Gomez (Non-state actors: *Acero-Garces* disapproved) Colombia * [2000] UKIAT 00007

IMMIGRATION APPEAL TRIBUNAL

Date heard: 03/10/2000
Date notified:..24/11/2000

Before

MR JUSTICE COLLINS (PRESIDENT)
DR. H. H. STOREY
MR G. WARR

Between

EMILIA DEL SOCORRO GUTIERREZ GOMEZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. This case has been starred for the purpose of clarifying the law on the 1951 Refugee Convention ground of political opinion in relation to claims to persecution at the hands of non-state actors.

2. The appellant is a citizen of Colombia. The basis of her claim to asylum was that as part of her training as a law student at the Universidad Libre de Pereira she was required to work at the Consultorio Juridico which provided free legal advice and was connected to the court system. She along with several fellow students had investigated a request for advice from a farmer who lived in a rural area on the outskirts of the town of Pereira. He had complained that he was the victim of extortion from armed men who had come to his farm demanding money. She thought they were guerrillas. Subsequently the appellant was visited at her place of work by some armed men. She also began receiving threatening telephone calls at home. Two co-workers who had helped with the investigation disappeared soon after. Before she left Colombia she had also learnt that her university tutor Dr Herrera had been kidnapped. She produced to verify this a newspaper article together with a letter from her faculty dean confirming that Dr Herrera had been her tutor. In addition whilst out driving she and her boyfriend had been chased by two motorcycles each with two men on, one of them carrying some kind of machine gun. After they had stopped at a police checkpoint, police had

escorted them home. Having no confidence in the police to do anything to catch the men on bikes, however, she did not pursue this matter further with them. Originally it had been her intention to leave her country temporarily by way of a holiday in Switzerland until the problem ended. But she realised after talking to a friend in the UK that her experiences justified making a claim for asylum. She had learnt subsequently – in March 2000 - that Dr Herrera had been released on payment of a ransom. If returned she feared she would be murdered or abducted by the guerrillas. She believed they were members of FARC and that this organisation had the wherewithal to pursue her anywhere in Colombia. Even three years later, she felt that the threats facing her remained real.

3. The Special Adjudicator rejected the appellant's claim for two main reasons:

a) he found her of poor credibility;
b) even had he accepted her account he was not satisfied there was a Convention reason. Relying in this regard on Auld, J in *ex parte Hernandez [1994] Imm AR 506* he wrote:

> "The facts of that case were that the applicant had feared the consequences of refusing to co-operate with guerrillas to the extent of supplying drugs and medicines to them. He had not asked for the protection of government forces but had asserted they would be unable to protect him. Although Mr Southey had sought to distinguish that authority from *Arcero Garces* by stating that the victims of crime themselves may not qualify under the Convention but those, who for example, are assisting the victims of crime and come into contact with criminals can qualify under the Convention, I found that argument unpersuasive. It seems to me that if the victims of crime, such as the farmer who was said to have suffered extortion at the hands of guerrillas by this appellant cannot qualify for protection under the Convention then it must surely follow that those who assist the victims of crime cannot be placed in any better position insofar as Convention protection is concerned than the actual victims of crime themselves".

4. In granting leave the Tribunal put the parties on notice that it intended to review whether *Acero-Garces* accurately reflected United Kingdom case law on the subject of claims to face persecution in Colombia from non-state actors likely to impute a political opinion to all those who obstructed their aims and activities. In *Acero-Garces* [1999] INLR 460, a Tribunal chaired by Mr R G Care, the appellant had witnessed the murder of a policeman in her home town. She had identified the murderer in an identification parade. She was then threatened by this man`s brother. Both the murderer and his brother were members of a criminal gang (Los Prispos) that operated throughout Colombia. Thereafter she received threatening phone calls and notes and her shop was burnt down by the gang. She moved to another part of town, but the threats continued. The police had not been able to help her. She travelled to the UK and claimed asylum. In allowing the appeal the Tribunal held that the appellant feared persecution for a Convention reason, namely imputed

political opinion. The Tribunal held that she would be seen by her persecutors to be on the side of law, order and justice and that the Colombian authorities would be unable to protect her against the persecution. The Tribunal noted the argument that the perceived political opinion arose:

> "out of a combination of evidence that all forces of law and order operate only where the drugs barons or whatever one may call them permit. In other words the authorities protect the criminals but not members of the public. Any attempt to reverse that state of affairs is seen by the barons as a threat. To disentangle that situation from political opinion is, it is argued, impossible".

The Tribunal concluded:

> "The appeal is allowed on the basis that imputed political opinion is the Convention ground. The reason that the appellant is seen to be on the side of law, order, justice and against disorder, chaos, injustice, and it is these dark forces that control government. We need make no decision on the basis of particular social group".

Tribunal determinations to similar effect include *Mezal* (14377).

5. At the hearing the representatives addressed us on the issues of credibility, sufficiency of protection and political opinion. In relation to the issue of credibility it was broadly agreed that the Special Adjudicator had fallen into error in his assessment of credibility. He had sought to reject the core of her account by reference to loose surmise about her conduct on arrival in the United Kingdom. Contrary to the view taken by the Special Adjudicator we do not consider that her conduct on arrival rendered her story implausible. In view of the fact that the great majority of the points relied upon by the Special Adjudicator against the credibility of the appellant's account concerned matters of detail, we considered that at worst the story she had told was exaggerated rather than invented. Key parts of it were supported by unchallenged documentary evidence corroborating that she was a law student, that as part of her training she was employed earning $720 a month to do advice work and that Dr Herrera, a teacher from the same University and faculty as her, had been kidnapped. Whilst therefore we do not necessarily believe her account in its entirety we are satisfied that we can accept its essential elements as credible for the purposes of determining this appeal.

6. As regards the issues of sufficiency of protection and political opinion, the respective views of the parties were as follows. Mr Southey for the appellant contended that the appellant had shown that she had become the target of threats and serious harassment from a guerrilla organisation which she believed to be FARC. Her personal tutor, Dr Herrera, for whom she and her colleagues had done investigative work on the case of the farmer was the victim of extortion demands from these guerrillas, had been kidnapped. Two of her colleagues had disappeared. She had also been threatened in a motorcycle incident. She had not felt confident enough in the police to afford

her protection against these threats and the general country materials bore out that in this regard her feelings were justified. It was plausible that the motives of the guerrillas who threatened her were political. As regards the situation now, it was not likely that FARC would forget; an expert witness, Professor Pearce, had assessed that "once targeted by an armed group, individuals are systematically persecuted through the use of sophisticated intelligence which enables them to be located when they flee to other parts of the country". If the appellant had suffered past persecution, one had to ask whether there had been any significant change in general country conditions. There had not been. No internal flight would be available for this appellant.

7. Citing *Hernandez*, Mr Saunders argued that just because someone was a victim of FARC did not mean that they would have a political opinion attributed to them. Individual cases of persons in danger from non-state agents ran along a continuum. At the one end there would be clear cases of people with no political opinion, e.g. mere victims of muggers. At the other end would be persons with a clear political opinion, e.g. those organising high-profile demonstrations against a guerrilla organisation whose aims include overthrow of the state. The appellant`s situation was clearly at the non-political end of the spectrum. Since law and order and justice were central issues in the policy agendas of most governments, being for or against law and order (as in *Acero-Garces*) was not enough to give rise to a political opinion, imputed or otherwise. There was also the question of causation: the key determining factor to be given most weight was why the persecutors were taking action. Whilst in Colombia there might be an inability to protect, there was not necessarily an unwillingness.

8. The Tribunal would begin by noting that one obvious and key question in relation to claims from citizens of Colombia is the sufficiency or otherwise of protection there.

9. Before proceeding to deal with this and related matters further, the Tribunal needs to say something about the relevance in this case of a report from a leading country expert on Colombia, Professor Pearce. Although her CV was not adduced before us, we note that it was before the Special Adjudicator and that it establishes her academic credentials. Author of Colombia: Inside the Labyrinth, Professor Pearce is a recognised expert on the situation in Colombia. Her studies of Colombia in general taken together with her May 29 2000 report on Miss Gomez in particular are of assistance to the Tribunal in describing relevant features of the Colombian political system, the very considerable power held by guerrilla groups such as FARC, the ascendancy of paramilitarism and the failure of the system of criminal justice in particular to afford protection to ordinary citizens. But the report on Miss Gomez has aspects which render it of limited assistance to us. At paragraph 5 for example, she writes:

> "The latter [the failure of the Colombian authorities to protect citizens] explains why elements which appear contradictory in your client`s case to outsiders are explicable in the Colombian context. Despite the dangers, your client and her fellow students tried to investigate this

> case, encouraged by their tutor. Partly they hoped to do well in their law studies, but partly they probably felt they were simply carrying out their duty to make the legal system work. Nevertheless, your client`s unwillingness to report to the police the threat from the men on the motorbikes reflects the other side of Colombia, the reality that the law does not in fact operate and those charged with implementing it cannot and do no carry out this task. Her fears that guerrillas would get to hear about any denunciations to the authorities reflects the profound lack of faith in the integrity and capacity of the country`s security forces to protect citizens."

Later on she concludes that: "I would disagree therefore with the Home Office`s statement that your client cannot be a victim of persecution if she is targeted by non-state armed groups".

10. Whilst the Tribunal recognises that Professor Pearce has a great fund and depth of knowledge in relation to the situation in Colombia, it is not assisted by her efforts to apply this knowledge to the circumstances of this particular appellant in the form of speculation about an appellant's motives. Except in unusual cases, an expert report should not attempt to usurp the fact-finding function of the appellate authorities whose duty is to test and evaluate the evidence in accordance with the legal criteria contained in the 1951 Refugee Convention. An expert is not a judicial decision-maker. A country expert`s function is to set out the general facts in the light of the objective evidence. Insofar as he or she has reason to comment on an individual case, his or her remarks should normally be confined to assessing whether what is said to have happened to a particular individual or individuals correlates or not with the general evidence about persons similarly situated. A competent expert`s report is always entitled to respect and due consideration; but from the point of view of the judicial decision-maker such reports will often amount in the end to just one among many other items of evidence which have to be weighed in the balance. As the Tribunal said in *Lando Kapela v Secretary of State* [1998] Imm AR 294 evaluation of background material and reports by those claiming to have special knowledge of a country was a matter of fact for the adjudicator.

The protection issue

11. As the Tribunal has found in previous cases dealing with Colombia over the past decade, the objective country materials show very plainly that in general the authorities are both unable and unwilling to provide sufficient protection to ordinary citizens. In reaching this conclusion in *Acero-Garces* the Tribunal relied on U.S. State Department reports, Human Rights Watch, Amnesty International, an expert report from Professor Pearce, a 1997 UNHCR Position paper augmented by subsequent comments and press cuttings. It also cited the Home Office`s own country assessment that:

> "Hundreds of people have been killed by the security forces and paramilitary groups operating "with their support and acquiescence". Death squad style killing of people regarded as disposable continued in

> urban areas and armed opposition groups were responsible for numerous human rights abuses".

In *Jaramillo-Aponte* (00/TH/00428) a Tribunal chaired by Professor Jackson and determined on 19 April 2000 drew the same conclusion, it being noted that:

> "In the Home Office Report it is said that credible sources have alleged that members of paramilitary groups committed 69 per cent of all politically motivated extrajudicial killings. The killings by such groups increased significantly in 1996 and 1997. The government figures show that in 1997 law-breakers were not brought to justice in 99.5 % of all crimes and that during the first 6 months of 1996 12,824 citizens were victims of homicide.
>
> The United States Reports includes comments that 19,665 murders occurred in 1998. In 1996 the Superior Council of the Judiciary reported that 74 per cent of all crimes went unreported and between 97 per cent and 98 percent went unpunished."

We ourselves observe that in the March 1999 report of the UN Human Rights Commissioner on the Office in Colombia noted at paragraph 40 that:

> "The increase in violence, the deterioration of the human rights situation in the armed conflict, the expansion of paramilitarism, the disregard for international humanitarian law on the part of both the guerrilla and the paramilitary forces, the attacks on human rights advocates, the worsening internal displacement situation, widespread impunity, the serious prison crisis, and the precarious situation of the most vulnerable population groups together make up a sombre picture which reflects the gravity of the human rights situation in Colombia".

12. In regard to the group of guerrillas whom the appellant in the instant case believed were responsible for her difficulties (FARC), we note that the US State Department report of February 2000 states that:

> "The FARC and the ELN regularly attacked civilian populations. Guerrillas were responsible for the majority of cases of forcible recruitment of indigenous people and of hundreds of children, they were also responsible for the majority of kidnappings. Guerrillas held more than 1,000 kidnapped civilians, with ransom payments serving as an important source of revenue. Other kidnap victims were killed. In some places, guerrillas collected "war taxes", forced members of the citizenry into their ranks, forced small farmers to sow illicit crops, and regulated travel, commerce and other activities".

We note also that in her May 2000 report concerning Miss Gomez, Professor Pearce identifies a deterioration rather than an improvement in Colombia since the appellant left.

However, the fact of insufficiency of protection in general in Colombia today does not establish the appellant`s claim under the Refugee Convention. In our view she has failed to make out other essential elements to such a claim.

The appellant`s fear of persecution

13. Even accepting the appellant`s account in its essentials the Tribunal is not persuaded that she has a current well-founded fear of persecution. Even disregarding inconsistencies in her evidence as to why she left Colombia when she did, it seems to us that the guerrillas` interest in targeting the appellant previously would be very unlikely to remain. On her own account she had incurred their wrath by taking part in an investigation into their extortion racket. Two of her fellow-investigators had disappeared. Dr Herrera had been kidnapped. However, in March 2000 she had heard from her father that Dr Herrera had recently been released. In addition there is no evidence that the advice centre`s investigations into this particular extortion racket had proceeded any further since she had left Colombia. We are prepared to accept that in relation to some persons seen as enemies guerrilla groups such as FARC would not forget them; but we cannot agree with the appellant (or Professor Pearce) that this would apply to all persons. Whether FARC forgot or not would depend on the particular circumstances which had brought someone to their attention in the first place. From the point of view of the guerrillas in this case, it would surely appear to them three years later that their earlier actions had achieved their purpose of ending the investigation into their extortion racket. Even if, at the precise time the appellant left Colombia, they had been still intent on targeting the appellant and others, it is unlikely they would now. In this regard it must be recalled that the appellant said that she was not a political person. Unlike Dr Herrera who was both a university tutor and a local politician and who had provided legal defence for people accused of drug trafficking offences, there is no evidence that she had a political identity in her own right or that she had ever taken a visible stand against guerrillas. Her involvement in the investigations was clearly ad hoc. Nor did she fall within any of the categories of "preferred victims" of kidnappings identified in the US State Department report for Feb 2000: ("According to Pais Libre, politicians, cattlemen, children, and businessmen were guerillas` preferred victims").

The issue of protection for this appellant

14. In view of our conclusions as to the appellant's current fear, it is not necessary for us to consider in separate fashion the issue of the sufficiency of protection for this appellant. It should be apparent from what we have said earlier, however, that had we considered her to face a real risk of serious harm from FARC, we would have very likely concluded that it was a risk against which the authorities of the state would be unable to protect her.

The issue of a Convention ground of particular social group

15. Mr Southey for the appellant rested his main argument concerning the Convention ground on that of political opinion, to which we return below. However he also submitted that there Miss Gomez would in any event be persecuted on account of her membership of a particular social group. That

group could be variously defined as students doing human rights work or as lawyers who stood up for peasant rights. In *Ouanes [1998] Imm AR 76* the Court of Appeal had accepted in principle that a common characteristic defining the group could include past employment. The common characteristic in this case was that in the past members had investigated guerrillas. Although not an innate characteristic it was a common, immutable characteristic based on what Lord Steyn *in Shah & Islam* [1999] Imm AR 283 had described as "shared past experience". There was clear evidence that people in Colombia who do this type of work are targeted. He referred to passages from the report of the UN High Commissioner for Human Rights Office in Colombia recounting events "typical of the general atmosphere of suspicion, pressure and open harassment to which many human rights NGOs are subjected, despite public recognition of their work by the Government".

16. With respect to Mr Southey`s argument on this point, the Tribunal considers that the particular social group relied upon consists in reality in a disparate a group of individuals. Bearing in mind the appellant`s account, the group could not said to be a dedicated group of lawyers or the like. At best it was a collection of individuals who had had an ad hoc involvement in a potential criminal investigation. As Mr Saunders rightly put it, such activities were not and are not such as to imbue those sharing them with an immutable characteristic. They are not a group which can be said to exist independently of their persecution.

The issue of a Convention ground of political opinion.

17. In view of our negative conclusion on current fear, it is not strictly necessary for us to consider whether or not that fear was on account of an imputed political opinion either. However, this hearing was convened with a view to resolving uncertainties in the case law concerning political opinion in non-state agent cases; we invited and received submissions on the these issues from both of the parties to this appeal; and it is our intention to set out such guidance as we can in order that adjudicators are better able to apply a consistent approach.

The political opinion ground in Convention jurisprudence

18. Despite being the most commonly invoked ground, United Kingdom case law elaborating upon the political opinion ground has been extremely sparse. However, taking significant U.K. cases together with leading overseas cases, the 1979 UNHCR Handbook and the commentaries of leading authors, it is possible to summarise the position as follows:

19. A claim cannot succeed under the Convention unless a person can show that he faces a well-founded fear of persecution for one or five Convention reasons or grounds; in addition to establishing a Convention ground it is necessary for a claimant to show that the persecution feared is on account of one or more Convention grounds.

20. The grounds of persecution are founded on principles of non-discrimination under international law: *Shah and Islam* [1999] Imm AR 283(HL); *Omoruyi v Secretary of State for the Home Department*, judgment of

12 October 2000 (CA); J. Hathaway, Law of Refugee Status, 1991, p.135; G.Goodwin-Gill, The Refugee in International Law 39 (1ST ed. 1983); *Canada(Attorney General) v Ward* [1993] 2 S.C.R.689, 734; *In re Acosta* 19 I.& N. Dec.211, 233 (BIA 1985) it was said that the grounds identify qualities of fundamental difference that distinguish the refugee from others in his society.

21. In keeping with the proper interpretation of an international treaty a broad purposive construction must be accorded to all five Convention grounds, including the political opinion ground: *Shah and Islam* [1999] Imm AR 283 at 293. Interpretation must not narrow the definition of political beyond recognition nor rely on intricate distinctions of definition that might deny political opinion status in contexts where a broad usage would accord it.

22. By the same token interpretation of the nexus test, whether persecution is "on account of" one of the five Convention grounds, must also eschew narrow or restrictive interpretation. In this connection, it must always be borne in mind that motives of the persecutor may be mixed; it is not necessary to show that they are purely political. As was stated by the U.S. Ninth Circuit in the case of *Harpinder Singh v Ilchert*, 63 F.3d at 1501, "…persecutory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied" (cited in D. Anker, Law of Asylum in the United States,1999 p.280). To similar effect it has been stated in leading Australian cases that it is not necessary that the Convention ground should be the sole reason for the fear: *see Jahazi v Minister for Immigration and Ethnic Affairs* (1995) 133 ALR 437, 443 (French, J) approved in *Minister for Immigration and Multicultural Affairs v Abdi* (1999) 162 ALR 105, 112 (FC;FC) O`Connor, Tamberlin and Mansfield JJ. Whilst in the U.K. our courts have been reluctant to exclude the possibility that persecution can arise from a state practice without there being any clear motive (*Ravichandran* [1996] Imm AR 97), there has been similar recognition, as we shall see, that where motives are involved, they can be mixed.

23. Leading commentators have seen the political opinion ground to differ in character from the other five Convention grounds in at least one important respect. As noted by A.Grahl-Madsen, The Status of Refugees in International Law,1966 at n.5 217 and 223, the grounds fall into two categories. First are those which are "beyond the control of the individual, namely race, nationality, membership of a particular social group, and - in certain respects - religion. Secondly are the political opinion ground and "active religion"" The latter two are distinguished by their ""individual character"". However, although grounds in the first category are inherently "group-based", the political opinion ground too is often a group-based phenomenon. As was noted by the U.S. Ninth Circuit in *Kotasz v INS* F.3d 847, 853 n.9(9th Cir.1994), although:

> "It is not inconceivable that a person would be individually persecuted on the basis of his uniquely abhorrent (in the persecutor`s view) political beliefs, [but] such occurrences would be rare. Political parties, factions, ideologies, and movements are group phenomena. Moreover,

> it is generally the existence of a group of opponents that concerns a government or other persecutor sufficient to provoke oppression."

24. In order to show persecution on account of political opinion, it is not necessary to show political action or activity, although action activity or conduct may be an important indication of political opinion: UNHCR Handbook para 81. As the Tribunal noted in *Orlov* (18505) the distinction between political actions and political beliefs is of limited value in asylum law, for a political belief may be manifested in more than one way – an intellectual might pen a tract or a pamphlet, a cinematographer might make a propaganda film, a political activist might campaign for his or her party in an election, or someone may simply fight for a cause in which they believe. Furthermore, as Kirby J in the High Court of Australia case of *Minister for Immigration and Ethnic Affairs v Guo* [1997] 191 CLR 559 at 598 noted, "political opinion" may be shown by repeated conduct which is never (or rarely) converted into articulate political protest of the kind familiar to democratic societies.

25. Furthermore, even political opinions that do not fall within the ambit of those protected by internal human rights norms (freedom of expression and conscience etc.) would appear to be covered: Macdonald and Blake, Immigration Law and Practice at p.60 of their supplement cite *Asante* [1991] Imm AR 78 and give the example of a negligent bank clerk who is accused of politically motivated sabotage to the national economy who may not have been expressing a political opinion when performing his function but where the imputation of such opinions by his persecutors would establish the Convention reason for such persecution.,

26. Political opinion may be express or imputed: *R v Secretary of State for the Home Department ex parte Jeyakumaran* (of 28 June 1985) [1994] Imm AR 45. *Adan and Lazarevic v Secretary of State for the Home Department* [1997] Imm AR 251 at 273; *Secretary of State for the Home Department v Patrick Kwame Otchere [1988] Imm AR 21; Asante* [1991] Imm AR; *Duodo* (5803), *Darko* (7315) *Quijano* (10699); *Bobe* (10838); *Nsimba* (13176); *Okwu* (14518); *Boteju* (18630); UNHCR Handbook paragraph 80.

27. The term "political" within the phrase "political opinion" has to be given a broad meaning but not one that is entirely undifferentiated. In conventional political science and political theory, the term "political" is confined to matters pertaining to government or governmental policy. This is reflected in some of the dictionary definitions, e.g. the Oxford English Dictionary defines political as:

> "of, belonging, or pertaining to the state or body of citizens, the government and policy, esp. in civil and secular affairs; public; civil; or or pertaining to the science or art of politics".

28. It is clearly this classical definition which Lord Diplock wished to affirm in *R v Governor of Pentonville Prison ex parte Cheng* [1973] AC 931:

> "Politics are about government. `Political` as descriptive of an objective to be achieved must, in my view, be confined to the object of overthrowing or changing the government of a state or inducing it to change its policy or escape from its territory the better so to do. No doubt any act done with any of these objects would be a `political act`.

29. However, as noted by Hill, J in a recent Australian Federal Court judgment, *V v Minister for Immigration and Multicultural Affairs* [1999] FCA 428 on the term "political" within Art 1A(2):

> "It clearly is not limited to party politics in the sense that expression is understood in a parliamentary democracy. It is probably narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society. It suffices here to say that the holding of an opinion inconsistent with that held by the government of a country explicitly by reference to views contained in a political platform or implicitly by reference to acts (which where corruption is involved, either demonstrate that the government itself is corrupt or condones corruption) reflective of an unstated political agenda, will be the holding of a political opinion."

30. The need for the "political opinion" ground to be construed broadly arises in part from the role of the Refugee Convention in the protection of fundamental human rights, which prominently include the rights to freedom of thought and conscience, of opinion and expression and of assembly and association: A.Grahl-Madsen, The Status of Refugees in International Law,1966 supra n.5 at 227. This entails that even in contexts where the persecutor may be simply another private individual, if his persecutory actions against a claimant are motivated by an intention to stifle his or her beliefs, the opinion being imputed can be seen as political, at least where the state authorities are unable to afford effective protection against such actions.

31. A broad construction is also required by the fact that the ground has to operate to protect a person against harm from non-state agents as well as state agents of persecution. Reference to "non-state *agents*" is not, in our view always helpful since it can wrongly imply that such entities have agency in the context of state responsibility. This Tribunal prefers to talk of "non-state actors" In the context of state agents of persecution, it is difficult to quarrel with the formulation given by Hathaway, *Law of Refugee Status*, 154:

> "Essentially any action which is perceived to be a challenge to governmental authority is therefore appropriately considered to be the expression of a political opinion".

Where however the claim is of persecution at the hands of non-state actors, a definition of political which was confined to the machinery of government or to governmental authority in any narrow sense would have the effect in many cases of rendering the political opinion ground inoperative. In the context of non state actors the need for a more inclusive, multi-sided definition of

political was made very evident in the case of *Canada(Attorney-General) v Ward* (1993) 2 SCR 689, 746. In concluding that the term went wider than a simple question of party allegiance the Supreme Court held:

> "Political opinion as a basis for a well founded fear of persecution has been defined quite simply as persecution of persons on the ground "that they are alleged or *known* to hold opinions that are contrary to or critical of the policies of the government or ruling party"…The persecution stems from the desire to put down any dissent viewed as a threat to the persecutors. Grahl-Madsen`s definition assumes that the persecutor from whom the claimant is fleeing is always the government or ruling party, or at least some party having parallel interests to those of the government. As noted earlier, however, international refugee protection extends to situations where the state is not an accomplice to the persecution, but is unable to protect the claimant. In such cases, it is possible that a claimant may be seen as a threat by a group unrelated, and even opposed, to the government because of his or her political viewpoint, perceived or real. The more general interpretation of political opinion suggested by Goodwin-Gill…ie, "any opinion on any matter in which the machinery of the state, government, and policy may be engaged" reflects more care in embracing situations of this kind".

32. In *Klinko v Canada (Minister of Citizenship and Immigration)* the Federal Court of Appeal on 22 February 2000 clarified that:

> "In Ward, the Supreme Court found that Mr Ward who belonged to the Irish national Liberation Army (INLA), had expressed a political opinion in allowing the hostages under his guard to escape when he discovered that they would be executed. For his act, he would be assassinated by the ruthless para-military organisation of which he was a member. There was no state complicity in the persecution that Mr Ward faced. Indeed the alleged persecution emanated from the INLA. Neither the Irish nor the British governments condoned, sanctioned or supported execution of hostages as a means of achieving secession from Great Britain. Mr Ward was in harmony with the state in opposing such violence….The act for which Ward was so punished was his assistance in the escape of the hostages he was guarding. From this act, a political opinion related to the proper limits to means used for the achievement of political change can be imputed. The position taken by Mr Ward with respect to the proper means of achieving secession thus satisfied the definition of "political opinion "as any opinion on any matter in which the machinery of state, government, and policy may be engaged".

33. Reading these passages from *Ward* and *Klinko*, the Tribunal has doubts (we put them no higher than that) that even Goodwin-Gills`s definition, which places focus on the machinery of the state or government, is in fact broad enough to encompass every type of situation relating to non state actors of persecution.

34. It is true that this definition allows one to consider government as a process or system rather than simply as a set of institutions (The Concise Oxford Dictionary 10th Ed. gives, as one meaning of "government", "the system by which a state or community is governed"). It is also true that the term government can embrace government at all levels, local as well as central. It would easily cover, therefore, cases at either the national or local level where the persecutors are plainly political entities e.g. members of opposition parties or local groups at odds with local politicians. However in principle the non-state actor category would appear to be capable of covering less overtly political entities.

35. The definitional consequences for construing political opinion in the context of non-state actor cases are spelt out more fully than anywhere else in the U.S. case law.

36. In *Sanga v INS*, 103 F.3d 1482, 1487 (9th Cirri. 1997) the Ninth Circuit judge held that:

> "In establishing an imputed political opinion, the focus of inquiry turns away from the views of the victims to the views of the persecutor. We consider, however, not the persecutor`s own political opinions, but rather the political views the persecutor rightly or in error attributes to his victims. If the persecutor attributed a political opinion to the victim, and acted upon the attribution, this imputed view becomes the applicant`s political opinion as required under this Act".

This approach was endorsed in *Agbuya v INS* 219 F.3d 9962, a Ninth Circuit opinion of July 18, 2000.

37. Where thus the persecutor is a non-state actor it becomes the persecutor`s perception of a political opinion held by the victim that matters.

38. However the fact that even state agents who are not overtly political can impute a political opinion does not in our view warrant the conclusion that any opinion imputed by a non-state actor qualifies as a political opinion. As Hill, J noted in a passage already cited from *V v Minister for Immigration and Multicultural Affairs* , the meaning of political is "… narrower than the usage of the word in connection with the science of politics, where it may extend to almost every aspect of society". Even in the case of non-state actors therefore one cannot easily see how differences they may have with someone they persecute could be described as political unless they themselves have or express a political ideology or set of political objectives, i.e. views which have a bearing on the major power transactions relating to government taking place in a particular society. That is to say, the Tribunal doubts that the Refugee Convention ground of political opinion was meant to cover power-relationships at all levels of society. It may well make sense to speak in other contexts of the "politics of the family" or of "sexual politics" taking place between two persons, but to engage the Convention these power relationships must in some way link up to major power transactions that take place in government or government-related sectors such as industry and the

media. Put another way, politics at the “micro” level must in some meaningful way relate to politics at the “macro” level. In *Shah and Islam* [1999] Imm AR 283 at 296, 298 both Lords Steyn and Hoffman noted that the evidence that the applicants` husbands practised domestic violence against them did not demonstrate that they were persecuted for a political opinion. We doubt that absent very unusual circumstances, for example where a violent husband sees his wife as an enemy of the state or regime, political opinion can ever be established at the purely domestic or interpersonal level. By the same taken, a neighbour from hell who targets a claimant may be someone who will inflict serious harm upon him; but without more one cannot sensibly attribute to the relationship between that neighbour and such a claimant a political dimension. Cases where an individual has been accepted as a non-state actor capable of imputing political opinion appear to be ones where that individual is effectively implementing the political views of either the state or some other body with political aims and objectives.

39. The approach we take here is reflected in previous Tribunal determinations, see for example *Allie* (14814) dealing with a political opinion imputed to those who were “against” rather than “with” a group of rebels in Sierra Leone; see also *Galvis* (22502).

40. As well as the need to adopt a broad definition of the term “political” there is also a need to recognise that the term is a malleable one. In the nature of politics, the boundaries between the political and the non-political shift in historical time and place. In *Shah and Islam* the point was made by Lord Hoffman that although women in contemporary Pakistan could constitute a particular social group, that did not mean that women anywhere or at any time could. It seems to us that the parameters of time and historical place are even more present in relation to the political opinion ground. That the definition of the adjective “political” must always be to some extent malleable flows from the fact that the nature of the power relationships and transactions that compose what is political vary from society to society. Sometimes political opinion may be located in a particular type of expression or activity, e.g. wearing western clothes in a highly fundamentalist Muslim country with strict social mores; sometimes not. In society A where trade unions adopt a combative posture towards the government, membership of a trade union may be tantamount to holding a political opinion; in society B it may not be so. The risk of extortion threats from a criminal gang will not normally be on account of political opinion, but in some societies where criminal and political activities heavily overlap, the picture may be different. Persons who hold posts in governmental agencies of the state at central or local level will not normally be capable of having political opinions attributed to them by groups opposed to the government. But if for example there is a major armed conflict going on between the authorities and guerrilla groups (e.g. Islamic fundamentalists in Algeria in the 1990s) then it may be that they will have attributed to them the political opinion of being on the government`s side rather than the fundamentalist Islamic side (*Doufani* (14798); see also *Woldemichael* (17663)).

41. One important consequence of this recognition of the shifting boundaries of the political in different societies is that it will be an error to rely upon any fixed distinctions between the "political" and the "criminal". As was stated in *Jerez-Spring v Canada* [1981] 2 F.C. 527[F.C.A.] , the "political" nature of a claimant`s actions or opinions must be assessed in the context of his or her country of origin. In the Federal Court of Australia in *V v Minister for Immigration and Multicultural Affairs* [1999] FCA 428, Wilcox, J cited Davies J in *Minister for Immigration and Ethnic Affairs v Y* [1998] FCA, 15 May 1998, in support of the view that there is no justification in the Convention definition for a dichotomy between criminal activity and persecution on account of political opinion:

> "The abduction and torture of Y and his friend, and the abduction and rape of Y`s wife, were undoubtedly serious criminal acts, but nobody suggested this prevented them being categorised as persecution on account of political opinion".

Hill, J added in relation to V that:

> "The exposure of corruption itself is an act, not a belief. However it can be the outward manifestation of a belief. That belief can be political, that is to say a person who is opposed to corruption may be prepared to expose it, even if so to do may bring consequences, although the act may be in disregard of those consequences. If the corruption is itself directed from the highest levels of society or endemic in the political fabric of society such that it either enjoys political protection, or the government of that society is unable to afford protection to those who campaign against it, the risk of persecution can be said to be for reasons of political opinion".

42. In another Australian case *Daljit Singh v Minister for Immigration and Multicultural Affairs* [1999] FCA 1599 which concerned the concept of "non-political crime" at Art IF(b), Mansfield J criticised the Administrative Appeals Tribunal for characterising the appellant`s help to the Khalistan Liberation Front in identifying a police officer who was then murdered by them as simply an act of revenge for the torture of a KLF member by police and there was no direct causal connection between the crime and the political objectives of the KLF:

> "The Tribunal failed to properly consider whether the appellant`s crime in being an accessory to the murder of a police officer was a political offence. The Tribunal eliminated the appellant`s crime from the rubric of "political" protection because it was an act of revenge. To characterise a criminal act as an act of "revenge" does not necessarily preclude it from being a political one. Revenge may be personal or it may be political."

43. For very similar reasons it will not always be possible to treat the categories of "political" and "economic" as dichotomies As was said by the U.S. Second Circuit in *Osorio v INS*, 18.F.3d 1017, 1028 (2d Cir. 1994), "…

the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution".

With reference to the 1979 UNHCR Handbook paras 62-64 this decision continued:

> "What appears at first sight to be primarily an economic motive for departure may in reality also involve a political element, and it may be the political opinions of the individual that expose him to serious consequences, rather than his objections to the economic measures themselves".

44. For very similar reasons also, it will be unwise to rely on rigid divides drawn between actions motivated by "personal interests" rather than political opinions (*Desir v Ilchert*, 840 F.2d 723, 725 (9th Cir.1988).

45. In consequence of the shifting boundaries of the political in different societies and at different periods *neither is it possible to identify any fixed categories of persons or bodies* that will qualify as political entities.The assessment of whether there is a political opinion ground in any particular case will depend very much on the individual circumstances.

46. The above approach also explains why in certain circumstances a person who is himself an agent of the state, e.g. a civil servant or policeman, may be at risk of persecution on political opinion grounds if the circumstances are such that non-state actors impute a political opinion opposed to theirs. The decision as to whether a civil servant is at risk of persecution on the grounds of political opinion should never be made by reference to an a priori argument based on a fixed notion that all that can be imputed to a person in such a position is that he is doing his job. It will always be necessary to examine whether or not the normal lines of political and administrative responsibility have become distorted by history and events in that particular country. This perception also explains why refugee law has come to recognise that in certain circumstances "neutrality" can constitute a political opinion. In certain circumstances, for example where both sides operate simplistic ideas of political loyalty and political treachery, fence-sitting can be considered a highly political act. In *Sanga v INS*, 103 F.3d 1482, 1488-90 (9th Cir.1997) it was stated that political opinion can be an affirmatively expressed opinion, an imputed political opinion, or political neutrality in a dangerous environment; see also the Belgian cases cited in J Yves-Carlier, Who is a Refugee 1997, p. 104 n.215.

47. It also follows from this approach that it cannot be said as a universal proposition that those on the side of law and order and justice who face persecution from non-state actors, be they guerrilla organisations or political gangs or criminal gangs, will have a political opinion imputed to them. If that is what *Acero-Garces* meant then we must respectfully disagree. Rather it will depend on the particular country and its particular circumstances whether that is so. Thus in *Storozhenko (*19935), a Tribunal chaired by the President, it was held that those on the side of law and order in the Ukraine would not

have a political opinion imputed to them by criminals intent on persecuting them.

48. This approach to imputed political opinion entirely accords with that taken in *ex parte Walteros-Castenada* a High Court judgment of the 27 June 2000 (CO/2383/99) Mr Justice Munby considered the case of a national of Colombia who had been an active trade union member at the oil refinery where he worked. As a result of his activities on behalf of the union in publicising his company's involvement in corruption, he became the victim of threats, physical assault and kidnapping at the hands of a paramilitary group involved in that corruption. The Special Adjudicator had concluded that the applicant`s well-founded fear of persecution by the paramilitaries was not for reasons of his political opinion. On the basis that his trade union membership was "in reality little more than an adjunct to common employment". About this Mr Justice Munby said:

> "That observation, which I suspect many would find slightly surprising, even in the context of trade unionism in Western Europe in the comparatively recent past, seems to me to give significantly too narrow and restricted a view of the purpose, objectives and activities of trade unions and members of trade unions, struggling, either on their own or in conjunction with other groups or individuals, for what they conceived to be social and economic justice in second and third world countries characterised by societies and regimes which they perceive as socially and economically oppressive and unjust".

He added:

> "In paragraph 13 of the determination, as I have already indicated, the special adjudicator was at pains to characterise the paramilitaries`s activties as "criminal". Implicitly, as it seems to me, the special adjudicator was treating the "criminal" nature of the persecutors`s activities as inconsistent with the applicant`s fear of persecution being, within the meaning of the Convention "for reasons of …political opinion". That may or may not be right on the facts of any particular case but, in my judgment, is a very questionable proposition if put forward as a universal truth…"

49. It seems to the Tribunal that the point made by Mr Justice Munby in this case is very much in line with the leading overseas cases already cited.

50. One consequence of the need in countries such as Colombia to avoid any dichotomy of the criminal and the political when dealing with persecution by criminal gangs is that adjudicators should recognise that mixed motives, non-political and political may be involved. We must respectfully differ, therefore, from the approach taken in *Erazoyuco* (18012) which concerned a Colombian appellant who was employed in support services for a bank and who had refused to recommend authorisation of an overdraft because he was aware that the money was required for drug dealing by members of the Cali cartel. Agreeing with the adjudicator who had said that "the purposes of the drug

traffickers are criminal in nature and not political" the Tribunal in that case sought to drive a distinction between aims and means:

> "We entirely accept that the evidence is that the Cali cartel has had some success in infiltrating the Colombian government and authorities. In our judgement, however, it does not follow that it is a body with political aims. We think it is more properly characterised as a body with aims which are entirely criminal, which has discovered that it can further those aims partly by political means. That does not entitle it to be regarded as political, nor does it entail the proposition that its opponents are to be regarded as holding a political opinion".

51. Whilst we entirely agree with the decision of the Tribunal in *Erazoyuco* in finding that the demands for money made of the appellant in this case were not motivated by political considerations primarily, we do not think that the aims of this drugs cartel could easily be described as wholly non-political. This cartel was a powerful one. According to the U.S. State Department report covering 1999 : "Narcotics traffickers continued to control large tracts of land and other assets and exerted influence throughout society, the economy and political life". Part of the evidence in the *Erazoyuco* case was that in 1997 the presidency itself had been financed by the Cali cartel. Bearing in mind the considerable overlap between governmental activities and those of leading drugs cartels in modern-day Colombia, it seems to us that this is an example of a decision relying on too narrow a view of the political dimensions to the activities of drugs cartels in that country.

The nexus question

52. It is necessary at this point to recall that even in a case where an appellant can make out a Convention ground of political opinion, he or she must also establish that the persecution is on account of that political opinion. Without entering upon the question of whether the correct test of causation in relation to the nexus test is a "but for" or an "effective cause" test, two things are clear: just because persecutors may in some cases attribute political opinions to victims or opponents does not mean they will necessarily do so in every case. A family wishing to revenge the killing of their son may not impute a political opinion to the murderer, notwithstanding that the murderer is one of their political opponents. Of course the family`s motives in a particular case may be both private revenge and political animus, but that will not always be so.

53. It is also common sense that although one may hold a political opinion, not everything one does is motivated by that political opinion.

54. Reflecting these common sense notions, the Tribunal would categorically reject the idea that even in countries such as Colombia where the boundaries between the political and the non-political have been heavily distorted by the conduct of paramilitary bodies and drug cartels, every case where such a body persecutes someone must be on account of an imputed political opinion. We would reaffirm the point made in *Quijano* (10699) that where the concern of persecutors was not a political one but rather to maintain their economic

position through criminal activities and to that end intimidate, and, if necessary, eliminate those that oppose the pursuit of that aim, then there will be no conflict based upon refusal to perform political acts, but only criminal ones.

56. The assessment will all depend on the particular circumstances of the case examined in the light of all the evidence, circumstantial or otherwise. In *Re Jeah* the New Zealand Refugee Status Appeals Authority in a case chaired by R P G Haines (No. 2507/95) considered the case of a Peruvian businessman who claimed to be at risk of persecution on the grounds of political opinion from the Senderos Luminoso who he believed would impute a political opinion to him for his failure to continue meeting their extortion demands. It concluded that the appellant would not face a real chance of persecution and went on to say that the appeal must fail for the additional reason that there was no Convention reason of political opinion:

> "On the evidence given by the appellant, no political opinion was involved in his failure to pay "taxes" to the Sendero Luminoso. Having complied with their extortion demands for some period of time, he simply ran out of money when his business failed.
>
> As counsel recognised, if this case is to succeed at all, it must be on the …imputed political opinion [limb]. The evidence establishes that the money was extorted from the appellant (and others) in order to fund the Sendero Luminoso in their attempt to overthrow the state. But the mere existence of a generalised "political" motive underlying the terrorist's forced extraction of money from businessman is inadequate to establish the proposition that the appellant fears persecution **on account of** his actual or imputed political opinion. In this regard, see INS v Elias-Zacarias 112 S.Ct. 812,816 (1992) and Bartesaghi-Lay F 3d 819 (10th Cir.1993). The evidence does not in any way even suggest that the terrorists erroneously believed that the appellant's refusal to pay the "taxes" was politically based. In short, there is simply no evidence that a political opinion had been imputed by the Sendero Luminoso to the appellant. The fallacy of the appellant's argument is that the mere existence of a generalised political motive underlying the terrorist`s demand for money does not lead to the conclusion that the terrorist's perceive his refusal to pay to be political".

57. In *ex parte Hernandez* [1994] Imm AR 506 Mr Justice Auld rejected the argument that a veterinary assistant who had suffered persecution at the hands of FARC would be at risk upon return of persecution for a Convention reason:

> "The reason for such fear as the applicant may have had, went to the danger that he would be in as a vetinerary assistant and a person with access to drugs, who, for that reasons might be of interest to guerrilla groups seeking drugs for their own purposes in Colombia"

58. Very much the same point is made in *ex parte Gedrimas* [1999] Imm AR 486 in relation to the particular social group ground. This case involved a successful businessman subject to protection money demands from criminal elements. Collins, J held that:

> "The only reason that he has attracted the attention of the Mafia is because they see in him a source of money. They are criminals. One suspects they may well have targeted any person who was worth threatening with a view to paying some sort of protection".

To similar effect see the observations of Burton, J in *ex parte Sigitas Roznys* [2000] Imm AR 57.

Imputed political opinion in the Colombian context

59. In *Acero-Garces* and *Jaramillo-Aponte* reference was made to the UNHCR letter commenting on the existence or otherwise of a Convention reason of political opinion in the context of those suffering persecution from gangs:

> "In the Colombian context it is not difficult to deduce that your client's testimony could be seen by her persecutors (criminal elements. Drug cartels) as representing a political opinion in favour of establishing law and order and contrary to the status quo. Indeed in the Colombian context law and order has been the principal political issue for some years."

60. In a September 1997 update UNHCR noted in relation to elections taking place in 1997 and scheduled to take place in 1998, "the army, paramilitary forces, guerrillas and other armed (private) groups are competing for political power and control of economic resources, particularly drugs and land.""

61. In *Storozhenko[19935]* the Tribunal stated:

> "We do not regard *Garces* as authority for the proposition that any victim of crime who seeks redress but cannot because of police corruption or the power of criminal element is entitled to the protection of the Convention ground because he may be perceived to be on the side of law and order. Normally, imputed political opinion will arise where there is perceived opposition to a policy espoused by the government or its agents. Since protection can be extended to cover those who are persecuted not by the government or its agents but because the government is unable or unwilling to afford protection from the persecutors, witnesses to crime may, if they come forward to help, be properly regarded as coming under the umbrella of imputed political opinion. But we think that such cases would be rare and limited to situations such as exist in Colombia where no protection can be given because the criminals are in effective control."

62. In the U.S. State Department Report for 1999 it was noted:

> "Two main guerrilla armies, the FARC and the ELN, as well as the much smaller EPL and other groups commanded an estimated total of between 11,000 and 17,000 full-time guerrillas operating in more than 100 semiautonomous groups in 30 of the nation`s 32 departments. These groups undertook armed actions in nearly 1,000 of the 1,085 municipalities. Both the FARC and the ELN systematically attacked non-combatants and violated citizen's rights through the use of tactics such as killings, forced disappearances, the mutilation of bodies, attacks on ambulances, and executions of patients in hospitals. Guerrillas also killed indigenous people and religious leaders""

63. In a March 1999 report the United Nations High Commissioner for Human Rights on the Office in Colombia noted that in July 1998 President-elect Andres Pastrana met with members of the FARC National Secretariat. The purpose of the meeting was to explore ways of carrying on a fruitful dialogue with this insurgent group. It was agreed that five towns had to be cleared so that a negotiating table and a dialogue could be set up during the new Government`s first 90 days. In October, the Government recognised the political nature of the ELN and FARC.

64. Commenting on the nature of the motives involved in guerrilla actions such as kidnappings, the U.S. State Department report noted that of the 2,945 cases of kidnapping during the year, "Pais Libre said that 1, 985 cases were financially motivated and 372 cases were politically motivated".

Application of these general facts about Colombia to the individual case

65. For reasons already given, The Tribunal does not agree with the implicit logic of the Special Adjudicator that persons who support victims of crime can never be able to show a Convention ground where the victims themselves may not. Historically many political groups have started up as bodies taking up the cause of the oppressed. By so doing they can often given political expression to what were hitherto inchoate feelings of powerlessness. Be that as it may, for reasons already given the essential point is that in relation to *any category of person* – whether a victim of crime or someone who is a witness to a crime or someone taking up the cause of a victim or victims of crime – it is necessary to look at the claim in relation to the particular society concerned and the objective facts about it.

66. In view of the above, the Tribunal considers that in a case such as this where the threat is said to come from a powerful guerrilla organisation like FARC or ELN, there will be less difficulty than otherwise in establishing that *a* possible opinion which such a group will impute to those who stand in their way will be a political one.

67. However, as noted by D. Anker, op.cit. 277 it must still remain that:

> "Evidence of imputed political opinion cannot consist solely of the general political purposes of the persecutor. Such evidence may, however, derive from an analysis of the structure and specific purposes

> of the persecutory agent or its past actions; it may consist of statements made by individuals or organisational actors that reveal an intent to harm persons with characteristic like the applicant or attribute political opposition to them."

Even where the non-state actor is a guerrilla organisation (like FARC) carrying out state-like functions in parts of the country there will arise cases in which no political motive is involved. Such organisations for some if not much of the time may act for purely economic reasons. Their reasons for seeking retribution against victims may for some if not much of the time be purely criminal. Indeed the background evidence suggests that most of the kidnappings undertaken by FARC and ELN are financially motivated" (1,985 in 1999) rather than "politically motivated (372 in 1999). Deciding whether any kidnapping is purely financial or purely political or is for mixed financial and political motives will obviously therefore depend on the particular circumstances of each case.

68. Earlier we found that Miss Gomez did not have a current fear of persecution largely on the grounds that any risk of harm to her will have abated. However for the avoidance of doubt we should clarify that we do not see her previous situation as being one in which she would have had a political opinion attributed to her. It is true that the work she and co-students did in investigating extortion appears to have been carried out under the supervision of a tutor who was also an active local politician holding the post of Councillor of La Virginia: Dr Herrera. Furthermore, the investigations she carried out were not confined to one farm. Her evidence was that she and her co-students had conducted wide-ranging enquiries in the locality, investigating which farms had been affected and doing so with a view to discovering who the people might be who were demanding extortion. Additionally, the actions which were taken by the guerrillas were against both Dr Herrera himself (who was kidnapped in December 1998), two of her co-students who disappeared and the appellant who received threatening calls and was chased by men on motorcycles with guns. Furthermore the guerrillas doubtless had a vested political interest in maintaining their (extortionate) economic operations in that area. Doubtless their power base could be threatened by investigations capable of weakening their control over local farmers. Possibly that in turn could weaken their pursuit of broader political objectives to operate as an alternative government in certain parts of Colombia.

69. However, even taking full account of these factors we cannot see that the specific actions taken against the appellant were by reason of any imputed political opinion. Given that Dr Herrera himself was apparently a farmer affected by the extortion racket we even have some doubts that their motives in kidnapping him were anything other than criminal and retaliatory. However, even assuming that in Dr Herrera`s case their motives were in part political, we cannot see that their motives could have had the same character in relation to the appellant. Unlike Dr Herrera she had no political profile and unlike Dr Herrera it is highly unlikely that they would impute a political opinion to her actions. It seems clear they knew that she was a law student and knew the ad hoc basis on which she had become involved in the investigations into

their extortion racket. We also attach particular significance to the fact that on the appellant`s own account those who threatened her never at any stage said anything to her to convey that they viewed her as a political threat

70. This case is thus far removed from the example mentioned in the hearing of a human rights lawyer who embarks on a crusade against guerrilla extortion rackets. In such an example one would at least need to assess whether the guerrillas would see such a crusade as a threat to their struggles to overthrow the state and as an expression of defiance towards their own political objectives.

71. Having found that the appellant has not shown a Convention ground, past or present, it is not necessary for us to go on to consider whether she can establish a causal nexus.

72. The Tribunal would emphasise, however, that in reaching its findings in this case it has not had recourse to broad "Star Wars" generalisations about the appellant being seen as on the side of law and order or in opposition to "dark forces". In contrast to certain isolated passages to this effect in *Acero-Garces* it has examined the different elements in the appellant's situation pointing to the presence or absence of political motives in the actions of her persecutors and doing so on the basis of concrete evidence as to the general situation pertaining in present-day Colombia as set out in the U.S. State Department report and other sources.

Summary of main conclusions

73.To summarise our main conclusions in this case:

I. The Special Adjudicator's approach to establishing credibility was flawed; but even treating the appellant's story as essentially true, she had not shown either a past or a current fear of persecution; furthermore, even if she had shown a fear of persecution it would not have been or be for a Convention reason;

II. In Colombia there is in general an insufficiency of protection, although this fact does not assist the case of this appellant;

III. The evidence did not establish a Convention ground of particular social group;

IV. The Tribunal confirms established case law: that in order to show persecution on account of political opinion, it is not necessary to show political action or activity; that in the context of both state and non-state actor cases the ground cannot be interpreted so as to exclude fundamental rights of the person protected under international human rights law, the rights to freedom of thought, conscience, opinion, expression, association and assembly in particular; and that political opinion may be express or imputed.

V. The political opinion ground requires a broad definition but not so broad as to cover any opinion which a non-state actor may impute.

VII. To qualify as political the opinion in question must relate to the major power transactions taking place in that particular society. It is difficult to see how a political opinion can be imputed by a non state actor who (or which) is not itself a political entity.

IX. It is an error to try to rely on a fixed category of persons on the side of law order and justice. Reference, *Star Wars*-style, to "dark forces" does not serve the interests of objective decision-making. To the extent that *Acero-Garces* relies on such an approach it is not to be followed;

X. Even in a case where an appellant can make out a Convention ground of political opinion, he or she must still also establish that the persecution is on account of that political opinion. It is common sense under this nexus test that even where persecutors have political views about those they target, it may not always be the political opinion that motivates their actions. As was said in *Jeah*, the mere existence of a generalised political motive does not lead to the conclusion that the persecutor perceives what the claimant has said or done as political;

XI. Certain features of the current Colombian context make it more possible than otherwise that criminal elements or guerrilla organisations will view the words or actions of those they persecute as representing a political opinion. This is certainly true of FARC, the guerrilla organisation being considered in this case.

XII. Even in cases involving criminal gangs or guerrillas, however, evidence of imputed political opinion cannot consist solely of the general political purposes of the persecutor.

XIII. When the appellant left Colombia guerrillas had not imputed a political to her nor would they do so now.

73. The appeal is dismissed.

DR H H STOREY
VICE- PRESIDENT