NOTES

A HUNGRY CHILD SHOULD KNOW NO POLITICS: HOW THE U.S. MATERIAL SUPPORT STATUTE HAS EXCESSIVELY CRIMINALIZED HUMANITARIAN RELIEF AND HAS UNINTENTIONALLY BARRED INNOCENT ASYLUM-SEEKERS FROM THE UNITED STATES

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Abstract

The material support statute, aimed at prosecuting those who provide various forms of support to terrorism, has been essential in the United States' ability to combat terrorism. However, the inflexible application of the statute in immigration law as well as in an international aid context has, at times, come with dire consequences without benefiting U.S. national security. Additionally, in an immigration context, there is an inconsistency in the types of exemptions available for a non-citizen who gives material support depending on whether the non-citizen is in removal proceedings. The Department of Homeland Security's June 2022 authorization of a statutory exemption to the material support statute for Afghans who assisted U.S. troops provides a template for potential future reforms to the material support statute. These potential future reforms would mitigate some of the drawbacks of the statute.

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INTRODUCTION

The material support statute, found in 18 U.S.C. Section 2339(a), is "... primarily aimed at reaching those persons who provide material support to terrorists knowing that such support will be used to commit one of the offenses specified in the statute."[1] Material support under this section is defined as "... any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal

1. US DEP'T OF JUST. ARCHIVES, PROVIDING MATERIAL SUPPORT TO TERRORISTS (18 U.S.C. § 2339A) (2020), https://perma.cc/D6C2-VLWB.

substances, explosives, personnel, and transportation, except medicine or religious materials."[2]

In finding that an individual has committed one of the enumerated offenses, the charge does not require that the individual providing material support share or know the specific intent of the perpetrator who carries out the terrorist act.[3] The applicable statutes and regulations regarding what constitutes a "terrorist organization" and therefore when someone is considered to be a material supporter differs in the immigration context as compared to the counterterrorism law context. There is, however, significant overlap in both contexts. In both immigration and counterterrorism law, the material support statute has been problematically and irrationally used to criminally convict humanitarian organizations and bar immigrants from receiving permanent residency, asylum, or naturalization in the United States. The application of material support has been particularly problematic for immigrants who have given *de minimis* support or support under duress to terrorist organizations.

This Note will consider the effects of the material support provisions in the humanitarian context through the use of case studies analyzing the statute's negative ramifications on humanitarian organizations and their recipients. Second, this Note will examine the application of the material support statute in the immigration context by looking at the devastating consequences immigrants have faced, especially those who are in removal proceedings. Comparing and contrasting how humanitarian organizations and immigrant communities have been affected is essential in creating effective statutory reform that takes both perspectives into account.

Finally, this Note will discuss one possible route for statutory reform that can serve to alleviate the unintended consequences the statute has had for both humanitarian organizations and immigrants. In June 2022, the Department of Homeland Security (DHS) announced the creation of a statutory exemption to the material support statute for Afghan allies. At times, the implementation of the material support statute has been counterproductive to the United States' reputation as a refuge for immigrants, its ability to provide humanitarian aid where it is most needed, and, more broadly, for its national security. The regulatory exemptions for Afghan allies to the United States, however, provides a template for potential future reforms to the material support statute.

2. 18 U.S.C. § 2339A.
3. *Id.*

I. THE MATERIAL SUPPORT STATUTE IN THE HUMANITARIAN CONTEXT: THE STATUTE'S ADVERSE EFFECTS ON U.S.-FUNDED HUMANITARIAN ORGANIZATIONS

As previously mentioned, the applicability of the material support statute varies in the context of counterterrorism law as compared to immigration law, where it is applied in a broader manner. The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") "prohibits an individual from giving material support to Foreign Terrorist Organizations (FTOs), designated by the Secretary of State'' and to "a broader list of terrorist entities and individuals designated by the Department of the Treasury under the International Emergency Economic Powers Act (IEEPA)."[4]

AEDPA's definition of material support, which is "generally referred to for sanctions compliance purposes," entails the provision of funds, weapons, and the like, technical advice and assistance, training, personnel and services.[5] AEDPA, like the material support statute in 18 U.S.C. Section 2339(a), allows for a humanitarian exception that is "limited to the provision of medicine and religious materials to FTOs" without clarifying whether other types of support can be given to civilians living under the control of an FTO.[6] Additionally, an individual or entity can also obtain an exception to the prohibition on "personnel, training, or expert advice or assistance to an FTO" if the Secretary of State approves it but "there is no established process to obtain this permission."[7]

The IEEPA also grants exemptions for "donations of food, clothing and medicine intended to relieve human suffering" but the President can cancel this exception during a national emergency if the exemption would interfere with his ability to respond to the emergency. President George W. Bush, for example, in his Executive Order 13224, discontinued the exemption for food, clothing and medicine after designating Al-Qaeda and associated forces as terrorist organizations.[8]

The trepidation that humanitarian organizations have felt, particularly after the 9/11 attacks on New York City's Twin Towers after which convictions under the material support statute increased, escalated in 2010 with the Supreme Court's holding in *Holder v. Humanitarian Law Project*. In that case, the Court upheld AEDPA's definition, highlighting the potential for far-reaching prosecution of humanitarian organizations under the material support statute. The Court held that the Humanitarian Law Project had provided material support to the PKK (Kurdistan Workers' Party) and the LTTE ("the Tamil Tigers"), which the U.S. government considers "terrorist" groups, by

4. *The Prohibition on Material Support and Its Impacts on Nonprofits*, CHARITY & SEC. NETWORK (2019), c [hereinafter Prohibition on Material Support].
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

giving those groups conflict resolution and human rights training. The Supreme Court rejected the organization's First Amendment and Fifth Amendment arguments and overturned the Ninth Circuit's application of a strict scrutiny standard, typically used to protect fundamental human rights,in interpreting the statute. [9] Importantly, in *Holder v. Humanitarian L. Project*, the Supreme Court also held that an organization's intent, or lack thereof, to further terrorist activity through their support is irrelevant.[10] In the Court's own words: "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."[11] The Court, through its ruling, accepted the government's fungibility argument, which is that "any contribution to a foreign terrorist organization frees up resources for that organization's other activities, including its violent and unlawful ones."[12] Critics of the fungibility argument and advocates for non-profits, like the Charity and Security Network, have pointed out, "carried to its logical extreme, the fungibility line of argument would preclude ever providing aid to people in regions where terrorist groups operate."[13]

Understandably, the *Humanitarian Law Project* ruling has discouraged humanitarian organizations from giving aid out of fear of facing criminal charges for providing material support to a terrorist organization.[14] In addition, as the Charity and Security Network has noted, material support convictions "allow the government to list U.S. charities as supporters of designated terrorist organizations and thereby seize their assets, including their donations, without the benefit of basic due process rights such as notification or adequate opportunity to challenge the listing."[15] Therefore, NGOs face trepidation in not knowing how each administration will exercise its prosecutorial discretion in material support cases. This situation is especially problematic for individuals who live in areas such as the Gaza Strip, where the FTO is not just considered a "terrorist" group by the United States, but it is also the de facto government.[16] Additionally, the Supreme Court's interpretation of the

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9. Strict scrutiny is the standard a court applies if a law has infringed a fundamental constitutional right but is nevertheless constitutionally valid as long as the government can demonstrate that the law is necessary to achieve a "compelling state interest."

10. *See* Holder v. Humanitarian L. Project, 561 U.S. 1, 2708–09 (2010).

11. *Id.* at 2710.

12. CHARITY AND SEC. NETWORK, SAFEGUARDING HUMANITARIANISM IN ARMED CONFLICT: A CALL FOR RECONCILING INTERNATIONAL LEGAL OBLIGATIONS AND COUNTERTERRORISM MEASURES IN THE UNITED STATES 66 (2012) [hereinafter SAFEGUARDING HUMANITARIANISM IN ARMED CONFLICT], https://perma.cc/8W4E-GNXS.

13. *Id.*

14. *Id.* (For example, "In Gaza, NGOs like Mercy Corps could not feed Palestinians. KARAMAH, a U.S. Muslim charity, could not provide backpacks to children who were displaced by the Pakistan flood for fear of criminal prosecution.")

15. *Id.* at 16.

16. *See* Justin A. Fraterman, *Criminalizing Humanitarian Relief: Are U.S. Material Support for Terrorism Laws Compatible with International Humanitarian Law?*, 46 N.Y.U. J. INT'L L. & POL. 399, 402 (2014) (describing the situation where an FTO operated as the de facto government of northeastern Sri Lanka during the country's civil war).

material support statute as well as the government's position seem to overlook the national security priority of ensuring that individuals living in terrorist-controlled areas do not themselves become "terrorists" out of necessity. As Jenna Krajeski a writer for the New Yorker states, "putting off aid can be counterproductive, because aid groups are often the only institutions in terrorist-controlled areas providing a significant alternative to militancy" not just by providing locals with basic necessities but also with the opportunity to attend job and conflict-resolution workshops.[17]

A. *Case Study: 2004 Tsunami that Devastated Sri Lanka*

A case of the adverse effect of the material support statute on U.S.-funded humanitarian organizations can be seen with the 2004 tsunami that hit Southeast Asia, resulting in the death of 40,000 Sri Lankans. At that time, the LTTE, a separatist group that had sought the creation of an independent Tamil state and classified as an FTO by the Department of State ("DOS") in 1997, served as the de facto government in Northeastern Sri Lanka.[18] Providing humanitarian aid was nearly impossible without "in some way coordinating, liaising, or interacting with LTTE officials."[19] As a result, Jordan Helton argues in her law review article on the material support statute that, "after the tsunami struck Sri Lanka, the [U.S.] anti-terrorism laws arguably prevented much-needed aid from reaching millions of people in the disaster zone because the U.S. aid organizations did not want to risk criminal prosecution and asset seizure."[20] The United States Agency for International Development (USAID)-funded humanitarian organizations focused on providing the only statutorily exempted form of aid: medical supplies. However, after the first week, it was clear that the affected population was not receiving what they primarily needed: food, clothing, water, and sanitation.[21]

Ahilan T. Arulanantham, an American Civil Liberties Union attorney, testified before Congress on the negative impact of the material support statute in obstructing the receipt of aid to victims of the tsunami and had spoken to humanitarian workers about their fears of criminal liability. He provided numerous examples of severe restriction to Northeastern Sri Lankan's humanitarian organizations operating capacity due to the material support statute. "If a public health expert wanted to talk to the LTTE about how to set up their refugee camps so as to decrease the spread of infectious diseases, that

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17. Jenna Krajeski, *A Victim of Terrorism Faces Deportation for Helping Terrorists,* NEW YORKER (June 12, 2019), https://perma.cc/PGH7-69EG.

18. Justin A. Fraterman, *supra* note 14.

19. *Id.*

20. Jordan E. Helton. *Construction Of A Terrorist Under The Material Support Statute, 18 U.S.C. § 2339B*, American University Law Review: Vol. 67 : Iss. 2 , Article 5, 568 (2018).

21. *See Implementation of the USA PATRIOT Act: Prohibition of Material Support Under Sections 805 of the USA PATRIOT Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 26 (2005) (statement of Ahilan T. Arulananatham, Staff Attorney, American Civil Liberties Union) [hereinafter Statement of Ahilan T. Arulananatham].

could be expert advice or assistance [of terrorism] under the PATRIOT Act provisions."[22] Training LTTE health workers on how to counsel traumatized children, who, for example, have seen their parents washed away in the ocean, would also likely fall under expert advice or assistance of "terrorism."[23] Providing toilets for LTTE-run refugee camps would be considered tangible property potentially used in support of "terrorism."[24] Even with the medical exception, Mr. Arulanantham points out that, "you can give them medicines for life-saving surgery, but you can't send a surgeon if there is nobody there to do the surgery to save people's lives."[25]

Concerns regarding U.S. Governments' material support statute, particularly after lawsuits against USAID-funded international NGOs, have resulted in some European NGOs, previously concerned with maintaining good relations with U.S. donors, to look for other funding. As the deputy general of one humanitarian organization, Norwegian People's Aid, put it, "[t]he whole definition of material support affects our ability to work in conflict zones. . . [if it continues] [i]t will be a devastating development for humanitarian aid worldwide."[26]

B. *Case Study: Gaza Strip after Hamas Won the 2006 Presidential Elections*

The USAID's "No Contact Policy" in Gaza following the presidential elections of 2006, which Hamas, an FTO, won is another example of humanitarian efforts sabotaged by a stringent interpretation of the material support statute. After Hamas took power in Gaza, recipients of the USAID grants were told that they could not contact Palestinians or public Palestinian officials that were affiliated with a Designated Terrorist Organization.[27] Because Hamas runs the government, the USAID-funded organizations are barred from "making any logistical arrangements with government officials or using government facilities, such as public schools or clinics, to access civilians in need." Although the USAID-funded NGOs were, and continue to be, allowed to apply for a license through the U.S. Department of Treasury to do otherwise prohibited transactions, the licensing system has been criticized by the Charity and Security Organization as "ill-suited to the needs of NGOs trying to operate in armed conflict" due to the regulations governing the licenses and the U.S. Government's view that the "distribution of funds may pose a threat to national security."[28] The Charity and Security Organization's criticism can be seen with the March 2009 conference call between George

22. *Id*.
23. *Id*.
24. *Id*.
25. *Id*.
26. Jenna Krajeski, *supra* note 15.
27. SAFEGUARDING HUMANITARIANISM IN ARMED CONFLICT, *supra* note 12, at 14 ("Contact" defined as "any meeting, telephone conversation, or a written or oral communication.").
28. *Id*. at 58.

Mitchell, a U.S. special envoy for Middle East peace, and a few chief executive officers of NGOs. The NGO officers discussed the difficulty in providing "food, shelter, medical care, and other basic resources to those in need" and in a subsequent letter, they mentioned how unpredictable and time consuming the licensing process remained, in part because the U.S. Treasury referred their applications for licenses to DOS.[29]

Following the 2006 Palestinian Presidential election, operating in Gaza has become even more challenging due to the 2008 convictions of the Holy Land Foundation (HLF) along with the U.S. Fifth Circuit Court of Appeals' 2011 decision upholding five of the HLF executives' convictions. HLF stirred controversy even among the U.S. Muslim community, with some suspecting "that the charity might indeed have operated as an overly politicized money funnel for Hamas in the 1990s." However, the Charity and Security Network in its *Safeguarding Humanitarianism in Armed Conflict* 2012 Report, points out that the government prosecuted the organization "for providing aid through local charities in Gaza that were not on terrorist lists, but which the government said were controlled by Hamas, which is a listed ["terrorist"] organization."[30] The local charities, according to the Charity and Security Network, had never been placed on a public terrorist list but nevertheless, "the government was not required to prove that HLF knew or even should have known that these local charities were controlled by Hamas. . ."[31] As a result of this prosecution, the Charity and Security Network concluded that there is a high risk for charities working with local partners in conflict zones where the Designated Terrorist Organizations ("DTOs") are present because even if a charity reviews terrorist lists, they are not necessarily insulated from criminal charges if the U.S. Government later finds that they did not carry out their due diligence.[32]

C. *Case Study: The 2008 and 2017 Somalian Famine*

One particularly tragic case can be seen with the reaction of some humanitarian organizations to the famine in Somalia under the Barack Obama administration who feared that if they provided aid, they would be prosecuted for giving material support to Al-Shabaab during the 2008 hunger crises. Although an Obama administration official assured a hesitant NGO official that his NGO would not be prosecuted for providing aid, that NGO had no way of knowing whether the subsequent administration would adopt the same prosecutorial discretion.[33] The U.S. government's response to that humanitarian crisis stands in sharp response to that of the U.N. Security

29. *Id*. at 59.
30. Laurie Goodstein, *U.S. Muslims Taken Aback by a Charity's Conviction*, N.Y. TIMES (Nov. 25, 2008), https://perma.cc/43DF-4QG7.
31. SAFEGUARDING HUMANITARIANISM IN ARMED CONFLICT, *supra* note 11, at 57.
32. *Id*.
33. Krajeski, *supra* note 15.

Council's response. The U.N. Security Council stated that it "created a humanitarian exemption from its sanctions regime as applied to Somalia … and called on [U.N.] Member States to freeze the funds, financial assets, and economic resources of individuals and entities that obstruct the delivery of humanitarian assistance to Somalia."[34]

On the other hand, an international NGO informed the Charity and Security Network that USAID, as a result of the Office of Foreign Assets Control's ("OFAC's") licensing program, required that local USAID-backed NGOs that drilled wells had to "monitor the wells so that if a member of Al-Shabaab drank from the well, the NGO would have to report it to the U.S. [G]overnment."[35] Predictably, the NGOs could not proceed since such a program was impossible to implement and, as a result, could not deliver on providing water to locals.[36] According to an expert report published in 2011, counterterrorism-related legislation, including in the United States, imposed constraints on aid agencies that contributed to the death toll of 258,000 people.[37]

The toll of counterterrorism-related legislation has been noted by Daniel Maxwell, an expert on the Somali famine crisis. He stated that both Al-Shabaab and the counterterrorism-based legal restrictions that outweighed humanitarian concerns, "put severe restrictions on humanitarian action that could have prevented or mitigated the [Somalian Famine] crisis—and significantly delayed a major international response."[38] The lack of a robust international response resulted in "many affected groups [being] forced to deal with the worsening crisis almost entirely using their own mechanisms and social networks."[39]

Somalia suffered another, more recent, famine crisis in 2017 that threatened six million people, with around two million of them living in areas run by Al-Shabaab.[40] Justin Brady, a senior U.N. humanitarian official, in explaining the reasons for which humanitarian organizations were hesitant to operate in Somalia in 2017, stated that security was the primary concern. Even after overcoming the security hurdle, NGOs faced the fear of prosecution under terrorism charges in both the United States and the United Kingdom, especially because of a lack of guidance on material support laws.[41] Reflecting on his organization's previous experience of operating in Somalia, Justin Brady pointed out that at the height of Al-Shabaab's power in

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34. SAFEGUARDING HUMANITARIANISM IN ARMED CONFLICT, *supra* note 11.
35. *Id.*
36. *Id.*
37. Ken Menkhaus, *No Access: Critical Bottlenecks in the 2011 Somali Famine*, 1 GLOB. FOOD SEC. 29, 29 (2012); *see* Daniel Maxwell, Nisar Majid, Guhad Adan, Khalif Abdirahman K & Jeeyon Janet Kim, *Facing Famine: Somali Experiences in the Famine of 2011*, 65 FOOD POL'Y 63, 64 (2016).
38. Maxwell et al., *supra* note 30.
39. *Id.*
40. Jason Burke, *Anti-Terrorism Laws Have 'Chilling Effect' on Vital Aid Deliveries to Somalia,* GUARDIAN (Apr. 26, 2017), https://perma.cc/8RDE-8FY7.
41. *Id.*

2010, the organization had to deal with Al-Shabaab's "taxes" at roadblocks that "totaled on average 90,000 dollars per aid agency every six months."[42] Not only would a U.S. or British NGO have to consider the effects of such an exuberant cost on their operations, but they would also have to consider the fact that paying that tax might make them liable to a material support charge. Additionally, even gaining access to Al-Shabaab-controlled areas would require NGOs to negotiate "with local community and clan elders, of whom some are likely to be connected to the insurgents."[43] Engaging in such negotiations would also expose them to potential criminal liability.

II. THE MATERIAL SUPPORT STATUTE IN AN IMMIGRATION CONTEXT: THE STATUTE'S ADVERSE EFFECTS ON NONCITIZENS AND LAWFUL PERMANENT RESIDENTS IN THE UNITED STATES

The second important factor to evaluate is the material support statute's effect on immigration decisions. In the immigration context, Section 212(a)(3)(B)(vi) of the Immigration and Nationality Act ("the INA") lays out the three tiers of terrorist groups. This section renders inadmissible any foreign national who is a member of a terrorist organization, or who endorses or persuades others to endorse or support a terrorist organization.[44]

The first category, known as "Tier I," consists of FTOs. An FTO is "a foreign group seeking to harm the United States or U.S. nationals through terrorist acts" and includes notorious terrorist groups such as the Islamic State of Iraq and the Levant ("ISIL") and al-Qaeda. The U.S. Secretary of State in consultation with the U.S. Attorney General and the U.S. Secretary of the Treasury designate which organizations fall under this category.[45] The second category ("Tier II terrorist organizations") are found on the Terrorist Exclusion List ("TEL"). These organizations are "designated by the Secretary of State for immigration purposes in consultation with, or upon the request of, the Attorney General or the Secretary of Homeland Security." An example is the Revolutionary United Front, a guerrilla unit formed in Sierra Leone in 1991 which contributed to the civil war following the overthrow of the government at the time and is notorious for committing atrocities against civilians across the country.[46]

Finally, Tier III terrorist organizations consist of "undesignated terrorist organizations" and were added to the INA with the passage of the PATRIOT Act in 2001.[47] These organizations are considered undesignated because

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42. Burke, *supra* note 21.
43. *Id.*
44. Denise Bell, *Tier III Terrorist Organizations: The Role of the Immigration Court in Making a Terrorist Determination*, 10 U.S. DEP'T OF JUST.: IMMIGR. L. ADVISOR 1, 3 (July 2016), https://perma.cc/8L7K-99JU.
45. *Id.*
46. Denise Bell, *supra* note 36; *Revolutionary United Front*, Britannica.com, https://perma.cc/G8MB-TZKH.
47. *Id.*

unlike the Tier I and Tier II organizations, "they qualify as terrorist organizations based on their activities alone without undergoing a formal designation process."[48] They are defined by law as "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in," terrorist activity.[49] The definition of a Tier III terrorist organization found in section 212(a)(3)(B)(vi) is dependent on two separate phrases: "terrorist activity" and to "engage in terrorist activity."

The term "terrorist activity" under the statute is defined as any activity that is unlawful in the country where it was committed or would be unlawful if committed in the United States, and involves any of the following listed under Section 212(a)(3)(B)(iii)(I)–(VI) of the INA. (U.S. Citizenship and Immigration Services' ("USCIS") website acknowledges that while the term "terrorist activity" "covers various actions commonly associated with terrorism. . . the INA defines terrorist activity quite expansively such that terms can apply to persons and actions not commonly thought of as terrorists and to actions not commonly thought of as terrorism."[50]

"Engaging in terrorist activity" includes planning or executing a terrorist activity as well as providing material support to a terrorist organization or one of its members. USCIS' website lists the following as including material support: "providing food, helping to set up tents, distributing literature, or making a small monetary contribution."[51] Additionally, based on the Seventh Circuit's ruling in *Hussain v. Mukasey*, a Tier III organization need not endanger U.S. national security or U.S. nationals in order to be designated in such a category.[52] Finally, and controversially, the PATRIOT Act also authorized the retroactive application of the Tier III determination.[53] Therefore, as a result of how broad the interpretation of a Tier III terrorist organization can be, it has colloquially been referred to as requiring "two guys and a gun."[54]

Although there are no formal designations for a Tier III terrorist organization, the BIA's decisions have resulted in specific Tier III determinations prior to their formal designations as terrorist organizations, including the Association de Secours Palestinien, Chin National Front, Jammu Kashmir Liberation Front, and the Mujahedin-e Khalq.[55] When looking at a non-state organization for which no case law exists, however, the USCIS adjudicators

48. *Terrorism-Related Inadmissibility Grounds (TRIG)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 19, 2019), https://perma.cc/PA5H-LHK8 [hereinafter TRIG].
49. *Id.*
50. *Id.*
51. *Id.*
52. *See* 518 F.3d 534, 538 (7th Cir. 2008).
53. Bojnoordi v. Holder, 757 F.3d 1075, 1077 (9th Cir. 2014); Daneshvar v. Ashcroft, 355 F.3d 615, 627 (6th Cir. 2004).
54. Hum. Rts. First, *Overly Broad Immigration Provisions Redefine Thousands of Legitimate Refugees, Asylum Seekers as 'Terrorists'*, COMMON DREAMS, (Nov. 11, 2009, 3:04 PM), https://perma.cc/D4EG-ZY6X.
55. Bell, *supra* note 36, at 2.

and immigration judges make case-by-case determinations as to whether an organization qualifies as a Tier III terrorist organization.[56] In making such decisions, both adjudicators and judges must look at whether the particular group was participating in terrorist activities while the individual was a member of that group. However, the process for determining whether an organization is a Tier III terrorist organization and whether an individual qualifies for a waiver differs for immigration judges as compared to the USCIS Officers, discussed in more detail over the following pages.

A. *USCIS Officers Decisions Regarding Tier III Terrorist Organizations and The of Granting Waivers*

In 2006, when the U.S. Congress realized the ramifications the material support statute would have for noncitizens, it granted new discretionary exemption authorities to the U.S. Secretary of Homeland Security (which are also applicable to USCIS, which is a component of the Department of Homeland Security) and the U.S. Secretary of State, allowing them to waive a range of terrorism-related bars on admission to avoid unfathomable outcomes, such as denying asylum and applying the material support bar to an individual held captive by a Tier III terrorist organization and forced to cook and clean for her captors under duress.[57] Under its exemption authority, U.S. Homeland Security has authorized two forms of exemptions: 1) situational exemptions, such as in cases of duress, in which a noncitizen is forced to provide material support to Tier III terrorist organizations, or where the support was "insignificant," and 2) group-based exemptions where the U.S. Government no longer considers a particular group a Tier III terrorist organization.[58] When a USCIS officer encounters a noncitizen who is applying for an immigration benefit and who, but for their material support, is eligible for the immigration benefit, the officer has the discretion to grant a waiver. The officer can grant the waiver to the noncitizen by filling out the "212(a)(3)(B) Exemption Worksheet," and submitting it through the "requisite levels of review."[59]

B. *How Immigration Judges Make Determinations Regarding Tier III Terrorist Groups*

The immigration judges, who fall under the Department of Justice's Executive Office for Immigration Review's ("EOIR") policies and regulations, base their decisions regarding whether an organization qualifies as a

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56. *Id*. at 1.

57. Jennifer Daskal & Paul Rosenzweig, *Enslaved and Forced to Watch Her Husband Dig His Own Grave—And Labeled A Terrorist As A Result,* LAWFARE (June 14, 2018, 9:00 AM), https://perma.cc/G8VN-G4AF.

58. For a full list of the exemptions, see TRIG, *supra* note 40.

59. Memorandum from U.S. Citizenship and Immigr. Servs. May 8, 2015 [hereinafter May 8, 2015 USCIS Memo].

Tier III Terrorist Organization and which individuals can qualify for waivers on the BIA and the U.S. federal court precedent.[60] Therefore, unlike the USCIS adjudicators, who follow DHS' regulations, immigration judges are unable to apply the same situational and group-based exemptions that the U.S. Secretary of Homeland Security has the authority to grant. They may, however, rely on government reports as probative evidence in reaching their determination of what constitutes a Tier III Terrorist Organization.[61]

Therefore, unlike the USCIS adjudicators who, if they believe a noncitizen to be eligible for a waiver, are allowed to grant a waiver (pursuant to supervisory review) immediately upon receiving the case, immigration judges do not have such an option. Rather, a waiver can be granted only "after an immigration judge has made a final decision of removal and announced that 'but for' the material support bar, the asylum seeker would have been granted asylum."[62] "After an administratively final order is issued, Immigration and Customs Enforcement [which is the agency responsible for carrying out the removal order] will forward to USCIS cases where relief or protection was denied solely on the basis of one of the terrorist-related inadmissibility grounds for which exemption authority has been exercised by the Secretary."[63] The qualifying exemptions are limited to "certain routine commercial transactions; certain routine social transactions; certain humanitarian assistance; or material support provided under sub-duress pressure."[64]

Additionally, unlike the DHS' recognition of a duress exemption, the BIA has not recognized a duress exemption and, as a result, the immigration judges must fall in line with the BIA's rulings.[65] As law professors Ms. Daskal and Mr. Rosenzweig point out in *Lawfare*, the material support statute neither "explicitly includes nor explicitly precludes a duress exception."[66] The material support statute in a criminal law context also does not explicitly include nor preclude a duress exception. Nevertheless, unlike the BIA, federal courts have read into the statute a narrow duress exception.[67]

Furthermore, unlike proceedings that take place under DHS' jurisdiction, there is also no exception recognized for *de minimis* support given, arguably making the word "material" superfluous. In the *Matter of ACM*, the BIA, while acknowledging that the asylum-seeker had only given *de minimis*

60. *See* Bell, *supra* note 36, at 2–3.
61. *Id.*
62. Daskal & Rosenzweig, *supra* note 44.
63. *Matter of A-C-M-*, 27 I&N Dec. 303, 315 n.6 (BIA 2018) (citing Fact Sheet: Department of Homeland Security Implements Exemption Authority for Certain Terrorist- Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal, USCIS (Oct. 23, 2008)).
64. May 8, 2015, USCIS Memo, *supra* note 51, at 8.
65. *Matter of M-H-Z-,* 26 I&N Dec. 757 (BIA 2016) (The "material support bar" in section 212(a)(3)(B)(iv)(VI) of the Immigration and Nationality Act, does not include an implied exception for an alien who has provided material support to a terrorist organization under duress.) In *Matter of A-C-M*, the BIA upheld its earlier ruling from *Matter of M-H-Z*, finding that there was no duress exception to the material support bar. *See Matter of ACM*, 27 I&N Dec. 303, 306 (BIA 2018).
66. Daskal & Rosenzweig, *supra* note 49.
67. *Id.*

support, nevertheless upheld the material support bar on the grounds that "if she had not provided the cooking and cleaning services she was forced to perform, another person would have needed to do so."[68] Judge Linda Wendtland, who dissented in part and concurred in part, noted that the definition of "material" can be found in the material support statute, and it includes activities such as the provision of a safe house or weapons.[69] Providing cooking and cleaning services was not a natural extension of the other enumerated examples.[70]

The consequences of an individual being barred under the material support statute means that they are ineligible to receive asylum, permanent residency (under any basis, not just asylum), or to naturalize.[71] The only form of relief for an individual considered to be a material supporter is deferral under the Convention Against Torture ("CAT"). The standard for obtaining the CAT status is extremely high, requiring that the individual show that there is a more likely than not probability that she will be tortured if she were to be sent back to her country.[72] Additionally, even if she obtains deferral under the CAT, she cannot petition for any family members to join her, cannot file for permanent residency, and can never naturalize.[73]

Due to the lack of formal designations for Tier III terrorist organizations, the excessively broad language of INA 212(a)(3)(B)(vi)(III), the expansive powers of the DHS, and the EOIR in making ultimately a foreign policy determination, the Tier III terrorist organization aspect of the material statute has resulted in unnecessary victims, wasted resources, and a weakened national security strategy.

C. *The Ramifications that Noncitizens Have Faced as a Result of the Material Support Statute*

The list of noncitizens who have suffered considerable harm as a result of being barred by the material support statute is considerable. Jenna Krajeski writes about one especially tragic case involving Ana, a Salvadorian woman who had lived in El Salvador during the civil war that took place in the 1980s between the government and the Farabundo Marti National Liberation Front (FMLN) guerrilla group.[74] The FMLN rebels forced Ana to choose between dying or shooting her husband, a member of the Salvadorian military, in the head.[75] She chose the latter and was subsequently forced to make food for

68. *Matter of A-C-M-*, 27 I&N Dec. 303, 306–07 (BIA 2018).
69. *Id.* (Wendtland, L., concurring and dissenting).
70. *Id.*
71. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, CHAPTER 2 - LAWFUL PERMANENT RESIDENT ADMISSION FOR NATURALIZATION (Sept. 29, 2022).
72. 8 CFR § 1208.17 (deferral of removal under the Convention Against Torture (2020)).
73. *Id.*
74. Jenna Krajeski, *supra* note at 17.
75. *Id.*

them and was once forced to receive training on using a gun.[76] Soon after, she escaped El Salvador but was forced to leave her children behind. She arrived in the United States in the spring of 1991 and since then, she has unsuccessfully tried to obtain asylum in the United States.[77] Her legal status, which has at times wavered from receiving a Cancellation of Removal Order to being in the legal limbo of waiting for asylum, has made emergency travels, such as when her mother passed away, especially difficult.

As mentioned before, the Tier III aspect of the material support statute was not added to the INA until the PATRIOT Act came along in 2001. Given its retroactive nature, Ana was adversely affected by the support she provided the FMLN, even though it was in the 1980s and under the most atrocious circumstances.[78] In 2011, when Ana applied for her final removal order to be canceled, DHS rejected the request and based its justification on the material support she had provided the FMLN, even though it was under duress.[79] As Jenna Krajeski highlights, before the PATRIOT Act, details regarding the "work she had been forced to perform for the guerrillas, including their single attempt to train her with a gun" would have made it easier for her to receive asylum.[80] In August 2016, an immigration judge, under the jurisdiction of EOIR, granted Ana a deferral of removal under the CAT, because Ana had been brutalized while in the guerrillas' custody, but denied her asylum.[81] She did note, however, that "she wished she could have given Ana asylum but felt bound by the recent case law on material support."[82] Ana appealed the case to the BIA, which also denied her asylum in *Matter of ACM,* a decision that created tidal waves for immigrants and their advocates because of its implications for other asylum-seekers in similar situations.[83]

The BIA held in Ana's case, *Matter of ACM*, that that there was no implied duress exception to the material support statute and therefore, "the respondent afforded material support to the guerillas in El Salvador in 1990 because the forced labor she provided in the form of cooking, cleaning, and washing their clothes aided them in continuing their mission of armed and violent opposition to the Salvadorian Government." Additionally, the court acknowledged that although cooking, cleaning, and washing clothes can be considered *de minimis* support, it nevertheless meets the definition of "material" because it had "a logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a *de minimis* degree."[84] The *ACM* decision has provoked strong criticism, with Professor Daskal

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id,*
84. *Matter of ACM*, 27 I&N Dec. 303, 308 (BIA 2018).

stating that, "what little moral standing we have left is squandered if we engage in this kind of category collapse—expecting the world to follow us in our fight against terrorism, only to treat the killing of civilians and the enslaved victims of those who kill civilians as one and the same."[85] Jenna Krajeski also interviewed Anwen Hughes, a deputy legal director at Human Rights First, who told her, "This decision takes all meaning out of the term 'material support.'"[86]

Unfortunately, Ana, as Jenna Krajeski points out, is one of many immigrants who has had to suffer seemingly irrational ramifications because of what in some cases are the horrible circumstances for which they are seeking asylum. The more absurd examples include "a Sri Lankan fisherman who bought his release from his Liberation Tigers of Tamil Eelam kidnappers; a Pakistani shop owner whose fruit was stolen by the Taliban; and a Colombian woman who was forced under threat of violence to provide food to FARC rebels."[87]

Historically, the BIA has not backed away from its broad interpretation of what constitutes a Tier III terrorist organization even when the individual in question gave support to an organization allied with a political party that the United States had recognized as the legitimate government. In the *Matter of S-K*, the Board upheld the Immigration Judge's finding of a material support bar against an individual who had given around $1,100 Singaporean dollars to Chin National Front, an organization that was fighting against the Burmese dictatorship and which the court acknowledged had democratic goals and used force only in self-defense.[88] The organization was an ally of the "National League of Democracy, which the United States (had) recognized as a legitimate representative of the Burmese people and is recognized by the United Nations."[89] The court justified its finding that the group was a terrorist organization based on "its use of firearms and/or explosives to engage in combat with the Burmese military."[90] The Court rejected a "totality of the circumstances" test in determining whether an organization is engaged in terrorist activity and therefore did not consider the organization's purposes or goals, the nature of the repressive dictatorship, the noncitizen's intent in making a donation nor the intended use of that donation in determining whether a noncitizen has provided material support to a terrorist organization.[91]

Other absurdities can be seen with cases in which noncitizens are banned for giving support to non-state organizations that the United States' Government at one point financially supported. As Jenna Krajeski in the New Yorker article points out, Radwan Ziadeh, a Georgetown University

85. Jenna Krajeski, *supra* note 17.
86. Jenna Krajeski, *supra* note 15.
87. *Id*.
88. *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006)
89. *Id*. at 939.
90. *Id*. at 941.
91. *Id*. at 936.

professor, faced removal under on the material support statute after he had "paid some travel expenses for the leaders of two Syrian opposition groups, the Free Syrian Army and the Syrian Muslim Brotherhood, to meet in Turkey and discuss resolving their conflict."[92] These actions were mentioned in the removal order a Virginia court handed him. The Free Syrian Army, however, is the exact same organization that the United States' Government provided CIA arms support to when it was fighting against Bashar al-Assad.[93]

III. THE RECENT EXCEPTIONS CREATED FOR AFGHAN REFUGEES PROVIDES A MODEL FOR MORE EXPANSIVE REFORM TO THE MATERIAL SUPPORT STATUTE

Although the history of how the material support statute has been interpreted has been bleak following the passing of the PATRIOT Act, there has been a silver lining with the June 14, 2022, announcement by the DOS and the DHS regarding three new exemptions to the Terrorism-Related Inadmissibility Grounds bars in order to aid Afghan allies.[94] The new exemptions are important not only because they prevent the possibility of the United States inadvertently punishing our Afghan allies but some of the proposed regulatory language provides a blueprint for more systematic reforms. The new exemptions apply to three groups, the first of which are Afghans who supported U.S. military interests specifically by participating in the resistance movement against the Taliban or against the Soviet occupation of Afghanistan (but excludes those who targeted non-combatants, U.S. interests, or committed human rights abuses for a terrorist organization).[95] The second group consists of "individuals employed as civil servants (except those who held high-level positions, worked for certain ministries, or whose civil service was in allegiance to the Taliban) in Afghanistan at any time from September 27, 1996 to December 22, 2001 or after August 15, 2021."[96] The third group is made up of "individuals who provided insignificant or certain limited material support to a designated terrorist organization."[97] In the DHS' elaboration on the third category, the DHS acknowledges how "due to the Taliban's presence and control of entities, roads, and utilities, many individuals who lived in Afghanistan needed to interact with the Taliban in ways that, absent such an exemption, render them inadmissible to the United States under U.S. law."[98]

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92. Jenna Krajeski, *supra* note 15.
93. John Walcott, *Trump ends CIA arms support for anti-Assad Syria rebels: U.S. officials,* REUTERS (July 19, 2017), https://perma.cc/RW2D-H2SB.
94. DEP'T OF HOMELAND SEC. PRESS RELEASE, DHS AND DOS ANNOUNCE EXEMPTIONS ALLOWING ELIGIBLE AFGHANS TO QUALIFY FOR PROTECTION AND IMMIGRATION BENEFITS, June 14, 2022 [hereinafter DHS AND DOS EXEMPTIONS FOR ELIGIBLE AFGHANS].
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

The details provided for the third category are particularly helpful because of their applicability to immigrants coming from other countries experiencing conflict and therefore would be useful in creating statutory exemptions to the material support statute that could be applicable to immigration courts as well as DHS and DOS. DHS' website mentions examples of exemptions to material support as including "paying a small amount to pass through a Taliban checkpoint to flee Afghanistan; paying the Taliban for utilities such as electricity or the telephone; serving the Taliban at one's place of business when to refuse would jeopardize one's livelihood; or paying a fee to obtain a passport or other identity documents necessary to flee Afghanistan when the Taliban controlled the offices providing those services."[99] DHS specifies that the "exemption *does not* include individuals who share the goals or ideology of the Taliban, provided preferential treatment to them, or who intended to support the Taliban through their activities."[100]

Although the material support exemption in the third category is related to material support given to the Taliban, which is considered an FTO and falls under the first tier, the reasoning is applicable in carving a statutory exemption to material support given to a Tier III (undesignated) Terrorist Organizations.[101] One can easily see how a Salvadorian living in El Salvador while the FMLN were fighting for territorial or governmental control, a Colombian living in FARC-controlled territory, a Syrian living in ISIS-controlled territory and others would face the same conundrum as Afghans, where surviving from one day to the next required that they give material support. Additionally, the Afghan exemption is also reasonable in that it applies a totality of the circumstances test in a way that the BIA has refused to do by not taking into consideration the intention of the individual in giving material support or the amount they gave and whether it was *de minimis*.[102]

A totality of the circumstances test and specifically one that includes taking into consideration the intent of the supporter could also be applied to humanitarian organizations. As DHS stated in its announcement, those who *intended* to support the Taliban through their activities are not exempt which, if applied to other terrorist organizations, would override the Supreme Court's reasoning in *Humanitarian Law Project* that it was irrelevant whether an organization specifically intended to further terrorist activity through their support. Additionally, DHS' announcement also acknowledges the on the ground realities for Afghans in having had to pay the Taliban essentially to

99. *Id*.

100. *Id* (emphasis added).

101. Elizabeth Carlsen, *New Exemptions to Terrorism-Related Inadmissibility Grounds to Aid Afghan Allies*, CATHOLIC IMMIGR. LEGAL NETWORK (June 24, 2022) ("Under the Consolidated Appropriations Act of 2008, Congress mandated that the Taliban be considered a Tier 1 terrorist organization.")

102. *See Matter of ACM*, 27 I&N Dec. 303 (BIA 2018); *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006).

survive. It is time that Congress acknowledges that a similar reality exists for many humanitarian organizations operating in terrorist-controlled areas and it is for this reason that examining an NGO's intent in giving material support is essential.

There has been no discussion in expanding the exemptions for Afghans to other groups of asylum-seekers, specifically those who have given material support to Tier III terrorist organizations, or humanitarian organizations. This may be because when it comes to asylum-seekers who are going through the immigration court process, Congress' intention in creating the Tier III terrorist category was to "capture activity that does not render an organization an FTO or qualify it for the (Terrorism Exclusion) list."[103] Even though immigration judges themselves have been wary of making Tier III determinations, "circuit courts and Congress have supported their authority to do so."[104]

When it comes to humanitarian organizations, the outlook seems slightly better, particularly in the context of Somalia. However, as Somalia undergoes another famine, the partial relaxation of the U.S. Department of Treasury sanctions following the 2011 famine in Somalia are unlikely to be sufficient in ensuring that aid gets to those who need it the most.[105] According to United Nations reports, "almost eight million people face extreme hunger in Somalia and more than 213,000 are at "imminent risk of dying" after four failed rainy seasons."[106] Although over 70 percent of the U.N.'s 1.46 billion dollar fundraising target has been met, a senior representative stated that its humanitarian organization "cannot deliver food, water or cash to many of those who need it the most" because of the material support statute.[107] While some of the aid has reached government-controlled areas, it has not reached Al-Shabaab controlled territory.[108] The US government has stated that its counterterrorism efforts are not meant to target aid efforts in Somalia. However, although the U.S. Treasury sanctions were partially relaxed in 2011, the ban on material support to Al-Shabaab stands.[109]

President Ronald Reagan declared that "a hungry child knows no politics," in justifying his decision to send food aid to Ethiopia, which was then under a Communist dictatorship at the height of the Cold War.[110] The time for the U.S. Government to follow his lead in assuring that the material aid provision does not hinder the ability of humanitarian organizations to assist people at risk of dying is long overdue.

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103. Denise Bell, *supra* note 36.
104. *Id*.
105. Phelan Chatterjee, *Somalia drought: Are US terror laws hampering aid effort?*, BBC (Sept. 27, 2022), https://perma.cc/PQ36-VJ8L.
106. *Id*.
107. *Id*.
108. *Id*.
109. *Id*.
110. CHARITY & SEC. NETWORK, *supra* note 11, at 64.

One way of following in President Reagan's footsteps is for Congress to follow DHS and DOS' lead by expanding material support exemptions to include an intentionality and totality of the circumstances test and apply it to Tier III terrorist organizations. Such exemptions would add the flexibility needed for a statute that in a humanitarian aid context has unnecessarily restricted the United States' ability to provide aid to those who need it the most and in an immigration context has been applied inconsistently and in an overreaching manner.