

Toward a More Individualized Assessment of Changed Country Conditions for Kosovar Asylum-Seekers

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Introduction	612
I. General Background on the Kosovo Situation	614
A. The Kosovo Conflict	614
B. The Aftermath of the Kosovo Conflict	616
C. Post Kosovo Conflict Stories of Political Pressure	617
II. Asylum Law and the Jurisprudence of Changed Country Conditions	619
A. The Asylum Process	619
B. Definition of “Refugee” and “Persecution”	619
C. The Jurisprudence of Changed Country Conditions	623
III. Facts of Typical Kosovar Asylum-Seeker Applications	625
A. Persecution at the Hands of the Serbian Military	625
B. Persecution at the Hands of the KLA	626
IV. How Courts Have Used Changed Country Conditions to Rebut Presumption in Favor of Well-Founded Fear of Future Persecution	627
V. Why State Department Reports Do Not Always Tell the Full Story	632
A. When Generalized Assessments of Changed Country Conditions Are Acceptable	632
B. The Problems of Generalized Assessments of Changed Country Conditions in Kosovo	634
VI. A New Framework	636
A. Individualized Assessments	636
B. Using the Entire State Department Report	637
C. Decreasing the Reliance on State Department Reports ..	638
VII. Addressing Some Perceived Weaknesses of the Proposed Framework	639

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A. The Difficulty of Making Individualized Assessment in Cases of Past Persecution that Occurred Many Years Before	639
B. State Department Reports Often Used Because They Are the Only Source Available	639
C. Does the New Framework Tip the Balance Too Heavily In Favor of Admitting Too Many Immigrants?	640
Conclusion	640

Introduction

Kosovo declared its independence on February 17, 2008, becoming the newest independent state in Europe.¹ Media outlets worldwide widely covered the lead up to its independence and included coverage of crimes against humanity, ethnic cleansing, and the intervention of NATO in 1999 to stop the atrocities. While many Kosovars originally sought asylum in the United States on the basis of persecution at the hands of the Milosevic government, in the years that followed, many Kosovars sought asylum on a new basis. These new asylum claims were complex, and included two independent (although related) forms of past persecution. The first was the original, well-known case of persecution on account of the crimes committed by the Serbian government. The second claim, significantly less covered by media outlets and largely unknown to those outside of Kosovo, involved post-NATO intervention persecution at the hands of Albanian extremists (former Kosovo Liberation Army (KLA) fighters). The KLA persecution included political intimidation, interrogations, beatings, and killings of pacifist Kosovar Albanians who did not participate in the Kosovo war.² Despite the numerous asylum applications that tell stories of horrendous treatment,³ many Kosovar asylum-seekers have had difficulty obtaining asylum in the United States.

Many claims of these Kosovar asylum applicants fail to establish a well-founded fear of future persecution. Although claims of past persecution are often found credible, Department of Homeland Security attorneys have often succeeded in rebutting the presumption of a well-founded fear of future persecution through evidence of “changed country conditions.”⁴ The evidence most often used to show “changed country conditions” are U.S. Department of State Reports on Human Rights Practices for the partic-

1. See Dan Bilefsky, *In a Showdown, Kosovo Declares Its Independence*, N.Y. TIMES, Feb.18, 2008, at A1.

2. For an in-depth discussion of the dual past persecution claims of Kosovar asylum-seekers, see *infra* Part I.

3. Most asylum applications do not make their way to the Circuit Court of Appeals of the United States. Unfortunately, only the circuit court decisions and a small number of Board of Immigration Appeals (BIA) opinions are available to the public, the other decisions are restricted. For more on the complete process of applying for asylum in the United States, see *infra* Part II.A.

4. See *infra* Part II for a discussion regarding what asylum applicants must show in order to succeed in getting asylum.

ular country.⁵ This evidence is often applied generally and mechanically,⁶ without an individualized assessment of how the purported changed country conditions affect the asylum eligibility of the applicant.⁷ With Kosovo's declaration of independence, Kosovar asylum applicants run the risk of having their claims for asylum denied on a general assessment of Kosovo's "changed" status.

Part I of this Note provides general background on the Kosovo situation, including accounts of the Milosevic Serb government's crimes prior to and during the Kosovo war, the NATO intervention and Kosovo's supervision under the United Nations' Interim Administration Mission in Kosovo (UNMIK), and an account of continued conditions in Kosovo since Kosovo's independence on February 17, 2008. Part II provides background on asylum law, particularly what the Immigration and Nationality Act (INA) requires of asylum applicants to qualify for refugee status and attain asylum in the United States. Part II also provides an explanation of the jurisprudence of "changed country conditions." Part III introduces the asylum claims of typical Kosovar asylum-seekers by examining the facts as they appear in several typical circuit court decisions. These facts include the applicants' claims of persecution by the Serb military, as well as persecution by ethnic Albanian extremist members of the KLA. Part IV provides examples of the holdings of these asylum tribunals, and focuses on how the Immigration Judges, Board of Immigration Appeals and the Circuit Courts applied the purported "changed country conditions" to particular cases, as well as why these decisions were wrong.

In Part V, I argue that a mechanical application of U.S. State Department reports in determining "changed country conditions" is the wrong approach when assessing the complex claims of Kosovar asylum-seekers. While U.S. State Department reports are often used as the only available evidence of country conditions, in the case of Kosovo these reports are not fully accurate and misstate the actual conditions in Kosovo. This part also compares the Kosovar claims to those of Albanian asylum-seekers that feared the communists. In Part VI, I argue that adjudicators should use a new framework for analyzing asylum claims of Kosovar asylum-seekers, and I advocate for a framework that pits the evidence of past persecution at the hands of Albanian extremists against the U.S. Department of State

5. See CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.04[5][g] (2008).

6. See Peter Margulies, *Democratic Transitions and the Future of Asylum Law*, 71 U. COLO. L. REV. 3, 17 (2000) ("Many recent decisions defer mechanically to State Department conclusions citing the results of single elections or changes in law "on the books" as proof that refugees have nothing to fear."). See also *Hoxhallari v. Gonzales*, 468 F.3d 179, 187 (2d Cir. 2006) (stating that in the case of Albania, which is no longer run by the Communists, "an immigration judge need not enter specific findings premised on record evidence when making a finding of changed country conditions . . .").

7. See *Alibasic v. Mukasey*, 547 F.3d 78, 87 (2d Cir. 2008) (vacating the decision of the BIA denying a Kosovar's claims for asylum because it "failed to conduct an individualized analysis of whether the changes in conditions in [Alibasic's homeland] were so fundamental that they are sufficient to rebut the presumption that [Alibasic's] fear of persecution is well-founded") (quotations and citations omitted).

reports in determining whether Kosovo's conditions have changed meaningfully for the particular asylum applicant. Finally, in Part VII, I consider some of the perceived weaknesses of the new framework, and explain why it remains a preferable alternative to the current model.

I. General Background on the Kosovo Situation

A. The Kosovo Conflict

As Yugoslavia dissolved, Kosovo, like Slovenia, Croatia, Macedonia, and Bosnia, desired to become an independent state.⁸ However, unlike the other countries that seceded from the former Yugoslavia, Kosovo, through the leadership of its leading political party, the Democratic League of Kosovo (LDK), attempted to achieve the same result through non-violent means.⁹ This LDK-backed, non-violent approach failed to secure independence for Kosovo and the subsequent suppression of the Albanian majority of Kosovo brought violence and ignited support for the radical paramilitary force known as the Kosovo Liberation Army (KLA).¹⁰ In 1997, the KLA initiated its violent campaign with small attacks on Serbian police officers and Albanians deemed to be Serb-collaborators.¹¹

Despite the KLA's attacks, the leader of the LDK, Ibrahim Rugova, dismissed stories of the KLA's uprising and claimed that the Serbian secret police had invented them.¹² As a response to the KLA's provocations, "[o]n February 28, [1998,] Serbian special police forces launched their first large-scale, military attack on villages . . . suspected of harboring KLA members."¹³ Beginning after February 28, 1998, KLA and Serbian forces engaged in ongoing hostilities that continued until after the NATO intervention.¹⁴ As a result of these hostilities, the Office of the United Nations Commissioner for Refugees (UNHCR) estimated that, by August 3, approximately 200,000 Kosovars had been displaced.¹⁵ After several international diplomatic attempts to end the Kosovo conflict failed, NATO

8. Albrecht Schnabel & Ramesh Thakur, *Kosovo, The Changing Contours of World Politics, and the Challenge of World Order*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION* 1, 3-4 (Albrecht Schnabel & Ramesh Thakur eds., 2000).

9. *Id.* at 4. See also Agon Demjaha, *The Kosovo Conflict: A Perspective From Inside*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION* 32, 33 (Albrecht Schnabel & Ramesh Thakur eds., 2000) ("Led by Ibrahim Rugova, the president of the Democratic League of Kosovo (LDK), the Kosovars conducted a non-violent campaign to win their right to self-determination."); TIM JUDAH, *KOSOVO: WAR AND REVENGE* 84 (Yale University Press 2000) (stating that Rugova's LDK pacified Kosovo while making the case for independence to the international community).

10. See Schnabel & Thakur, *supra* note 8, at 4. For a detailed account of the rise of the KLA in Kosovo, see JUDAH, *supra* note 9, at 94-103.

11. TIM JUDAH, *KOSOVO: WHAT EVERYONE NEEDS TO KNOW* 79 (Oxford Univ. Press 2008).

12. *Id.*

13. THE KOSOVO CRISIS: FACTS, FIGURES AND DOCUMENTS 49 (W. Van Der Wolf ed., 1999).

14. *Id.*

15. JUDAH, *supra* note 11, at 82.

intervened with a bombing campaign that began on March 24, 1999.¹⁶

The bombing of Serbian military and dual-use targets lasted for 78 days.¹⁷ During the bombings, the number of displaced Kosovars seeking refuge outside of Kosovo continued to increase until June 4, 1999.¹⁸ On June 4, the toll had reached “a reported total of 670,000 in the neighboring countries (Albania, Macedonia), along with an estimated 70,000 in Montenegro (within FRY), and 75,000 who had left for other countries.”¹⁹ These figures do not include the number of displaced Kosovars within Kosovo, estimated by NATO to have been around 200,000–300,000 in the year before the bombings.²⁰ By November 10, 1999, over 2,100 bodies had been found in approximately one-third of the 529 grave sites that had been reported to the International Criminal Tribunal for the Former Yugoslavia (ICTY), with more than 11,000 deaths reported to the ICTY prosecutors.²¹ The international community had, by this time, begun to recognize this violence as a systematic campaign implemented by the Serbian government of Milosevic to ethnically cleanse Kosovo.²²

On May 22, 1999, the ICTY charged Slobodan Milosevic with crimes against humanity and violations of the laws and customs of war.²³ The indictment against Milosevic accused him of planning, preparing and ordering the forceful expulsion of “over 740,000 Kosovo Albanians, approximately one-third of the entire Kosovo Albanian population” and the killing of “[a]n unknown number of Kosovo Albanians.”²⁴ Although the atrocities committed by the Serbian regime of Slobodan Milosevic are well-known, the KLA also committed a number of crimes, often killing civilians indiscriminately.²⁵

16. *Id.* at 83–87.

17. *Id.* at 87.

18. THE KOSOVO CRISIS, *supra* note 13, at 75.

19. *Id.*

20. *Id.*

21. *UN Gives Figure for Kosovo Dead*, BBC NEWS, Nov. 10, 1999, <http://news.bbc.co.uk/2/hi/europe/514828.stm>. For number of deaths of particular massacres carried out by the Serbian forces on civilian Kosovar Albanians, see JUDAH, *supra* note 11, at 89–90.

22. U.S. Dep’t of State, *Ethnic Cleansing in Kosovo: An Accounting* 3–4 (1999), available at http://www.state.gov/www/global/human_rights/kosovoii/pdf/kosovii.pdf (listing as aspects of ethnic cleansing: forcible displacement of Kosovar Albanians, looting of homes and businesses, widespread burning of homes, use of human shields, detentions, summary executions, exhumation of mass graves, rape, violations of medical neutrality, and identity cleansing).

23. THE KOSOVO CRISIS, *supra* note 13, at 350.

24. *Id.* at 356.

25. See, e.g., JUDAH, *supra* note 11, at 84 (“The number of clashes began multiplying, as did ugly incidents of pure terror, such as the gunning down of six Serbian teenagers in the Panda Café”); JUDAH, *supra* note 9, at 137 (“Kosovar observers calculate that since 1996 [until March 1998] the organisation has claimed responsibility for killing twenty-one citizens in the province, including five policemen, five Serb civilians and eleven Kosovars accused of collaborating with the Serbian regime.”) (citations omitted).

B. The Aftermath of the Kosovo Conflict

At the end of the Kosovo conflict, the United Nations Security Council passed Security Council Resolution 1244 on June 10, 1999, transferring the jurisdiction of Kosovo to the UN, and creating the United Nations Interim Administration Mission in Kosovo (UNMIK).²⁶ The goal of the UNMIK was to help Kosovo by “provid[ing] transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.”²⁷ UNMIK experienced some successes during its supervision of Kosovo, including creating and training the Kosovo Police Service (KPS), issuing Kosovars documents such as UNMIK passports, overseeing the creation of an assembly, and overseeing national elections.²⁸

On October 10, 1999, the leader of KLA, Hashim Thaci, created the Democratic Party of Kosovo (PDK).²⁹ On its website, the PDK honors its roots by stating on its history page that “The Democratic Party of Kosovo was founded at a very important moment of our history. After the heroic war of the Kosovo Liberation Army and the entry of international forces, . . . the conditions were appropriate for political activity.”³⁰ Although the LDK remained in power through the general elections of November 17, 2001,³¹ and the general elections of October 23, 2004,³² it lost the general elections of November 17, 2007 to Hashim Thaci’s PDK.³³

After the 2007 election defeat, the LDK joined a fragile coalition with the PDK, retaining some ministry positions and the Presidency. The PDK became the dominant party in Kosovo, with Hashim Thaci as the Prime Minister.³⁴ Despite their “coalition of convenience” the two parties have continued to spar, recently threatening to break off their coalition and force

26. S.C. Res. 1244, ¶¶ 9-11, U. N. Doc. S/RES/1244 (June 10, 1999).

27. *Id.* at ¶ 10.

28. Judah, *supra* note 11, at 95.

29. See Democratic Party of Kosovo History Page, <http://www.pdk-ks.org/advCms/?id=4,124,124,124,a> (stating that the PDK was founded on October 10, 1999, and that Hashim Thaci has been its leader since its founding) (translated from Albanian).

30. *Id.* (“Partia Demokratike e Kosovës u themelua në një moment të veçantë të historisë sonë. Pas luftës heroike të Ushtrisë Çlirimtare të Kosovës dhe vendosjes së forcave ndërkombëtare, . . . u krijuan kushtet e përshtatshme për veprimtari politike.”) (translated from Albanian).

31. The LDK gained 47 seats in the assembly while the PDK gained 26. Adam Carr’s Election Archive, Legislative Election of 17 November 2001, <http://psephos.adam-carr.net/countries/k/kosovo/kosovo2001.txt>.

32. The LDK gained 49 seats compared to the 31 seats for the PDK. Adam Carr’s Election Archive, Legislative Election of 23 October 2004, <http://psephos.adam-carr.net/countries/k/kosovo/kosovo2004.txt>.

33. In the 2007 elections, the latest as of this writing, the PDK gained 37 seats in the assembly while the LDK gained 25 seats. Adam Carr’s Election Archive, Legislative Election of 17 November 2007, <http://psephos.adam-carr.net/countries/k/kosovo/kosovo2007.txt>. Hashim Thaci is currently the Prime Minister of Kosovo.

34. See Krenar Gashi, *Two Kosovo Parties to Form Government*, BALKAN INSIGHT, Dec. 25, 2007, <http://www.balkaninsight.com/en/main/news/7145> (“Thaci will lead a government of 7 ministers from his party, 5 ministers from LDK and 3 ministers from representatives of non-Albanian communities, according to Balkan Insight sources.”).

early elections in Kosovo.³⁵

Under Hashim Thaci's leadership, Kosovo declared independence on February 17, 2008.³⁶ As of March 23, 2010, sixty-five countries have recognized Kosovo's independence, including the majority of the European Union countries and the United States.³⁷ Although the declaration of independence will likely afford the current Albanian government of Kosovo an increased ability to govern without obstacles from international bodies, the Kosovo situation has not yet been resolved and Kosovo's declaration of independence may only be the latest, rather than the final development, of this saga.³⁸

C. Post Kosovo Conflict Stories of Political Pressure

The Kosovo Liberation Army and other radical Albanian groups committed many atrocities after the end of the Kosovo conflict. Examples of these atrocities include burnings and lootings of Serb and Roma property, beatings, and killings.³⁹ The KLA also maintained a network of secret prisons "where Kosovo Serbs, Albanians and Roma were interrogated, tortured and in most cases killed."⁴⁰ According to Tim Judah, "even after the demilitarisation of the KLA, killings continued, sometimes committed by the 'secret police' which was connected to Thaci's ministry of the interior."⁴¹ Included in these atrocities were those directed at moderate Kosovar Albanians and critics of the KLA, often named "Serb collaborators."⁴²

The KLA directed many of their attacks at LDK party members. The LDK and Ibrahim Rugova, unlike the KLA, had sought a non-violent solution to Kosovo's independence.⁴³ After the Kosovo conflict, politically motivated crime increased as ethnically motivated crimes decreased.⁴⁴ According to a March 3, 2000 report by the International Crisis Group,

35. See Petrit Collaku, *Fraud Forces Kosovo Election Re-runs*, BALKAN INSIGHT, Dec. 21, 2009, <http://www.balkaninsight.com/en/main/news/24547> ("Officials from LDK and PDK said over the weekend that the governing coalition is in political crisis and they believe that early elections will be held in spring 2010. . . . [T]he latest developments and the second round of elections are a clear signal that PDK and LDK cannot govern together.").

36. Bilefsky, *supra* note 1, at A1.

37. See *Who Recognized Kosova as an Independent State? Home Page*, <http://www.kosovothankyou.com> (last visited Mar. 23, 2010).

38. For more on why the status of Kosovo is still not completely determined despite the declaration of independence, see JUDAH, *supra* note 11, at 140-51. See also *Kosovo and Serbia Set for UN ICJ Battle*, THE KOSOVO TIMES, Sept. 2, 2009, <http://www.kosovotimes.net/analysis/1004-kosovo-and-serbia-set-for-un-icj-battle.pdf>.

39. See JUDAH, *supra* note 9, at 290 ("The most serious incidents of violence, however, have been carried out by members of the KLA.").

40. See Michael Montgomery, *Horrors of KLA Prison Camps Revealed*, BBC NEWS, Apr. 9, 2009, <http://news.bbc.co.uk/2/hi/europe/7990984.stm>.

41. See JUDAH, *supra* note 9, at 290.

42. See *id.* at 137, 292-95. See also JUDAH, *supra* note 11, at 96-98.

43. See Demjaha, *supra* note 9, at 33.

44. See International Crisis Group Balkans Report No. 88, *What Happened to the KLA?* 16 (2000), available at <http://www.ciaonet.org/wps/icg180/icg180.pdf>.

“[i]n almost all cases the victims have been prominent officials of the LDK, and here the argument of *cui bono* (who benefits?) appears irresistible, since the LDK is the PPK’s only credible political opponent (even more so, as in the countryside where the war was fought, many people see the KLA and the LDK as complementary organisations).”⁴⁵ An example provided in the report notes that “[o]n 23 February 2000, another local LDK activist and schoolteacher, Ismet Veliqi, was abducted, beaten, shot and left for dead. Veliqi claims that the assailants were Albanians, who during the mistreatments asked him: ‘Why do you still support Rugova?’”⁴⁶ Tim Judah reports that “[d]uring the autumn of 1999, as Rugova’s war-shattered LDK began reorganising, party officials were threatened, harassed and at least one was killed.”⁴⁷ Although there have been numerous crimes committed against the political opponents of the KLA, the events have rarely been reported due to journalists’ fear of repercussions.⁴⁸

Also very worrisome are reports that a new extremist Albanian group, the Albanian National Army (ANA) (also known as the Armata Kombëtare Shqiptare (AKSH)), has been formed and continues to grow in number.⁴⁹ The ANA’s alleged goal is “uniting all ethnic Albanian lands in the Balkans.”⁵⁰ The ANA has claimed responsibility for a number of attacks in the region, and has been declared a terrorist organization by the UNMIK.⁵¹ This group has been closely associated with the KLA.⁵²

45. *Id.* Note that the PPK is the former name of the PDK party. The party changed its name from PPK (Party for the Democratic Progress of Kosovo) to PDK (Democratic Party of Kosovo) on May 21, 2000 because of an internal dispute over whether the word “progress” had Albanian origins. See BPT International, Monthly Reports No. 15, May 2000, <http://www.ddh.nl/fy/kosova/reports/2000/bpt-k-monthly1906.html>.

46. International Crisis Group, *supra* note 44 at 16 n.18.

47. JUDAH, *supra* note 9, at 294–95 (linking the KLA to the crimes committed against the moderate Kosovar Albanians and LDK party members).

48. See JUDAH, *supra* note 11, at 98 (“In Kosovo, journalists can get killed for probing into these things so, in general, they don’t.”). See also U.S. Dep’t of State, 2008 Human Rights Report: Kosovo §2(a) (2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119462.htm> (“[T]here were reports of intimidation of reporters, including by officials in the public sector and government and by politicians and businesses. . . . Journalists reported pressure from politicians and organized crime, which frequently resulted in indirect forms of censorship. Some journalists refrained from critical investigative reporting out of fear for their personal security.”); Veton Surroi Refuses to Participate in the State Events, *Raises Voice Against Pressure on Media*, THE KOSOVO TIMES, June 15, 2009, <http://www.kosovotimes.net/kosovo-chronicle/511-veton-surroi-refuses-to-participate-in-the-state-events-raises-his-voice-against-pressure-on-free-m.html> (reporting that Veton Surroi refused to participate in events marking first anniversary of Kosovo’s Constitution because of refusal by leaders to protect “a long list of media people who are being exposed to direct pressure . . . on many cases directly by representatives of the governing structures in the Republic of Kosovo”).

49. Report: ANA Paramilitaries Patrolling Northern Kosovo Towns, SOUTHEAST EUROPE TIMES, Nov. 14, 2007, http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2007/11/14/feature-01 (reporting that since its creation in 2001, the ANA has reportedly grown to 12,000).

50. *Id.*

51. *Id.*

52. See Altin Raxhimi, *The KLA: From Guerrilla Wars to Party Plenums*, BALKAN INSIGHT, <http://www.balkaninsight.com/en/main/info/18016/> (“Several former senior

Kosovar seekers' pleas for asylum often fall on deaf ears because, since the end of the Kosovo conflict, foreign powers who want the Kosovo project to succeed have largely ignored the continuing atrocities in Kosovo. As Tim Judah stated:

Unfortunately, especially in a book such as this, readers should be aware that there are also many things that are either known or widely believed but which cannot be written about for legal reasons. The sort of thing being referred to includes questions of when outsiders turn a blind eye to things they should not, in return for stability.⁵³

II. Asylum Law and the Jurisprudence of Changed Country Conditions

A. The Asylum Process

The asylum process in the United States can begin in one of two ways: either asylum-seekers may affirmatively apply for asylum by filing asylum applications, or undocumented immigrants that are apprehended can request asylum as a defense in deportation proceedings.⁵⁴ The affirmative asylum process involves: (1) arriving in the United States; (2) filing an I-589, Application for Asylum and Withholding of Removal form; (3) interviewing with an Asylum Officer. If denied, (4) deportation proceedings begin in front of an Immigration Judge, where the applicant may request asylum as a defense; (5) if denied again, the applicant may appeal the Immigration Judge's decision to the Board of Immigration Appeals (BIA); (6) if denied by the BIA, the applicant may appeal the ruling of the Board of Immigration Appeals to the Circuit Courts of Appeal of the United States.⁵⁵ The deportation proceedings process is the same as the affirmative process, except for commencing at step (4). For the purposes of this note, only steps (4)-(6) are relevant.

B. Definition of "Refugee" and "Persecution"

The immigration law of the United States is ever-growing and complex.⁵⁶ Much of this complexity comes from the competing policy goals of accepting immigrants, but limiting the number of immigrants successfully accepted to those that "deserve" to stay.⁵⁷ Partly to satisfy these competing

KLA officials . . . were active in the formation of . . . the Albanian National Army, ANA, which operated in Macedonia.").

53. See JUDAH, *supra* note 11, at 97-98.

54. See Vincente A. Tome, *Administrative Notice of Changed Country Conditions in Asylum Adjudication*, 27 COLUM. J.L. & SOC. PROBS. 411, 422-23 (1994).

55. See *id.* at 422-26. See also U.S. Citizenship and Immigration Services, *Affirmative Asylum Procedures Manual*, November 2007, 5-50, available at <http://www.uscis.gov/files/nativedocuments/AffirmAsyManFNL.pdf>. Notably only the circuit court opinions are fully available to the public. A few "notable" BIA opinions designated for publication are also available, but most BIA decisions remain restricted to anyone but the applicant herself, making research on BIA decisions difficult to impossible.

56. See GORDON, *supra* note 5, at § 1.01 (2008).

57. See *id.* "The subject owes its mazelike quality in part to the conflict between the positive experience of the United States as a 'nation of immigrants' and the considera-

policies, the Immigration and Nationality Act (INA), which provides the basis for asylum law, authorizes the Secretary of Homeland Security to grant asylum to a noncitizen of the United States that meets the definition of a refugee.⁵⁸

The INA defines a “refugee” as:

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁵⁹

This definition clarifies that, to qualify for asylum in the United States, an applicant must demonstrate either past persecution or a well-founded fear of future persecution on the basis of one of the five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion.⁶⁰

Because the INA does not define the term “persecution,” the definition of the term has evolved through case law.⁶¹ The case law definition of “persecution” has been very fact-dependent and has come to include acts as severe as imprisonment and torture as well less harmful acts such as confiscation of property.⁶² The First Circuit explained that, while persecution is a broader concept than “threats to life or freedom,” it does not extend to “mere harassment or annoyance.”⁶³ The court then further elaborated that “[b]etween these broad margins, courts have tended to consider the subject on an ad hoc basis.”⁶⁴ The Second Circuit expanded the definition of persecution to explicitly include “non-life threatening violence and physical abuse.”⁶⁵ While agreeing that many non-life threatening acts constitute persecution, courts have continually clarified that the definition of

tions . . . for limiting the number and kind of those ‘whom we shall welcome.’” (citations omitted).

58. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A). See also GORDON, *supra* note 5, at § 33.04[1][c].

59. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

60. *Id.* If an applicant does not meet some of these requirements, he or she may still qualify for humanitarian asylum. 8 C.F.R. §§ 208.13(b)(1)(iii), 1208(b)(1)(iii). The applicant could also have recourse under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), available at http://www.asylumlaw.org/docs/international/UN_convention_torture.pdf. Because these two alternate methods are much harder to obtain for Kosovar asylum-seekers, they are not analyzed in this note.

61. See GORDON, *supra* note 5, at § 33.04[2].

62. See *id.*

63. See *Aguilar-Solis v. INS*, 168 F.3d 565, 570 (1st Cir. 1999).

64. See *id.*

65. See *Chen v. U.S. INS*, 359 F.3d 121, 128 (2d Cir. 2004) (citing *Begzatowski v. INS*, 278 F.3d 665, 669 (7th Cir. 2002), and *Liao v. U.S. Dep’t of Justice*, 293 F.3d 61, 67 (2d Cir. 2002)).

persecution does not include all acts deemed offensive.⁶⁶

Although the BIA has not attempted to provide a concrete definition of persecution, it has provided some insight on the parameters of the term.⁶⁷ Persecution, according to the BIA is

the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.) in a manner condemned by civilized governments. The harm or suffering need not [only] be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.⁶⁸

The term “under government sanction” does not mean that the government must affirmatively sanction the offensive acts. Instead, the BIA has interpreted the statutory language to require that the persecutors are forces that the government is either “unable or unwilling to control.”⁶⁹

As the INA makes clear, an applicant can qualify for asylum only after demonstrating either past persecution or a well-founded fear of future persecution.⁷⁰ The “well-founded fear” standard was clarified by the Supreme Court in *INS v. Cardoza-Fonseca*.⁷¹ According to the Court, the standard was more generous than the “clear probability” standard that governs restrictions on removal.⁷² Instead of this clear probability standard, the difficulty of meeting the “well-founded fear” standard depends on the facts of each case.⁷³ However, an applicant does not have to prove “that it is more likely than not that he or she will be persecuted in his or her home country.”⁷⁴ In fact, all the applicant must show is that “persecution is a reasonable possibility,” and, for example, even a ten percent chance of future persecution could meet the “well-founded fear” of future persecution standard.⁷⁵ The Court stated that

[t]here is simply no room . . . for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no ‘well-founded fear’ of the event happening. . . . [S]o long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.⁷⁶

66. See *Fatin v. INS*, 12 F.3d 1233, 1243 (3d Cir. 1993) (defining persecution as an “extreme concept that does not include every sort of treatment our society regards as offensive”).

67. See *Matter of Laipenieks*, 18 I. & N. Dec. 433, 456–57 (BIA 1983), *rev’d on other grounds* 750 F.2d 1427 (9th Cir. 1985).

68. *Id.* at 457 (citations omitted).

69. See *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

70. See INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

71. 480 U.S. 421 (1987).

72. *Id.* at 449–50.

73. *Id.* at 448.

74. *Id.* at 449.

75. *Id.* at 440.

76. *Id.* (internal quotations and citations omitted).

The “well-founded fear” standard includes both subjective and objective components, requiring that the applicant show that his or her fear is subjectively genuine, and that this fear has an objective, reasonable basis.⁷⁷ This standard therefore requires a court to consider both the applicant’s state of mind (the subjective component), as well as whether that state of mind is reasonable (the objective component).⁷⁸ Although courts often assume that an applicant has satisfied the subjective component, the objective component is harder to establish.⁷⁹ To satisfy the objective component, applicants must demonstrate that the fear is reasonable by producing “credible, direct, and specific evidence in the record.”⁸⁰ The asylum applicant must demonstrate that his or her persecutor has the capability and inclination to punish the applicant for a characteristic that the persecutor knows or could find out about the applicant.⁸¹ The applicant may either provide evidence showing that he or she will be individually targeted for persecution, or, in some situations, the applicant can provide evidence showing that he or she is similarly situated to others that the persecutors target.⁸²

The asylum applicant must show that his or her persecution has come or will come on account of one or more of the five enumerated grounds.⁸³ These grounds are race, religion, nationality, membership in a particular social group, and political opinion.⁸⁴ For the applicant’s persecution to be “on account of” one of the enumerated grounds, the REAL ID act requires the ground to be “at least one central reason” for persecution.⁸⁵ The REAL

77. See *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986) (“The objective component ensures that the alien’s subject fear is ‘well-founded’ in fact and not in fantasy What is critical is that the alien prove his fear is subjectively genuine and objectively reasonable.”) (citations omitted). See also GORDON, *supra* note 5, at § 33.04[2][a][ii].

78. GORDON, *supra* note 5, at § 33.04[2][a][iii].

79. E.g., *Ang v. Gonzales*, 430 F.3d 50, 57 (1st Cir. 2005) (“We assume, for argument’s sake, that Ang has satisfied the subjective component, that is that he genuinely fears persecution were he to return to Cambodia. Even so, Ang still must satisfy the objective component of the test.”); *Guevara Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986) (“[F]ear is a state of apprehension or anxiety not usually subject to rational measurement.”).

80. *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986).

81. See *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987) (listing the elements that an asylum applicant must meet to satisfy the objective component of well-founded fear).

82. 8 C.F.R. §§ 208.13(b)(2)(iii), 1208.13(b)(2)(iii); *M.A. v. U.S. INS*, 858 F.2d 210, 214 (4th Cir. 1988), *rev’d on other grounds*, 899 F.2d 304 (4th Cir. 1990) (rehearing en banc) (“We interpret the petitioner’s burden to produce specific, objective evidence of a ‘good reason’ to fear persecution, not to require evidence that demonstrates that the petitioner has individually been threatened by the authorities. Rather, the petitioner ought to be able to adduce objective evidence that members of his group, which includes those with the same political beliefs of the petitioner, are routinely subject to persecution.”) (citations omitted).

83. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

84. *Id.*

85. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(3)(B)(i), 119 Stat. 231.

ID act likely requires more proof of causation than previously required.⁸⁶ Despite this change, however, the new language preserves the possibility that the persecutor is acting on mixed motives.⁸⁷ Furthermore, as in many of the Kosovar asylum applicant cases, the applicant's refugee status need not be based on only one of the grounds, and the courts need not parse out the exact protected ground if more than one protected ground is implicated.⁸⁸

Finally, an asylum applicant that satisfactorily demonstrates past persecution on account of one of the five enumerated grounds⁸⁹ is presumed to have a well-founded fear of future persecution.⁹⁰ There are, however, two caveats to this presumption in favor of a well-founded fear. First, the applicant will only have a presumption of well-founded fear of future persecution if the basis for future persecution is on the same protected ground as the basis for the past persecution.⁹¹ Second, the Department of Homeland Security (DHS) can rebut the presumption of a well-founded fear of future persecution by showing that the applicant could relocate safely within the applicant's own country.⁹² The DHS can also rebut the presumption by introducing evidence showing that there have been fundamental changes in the applicant's country such that the applicant's fear of future persecution can no longer be well-founded.⁹³

C. The Jurisprudence of Changed Country Conditions

The DHS can rebut the presumption of a well-founded fear of future persecution by introducing evidence that there have been fundamental changes in the applicant's country which make the applicant's fear of returning not well-founded.⁹⁴ Such changes may include, for example, a change in government from a government hostile to the applicant to one

86. See Marisa S. Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act Is a False Promise*, 43 HARV. J. ON LEGIS. 101, 118 (2006) (“[U]se of the term “central” creates opportunity for adjudicators to require more proof of causation . . .”).

87. See GORDON, *supra* note 5, at § 33.04[3].

88. See *id.* at § 33.04[4]. Kosovar applicants, for example, may claim refugee status on account of religion, nationality, political opinion and membership in a social group when complaining of persecution at the hands of the prior Serbian government. They may also claim persecution on the grounds of political opinion and membership in a social group when complaining of persecution at the hands of Albanian extremists.

89. In the Ninth Circuit, an applicant does not have to show that he or she was singled out to establish past persecution, it suffices to show that the persecution was on account of a protected ground. See *Knezevic v. Ashcroft*, 367 F.3d 1206, 1211 (9th Cir. 2004) (“While proof of particularized persecution is sometimes required to establish a well-founded fear of future persecution, such proof of particularized persecution is not required to establish past persecution.”).

90. See GORDON, *supra* note 5, at § 33.04[2][b][i].

91. See *id.*

92. See 8 C.F.R. §§ 208.13(b)(1)(i)(B), 1208.13(b)(1)(i)(B) (stating that if the applicant could relocate to another part of his or her country and avoid persecution there, “it would be reasonable to expect the applicant to do so”).

93. See 8 C.F.R. §§ 208.13(b)(1)(i)(A). See also *Matter of C-Y-Z*, 21 I. & N. Dec. 915, 919 (BIA 1997).

94. See 8 C.F.R. §§ 208.13(b)(1)(i)(A).

tolerant of the applicant.⁹⁵ “Further, if an ‘appreciable portion’ of refugee claims arise from a particular country so that Immigration Judges have developed expertise in that country’s current conditions, judges can take administrative notice of a change in those conditions without citing to record evidence.”⁹⁶ However, the Immigration Judge must apply the change to the applicant’s claims.⁹⁷

Evidence of changed country conditions often comes in the form of U.S. State Department reports.⁹⁸ Immigration Judges, the BIA, and circuit courts have often relied on these reports as the best source of information on conditions within foreign states, even though courts have admitted that reliance on these reports is problematic.⁹⁹ This heavy reliance on State Department reports received a boost from the Supreme Court in *INS v. Ventura*,¹⁰⁰ where the Court ruled that, even though the country report at issue was ambiguous, it was appropriate for the BIA to construe it “in light of its own expertise.”¹⁰¹ However, adjudicators must not rely solely on the State Department reports to the exclusion of evidence produced by the applicant,¹⁰² nor can they rely on general evidence in the State Department reports to find an applicant’s testimony incredible, or pick and choose facts from the reports while ignoring evidence in the reports

95. See, e.g., *Dhine v. Slattery*, 3 F.3d 613, 619 (2d Cir. 1993) (“[I]t is undisputed that the fall of Mengistu resulted in a new regime rather than an orderly substitution of ministers or parties in a continuing government. Such a change in conditions is sufficient, in the absence of any countervailing showing by Dhine, to support a finding on a preponderance of evidence test that conditions in Ethiopia have so changed that Dhine no longer has a well-founded fear of being persecuted if he were to return.”).

96. GORDON, *supra* note 5, at § 33.04[5][e] (citing *Hoxhallari v. Gonzales*, 468 F.3d 179, 187 (2d Cir. 2006); *Circu v. Gonzalez* 450 F.3d 990, 993 (9th Cir. 2006)).

97. See *Berishaj v. Ashcroft*, 378 F.3d 314, 328 (3d Cir. 2004) (“The IJ’s extremely general observation that, in the wake of Milosevic’s withdrawal of influence over Montenegro, ‘the government of Montenegro has shown signs of self-determination’ does nothing to refute Berishaj’s claims of police-initiated persecution.”).

98. See *Ramaj v. Gonzales*, 466 F.3d 520, 531 (6th Cir. 2006) (“The country reports relied upon by the IJ constitute substantial evidence supporting the conclusion that country conditions in Albania have improved to the point that any presumption of a well-founded fear of future persecution is rebutted.”). See also GORDON, *supra* note 5, at § 33.04[5][e].

99. *Mullai v. Ashcroft*, 385 F.3d 635, 639 (6th Cir. 2004) (“Although this circuit acknowledges that State Department reports may be problematic sources on which to rely, . . . in other cases we adopt the view that such reports ‘are generally the best source of information on conditions in foreign nations.’”) (citations omitted). The heavy reliance on State Department reports is particularly problematic in the Kosovo context. See *infra* Part V.

100. 537 U.S. 12 (2002) (per curiam).

101. *Id.* at 17.

102. See *Tambadou v. Gonzales*, 446 F.3d 298, 302-03 (2d Cir. 2006) (stating that the State Department reports’ “observations do not automatically discredit contrary evidence presented by the applicant, and they are not binding on the immigration court. . . . In addition, the immigration court cannot assume that a report produced by the State Department—an agency of the Executive Branch of Government that is necessarily bound to be concerned to avoid abrading relations with other countries, especially other major world powers—presents the most accurate picture of human rights in the country at issue. We note the widely held view that the State Department’s reports are sometimes skewed toward the governing administration’s foreign-policy goals and concerns.”).

favorable to the applicant.¹⁰³ The Seventh Circuit has criticized the BIA's heavy reliance on the State Department reports, noting that it has a tendency to treat the reports as "Holy Writ."¹⁰⁴ Finally, various circuit courts have chastised the BIA for shirking its responsibilities due to its practice of often basing its decisions on outdated State Department reports in finding that country conditions have substantially improved for the asylum applicant.¹⁰⁵

The U.S. Department of State is not the only source of country reports on human rights violations. Prominent private organizations such as Amnesty International and Human Rights Watch also release similar reports. There have been cases where immigration tribunals have used such reports as evidence of country conditions,¹⁰⁶ but this practice is not widespread, and is, at most, limited to supplementing the overall record of current country conditions.¹⁰⁷ In fact, some immigration tribunals have viewed these private organizations' reports as replete with problems and bias, and they therefore play a much less prominent role in immigration tribunal decisions than do State Department reports.¹⁰⁸

III. Facts of Typical Kosovar Asylum-Seeker Applications

A. Persecution at the Hands of the Serbian Military

Most Kosovar asylum-seekers, among other claims for persecution, include stories of torture and degradation at the hands of the Serbian military and paramilitary forces both before and during the Kosovo conflict of 1998-1999. Their mistreatment included imprisonment for false reasons, mortal threats, severe beatings, and even killings of family members. All of these methods of persecution have been alleged by the petitioner in *Maliqi v. Attorney General of the U.S.*¹⁰⁹ Mr. Maliqi had been arrested six times, and during the last arrest, which occurred in March 1999, he was falsely

103. GORDON, *supra* note 5, at § 33.04[5][g] (citing cases from the First, Seventh and Ninth circuits).

104. *Gallina v. INS*, 213 F.3d 955, 959 (7th Cir. 2000).

105. See, e.g., *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004) (chastising the BIA in stating that "[t]he 'reasoning' of the IJ is open to ridicule, . . . and the administrative record is a hoary relic: For example, the most recent country report was thirty-five months out-of-date at the time the BIA rendered its decision, and as of this writing, is fifty-four months out-of-date. . . . Setting aside our perplexity at how the BIA apparently thought the IJ's opinion worthy of being the 'final agency determination,' we do not understand why the BIA did not intervene to supplement the record in a weak case"); *Yang v. McElroy*, 277 F.3d 158, 163 (2d Cir. 2002); *Gafoor v. INS*, 231 F.3d 645, 654 (9th Cir. 2000).

106. See *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003).

107. See *M.A. v. U.S. INS*, 899 F.2d 304, 313 (4th Cir. 1990)

108. See *id.* (agreeing with the BIA decision not to recognize the private reports, and further elaborating that "[a] standard of asylum eligibility based solely on pronouncements of private organizations or the news media is problematic almost to the point of being non-justiciable. . . . Although we do not wish to disparage the work of private investigative bodies in exposing inhumane practices, these organizations may have their own agendas and concerns, and their condemnations are virtually omnipresent").

109. 262 F. App'x 426 (3d Cir. 2008).

accused of assisting the Kosovo Liberation Army and detained and beaten at the police station for four days.¹¹⁰ Serbian police forces also shot and killed Maliqi's father on March 21, 1999, three days prior to the NATO intervention.¹¹¹ Similar claims of imprisonment, threats and beatings appear in the brief for petitioner in the case of *Shalaj v. Gonzales*.¹¹² In that case, Shalaj's father had been arrested three times from 1990 to 1992 because of his anti-Serbian government activities. During these arrests, Shalaj's father was beaten severely, and as a result of numerous blows to the head in the last of these arrests, he slipped into a coma and died.¹¹³

Other methods of persecution at the hands of the Serbian forces included forced expulsions and even rape. According to the Shalaj petitioner brief, Shalaj and his family were forced to leave their homes and were forced to go to Montenegro.¹¹⁴ During the forced trip there, Shalaj was separated from his family and Serbian forces took him away with approximately 120 other males, some of whom were executed.¹¹⁵ Shalaj was one of the lucky ones, surviving and staying at Rozi, Montenegro for three weeks, later reuniting with his family and returning home after the NATO campaign to find that his house had been burned down.¹¹⁶ Meanwhile, the petitioner in *Nikollbibaj v. Gonzales*¹¹⁷ alleged that Serbian police officers took him to a police station, and while he was detained, five Serbian police officers raped his wife in front of her daughter, mother-in-law, sister-in-law, and other family members.¹¹⁸

B. Persecution at the Hands of the KLA

Most recent Kosovar asylum-seekers have alleged that they, at least in part, fear returning to Kosovo because they fear that the Kosovo Liberation Army will persecute them. As part of their applications, these asylum-seekers allege that, after the end of the Kosovo conflict, former members of the KLA committed different kinds of atrocities against them and caused them to fear for their lives. An example of KLA pressure toward members of the LDK party who did not fight in the Kosovo conflict is the story of fear told by Fatos Shalaj. According to Shalaj, he was constantly harassed by KLA members upon returning to Kosovo after the conflict.¹¹⁹ Besides constant harassment and threats, Shalaj was attacked one night in May 2003 by two masked individuals and was brutally beaten for approximately twenty min-

110. Brief of Petitioner at 5, *Maliqi v. Attorney Gen. of the U.S.*, 262 F. App'x 426 (3d Cir. 2008) (No. 06-3169), 2007 U.S. 3rd Cir. Briefs LEXIS 993. Brief of Petitioner used because Circuit Court opinions are generally very short and do not lay out all the facts presented by the applicants.

111. *Id.*

112. Brief for Petitioner, *Shalaj v. Gonzales*, 229 F. App'x 34 (2d Cir. 2007) (No. 06-4306), 2006 U.S. 2nd Cir. Briefs LEXIS 203

113. *Id.* at 4.

114. *Id.*

115. *Id.* at 4-5.

116. *Id.*

117. 232 F. App'x 546 (6th Cir. 2007).

118. *Id.* at 550.

119. Brief for Petitioner, *supra* note 112, at 5.

utes.¹²⁰ This attack was followed by numerous threatening phone calls.¹²¹

Similarly, Fitim Balaj was an LDK supporter (becoming a party member in 1997) who faced constant pressure and threats from KLA members.¹²² According to Balaj, in October 2002, as he and his wife walked home after an LDK meeting, three masked men stopped them and warned them to discontinue their LDK activities.¹²³ After the threats, one of the masked men hit Balaj over the head with a gun, and, while Balaj was unconscious, the masked men threatened to rape his wife. Luckily, other LDK members who had left the meeting stopped the masked men from continuing. In March 2004, a car bomb exploded outside the Balaj residence during the night, shattering the windows and injuring the family. For Balaj this was the straw that broke the camel's back, and he left Kosovo that same day.¹²⁴

An even more startling story of horror at the hands of the KLA is that of Pal Gojani.¹²⁵ Gojani had been a member of the LDK since 1989.¹²⁶ In 1998, during the ethnic cleansing campaign in Kosovo, KLA members tried to recruit Gojani to fight with them.¹²⁷ Gojani refused to join and the KLA members told Gojani to leave his village or else they would consider him a traitor. On June 13, 1999, Gojani's wife and cousin disappeared and were later found dead. On July 21, 1999, approximately one month later, KLA members returned to Gojani's house but were told that he had left for Albania. Gojani remained in hiding until after NATO had taken control of the area fearing that the KLA would kill him. After the end of the war, Gojani opened a café with his brother. Shortly after the café opened, two men came and threatened Gojani because of his LDK membership. Within a week of the incident, Gojani's café was burned down and a note was left for him that read "we are going to bake you like a sheep." Gojani fled Kosovo after this incident.¹²⁸

IV. How Courts Have Used Changed Country Conditions to Rebut Presumption in Favor of Well-Founded Fear of Future Persecution

The case law on Kosovar applicants includes cases in which the circuit courts have corrected the mistakes of the BIA when evaluating the presumption that future fear of persecution is well-founded. An example of a circuit court correctly pointing out that the BIA had not "conduct[ed] an individualized analysis of whether the changes in conditions . . . were so

120. *Id.*

121. *Id.* at 6.

122. *Balaj v. Attorney Gen. of the U.S.*, 265 F. App'x 82 (3d Cir. 2008).

123. *Id.* at 83-84.

124. *Id.* at 84.

125. *Gojani v. Mukasey*, 266 F. App'x 420 (6th Cir. 2008).

126. *Id.* at 421

127. *Id.* At least part of Gojani's reason for not joining was religious. Gojani sought asylum on both bases of political opinion and religion. *See id.*

128. *Id.*

fundamental that they were sufficient to rebut the presumption that . . . fear of persecution is well founded” is *Alibasic v. Mukasey*.¹²⁹ In that case, the BIA had used the 2004 State Department Country Report for Serbia and Montenegro (Kosovo was not yet an independent country and was included in that report) to find that the presumption of well-founded fear of future persecution had been rebutted.¹³⁰ As the Second Circuit noted, the BIA only relied on facts in the State Department report that favored its conclusion and ignored other facts included in the report that supported Alibasic’s claims.¹³¹ The court also stated in a footnote that “where a report suggests that, *in general*, an [applicant] would not suffer or reasonably fear persecution in a particular country,’ the immigration court is still ‘obligated to consider . . . contrary or countervailing evidence . . . as well as the particular circumstances of the applicant’s case’”¹³²

Circuit courts have not always taken the BIA to task for making general and sweeping assumptions about changed country conditions based on State Department reports. In fact circuit courts have, at times, themselves made general arguments for why country conditions have changed.¹³³ One such example is *Gojani v. Mukasey*.¹³⁴ As described above,¹³⁵ Gojani alleged a number of instances of persecution, including an incident in which members of the Kosovo Liberation Army made threats against his life, destroyed his café, and may have also been involved in the abduction and murder of his wife and cousin.¹³⁶ On November 12, 2004, the Immigration Judge denied Gojani’s application for asylum and ordered him deported.¹³⁷ Part of the Immigration Judge’s reasoning for denying Gojani’s application was that “even if Gojani had established past persecution, the country reports submitted by the government demonstrated changed country conditions which would rebut any presumption of a well-founded fear of future persecution.”¹³⁸ The changed country conditions upon which the judge based his opinion included portions of the 2003 State Department report that indicated that the LDK was the largest political party in Kosovo and that Albanians were politically in control of Kosovo.¹³⁹

129. 547 F.3d 78, 87 (2d Cir. 2008).

130. *Id.* at 86.

131. *Id.*

132. *Id.* at 87 n.6 (quoting *Chen v. U.S. INS*, 359 F.3d 121, 130 (2d Cir. 2004)) (emphasis in original).

133. For every case that shows that the BIA or the circuit courts made general assumptions about country conditions, there are many more cases that are unpublished and therefore impossible to review. See *Affirmative Asylum Procedures Manual*, *supra* note 55.

134. *Gojani*, 266 F. App’x at 420.

135. See *supra* Part III.B.

136. See *Gojani*, 266 F. App’x at 421.

137. *Id.* at 421-22.

138. *Id.* at 422

139. *Id.*

On June 19, 2006, the BIA summarily adopted and affirmed the Immigration Judge's decision in a one paragraph order. The BIA's affirmance stated in part:

We adopt and affirm the decision of the Immigration Judge who found that even had the respondent been credible and had he established past persecution, which we do not concede, there have been material and substantial changed country conditions sufficient to rebut the respondent's presumption of a well-founded fear of persecution.¹⁴⁰

The Sixth Circuit then affirmed the BIA's and Immigration Judge's decision on February 20, 2008, ruling that the decision to deny Gojani's application for asylum was supported by substantial evidence.¹⁴¹

The decision to deny Gojani's application, at least insofar as the claim concerning changed country conditions matters, is wrong. If Gojani was indeed able to establish past persecution, he would then have had a presumption of a well-founded fear of future persecution. In order for his application for asylum to be denied, the DHS needs to prove that conditions in Kosovo had changed so much that he no longer had a well-founded fear of persecution in the future. As the Supreme Court stated in *Cardoza-Fonseca*, even a ten percent chance of future persecution may suffice to meet the well-founded fear standard.¹⁴² The *Gojani* court, however, ignored these precedents with its use and application of State Department reports.

Gojani entered the United States on January 13, 2003.¹⁴³ Although the decision does not state the actual date that Gojani left Kosovo, it is reasonable to assume that he left a short time before the date on which he entered the United States.¹⁴⁴ Therefore, the argument the courts made in Gojani's case was that country conditions changed substantially within the year that he left Kosovo. Of note is the assertion that part of the purported changed country conditions was the existence of the LDK as the largest political party in Kosovo.¹⁴⁵ This fact, however, was also true of conditions in Kosovo before Gojani's departure.¹⁴⁶ Two other factors that the Immigration Judge noted, and the BIA and Sixth Circuit adopted in showing changed country conditions to rebut the presumption in favor of Gojani, included the fact that Albanians were politically in control of Kosovo and that peaceful elections had been held.¹⁴⁷ The same argument exists with these factors: Albanians had been in control of Kosovo since the NATO

140. *Id.*

141. *Id.* at 424.

142. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

143. *Gojani*, 266 F. App'x at 421.

144. The decision states that Gojani traveled through Albania to Canada and from there entered the United States on January 13, 2003. *Id.* Unless he had the luck of Odysseus, the assumption that he left Kosovo within a short time of his arrival date to the United States is reasonable.

145. *Id.* at 422.

146. The LDK won each election before the 2007 elections, when it was ousted by the PDK. See *supra* notes 31-33.

147. *Gojani*, 266 F. App'x at 422.

intervention (circa 1999), and the “peaceful” elections in the 2003 State Department Report that the IJ, BIA and Sixth Circuit relied on were the 2002 municipal elections, which also took place prior to Gojani’s departure from Kosovo.¹⁴⁸ In sum, the purported “change” had occurred before Gojani’s departure, and, therefore, if Gojani had actually proven past persecution, it could not be used to rebut the presumption in his favor concerning a well-founded fear of future persecution.

Another reason for finding changed country conditions in Kosovo was the 2003 State Department Report’s assertion that LDK enjoyed broad support in Kosovo.¹⁴⁹ This assertion, whether true or not, is immaterial to Gojani’s asylum application. Gojani had not complained that the LDK was out of favor in Kosovo, rather he complained that his fear of return arose primarily from the existence of KLA members who tormented LDK members and mistreated them for their political beliefs.¹⁵⁰ Gojani’s fear was, in actuality, centered on the fact that the LDK, although in power, had been unable to control the extremists that targeted its members. This is the exact worry that was recognized as legitimate and worthy of granting asylum in *Matter of Acosta*.¹⁵¹

Furthermore, while using the 2003 State Department Report, the Immigration Judge, BIA and the Sixth Circuit focused only on the facts that may suggest a better situation for Gojani in Kosovo. This is the problem that the Second Circuit noted in *Alibasic v. Mukasey* in overturning the BIA decision.¹⁵² In *Gojani*, the 2003 State Department Report also included facts that supported the applicant’s asylum claims. For example, the report stated that “some unidentified gangs appeared in the village of Kodrali, Decan municipality, and harassed several LDK supporters.”¹⁵³ According to the report, “[t]he media reported on May 13 that Pristina Mayor Ismet Beqiri received a threatening letter claiming to be from the AKSh similar to the one Member of Parliament Fatmir Rexhepi (LDK) received a few days before.”¹⁵⁴ The report also lists a number of LDK party members that had been killed in the previous year (2002).¹⁵⁵ None of these facts, which were also included in the 2003 State Department Report, and which were arguably more material to Gojani’s case, were mentioned in the opinion. The decision to skip over these facts is disheartening because the same State

148. 2003 Country Reports on Human Rights Practices, Serbia and Montenegro, Kosovo, U.S. Department of State, February 25, 2004, available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27874.htm>.

149. *Gojani*, 266 F. App’x at 423.

150. *Id.* at 421.

151. 19 I. & N. Dec. 211, 222 (BIA 1985).

152. *Alibasic v. Mukasey*, 547 F.3d 78, 86 (2d Cir. 2008).

153. 2003 Country Reports on Human Rights Practices, Serbia and Montenegro, Kosovo, U.S. Department of State, February 25, 2004, available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27874.htm>.

154. *Id.*

155. *Id.* (listing the killings of Smajl Hajdaraj, an LDK member of the Kosovo Assembly, Uke Bytyci, an LDK member and Mayor of Suhareke/Suva Reka municipality, Bekim Kastrati, journalist for LDK-linked newspaper, Bota Sot, and Besim Dajaku, an LDK bodyguard).

Department report that the Sixth Circuit used to argue that country conditions had changed also provided sufficient evidence to allow Mr. Gojani to meet the ten percent standard of well-founded fear of future persecution from *Cardoza-Fonseca*.

Finally, the Sixth Circuit decision on Gojani's case was handed down on February 20, 2008. By this time, many changes had taken place in Kosovo. For example, in the 2007 general assembly elections, the PDK had finally unseated the LDK, which arguably made Gojani's return to Kosovo even more dangerous.¹⁵⁶ Meanwhile, the opinion of the case cites to the 2003 State Department Report in making the claim that the conditions in Kosovo had changed sufficiently to rebut Gojani's presumption of a well-founded fear of future persecution. Indeed, the Sixth Circuit could only review the BIA decision under the "substantial evidence" standard,¹⁵⁷ requiring the Sixth Circuit to overturn the BIA decision only if it was "not 'supported by reasonable, substantial and probative evidence on the record considered as a whole.'"¹⁵⁸ Due to this limited standard of review, the Sixth Circuit decision and its reliance on a five-year-old State Department report, is justifiable. However, the policy argument made in *Berishaj v. Ashcroft* concerning the improper use of outdated State Department reports to find changed country conditions remains.¹⁵⁹

Similarly careless assertions about changed country conditions also appear in the circuit court opinions of *Gashi v. U.S. Attorney General*,¹⁶⁰ and *Balaj v. Attorney General of the United States*.¹⁶¹ In *Gashi*, the court stated that the BIA "believed that the evidence demonstrated that conditions in Kosovo had changed for the better since Gashi's incidents of persecution and that Gashi could have asked the government for help, since his party was in power."¹⁶² It is hard to imagine (and the opinion does not provide) what the basis for finding the changed country conditions in Gashi's case may have been. Gashi had alleged that he feared members of the extremist Democratic Party (PDK) who had previously abducted, threatened and beaten him.¹⁶³ The fact that the LDK was in power is immaterial to Gashi's application (as also noted above in the discussion of *Gojani*), and, in either case, the LDK had been in power since before Gashi fled Kosovo. Unfortunately, Gashi filed an untimely petition for review of the BIA's decision,¹⁶⁴ and thus the BIA's "belief" about country conditions in Kosovo was never reviewed by the Eleventh Circuit.

In *Balaj*, among other dicta, the Third Circuit opinion states that "[e]ven if Balaj had carried his burden of proof as to past persecution, he

156. See Adam Carr's Election Archive, Legislative Election of 17 November 2007, <http://psephos.adam-carr.net/countries/k/kosovo/kosovo2007.txt>.

157. *Gojani v. Mukasey*, 266 F. App'x 420, 422 (6th Cir. 2008).

158. *Id.* (quoting *Mullai v. Ashcroft*, 385 F.3d 635, 638 (6th Cir. 2004)).

159. *Berishaj v. Ashcroft*, 378 F.3d 314, 331 (3d Cir. 2004).

160. 288 F. App'x 629 (11th Cir. 2008).

161. 265 F. App'x 82 (3d Cir. 2008).

162. *Gashi*, 288 F. App'x at 633.

163. *Id.* at 632.

164. *Id.* at 633.

would not be entitled to relief, because country conditions in Kosovo have changed such that he need not fear future persecution.”¹⁶⁵ The reasons cited for the changed country conditions once again involve the fact that the LDK was in control.¹⁶⁶ This assumption once again suffers from both irrelevance to the case as well as the fact that LDK had been in control since before Balaj’s departure. If Balaj had indeed carried his burden of proof as to past persecution, evidence of changed country conditions would need to rebut any presumption of well-founded fear of future persecution, including the hypothetical ten percent chance of future persecution stated in *Cardoza-Fonseca*.¹⁶⁷

V. Why State Department Reports Do Not Always Tell the Full Story

A. When Generalized Assessments of Changed Country Conditions Are Acceptable

It has previously been argued and accepted that U.S. Department of State Country Reports are often the most reliable source of country conditions.¹⁶⁸ There are certainly situations in which State Department reports can be very reliable and should be used by the courts as important evidence of a change in country conditions. In the context of Kosovo, State Department reports can and should be used as reliable evidence of the fact that ethnic Albanians are now politically in control of Kosovo, and that Kosovo has declared its independence. Therefore any presumption in favor of a well-founded fear of future persecution as it pertains to persecution from Serbs is unquestionably rebutted, even under the ten percent threshold of *Cardoza-Fonseca*.¹⁶⁹

One country that presents similar circumstances with regard to general assumptions arising from State Department reports which *do* suffice in rebutting the presumption of a well-founded fear is Albania. Albania is one of Kosovo’s neighboring countries, and the historical connection between the two states goes back many years.¹⁷⁰ Albanian asylum-seeker claims often cite to past persecution during the communist regime that ruled from the end of World War II until 1992.¹⁷¹ The case of *Hoxhallari v.*

165. *Balaj*, 265 F. App’x at 85–86.

166. *Id.* at 86.

167. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

168. *Mullai v. Ashcroft*, 385 F.3d 635, 639 (6th Cir. 2004).

169. That would change if Serbia regains control of Kosovo. That outcome, however, is unlikely considering the growing number of countries that have recognized Kosovo as an independent state. For more, see *supra* note 37.

170. In fact many Kosovars were hoping for a reunification with Albania rather than independence for Kosovo as its own republic. See Dan Bilefsky, *Kosovo Struggles to Forge an Identity*, N.Y. TIMES, Dec. 17, 2007, at A20. Kosovo had previously been part of Albania, including during World War II when it was part of the Albanian Kingdom. See *Timeline: Kosovo, A Chronology of Key Events*, BBC NEWS, Nov. 13, 2009, http://news.bbc.co.uk/2/hi/europe/country_profiles/3550401.stm.

171. Henry Kamm, *Ex-Communists Lose in Albania Vote*, N.Y. TIMES, Mar. 23, 1992, at A3.

*Gonzales*¹⁷² presents typical claims. According to Hoxhallari, “[t]he Communist regime seized the property of his once well-to-do family, and interned them for a decade ending in 1988.”¹⁷³ His family further suffered discrimination and his father was arrested, beaten, and threatened during the periods of the communist regime.¹⁷⁴

Hoxhallari’s application was denied in part because the Immigration Judge found that “fundamental political changes after 1991 adequately rebutted any presumption of future persecution.”¹⁷⁵ The BIA affirmed without opinion,¹⁷⁶ and the Second Circuit denied Hoxhallari’s petition for review.¹⁷⁷ In its opinion, the Second Circuit stated that it was unreasonable to “assume that an IJ comes to each case ignorant of the history, political status, and evolving conditions in countries from which many petitioners seek asylum.”¹⁷⁸ The Second Circuit further elaborated that in cases where “changed conditions evidently prevail in a country that is the subject of an appreciable portion of asylum claims . . . an immigration judge need not enter specific findings premised on record evidence when making a finding of changed country conditions under the INA.”¹⁷⁹

The fact that Albanians—even those that had been previously persecuted under the communist regime—have no well-founded fear of future persecution from communists is well-known. Although communist rule lasted for nearly half a century, Albania has been free of communism for 19 years.¹⁸⁰ Since the fall of communism, many of the previously persecuted have received redress for their suffering, with the Assembly of the Republic of Albania passing laws such as the Law on Innocence, Amnesty, and Rehabilitation of Ex-political Convicted and Persecuted Persons in 1991.¹⁸¹ Furthermore, many communist leaders, including the widow of the dictator, Enver Hoxha, have been sentenced to jail terms for atrocities and crimes committed during the communist years.¹⁸² Finally, since its fall, the Communist Party has failed to gain any seats in the Assembly of the Republic of Albania.¹⁸³

172. 468 F.3d 179 (2d Cir. 2006).

173. *Id.* at 182.

174. *Id.* Hoxhallari also claimed a number of other incidents occurred in the period between 1997 and 2000. *Id.*

175. *Id.* at 183.

176. *Id.*

177. *Id.* at 188

178. *Id.* at 187.

179. *Id.*

180. See *Tirana Celebrates 19th Anniversary of Fall of Communism*, SOUTHEAST EUROPE TIMES, Dec. 12, 2009, http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/newsbriefs/2009/12/09/nb-11.

181. See U.N. Comm. Against Torture [CAT], *Considerations of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture: Albania*, ¶ 5(b)(i), U.N. Doc. CAT/C/CR/34/ALB (June 21, 2005).

182. See *Hoxha’s Widow Sentenced*, WASHINGTON POST, Jan. 28, 1993, at A22.

183. See Adam Carr’s Election Archive, Legislative Elections of 28 June 2009, <http://psephos.adam-carr.net/countries/a/albania/albania2009.txt>. In fact, the Albanian Par-

B. The Problems of Generalized Assessments of Changed Country Conditions in Kosovo

Kosovo presents a unique problem that does not exist in most other countries from which asylum applicants come from. Unlike Albanians and other asylum applicants, Kosovars fear persecution from two separate and mostly unrelated sources. Therefore, although it is obvious that Kosovar asylum-seekers have no legitimate fears when it comes to a possible return of Serbian persecution, the same claims cannot stand in reference to KLA persecutors. In fact, the current conditions in Kosovo are far from improving for asylum-seekers who claim that extremists from the KLA have tormented them in the past. As of the 2007 elections, the LDK is no longer in control of Kosovo, losing to the Hashim Thaci-led PDK.¹⁸⁴ Furthermore, with Kosovo's independence, extremists may be further emboldened, and they are likely to experience less oversight by international parties. In general, it appears that if a Kosovar asylum applicant has succeeded in proving past persecution at the hands of KLA extremists, rebutting the presumption of a well-founded fear of future persecution in light of the current conditions is a tall task, and certainly not one that can be achieved by generally relying on parts of a U.S. Department of State report.

There are several problems with some of the courts' approaches to using State Department reports in Kosovar asylum application cases. The first problem is that "the State Department follows criteria much less centered around the refugee's circumstances than the ten-percent standard for a well-founded fear of persecution set out in *Cardoza-Fonseca*."¹⁸⁵ In fact, State Department reports often make sweeping conclusions that ignore certain facts within the reports. An example of this is the U.S. Department of State 2008 Human Rights Report on Kosovo. Under the heading of Freedom of Speech and Press, the first sentence offers the conclusion that "[t]he constitution and law provide for freedom of speech and of the press, and the government and UNMIK generally respected these rights in practice."¹⁸⁶ This broad conclusion, however, is rebutted by the very next sentence, which states that "there were reports of intimidation of reporters, including by officials in the public sector and government and by politicians and businesses."¹⁸⁷ The report further states that "[j]ournalists reported pressure from politicians and organized crime," that they "were occasionally offered financial benefits in exchange for positive reporting or for abandoning an investigation," and that "government agencies withdrew regular advertising from newspapers that had published critical coverage of them."¹⁸⁸ Although the government may have "generally" respected the

liament banned the Communist Party for a number of years. See *Albania Bans Communists*, N.Y. TIMES, July 17, 1992, at A2.

184. See *supra* Part I.B.

185. Margulies, *supra* note 6, at 18-19.

186. 2008 Human Rights Report: Kosovo, U.S. Department of State, February 25, 2009, available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119462.htm>.

187. *Id.*

188. *Id.*

freedom of the press, the facts presented above would easily meet the ten percent standard of *Cardoza-Fonseca*, which is all that is required to meet the well-founded fear threshold.

Another reason why State Department reports should not be the determining factor in showing changed country conditions in Kosovo is a reason recognized by the Second Circuit in *Tambadou v. Gonzales*, when the court stated that “the State Department’s reports are sometimes skewed toward the governing administration’s foreign-policy goals and concerns.”¹⁸⁹ The State Department’s foreign-policy goals concerning Kosovo became clear the day after Kosovo declared its independence, when the U.S. Department of State moved quickly to recognize Kosovo.¹⁹⁰ According to an MSNBC report, “for Washington the declaration of independence by Kosovo vindicated years of dogged effort to help a land achieve its dream of self-determination after years of ethnic conflict and repression by Serbia.”¹⁹¹ Although President George W. Bush was visiting Tanzania when the declaration of independence took place, he declared “The Kosovars are now independent.”¹⁹² This was not the first time that President Bush had gone on the record when it came to his views on whether Kosovo should be an independent country. During his June 10, 2007 visit to Albania, President Bush stated that he believed “[a]t some point in time, sooner rather than later, you’ve got to say, ‘Enough is enough – Kosovo is independent.’”¹⁹³ As Tim Judah stated in his book, sometimes outsiders turn a blind eye in return for stability.¹⁹⁴ The United States clearly has much at stake as a result of its strong push for Kosovo to achieve independence. Reports suggesting that the situation in Kosovo is not stable would lead to embarrassment in the international arena.

Finally, the heavy deference that courts have lent to the State Department reports in effect shifts the burden of proof concerning future persecution from the DHS to the asylum applicants. In the battle of documents presented by asylum applicants and State Department reports, the courts have often deferred to State Department conclusions “to outweigh all but the most copiously corroborated refugee testimony.”¹⁹⁵ This has often led to courts asking for more from the asylum applicants while ignoring “the unique difficulties of proof associated with ‘the circumstances of refugee flight, exile, and trauma.’”¹⁹⁶ As a result of this deference to State Department conclusions, courts have resolved uncertainty against the asylum

189. *Tambadou v. Gonzales*, 446 F.3d 298, 303 (2d Cir. 2006)

190. See *U.S., European Powers Recognize Kosovo*, MSNBC, Feb. 18, 2008, available at <http://www.msnbc.msn.com/id/23219277>.

191. *Id.*

192. *Id.*

193. Sheryl Gay Stolberg, *Bush Gets Respite in Albania, Where Thousands Hail Him*, N.Y. TIMES, June 11, 2007, at A3.

194. See JUDAH, *supra* note 11, at 97-98.

195. Margulies, *supra* note 6, at 19.

196. Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 IND. J. GLOBAL LEGAL STUD. 197, 203 (2000) (quoting DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 20 (3d ed. 1999)). See also Margulies, *supra* note 6, at 18 (“The trend in proof of changed country conditions is to

applicant, which results in a shifting of the presumption of a well-founded fear of future persecution to a presumption of no fear of returning. As Peter Margulies argues, “[t]he only way for the asylum-seeker to meet this heavier burden is to produce a ‘smoking gun’ – an affidavit from his persecutors stating what they intend to do to him if he returns.”¹⁹⁷

Therefore, although State Department reports are often viewed as the most reliable source of country conditions,¹⁹⁸ they present many problems in the case of Kosovo. Not only are the reports often biased, but the criteria used by the State Department does not match that which courts of law must use in determining asylum applications. While State Department reports may be used as evidence of changed country conditions, courts must exercise a high degree of caution in accepting the conclusions of the U.S. Department of State regarding Kosovo.

VI. A New Framework

As stated above, the immigration system of the United States is built on two competing policies, (1) accepting immigrants while (2) limiting the number of immigrants to those that “deserve” to stay.¹⁹⁹ In connection with Kosovar asylum-seekers, the current jurisprudence of changed country conditions does not strike the right balance between these two policies. By deferring too much to the State Department and by only making generalized assessments of country conditions based on the conclusions of the State Department reports, the immigration tribunals (including courts) are wrongly limiting the number of immigrants, in effect closing the door to a number of deserving immigrants and turning away refugees in need of asylum. To better serve the two competing policies behind the immigration system, I suggest a new framework that changes the emphasis placed on State Department reports and seeks to better contextualize the conclusions offered in the reports to each individual case.

A. Individualized Assessments

In *Berishaj v. Ashcroft*, the Third Circuit stated:

[E]vidence of changed country conditions can successfully rebut an alien’s fear of future persecution based on past persecution only if that evidence addresses the specific basis for the alien’s fear of persecution; generalized improvements in country conditions will not suffice as rebuttals to credible testimony and other evidence establishing past persecution.²⁰⁰

Unfortunately, this rule has not been applied in many asylum cases of Kosovar applicants. In keeping with the directives of the Third Circuit in *Berishaj v. Ashcroft*, the first recommendation I propose in the new frame-

require greater specificity and certainty of the asylum-seeker, and less specificity and certainty of the government.”).

197. Margulies, *supra* note 6, at 24–25.

198. See *Mullai v. Ashcroft*, 385 F.3d 635, 639 (6th Cir. 2004).

199. See GORDON, *supra* note 5, at § 1.01 (2008).

200. *Berishaj v. Ashcroft*, 378 F.3d 314, 327 (3d Cir. 2004).

work is that Immigration Judges, the BIA, and circuit courts make individualized assessments of State Department reports to see if these reports actually rebut the fear of persecution.

Assuming that an asylum applicant has already met the criteria and has convinced the Immigration Judge that the applicant has suffered from persecution in the past, the DHS must then present evidence to rebut the possibility that the particular incidents may happen in the future. To meet this burden, courts must require the DHS to present evidence of changed country conditions that has a one-to-one match with the persecution complained of. Therefore, what the courts must look for in the cases of Kosovar asylum-seekers include statements such as “no reported politically motivated killings,” or “Kosovo police officers arrested a number of former KLA members who took part in killing and threatening LDK members,” or, perhaps, “the KLA has officially apologized to the LDK for the threats and crimes they committed.” Courts should stop making general observations such as those presented in the cases of *Gojani*, *Gashi* and *Balaj*.²⁰¹ If the well-founded fear of future persecution for those cases is to be rebutted, then the DHS must provide evidence showing that prior KLA members and current PDK members have stopped harassing LDK members. This method would be a way to rebut even the ten percent standard of *Cardoza-Fonseca*.

B. Using the Entire State Department Report

State Department reports often make broad and general conclusions about “improving conditions” in a particular country, even though the reports themselves offer evidence that counters the conclusion. Very often, the general conclusion is true because it only speaks of the trend, and some facts that refute the conclusion do not necessarily make it invalid. However, it is very dangerous for courts to cite to the conclusions that State Department reports make without combing through the entire report to see whether there are facts that tend to disprove the conclusion. The Supreme Court has stated that even a ten percent chance of future persecution qualifies for the well-founded fear standard.²⁰² While the conclusion may generally be true, the facts that cut against the conclusion may be enough to meet the ten percent standard.

Courts must be very wary of State Department conclusions. Not only does the State Department use different criteria from what the INA and case law requires,²⁰³ but State Department reports often “offer an apology for human rights abuses that is driven by United States foreign policy concerns rather than the safety of refugees.”²⁰⁴ In fact, the institutional culture of the State Department “treats human rights as a distraction from core policy concerns.”²⁰⁵ Because of all these problems, it is important

201. See *supra* Part IV.

202. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

203. See Margulies, *supra* note 6, at 18-19.

204. *Id.* at 34.

205. *Id.*

that courts stop relying on State Department conclusions to make their decisions. Instead, courts must pay careful attention to all the facts included in the reports, and determine whether any of the facts is enough to meet the ten percent standard of *Cardoza-Fonseca*.

C. Decreasing the Reliance on State Department Reports

Perhaps the best and most reliable evidence presented in an asylum case is the evidence that tends to prove that persecution occurred in the past. If the immigration hearing has gotten to the point where country conditions evidence is needed to rebut the well-founded fear in favor of the applicant, then it is likely that credible evidence of past persecution has already been presented by the applicant and trusted by the adjudicator. Courts should also use the evidence of past persecution in making their determination concerning well-founded fear of future persecution. Although a State Department report may suggest that there has been a change for the better in a particular country, the evidence of past persecution may successfully rebut the report at least insofar as the ten percent standard of *Cardoza-Fonseca* is concerned.

The problem of bias that riddles the State Department reports also exists in evidence that the asylum-seekers may present to show past persecution. It is not hard to imagine that applicants that come from poor countries, such as Kosovo, likely have an incentive to lie or exaggerate what actually happened. However, there is an important difference between a State Department report and evidence of past persecution. While an immigration tribunal will have to either accept or deny the facts in the State Department report without the ability to cross-examine its maker, the asylum-seeker may be cross-examined in court by the DHS attorney to try and elicit the truth and lies of the testimony. As the asylum-seeker presents evidence of past persecution, the DHS attorney may point to parts of a State Department report and ask the asylum-seeker to reconcile any differences between the State Department report and the other evidence presented in the case.

To further decrease the reliance on State Department reports, I suggest that immigration tribunals consider increasing the use of reports from reputable private independent sources. Such reputable private sources include Human Rights Watch and Amnesty International. These private organizations also release regular reports that track human rights violations.²⁰⁶ While “[a] standard of asylum eligibility based solely on pronouncements of private organizations . . . is problematic almost to the point of being non-justiciable[.]”²⁰⁷ using these reports to counterbalance and complement State Department reports would not be problematic. In contrast, the increase in use of private independent organizations’ reports

206. See e.g., The History of Amnesty International, <http://www.amnesty.org/en/who-we-are/history> (last visited Apr. 9, 2010); Human Rights Watch, Frequently Asked Questions, <http://www.hrw.org/en/node/75138#5> (last visited Apr. 9, 2010).

207. *M.A. v. U.S. INS*, 899 F.2d 304, 313 (4th Cir. 1990).

would allow the immigration tribunals to better judge whether, and how heavily, to rely on the broad conclusions of the State Department reports.

VII. Addressing Some Perceived Weaknesses of the Proposed Framework

As with any proposed framework, the suggestions made herein may have perceived weaknesses that call into question the ability of the framework to improve the current system of deferential use of State Department reports. Below I respond to some of these perceived weaknesses, and demonstrate why the suggested framework remains preferable to the current system.

A. The Difficulty of Making Individualized Assessment in Cases of Past Persecution that Occurred Many Years Before

One argument against the proposed changes is that it is difficult to make individualized assessments of changed country conditions in cases where the alleged persecution occurred a number of years before. This argument is a valid point of concern, and suggests that the current deferential framework of generalized assessment is the one used, in part, because the passing of time makes it hard for courts to assess past persecution claims side-by-side with current country conditions as described by the Department of State. Although this point remains valid, a system that requires courts to make side-by-side comparisons between the credible evidence of past persecution that asylum applicants present and the State Department reports is superior to a system that defers broadly to general conclusions contained in the latter.

B. State Department Reports Often Used Because They Are the Only Source Available

Another argument for why State Department reports play an important role in asylum cases is that often the country reports are the only evidence available to determine current country conditions. This concern, however, is overstated. To get to the point where there is a need to rebut a well-founded fear of future persecution, an asylum-seeker must have already proven with credible and convincing evidence that persecution occurred in the past. The documents that make up the evidence of past persecution are documents that also play a role in determining the likelihood of future persecution. Although documents from the past do not show the current conditions of a country, they are useful when compared to State Department reports to aid in determining the likelihood that “changes” noted in the reports may or may not affect the form of persecution alleged.

Further, the U.S. Department of State is not the only source of country conditions. Numerous independent organizations also monitor for human rights abuses and release regular reports on such abuses. Under my framework immigration tribunals would still consider State Department Reports,

the proposed change merely decreases their importance and decreases the improper deference to them. Therefore, the argument that State Department reports are the only evidence of current country conditions entirely misses the point. Not only are there are other reputable sources of current country conditions, but in cases where past persecution has successfully been proven, there are other documents that can supplement the State Department reports and help the courts make individualized determinations of the applicants' fears. Such documents would include the evidence of past persecution (i.e. photographs, letters, other hard evidence as well as asylum applicants' testimony) that succeeded in convincing the tribunal that the asylum-seeker indeed suffered from persecution in the past.

C. Does the New Framework Tip the Balance Too Heavily In Favor of Admitting Too Many Immigrants?

Finally, any new framework must be mindful of the policy choices that make up the immigration system. While the United States desires to provide asylum for those who face persecution in their countries, the United States cannot grant asylum to all who apply and must only grant it to those who "deserve" it. Although the current system tips the balance too heavily in favor of denying deserving asylum applicants,²⁰⁸ there may be a similar concern that the approach I suggest, considering the emphasis placed on evidence of past persecution, tips the balance too heavily in favor of admitting too many asylum applicants who do not deserve to stay. It is true that under my proposed framework some asylum-seekers could fabricate evidence of past persecution and end up with asylum. However, there are some safeguards against this danger in the proposed framework. One of these safeguards is in the nature of the past persecution evidence used to determine fear of future persecution. As argued, this evidence must have first convinced the Immigration Judge that it is credible. Further, in the framework I suggest that the DHS be allowed to cross-examine the asylum-seekers not only about their evidence of past persecution, but also about how events included in the State Department reports may affect their case. While some unscrupulous applicants may gain asylum, it is improper to use this fear to keep out refugees that are in risk of dire consequences upon their return to Kosovo.

Conclusion

The situation in Kosovo continues to remain unsettled. Although Kosovo is now an independent country and fear of ethnical persecution has receded, persecution on the basis of political beliefs has not yet ended. Kosovo presents a unique problem because most Kosovar asylum-seekers present claims for past persecution that have two separate bases. Furthermore, Kosovo's international prominence comes almost exclusively from the extensive coverage of the Serbian problem, while the ongoing political

208. See *supra* Part VI.

instability remains largely ignored by the international arena. Because of these unique features, Kosovo presents the perfect case study for investigating how courts defer to State Department reports, resulting in decisions that ignore both asylum law as well as the policies behind it. To fix this problem, Immigration Judges, the BIA, and the circuit courts must make individualized assessments of each asylum-seeker in determining whether the well-founded fear of future persecution has indeed been rebutted to the required extent. To achieve this result, I propose that courts look to the entirety of State Department reports and attempt to find a one-to-one match between the alleged changes and the evidence of past persecution submitted by the asylum-seeker. Furthermore, the DHS can make use of cross-examination of the asylum-seekers to ensure that only bona fide cases of persecution get the privilege of receiving asylum in the United States of America.

While the scope of this Note was narrowly focused on the current asylum system's failings concerning Kosovar asylum-seekers, the points made here have a much broader application. It is true that Kosovo presents a special situation because many of the Kosovar asylum-seekers complain of two independent sources of persecution. However, the need for a fairer asylum system that curbs the asylum tribunals' improper deference to State Department reports applies just as strongly to all asylum-seekers that face dire consequences if they are forced to return to their countries. A more individualized assessment of changed country conditions would improve the current United States asylum system for all refugees by providing them with the ability to more fairly present their cases for asylum protection.