it to fight and fund its own war on drugs, thousands of Colombians will be deprived of political asylum.

IV. TEMPORARY SOLUTIONS: TEMPORARY PROTECTIVE STATUS

The Temporary Protective Status (TPS) statute is an important recognition of the need for legislation to protect those individuals who fall through the gap between immigration policy and refugee law. As part of the Immigration Act of 1990,¹⁰⁶ Congress intended to provide for the temporary protection of aliens present in the United States who have been forced to flee certain dangerous conditions in their homeland.¹⁰⁷ The provision directed at accomplishing this protection is Section 1254(a), entitled "Temporary Protected Status."¹⁰⁸ This section authorizes the Attorney General to confer temporary protective status on nationals of a foreign state who are experiencing dangerous conditions and allows them to remain in the United States until conditions in their country improve.¹⁰⁹ The Attorney General may designate the nationals of any foreign state as temporarily protected if the Attorney General finds the following: 1) such foreign state is experiencing civil strife – ongoing armed conflict

102. Curtis Warren Kamman, United States Ambassador to Colombia, *Colombia: What Are We Getting Into?*, Presentation for the Secretary's Open Forum Conversation Series, (Nov. 1, 1999) at http://www.state.gov/www/dept/openforum/proceedings/991101_kamman.html.

103. UNHCR Background Paper, *supra* note 44.

104. Kamman, *supra* note 103.

105. *Id.*

106. Immigration Act of 1990, Pub.L. No. 101-649, 104 Stat. 4978.

107. INA 8 U.S.C. § 1254(a)(1994).

108. *Id.*

109. *Id.* at § 1254(a)(1)(A).

within the state, environmental disaster, or other extraordinary conditions; 2) requiring persons to return would pose a serious threat to their safety; and 3) such a finding would not be contrary to our national interest.¹¹⁰

“The United States Committee for Refugees (USCR) has called on the United States to provide TPS to Colombians residing in the United States.”¹¹¹ USCR senior policy analyst, Hiram A. Ruiz, stated that “the violence has reached into previously unaffected areas of the country, including urban areas. The number of civilians killed has increased, and the number of civilians displaced as a result of the violence has skyrocketed.”¹¹² He noted that in essence “no region of the country is untouched by the violence and all civilians are potential targets of the violence. Many people fear for their lives on a daily basis.”¹¹³ USCR estimates that more than 1.2 million Colombians have been forced to flee their homes due to continued armed conflict.¹¹⁴ In 1998, 300,000 people, mainly women and children, were newly displaced, and 50,000 more were displaced in the first three months of 1999.¹¹⁵ In a letter to Immigration and Naturalization Services Commissioner Doris Meissner, USCR stated:

Given the escalation of conflict in Colombia and the Colombian government’s inability to protect civilians from danger, we believe it is wrong to return Colombian nationals now residing in the United States who fear for their lives should they have to return to Colombia. We therefore encourage you to urge the Attorney General to designate national and habitual residents of Colombia for TPS.¹¹⁶

Further urges for Temporary Protective Status for Colombians were heard on July 20, 1999, when thousands of Colombians

110. *Id.* at § 1254(a)(b)(1)(A-C).

111. United States Committee for Refugees Calls on United States Government to provide Temporary Protection for Colombians, at http://www.refugees.org/news/press_releases/1999/072999.htm.

112. *Id.*

113. *Id.*

114. *Id.*

115. USCR Country Report, *supra* note 3.

116. *Id.*

rallied in Miami and other United States cities calling for TPS.¹¹⁷

TPS is an ideal "temporary" solution to the ignored humanitarian crisis in Colombia for two reasons. First, Congress created this mechanism precisely to respond to such situations of wide-spread violence to protect those aliens whose native countries were torn with strife, yet who did not qualify as refugees.¹¹⁸ Second, TPS rectifies the problem of apparent negative judgments against the United States' allies by sending a message that the government's purpose in extending TPS to foreign nationals is not meant to be a negative political judgment on the home country is government. It does not condemn the government as immoral or acting inhumanely. It proposes that there may be circumstances where their government may be the victim, causing these problems. This is an important consideration because foreign policy taints asylum decisions, and the United States is hesitant to label a friendly state as a "persecutor." The customary norm of temporary refuge is one that merely responds to the basic human need for protection that cannot be afforded by the home country because of its preoccupation with civil unrest.¹¹⁹ It is not meant as a sanction for a nation's unethical behavior.¹²⁰

Therefore, just as TPS was awarded to Nicaraguans because of the civil war that plagued their country, Colombians should be granted TPS for the civil war that has plagued their country for 40 years. The United States has ignored the humanitarian crisis in Colombia and its civilian-victims for too long. Granting TPS to Colombians will not only extend protection to thousands of individuals, it will also send a clear message that the United States recognizes the severity of the crisis in Colombia.

117. Sonji Jacobs, *Thousands Demand Protected Status for Colombians*, The Miami Herald, July 21, 1999, at 3B.

118. H.R. REP., *supra* note 80.

119. Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA.J Int'l L. 551, 554 (1986).

120. *Id.*

V. CONCLUSION

While the primary purpose of asylum is to provide humanitarian relief to those who might face harm upon deportation, the conflicting concerns of protecting people and of maintaining control over our borders has led to a narrow construction of the possible causes for persecution outlined in the refugee definition.¹²¹ Colombia's unique and misunderstood country-conditions, coupled with this narrow construction, places an onerous hurdle that few Colombian applicants can overcome. Colombians must show first that they meet the narrowly construed factor of persecution because of political opinion and, second that they are being *individually* targeted for persecution as a result of that factor.

Moreover, the United States has a general misunderstanding of the situation in Colombia. The victims of this civil strife are usually categorized as collateral victims to the drug war; however, the strife is between long-standing political insurgencies, which recently began funding their operations with the lucrative drug business. They have existed for 40 years, before Colombia's drug empire and cartels were created. The United States cannot fully ignore the crisis, however, because it realizes that it cannot do so and fight its own effective war on drugs. Therefore, it takes Colombia under its "wing" but only to achieve its own political agenda of drug reform. The United States has taken a myopic stance to the humanitarian crisis occurring in Colombia. Until it realizes that armed insurgencies do not recognize the neutrality of civilians and that the armed conflict is political in nature, thousands of Colombians will be denied the political asylum they urgently need, not only to exercise the rights that Americans exercise daily, but more importantly, to stay alive.

Temporary Protective Status provides just that – temporary protection. But, nevertheless, it is an ideal solution until either the asylum decision-makers become more educated about the grave situation in Colombia or the civil war in Colombia ceases. Whichever action the United States decides to take, it should be

121. Derek Smith, *A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Action in Asylum Cases*, 75 Va. L.Rev. 681, 690 (1989).

taken quickly because each day many more silently lose their lives, adding to the already appalling Colombian death toll and increasing the severity of this ignored crisis.

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* Juris Doctor candidate, May 2001, University of Miami School of Law. The author dedicates this article to the thousands of Colombians who have lost their lives in the violent political struggle that has plagued Colombia for nearly forty years. The author thanks her parents, Aurelio and Myriam de la Asuncion, for teaching her to appreciate and be proud of her Colombian heritage. I would also like to extend my gratitude to my advisor, David Abraham of the University of Miami School of Law, for his guidance and encouragement.