## Refugees From Oppressive Regimes Kept Out

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In 1993 a Mandingo family in Liberia was kidnapped by rebels working for Charles Taylor, the former Liberian president now facing war crimes charges in the Hague. The wife and her 13-year-old daughter were repeatedly raped and, with the husband and three other children, forced to work for two weeks as slaves for the rebels, fetching water and cooking for them.

Now living in a refugee camp in West Africa while awaiting resettlement to the United States, the family members were interviewed in February by a Department of Homeland Security adjudicator, who found they had the "credible and well-founded fear of persecution" required for refugee status.

But the official discovered something else, as well.

The slave labor the wife and children provided violated a provision of U.S. immigration law, one that forbids admittance of anyone who provides "material support" to a terrorist organization.

Whether that support — the cooking and the fetching of water — took place under threat of torture or death is irrelevant. Whether the "support" is as minimal as fixing one meal instead of many does not matter, either. According to the family's case file, their refugee claim was put on hold, and they remain in the camp.

"Everyone realizes there are cases that are quite sympathetic," says Igor Timofeyev, the DHS special adviser on refugee and asylum affairs. But the language of the immigration statute is "pretty plain and pretty uncompromising," he says. "There is no exception depending on the amount of support, and it does not exempt cases of duress," adds Timofeyev, a former Sidley Austin associate and law clerk to Justice Anthony Kennedy.

Welcome to the latest unintended consequence of a post-9/11 world. In its zeal to keep real terrorists out, the United States is also barring entry to thousands of legitimate refugees and asylum seekers who now fit a new definition of terrorist so broad that it includes membership in and aid to rebel groups the United States supports — and who are fighting against regimes that Washington condemns.

"As soon as you say 'terrorism,' " notes Amnesty International refugee advocate Susan Benesch, "all hell breaks loose."

The anti-terrorism provisions of the **USA Patriot Act of 2001** and the **Real ID Act of**

**2005** created the current anomalous skein of immigration rules. And individuals potentially running afoul of the "material support" laws include not only those applying for refugee or asylum status but people already in the country seeking green cards or citizenship — anyone, says Timofeyev, using the language of immigration law, "who wants to adjudicate their status."

The numbers are significant. Congress authorized funds to pay for the resettlement of 54,000 refugees during the current fiscal year. Of that number, says a senior State Department official, an estimated 26 percent, or 14,000, will not be allowed in because they provided material support to a so-called terrorist organization. More than 1,000 of those 14,000 provided that support under duress, the official adds.

Among the 10,000 to 20,000 people granted asylum in the United States each year, some 555 applications are now being held up for material-support violations, DHS officials told U.S. refugee organizers during a May 16 meeting.

"Material support," says Ann Buwalda, who directs **Jubilee Campaign USA**, a conservative human rights group, "is crippling the refugees resettlement program to the United States."

The Bush administration does not deny there are "anomalies" in the process.

"By broadening the definition of terrorism, we inadvertently caught up some people we didn't mean to," says a senior Bush administration official involved in the issue.



But the administration opted not to back an amendment to the Senate's immigration bill that sponsors Sens. Patrick Leahy (D-Vt.) and Norm Coleman (R-Minn.) say would have given the terrorism statute the flexibility it needs to allow refugees into the country who pose no national security risk. On May 23 the amendment was crushed, 79-19.

For now, the Bush administration points to a statutory provision that allows the secretary of state and the secretary of homeland security — after consultation with the attorney general — to waive the material-support bar, something the government did for the first time last month for 9,300 ethnic Karens who fled Burma and are now living in the Tham Hin refugee camp in Thailand.

The problem, say refugee advocates, is that because the waiver process requires the involvement of three federal agencies, it is far too cumbersome to be practical. And the waiver is only applicable in material-support cases; it cannot be used to waive in members of groups that have been technically labeled terrorist organizations but are in fact fighting oppressive regimes.

"It's a fairly major step in the right direction," says the official, referring to the Tham Hin waiver. "But I'm the first one to say it's not enough.

"We're committed to resolving this problem," he adds. "How we do it, that is under

discussion. But stay tuned."

## THE GROWTH OF TERROR

"Material support" is not a new concept; it has been around since the **Immigration Act of 1990**. Statutorially, it is an elusive and elastic term that is only defined by example — and not an exhaustive list of examples at that. They include providing a terrorist group a safe house, transportation, communications, and funds. But there is no explanation of how much money constitutes "funds," no definition of what counts for transportation. Does lending your bike to a terrorist count — or must it be your automobile?

"We don't have a precise and exclusive definition of material support, so the U.S. government has interpreted the concept broadly enough that giving a glass of water or one bowl of rice to a terrorist organization is enough to raise concerns, at the very least, and in some cases deny refugee or asylum status," says Stephen Yale-Loehr, who teaches asylum law at Cornell Law School.

Still, an ambiguous definition of material support really was not a problem when the only terrorist groups recognized by the United States were all officially designated by the State Department and individually listed in the *Federal Register*.

The problem started after Sept. 11, 2001, when it became clear that a carefully vetted formal list of "Foreign Terrorist Organizations" was simply not sufficient or comprehensive enough in an era when new and highly potent terrorist groups could be formed in a matter of days.

So the USA Patriot Act of 2001 created a new class of terrorist: "any group of two or more persons, whether organized or not, who engage in certain activities can be considered 'terrorist organizations,' " the statute reads.

And those "certain activities" are arguably even broader. As the statute inelegantly puts it, a person is taking part in "terrorist activity" if he or she uses a dangerous weapon to commit "any activity which is unlawful under the laws of the place where it is committed."

And, consequently, any material support for that terrorist activity — whether it is forced support, whether the support is minimal, or whether the support goes to a "rebel" group fighting to protect minority rights — is also grounds for barring admission into the United States.

In Ecuador, for example, there are 12,300 recognized refugees from Colombia, which is riddled with paramilitary groups, all of which fit the statutory definition of a "terrorist organization." Walter Sanchez Arlt, the Quito-based resettlement officer for the **United Nations High Commissioner for Refugees**, estimates that as many as 75 percent to 80 percent of those refugees provided material support to one of those groups.

“Once an irregular group controls an area, they threaten the civilian population,” says Sanchez. “If you have a shop or you have a farm, they say, ‘You have to pay us so much money’ — the so-called war tax — ‘otherwise you have to leave or we will kill your family,’ ” he explains.

Sanchez says that in the fall of 2004, he was told the United States would no longer accept refugees with a material-support problem. “All of a sudden we couldn’t submit any more cases to the United States,” he says.

“If someone provides a glass of water to a military man, ‘material support.’ If a paramilitary tells you to give him a chicken, ‘material support,’ ” says Sanchez. “If he says, ‘Let me camp on your farm, otherwise I’ll kill you,’ it’s material support.”

In 2004, Sanchez says, 288 of the 618 refugees submitted for resettlement were assigned to the United States. In 2005 the number assigned to America dropped to 50 out of 586 resettled refugees.

**A LACK OF DISCRETION**

“She is taking it well. Better than me,” e-mailed Baltimore attorney Edward Neufville about his client Ma San Kywe, a 46-year-old Burmese woman who learned late last week that a three-judge immigration appeals panel had denied her asylum claim.

The unanimous June 8 decision was delivered almost apologetically. “It is clear that the respondent poses no danger whatsoever to the national security of the United States,” wrote the board’s vice chairman, Juan Osuna, who criticized the terrorism statute as “breathtaking in its scope.”

Kywe’s problem: Over 11 months she had provided 1,100 Singapore dollars to the **Chin National Front**, a group that has engaged in armed conflict with the Burmese government on behalf of the ethnic Chins, a Christian minority who have been persecuted and tortured by the ruling Burmese junta.

When Kywe’s Singapore work visa ran out, she could not return to Burma for fear of persecution. “So I flew from Bangkok to Frankfurt to Mexico City, then took a bus to Juarez,” she said in a telephone interview from an El Paso, Texas, detention facility a few days before the board denied her asylum appeal.

“I crossed the bridge and I told them, ‘I want to apply for asylum,’ and they put me in this place,” she said. “It’s very terrible here. There are a lot of people from Central America. I’m different. All the time I read the Bible, I’m working, I’m praying, but otherwise I’m still in jail.”

Neufville says he plans to appeal the decision to the U.S. Court of Appeals for the 5th Circuit, although the immigration board also made clear that under the **United Nations Convention Against Torture**, Kywe cannot be sent back to Burma, either.

"In sum," wrote Judge Osuna, "what we have is an individual who provided a relatively small amount of support to an organization that opposes one of the most repressive governments in the world[.] . . . And yet we cannot ignore the clear language that Congress chose in the material support provisions; the statute that we are required to apply mandates that we find the respondent ineligible for asylum for having provided material support to a terrorist organization."

The Bush administration and Congress, anxious to show a united front against terrorism, are reluctant to do anything, no matter how compelling the reason, that would affect the current terrorism statutes. Even Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) spoke out vigorously against the Leahy-Coleman amendment, although his complaint focused more on the fact that his committee had never held hearings on the issue. "These are hardly the kinds of complex issues which can be decided without a record, without a hearing, and without analysis," Specter said on the Senate floor before the amendment vote.

Notes Larry Yungk, a senior UNHCR resettlement officer in Washington: "There is a free-floating fear that in somehow correcting [material support], you're going to let in bad guys. I've been doing resettlement work since 1980, and this is the most difficult problem to fix that I've seen."

The senior Bush administration official involved in the process says he is sympathetic to the material-support issue, but by correcting the problem on one end — for individuals trying to enter the country legitimately — the government risks losing a valuable prosecutorial tool on the other end, for deportations, when it is trying to kick people out.

"The trick is dealing with two different things," he says. "People who provide material support can also be deported, and it's obviously in your interest as a litigator to keep that, since it's one of the easiest things to prove. But we don't want to have that on the intake side.

"We're not content with the status quo; we're committed to getting a fix to this," he continues. "But there are lots of moving parts, different agencies, different equities. And Congress."

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