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Reclassifying "Terrorists" As Victims: Integrating Terrorism Analysis into the Particular Social Group Framework of Asylum

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RECLASSIFYING “TERRORISTS” AS VICTIMS: INTEGRATING TERRORISM ANALYSIS INTO THE PARTICULAR SOCIAL GROUP FRAMEWORK OF ASYLUM

BY EMILY NASER-HALL

PART I. INTRODUCTION

Jennifer, a thirteen-year-old Ugandan girl, was abducted by the Lord’s Resistance Army in northern Uganda and forced to serve as one of many “wives” to an LRA leader. R.K. was kidnapped by a Sri Lankan terrorist organization and forced to pay his own ransom. Helene was gang raped and burned by the Revolutionary United Front in Sierra Leone and forced to wash clothes and cook for the rebels. Mariana, a nurse from Colombia, was kidnapped by the Revolutionary Armed Forces of Colombia, also known as the FARC, and forced at gunpoint to provide nursing care to FARC soldiers. Jennifer, R.K., Helene, and Mariana escaped their persecutors in their home countries and traveled to the United States with the hope of living free from fear in this country. However, all four were denied asylum because they provided “material support” under duress to armed rebel groups that the United States government has classified as “terrorist organizations.”

After the September 11th terrorist attacks at the hands of al-Qaeda operatives who slipped through the cracks of the US immigration system, immigration and asylum law became increasingly focused on ensuring that potential terrorists are not allowed into the United States. The USA PATRIOT Act and its subsequent legislations created what has become an unyielding

2 Id.
3 Id.
4 Id.
5 Id.
bar to admission for any individual who is a member of a terrorist organization or who has committed terrorist activities. While the terrorism bar developed in response to real or perceived threats to US national security and has recently regained public light with the trial of the Nigerian “underwear bomber” and the New York foreign exchange student surveillance program, the terrorism bar as it exists today does not allow for a totality of the circumstances approach that accounts for all of the factors in an immigration applicant’s history.\(^7\) In addition, the overly broad definitions of the terrorism bar result in inconsistency and impossibility of predicting whether a particular group will be classified as a terrorist organization at any time in the future.

As a result of this inflexibility and overbreadth, the terrorism bar prohibits admission to the United States to genuine refugees and victims of terrorism. The waiver system, which ostensibly permits exemptions from the terrorism bar for immigration applicants who meet certain criteria, has developed into a cumbersome, complicated, and incomplete process that depends heavily on the cooperation within the Executive Branch and the discretionary whims of the individual adjudicator. A new approach to addressing terrorism in immigration law is required. This Paper proposes an alternative solution based on a fundamental principle of asylum law: individuals who have a well-founded fear that they will be persecuted based on their membership in a particular social group are deserving of protection in the United States. This Paper will propose a new particular social group of “former members or assistors of groups that engaged in terrorist activity” as a method of integrating terrorism analysis into the existing asylum framework, thereby clarifying the way that adjudicators must address applicants with terrorist pasts and eliminating many of the complicating factors that exist in the current terrorism and waiver schemes.

\(^7\) Id.
Part II of this Paper discusses the development of the terrorism-related inadmissibility grounds, known as TRIG. It includes a historical background of immigration bars based on national security interests and a discussion of the development of such bars in post-September 11th immigration law. Part III outlines the current state of TRIG legislation and jurisprudence, including the key legislation involved in TRIG and case law development of terrorism-related inadmissibility. Part IV outlines the waiver system for TRIG. It discusses the various TRIG waivers for providing material support to terrorist organizations, receiving military-type training from terrorist organizations, and soliciting funds or members for a terrorist organization. It concludes with a criticism of the waiver system, which is often limited, confusing, and highly discretionary. The Supreme Court case *Negusie v. Holder*, addressing the persecutor bar, alludes to the possibility of an expanded waiver for individuals who participated in the persecution of others under duress. The Supreme Court’s reasoning can be transferred to TRIG cases, and promises potential reform to TRIG waivers in the future.

Part V delves into the world of national security to investigate what the United States government and other observers consider the greatest threats to the safety and security of the country and its people. Through this investigation, it is apparent that the supposed “national security threat” that the overbroad terrorism bar seeks to impede is not of high priority to those actors who study national security. Finally, Part VI proposes an asylum solution to the existing problems with TRIG and its waivers. In the absence of a comprehensive TRIG waiver, asylum applicants who participated in terrorist activity should be afforded protection as a particular social group, namely “former members or assistors of groups that engaged in terrorist activity,” under the same legal analysis used to provide protection to former members of criminal organizations. Recent Courts of Appeals cases, including *Benitez-Ramos v. Holder*, have
afforded asylum protection to individuals who previously participated in criminal organizations such as gangs, arguing that even voluntary participants who have renounced their association with criminal organizations will likely face persecution upon return to their home countries on the basis of this renunciation. This proposed solution would ensure that former participants in terrorist organizations, who are currently penalized under TRIG for their involvement with the very group that would persecute them upon return, are able to enjoy the protections of asylum in the United States. Finally, this solution would re-classify asylum applicants who formerly participated in terrorist organizations, whether voluntarily or under duress, as victims deserving of protection rather than active threats to US national security. While overarching reform of TRIG is necessary, particularly given that it does not reflect contemporary national security concerns, such reform may come too slowly for the many people who become trapped within it. This asylum solution is intended for practitioners who represent TRIG-vulnerable clients that need an alternative before TRIG reform can be achieved.

Protecting these individuals aligns with the purpose of asylum, which seeks to protect individuals who would face persecution upon return to their home countries, and national security law in a post-September 11th world, which aims to deter the spread of terrorism across the globe. Individuals such as Jennifer, R.K., Helene, and Mariana, who participated in terrorist activity and desire to escape the terrorist organizations that they formerly aided by seeking asylum in the United States, would with this proposed solution have an incentive to renounce their previous affiliations in exchange for protection in the US. Such protection in this country would undermine the growth of terrorism worldwide and provide refuge to individuals who face victimization by terrorist organizations, thereby fulfilling the purposes of both asylum and post-9/11 national security law.
PART II. THE DEVELOPMENT OF THE TERRORISM-RELATED INADMISSIBILITY GROUNDS (TRIG)

A. HISTORICAL BACKGROUND OF NATIONAL SECURITY-BASED BARS TO IMMIGRATION

The expansion of national security-based bars to admissibility in US immigration law in times of a real or perceived threat to the United States or US interests is not a new development in a post-September 11th world. US immigration law has been quick to respond to national security interests, particularly during World War I, World War II, and the Cold War. Ruchir Patel notes that the US relies on immigration law to purge the country of subversives, whether this class of individuals is comprised of spies, traitors, saboteurs, anarchists, or terrorists.\(^8\)

Immigration protections contract during national security emergencies, as immigrants are viewed not as individuals in need of shelter but rather as threats who seek to destroy the US way of life. In this sense, a strong sense of nativism arises during these times, shifting popular perceptions of immigration toward an intense opposition to foreign influences.\(^9\)

In 1875, Congress began restricting immigration admissions by barring immigration of prostitutes, convicts, and Chinese nationals.\(^10\) This exclusion marked the beginning of immigration restrictions that responded to US national security interests.

World War I saw the United States becoming increasingly concerned with subversive and radical individuals entering the US, and immigration legislation responded to this concern. Immigrants who campaigned against the war were imprisoned, and the Anarchists Act of 1918 required the deportation of immigrant anarchists residing in the US.\(^11\) Anti-German sentiment was rampant throughout the US as an effect of the war, and the Department of Justice interned

\(^9\) Id. at 84.
German immigrants under the President’s summary powers.\textsuperscript{12} By the end of 1918, the number of immigrants who were arrested under these new laws rose from 1,200 to 6,300, and remaining German immigrants who were not arrested were required to register and forbidden from moving without official permission.\textsuperscript{13} This atmosphere of immigration restriction continued after the conclusion of the war; in 1919, immigrant participants in two communist parties were rounded up following the bombing of the Attorney General’s home. Approximately three thousand immigrants were held for deportation after this politically motivated event.\textsuperscript{14}

Shortly thereafter, the specter of World War II led to the Alien Registration Act of 1940, which allowed for mass deportation and required registration and fingerprinting in advance of visa issuance. Additionally, the US interned over 110,000 individuals, mostly Japanese immigrants, following President Roosevelt’s 1942 authorization of internment of persons who may pose a threat to the war effort.\textsuperscript{15}

US immigration responses to national security threats did not cease on VE or VJ Day. The Cold War, reaching its zenith during the McCarthy Era, brought widespread anti-communist sentiment to the forefront of immigration policy. The McCarran-Walter Act of 1952, also known as the Immigration and Nationality Act (INA), was passed over a presidential veto and allowed for denied entry to immigrants and visitors to the US based on their political ideology.\textsuperscript{16} This development represented the introduction of “an ideological criterion for admission;”\textsuperscript{17} the McCarran-Walter Act clearly established that communists were not welcome in the US. This Act further expanded the class of individuals who were subject to exclusion and deportation,

\textsuperscript{12} Patel, supra note 8, at 85.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{16} Aldworth, supra note 10, at 1165; Patel, supra note 8, at 85.
\textsuperscript{17} Patel, supra note 8, at 85.
particularly targeting members of the Communist Party and its associated organizations. 18 The passage of the INA and its inclusion of national security-based inadmissibility grounds mark the entry into a new era of immigration law, one that designated a class of individuals who were deemed unwanted in the United States.

B. IMMIGRATION LAW IN RESPONSE TO THE THREAT OF TERRORISM

Section 212 of the INA designates “general classes of aliens ineligible to receive visas and excluded from admission.” 19 In particular, immigrants could be excluded from the US if they sought to enter the US “to engage in activities which would be prejudicial to the public interest” or if there were grounds to believe that the individual would “engage in activities…relating to espionage, sabotage, public disorder, or in any other activity subversive to the national security.” 20 The Immigration Act of 1990 amended the national security grounds for exclusion, containing the first reference to “terrorist activity.” It created the foundation for the broad terrorism bar that exists today. Under the Immigration Act of 1990, individuals who engaged in terrorist activity were ineligible for admission. The Act defined “terrorist activity” as:

[A]ny activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves…[t]he use of…explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property. 21

The Anti-Terrorism and Effective Death Penalty Act (AEDPA), passed in response to the 1996 Oklahoma City bombing, expanded the terrorism bar even further. AEDPA broadened the

18 Id. at 85-86.
20 INA of 1952, supra note 19; Aldworth, supra note 10, at 1165-1166.
statutory definition of terrorism, including representatives and members of terrorist organizations in addition to individuals who actually engaged in or were likely to engage in terrorist activity.\textsuperscript{22} AEDPA also mandated that adjudicators deny almost every form of immigration relief, including withholding of deportation, the US’s response to its treaty obligation of non-refoulement, and asylum, to individuals who were determined to be terrorists. However, this terrorism bar was subject to the qualification that the Attorney General could exercise discretion to determine that an individual immigration applicant was not a danger to US security.\textsuperscript{23}

The Attorney General’s discretionary determination underwent major changes with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, which transformed the entire INA but left intact much of the terrorism bar.\textsuperscript{24} Under IIRAIRA, the Attorney General may waive the terrorism bar in situations where there was no reason to believe that the individual in question posed a danger to the US and the individual was only inadmissible because of his participation in a terrorist organization as classified by the Secretary of State.\textsuperscript{25} Asylum applicants who had in fact participated in a terrorist organization or engaged in terrorist activity, but who no longer posed a threat to national security could not avail themselves of the Attorney General’s discretionary waiver.

The developments of the Immigration Act of 1990, AEDPA, and IIRAIRA paved the way for the expansion of the terrorism bar after the September 11th attacks. The Oklahoma City bombing shook the confidence of the US government in its ability to deter terrorist attacks by immigrants, despite the fact that this attack occurred at the hands of a US citizen. Reviving its

\begin{footnotes}
\footnote{\textsuperscript{23} AEDPA §§ 413, 421; Aldworth, \textit{supra} note 10, at 1167.}
\footnote{\textsuperscript{25} IIRIRA § 604; Aldworth, \textit{supra} note 10, at 1167.}
\end{footnotes}
old nativism, Congress focused its attention on excluding from the US any individual who could potentially pose a threat to national security and deprived the Attorney General of the discretion to waive the terrorism bar for former participants in terrorist activity even when those individuals no longer posed a threat to the United States. The terrorism bar only expanded further after the terrorist attacks of 2001 as a result of immigration provisions contained in primarily national security legislation.26

PART III. THE CURRENT STATE OF TRIG LEGISLATION AND JURISPRUDENCE

A. KEY LEGISLATION INVOLVED IN TRIG

On September 11, 2001, nineteen individuals hijacked four commercial planes in the United States and flew three into the World Trade Centers and the Pentagon, killing over 6,000 people.27 At least sixteen of the hijackers entered the US through ports of entry with tourists or student visas, some of which expired before September 11th. Two of the hijackers were affiliated with al-Qaeda and under CIA surveillance, but the CIA failed to report its findings to watch list databases or notify the Immigration and Naturalization Service (INS) in time to prevent their entry into the US.28

In response to the September 11th terrorist attacks, Congress enacted the USA PATRIOT Act in October 2001.29 In addition to specifically requiring immigration reforms, such as

26 Patel, supra note 8, at 86
27 Id.
28 Id. at 87.
29 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001); Aldworth, supra note 10, at 1167; Garcia and Wasem, supra note 6, at 3.

Subsequent to September 11th, Congress also reassigned responsibility for immigration and immigrant policy to the Department of Homeland Security (DHS), symbolically subordinating these concerns to national security goals. The placement of immigration matters under the Department of Homeland Security sends a clear message that immigration is a national security concern and immigrants should be viewed first as potential threats to the United States. Karen C. Tumlin, “Suspect First: How Terrorism Policy is Reshaping Immigration Policy,” 92 Cal. L. Rev. 1173, 1177 (2004)
mandatory detention for immigrant terrorism suspects, the USA PATRIOT Act created a three-tiered classification system for terrorist organizations that implicates the INA and contributes significantly to TRIG determinations in an immigration context. The first tier of terrorist groups (Tier I) includes organizations that are classified under INA § 219, which allows the Secretary of State to classify a group as a terrorist organization if “the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.” This classification is subject to Congressional approval and publication of the classification in the Federal Register. The second tier of terrorist groups (Tier II) includes groups that the Secretary of State, in consultation with or upon request of the Attorney General, designates as terrorist organizations, specifically with respect to any group that engages in terrorist activity or provides material support to groups that engage in terrorist activity. The third tier of terrorist organizations (Tier III) is perhaps the most controversial classification tier. Tier III terrorist organizations are any “group of two or more individuals, whether organized or not, which engages in the activities described in subclause (I) through (VI) of clause (iv) of section 212(a)(3)(B).” These activities include committing or inciting to commit a terrorist activity; preparing or planning a terrorist activity; gathering information on potential targets for terrorist activity; soliciting funds for a terrorist activity or terrorist organization; soliciting any individual to engage in terrorist conduct or for membership in a terrorist organization; or

30 USA PATRIOT Act § 412.
33 USA PATRIOT Act § 411(a)(1)(G); INA § 212(a)(3)(B)(vi)(II); Aldworth, supra note 10, at 1168; Albery, supra note 32, at 2; Gallagher and Dizon, supra note 31; Human Rights First, supra note 31, at 7.
34 USA PATRIOT Act § 411(a)(1)(F); INA § 212(a)(3)(B)(vi)(III); Aldworth, supra note 10, at 1168; Albery, supra note 32, at 2; Gallagher and Dizon, supra note 31; Human Rights First, supra note 31, at 7.
committing any act that the individual knows or should reasonably know affords material support for terrorism, the category that casts the widest net in terms of potential asylum applicants who could be trapped under the INA’s terrorism provisions.\(^{35}\)

As of January 27, 2012, the Secretary of State has designated fifty groups as terrorist organizations, including Aum Shinrikyo, Hamas, Hizbollah, al-Qaeda, and the Revolutionary Armed Forces of Colombia (FARC).\(^{36}\) The Terrorist Exclusion List documents all Tier II terrorist organizations and includes fifty-nine groups; no groups have been added to this list since 2004, for unknown reasons.\(^{37}\) The list of Tier III terrorist group is constantly expanding, as it essentially includes any group or two or more individuals who have used force for any reason other than personal monetary gain, without consideration of any underlying circumstances such as self-defense or desire to overthrow a tyrannical regime. However, the USA PATRIOT Act does include a waiver provision, holding that the Secretary of State or the Attorney General, in consultation with each other, may conclude in their sole unreviewable discretion that the terrorism bar shall not apply to an individual who provided material support to a Tier III organization or an individual belonging to a Tier III organization.\(^{38}\)

However, this broad waiver provision changed with the REAL ID Act of 2005, which included the newly-created Secretary of Homeland Security in the consultation process and provided that the waiver could only be provided to a member of a Tier III terrorist organization if

\(^{38}\) USA PATRIOT Act § 411(a)(1)(F).
that group was classified as a Tier III terrorist organization solely because one of its subgroups fell within the scope of the terrorism bar.\(^{39}\) This represented a drastic reduction in the waiver provision for individuals involved in a Tier III terrorist group. While under the USA PATRIOT Act, the Secretary of State or the Attorney General could waive the terrorism bar for an individual who had provided material support to a Tier III terrorist organization under their own discretion, they were not afforded the same ability under the REAL ID Act. Under the new laws, an asylum applicant who belonged to or supported a pro-democracy organization that used force against a totalitarian government was a “terrorist” who fell under the terrorism bar without the benefit of a discretionary waiver.\(^{40}\)

In 2008, the Consolidated Appropriations Act (CAA) amended the waiver provision so the Secretary of State or the Department of Homeland Security could waive the terrorism bar for any individual who was not affiliated with a Tier I or Tier II group.\(^{41}\) The Secretary of State or the DHS may determine that certain groups should not be designated as Tier III terrorist organizations, and the CAA included an “automatic relief” provision to ten groups that should not be designated as terrorist organizations.\(^{42}\) Despite this positive development in the waiver provision, the Secretary of State and the DHS have only exercised their waiver authority once, and this singular exclusion merely extended the waiver to members of the same ten non-


\(^{40}\) For example, Po Wah, an asylee from the Tham Hin refugee camp who was featured in a UNHCR instructional video presented at the Subcommittee on Human Rights and the Law, US Senate Judiciary Committee hearing on the material support bar, is barred from bringing her parents to the United States to resettle with her because her father participated in a rebel group that fought against the Burmese dictatorship. Durbin Statement, supra note 1.


\(^{42}\) Id at §691(a)-(b); Garcia and Wasem, supra note 6, at 6-7.
designated groups that were listed in the CAA but were “not otherwise covered by the automatic
relief provisions” of CAA § 691(b). 43

B. CASE LAW DEVELOPMENT ON TRIG

Jurisprudence from the Board of Immigration Appeals (BIA) and the Courts of Appeal regarding the broad-based terrorism bar has grown exponentially as the bar has become less forgiving and the waiver provisions have become increasingly restricted. The most influential case on the terrorism bar is In re S-K-. 44 S-K-, a native and citizen of Burma, donated money to the Chin National Front, a pro-democracy organization that used land mines and engaged in armed conflict with the dictatorial Burmese government. 45 She donated money to the CNF for eleven months and attempted to donate other goods to the organization. 46 The Immigration Judge denied S-K-’s application, although she established a well-founded fear of persecution to qualify for asylum, because she fell under the material support bar to asylum and withholding of removal. 47 The BIA was therefore tasked with resolving two overarching questions: (1) what standards or definition should be used to assess whether the term “material support” should be defined narrowly or broadly; whether it should consider the mens rea of the provider; and whether it included the type of support that SK provided to the CNF; and (2) to what extent an adjudicator should consider an organization’s purpose and goals in assessing whether an organization is engaged in terrorist activity. 48

The BIA concluded that the terrorism bar to relief under INA § 212(a)(3)(B)(i)(I) precluded a “totality of the circumstances” approach to determining whether a group fell within

44 23 I&N Dec. 936 (BIA 2006).
45 Id. at 937.
46 Id.
47 Id. at 938.
48 Id.
the definition of a terrorist organization under INA §212(a)(3)(B)(vi).\textsuperscript{49} Furthermore, the BIA rejected the proposition that a link must exist between the provision of material support and the recipient terrorist organization’s intended use of the support to further terrorist activity.\textsuperscript{50} The BIA held that the motivation of the CNF in attempting to effect change against the Burmese dictatorship was irrelevant to terrorist organization analysis because Congress intentionally drafted the terrorism bars to relief very broadly to include even those people who could otherwise be classified as “freedom fighters” and did not intend to give the BIA discretion to create exceptions for members of organizations to which the US might be sympathetic.\textsuperscript{51} Furthermore, the BIA found no legislative history to show that Congress intended to limit the definition of “material support” or require a showing of intent on the part of the provider of material support to further a particular terrorist goal.\textsuperscript{52} Finally, it noted that the sole exception to the material support by is a showing by clear and convincing evidence that the individual did not know and should not reasonably have known that the organization was a terrorist organization.\textsuperscript{53}

This precedent represents a complete bar on the ability of an adjudicator to consider the totality of the circumstances surrounding the organization and activities of a designated terrorist group. If a group meets the statutory definition, then the only possibility for relief from the material support waiver is a showing by clear and convincing evidence that the individual did not know and should not have known that the organization was of a terrorist nature. This is particularly troubling with respect to Tier III terrorist groups, which are defined broadly and classified as such on an ad hoc basis. Under both the definition of a Tier III organization and \textit{In re S-K-}, two individuals who shot and killed in self-defense a corrupt police officer from a

\textsuperscript{49} \textit{Id.} at 946.
\textsuperscript{50} \textit{Id.} at 943-944.
\textsuperscript{51} \textit{Id.} at 941.
\textsuperscript{52} \textit{Id.} at 943.
\textsuperscript{53} \textit{Id.} at 945.
dictatorial regime constitute a Tier III terrorist organization, and anyone who assisted them, whether by allowing them to sleep on the floor of their houses or by buying them plane tickets to flee the repressive country, is barred from seeking asylum in the United States because they provided material support to a terrorist organization.\(^54\)

A number of Courts of Appeal have addressed the terrorism bar in general and the material support bar in particular.\(^55\) In *American Academy of Religion v. Napolitano*, the Second Circuit held that material support only requires that the individual knew that he was rendering material support to the recipient, not that he knew that the recipient was a terrorist organization.\(^56\) This decision further lowered the *mens rea* for material support; so long as the applicant knew that he was providing support to a particular individual or group, there is no further requirement that the applicant know that the recipient was a terrorist organization. Furthermore, in *Arias v. Gonzalez*, the Third Circuit found that a Colombian respondent provided material support to a terrorist organization because he was not expressly threatened to make payments to a Colombian paramilitary group that was designated as a foreign terrorist organization.\(^57\) This seems to indicate that duress might be an exception to the material support bar; however, as discussed below in Part IV, this is not universally the case.

Courts are slow to question an official designation of a terrorist organization. A group that is classified as a terrorist organization has thirty days from the date of publication in the Federal Register to challenge that designation, but courts invalidate a designation only if the

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\(^{54}\) *Id.*

\(^{55}\) See *Pathak v. Gonzalez* (9th Cir. 2006); *Abufayad v. Holder* (9th Cir. 2011); *Khan v. Holder* (9th Cir. 2009); *Hussain v. Mukasey* (7th Cir. 2008); *McAllister v. Attorney General of the U.S.* (3d Cir. 2006); *Singh-Kaur v. Ashcroft* (3d Cir. 2004); *Cheema v. Ashcroft* (9th Cir. 2004); *Daneshvär v. Ashcroft* (6th Cir. 2004); *Singh v. Mukasey* (9th Cir. 2007); *Sor v. Attorney General of the U.S.* (3d Cir. 2005); *Parlak v. Holder* (6th Cir. 2009).

\(^{56}\) 573 F.3d 115 (2d Cir. 2009).

\(^{57}\) 143 Fed.Appx. 464 (3d Cir. 2005).
classification is (1) “arbitrary, capricious, an abuse of discretion;”\textsuperscript{58} (2) “contrary to constitutional power;”\textsuperscript{59} (3) “in excess of statutory jurisdiction;”\textsuperscript{60} or (4) “lacking substantial support in the administrative records taken as a whole or in classified information submitted.”\textsuperscript{61}

Because of this highly deferential standard, very few cases exist where a court has reversed a designation as unlawful.\textsuperscript{62} Therefore, once a group has been designated as a terrorist organization, an immigration applicant can only fight the terrorism bar as regards his particular activity with the organization.

C. CRITIQUES AND COMPLICATIONS OF TRIG

The terrorism bar and its attendants, in particular the material support bar, have received widespread criticism as overbroad and victimizing. Nevertheless, judicial willingness to question the snags of the terrorism bar has been lackluster; Judge Posner of the Seventh Circuit stated, “The statute may go too far, but that is not the business of the courts.”\textsuperscript{63} While courts have criticized the terrorism bar in concurrences and even majority opinions, they have relentlessly held that Congress holds the power to remedy the flaws in the terrorism bar and have simply applied the plain language of the bar in denying asylum applications.\textsuperscript{64} The BIA’s precedential decision in \textit{In re S-K-} clearly establishes the Board’s approach to applying the terrorism bar. It states plainly and authoritatively that an adjudicator must look to the plain language of the statute, particularly with regard to Tier III terrorist organizations and the

\textsuperscript{59} 8 U.S.C. § 1182(b)(3)(B); Aziz, supra note 58, at 53.
\textsuperscript{60} 8 U.S.C. § 1182(b)(3)(C); Aziz, supra note 58, at 53.
\textsuperscript{61} 8 U.S.C. § 1182(b)(3)(D); Aziz, supra note 58, at 53.
\textsuperscript{62} See United States v. Rahmani, 209 F.Supp.2d 1045 (C.D. Cal. 2002) (holding in a non-immigration case that AEDPA § 1189 was unconstitutional on its face rather than rejecting the designation in question); Aziz, supra note 58, at 53.
\textsuperscript{63} Aldworth, supra note 10, at 1172.
\textsuperscript{64} Id.
interpretation of “material support,” to determine whether the terrorism bar should apply. A
totality of the circumstances approach has no place in such a determination, according to the
BIA.

Much has been written to critique the terrorism bar as violative of international law,\textsuperscript{65}
unreasonably restrictive on immigrants’ civil rights,\textsuperscript{66} ineffective at encouraging actual change in
admission and border patrol systems,\textsuperscript{67} and infringing on due process and First Amendment
rights.\textsuperscript{68} Perhaps the most controversial aspects of the terrorism bar are the classification process
for Tier III terrorist organizations and the expansive definition of “material support.” The statute
itself provides little guidance about the characteristics of a Tier III terrorist group other than the
requirement that they be comprised of two or more individuals who engaged in one of the
activities listed in the INA. Critics argue that the overbroad definition of a Tier III terrorist
organization results in the classification of certain groups as terrorist organizations in the
immigration context when the US does not consider them such in other contexts, even under
national security law.\textsuperscript{69} A group only becomes a Tier III terrorist organization when an
immigration adjudicator decides that it meets the statutory qualifications in the context of an
individual case. When this decision is made, there is no public announcement,\textsuperscript{70} even the group
itself does not know of its designation, and applicants for asylum typically have no idea that they
may be facing the terrorism bar for their participation in a particular group in their home country.

This lack of predictability presents a serious challenge in the asylum system, wherein
applicants must admit to their participation in the group but have no opportunity to prepare a

\textsuperscript{65} See generally id.
\textsuperscript{66} See generally Tumlin, supra note 29.
\textsuperscript{67} See generally Patel, supra note 8.
\textsuperscript{68} See generally Aziz, supra note 58.
\textsuperscript{69} Human Rights First, supra note 31, at 4-5.
\textsuperscript{70} Id. at 5.
defense because they do not know that they are facing a bar to asylum. It also implicates a human cost; hopeful asylum applicants receive written denials of their applications explaining that they are ineligible for asylum because they triggered the terrorism bar. Upon seeing themselves labeled as “terrorists,” asylum applicants become confused, angered, and apprehensive, fearful that the United States has misunderstood them and that they will be returned to the country where they will face harassment, torture, or death. Furthermore, asylum lawyers are stymied about how to explain the terrorism bar to clients, because the classification of a group as a Tier III terrorist organization occurs as if on a whim of the asylum adjudicator. The ability to notify a client about potential terrorism bar complications is therefore compromised.

While the unyielding terrorism bar does undoubtedly designate some groups, such as Aum Shinrikyo or the Lord’s Resistance Army, as terrorist organizations correctly based on their destructive activities, the legitimate terrorist nature of some groups that have been classified as Tier III terrorist organizations in the past is questionable. For example, under the existing statutory language, the following groups have been classified as Tier III terrorist organizations in the immigration context but not in any other context:

- All Iraqis and Iraqi groups who resisted Saddam Hussein in the 1990s, including those who participated in the 1991 post-Gulf War uprising encouraged by President Bush;
- All Iraqis and Iraqi groups who joined with the Coalition forces that overthrew the Hussein regime in 2003;
- The Sudan People’s Liberation Movement/Army, which participated in southern self-determination and opposed the now-ruling party;
- All Ethiopian and Eritrean political parties and movements, past and present;

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• The Movement for Democratic Change (MDC), which opposes current President Mugabe of Zimbabwe and whose leader is a current political ally of President Obama.72

Critics of the terrorism bar, particularly of the Tier III classification, argue that the existing bar more often than not targets genuine refugees and victims of terrorism rather than terrorists themselves. In a hearing before the House Subcommittee on Africa, Global Human Rights and International Operations, Representative Chris Smith voiced his opposition to the widespread classification of groups that resist tyrannical regimes as “terrorists,” noting that these groups take up arms “just as our founding fathers engaged in armed resistance to a relatively benign despotism.”73 Such an extreme and inflexible position on the terrorism provisions of immigration law has resulted in a practice of treating victims of armed groups as supporters of those groups if they assisted them in any way, treating minimal contributions and medical care as material support, and interpreting material support to cover everything from writing an article about a group for a newspaper to donating a bag of grain to rebels.74 However, despite the Executive Branch’s open acknowledgement that the terrorism bar has unintended consequences for genuine refugees, the response to the critiques of the terrorism bar has been the development of a system of waivers rather than widespread legislative reform.75 While the waiver system does represent some progress and a general realization that the terrorism bar catches in its web a number of victims rather than legitimate terrorists, it ultimately does not remedy the situation because its provisions are complex, confusing, and dependent on the discretion of the Secretary of State, the Secretary of Homeland Security, or the individual immigration adjudicator.

PART IV. THE TRIG WAIVER SYSTEM

72 Human Rights First, supra note 31, at 4-5.
73 Id. at 5.
74 Id. at 6.
75 Id. at 7.
A. WAIVERS FOR MATERIAL SUPPORT, SOLICITATION, AND MILITARY TRAINING

The existing waiver system for various aspects of the terrorism bar is complex and largely inadequate. Waivers exist at various places in the INA, each with different requirements to waive different terrorism bars. The first waiver lies at INA § 212(a)(3)(B)(iv)(VI)(cc). This waiver designates that an individual engages in terrorist activity if he solicits funds or other things of value for a Tier III terrorist organization unless the individual “can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization.” A similar exception exists for individuals who solicit for membership in a Tier III terrorist organization or afford material support to Tier III terrorist organizations. In each instance, the burden is on the immigration applicant to provide such clear and convincing evidence that he did not know in fact and should not reasonably have been expected to know that the organization to whom he was providing support was a terrorist organization. No guidance currently exists as to what kind of evidence would satisfy this burden. Furthermore, it is difficult to conceive of the type of proof that an applicant could produce to show that he should not reasonably have known that the organization he supported was a terrorist organization. While it is possible to produce evidence of the applicant’s subjective belief, the evidence necessary to prove the second prong of the evidence is more elusive.

In 2006, in response to the limited availability of this waiver, Representative Joseph Pitts, a Republican from Pennsylvania who supported both the USA PATRIOT Act and the REAL ID Act, introduced a bipartisan bill that stated that “vulnerable refugees who would otherwise be admitted will be denied entry because of the unintended consequences of overbroad bars on
admission.” The Pitts Legislation did not propose to alter the TRIG applicable to Tier I and Tier II designated terrorist organizations, but rather sought to change the process of classifying a Tier III terrorist organization. The bill called for an amendment to the INA terrorism bar to require that a group only be classified as a Tier III terrorist organization if it posed an actual threat to US security or US nationals. Tier I designation already requires this kind of threat; Pitts argued that this change was necessary to protect groups that the US supports and that support the US from being inadvertently labeled as Tier III terrorist organizations. The Pitts Legislation arrived at the Committee on the Judiciary in July 2006 but went no further. Similarly, an amendment on the material support bar was proposed and rejected in the Senate.

Until December 2007, INA § 212(d)(3)(B) provided that the Secretary of State or the Secretary of Homeland Security, in consultation with each other and with the Attorney General, “may conclude in such secretary’s sole unreviewable discretion that…[the material support bar] shall not apply with respect to any material support an alien afforded to an organization or individual that has engaged in a terrorist activity.” In 2006 and 2007, Secretary of State Rice exercised her discretionary waiver to excuse from the terrorism bar in the asylum context for individuals who provided material support to, but not to individuals who were members of,

76 Aldworth, supra note 10, at 1169; “List of Terrorist Organizations,” supra note 37.
77 “List of Terrorist Organizations,” supra note 37.
78 Id.; Aldworth, supra note 10, at 1169.
79 “List of Terrorist Organizations,” supra note 37. Under INA § 219, a Tier I terrorist organization must satisfy three requirements:

1. It must be a foreign organization;
2. The group must engage in terrorist activity as defined in INA § 212(a)(3)(B) or terrorism as defined in the Foreign Relations Authorizations Act § 140(d)(2) or retain the capability and intent to engage in terrorist activity or terrorism; and
3. The group’s terrorist activity or terrorism must threaten the security of US nationals or national security of the United States.

Courts can review the Secretary of State’s determination that an organization is “foreign” and that it is “engaged in terrorist activity,” but they cannot review the Secretary’s determination that the terrorist activity of a particular organization threatens the national security of the US or the security of US nationals. Gallagher and Dizon, supra note 31, at 5.
80 Aldworth, supra note 10, at 1169.
81 INA § 212(d)(3)(B); Albery, supra note 32, at 3.
thirteen listed organizations in what became known as “group-based exemptions.” In February 2007, Secretary of Homeland Security Chertoff exercised his discretionary authority to recognize the same group-based exemptions regardless of whether the support was provided under duress and waived the material support bar for certain immigration applicants if the material support was provided under duress to a Tier III terrorist organization and the totality of the circumstances justified the favorable exercise of discretion. This discretionary exercise officially recognized the “duress exemption.” While this initial duress exemption only waived the terrorism bar for individuals who provided material support to Tier III organizations, Secretary Chertoff later authorized the U.S. Citizenship and Immigration Services (USCIS) to grant the duress exemption to applicants who provided material support to the FARC and the ELN in Colombia, both Tier I organizations. Following these group-based exemptions, the Attorney General personally certified In re S-K-; in the 2008 rehearing of the case, the BIA held that the respondent was no longer subject to the material support bar because the Chin National Front had been granted a group-based exemption. Nevertheless, the BIA clarified that its previous reasoning in the case remained controlling on determinations about the applicability of the material support bar except to groups that had been granted the group-based exemption.

The duress exemption entails a three-part analysis. First, all applicants who may be subject to the material support bar must satisfy four threshold requirements: (1) the applicant must be seeking and eligible for a benefit or protection under the INA; (2) the applicant must undergo and pass relevant background and security checks; (3) the applicant must undergo and pass relevant background and security checks; and (4) the applicant must fully disclose

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82 Alberty, supra note 32, at 3; “Exercise of Authority under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act,” (May 5, 2006; August 24, 2006; October 11, 2006; January 24, 2007); Garcia and Wasem, supra note 6, at 9.
83 Alberty, supra note 32, at 3.
85 Alberty, supra note 32, at 4.
the nature and circumstances of each provision of material support; and (4) the applicant must pose no danger to the safety and security of the United States.\textsuperscript{86} Second, the adjudicator must determine whether the support was in fact provided under duress. Factors to consider in this determination include: (1) whether the applicant reasonably could have avoided or taken steps to avoid providing the support; (2) the severity and type of harm inflicted or threatened to obtain the support; (3) to whom the threat or harm was directed; and (4) in the case of threats alone, the perceived imminence and likelihood of the harm threatened.\textsuperscript{87} Finally, even if an applicant meets the four threshold requirements and the adjudicator determined that the applicant provided the support under duress, the adjudicator may still withhold the duress exemption on discretionary grounds. To determine whether an applicant warrants a positive grant of discretion, the adjudicator must engage in a totality of the circumstances analysis and consider such factors as: (1) the amount, type, and frequency of material support given to the organization; (2) the nature of the activities that the terrorist organization committed; (3) the applicant’s awareness of such activities; (4) the length of time since the material support was provided; (5) the applicant’s conduct in the interim; and (6) any other relevant factor.\textsuperscript{88}

Adjudicators are instructed to look for key words or phrases, such as “fighter,” “militant,” “soldier,” or “rebel,” that indicate participation in terrorist activity, as well as testimony that an applicant provided food, money, housing, or any assistance to a terrorist individual or group. They are further guided to look for words or phrases like “ransom,” “war tax,” “slave,” “force,” “threat,” and “extortion” that may indicate that such support was provided under duress.\textsuperscript{89}

\textsuperscript{86} “Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations,” (May 24, 2007), USCIS; Alberty, \textit{supra} note 32, at 3.
\textsuperscript{87} “Processing the Discretionary Exemption,” \textit{supra} note 86; Alberty, \textit{supra} note 32, at 3.
\textsuperscript{88} “Processing the Discretionary Exemption,” \textit{supra} note 86; Alberty, \textit{supra} note 32, at 3-4.
\textsuperscript{89} “Processing the Discretionary Exemption,” \textit{supra} note 86.
As discussed above, the CAA of 2008 contained a provision at § 691(a) authorizing the Secretaries of State and Homeland Security, in consultation with the Attorney General, to exempt from TRIG individuals who provided material support to undesignated, or Tier III, terrorist organizations. Additionally, CAA § 691(b) contained group-based exemptions. The amendments contained in the CAA extended the availability of the existing waiver authority to members of Tier III groups, applicants who engaged in terrorist activity or association for Tier III terrorist organizations, and applicants who engaged in terrorist activity or association with Tier I or Tier II organizations under duress or without mens rea. However, members of Tier I and Tier II terrorists groups are still ineligible for a waiver of TRIG, as are applicants who knowingly and voluntarily engaged in terrorist activity or received military training from a Tier I or Tier II terrorist organization.

The Department of Homeland Security processes all possible exemption cases after an administratively final order of removal issued by the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR). It reasons that adjudicating the exemption at this stage allows all parties to litigate the merits of the case through the BIA and enables the DHS to focus its resources on cases where a possible TRIG exemption is the only remaining issue in an applicant’s case. Once removal proceedings against an applicant have been initiated, only the Secretary of Homeland Security may exercise the waiver authority.

In 2007 and 2008, USCIS anticipated that the Secretary of Homeland Security would exercise his discretionary authority for cases where the applicant provided material support under duress to a Tier I or Tier II terrorist organization. Therefore, USCIS placed a hold on all cases

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90 CAA § 691(a); Alberty, supra note 32, at 4.
91 CAA § 691(b).
92 Alberty, supra note 32, at 4; Garcia and Wasem, supra note 6, at 10.
93 “Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal,” (October 23, 2008), USCIS; Garcia and Wasem, supra note 6, at 12.
currently pending in its jurisdiction where TRIG was the only ground for referral or denial of an application and the applicant was: (1) associated with an organization granted a group-based exemption but may be otherwise inadmissible under TRIG; (2) inadmissible under TRIG based on activity associated with a Tier III group not under duress; (3) inadmissible under TRIG based on any activity other than material support for any Tier of organization that was under duress; (4) a voluntary provider of medical care to any organization, its members, or to individuals who engaged in terrorist activity; and (5) inadmissible as the spouse or child of applicants described in the former situations. 94

This hold policy indicates that USCIS assumed that future waivers would be expansive; this was not the case in reality. In 2009, USCIS received revised guidance on the hold policy for TRIG cases. 95 This memorandum removed from the March 2008 hold directive all cases in which the applicant provided material support to a Tier I or Tier II terrorist organization under duress. USCIS was therefore authorized to begin considering these cases for the duress-based material support exemption, subject to two levels of supervisory review prior to final adjudication. All other cases described in the 2008 memo remained in hold pending further instruction. 96 Additional revised guidance was issued in 2011 in response to the backlog of cases awaiting decisions, allowing adjudicators of TRIG cases to deny some cases currently on hold in which an exemption would not be granted to the applicant even if an exemption were available. 97 This revision removed from hold all cases in which applicants were inadmissible under TRIG based on activity or association not under duress with a Tier III terrorist organization and those

94 “Withholding Adjudication and Review of Prior Denials of Certain Categories of Cases Involving Association With, or Provision of Material Support to, Certain Terrorist Organizations or Other Groups,” (March 26, 2008), USCIS Memorandum; “Processing the Discretionary Exemption,” supra note 86; Alberty, supra note 32, at 5.
95 “Revised Guidance on the Adjudication of Cases Involving Terrorist-Related Inadmissibility Grounds and Amendment to the Hold Policy for Such Cases,” (February 13, 2009), USCIS.
96 Id.
97 “Revised Guidance on the Adjudication of Cases Involving Terrorism-Related Inadmissibility Grounds (TRIG) and Further Amendment to the Hold Policy for Such Cases,” (November 20, 2011), USCIS.
in which applicants were inadmissible under TRIG based on activity other than material support provided under duress to any Tier of terrorist organization. Applications on behalf of individuals who fell into those categories may be denied if the adjudicator and other reviewers determined that the applicant did not warrant a favorable exercise of discretion, even if an exemption may be available to those individuals in the future. USCIS argued that the mandatory hold policy created unnecessary delay and buildup of case backlog. Every recommended denial of a case in a former hold category was subject to additional headquarter review and concurrence.98 Therefore, as of March 2012, the only remaining categories of TRIG cases on hold with USCIS involve applicants who voluntarily provided medical care and applicants who are inadmissible under TRIG as spouses or children of applicants from the other categories.

On February 23, 2011, USCIS implemented two new discretionary exemptions for TRIG: the exemption of receipt of military-type training under duress and the exemption for solicitation of funds or members under duress.99 The Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, issued an exemption that authorized USCIS adjudicators to exempt from TRIG certain applicants who received military-type training from a terrorist organization under duress or who solicited funds or members for a terrorist organization under duress. Duress is established for both exemptions if the training or solicitation occurred in response to a reasonably perceived threat of serious harm. To determine whether duress existed, adjudicators are instructed to consider the same factors listed above. Applicants must also meet the same four threshold requirements; however, individuals seeking the military-type training exemption must also show that the training he received does not pose a risk to the US or US

98 Id.
interests. Finally, adjudicators may consider the totality of the circumstances to determine whether the applicant merits a positive grant of discretion. As with the waivers described above, adjudicators may deny the exemption on the basis of discretion even if the applicant meets all other requirements. Cases denied on discretionary grounds are subject to additional review.\(^{100}\)

Given these developments, waivers or exemptions may be available to the following classes of applicants:

- Applicants who provided material support to organizations granted group-based exemptions;
- Applicants who provided material support to Tier III terrorist organizations under duress;
- Applicants who provided material support to the FARC or the ELN under duress;
- Applicants who were members of Tier III terrorist organizations;
- Applicants who engaged in terrorist activity for Tier III terrorist organizations (removed from hold policy);
- Applicants who engaged in terrorist activity under duress for Tier I or Tier II terrorist organizations (removed from hold policy);
- Applicants who engaged in any activity other than material support under duress for any Tier of terrorist organization (removed from hold policy);
- Applicants who voluntarily provided medical care to any Tier of terrorist organization, its members, or individuals engaged in terrorist activity (currently on hold);
- Applicants who are the spouses or children of applicants who are inadmissible under TRIG (currently on hold);
- Applicants who received military-type training from a terrorist organization under duress; and
- Applicants who solicited funds or members on behalf of a terrorist organization under duress.

Despite their ability to grant waivers to some classes of applicants, immigration authorities may not waive application of the terrorism bar with respect to the following categories of applicants:

- Applicants who are presently engaged in or are likely to engage in terrorist activity;
- Applicants who voluntarily and knowingly engage in or have engaged in terrorist activity on behalf of a Tier I or Tier II terrorist organization;

\(^{100}\) “Military-Type Training Exemption,” \textit{supra} note 99; “Solicitation Exemption,” \textit{supra} note 99.
• Applicants who voluntarily and knowingly received military-type training from a Tier I or Tier II organization;
• Applicants who are members or representatives of Tier I or Tier II organizations; and
• Applicants who voluntarily and knowingly endorse or espouse the terrorist activities of a Tier I or Tier II organization or convince others to support terrorist activity on behalf of a Tier I or Tier II organization.¹⁰¹

However, all of these waivers require that applicants meet cumbersome eligibility hurdles. All applicants who may be eligible for a waiver or exemption must first meet the four (or in the case of the military-type training exemption, five) threshold requirements, and applicants for duress exemptions must satisfy the adjudicator that the activity in question did in fact occur under duress. Finally, all applicants must satisfy the adjudicator that they merit a favorable grant of discretion. Save further internal review, the adjudicator’s discretionary decision is subject to limited oversight. Therefore, even eligible applicants may be denied a waiver or exemption based on the whims of the adjudicator.

Furthermore, while the Secretary of State and the Secretary of Homeland Security have express authority to waive certain terrorism-related grounds under INA §212, they do not possess a similar waiver authority for terrorism-related grounds under INA §237, even though the language of the terrorism-related grounds of inadmissibility under §212 and deportability under §237 are identical and the language in the CAA of 2008 suggests that the waiver authority should apply to both inadmissibility and deportability grounds.¹⁰² This is one of many criticisms of the existing waiver and exemption process, which is burdensome, confusing, incomplete, and fraught with complex requirements that are difficult for applicants who are not versed in US immigration law and the winding maze of TRIG to both meet and understand.

B. INSUFFICIENCIES WITH THE CURRENT WAIVER SYSTEM AND HINTS AT IMPROVEMENT FROM NEGUSIE V. HOLDER

¹⁰¹ Garcia and Wasem, supra note 6, at 13.
¹⁰² Id.
While the terrorism bar itself has garnered a great deal of criticism, the attempts to create an overarching waiver system have not developed without critiques of their own. The waiver system first suffers from a reliance on cooperation among the Secretary of State, the Secretary of Homeland Security, and the Attorney General that has proven unrealistic. Discussion over even the basic framework of the waivers requires extensive negotiation among high-level government officials who have other concerns. Additionally, the decision of whether to grant a group-based exemption to individual Tier III terrorist organizations requires extensive archival research and discussion that often ends with “a referendum on the group that is often quite disconnected from the facts and equities of the individual asylum seekers and refugees affected.”

Furthermore, the waiver process remains alienated from the asylum applicants who may deserve them. The process of applying for a waiver or an individual’s eligibility for a waiver are not communicated to the asylum applicant, and an applicant has no way of knowing whether his application has been flagged under the terrorism bar, whether he is being considered for a waiver, or why the waiver is granted or denied.

After much negotiation, the Secretary of State and the Secretary of Homeland Security have exercised their authority to grant waivers to the material support bar to applicants who provided such support under duress. Nearly all asylum seekers who have been granted terrorism bar waivers since waiver implementation began in 2007 have been granted duress exemptions under this discretionary exercise. While confusion used to exist over whether to classify involuntary participation in an armed group as “material support” or as “military-type training,”

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103 Human Rights First, supra note 31, at 7.
105 Human Rights First, supra note 31, at 8.
this complication has been addressed through the 2011 adoption of the waiver for applicants who received military-type training from a terrorist organization under duress.\textsuperscript{106}

However, the duress waiver is not without flaws. Even individuals who meet the threshold requirements and establish that they gave material support to a group that has been granted an exemption, a Tier III terrorist organization, or the FARC or ELN in Colombia under duress, they must still convince the asylum adjudicator that they merit a positive grant of discretion. While discretionary decisions are subject to additional supervisory review, no information is available about the prevalence of reversals of an adjudicator’s discretionary decisions. The reliance on discretion for these waivers also presents a predictability problem, as asylum applicants are unable to determine whether they will be granted a waiver even if they meet the established requirements. Individuals who apply for asylum affirmatively, without first being placed in removal proceedings and asserting asylum as a defense to deportation, are bringing their presence in the United States to the attention of the government and exposing themselves to the possibility of removal from the United States. Such applicants may choose this option anyway if they knew for certain that they would be granted a waiver of their grounds of inadmissibility, but it is unknown whether they will apply for asylum affirmatively if they have no way of predicting whether such a waiver will be granted.

Furthermore, no duress waiver exists for applicants who provided material support under duress to a Tier I or Tier II terrorist organization, save the exception that mentions the FARC and the ELN. There is a waiver for applicants who engaged in terrorist activity under duress for a Tier I or Tier II terrorist organization, but the language of the waiver is unclear as to whether “terrorist activity” includes “material support.” Tier I and Tier II terrorist organizations are groups that are classified as terrorist organizations across the board, not only for immigration law

\textsuperscript{106} “Military-Type Training Exemption,” \textit{supra} note 99.
purposes, and are presumably the groups that pose the greatest threats to US national security and the security of US nationals. It seems illogical that the victims, the individuals who were forced to provide material support, of what are generally considered the most dangerous of organizations are ineligible for waivers. Instead of protecting some of terrorism’s most affected victims, the US asylum system labels them as “terrorists” and denies them refuge.

Additionally, the Secretary of State and the Secretary of Homeland Security have not exercised their discretionary authority to conceive of a waiver for applicants who voluntarily provided material support to Tier III terrorist groups. They have established a waiver for applicants who were members of such groups, but not for those who merely provided material support without participating in the group’s activities. Membership implies a greater level of organizational buy-in than does providing material support, so it is confounding that voluntary members of Tier III terrorist organizations are afforded a waiver while voluntary providers of material support are not.

The immigration court waiver process is likewise flawed. An immigration judge may not consider the applicability of a waiver until the applicant has already been ordered deported and that order is administratively final. This results in years of delays waiting for an available court date and unnecessary detention, at the expense of the government, for detained applicants; while it is unknown what percentage of asylum applicants are currently detained, over 10,000 asylum seekers were detained in 2007 alone. The court waiver process does not apply to the unknown number of cases that were denied based on the terrorism bar unless and until the

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107 Human Rights First, supra note 31, at 8.
108 Id. at 10.
applicant is detained. Finally, the court waiver process does not provide any deportation protection for people for whom the Secretary of State or the Secretary of Homeland Security has not yet implemented waivers. Individuals whose applications are pending before the Department of Homeland Security are placed on adjudicatory hold as instructed in the USCIS hold policy, but individuals whose applications come before an immigration judge are not afforded the same hold policy.

Human Rights First argues that the most effective approach to addressing the muddled waiver system would be to fix the statutory definitions of the terrorism and material support bars and shift agency legal positions that have resulted in the widespread confusion of the waiver system. It argues that this approach would increase protection of victims of persecution who apply for asylum in the United States and improve the US’s international image by no longer labeling individuals that some would consider victims or innocent bystanders as terrorist participants. This solution, while ambitious, suffers from an overabundance of idealism and optimism. While lawmakers and members of the Executive Branch have acknowledged the flaws in the terrorism bar and in the waiver system, they exhibit no indications that they can conceive of a plan to amend the INA in such a way that would simplify the terrorism bar and its attendant waivers, protect genuine refugees, and ensure that the immigration process managed to intercept bona fide terrorists before their admission.

Furthermore, a new statutory scheme that relaxed the terrorism bar may have been desirable as September 11th became more of a memory, the 2009 case of Umar Farouk Abdulmutallab, who allegedly tried to ignite a crude bomb on Northwest Airlines Flight 253 on

110 Human Rights First, supra note 31, at 10.
111 Id.
112 Id. at 2.
113 Id.
Christmas Day, reminded the United States as a whole that the threat of terrorism may lie dormant for years but it is never completely extinguished. US consular offices in London issued Abdulmutallab a multi-year, multiple-visit tourist visa in June 2008 because there was “nothing in his application nor in any database at the time that would indicate that he should not receive a visa.”\textsuperscript{114} Although Abdulmutallab’s father warned US officials of his son’s fanatical beliefs and the Embassy in Abuja, Nigeria sent a cable to the National Counterterrorism Center according to standard procedures for screening suspected terrorists, the State Department could not connect the individual who was a suspected terrorist with the individual who had been issued a visa in 2008 because Abdulmutallab’s name was misspelled in the terrorist database.\textsuperscript{115} While this error was clearly a failure in interagency procedure, and a rather foolish oversight at that, the knee-jerk reaction in the aftermath of the December 25 attempted bombing was a re-tightening of terrorist controls overall, from airport security to immigration law.

Given the serious flaws with the existing waiver system, the small likelihood of sweeping legislative reform, and the increased attention on the threat of terrorism after recent bombing attempts, it is clear that both the waiver system and the terrorism bar in general require a new approach. This approach presented its potential in the 2009 United States Supreme Court decision in \textit{Negusie v. Holder}. In that case, a dual national of Eritrea and Ethiopia petitioned the Supreme Court for review of the BIA’s denial of asylum based on the persecutor bar in INA § 208(b)(2)(A)(i), which sates that an applicant is ineligible for asylum if “the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”\textsuperscript{116} When Negusie was conscripted into the Eritrean army during the 1998 war with Ethiopia, he refused to

\textsuperscript{114} Garcia and Wasem, \textit{supra} note 6, at 19.
\textsuperscript{115} \textit{Id.}
fight against Ethiopia, his other homeland.\footnote{Id. at 515.} He was forced to work as a guard at a prison, where it was undisputed that prisoners were being persecuted on account of protected grounds.\footnote{Id.}

The immigration judge denied his application for asylum and the BIA affirmed this denial on the grounds that Negusie’s role as a prison guard activated the persecutor bar.\footnote{Id. at 516.} The BIA held:

\begin{quote}
The fact that [petitioner] was compelled to participate as a prison guard, and may not have actively tortured or mistreated anyone, is immaterial…[because] an alien’s motivation and intent are irrelevant to the issue of whether he ‘assisted’ in persecution…[I]t is the objective effect of an alien’s actions which is controlling.\footnote{Id.}
\end{quote}

The Supreme Court reversed the BIA’s denial, holding that the BIA’s decision did not merit administrative deference under \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}\footnote{467 U.S. 837 (1984).} because the BIA had misapplied the principles established in \textit{Matter of Fedorenko},\footnote{19 I & N Dec. 57 (BIA 1984).} a 1984 BIA decision dealing with the Displaced Persons Act of 1948.\footnote{Negusie, 555 U.S. at 518-520.} \textit{Fedorenko} held that the persecutor bar did not contain a voluntariness requirement; however, the Displaced Persons Act had different language and a different purpose than the INA, and therefore the BIA’s reliance on this decision was in error.\footnote{Id. at 520; Aldworth, \textit{supra} note 10, at 1184.} Given that the BIA had mistakenly relied on a non-controlling case to determine that the persecutor bar allowed no consideration of the applicant’s intent, the Court remanded the case to the BIA for reconsideration.\footnote{Negusie, 555 U.S. at 523.} The BIA has not yet issued its decision.

Justice Stevens concurred in the decision but argued that it was “plain that the persecutor bar does not disqualify from asylum or withholding of removal an alien whose conduct was coerced or otherwise the product of duress.”\footnote{Negusie, 555 U.S. at 1174; Aldworth, \textit{supra} note 10, at 1184.} The ease with which Justice Stevens saw a duress
exception in the persecutor bar gives hope that the Attorney General and the other relevant participants in the waiver process will follow suit.

While *Negusie* addresses the persecutor bar rather than the terrorism bar, the Supreme Court’s reasoning is both relevant and transferable to the problems with the terrorism bar. The majority’s reasoning reveals the Supreme Court’s unwillingness to accept a broad interpretation of an absolute exclusionary bar in a situation similar to that of the terrorism bar. This decision represents the proposition that sweeping bars are incompatible with the purpose of asylum law, which seeks to provide refuge to individuals who need protection while excluding only those individuals who either do not meet the statutory requirements for asylum or who pose a real and credible danger to the United States. In order to achieve the ultimate goals of asylum law, cases must be adjudicated on a more fact- and circumstances-specific inquiry into each application rather than the imposition of unyielding and broad classifications that do not permit consideration of “the true reality of the situation.”

*Negusie* suggests the first hints at possible change to the inflexible terrorism bar and its accompanying inadequate waiver system. It allows a court to consider the totality of the circumstances surrounding an asylum applicant’s association with a terrorist organization and render a judgment based on the facts specific to each applicant’s case. However, such change would come from the Supreme Court, which has thus far declined to grant certiorari on an asylum case involving the terrorism bar. Furthermore, Supreme Court adjudication of such a case would require a persistent asylum applicant to continue to push his case through all of the preceding processes and persevere in his cause during the long wait and exorbitant legal expense.

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128 *Id.*
129 *Id.*
Therefore, change from this avenue may come too slowly for many asylum applicants caught in the terrorism bar trap.

The proposed methods of resolving both the broad interpretation of the terrorism bar and the many insufficiencies of the waiver process are inadequate. Congressional overhaul of the INA to enact legislative change to the terrorism bar is unlikely given the recent resurgence of terrorism apprehension, the sharply divided nature of Congress, and the hot-button nature of immigration reform as a whole. Furthermore, there is no indication that legislative reform to the terrorism bar would in fact loosen its restrictions. Lastly, the development of a more comprehensive and workable waiver system by the Secretary of State, the Secretary of Homeland Security, and the Attorney General is similarly unlikely given the demanding nature of all three executive-level positions and the difficulty of establishing a consensus among the relevant actors. Therefore, given the inadequacy of the existing proposals, a new solution is required. Rather than looking to Supreme Court activism, legislative reform, or the development of additional waivers, which would require time, consensus, and cooperation, it is possible to find a method of dealing with the restrictions of the terrorism bar through an existing, commonplace asylum mechanism: the articulation of a new particular social group based on former participation in a criminal organization.

PART V. TRIG AND ITS RELATIONSHIP TO CONTEMPORARY NATIONAL SECURITY THREATS

An investigation of the contemporary national security landscape and atmosphere that permeates United States political, military, economic, and cultural decision-making informs an analysis of TRIG and its broadly overreaching nature. An analysis of how today’s primary national security concerns and the threats that the U.S. government and other security observers consider to pose the most clear and present danger to U.S. territory and people reveals that these
concerns differ from those that existed in the immediate post-September 11th environment, in which time period the existing TRIG grounds were conceived. Furthermore, while the generalized threat of terrorism remains of national concern, the nature of this threat has shifted to an extent that the fears that drove the expansion of TRIG are no longer relevant to TRIG as it continues to operate. Ultimately, existing TRIG does not address the contemporary national security concerns of the United States; it must therefore be re-configured and relaxed in the face of such incompatibility.

Determining exactly which of the myriad of threats represent the greatest threats to the national security of the United States can be complicated, given the number of actors and participants in the field who have divergent opinions on the subject. The first source of information is the United States government itself. The Director of National Intelligence issued the U.S. Intelligence Community Worldwide Threat Assessment Statement for the Record before the Senate Armed Services Committee on February 16, 2012. The statement provides extensive detail about the numerous state and nonstate actors and intersecting political, economic, and military developments and trends which constitute “the multiplicity and interconnectedness of potential threats—and the actors behind them” that constitute the greatest threats to the United States. The Director of National Intelligence states that “by providing better strategic and tactical intelligence, we can partner more effectively with other Government officials at home and abroad to protect our vital national interests.” In short, the Threat Assessment intends to outline the biggest challenges to national security in order to allow government officials to devise better strategies for overcoming them.

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130 James R. Clappen, Director of National Intelligence, U.S. Intelligence Community Worldwide Threat Assessment Statement for the Record (Feb. 16, 2012) [hereinafter Threat Assessment].
131 Id. at 1.
132 Id.
The Threat Assessment first discusses terrorism and the “global jihadist movement,” a term that describes the shifting nature of the terrorism threat that has existed since before the September 11th attacks. While the Threat Assessment considers terrorism to still represent a threat today, it recognizes that the global jihadist movement has become fragmented; the nature of the terrorism threat differs now from how it existed immediately post-September 11th. Specifically, the Threat Assessment notes that the death of Osama bin Laden constituted a loss for the global jihadist movement of its “most iconic and inspirational leader” and that the new al-Qaeda leader lacks bin Laden’s compelling leadership style. Ultimately, it concludes that core al-Qaeda is in decline, that leadership of the rest of the global jihadist movement is fractured, and that homegrown violent extremists may represent a more considerable threat than attacks from external terrorist organizations.

Aside from the changing terrorism threat, the Threat Assessment recognizes weapons of mass destruction proliferation, cyber threats, counterintelligence, and mass atrocities as threats worthy of discussion. The Threat Assessment then delves into regional threats, including an investigation of the various internal conflicts within countries around the world that may have threatening possibilities to U.S. nationals abroad. It raises concerns about the al-Qaeda presence in Afghanistan and Pakistan, the modernization of the People’s Liberation Army in China, the tenuous future of North Korean under Kim Jong Un; the regional implications of

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133 See id. at 1-5.
134 Id. at 2.
135 Id.
136 Id. at 2-4.
137 Id. at 6-9.
138 Id. at 9-26.
139 Id. at 9-10.
140 Id. at 13.
141 Id. at 12.
the Arab Spring;\footnote{Id. at 14.} violence, corruption, and developing regional terrorist movements, such as Boko Haram, in Africa;\footnote{Id. 18-20.} and growing violence and authoritarianism in Latin America.\footnote{Id. at 23-26.} While some of these regional threats involve the possibility of terrorism, these terrorist threats remain contained to isolated, country-specific concerns. More prominent in this regional assessment is the determination that corruption and generalized political instability represent the greatest threats to U.S. interests abroad.

An analysis of the Threat Assessment reveals the changing nature of contemporary national security concerns and the extent to which such concerns have evolved since the immediate post-September 11th era in which TRIG was conceived and expanded. After the failures in immigration and border protection that resulted in the admission of the September 11th bombers, the creators of TRIG and its varied implementing pieces of legislation were concerned with excluding from the United States any individual with potential ties to a terrorist organization, whether this tie constituted direct and voluntary participation within a terrorist organization or resulted from material support, whether voluntary or involuntary, of such an organization. In a national climate fraught with fear that another mass atrocity could occur at any time and from any number of actors, the drafters of TRIG adopted an attitude that it was better to exclude potentially innocent immigrants than it was to admit even one potentially dangerous immigrant. Now, however, the nature of threats against the United States have waned to some extent; the Threat Assessment recognizes the fractured nature of the global jihadist movement and in fact recognizes that homegrown terrorists may represent a more viable threat. As a result, the climate of pervasive apprehension that existed after September 11th no longer
exists, and the Threat Assessment, a product of the U.S. government itself, supports this conclusion.

Rather, the Threat Assessment and other observers of national security have taken a broader view of what can constitute a threat to national security. For example, the Threat Assessment includes considerations of unresolved economic strains, energy concerns, water security, and the growing prevalence of natural disasters and public health epidemics as viable threats to U.S. national security. The U.S. Intelligence Community is not alone in its widened perspective concerning what may pose a danger to U.S. national security. Daniel Byman, a Security Studies professor at Georgetown University’s School of Foreign Service, responded to the view expressed during the 2012 Vice Presidential Debate that Iran represents the greatest threat to national security, presenting five alternate threats that may prove more dangerous than the Iranian threat. He lists the myriad of threats that exist within Pakistan, such as ethnic strife, disputed borders, and endemic corruption; North Korea’s nuclear program; China’s obstructionist position within international affairs; the increasingly bloody Syrian conflict; and exorbitant budget deficits within the United States as five alternative threats that pose a greater danger to the United States than Iran. A six-page article received ten additional pages of online comments; clearly there is no consensus concerning what poses a threat to the United States. Byman’s claims concerning China, however, have been validated with a House Permanent Select Committee on Intelligence report analyzing the issues posed by Chinese telecommunications companies Huawei and ZTE and their potential threat to U.S. national

145 Id. at 28-30.
147 Id.
148 Id.

Furthermore, the threat of climate change has received more attention in recent years. A growing number of policymakers at the Pentagon claim that “the changing global climate will pose profound strategic challenges to the United States in coming decades” and that such change could “topple governments, feed terrorist movements, or destabilize entire regions.”\footnote{John M. Broder, “Climate Change Seen as Threat to U.S. Security,” The N.Y. Times (Aug. 9, 2009), available at http://www.nytimes.com/2009/08/09/science/earth/09climate.html.} Climate change has received so much attention as a potentially deadly threat that the National Defense University conducted an exercise in December 2008 to explore the potential impact of a destructive flood in Bangladesh that sent hundreds of thousands of climate refugees into India, resulting in religious conflict, epidemics of contagious diseases, and massive infrastructure damage.\footnote{Id.}

Perhaps the most prevalent feature of discussions on threats to U.S. national security is the lack of consensus concerning how to establish a hierarchy or even a generalized list of threats. Given the U.S. government’s limited resources, not all potential threats to national security can receive equal attention, but the question of which threats should receive attention and which should be accepted as facts of life largely remains unanswered and hotly debated. A November 2012 RAND Corporation panel entitled “Assessing Risk: Where Will It Come
From?” highlights this contentious debate. Five national security experts discussed what they consider to be the most potent threats to the safety and security of the United States. The topics of their nightmares spanned from the national debt to the spread of terrorism (and the government’s overreaction to that spread) to China to global climate change.

A discussion of the greatest threats to U.S. national security is unlikely to result in any kind of consensus where the U.S. government and national security observers agree on a clean, concise list of “top ten threats to the United States.” It is a debate that will be ongoing as the international community evolves and the nature of threats against the United States evolves with it. What is evident, however, is the movement away from the single-mindedness of the post-September 11th national security debate, wherein the prevention at all costs of another major terrorist attack became the raison de’tre of both the national security and immigration agencies with the U.S. government. The national security landscape that exists today differs greatly from that of the time period in which TRIG was expanded. TRIG as it exists today has little relationship to contemporary national security concerns; TRIG in 2002 could have prevented the admission of a suicide bomber, but TRIG in 2012 is unlikely to have any effect on North Korea’s nuclear program, China’s isolationism, the national debt, or global climate change. Given the evolved nature of national security, TRIG must undergo an overhaul in order to relax its extremely rigid “exclude over admit” attitude and ensure that only those individuals who actively and presently pose a threat to the United States fall within TRIG’s trap.

154 Id. The five panelists were former FDIC Chair Sheila Bair, former Deputy Secretary of Homeland Security Admiral James Loy, economist Stephen Roach, terrorism expert Brian Michael Jenkins, and RAND scientist Robert Lempert.
155 Id.
Such an overhaul, however, is likely to take years, requiring implementing legislation and revised agency guidance, not to mention the general political will to undertake such an endeavor. During this revision, immigration law practitioners who represent clients who may be vulnerable to TRIG must continue to operate under the existing, stringent terrorism bar. Such practitioners should not, however, merely wait for such a revision when they have clients who require an innovative solution now. With some imagination, a practical solution lies entirely within asylum law as it exists today: the creation of a new particular social group to protect such vulnerable clients.

PART VI. BENITEZ-RAMOS AND BEYOND: PROTECTING THE VICTIMS OF TERRORISM UNDER ASYLUM LAW

A. BENITEZ-RAMOS V. HOLDER AND THE FORMER STATUS CASES

Asylum law in the United States is premised on the notion that no individual anywhere in the world should suffer persecution at the hands of his government or a group that the government cannot or will not control merely because of a characteristic that is fundamental to his identity. Asylum therefore developed as a form of relief available to applicants who could show a well-founded fear of persecution on account of his race, nationality, political opinion, religion, or membership in a particular social group (PSG). 156 This last protected ground has been the most contentious, as its definition is ambiguous and BIA precedent on the matter has been divisive in the circuit Courts of Appeals. Nevertheless, despite its often-complicated nature, the PSG ground for asylum provides an alternative to the terrorism bar and the waiver system for asylum applicants who participated in or materially supported a designated or otherwise classified terrorist organization in their home countries. Specifically, these asylum

applicants may file applications for asylum based on their membership in a newly recognized PSG: former members or assistors to groups that engaged in terrorist activity.

The Third Circuit hinted at the possibility for cognizable PSGs based on an applicant’s “former status” in *Lukwago v. Ashcroft*.

Lukwago, a native of Uganda, was kidnapped into the Lord’s Resistance Army after LRA rebels killed his parents. He was forced to perform manual labor, receive military training, and fight on the front line against government soldiers. Upon arriving in the United States, he applied for asylum based on both past persecution by the LRA and fear of future persecution by both the LRA and the Ugandan government if returned to Uganda. The BIA also denied him asylum because his proposed PSG, “all persons under the age of eighteen,” was not a cognizable social group and he established no nexus between his proposed PSG and his treatment by the LRA. The Third Circuit reversed the BIA’s decision, holding that Lukwago’s proposed PSG, which it interpreted as “escaped LRA child soldiers,” was a cognizable PSG for purposes of future persecution. The court noted that Lukwago would likely suffer persecution from the LRA as an escaped child soldier, reasoning that “[t]he treatments meted out to children who escape from the LRA and then fall back into their hands suggest that a person within this category would be in grave danger if members of the rebel forces were to see and recognize him/her.”

*Lukwago* began the process of establishing the viability of new PSGs based on former status or former membership in a group. This possibility reached new heights in 2009 with the dual Seventh Circuit decisions of *Gatimi v. Holder* and *Benitez Ramos v. Holder*.

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157 329 F.3d 157 (3d Cir. 2003).
158 Id. at 164.
159 Id. at 165.
160 Id. at 166.
161 Id. at 181.
162 Id. at 179.
*Gatimi v. Holder* presented the question of whether the PSG of “defectors from the Mungiki,” a violent group in Kenya with ambiguous political aims and strange religious observances that was generally viewed as a cover for extortion and other financial crimes, was a cognizable PSG for the purposes of asylum.\(^{163}\) Gatimi defected from the Mungiki in 1999 and subsequently endured threats to himself and his family, kidnapping, and torture from other Mungiki members.\(^{164}\) The Seventh Circuit acknowledged the BIA’s legitimate interest in ensuring that PSGs are not based merely on the shared persecution that the members in the group suffer, but it held that Mungiki defectors would likely be targeted on account of their break from the group.\(^{165}\)

In *Benitez Ramos v. Holder*, the court held that Ramos merited a grant of withholding of removal, which requires the same elements as asylum with a higher burden of proof, on account of his membership in the PSG of “tattooed, former Salvadoran gang members.”\(^{166}\) Ramos testified that he joined the Mara Salvatrucha, a violent street gang in El Salvador, when he was fourteen. When he arrived in the United States, he renounced his gang membership and claimed that the gang would kill him for his refusal to rejoin if returned to El Salvador.\(^{167}\) The BIA held that “‘membership in a criminal gang [cannot] constitute membership in a particular social group,’”\(^{168}\) but the Seventh Circuit found that a gang is a group and being a former member of a group is an innate characteristic that a person is incapable of changing.\(^{169}\) While “participation in [gang activity] is not fundamental to gang members’ individual identities or consciences, and

\(^{163}\) 578 F.3d 611, 612 (7th Cir. 2009).
\(^{164}\) *Id.* at 614.
\(^{165}\) *Id.* at 616.
\(^{166}\) 589 F.3d 426, 429 (7th Cir. 2009).
\(^{167}\) *Id.* at 428.
\(^{168}\) *Id.* at 429.
\(^{169}\) *Id.*
they are therefore ineligible for protection as members of a social group,” the BIA had never presented a reason for why the bars that render active gang members ineligible for asylum should also apply to former members of gangs. Given that Ramos’s proposed PSG was cognizable, the Seventh Circuit remanded the case to the BIA to determine the likelihood of future persecution. The BIA has not yet rendered its decision.

These Seventh Circuit precedents both recognized existing cases that established the possibility for former status as a PSG and paved the way for other circuits to recognize former status as the basis for a PSG. These cases provide a compelling alternative to the terrorism bar and its cumbersome waivers when asylum adjudicators are presented with a case in which the applicant has some terrorist activity, association with a terrorist organization, or material support of a terrorist group in his past. Furthermore, such an alternative would be more in keeping with the spirit of asylum law and of national security law.

B. “FORMER STATUS” AS A PARTICULAR SOCIAL GROUP FOR PREVIOUS PARTICIPANTS IN TERRORIST ORGANIZATIONS

In the three milestone cases of Lukwago, Gatimi, and Benitez Ramos and other cases preceding and following these cases, the groups with which the applicants were formerly associated were regularly engaged in criminal activity. Nevertheless, because the applicants had

170 Id.
171 Id. at 430.
172 Id. at 431.
173 See Koudriachova v. Gonzales, 490 F.3d 255 (2d Cir. 2007) (acknowledging the possibility that KGB defectors may be a PSG); see also Sepulveda v. Gonzales, 464 F.3d 770 (7th Cir. 2006) (recognizing former employees of the Attorney General’s office in Colombia as a PSG); see also Cruz-Navarro v. INS, 232 F.3d 1024 (9th Cir. 2000) (recognizing former police or military officers in Peru as a PSG); see also Velarde v. INS, 140 F.3d 1305 (9th Cir. 1998) (recognizing former bodyguards to the Presidential family in Peru as a PSG); see also Matter of C-A-, 23 I & N Dec. 951 (BIA 2006) (acknowledging the possibility that former police officers in Colombia may be a PSG); see also Matter of Fuentes, 19 I & N Dec. 658 (BIA 1988) (recognizing former military officers in El Salvador as a PSG); but see Arteaga v. Mukasey, 511 F.3d 940 (9th Cir. 2007) (holding that former gang members from El Salvador are not a cognizable PSG, but focusing heavily on the possibility that the applicant was a current gang member as well).
174 See Ayala v. Holder, 640 F.3d 1095 (9th Cir. 2011) (recognizing former military officers in El Salvador as a PSG); see also Urbina-Mejia v. Holder, 597 F.3d 360 (6th Cir. 2010) (recognizing former gang members from Honduras as a PSG).
renounced their former voluntary membership in these groups and would likely face persecution at the hands of those same groups because of their defection upon return to their home countries, the various circuit courts found them deserving of a grant of asylum and/or withholding of removal. The same logic can be applied with respect to former members of terrorist organizations of any Tier. This method of circumventing the confusion of the terrorism bar and the complicated waiver process would integrate any potential terrorism or national security issues into the ordinary asylum analysis and require asylum adjudicators to consider the applicant’s former history of terrorist activity, whether voluntary or involuntary, along with the other asylum factors. This concurrent consideration would present the asylum adjudicator with a clearer picture of the asylum applicant’s full history rather than forcing him to put on unyielding blinders as soon as the possibility of the terrorism bar began looming in the background. The express purpose of asylum law is the protection of individuals who will be persecuted for an innate characteristic or a characteristic that they should not be required to change.

Simultaneously, the USA PATRIOT Act’s preamble states that this legislation was adopted “to deter and punish terrorist acts in the United States and around the world.”\footnote{USA PATRIOT Act, supra note 29.} The current asylum scheme for addressing terrorism provides little protection to some of the most genuine victims of terrorism: those individuals who formerly participated in terrorist activity, whether of their own volition or under duress, who have renounced their terrorist ways and wish to make a new start in the United States.\footnote{Durbin Statement, supra note 1; The “Material Support” Bar: Denying Refuge to the Persecuted? Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary, 110th Cong. (2007) (statement of Anwen Hughes, Senior Counsel, Refugee Protection Program, Human Rights First) [hereinafter Hughes Statement], available at www.gpo.gov/fdsys/pkg/CHRG.../pdf/CHRG-110shrg47451.pdf.; The “Material Support” Bar: Denying Refuge to the Persecuted? Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary, 110th Cong. (2007) (statement of Bishop Thomas Wenski, Diocese of Orlando, and Chairman of the International Policy Committee, U.S. Conference of Catholic Bishops, Orlando, Florida) [hereinafter Wenski Statement], available at www.gpo.gov/fdsys/pkg/CHRG.../pdf/CHRG-110shrg47451.pdf.} This lack of protection defines the express desire to deter terrorism
worldwide; through protection of victims of terrorism, the US can “win the hearts and minds”\textsuperscript{177} of potential asylees around the world and throw a wrench in the cycle of terrorist growth.

In \textit{Benitez Ramos}, the Seventh Circuit acknowledged the BIA’s concern that members of criminal enterprises should not be afforded the protections of asylum in the United States.\textsuperscript{178} However, the court noted the difference between current members of gangs and former members:

Being a member of a gang is not a characteristic that a person “cannot change, or should not be required to change,” provided that he can resign without facing persecution for doing so….But if he \textit{can’t} resign, his situation is the same as that of a former gang member who faces persecution for having quit….A gang is a group, and being a former member of a group is a characteristic impossible to change, except perhaps by rejoining the group.\textsuperscript{179}

While “the term ‘particular social group’ surely was not intended for the protection of members of the criminal class,”\textsuperscript{180} there is no indication that asylum law is not intended for the protection of former members of the criminal class who have renounced their membership in that class. The act of renouncing one’s membership entails a voluntary relinquishing of the ideals, goals, and tactics that a particular group employs, and indeed the fact that an asylum applicant demonstrates a subjective fear that his former compatriots and friends would persecute their old ally is an indication of the genuineness of his decision to renounce his former lifestyle.

Viewing applicants who participated in or assisted terrorist organizations in the past through the lens of PSG analysis would not eliminate all protections in the asylum or immigration system against admitting genuine threats to the United States. Asylum is a discretionary form of relief, and no new PSG will alter that particular element of asylum

\textsuperscript{177} Elizabeth Dickinson, “A Bright Shining Slogan,” Foreign Policy (September/October 2009), \textit{available at} http://www.foreignpolicy.com/articles/2009/08/13/a_bright_shining_slogan. This references a 2006 quotation from the US Army and Marine Corp “Counterinsurgency Manual,” in which the authors recommend the minimal use of force because “[p]rotracted popular war is best countered by winning the hearts and minds of the populace.”

\textsuperscript{178} \textit{Benitez Ramos}, 589 F.3d at 429.

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} \textit{Id.}
analysis. Even if an adjudicator recognized “former members or assistors of groups that engaged in terrorist activity” as a PSG, he could deny the applicant’s plea for asylum if he found, in his exercise of discretion, that the applicant was still a member of a terrorist organization, continued to espouse terrorist ideologies, or posed a genuine threat to the national security of the United States or United States nationals. The Seventh Circuit noted in *Benitez Ramos* that “if he [Ramos] is found to have committed violent acts while a member of the gang...he may be barred from the relief he seeks for reasons unrelated to whether he is a member of a particular social group.”

While a grant of discretion always has the potential to result in an abuse of power, this method of addressing applicants with a terrorist past is preferable to the existing system because it requires the asylum adjudicator to view the applicant’s terrorist past in conjunction with all of the other facts of his case. Rather than spotting a potential terrorist history and immediately stamping the application with the terrorism bar, adjudicators must address the applicant’s former terrorist activity in light of the requirements for a PSG and then consider all of the other attendant factors, such as whether the applicant committed violent acts, whether he did so under duress, and whether he still engages in or supports terrorist activity, as part of an all-encompassing discretionary analysis.

This proposed PSG satisfies the initial prerequisites for a PSG as required by the BIA in *In re Acosta*. PSGs are recognized as a ground for asylum because they are extension of the other protected grounds, and as such must share the fundamental core of the other grounds: a common characteristic among all members of the class that is innate or so fundamental that the

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181 *Id.* at 431.
asylum applicant cannot change or should not be required to change.\textsuperscript{182} If a proposed PSG centers around a common characteristic that its members cannot or should not be required to change, then it satisfies the initial criteria for viability. As the Seventh Circuit noted in \textit{Benitez Ramos}, the only possible way to change one’s status as a former member in a group is to rejoin that group and become a current member.\textsuperscript{183} Former members or assistors of groups that engaged in terrorist activity can make the same argument. In order to change their former status, they would be forced to return to the terrorist group and re-engage in terrorist activity. If an asylum adjudicator were to reject the PSG of “former members or assistors of groups that engaged in terrorist activity,” he would in essence hold that this status is a characteristic that the applicant either can change or should change. The adjudicator would be arguing that the applicant can or should change this status by returning to the terrorist organization, thereby punishing the applicant for who he once was, despite his change of heart, and encouraging him to return to his old ways.

Furthermore, classifying former members or assistors of groups that engaged in terrorist activities as a PSG and analyzing asylum claims through that lens is preferable to the existing approach because this proposed method looks to the voluntariness of the applicant’s actions only as a discretionary factor and not as a requirement for a waiver. The existing waiver system is inadequate to address many of the possible situations in which an individual participated in terrorist activity. For example, no waiver exists for applicants who voluntarily provided material support to Tier III terrorist organizations or for applicants who were members of Tier I or Tier II terrorist groups under duress. This proposed method of addressing the terrorism issue is not concerned with whether the applicant’s participation was voluntary or involuntary; it cares only


\textsuperscript{183} \textit{Benitez Ramos}, 589 F.3d at 430.
about whether the applicant has truly renounced his membership in or support of a terrorist organization. It must be emphasized that this PSG would be available only to asylum applicants who are former members or supporters of terrorist organizations. Current members of terrorist organizations should appropriately be barred from asylum. Voluntariness will be considered as a discretionary factor but it should not be dispositive so long as the applicant can demonstrate through credible and corroborated evidence that he has in fact ceased his membership with or support of a terrorist organization and has no intention of engaging in terrorist activity in the future. This will of course require the asylum adjudicator to make a credibility assessment, but this is an ordinary part of the asylum process as it exists today.

While the Seventh Circuit has rejected the additional PSG requirements of social visibility and particularity as established in the BIA case Matter of C-A-,\(^{184}\) PSGs based on former status have been recognized in jurisdictions that accept and utilize these additional requirements.\(^{185}\) The proposed PSG of “former members or assistors of groups that engaged in terrorist activities” would likewise withstand these tests as well. In Matter of C-A- itself, the BIA held that “shared past experiences do constitute an immutable characteristic because a past experience cannot be undone.”\(^{186}\) Additionally, neither Acosta nor Matter of C-A- requires a “voluntary associational relationship” among group members.\(^{187}\) Given the clear statement in BIA and circuit court precedents that past experiences, such as former participation in terrorist activity, form an immutable characteristic that deserves protection under asylum law.

The PSG argument for former members or assistors of groups that engaged in terrorist activity receives additional support from dicta in Benitez Ramos. The Seventh Circuit noted that

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\(^{184}\) 23 I & N Dec. 951 (BIA 2006).

\(^{185}\) See Ayala, 640 F.3d 1095; see also Koudriachova v. Gonzales, 490 F.3d 255 (2d Cir. 2007).

\(^{186}\) 23 I & N Dec. at 958; Koudriachova, 490 F.3d at 263.

\(^{187}\) Id. at 956-957; Koudriachova, 490 F.3d at 263.
the existing asylum laws bar from asylum and withholding of removal any individual who persecuted others or who has committed serious nonpolitical crimes, they say nothing about barring former gang members because of the ambiguity about what exactly constitutes or defines a “gang.” The court noted that this absence in the laws of any mention of former gang members could also be “because of the variety of activities, not all criminal, that some ‘gangs’ engage in; or because of the different levels of participation, some innocuous, of members of some gangs.” While the immigration laws do mention terrorism quite extensively, the above analysis reveals that the laws concerning terrorism are vague, overbroad, and inflexible.

Merely from the requirement that terrorist groups be divided into three Tiers depending on their activities and dangerousness to the United States, it is clear that there is no clear definition of a “terrorist group” any more than there is a clear definition for “gangs.” Just as not all gang activities are criminal, so not all activities of classified terrorist groups are criminal; not all gang actions are offensively violent, and not all “terrorist” activities are offensively violent. Where there are different levels of participation in gangs, there are also different levels of participation in terrorist groups, some of which are not even voluntary. Asylum adjudicators should therefore adopt the same method of conceiving terrorist groups as the Courts of Appeals have adopted when considering gangs. The overbroad definition of Tier III terrorist groups in particular indicates that such groups are nuanced, varied, and not easily defined due to their many activities, tactics, goals, and levels of participation.

This alternative approach to addressing terrorism in asylum law withstands the tests of consistency with existing case law and simple practicality. In keeping with recent jurisprudence

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189 Benitez Ramos, 589 F.3d at 430.
190 Id.
191 See id.
stating that former membership in a group or former status constitutes a PSG for the purposes of asylum, a PSG of “former members or assistors of groups that engaged in terrorist activity” would meet the requirements for PSGs outlined in Acosta and Matter of C-A-. Former status is an immutable characteristic that an individual cannot change, and asking him to change that status would be tantamount to requiring him to return to an organization that engages in terrorist activity and would likely persecute him for defecting or renouncing his old ideology. This PSG would be available only to applicants who can credibly show that they have renounced their membership in the terrorist group; applicants who are current members of terrorist organizations certainly may not claim the protection of this PSG. Furthermore, an asylum adjudicator retains the authority to reject an asylum application based on discretion if he finds that the applicant still engages in terrorist activity, committed serious nonpolitical crimes or engaged in the persecution of others during his time in the terrorist organization. However, such activities in which an applicant engaged during his former membership should be considered in light of their voluntariness.

This proposed social group may, to some critics, fly in the face of the purpose of asylum law, which is intended to protect “the helpless men, women, and children who are persecuted in their countries because they belong to a particular social group.” The Seventh Circuit’s decision in Benitez Ramos sparked a debate about whether previous gang members should be allowed to seek protection in the United States. Critics argued that courts should not protect gang members, whether former or current, but should instead protect only innocent people who fear for their lives through no fault of their own. Traditionally, asylum law is intended to protect only those individuals who are “most deserving of mercy,” and opponents of Benitez

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193 Id.
Ramos disparaged the notion of “extending mercy to those seen as hardened criminals who have left organized crime.” This opposition transfers easily to the suggestion that courts should provide protection to individuals who formerly participated in terrorist activity, and would perhaps be further augmented given the heightened attention to global terrorism in a post-9/11 world. Critics could argue that individuals who associate with terrorist groups that commit brutal crimes should be denied protection and forced to “pay the price of their associations.” This side of the argument could hold that asylum was designed to protect victims of crimes and atrocities, rather than those who committed them.

Nevertheless, these criticisms reflect the “reactionary, blunt-instrument approach to a complex issue” in which “fear overcame common sense and our collective conscience.” The individuals who would fall under the proposed PSG are not hardened criminals, but rather individuals who have either experienced a legitimate change of heart or never wished to participate in terrorist activity in the first place. Critics imply that people who once committed criminal acts can never overcome their pasts; Benitez Ramos himself, however, was a member of the MS-13 gang in El Salvador for thirteen years but chose to flee the gang after the birth of his child and devoted himself to Christian values in the United States. Furthermore, many individuals who are currently classified as “terrorists” because they aided or provided material support to terrorist organizations are not hardened criminals but rather genuine victims of terrorist activities. For example, Jennifer, the young girl abducted into the Lord’s Resistance...
Army, could hardly be called a “criminal” when she was kidnapped and forced to become a “wife” of an LRA commander, and yet the United States declined to protect her from the LRA because she provided them with “material support.”\textsuperscript{200} Under the current terrorism bar and waiver system, individuals like Jennifer have no hope that they could resettle in the United States, but providing them protection under asylum law would offer an incentive for these people to stop assisting terrorist organizations and seek refuge in the United States.\textsuperscript{201} This promise of refuge would give hope to people like Jennifer, inspiring them to flee from their patterns of terrorist activity and start new lives. As Liesen argues in the context of granting asylum to former gang members:

\textquote{Someone should not be denied protection simply because they once belonged to a gang that has done some bad things. Many of these people are themselves victims and should be treated as such. It is unfair to deny someone the ability to make a life for themselves because of controlling stereotypes.}\textsuperscript{202}

Critics of a particular social group that protects former participants in terrorist activity could also argue that this PSG raises significant evidentiary issues, as the consequences of granting asylum to these individuals who has not in fact renounced his terrorist activities are more dire than the consequences of granting asylum to an applicant who, for example, was not in fact persecuted in his home country. Asylum applicants under the proposed PSG would be responsible for producing evidence to demonstrate that they have genuinely ceased their former terrorist activity. The evidentiary burden is a concern in most asylum cases, as applicants flee their countries without the ability to carefully gather the documents that will be necessary or helpful when they apply for asylum in the United States. Asylum applicants under this PSG face an additional burden, as they must prove both their sincere shift away from terrorist affiliation

\textsuperscript{200} Durbin Statement, \textit{supra} note 1.
\textsuperscript{201} See Liesen, \textit{supra} note 192, at 1004.
\textsuperscript{202} \textit{Id.} at 1004-1005.
and their promise not to commit any terrorist activity in the future. They somehow have to show evidence of their state of mind and their future actions. How can a person prove that he has had a change of heart in a way and to an extent that an adjudicator would be comfortable allowing that person to remain in the United States despite his questionable past? Critics would argue that because an adjudicator can never know for sure what will happen in the future, it is preferable to exclude individuals who fall under the terrorism bar than engage in a case-by-case adjudication that would potentially protect those individuals who unfairly fall under the terrorism bar.\(^{203}\)

Despite these legitimate evidentiary concerns, the burden of proof in such an asylum case is not insurmountable. A large part of the evidentiary concern stems from the government’s own failure to inform asylum applicants about the kind of evidence it wants. To date, the Department of Homeland Security has not made public any information regarding the substantive criteria that it requires to make a determination in a case that involves the terrorism bar.\(^{204}\) Typically, when USCIS suspects that an asylum applicant may face a ground of inadmissibility, it issues a Request for Evidence, through which the applicant can provide the government with specific documentation to prove that he is not inadmissible.\(^{205}\) However, when USCIS believes that an applicant faces the terrorism bar, it does not request more evidence or inform the applicant of the reasons for its belief that the terrorism bar is implicated; rather, it denies the case with no explanation other than a letter telling the applicant that he has been denied asylum because he falls under the terrorism bar.\(^{206}\) Therefore, a key step to overcoming the evidentiary hurdle lies in the government’s release of information concerning its substantive criteria and procedural

\(^{203}\) Id. at 1002.


\(^{205}\) Id. at 17.

\(^{206}\) Id.
practices regarding the terrorism bar. As the National Immigrant Justice Center noted in its FOIA request:

It is critical that the public receive more information immediately regarding DHS’s interpretation and implementation of the…terrorism bar to ensure that the Agency is applying the statute in conformity with Congressional intent and to protect the asylum seekers, refugees, asylees and their families, whose lives are placed at risk because of the bar. 207

Nevertheless, an asylum applicant can provide some proof that he merits a grant of asylum despite his former participation in terrorist activity. An adjudicator’s determination depends on a case-by-case, totality of the circumstances analysis. Such a consideration would start with a focus on what the applicant actually did and the circumstances under which he acted. 208 This tactic would require collaboration with the executive branch, which would contribute its foreign policy and national security expertise and aid the adjudicator in extensive background checks through its access to “comprehensive intelligence, classified information, and criminal and diplomatic policy considerations.” 209 This stage of the evidentiary process would remove the burden of proof from the applicant and allow the adjudicator to determine the seriousness and extent of the applicant’s past activities based on the information that the executive branch possesses. While requiring the adjudicator to undergo its own fact-finding may be costly in terms of time and money, this extensive background check would ensure that the adjudicator could make an informed decision that would best take into consideration the nature of the applicant’s prior actions. This is the best way of ensuring that the individuals who are

207 Id. at 18.
208 Hughes Statement, supra note 176.
admitted to the US as refugees are in fact former members or assistors of groups that engaged in terrorist activity.\textsuperscript{210}

The second step to overcoming the evidentiary conundrum falls to the applicant. Under the totality of the circumstances approach, the applicant would be required to produce any and all evidence that would show: (1) his former association with a group that engaged in terrorist activity; (2) his genuine change of heart and renunciation of terrorist association; and (3) his dedication not to associate with terrorist groups in the future. Paul Rosenzweig of the Department of Homeland Security has suggested that the factors to be proven could include the amount, type, and frequency of participation or support provided; the nature of the activities that the organization committed; the nature of the activities that the applicant committed; the applicant’s awareness of the organization’s overarching goals and activities; the length of time since the applicant’s participation; and the applicant’s conduct since that time.\textsuperscript{211} These factors would be balanced with other factors relevant to the likelihood of persecution by the group with which the applicant was formerly associated, including the possibility that the applicant could have avoided participation with the group; the severity and type of harm that the organization inflicts on its adversaries; and the imminence of the harm.\textsuperscript{212} The type of documents and evidence that would be required to prove these elements would be the traditional documents and evidence for an asylum claim: the applicant’s own sworn affidavit, letters and statements of support from individuals who know the applicant; country condition documents and reports by experts; and any other available information that would convince the adjudicator that the applicant merits a grant of asylum.

\textsuperscript{210} See Liesen, \textit{supra} note 192, at 1005.

\textsuperscript{211} Rosenzweig Statement, \textit{supra} note 209.

\textsuperscript{212} See \textit{id}. 
Despite the criticisms of making asylum available to former members or assistors of groups that engaged in terrorist activity, the policy of expanding PSGs to include these individuals would ensure that genuine victims of terrorism and people who legitimately qualify as refugees under US law are offered protection from persecution. Such an approach would integrate terrorism analysis into the existing asylum analysis and present the asylum adjudicator with a complete picture of the applicant’s troubled past. The existing landscape of terrorism analysis, with the breadth of the terrorism bar, the problem of accurately defining a “terrorist group” in the first place, and the inadequacies of the current waiver system, require a new approach. The creation of a new PSG of “former members or assistors of groups that engaged in terrorist activity” would bring terrorism analysis in line with the purpose of asylum law and the US’s express goal of eradicating the spread of terrorism worldwide.

**PART VI. CONCLUSION**

In the aftermath of September 11th, immigration and asylum law became increasingly concerned with protecting the national security of the United States and the security of US nationals. In its desire to reduce the possibility that genuine terrorists may slip through the cracks in the US immigration system, Congress and the Executive Branch, through the Secretary of State, the Secretary of Homeland Security, and the Attorney General, have developed a scheme that is overly broad, ambiguous, and unyielding. The definition of Tier III terrorist organizations allow for the ad hoc determination that a particular group is a “terrorist organization” without any publication or notification requirements, thereby depriving immigration applicants of any notice that their previous activities with a given group or association might subject them to the terrorism bar. Furthermore, the term “material support” has been construed so broadly that even the smallest contribution is sufficient to bar an
immigration applicant from admission. Furthermore, the waiver system that has developed in response to some of the critiques of TRIG is inadequate and cumbersome. The waivers that exist remain subject to the immigration adjudicator’s discretion even when the applicant meets all of the threshold requirements for the waiver. Furthermore, development of additional or more comprehensive waivers requires the collaboration of three high-ranking members of the Executive Branch and the political will to create such waivers at all.

Given the flaws with TRIG and the patchwork approach to resolving these flaws that has developed in the waiver system, a new approach to addressing terrorism in immigration and asylum law is necessary, especially considering the shift between the major national security concerns when TRIG was expanded and those that exist in the contemporary global environment. Rather than waiting for overhauling TRIG reform or creating a new framework merely for analyzing applications where the applicant has a terrorist past, a new solution can be integrated into the existing immigration framework. The asylum protections afforded to particular social groups provides a starting point for this integration. Using the recent string of Court of Appeals decisions granting asylum to former members of criminal organizations based on their membership in a particular social group, asylum applicants who at one point in their past participated in terrorist organizations can apply for asylum on the basis of membership in the particular social group of “former members or assistors of groups that engaged in terrorist activity.” This proposed group is viable under the requirements for defining particular social groups and flows logically from the existing logic in Court of Appeals decisions. Finally, the approach of addressing terrorism through the existing asylum framework would realign the terrorism analysis with the purposes of asylum law and national security law. This approach would ensure that terrorism’s true victims and individuals who have renounced their terrorist
ideologies in favor of a new life are given protection in the United States and assist in the elimination of terrorism’s global spread. These applicants would no longer be classified as terrorists and would instead be granted asylums as victims of the same evil that the United States has devoted itself to eradicating.