

THE UNITED STATES AND THE MATERIAL-SUPPORT BAR FOR REFUGEES: A TENUOUS BALANCE BETWEEN NATIONAL SECURITY AND BASIC HUMAN RIGHTS

*Jordan Fischer**

ABSTRACT

Assessing the implications of the material-support bar in the refugee context, this Note focuses on the United States's deviation from its obligations in offering refugee protection under international law following the September 11th World Trade Center attacks and its continued departure from international standards in the Holder v. Humanitarian Law Project decision. An evaluation of U.S. Citizenship and Immigration Services and federal court decisions leads to the conclusion that the United States needs to reassess the application of the material-support bar for refugees and more accurately comply with its obligations under international law. The over-inclusive nature of this bar to asylum protection casts a wide net, affecting a variety of otherwise meritorious refugee applications and directly conflicting with the purpose of asylum protection.

While the material-support bar debate involves the crucial balance between national security and international aid for refugees, the scales are now tipped too heavily in favor of protecting national security at the cost of denying protection to thousands of meritorious refugees. This imbalance forces refugees to remain in inhumane conditions in violation of their basic human rights. The United States needs to meet its obligations as a global leader and reassess the application of the material-support bar. Without a change to the material-support bar, refugees, who are least able to help themselves, will continue to face daily and inhumane persecution.

TABLE OF CONTENTS

INTRODUCTION	238
I. BACKGROUND OF THE MATERIAL-SUPPORT BAR	240

* J.D. Candidate, 2013, Earle Mack School of Law at Drexel University; B.A., University of Delaware. I would like to thank my family, friends, and professors for supporting me throughout law school and always encouraging me to push myself to new levels. I would especially like to acknowledge the support of my parents, who are a constant source of inspiration and strength.

A. <i>The International Development and Recognition of the Material-Support Bar for Terrorist Activities</i>	240
B. <i>The U.S. Development of the Material-Support Bar for Refugees</i>	244
1. <i>The legislature as the pivotal player behind the initial material-support bar</i>	245
2. <i>The executive's support of broad bars to asylum</i>	249
3. <i>Judicial interpretation of the material-support bar</i>	250
II. THE BROAD APPLICATION OF THE MATERIAL-SUPPORT BAR TODAY	255
A. <i>The U.S. Construction of the Material-Support Bar</i>	255
B. <i>The Broad Application of the U.S. Material-Support Provision Violates International Law</i>	258
C. <i>The Implication of Humanitarian Law Project on the Material-Support Bar</i>	260
CONCLUSION	262

INTRODUCTION

Anna is a Christian and ethnic Chin living in Burma.¹ Both Anna's brother and fiancé were arrested and detained by the Burmese Government, a military dictatorship ruled by the majority Burman ethnic group. Anna's fiancé was murdered by the military, a group known for its human rights violations against ethnic and religious minorities. Being a Christian, Anna and her family were prime targets. Beginning in 2001, an undercover agent for the Chin National Front (CNF), and a friend of Anna's dead fiancé, approached Anna. The CNF garnered Anna's sympathies in its goal of "securing freedom for ethnic Chin people,"² a group Anna counted as her own. For eleven months, Anna donated one-eighth of her monthly income to the organization, totaling S\$1100 (Singapore dollars).³ Anna's attempt to donate material goods, including a camera and binoculars, to the CNF resulted in her downfall. The goods were confiscated and led to the Burmese Government—and, consequently, the military—discovering Anna's support of the CNF. Facing certain de-

1. These facts are derived from *S--- K---*, 23 I. & N. Dec. 936 (B.I.A. 2006), *superseded by statute*, Consolidated Appropriations Act, Pub. L. No. 110-161, 121 Stat. 1844, *as recognized in* 24 I. & N. Dec. 475 (B.I.A. 2008). The refugee's real name is unknown.

2. *Id.* at 937.

3. *Id.* at 945. This amounted to approximately \$871. See *Currency Converter Widget*, XE: UNIVERSAL CURRENCY CONVERTER, <http://www.xe.com/ucc/> (last visited Oct. 13, 2012).

tention by the Burmese military for her actions, and potential brutal treatment, Anna fled to the United States to gain asylum protection. But, the United States denied Anna's asylum application. Although finding that Anna established a "well-founded fear of persecution,"⁴ the Board of Immigration Appeals (BIA) found her minimal monetary support gave rise to the material-support bar for asylum applications.⁵ The CNF, "an organization [using] land mines and [engaging] in armed conflict with the Burmese Government" fell under the statutory definition of a terrorist organization.⁶ The BIA, disregarding Anna's lack of any intent to promote the group's militant tactics, found she should have known that her money would be used to facilitate terrorist activities – and, therefore, she was barred from seeking relief in the United States.

Unfortunately, Anna's story is not an anomaly. The United States is denying or delaying thousands of individuals meeting the international definition of "refugee" because the asylum-seekers gave "material support" to "terrorist organizations," regardless of any intent by the asylum-seeker to promote any terrorist activities. This Note evaluates the evolution of the material-support bar and the United States's continued divergence from its obligations under international refugee law, especially in light of the Supreme Court's recent decision in *Holder v. Humanitarian Law Project*.⁷ Part I provides a background on the material-support bar, explaining the development, both in international law and U.S. law, which led to the modern material-support bar. Part II assesses the implication of the material-support bar, focusing on the United States's deviation from its obligations under international law following the September 11th World Trade Center attacks and its continued departure from international standards in the *Humanitarian Law Project* decision.

4. In the United States, a refugee must show that he or she has a "well-founded fear of persecution" to meet the burden for asylum. 8 U.S.C.A. §§ 1158(b)(1), 1101(a)(42)(A) (West 2011) (defining a refugee under U.S. law). To meet the burden of proof under *nonrefoulement*, otherwise known as withholding of removal, a refugee must show that if returned to his or her country, his or her "life or freedom would be threatened." 8 U.S.C.A. § 1231(b)(3) (West 2006). For a detailed explanation of the differences between the protections of asylum and withholding of removal, see DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* §§ 2:1–2:2 (4th ed. 2011).

5. The BIA is the "administrative appellate body charged with reviewing decisions by immigration judges (IJs) and interpreting immigration statutes and regulations." REGINA GERMAIN, *AILA'S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE* 15 (3d ed. 2003). For an explanation of the asylum process, see ANKER, *supra* note 4, § 1:4.

6. *S---* *K---*, 23 I. & N. Dec. at 937.

7. 130 S. Ct. 2705 (2010).

An evaluation of U.S. Citizenship and Immigration Services (USCIS) and federal court decisions will lead to the conclusion that the United States needs to reassess the application of the material-support bar to more accurately comply with its obligations under international law.⁸ The current application of this bar “to meritorious refugees is inhumane and counterproductive to U.S. interests.”⁹ The over-inclusive nature of this bar to asylum protection directly conflicts with the purpose of asylum protection: to provide “international protection” for individuals who have suffered severe, brutalizing persecution in their own homeland.¹⁰

I. BACKGROUND OF THE MATERIAL-SUPPORT BAR

A. *The International Development and Recognition of the Material-Support Bar for Terrorist Activities*

For more than fifty years, both U.S. and international refugee law recognized that nations could deny otherwise eligible refugees protected status on the basis that a refugee committed war crimes. Modern immigration law stems from the creation of the United Nations High Commissioner for Refugees (UNHCR), an effort by the original signing states to address human rights issues following World War II.¹¹ One of the first acts of the newly created UNHCR was to create the 1951 Refugee Convention, “the key legal document in defining who is a refugee, their rights and the legal obligations of

8. USCIS, a government agency under the purview of the Executive Branch, oversees lawful immigration into the United States. *U.S. Citizenship and Immigration Services: About Us*, U.S. DEP’T OF HOMELAND SECURITY, <http://www.uscis.gov/portal/site/uscis> (last visited Oct. 13, 2012).

9. GEORGETOWN UNIV. LAW CTR. HUMAN RIGHTS INST., UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR 2 (2006), available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1000&context=hri_papers [hereinafter UNINTENDED CONSEQUENCES].

10. Guy S. Goodwin-Gill, *1951 Convention and 1967 Protocol Relating to the Status of Refugees*, AUDIOVISUAL LIBR. OF INT’L L., <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html> (last visited Oct. 25, 2012).

11. See Convention and Protocol Relating to the Status of Refugees, G.A. Res. 429(V), U.N. Doc. A/1775/48 (Dec. 14, 1950), available at <http://www.unhcr.org/3b66c2aa10.html>; G.A. Res. 428(V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1682, at 46 (Dec. 14, 1950), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/060/26/IMG/NR006026.pdf> (The High Commissioner’s primary responsibility, set out in paragraph 1 of the statute annexed to resolution 428(V), is to provide “international protection” to refugees and, by assisting Governments, to seek “permanent solutions for the problem of refugees.”). The UNHCR is a department within the United Nations.

states.”¹² A refugee, by virtue of his or her lack of protection from his or her home state, needs the international community to “ensure [he or she is] safe and protected.”¹³ The UNHCR further extended these protections in the 1967 Protocol, which eliminated any geographical limitations on refugees.¹⁴

From this original creation of the obligations of states to provide a safe haven for refugees, the United Nations (U.N.) recognized the need to allow states to deny protection to individuals presenting a security threat to these nations willing to accept and protect refugees. Article 1F of the 1951 Convention states:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.¹⁵

Article 1F derived from the U.N.’s twin aims: the “protection of only the ‘deserving’ refugee; and the need to ensure that serious international criminals do not escape punishment.”¹⁶ Using Article 1F(b), permissive exclusion on the basis of a “serious non-political

12. *The 1951 Refugee Convention*, UNHCR: THE U.N. REFUGEE AGENCY, <http://www.unhcr.org/pages/49da0e466.html> (last visited Oct. 13, 2012).

13. UNITED NATIONS HIGH COMM’R FOR REFUGEES, *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 2* (2011), available at <http://www.unhcr.org/4ec262df9.html>.

14. *Id.* at 4.

15. G.A. Res. 429(V), *supra* note 11; see also Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses* (2002), available at <http://www.unhcr.org/419dba514.pdf> (discussing the historical and current application of the Article 1F exclusion provisions of the 1951 Refugee Convention).

16. Gilbert, *supra* note 15, at 429.

crime," states created bars to asylum protection for refugees found to have participated, in some fashion, with terrorist activities.¹⁷

Section 2 of Article 33 of the 1951 Convention further strengthened the idea of using terrorism bars in refugee cases. In Article 33, the U.N. created a balancing test, permitting states to treat security interests as superior to a refugee's *nonrefoulement* protection.¹⁸ This section permitted states to deny benefits to refugees posing "a danger to the security of the country . . . [or] to the community of that country."¹⁹ Nations used this provision to develop a balancing test to assess various asylum applications.²⁰ From these two articles—Article 1F and Article 33—the permissive use of the ban on protected status for those committing terrorist activities was born.

In the last twenty years, terrorism has greatly impacted the global application of immigration law. In 1994, the U.N. General Assembly adopted a general resolution encouraging states to ensure that asylum-seekers have not "engaged in terrorist activities."²¹ The U.N. further buttressed its view on terrorism following the September 11th World Trade Center attacks, calling on states to ensure that asylum-seekers have "not planned, facilitated or participated in the commission of terrorist acts."²² As recent as 2010, the U.N. reiterated this mandate in the U.N. Global Counter-Terrorism Strategy, urging states "[t]o take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum-seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to

17. *Id.* at 439–55 (including an in-depth discussion of Article 1F(b) and states' use of it in the terrorism context).

18. G.A. Res. 429(V), *supra* note 11, art. 33(2). *Nonrefoulement* protection, separate from asylum protection, only permits an asylum-seeker to obtain "withholding of removal," but not permanent status, in the country accepting the refugee. See generally ANKER, *supra* note 4, §§ 1:1–:2 (discussing the difference between a grant of asylum protection and *nonrefoulement* protection).

19. G.A. Res. 429(V), *supra* note 11, art. 33(2).

20. Gilbert, *supra* note 15, at 458.

21. G.A. Res. 49/142, ¶ 5(f), U.N. Doc. A/RES/49/60 (Dec. 9, 1994); see also GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 194 (3d ed. 2007) ("In . . . 1999, the [U.N.] Security Council adopted a general resolution on international terrorism, which appeared to identify refugees and asylum-seekers as potential participants in terrorism." Further, the Security Council "'calls' upon all states to take 'appropriate measures' to ensure that asylum seekers have not 'planned, facilitated, or participated in the commission of terrorist acts.'").

22. S.C. Res. 1373, ¶ 3(f), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

the[se] provisions.”²³ These various U.N. resolutions served to strengthen the global view that immigration laws should employ terrorist bars to deny asylum to various refugees.²⁴

As the threat of terrorism became more prominent on the international stage, states broadened bars to asylum status, affecting a larger class of asylum-seekers than the U.N. originally intended. In 2003, the U.N. special rapporteurs and independent experts expressed “alarm” at the growing threat to human rights due to the indiscriminate use of the term “terrorism.”²⁵ This fear was especially heightened by the ambiguity surrounding the term “terrorism.”²⁶ Over the years, the U.N., along with other international organizations, attempted to create outlines giving guidance in defining “terrorism”; however, no clear international definition of terrorism emerged.²⁷ While the U.N. clearly recognized that terrorism is in direct contradiction with the principles of the U.N. and the protection of basic human rights,²⁸ it fought the increasingly expansive and indiscriminate reach of individual states’ immigration laws into the realm of asylum law.

Today, in light of the rapid changes in immigration law among a variety of states, the U.N. recognizes an ever-present need to balance the security of individual nations with the needs of refugees to find safe havens from persecution. In 2005, the U.N. created the

23. The United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, ¶ II(7), U.N. Doc. A/RES/60/288 (Sept. 20, 2006), available at <http://www.un.org/terrorism/strategy-counter-terrorism.shtml#poa2> (adopting the U.N. Security Council Global Strategy report).

24. See, e.g., Immigration and Refugee Protection Act, S.C. 2001, c. 27, § 34.1(c), (f) (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/fulltext.html> (barring asylum to immigrants who (1) are members of an organization engaged in terrorism, or (2) have engaged in terrorism). The United Kingdom adopted the Prevention of Terrorism Act, creating a material-support bar similar to the United States. See Prevention of Terrorism Act, 2005, c. 2, § 1 (Eng.), available at <http://www.legislation.gov.uk/ukpga/2005/2/section/1/enacted>. The act stated that “terrorism-related activity is . . . conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity.” *Id.* § 1(9)(d).

25. GOODWIN-GILL & MCADAM, *supra* note 21, at 191. A special rapporteur is charged by the UNHCR “to examine, monitor, advise and publicly report on human rights situations in specific countries.” *Special Procedures of the Human Rights Council*, OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (last visited Oct. 13, 2012).

26. See, e.g., BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 57–68 (2006) (outlining approaches to defining terrorism and the elements of a definition); Gilbert, *supra* note 15, at 439–41 (detailing the various definitions of “terrorism” promulgated by the U.N. and other international organizations over the last few decades).

27. See Goodwin-Gill, *supra* note 10, at 192–93.

28. Gilbert, *supra* note 15, at 441.

Counter-Terrorism Implementation Task Force (CTITF) to implement the U.N.'s Global Terrorism Strategy.²⁹ Organized around four key pillars, the CTITF is charged with aiding member states in combating terrorism while still ensuring "respect for human rights for all" in the "fight against terrorism."³⁰ In essence, the U.N. General Assembly encouraged the CTITF to strike the ultimate balance between national security and human rights.³¹ Since its inception, the CTITF expressed fear that counter-terrorism measures negatively impact the "enjoyment of a range of human rights, including . . . the right to seek asylum."³² Finding that individual nations weigh too heavily on the side of national security, the CTITF urges states to limit counter-terrorism measures restricting the "full enjoyment" of human rights to only those deemed "necessary and proportional."³³

Since the creation of the UNHCR and its 1951 Convention, the U.N. has attempted to balance the needs of individual states with the very serious threats that refugees face. The fear that the taint of terrorism will result in a decrease in states' willingness to take in and protect refugees is very real. The U.N. continually encourages states to narrowly tailor national laws to allow for the protection of national security while still supporting the much-needed refugee programs.

B. The U.S. Development of the Material-Support Bar for Refugees

A review of the development of immigration law in the United States requires an assessment of all three federal branches of government to truly understand the full impact of the federal government's decisions on the material-support bar. Each branch played—and continues to play—key roles in the development and implementation of the material-support bar for refugees. From the legislature creating the initial material-support bar statute to the repeated broad interpretation of this statute by the courts, one clear message

29. Counter-Terrorism Implementation Task Force (CTITF), UNITED NATIONS, <http://www.un.org/en/terrorism/ctitf/index.shtml> (last visited Oct. 25, 2012) [hereinafter *CTITF*].

30. *Id.*

31. See United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, Annex (IV) U.N. Doc. A/RES/60/288 (Sept. 20, 2006), available at <http://www.un.org/terrorism/strategy-counter-terrorism.shtml/#resolution>.

32. CTITF, BASIC HUMAN RIGHTS REFERENCE GUIDE: SECURITY INFRASTRUCTURE ¶ 4 (Sept. 2010), available at http://www.un.org/terrorism/pdfs/bhrrg_security_infrastructure.pdf.

33. *Id.*

evolved: the federal government weighs in favor of protecting national security at the cost of granting protection to worthy asylum applicants.

1. *The legislature as the pivotal player behind the initial material-support bar*

From the inception of the United States, the Legislature quickly delved into the realm of immigration, creating various statutes governing the movement of individuals into the United States.³⁴ From as early as 1789, with the passage of the Alien and Sedition Acts, Congress began placing limits on the ability of individuals to immigrate to and remain in America.³⁵ In the Alien Act,³⁶ Congress granted the President the power to “order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States.” Even at this early date, Congress created the power to exclude individuals posing a security threat to the United States. While immigration law constantly evolved over the years following these initial statutes, the last twenty years have seen rapid change in the Legislature’s interest in immigration law.

The Legislature first recognized a bar for refugees who participated in “terrorist activities” in the Immigration Act of 1990.³⁷ In 1996, Congress articulated one of the first versions of the material-support bar in the Anti-Terrorism and Effective Death Penalty Act (AEDPA).³⁸ The AEDPA prevented “persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in ter-

34. See KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 55, 60–61 (2004).

35. See Naturalization Act, ch. 54, 1 Stat. 566 (1798), *repealed by* Naturalization Law of 1802, ch. 28, 2 Stat. 153.

36. An Act Concerning Aliens (The Alien Act), ch. 58, 1 Stat. 570 (1798). The Alien Act is considered part of the Alien and Sedition Acts.

37. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5067–75; Bryan Clark & William Holahan, *Material Support: Immigration and National Security*, 59 CATH. U. L. REV. 935, 939–40 (2010) (“[The material-support bar’s] first iteration appeared in the Immigration Act of 1990 when Congress added the words ‘terrorist activities’ to the list of reasons for which aliens may be denied admission to or deported from the United States.”).

38. Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 301(b), 110 Stat. 1214 (1996).

rorist activities."³⁹ While broadly written, USCIS narrowly applied the material-support bar to refugees and asylum-seekers.⁴⁰

However, the September 11th terrorist attacks dramatically altered congressional interest in prohibiting entry of suspected terrorists into the United States.⁴¹ Similar to the response in international law, Congress called for stronger laws to combat the threat of global terrorism.⁴² Through the Patriot Act and the REAL ID Act, the United States broadened the application of the material-support bar.⁴³ This resulted in the exclusion of thousands of valid refugees' applications to the United States, and it virtually "decimated the United States's refugee-resettlement program."⁴⁴ This was especially true for asylum-seekers coming from terrorist breeding grounds.⁴⁵

In 2001, under the Patriot Act, Congress broadened four key definitions directly affecting asylum-seekers: "terrorism," "terrorist activity," "engaging in terrorist activity," and "foreign terrorist organization."⁴⁶ These broader definitions impacted asylum-seekers in

39. *Id.*

40. Clark & Holahan, *supra* note 37, at 935.

41. Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, in *THE U.S. IMMIGRATION LAWS: A DEBATE* 141, 142 (D. Sujatha ed., 2007) ("[I]mmigration law and policy quickly emerged as ground zero in the so-called 'war on terror' declared by the Bush administration.").

42. See *Terrorist Bombings Convention: Hearing on H.R. 3275*, 107th Cong. (2002) (statement of Sen. Michael Enzi), available at http://capitolwords.org/date/2002/06/14/S5569_terrorist-bombings-convention/ (drawing attention to the need to examine the "long-term global means to address the threat of terrorism" in the course of debating wiretap legislation).

43. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (Patriot) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

44. Clark & Holahan, *supra* note 37, at 946; see also Johnson & Trujillo, *supra* note 41, at 142 (noting that deportations rose to "record levels" following the September 11th attacks).

45. CARY STACY SMITH & LI-CHING HUNG, *THE PATRIOT ACT: ISSUES AND CONTROVERSIES* 24 (2010) ("Following the [September 11th] attacks, all aircraft originating from any country that supported terrorism was blocked from landing in America."). It should be noted that the terrorists associated with the September 11th attacks did not gain entry into the United States through the asylum system but by obtaining various visitor visas, including student visas. *Id.* at 24-25.

46. The Patriot Act defines the terms as follows. "Terrorism" is the "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents." 22 U.S.C. § 2656f(d)(2) (2006). "Terrorist activity" is any activity "which is unlawful under the laws of the place where it is committed . . . [or the United States] and which involves" hijacking, sabotage, detaining an individual to compel a third party to act, "a violent attack upon an internationally protected person," an assassination, the use of a chemical or explosive agent to endanger an individual's safety, or an attempt, threat, or conspiracy to do any of the acts enumerated in the statute. 8 U.S.C. § 1182(a)(3)(B)(iii) (2006). "Engaging in 'terrorist activity'" includes committing, or inciting another to commit, a terrorist ac-

three distinct ways. First, the Patriot Act imposed guilt by association, without any nexus between the immigrant's actions and the terrorist activity.⁴⁷ Just by virtue of associating with a specific group, without any intent to further any terrorism, a person is guilty for the group's terrorist actions. Second, the Act authorized the United States to detain immigrants on "*mere suspicion* that an immigrant has at some point engaged in a violent crime or provided humanitarian aid" to an organization.⁴⁸ This change alone resulted in the suspension of numerous refugee applications.⁴⁹

Third—and one of the most influential changes for asylum applicants—the Patriot Act expanded the definition of "terrorist organization," resulting in three categories, or tiers, of terrorist organizations:

Tier I: An organization designated under INA § 219, 8 U.S.C.A. § 1189, (specifying procedures for designation of organizations by the Secretary of Homeland Security);

Tier II: An organization otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Secretary of Homeland Security or the Attorney General after finding that the organization "engages in terrorist activity";

Tier III: Any group of two or more individuals, whether organized or not, which "engages in terrorist activity" or has a

tivity. *Id.* § 1182(a)(3)(B)(iv). It also includes planning, gathering information for, or soliciting funds or members for terrorist activity. *Id.* Finally, it includes offering material support for the commission of terrorist activity, including providing a safe house, transportation, funds, weapons, or false documents. *Id.* Thus, one can be guilty of engaging in terrorist activity for soliciting money or members for any "terrorist organization" even if the organization has other valid political or humanitarian ends. ROBERT JAMES MCWHIRTER, CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS 11 (2d ed. 2006) (citing 8 U.S.C. § 1182(a)(3)(B)(iv)). "[T]errorist organization" was expanded to include "a group of two or more individuals, whether organized or not, which engages in" certain terrorist activity. Patriot Act, § 411(a)(1)(G), 115 Stat. at 347–48 (codified at 8 U.S.C. § 1182(a)(3)(B)(vi)(III)).

47. DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 153–55, 158 (2d ed. 2002).

48. *Id.* at 152 (emphasis added).

49. See generally *id.* at 156–58 (discussing the Attorney General's "unprecedented power" that provides "extraordinary breadth" to not only detain those immigrants who pose a "current danger or flight risk," but also those "suspected terrorists" who may have merely provided aid to a disfavored humanitarian organization).

subgroup that does so.⁵⁰

Although the first two tiers are designated by the federal government and published for everyone to view, the third tier is not given such transparent treatment. This tier heavily altered the application of the material-support bar.⁵¹ By expanding the definition of "terrorist organization," the government could deny an asylum-seeker's application when the only link to a terrorist act was through a small group whom the alien might not even know was involved in terrorism.⁵² This broadened designation places a huge burden on the refugee: not only must he or she be wary of coming into contact with the fifty-one organizations designated on the State Department's website,⁵³ he or she must also avoid any group of two or more individuals. While it may seem simple, sitting in the United States, "not to come in" contact with "two or more individuals" intending to engage in terrorist activity, many of these refugees come from war-torn regions where contact with militant or terrorist groups is a daily occurrence.⁵⁴

In the REAL ID Act of 2005, Congress further broadened the material-support bar. The Act places a higher burden on asylum applicants by requiring the alien to support his or her application with credible evidence under a "totality of the circumstances" test.⁵⁵ However, the Act did allow for the Secretary of State to waive particular bars to asylum, including the material-support bar.⁵⁶ While the Secretary of State used the new waiver provision in certain in-

50. ANKER, *supra* note 4, § 6:25 (citing 8 U.S.C. § 1182(a)(3)(B)(vi)); *see also* Bureau of Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP'T OF ST. (Sept. 28, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm> (explaining the legal significance of the "foreign terrorist organization" designation).

51. This type of terrorist organization is commonly referred to as "Tier III" or "undesignated category." Craig R. Novak, *Material Support to Terrorists or Terrorist Organizations: Asylum Seekers Walking the Relief Tightrope*, 4 AM. U. MODERN AM. 19, 19 (2008); *see also* 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

52. Many argue that, under the current construction of the statute, the material-support bar could easily exclude protestors who throw rocks because it no longer requires that a group be organized. *See* ANKER, *supra* note 4, § 6:26.

53. *See* Bureau of Counterterrorism, *supra* note 50.

54. *See, e.g., infra* pp. 255–56 (discussing the situation in Colombia).

55. This test "requires that the trier of fact base credibility on the applicant's demeanor, candor, responsiveness, and the internal consistency of the applicant's statements." Novak, *supra* note 51, at 20.

56. *Id.*; *see also* 8 U.S.C. § 1182(d).

stances,⁵⁷ the waiver fails to truly address the wide breadth of the material-support bar and the negative impact it has on individuals with valid refugee claims.

2. *The executive's support of broad bars to asylum*

Throughout the creation and passage of the Patriot Act and the REAL ID Act, the Executive Branch, under the direction of President George W. Bush, continually pushed for stronger laws to protect national security. In President Bush's first State of the Union address following the September 11th attacks, he stated: "We will work closely with our coalition to deny terrorists and their state sponsors the materials, technology, and expertise to make and deliver weapons of mass destruction."⁵⁸ President Bush reaffirmed the nation's first priority: "the security of our nation."⁵⁹ Less than five years after the September 11th attacks, President Bush again called for the government to "remain on the offensive against terrorism *here at home*."⁶⁰ President Bush actively supported the passage and application of the Patriot Act and urged an aggressive pursuit of terrorists.⁶¹ With the support of the Executive Branch, the expansive application of bars to immigration flourished.⁶²

In recent years, the Executive Branch, under the direction of President Barack Obama, has given the appearance of taking a more open position concerning the bars to immigration. As recently as his 2012 State of the Union address, President Obama called for Con-

57. *The Problem of Terrorism-Related Inadmissibility Grounds (TRIG) and the Implementation of the Exemption Authority for Refugees, Asylum Seekers, and Adjustment of Status Applications*, REFUGEE COUNCIL USA (July 28, 2009), <http://www.rcusa.org/uploads/pdfs/TRIG%20Backgrounder%207-28-09.pdf> ("As of June 2009, more than 10,500 exemptions have been granted, mostly in cases of refugees being resettled in the US from abroad.").

58. President George W. Bush, State of the Union Address (Jan. 29, 2002), *available at* <http://millercenter.org/president/speeches/detail/4540>.

59. *Id.*

60. President George W. Bush, State of the Union Address (Jan. 31, 2006) (emphasis added), *available at* <http://georgewbush-whitehouse.archives.gov/stateoftheunion/2006/>.

61. *Id.*

62. While the impact on immigration solely due to the material-support bar is unknown, data show that "the total number of U.S. asylum cases dropped by 41.51% in the years 2001 to 2005" with the number of asylees granted asylum dropping "by 11.95% in the years 2003 to 2005." Novak, *supra* note 51, at 21.

gress to work on “comprehensive immigration reform.”⁶³ However, some observers question the difference between President Obama’s policies concerning immigration when compared to those of his predecessors.⁶⁴ During his 2011 State of the Union address, President Obama stated that “we should continue the work of fixing our immigration system,” while virtually in the same breath he reiterated the need to “secure our borders . . . and ensure that everyone who *plays by the rules* can contribute to our economy.”⁶⁵ These statements must be compared with those made by Secretary of State Hillary Clinton to the UNHCR: “My country is a nation of immigrants, and we are proud to have welcomed so many refugees to our shores.”⁶⁶ While President Obama’s message may not be as clear as President Bush on the interplay of the war on terror and asylum, the material-support bar still exists today, with its broad application and devastating ramifications for refugee applicants.

3. *Judicial interpretation of the material-support bar*

The final nail in the coffin for asylum-seekers came at the hands of the judicial branch. The Third Circuit led with its interpretation of the material-support bar in *Singh-Kaur v. Ashcroft*.⁶⁷ *Singh-Kaur* dealt with an Indian citizen who organized religious meetings, providing food and tents to attendees. Some attendees, whose identities remain unknown, *could* have been members of groups using militant means against the government. Neither the government, the court, nor Mr. Singh-Kaur could definitively identify any of the people

63. President Barack Obama, State of the Union Address (Jan. 25, 2012), *available at* <http://www.whitehouse.gov/photos-and-video/video/2012/01/25/2012-state-union-address-enhanced-version#transcript> (follow “Read the Transcript” hyperlink).

64. *See generally* Stephen Lendman, *Obama’s War on Terror*, THE MARKET ORACLE (Feb. 11, 2009, 5:11 PM), <http://www.marketoracle.co.uk/Article8825.html> (questioning whether there is any real difference between Presidents Obama and Bush in the “war on terror”).

65. President Barack Obama, State of the Union Address (Jan. 27, 2010) (emphasis added), *available at* <http://millercenter.org/president/speeches/detail/5706>. It is critical to note that President Obama never clarifies whose rules immigrants must play by: international standards or the more strict U.S. standards.

66. Hillary Rodham Clinton, Sec’y of State, Remarks at the United Nations High Commissioner for Refugees Ministerial on the 60th Anniversary of the Refugee Convention (Dec. 7, 2011), *available at* <http://www.state.gov/secretary/rm/2011/12/178406.htm>.

67. 385 F.3d 293 (3d Cir. 2004). It should be noted that this case was decided prior to the implementation of the REAL ID Act in 2005. However, the court interpreted statutes that remained substantially unaltered following the passage of the REAL ID Act.

who participated in the religious meetings.⁶⁸ The Third Circuit, disregarding Mr. Singh-Kaur's intent to only spread a peaceful message of his faith, denied Mr. Singh-Kaur protection by finding he provided material support to terrorist organizations.⁶⁹ The court found that Mr. Singh-Kaur knew or should have known that some members attending these meetings would participate in some future unknown terrorist activities.⁷⁰

Drawing support from the Third Circuit's decision in *Singh-Kaur*, other federal circuit courts and district courts soon followed with similar interpretations of the material-support bar.⁷¹ The Second Circuit, in particular, found the knowledge requirement of the material-support bar "requires only knowledge that the alien knew he was rendering material support to the recipient of his support."⁷² The court acknowledged, "Congress could well have wanted to require that a person rendering non-monetary support know only that his actions 'afford material support,' even if he does not know that the recipient is a terrorist organization."⁷³ The courts are clearly willing to interpret the material-support bar in the broadest manner, resulting in the denial of otherwise valid asylum applications.

While to date, the Supreme Court has yet to decide a case directly hinging on the material-support bar for refugees, it did decide three different cases applicable to the discussion surrounding a refugee's intent when giving material support. First, in 1981, the Supreme Court decided *Fedorenko v. United States*,⁷⁴ a case involving the Dis-

68. *Id.* at 308 (Fisher, J., dissenting) ("The majority bases its holding on five premises: (1) Singh-Kaur supplied food and tents (2) prior to 1989 (3) to unnamed members of the Babbar Khalsa and/or Sant Jarnail organizations (4) who engaged in unnamed terrorist acts or planned to engage in such unnamed act, and (5) Singh-Kaur knew or should have known that these unnamed individuals engaged in unnamed terrorist acts or planned to engage in such unnamed acts.").

69. *Id.* at 301.

70. *Id.* at 308.

71. See *Haile v. Holder*, 658 F.3d 1122, 1129 (9th Cir. 2011) (recognizing the broad nature of the material-support bar); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698-99 (7th Cir. 2008) (finding applicant's earmarking of funds given to Hamas for social welfare services irrelevant for material-support bar considerations); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 647 F. Supp. 2d 857, 895-96 (N.D. Ohio 2009) (finding the material-support bar not unconstitutionally vague).

72. *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 131 (2d Cir. 2009).

73. *Id.* at 130.

74. 449 U.S. 490 (1981).

placed Persons Act of 1948 (DPA).⁷⁵ Under the DPA, a person could not emigrate to the United States if he or she “assisted the enemy in persecuting civilians or had voluntarily assisted the enemy forces in their operations.”⁷⁶ Fedorenko faced deportation because, during World War II, he worked as a guard at a concentration camp for the Nazis.⁷⁷ His primary defense for these actions: he was forced to work for the Nazis, and, therefore, he did not act voluntarily.⁷⁸ The Court rejected this argument, holding that there is no “basis for an ‘involuntary assistance’ exception” to the persecutor bar and therefore, “an individual’s service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa.”⁷⁹

Following this decision, the BIA relied on *Fedorenko* for the proposition that “[t]he participation or assistance of an alien in persecution need not be of his own volition to bar him from relief.”⁸⁰ The court completely disregarded a duress exception for these aliens. For almost twenty years, the BIA applied this principle when interpreting the intent requirement of a variety of immigration statutes.⁸¹ In 2009, the Supreme Court struck down this overreaching and broadly applied interpretation of intent in *Negusie v. Holder*.⁸² This case dealt with the “persecutor bar,” which denies an otherwise meritorious refugee from obtaining relief in the United States if “he has persecuted others.”⁸³ The Supreme Court did not decide whether an alien could plead duress as an excuse under the “persecution bar.” However, the Court halted the BIA’s blind following of the *Fedorenko* decision, and the Court charged the BIA with assessing

75. Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009. The DPA “enable[d] European refugees driven from their homelands by the war to emigrate to the United States without regard to traditional immigration quotas.” *Fedorenko*, 449 U.S. at 495.

76. *Fedorenko*, 449 U.S. at 495 (internal quotation marks omitted).

77. *Id.* at 494.

78. *Id.* at 500.

79. *Id.* at 512.

80. *In re Rodriguez-Majano*, 19 I. & N. Dec. 811, 814 (B.I.A. 1988).

81. *See id.* at 815 (holding that alien did not persecute on a protected ground but reaffirmed the lack of an involuntary assistance exception); *In re Fedorenko*, 19 I. & N. Dec. 57, 69–70 (B.I.A. 1984) (finding as a matter of law that motivations for serving as a guard are “immaterial”); *In re Laipenieks*, 18 I. & N. Dec. 433, 463–64 (B.I.A. 1983) (applying the *Fedorenko* decision to a deportation proceeding of an individual associated with the Nazis), *rev’d*, *Laipenieks v. Immigration & Naturalization Serv.*, 750 F.2d 1427, 1429 (9th Cir. 1985).

82. 555 U.S. 511, 514 (2009).

83. *Id.* at 513–14.

whether the persecution bar included a duress exception.⁸⁴ While *Fedorenko* still stands as good law, the Supreme Court significantly narrowed its application.

Through the *Neguse* decision, the Supreme Court seemed to give hope to refugee applicants; the initial foundation for a duress exception was laid.⁸⁵ However, the Supreme Court quickly dashed this hope. In 2010, the Supreme Court weighed in on the discussion pertaining directly to “terrorism statutes.” Its recent decision in *Holder v. Humanitarian Law Project* shows that the Supreme Court is unwilling to be influenced by international standards concerning the material-support bar.⁸⁶ *Humanitarian Law Project* concerned the legality of American citizens and organizations giving aid to designated foreign terrorist organizations. American organizations and citizens wanted to give aid in the form of educational and advocacy services, allowing these organizations to use legal and peaceful means to petition governments for their cause—instead of using terrorist activities. The statute at issue in the case, 18 U.S.C. § 2339B, makes it a federal crime to knowingly provide material support or resources to a foreign terrorist organization.⁸⁷

Prior to supplying aid to certain organizations, the plaintiffs brought suit seeking a declaration that section 2339B was unconstitutional and that the anticipated aid would not result in criminal penalties.⁸⁸ Although the plaintiffs proffered a variety of arguments against the validity of the statute, the dispute relevant to an asylum discussion concerned the knowledge requirement attached to section 2339B.⁸⁹ The plaintiffs contended that the knowledge requirement should be interpreted to “require proof that a defendant intended to further a foreign terrorist organization’s illegal activi-

84. *Id.* at 522–23.

85. See Charlotte Simon, *Change Is Coming: Rethinking the Material Support Bar Following the Supreme Court’s Holding in Neguse v. Holder*, 47 HOUS. L. REV. 707, 711 (2010) (“*Neguse* has undercut the current broad application of the material support bar and laid the analytical foundation for a statutory duress exemption.”).

86. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010).

87. *Id.*

88. *Id.* at 2717.

89. *Id.* at 2717–18. While section 2339B is not an asylum statute, the knowledge requirement under this statute tracks the language of the material-support bar for asylum applications. Compare 18 U.S.C. § 2339B(a)(1) (2006) (“Whoever knowingly provides material support or resources . . .”), with 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006) (“[T]o commit an act that the actor knows, or reasonably should know, affords material support . . .”).

ties.”⁹⁰ Rejecting this interpretation, the Supreme Court found that a person could be culpable under the statute without the specific intent to further the terrorist goals of an organization.⁹¹ Therefore, knowledge of an organization’s terrorist activities was immaterial to the discussion of criminal culpability. A person need only knowingly give the material support to be culpable.

Throughout the Court’s opinion, Chief Justice Roberts continually returned to the theme that terrorist issues—these “sensitive interests in national security and foreign affairs”—are better left to the executive and legislative branches.⁹² The Supreme Court seemed very reluctant to step in when the issue involved terrorism. Additionally, the Supreme Court relied heavily on the “fungibility argument,”⁹³ reasoning that any material aid, even if not meant for terrorist purposes, frees up more resources for terrorist activities.⁹⁴ Explaining that the “taint” of terrorism penetrates an entire organization, the Supreme Court readily accepted the proposition that an individual’s personal intent to aid in the actual terrorism was irrelevant.⁹⁵

From its decision, it is abundantly clear that the Supreme Court will not lightly involve itself in the terrorism discussion. Under most circumstances, the Court seems willing to remain highly deferential to the executive and legislative branches of the government. If Congress or the President deem that a refugee’s presence in the United States threatens national security, the judicial branch will not insert itself for the benefit of a refugee.

90. *Humanitarian Law Project*, 130 S. Ct. at 2717.

91. *Id.*

92. *Id.* at 2727–29; see also Johnson & Trujillo, *supra* note 41, at 146–49 (discussing the long history of the Court’s deference to the political branches in matters of national security).

93. See COLE & DEMPSEY, *supra* note 47, at 154–55 (discussing the faulty assumption underlying the fungibility argument).

94. *Humanitarian Law Project*, 130 S. Ct. at 2727 (“The State Department informs us that the experience and analysis of the U.S. government agencies charged with combating terrorism strongly support Congress’s finding that all contributions to foreign terrorist organizations further their terrorism.” (citation and internal quotation marks omitted)). The federal government seems to rely heavily on the proposition that aid, even if earmarked for non-terrorism activities (e.g., an orphanage or shelter), frees up resources for an organization to devote solely to terrorist activities.

95. *Id.* at 2717.

II. THE BROAD APPLICATION OF THE MATERIAL-SUPPORT BAR TODAY

A. *The U.S. Construction of the Material-Support Bar*

The actions taken by all three branches of the U.S. government paint a bleak picture for asylum applicants. Regardless of an alien's intent when giving material support to an organization, be it under duress or with innocent motivations, the United States can deny protected status for the applicant if it determines the aid supports terrorist activities. In the debate surrounding immigration and national security, the dominant concerns pertain to our nation's security, at the expense of the rights of asylum applicants.⁹⁶ In addition to violating core American values—the right of all to “Life, Liberty, and the pursuit of Happiness”⁹⁷—the United States's further broadening of the material-support bar resulted in an ever-widening divergence from international asylum law. The United States is now failing to meet its immigration obligations.

Today, the material-support bar prohibits a refugee from receiving asylum protection if he or she has committed an act:

that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause

96. See Johnson & Trujillo, *supra* note 41, at 142. “Unfortunately, national security today dominates the debate over virtually any immigration-related policy.” *Id.* at 162.

97. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also Daniel Kanstroom, *Legal Lines in Shifting Sand: Immigration Law and Human Rights in the Wake of September 11*, in THE U.S. IMMIGRATION LAWS: A DEBATE 180, 183 (D. Sujatha ed., 2007) (discussing that, when the United States acts against citizens abroad, it cannot “do so free of the Bill of Rights”).

(vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.⁹⁸

According to the BIA, the material-support bar has three elements: “(1) the applicant knows or should have known (*mens rea*) that (2) the material support the applicant provided (3) was to a terrorist organization.”⁹⁹ The current application of the material-support bar under the REAL ID Act suffers from both a lack of an intentional *mens rea* and a failure to apply the knowledge requirement to the third element—a terrorist organization. Prior to the creation of the Patriot Act, the government barred applicants only when an alien gave material support “with the knowledge that the support was going to a group planning terrorist activity.”¹⁰⁰ Today, the U.S. government can bar an applicant regardless of his or her knowledge that the group will commit—or has committed—a terrorist activity.¹⁰¹

While arguably the application to those individuals with knowledge of—or who should have knowledge of—terrorist activities is justified in the name of national security, application of the material-support bar to asylum applicants who do not *intend* to support terrorist activities goes too far. This misapplication is best assessed in the light of cases where an applicant involuntarily supplied aid to a terrorist organization under duress. Currently, the statute does not recognize an exception for material support given under duress.¹⁰² The lack of a duress exception plays a significant role in the asylum applications from war-torn regions, such as Somalia and the Middle East.¹⁰³

Take, for example, the situation in Colombia. Revolutionary guerrilla groups control a majority of the country; some estimate that

98. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2012); *see also* 8 U.S.C. § 1182(a)(3)(B)(i).

99. Novak, *supra* note 51, at 20.

100. *Id.* at 19.

101. *Id.*; *see also* Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 137–38 (2d Cir. 2009) (upholding the denial of an Islamic scholar’s visa application because he gave material support to a charity that supplied funds to Hamas).

102. ANKER, *supra* note 4, § 6:27.

103. *See generally* UNINTENDED CONSEQUENCES, *supra* note 9 (discussing the consequences resulting from the lack of a duress exception for Colombian refugees attempting to seek asylum in the United States).

these groups control as much as 75% of Colombia.¹⁰⁴ Because of their massive presence, “aid” given to these groups is common. Often, this aid takes the form of “war taxes” – the involuntary supplying of these militant groups with food or goods.¹⁰⁵ Currently, the United States treats these war tax payments as material support giving rise to the material-support bar, “regardless of whether or not they were given under duress or were extremely small payments.”¹⁰⁶ These refugees are faced with a horrific catch-22: to stay alive in their home country, they must provide the goods and services demanded by these guerrilla groups. However, by doing so, they are giving up any chance of gaining protection from these same guerilla groups through United States refugee programs. Through its lack of recognition of a duress exception, the United States is failing in its duty to aid these individuals in escaping the dangerous and life-threatening environment of their homelands.

Another unaccounted-for situation under the current material-support bar occurs when an applicant inadvertently gives aid to a terrorist organization.¹⁰⁷ In nations like Colombia, a country housing numerous guerilla groups, anyone could unintentionally give aid to a terrorist organization. This is especially relevant for shop owners in areas heavily controlled by militants; just by virtue of opening a shop, a person is subjecting him or herself to this asylum bar.¹⁰⁸ For example, recall Mr. Singh-Kaur’s situation: the Third Circuit denied his application because he unintentionally gave aid to unnamed members of a terrorist organization at a purely religious gathering.¹⁰⁹

104. *Id.* at 2.

105. *Id.* at 16 (discussing the deadly ramifications for Colombians who refuse to pay these “war taxes”).

106. *Id.* at 18 (footnote omitted).

107. *See id.* at 29 (discussing the response of a Colombian seminarian to a claim he gave aid to a terrorist organization). “I was so stupid. I sold bread to everyone. I never asked who they were.” *Id.*

108. *Id.* at 29–30 (discussing the ramifications for refugees who inadvertently support militant groups in Colombia).

109. *See supra* notes 67–69 and accompanying text. Mr. Singh-Kaur consistently claimed that he never intended to further any terrorist goals with his aid. Further, any aid (i.e. food or tents) that Mr. Singh-Kaur gave to any member of a terrorist organization was done inadvertently. *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 310 (3d Cir. 2004) (Fisher, J., dissenting) (showing how Mr. Singh-Kaur disclaimed any connection to violence).

*B. The Broad Application of the U.S. Material-Support Provision
Violates International Law*

The United States's application of the material-support bar to refugees who have acted either inadvertently or under duress is in direct contradiction with the U.N.'s position on refugees. The UNHCR urges the United States to take into account a defense of duress for Colombian applicants.¹¹⁰ Under Article 33 of the 1951 Convention,¹¹¹ a country may only deny a refugee withholding of removal when there are "*reasonable grounds* for regarding [the refugee] as a danger to the security of the country."¹¹² When a person is forced to aid in these activities, or does so unwittingly, he or she does not pose the same security threat to a nation. A security threat is born when an individual intends to support the dangerous, terrorist activities of an organization. Recognition of this difference in level of security threat is called for under the 1951 Convention.¹¹³ By failing to address this distinction, the United States is not accurately complying with Article 33(2)—and therefore not complying with its international obligations.

Further, the United States's application of the material-support bar to refugees directly contributes to the U.N.'s fear of the arbitrary denial of protection for valid asylum-seekers. The CTITF, responding to the use of a material-support bar by a variety of countries, reiterates the view that "limitations imposed for the protection of national security must be necessary to avert a *real and imminent*—not just hypothetical—danger."¹¹⁴ Therefore, the use of the material-support bar to deny refugees who gave support inadvertently or involuntarily directly contradicts the CTITF's position. As stated previously, these refugees do not pose a real or imminent risk.

The CTITF further recognizes the concern that "legal and bureaucratic barriers" affect the ability of individuals to receive protection as refugees.¹¹⁵ The U.N. acknowledges that a lack of finding individual involvement with a specific crime would be in direct contra-

110. UNINTENDED CONSEQUENCES, *supra* note 9, at 29–40.

111. See *supra* notes 18–19 and accompanying text.

112. G.A. Res. 429(V), *supra* note 15, art. 33(2) (emphasis added).

113. *Id.*

114. See CTITF, *supra* note 32, ¶ 16 (emphasis added).

115. *Id.* ¶ 43.

diction with the “spirit and intention” of the 1951 Convention.¹¹⁶ Further, U.N. Special Rapporteurs issued reports detailing the devastating impact of material-support bars on asylum applications.¹¹⁷ These Special Rapporteurs encourage the U.N. to urge countries to more accurately comply with international law when implementing a material-support bar for asylum-seekers.¹¹⁸

Again, the United States is failing to recognize that not every refugee who gave support to a terrorist organization possesses a “real and imminent” threat to the nation’s security. Take for example a woman who was forced to provide ski masks and scarves to a militant group.¹¹⁹ This woman was then gang-raped, strapped with meat, and fed to a ferocious dog. While she presents a valid claim for having suffered past persecution and a well-founded fear of future persecution, under the current material-support bar this woman materially supported a terrorist organization. Therefore, she cannot look to the United States for protection. But, does this woman present a “real and imminent” threat to U.S. national security? It is clear that she does not pose the same level of danger as, say, a leader of Hamas. However, this woman would be barred under the same theory used for a leader of Hamas.

The U.N.’s fear that the United States will deny meritorious refugee claims is clearly justified. With the broad application of the material-support bar, the UNHCR virtually stopped referring Colombian refugees to the United States for asylum protection.¹²⁰ While this may seem a drastic step, it reflects the dire consequences for those refugees who are found by the United States to have materially supported a terrorist organization. Once labeled as such—especially by a global leader—their hope of finding protection in another safe country is significantly diminished.¹²¹

116. Gilbert, *supra* note 15, at 445.

117. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 64/211, ¶ 53(h), U.N. Doc. A/RES/64/211 (Aug. 3, 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NU9/437/55/PDF/NO943755.pdf?openelement>.

118. *Id.*

119. UNINTENDED CONSEQUENCES, *supra* note 9, at 18–19.

120. *Id.* at 30.

121. See generally Andrew I. Schoenholtz & Jennifer Hojaiban, *International Migration and Anti-Terrorism Laws and Policies: Balancing Security and Refugee Protection*, 4 TRANSATLANTIC PERSPS. MIGRATION 1 (2008) (examining the development and application of asylum laws in the United States and Europe).

C. *The Implication of Humanitarian Law Project on the Material-Support Bar*

This Note posits that, by failing to require that an individual who has given aid to an organization *intend* the terrorist acts of an organization, the United States fails to adequately assess an *individual's* personal accountability for terrorist acts. As noted previously, the *Humanitarian Law Project* decision is not a refugee case. However, it does foreshadow the Supreme Court's view on the issue of the mens rea attached to the material-support bar for refugees. In the refugee sphere, *Humanitarian Law Project* lays the foundation to further decrease the need to show that an alien knew and intended any material support offered to an organization to be used for terrorist acts.

In *Humanitarian Law Project*, the Supreme Court rejected an interpretation of specific intent with regard to the use of aid given to a terrorist organization. For refugees, this interpretation presents broad ramifications: aliens presenting valid claims for asylum protection are denied protection in the United States because they provided material support to a terrorist organization when they neither knew nor intended to promulgate the terrorist actions.¹²² The Supreme Court noted that Congress drew a distinction between knowledge of an organization's terrorist activities and intent of the individual to further those terrorist activities.¹²³ The Court found the latter irrelevant when a person gave material support to an organization; liability attaches solely on the basis that a person knowingly aided an organization.¹²⁴ The Court does not require further knowledge that this organization will use this aid to commit terrorism.

In its analysis, the Court failed to accurately assess the application of the term "knowingly" to all the elements of the statute. By only requiring knowledge of the organization as a terrorist organization, without requiring knowledge that the aid will go toward the terrorist activities, individual culpability is not accurately assessed. In some areas of the world, these terrorist organizations provide a variety of services to local communities, including aid to charities, shelters, and orphanages. Further, they operate under multiple

122. See ANKER, *supra* note 4, § 6:27.

123. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2715 (2010) ("Congress clarified the mental state necessary to violate [section] 2339B, requiring knowledge of the foreign group's designation as a terrorist organization or the group's commission of terrorist acts.").

124. *Id.* at 2725.

names with a variety of hierarchical structures. A person may know they are giving to an organization without knowing that this same organization has a branch involved in terrorism.¹²⁵

Justice Berger, in his dissent, correctly articulates the proper definition of the knowledge mens rea: “[a] person acts with the requisite knowledge if he is aware of (or willfully blinds himself to) a significant likelihood that his or her conduct will materially support the organization’s terrorist ends.”¹²⁶ He continues his analysis of the statute, finding that the statute can be broken into four key components:

[T]he defendant would have to know or intend (1) that he is *providing* support or resources, (2) that he is providing that support *to a foreign terrorist organization*, and (3) that he is providing support that is *material*, meaning (4) that his support bears a significant likelihood of furthering the organization’s terrorist ends.¹²⁷

Justice Berger’s construction requires that a person know that the aid given will promote terrorism, not just that the person supports an organization. He goes even further, requiring that an alien know that this support will be material to the foreign terrorist organization. This construction accurately reflects a person’s individual culpability as well as the risk to security posed by the individual.

This same interpretation should be applied to the material-support bar in asylum cases. The mens rea element—“that the actor knows, or reasonably should know”¹²⁸—should apply not only to the issuance of support, but also to the intended use of that support. Take, for example, the first subsection under the material-support bar: “that the actor knows, or reasonably should know, affords material support . . . for the commission of a terrorist activity.”¹²⁹ Congress’s inclusion of knowledge in the beginning of the statute

125. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS: MIDDLE EAST AND NORTH AFRICA OVERVIEW (2011), available at <http://www.state.gov/j/ct/rls/crt/2010/170257.htm> (“Financing of Hamas through charitable organizations remain[s] a concern”); see also *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (involving a denial of a visa to a Swiss-born Islamic scholar who donated money to a charity from 1998 to 2002 that was later designated as a terrorist organization because of its ties to Hamas).

126. *Humanitarian Law Project*, 130 S. Ct. at 2740 (Berger, J., dissenting).

127. *Id.* at 2740–41.

128. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006).

129. *Id.*

should be interpreted to also apply to “for the commission of terrorist activity.” Only when a person knows, or reasonably should know, that the material support given will be used in “the commission of a terrorist activity,” should he or she be barred from obtaining asylum relief.

Interpreting the statute in this manner would allow for the United States to protect national security without violating the rights of refugees seeking protection.¹³⁰ Only those refugees who intend to further terrorist activities would be barred from relief. Further, those who give support unwittingly would be protected because they neither knew nor should have known that the support was going to further terrorist activity. It is important to note that this interpretation does not solve the duress issue discussed previously. Many refugees who give support, though under duress, know they are giving support to a terrorist organization that will use the funds toward terrorist ends. Therefore, these refugees would still fall under the purview of the material-support bar.

As written, the statute does not contain a duress exception or a construction that would exempt these individuals. To deal with this situation, Congress must actively step in and change the material-support bar to better reflect the issues facing refugees. Without an alteration to the statute that would require either intent by the refugee to further the terrorist goals or an explicit involuntary assistance exception to the statute, these refugees will continue to suffer from an inability to obtain U.S. relief from persecution.

CONCLUSION

The debate surrounding the material-support bar gives rise to the crucial balance between national security and aid given to refugees trying to escape persecution in their homeland. The creation and application of the material-support bar directly reflects the fear and confusion in the United States following the September 11th attacks. Congress felt it necessary to protect the nation at all costs in a time of great American turmoil. However, Congress’s response went too far. The scales are now tipped too heavily in favor of protecting national security at the cost of denying protection to thousands of mer-

130. See Johnson & Trujillo, *supra* note 41, at 163 (“We as a nation . . . should expect and demand that security measures must be calculating, fair, and effective, not overbroad, arbitrary and capricious, and ineffective.”).

itorious refugee claims.¹³¹ Not only does the material-support bar violate international law, it forces refugees to remain in inhumane conditions in violation of their basic human rights.

Readers may be left with a crucial question: why should the United States change its policies when there are other nations where these refugees could find protection? Senator Brownback answers this question in his statements made almost a year after the September 11th attacks:

As a Nation, the United States is the world's leader in the protection of refugees. The world takes its lead from the United States when reacting to asylum-seekers, and the example[s] we set have far-reaching implications for those who flee persecution. For this reason, we have stood firm against excuses for the denial of basic human rights and life's basic liberties.¹³²

The United States needs to meet its obligations as a global leader and reassess the application of the material-support bar. Nations look to the United States to lead in a variety of international arenas. But, in asylum law, the United States is leading other countries down a treacherous path where refugees who are least able to help themselves will continue to suffer daily and inhumane persecution.

131. *Id.* at 144 (“Besides being overbroad, under-inclusive, and, in many instances, grossly unfair, the measures [taken by the United States] appear to have done little to truly improve the security of the United States but have done much to alienate the very communities whose help is desperately needed to effectively protect national security in modern times.”).

132. 148 CONG. REC. 20,929 (2002) (statement of Sen. Sam Brownback on North Korean refugees).