Victims of Terror Stopped at the Gate to Safety: The Impact of the “Material Support to Terrorism” Bar on Refugees

by Jennie Pasquarella

During the civil war in Liberia, rebels from the Liberians United for Reconciliation and Democracy (LURD) came to “Mrs. J’s” home, shot and killed her father, gang-raped her, abducted her, and held her against her will. While held hostage she was forced to perform a variety of household tasks for the LURD rebels, including cooking and doing laundry. After several weeks in captivity, Mrs. J escaped and made her way to a refugee camp where she now awaits resettlement to another country. In 1992 Sierra Leonan rebels attacked “Mrs. D’s” family. The rebels brutally killed one family member with machetes, severely burned another, and raped Mrs. D and her daughter. The rebels held the family captive for four days in their own home. Like Mrs. J, Mrs. D is awaiting refugee resettlement.

Both women were designated “refugees” by the United Nations High Commissioner for Refugees (UNHCR) and, until recently, would be eligible for resettlement in the United States. Today, however, they are not. Although the United States Department of Homeland Security (DHS) initially agreed with UNHCR’s determination that both women were eligible for resettlement in the United States, DHS recently put both cases on indefinite hold, alleging that these women provided “material support” to terrorists. According to DHS, the cooking and laundry services that the LURD forced Mrs. J to provide while holding her hostage and the shelter that rebels obtained by force from Mrs. D constitute “material support” to a terrorist group.

Antiterrorism legislation adopted under the USA PATRIOT Act of 2001 and the REAL ID Act of 2005 amended section 212 of the Immigration and Nationality Act (INA) to widely expand the class of individuals considered inadmissible to the U.S. for having “engaged in terrorist activity,” including providing “material support” to “terrorists” or “terrorist organizations.” The collection of amended terrorism provisions in the INA creates the grounds for inadmissibility that this article refers to as the “material support bar.” As a result of its overbroad language and lack of a defense of duress, the “material support bar” has already prevented thousands of refugees from obtaining asylum relief or resettlement in the United States. Although this legislation may have imposed a formidable barrier on the ability of terrorists to pose as refugees, it has also had the perverse effect of shutting the gate on thousands of meritorious refugees who are the victims of terrorism. In effect, the U.S. has foreclosed entry for those individuals who have suffered at the very hands of the terrorist groups it seeks to target.

Harming Victims While Helping Terrorists?

The material support bar is written and applied as a catchall. It effectively excludes any individual who ever provided goods, services, or funds to an armed group from U.S. refugee protection, even if, like Mrs. J and Mrs. D, they are victims of the groups they supposedly “support.” The principal problems with the material support bar are threefold. First, it adopts an overly expansive definition of “terrorism,” “terrorist organization,” and “terrorist activity.” Second, “support” is broadly defined with no exception for minimal levels of support. As a result, DHS interprets “material” support to include even insignificant amounts of support. Third, as in the cases of Mrs. J and Mrs. D, there is no explicit duress defense available to situations where “material support” was provided under the threat of harm. In spite of these problems, adjudicators of resettlement and asylum claims are applying the bar strictly and broadly, “catching” an assortment of refugee populations in its net.

The law makes inadmissible any alien who is a member of a “terrorist organization” or who “has engaged in terrorist activity.” “Terrorist organizations” are defined as either (1) those designated by name as foreign terrorist organizations under Title 8, U.S. Code, 1189 (known as Tier I organizations) or “otherwise designated” as such by the Secretary of State (known as Tier II organizations) or (2) any “group of two or more individuals, whether organized or not, which engages in” certain enumerated terrorist activities (known as Tier III, non-designated organizations). The definition of “terrorist activities” includes “a threat, attempt, or conspiracy” to use “any … explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.” Activity that meets this definition is considered “terrorist” if the activity is “unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State).”

The statute provides that an individual has “engage(d) in terrorist activity” if he or she committed “an act that the actor knows, or reasonably should know, affords material support … for the commiss-
sion of a terrorist activity” or to “a terrorist organization.”11 “Material support” includes, but is not limited to, “a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, [and] weapons.”12

An individual found under the law to have “engage(d) in terrorist activities” by providing material support to a “terrorist” or to a non-designated, Tier III “terrorist organization,”13 is entitled only to a “lack of knowledge” defense.14 An individual must prove that she “did not know and should not reasonably have known” that she was providing “material support,” or that the recipient planned to commit a terrorist activity or was a non-designated Tier III terrorist organization.15 Only if the individual shows this lack of knowledge will the admissibility bar be inapplicable. The law includes no other common defenses to culpability, such as the defenses of duress and self-defense, nor an exception for minimal or insignificant support.16

The USA Patriot Act and the REAL ID Act have provided the executive branch some discretion in applying the material support bar by adopting a waiver provision. Under the law, on a case-by-case basis, the Secretary of State and the Secretary of Homeland Security, after consultation with each other and the Attorney General, can decide not to apply the material support bar to a particular individual or group who supported an organization or individual engaged in terrorist activities.17 Although the authority for the discretionary waiver exists, it only recently was exercised for the first time.18

**Problem 1: Terrorism Definitions: Commingle Refugees with Terrorists**

Under the definition of “terrorist organization,” an individual who gave support to virtually any armed group can be excluded from entry to the United States, whether or not the group was previously designated a terrorist organization. If an organization is not already designated as a terrorist organization, the material support bar allows DHS adjudicators and immigration judges to evaluate whether an organization qualifies as a non-designated Tier III terrorist organization. DHS asserts that Congress intended the material support inadmissibility ground “to be able to capture all potential forms [of] terrorist activity and material support to terrorist activity.”19 But the law makes no substantive distinction between actual “terrorist organizations,” such as Al-Qaeda, and organizations struggling against repressive regimes for democracy or liberation, such as the Burmese Chin National Front.20

The definition of “terrorist organization” is based on whether illegal violence was used, not on the character of the organization, the nature of the conflict, or the type of government in question.21 Therefore, it can apply equally to organizations that the U.S. government opposes or supports. For example, according to DHS a refugee who provided support to Afghanistan’s Northern Alliance in the 1990s would be barred from entry even though the Northern Alliance was fighting the Taliban government, a regime the U.S. government considered illegitimate.22 DHS has also recently put on hold the resettlement cases of 147 Cubans who provided support to the “Alzados,” an armed group that fought against Fidel Castro in the 1960s.23 Although their “Alzado” family members were resettled in the United States years ago, these individuals are now barred from joining them.

Similarly, it applies to nationals of Burma (Myanmar) who work with pro-democracy organizations that the United States supports. DHS applied the material support bar to some 9,300 Burmese refugees awaiting resettlement from the Tham Hin refugee camp in Thailand.24 These refugees are predominately from the Karen ethnic minority who provided indirect support to the Karen National Union (KNU), a political and armed group resisting Myanmar’s repressive military regime.25 DHS put their cases on indefinite hold until May 2006 when Secretary of State Condoleezza Rice and Secretary of Homeland Security Michael Chertoff agreed to use their discretionary authority to waive the application of the bar to those refugees who provided material support to the KNU.26

The absurd results of such an expansive definition of a “terrorist organization” do not end there. The definition of terrorist organization is so broad that it would even apply to U.S. military activity abroad. DHS recently admitted in oral argument before the Board of Immigration Appeals (BIA) that the Iraqi national who provided information to the U.S. Marines who rescued American soldier Jessica Lynch would be barred from entry under this law.27 Under the current definition of “terrorist organization,” the U.S. Marines would qualify as a Tier III terrorist organization because their activity was unlawful during the U.S. occupation of Iraq under Iraqi law and they were fighting against an established government.28

Similarly, in accordance with DHS’s literal application of the law, U.S. troops in Vietnam during the Vietnam War would have qualified as a Tier III terrorist organization. The Hmong people of Laos, many of whom were recruited by the Central Intelligence Agency to fight alongside U.S. troops in Vietnam, could be ineligible for resettlement for providing “material support” to “terror-
ists,” i.e., the U.S. government. Over 100,000 Hmong refugees are resettled in the United States,39 but DHS recently put the resettlement cases of as least 30 Hmong refugees in Thailand on indefinite hold on material support grounds, presumably for their support to U.S.-backed Hmong armed resistance against the government of Laos.30 The resulting denial of admission to myriad refugee population was clearly not within the scope of Congress’ intent when the material bar was drafted.

**Problem 2: “Material Support” Includes Immaterial Support**

The current law does not explicitly account for the amount and nature of the support given when determining whether an individual provided “material support” or include an explicit exception for de minimis support. The Department of Justice has argued that it was “Congress’s intent that the material support provision be broadly construed and strictly applied.”31 Further, DHS construes “material support” as though all support, no matter how nominal, is per se “material.” DHS counsel argued before the BIA and the U.S. Court of Appeals for the Third Circuit that Congress intended “material support” as a legal term of art that means any support, no matter how insignificant.32 As such, the DHS interpretation effectively reads the word “material” out of the provision and concludes that even a contribution of five dollars is “material support.”33

In Singh-Kaur v. Ashcroft, the Third Circuit agreed with DHS and adopted a broad definition of “support.”34 The court found that providing food and setting up tents for a religious congregation, which may have included members of the religion’s militant sect, constituted material support.35 An interpretation of the material support bar that does not imply a de minimis exception plainly violates international law and U.S. obligations under the 1951 Refugee Convention as incorporated under the 1967 Protocol.36 Even though providing funds to a “terrorist group” is a criminal offense under international law,37 according to UNHCR an individual should not be found guilty of engaging in terrorist activity or a “serious non-political crime” — a bar to refugee protection under the 1951 Convention — “if the amounts concerned are small and given on a sporadic basis.”38 By not applying a de minimis exception, DHS and U.S. courts are failing to limit the material support bar to actual terrorists and their supporters. Instead, they extend the material support bar to innocent civilians in war-torn regions throughout the world who are often forced to pay negligible “war taxes” in currency or goods to rebel or terrorist groups.

In Colombia, for example, where the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), and the United Self-Defense Forces of Colombia (AUC) control or contest 75 percent of Colombian territory,39 de minimis support to these groups is routine. In many rural Colombian contexts, support in the form of “war taxes” or the provision of food or shelter is necessary for survival. Irregular armed groups routinely kill civilians who refuse to comply with their material demands.40 UNHCR estimates that between 70-80 percent of Colombian refugees seeking asylum in Ecuador are ineligible for resettlement in the United States because they have provided some form of material support to these groups.41

In March 2006 law students from Georgetown University Law Center undertook a fact-finding investigation in Ecuador to interview Colombian refugees who are ineligible for resettlement in the United States on material support grounds and review their cases. The team found that 45 of 63 interviewees (71 percent) had provided some form of “material support” as currently defined to a guerrilla, paramilitary, or other armed group, and most had provided only de minimis support.42

In most cases the support given was an unavoidable part of daily life in areas where the armed groups were present. “Ana,” for instance, merely provided a glass of water to an armed guerilla from the FARC who requested one when he came to her home.43 “Mario” occasionally sold basic goods to members of the FARC, the ELN, and the AUC from his family’s small bodega in the center of town.44 “Guillermo” sold bread from his bakery to guerillas disguised in civilian clothes,45 while “Juan,” a refrigerator repairman, was taken to a FARC encampment and forced to repair their refrigerators.46 All of these refugees are ineligible for resettlement in the United States because of the insignificant support they provided.

In some cases these refugees actively fought against an armed groups’ terrorist control but were nevertheless forced to provide some minimal support. For example, “Jorge” was a security guard who was hired to protect his neighborhood from the sicarios, a gang of professional assassins that charged residents a “war tax.” Every week armed men would extort “taxes” from residents. “Elena,” Jorge’s sister, had to pay 2,000 pesos (the equivalent of 85 cents) to the gang every week. Jorge actively opposed the collection of the “tax” and the gang’s activities. In retaliation the gang beat him and shot him five times.48 Despite Jorge’s active opposition of the sicarios, the family is nevertheless barred from resettlement in the United States for having made the weekly payments.

**Problem 3: Refugees Victimized by Terrorists Have No Duress Defense**

The material support bar provides no explicit defense for duress. In the resettlement context, DHS does not imply a duress defense. In the asylum context, DHS argues and some courts agree that such a defense should not be read into the statute. Consequently, the bar applies equally to terrorists and victims of terrorism. In effect, the bar requires the United States to refuse to protect an individual who provided “support” to terrorists involuntarily or under the threat of death from further terrorist abuse. As a result, the bar threatens to deny refugee protection to a significant number of refugees worldwide fleeing conflicts perpetrated by “terrorists” or characterized by terrorist violence.
The lack of an explicit duress defense and DHS’s refusal to read one into the material support bar is inconsistent with U.S. and international law. The principle of “duress” is well recognized in U.S. criminal law and may be implied as a common law defense even when certain conduct violates criminal statutes. In the absence of an explicit duress defense, the material support bar should be construed in light of common law and criminal law principles of duress. The canons of statutory construction require that laws be read to “avoid absurd results.” It is both an “absurd result” and incongruent with congressional intent for DHS and the immigration courts to apply the material support bar to victims of terrorism when its application should be limited to terrorists themselves or those who intentionally and voluntarily support terrorism.

In addition, international law is part of U.S. law. Treaties signed and ratified by the United States are the “supreme law of the land.” Under the Charming Betsy doctrine, U.S. courts have an obligation to interpret the material support bar in a manner consistent with international law, including the 1951 refugee Convention and the 1967 Protocol, where “fairly possible.”

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Interpreting the material support bar to imply a defense of duress is a “possible construction” that would not violate international law. Without a duress defense, application of the bar to an individual who provided support involuntarily may be inconsistent with Article 1(F) of the 1951 Refugee Convention and its 1967 Protocol, which enumerates the grounds for exclusion from protection of any individual who has committed serious international crimes or serious non-political crimes. Allegations of terrorist activity are generally categorized as “serious non-political crimes” under Article 1(F)(b). The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status suggests, however, that Article 1(F)(b) must be interpreted restrictively and limited to “offenses of a serious character” that must constitute “a capital crime or a very grave punishable act.” UNHCR explains that Article 1(F)(b) is inapplicable “if the circumstances give rise to a defense, such as coercion or self-defense.”

Some immigration judges, however, have refused to recognize any duress defense to the material support bar, even in the most extreme cases of threats of imminent bodily harm. In the Matter of R.K., for example, an immigration judge declined to recognize a defense of involuntariness when a Sri Lankan refugee was kidnapped by the Liberation Tigers of Tamil Eelam and forced to pay 50,000 rupees for his release. In the overseas refugee resettlement context, DHS does not apply an exception for duress, which causes an outright bar to resettlement for thousands of victims of terrorism.

In the asylum context, interpretations of the material support bar that do not apply a duress defense violate the principle of customary international law and the U.S. treaty obligation of non-refoulement of refugees who have entered the United States under Article 33 of the 1951 Convention. Under Article 33 the United States cannot expel or return a refugee to face persecution unless there are “reasonable grounds for regarding [the refugee] as a danger to the security of the [United States]” and the refugee “constitutes a danger to the community of [the United States].” Applying the material support bar to refugees who provided support to terrorists under duress is inconsistent with the United States’ binding obligations under Article 33. Providing “material support” at gunpoint or under the threat of death does not make a refugee a danger to the security of the United States.

The implication of DHS’s application of the material support bar without a defense of duress is that civilians should allow themselves to be killed or jeopardize the lives of their family members rather than comply with the demands of a controlling terrorist organization. This is a particularly shocking proposition in the Colombian context. More often than not, according to the Georgetown group’s findings, Colombian refugees gave material support under duress that was part and parcel of their persecution by terrorist groups. Of the 45 refugees the group interviewed that gave some form of material support, 73 percent did so under duress, 24 percent inadvertently, and 3 percent voluntarily. For example, in October 2005 members of the FARC came to “Louisa’s” house, kidnapped her husband to forcibly conscript him into their army, and imprisoned her and her two children in their house for three days. DHS’s reasoning would imply that Louisa should have fought back against the FARC guerrillas that imprisoned her because their literal application of the material support bar would deem her to have provided shelter to terrorists. “Miguel,” as a teenager, was kidnapped by marauding AUC paramilitaries on a killing spree and forced to dig graves as their slaughter ensued. Other gravediggers were sometimes shot by the paramilitaries and buried in the graves they had dug. Miguel never knew whether the grave he was digging would become his own. DHS’s reasoning would imply that Miguel should have refused to dig graves and stood before the firing squad. In 2003 “Jorge’s” motorcycle and food were stolen by a group of armed men that ambushed him on a mountain road. They held him prisoner in a remote mountain location, where he was chained at the feet during the day and tied up by his hands at night with a leash around his neck. After 45 days a guard in the camp helped Jorge escape before all the other prisoners in the camp were murdered. DHS’s reasoning would imply that Jorge should have repossed his motorcycle and food before fleeing the slaughter that ensued at the prisoner camp. Today, Louisa, Miguel, and Jorge are all barred from resettlement for providing goods and services to terrorist organizations.
UNINTENDED CONSEQUENCES OF THE MATERIAL SUPPORT BAR

DHS’s overly literal interpretation of the poorly drafted material support bar has already prevented thousands of bona fide refugees and asylum seekers fleeing the persecution of terrorist groups from receiving U.S. protection. There are currently 512 asylum cases on indefinite hold at the Asylum Office because of material support concerns; in many of these cases, asylum seekers have been held in limbo for years, unable to present their cases to an immigration judge. In 2004 the material support bar effectively shut down the U.S. resettlement program for Colombian refugees just one year after it was launched, which will have serious repercussions for the thousands of refugees whom the United States had originally anticipated resettling. Many of these Colombian refugees continue to be persecuted by armed groups operating in their countries of first asylum (like Ecuador) and still require immediate resettlement to a third country. In addition, thousands of Burmese refugees in Thailand are without protection because of the material support bar. Liberian, Somali, Laotian Hmong, Vietnamese Montagnard, and Cuban refugees, among others, have also had their resettlement cases indefinitely delayed for material support concerns.

Congress must urgently amend the material support bar, and the executive branch must interpret the material support bar in concert with U.S. obligations under international law. Without legislative change, the material support bar will continue to have profoundly harmful consequences on refugees fleeing war-torn regions around the world. The material support bar currently stands to vindicate the very terrorists the United States opposes while abandoning the victims of terror the United States has long sought to protect.

ENDNOTES: Victims of Terror Stopped at the Gate to Safety

2 PRM Case Summaries. Under INA § 212(a)(3)(B)(iv)(VI), DHS alleges Mrs. J provided “services” to LURD rebels and Mrs. D provided “housing” to rebels that constitute “material support” to armed groups that qualify as “terrorist organizations.”
6 Id.
7 The designation by the Secretary of State must be in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security. INA § 212(a)(3)(B)(v)(I-II); 8 USC §1182(a)(3)(B)(v)(I-II).
12 INA § 212(a)(3)(B)(iv)(VI); 8 USC § 1182(a)(3)(B)(iv)(VI). Singh-Kaur v. Ashcroft, 385 F.3d 293, 298 (3d Cir. 2004), held that the list stated in the INA of “material support” examples is not exhaustive and “the use of the term ‘including’ suggests that Congress intended to illustrate a broad concept rather than narrowly circumscribe a term with exclusive categories.”
13 INA § 212(a)(3)(B)(iv)(VI) and (iv)(VI)(dd). The “lack of knowledge” defense does not appear to apply to an individual who knew he or she was providing material support but who did not know that the recipient was a designated terrorist organization.
15 Id.
17 INA § 212(d)(3)(B)(ii).
18 On May 5, 2006, Secretary of State Condoleezza Rice announced she would exercise her discretionary waiver authority under the Immigration and Nationality Act (INA) so that some Burmese refugees in the Tham Hin camp in Thailand “can be allowed to resettle in the United States even if they have ‘provided material support’ to the Karen National Union (KNU).” U.S. Dept. of State, Office of the Spokesman, Fact Sheet, “Secretary Decides Material Support Bar Inapplicable to Ethnic Karen Refugees in Tham Hin Camp, Thailand” (May 5, 2006), available at http://www.state.gov/r/pa/prs/ps/2006/65911.htm; see also Neznez, The ‘Material Support’ Problem; Benesch and Chaffee, The Ever-Expanding Material Support Bar at 467.
19 In re S-K., Oral Argument Transcript, Board of Immigration Appeals (BIA) (Jan. 26, 2006) at 25 (on file with author).
20 See generally id.
21 See INA § 212(a)(3)(B); 8 USC § 1182(a)(3)(B); see e.g., In re S-K’, Oral Argument.
22 See id. at 22.
24 See id.
27 In re S-K., Oral Argument at 25.
30 See id.; Swarns, “Provision of Antiterror Law.”
33 In re S-K., Oral Argument at 20.
35 Id.
38 UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (Sept. 4, 2003) at ¶ 82; see also Kolude Doherty, Regional Representative for the U.S. and the Caribbean, UNHCR Response to Mr. Edward Neuville re: Request for Advisory Opinion (June 15, 2005) (on file with author).
39 See amicus curiae brief, Human Rights First in Support of Petitioner, Walter
See generally email Article 1(F) provides: “The provisions of this Convention shall not apply to...”


See e.g., Rachel L. Swarns, “Provision of Antiterror Law.”

See The Paquete Habana, 6 U.S. 64, 118 (1804), held that “an act of Congress ought never to be construed to violate the law of nations, if the circumstances other reasonable men must concede that they too would not have been able to act otherwise.”


See also Article 1(F) provides: “The provisions of this Convention shall not apply to...”