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Comments: The Scarlett Letter "T": The Tier III Terrorist Classification's Inconsistent and Ineffectual Effects on Asylum Relief for Members and Supporters of Pro-Democratic Groups

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THE SCARLETT LETTER “T”: THE TIER III TERRORIST CLASSIFICATION’S INCONSISTENT AND INEFFECTUAL EFFECTS ON ASYLUM RELIEF FOR MEMBERS AND SUPPORTERS OF PRO-DEMOCRATIC GROUPS

I. INTRODUCTION

In Cameroon, Sara¹ was a peaceful political activist involved in the Southern Cameroons National Council (SCNC), a non-violent organization seeking the independence of the English-speaking regions from the French-speaking regions of Cameroon.² Due to civil unrest that ravaged her home country,³ Sara escaped to the United States, applied for asylum, and received the U.S. government’s protection from persecution.⁴ Since her children were still in danger in Cameroon, Sara petitioned for her children to join her.⁵ However, the Department of Homeland Security (DHS) unexpectedly determined that the SCNC was a Tier III terrorist organization⁶ and placed their applications on hold.⁷ During the lengthy and troubling waiting period, one of Sara’s children died from illness.⁸

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1. The name is added for specificity. *Denial and Delay: Real Life Stories*, HUMAN RIGHTS FIRST, <http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-refugee-stories-111009-web.pdf> (last visited May 31, 2012) [hereinafter *Denial and Delay: Real Life Stories*]; see also *Homeland Security Flags Cameroonian Group in Terrorist Category*, AFRICAN METRO NEWS (Sept. 15, 2011), <http://africanmetronews.com/?p=375> [hereinafter *Homeland Security Flags*].
 2. *Cameroon: The Southern Cameroons National Council (SCNC) and the Southern Cameroons Youth League (SCYL); Organizational Structures; Leaders; Activities; Membership Cards; Treatment of Their Members by Government Authorities*, IMMIGRATION & REFUGEE BD. OF CAN. (Apr. 2, 2008), available at <http://www.unhcr.org/refworld/docid/4829b55cc.html>.
 3. *Id.*
 4. *Denial and Delay: Real Life Stories*, *supra* note 1.
 5. *Id.*
 6. *Homeland Security Flags*, *supra* note 1. The SCNC has consistently brought their cause for independence before the Unrepresented Nations and People’s Organization, whose members included minorities and unrecognized territories joined together to find non-violent solutions to conflicts. IMMIGRATION & REFUGEE BD. OF CAN, *supra* note 2.
 7. *Denial and Delay: Real Life Stories*, *supra* note 1.
 8. *Id.*

Sara's story echoes other real-life stories of hundreds of pro-democratic asylum seekers who seek protection from persecution.⁹ But these "freedom fighters"¹⁰ and their supporters are barred from receiving safe harbor by § 212(a)(3)(B)(vi) of the Immigration and Nationality Act, commonly known as the Tier III bar.¹¹ Under Tier III, members of pro-democratic groups who have fought against totalitarian regimes and who have fought within U.S. campaigns, like the U.S. and Iraqi operation against Saddam Hussein's regime, are classified as terrorists.¹² The Tier III bar also denies asylum to those who have supported such groups, such as interpreters or messengers.¹³ These bizarre results contradict Congress's purpose in establishing Tier III: to enforce stricter post-September 11, 2001 (9/11) security measures and bar from asylum individuals who pose genuine threats to the United States.¹⁴ However, Tier III is overcompensating.¹⁵

This comment examines how the current Tier III terrorism bar inconsistently and ineffectually denies asylum to members and supporters of pro-democratic groups by branding them as "undesignated terrorists."¹⁶ Part II discusses how the Tier III classification and its consequent effect on the material support bar undermine the United States' historic commitment to asylum.¹⁷ Part III evaluates how Tier III's overbroad classification results in inconsistent and ineffectual application of asylum law to members and supporters of pro-democratic groups.¹⁸ Part IV proposes that, rather than using the Tier III classification to impose a blind and sweeping bar to asylum, Congress should amend the bar to include a reasonable nexus between terrorist acts, their purposes, and their

9. Karen DeYoung, *U.S. to Stop Green Card Denials for Dissidents*, WASH. POST, Mar. 27, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/26/AR2008032603281.html>.

10. *Id.*

11. *Id.*

12. *See id.* (discussing how many Iraqi and Vietnamese are barred from asylum because they fought and materially supported U.S. forces during the Vietnam and Iraq Wars).

13. *See* Felicia Cardona, *Saddam Hussein Foe in Immigration Limbo in Denver*, DENVER POST, Aug. 19, 2009, at B1, http://www.denverpost.com/technology/ci_13154773.

14. *See* REAL ID Act of 2005, H.R. 418, 109th Cong. (2005); *infra* Parts III.B–IV.A.

15. *See* Elizabeth Dwoskin, *Freedom Fighter or Terrorist? The U.S. Can't Decide About Bangladeshi Immigrant Sachin Karmakar*, VILLAGE VOICE, Nov. 12, 2008, <http://www.villagevoice.com/2008-11-12/news/freedom-fighter-or-terrorist-the-us-can-t-decide-about-bangladeshi-sachin-karmakar/>.

16. *See infra* Parts II.B, III.A.

17. *See infra* Part II.

18. *See infra* Part III.

targets.¹⁹ I argue that this nexus should be realized in an individualized, multi-factor test based in domestic and international law.²⁰ The proposed amendment to Tier III bar will draw a clearer line between individuals who are actual threats to national security and those who are genuine victims of persecution.²¹

II. THE TIER III CLASSIFICATION AND ITS CONSEQUENT EFFECT ON THE MATERIAL SUPPORT BAR UNDERMINE THE UNITED STATES’ INTERNATIONAL OBLIGATIONS TO ASYLUM UNDER THE REFUGEE CONVENTIONS

A. *The United States’ Commitment to Protecting the Persecuted*

Consistent with the 1951 United Nations Convention relating to the Status of Refugees²² (the Refugee Convention), the United States “has long held to the principle that it will not return a foreign national to a country where his life or freedom would be threatened.”²³ Yet Tier III classification endangers this principle by labeling persecuted pro-democratic groups and those who support them as terrorists.²⁴ To understand how the Tier III definition does not fulfill the aim of protection, a brief discussion of the statutory history of asylum in the United States via the Refugee Act and the Tier III material support statutory definitions is necessary.

1. The Refugee Act of 1980

With the passage of the Refugee Act of 1980, the United States became what some call “the first universal nation.”²⁵ The Act created a legal remedy by which foreign nationals could find protection from persecution by adopting the Refugee Convention’s definition of

19. See *infra* Part IV.B.

20. See *infra* Part IV.A–B.

21. See *infra* Part IV.B.

22. As of 2008, the United States has acceded to but not ratified the Protocol of 1967. See Guy S. Goodwin-Gill, *Convention Relating to the Status of Refugees, Protocol of 1967 Relating to the Status of Refugees* 7, AUDIOVISUAL LIBRARY OF INT’L LAW (2008), <http://untreaty.un.org/cod/avl/ha/prsr/prsr.html>.

23. RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 32621, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 1 (2005).

24. See Dwoskin, *supra* note 15, at 2.

25. Doris Meissner, *Thirty Years of the Refugee Act of 1980*, AMERICA.GOV (Sept. 21, 2010), <http://www.america.gov/st/peopleplaceenglish/2010/September/20100921144657aidan0.8100397.html>.

asylum.²⁶ The Refugee Act became the emblem of the United States' commitment to international relief for persecuted individuals around the world.²⁷ As a result, more than three million individuals have been able to find protection and resettlement in the United States since 1980.²⁸

The United States' commitment to asylum, however, did not extend to those who threatened U.S. security.²⁹ These exclusionary provisions of asylum were based in the Refugee Convention.³⁰ The Refugee Convention provided that a state must refuse asylum to an individual in two instances: (1) if there are reasonable grounds to consider an individual a "danger to the security of the country"; and (2) if the individual has been "convicted by a final judgment of a particularly serious crime, [and] constitutes a danger to the community of that country."³¹ Similarly, the Refugee Act bars from asylum those whom the United States has reasonable grounds to consider as a danger to national security.³²

2. Asylum Procedure, Benefits, and Exclusions

The United States' commitment to asylum is incorporated in the Immigration and Nationality Act (INA), which contains the legal basis for asylum in Section 101(a)(42)(A).³³ To apply for asylum, a person must be "unable to return to [his or her] country because of a . . . 'well-founded fear of persecution' based on race, religion, nationality, political opinion or membership in a particular social group or political opinion."³⁴ To seek asylum, a foreign national

26. *Id.* See Refugee Act of 1980, tit. I, Pub. L. No. 96-212, § 101(b), 94 Stat. 102, 102 (1980). This definition is the basis for U.S. asylum in the U.S. Immigration and Nationality Act. See Immigration and Nationality Act §§ 101(a)(42)(A), 208(b)(1)(B)(i), 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i) (2006) [hereinafter INA]; *infra* Part II.A.2.

27. See Meissner, *supra* note 25.

28. *Id.* at 8.

29. See Refugee Act of 1980, tit. II, Pub. L. No. 96-212, sec. 201(e), § 243(h), 94 Stat. 102 (1980).

30. See Goodwin-Gill, *supra* note 22, at 4.

31. Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Convention of Status of Refugees]. Ratification of the Convention by 144 countries makes the treaty one of the principal treaties in immigration law. See U.N. High Comm'r for Refugees, States Party to the Convention Relating to the Status of Refugees and the 1967 Protocol (Apr. 1, 2011), available at <http://www.unhcr.org/3b73b0d63.html>.

32. See Refugee Act of 1980 sec. 201(e), § 243(h).

33. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

34. *Id.*

must be outside his or her country of nationality.³⁵ According to Section 101(a)(42)(A) and Section 208(a)(2)(A), to be eligible for asylum, a foreign national must be “unable or unwilling to avail himself or herself of the protection of . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”³⁶

Receiving asylum in the United States provides an individual protection from persecution and an opportunity to rebuild his or her life in a new country.³⁷ A person who receives asylum can apply for work authorization, petition for his or her spouse and children to come to the United States, apply for lawful permanent residence one year after being granted asylum, and apply for U.S. citizenship five years after acquiring lawful permanent residence.³⁸ However, as discussed below, these benefits are not available to those statutorily excluded from asylum, even if they otherwise meet the legal basis.³⁹ These benefits provide a small glimpse of how precious an opportunity asylum is to individuals fleeing from threats to their lives and freedom.

B. The Tier III Terrorist Bar to Asylum

Though an individual’s life may be in dire danger if he or she returns home, and though he or she may have an eligible legal basis for asylum, participation in certain kinds of ambiguous activities labeled as “terrorist” activities will bar such an individual from asylum.⁴⁰ INA § 212(a)(3)(B)(vi)⁴¹ contains a three-tier structure for

35. *Id.* §§ 101(42)(A), 208(a)(2)(A). For individuals with no nationality, the law requires that they must be outside of the country they last habitually resided. *Id.*

36. *Id.* § 101(a)(42)(A).

37. *See Asylum*, UNITED STATES CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis> (follow “Refugees & Asylum” hyperlink; then follow “Asylum” hyperlink) (last updated Sept. 7, 2011).

38. *Id.*

39. *See infra* Part II.B.

40. INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v).

41. The current statutory definitions of terrorist organizations and terrorist activities were added to the INA by the passage of the USA PATRIOT Act on October 26, 2001 and the passage of the REAL ID Act in 2005. USA Patriot Act, Pub. L. No. 107-56, § 411, 115 Stat. 272, 345–48 (2001) (codified as amended at 8 U.S.C. § 1182 (2006)); Real ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, § 103, 119 Stat. 302, 306–09 (2005) (codified at 8 U.S.C. § 1182).

categorizing terrorist activities.⁴² Tier I includes groups found by the Secretary of State to be foreign organizations that engage in terrorism that threatens U.S. national security;⁴³ Tier II encompasses groups publicly designated in the Federal Register as terrorist organizations;⁴⁴ and the Tier III classification is reserved for “unnamed” groups that are not designated as terrorist organizations but who meet certain criteria.⁴⁵

According to the INA, the Tier III classification includes any “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” any activity listed as a terrorist activity in the INA.⁴⁶ Rather than authorizing a government agency or providing clearer statutory criteria to determine which groups qualify as Tier III organizations, Congress has allowed DHS adjudicators and immigration judges to “make these determinations on an ad hoc basis.”⁴⁷ The following three sections briefly discuss each part of the Tier III terrorist bar and the corresponding material support bar, as well as their consequences for eligible asylees who erroneously fall under their overbroad classifications.

1. Definition of a “Terrorist Activity”

The INA list of what constitutes a “terrorist activity” is not meant to be exhaustive.⁴⁸ Rather, it includes certain activities that Congress

42. INA §§ 212(a)(3)(B)(vi)(I)–(III), 8 U.S.C. §§ 1182(a)(3)(B)(vi)(I)–(III); Kathryn White, *Chance for Redemption: Revising the “Persecutor Bar” and “Material Support Bar” in the Case of Child Soldiers*, 43 VAND. J. TRANSNAT’L L. 191, 204–05 (2010) (discussing the three tiers of terrorism bars to asylum and their practical consequences).

43. INA §§ 212(a)(3)(B)(vi)(I), 219(a)(1)(A)–(C), 8 U.S.C. §§ 1182(a)(3)(B)(vi)(I), 1189(a)(1)(A)–(C).

44. *Id.* §§ 212(a)(3)(B)(vi)(I)–(II), 8 U.S.C. §§ 1182(a)(3)(B)(vi)(I)–(II). Tier II organizations are “groups that are ‘otherwise designated’ by the Department of State, upon publication in the Federal Register, as a terrorist organization, after a finding that the organization engages in certain terrorist activities defined under the INA.” *“Material Support” and Related Bars to Refugee Protection: Summary of Key Provisions of the Immigration and Nationality Act*, UNHCR (Dec. 15, 2006), <http://www.rcusa.org/uploads/pdfs/ms-summ-unhcrkeyprov12-06.pdf>.

45. INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III); *see also* White, *supra* note 42, at 204–05 (discussing the three tiers of terrorism bars to asylum and their practical consequences).

46. INA § 212(a)(3)(B)(vi)(III) (2010), 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

47. White, *supra* note 42, at 205–06.

48. *See Khan v. Holder*, 584 F.3d 773, 780, 786 (9th Cir. 2009); *McAllister v. Att’y Gen. of the United States*, 444 F.3d 178, 187 (3d Cir. 2006).

considered indicative of terrorism.⁴⁹ The activities primarily must be “unlawful under the laws of the place where [they] [are] committed.”⁵⁰ Most of the enumerated activities are clear terrorist actions: “hijacking or sabotag[ing]” of aircrafts or vehicles;⁵¹ kidnapping or threatening to physically harm a person in order to coerce a governmental entity “to do and abstain from doing any act;”⁵² violently attacking an “internationally protected person”;⁵³ assassination;⁵⁴ or threatening, attempting, or conspiring to commit any of these acts.⁵⁵

While most of these provisions constitute activities that violate foreign domestic laws, section V is a notable distinction in the list. INA § 212(a)(3)(B)(iii)(V) provides that a terrorist activity may also involve:

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.⁵⁶

Section V produces the most inconsistent and ineffectual designations of “terrorists” because the classification leads to illogical results.⁵⁷ In *In re Ma San Kywe*, the Immigration and Customs Enforcement Agency frankly admitted to a local immigration court that U.S. forces meet the required elements of a Tier III organization because they used weapons that violated the

49. INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii).

50. *Id.*

51. *Id.* § 212(a)(3)(B)(iii)(I), 8 U.S.C. § 1182(a)(3)(B)(iii).

52. *Id.* § 212(a)(3)(B)(iii)(II), 8 U.S.C. § 1182(a)(3)(B)(iii)(II).

53. *Id.* § 212(a)(3)(B)(iii)(III), 8 U.S.C. § 1182(a)(3)(B)(iii)(III).

54. *Id.* § 212(a)(3)(B)(iii)(IV), 8 U.S.C. § 1182(a)(3)(B)(iii)(IV).

55. *Id.* § 212(a)(3)(B)(iii)(VI), 8 U.S.C. § 1182(a)(3)(B)(iii)(VI).

56. *Id.* at § 212(a)(3)(B)(iii)(V), 8 U.S.C. § 1182(a)(3)(B)(iii)(V).

57. Won Kidane, *The Terrorism Exception to Asylum: Managing the Uncertainty in Status Determination*, 41 U. MICH. J.L. REFORM 669, 690–91 (2008); see also GEORGETOWN LAW CTR. HUMAN RIGHTS INST., *Unintended Consequences: Refugee Victims of the War on Terror* 1, 12 n.84 (2006), reprinted in 37 GEO. J. INT’L L. 759 [hereinafter *Unintended Consequences*].

laws of Saddam Hussein's regime and caused damage to property and injury to persons.⁵⁸

2. The Definition of "Engaging" in Terrorist Activities

The meaning of "engaging" in terrorist activities has its own legal definition.⁵⁹ Engaging in terrorist activities includes:

- I. commit[ing] or . . . incit[ing] to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
- II. prepar[ing] or . . . plan[ning] a terrorist activity; [and]
- III. gather[ing] information on potential targets for terrorist activity. . . .⁶⁰

The statute also provides that a person who solicits funds "or other things of value for a terrorist activity" or for a Tier I, II, or III organization also engages in a terrorist activity.⁶¹ Finally, an individual engages in a terrorist activity if he solicits any person to engage in conduct described in § 212(a)(3)(B)(iv) or if he solicits any individual to become a member in a Tier I, II, or III terrorist organization.⁶²

In practical terms, the definition of engaging encompasses any kind of direct or indirect involvement in a terrorist activity enumerated in Section 212(a)(3)(B)(iii).⁶³ If an individual is involved in a terrorist activity as defined by INA § 212(a)(3)(B)(iii), the individual meets the definition of "engaging in a terrorist activity."⁶⁴ The only provision in the list that involves a finding of intent is section I, which requires a nexus between "circumstances indicating

58. Kidane, *supra* note 57, at 690–91 (citing *Unintended Consequences*, *supra* note 57, at 12 n.84).

59. INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv).

60. *Id.*

61. *Id.* § 212(a)(3)(B)(iv)(IV), 8 U.S.C. § 1182(a)(3)(B)(iv)(IV). The exception is if the person can show by clear and convincing evidence that he did not know, and should not reasonably have known, that the group was a terrorist organization. *Id.* § 212(a)(3)(B)(iv)(IV)(cc), 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(cc).

62. *Id.* § 212(a)(3)(B)(iv)(V), 8 U.S.C. § 1182(a)(3)(B)(iv)(V). The exception is identical to the one provided for in Part IV.A–B. *See supra* note 61.

63. *See* Won Kidane, *The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom, and the United States: Transporting Best Practices*, 33 *FORDHAM INT'L L.J.* 300, 320 (2010) (explaining the practical effects of "engaging" in terrorist activities under the INA).

64. INA §§ 212(a)(3)(B)(iv)(I)–(IV), 8 U.S.C. §§ 1182(a)(3)(B)(iv)(I)–(V).

an intention to cause death or serious bodily injury” and the terrorist activity.⁶⁵ However, section I fails to explain how to determine whether a nexus exists.⁶⁶ Instead, the INA only requires government agencies to reasonably show that any circumstances may indicate the intention.⁶⁷

3. “Material Support” of Pro-Democratic Organizations

The Tier III classification not only impacts the asylum eligibility of pro-democracy groups engaged in armed conflict, but it also affects the asylum eligibility of those who “materially support” pro-democracy groups erroneously branded as Tier III terrorist groups.⁶⁸

Under the material support bar, a person is ineligible for asylum if he or she commits an act that he or she “knows, or reasonably should know, affords material support . . . to a terrorist organization.”⁶⁹ “Terrorist organizations” include those groups labeled as Tier III terrorist groups.⁷⁰ This standard is disturbingly expansive. An individual who “commits an act that he reasonably should have known—but did not know—would afford material support to a terrorist organization [is] barred from asylum.”⁷¹ Acts considered as material support are also needlessly expansive.⁷² “Material support” includes providing “a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons . . . explosives, or training.”⁷³ DHS and the Board of Immigration Appeals (BIA) have interpreted this provision as “not exhaustive”⁷⁴ and to include any

65. *Id.* §§ 212 (a)(3)(B)(iv)(I), 8 U.S.C. § 1182(a)(3)(B)(iv)(I).

66. *Id.*

67. *See Id.* §§ 212(a)(3)(B)(i)(II), (iv)(I), 8 U.S.C. §§ 1182(a)(3)(B)(i)(II), (iv)(I).

68. *See Jennie Pasquarella, Victims of Terror Stopped at the Gate to Safety: The Impact of the “Material Support to Terrorism” Bar on Refugees*, 13 HUM. RTS. BRIEF, no. 3, Spring 2006, at 28, 29.

69. INA § 212(a)(3)(B)(iv)(VI)(cc), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(cc).

70. *See Pasquarella, supra* note 68, at 28.

71. White, *supra* note 42, at 203 (citing Theodore Roethke, *American Law and the Problem of Coerced Provision of Support to a Terrorist Organization as Grounds for Removal*, 17 TEMP. POL. & CIV. RTS. L. REV. 173, 177–78 (2007) (describing additional effects of the material support bar)). Additionally, a person may be ineligible for asylum if he performs an act that he does not know is classified as a terrorist act and does so for a group that he does not know, though he reasonably should have known, is associated with terrorism. *Id.*

72. *See id.* at 203–204.

73. INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI).

74. *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298 (3d Cir. 2004).

support, “no matter how small.”⁷⁵ As a result, “‘if a person gave even a glass of water’ to a member of an armed group, that act would qualify as material support.”⁷⁶

An individual who unfortunately falls into the material support class has the burden of proving “by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.”⁷⁷ This high threshold of proof is difficult to overcome.⁷⁸

III. INCONSISTENT AND INEFFECTUAL FUNCTIONS OF THE TIER III CLASSIFICATION

At first blush, the goal of the Tier III classification system seems to be to protect the United States from terrorist activities, no matter how big or small.⁷⁹ However, the Tier III terrorist classification serves more as a band-aid, rather than a solution, to the problem of guarding against terrorism while furthering the United States’ commitment to international human relief.⁸⁰ This section first shows how the Tier III’s classification impedes a consistent and effectual application of asylum law to terrorists and U.S. allies. Secondly, this section argues for a clearer definition of terrorism for Tier III based in international law.

A. *Tier III’s Problematic Effects in Case Law: Matter of S-K-*

Although it is a case primarily involving the material-support-to-a-terrorist-organization bar, the Board of Immigration Appeals’ decision in *Matter of S-K*⁸¹ is a clear signal for the need to statutorily amend the Tier III classification in order to administer asylum law effectively.⁸² The case illustrates how applying Tier III contradicts the purposes of asylum and safeguarding national security.⁸³

75. *Unintended Consequences*, *supra* note 57, at 801.

76. *Id.* at 801 (quoting Interview with Walter Sánchez, Resettlement Officer, UNHCR-Ecuador, in Quito, Ecuador (Mar. 2006)).

77. INA § 212(a)(3)(B)(iv)(VI)(dd), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd).

78. See White, *supra* note 42, at 206 (citing Gregory F. Laufer, Note, *Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act’s “Material Support for Terrorism” Provision*, 20 GEO. IMMIGR. L.J. 437, 442, 459 (2006)).

79. See INA § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (stating Tier III classification encompasses “groups of two or more individuals, whether organized or not, which engages in” a broad range of acts).

80. See DeYoung, *supra* note 9.

81. See *S-K-*, 23 I. & N. Dec. 936, 936 (B.I.A. 2006), *aff’d in part, vacated in part*, 24 I. & N. Dec. 475 (B.I.A. 2008).

82. See *S-K-*, 23 I. & N. Dec. at 948–50 (Osuna, J., concurring) (discussing the implications of the overly broad statutory language regarding “terrorist activity” in

Matter of S-K- involved a Burmese Christian woman who was part of the Chin minority population in Burma.⁸⁴ S-K faced persecution and torture in Burma that would result from the Burmese military dictatorship’s constant human rights abuses against religious and ethnic minorities.⁸⁵ S-K- had provided goods and money to the Chin National Front (CNF), an organization seeking independence from, and using explosives and arms in self-defense against, the Burmese dictatorship.⁸⁶ CNF was also “allied with the National League of Democracy, which the United States has recognized as a legitimate representative of the Burmese people and is recognized by the United Nations.”⁸⁷

While finding that S-K- met the legal requirements of asylum and despite finding her account of persecution credible, the immigration judge determined that S-K- was barred from asylum because she provided money and goods to an alleged terrorist group.⁸⁸ CNF was deemed an undesignated Tier III terrorist organization because it used explosives and arms to endanger others and cause substantial property damage—even though it used such weapons in self-defense.⁸⁹ As a result, the judge barred S-K- from asylum.⁹⁰ The paradoxical import of this decision is best said by the immigration judge in *S-K-*: “[O]ur own history is based on an armed response to a government that we could not change democratically.”⁹¹

When S-K- appealed the decision to the Board of Immigration Appeals in 2005, a similar concern echoed the BIA’s stalwart decision upholding the Immigration Judge’s decision.⁹² In his concurring opinion, Board Member Osuna frankly stated that it is doubtful whether CNF is a terrorist organization under the common

§ 212(a)(3)(B) of the INA, 8 U.S.C. § 1182 (a)(3)(B) (2006), which can lead to finding individuals ineligible for asylum based on actions that are actually consistent with United States foreign policy).

83. See *infra* notes 84–103 and accompanying text.

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

85. *Id.* The Burmese government had also arrested and detained the respondent’s brother and fiancé; her fiancé was later killed by the military. *Id.*

86. *Id.* at 937–39.

87. *Id.* at 939; see also *id.* at 947–50 (Osuna, J., concurring).

88. *Id.* at 937 (majority opinion).

89. *Id.* at 937, 939.

90. *Id.* at 937.

91. *Denial and Delay: The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States*, HUMAN RIGHTS FIRST, 3 (Nov. 2009), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf>.

92. See *S-K-*, 23 I. & N. Dec. at 937–39.

definition of the term.⁹³ Neither was CNF likely a Tier III organization according to the DHS, which had reported that there was no evidence CNF was involved in systematic acts of terrorism.⁹⁴

Indeed, Board Member Osuna noted that the INA's definition of what constitutes a terrorist is "breathtaking in its scope."⁹⁵ Tier III labels any group who uses firearms for any purpose other than personal monetary enrichment as a terrorist group.⁹⁶ This definition includes the U.S.-supported Afghan Northern Alliance that fought against the Taliban, domestic violence disputes, and even juveniles who discharge a gun and damage abandoned property.⁹⁷ The overbroad scope of the statute is inconsistent with what Congress intended the terrorism bars to protect against: actual threats to national security.⁹⁸

Nonetheless, the BIA ultimately found that Tier III's current classification of terrorist organizations includes "even those people described as 'freedom fighters,' and [Congress] did not intend to give [the immigration courts] discretion to create exceptions for members of organizations to which our Government might be sympathetic."⁹⁹ Despite evidence showing that the CNF was not a terrorist group and that the arms it used were for self-defense, the BIA was bound by the Tier III statute to classify the CNF as a terrorist organization.¹⁰⁰ Consequentially, those like S-K-, who "material[ly] support" such organizations, are also barred from receiving asylum.¹⁰¹ This is true even when the undesignated terrorist group aided U.S. war efforts in the past.¹⁰²

This illogical result did not escape the notice of the Attorney General, who, in a March 2007 opinion, remanded *In re S-K-* to the BIA for reconsideration following the DHS Secretary's determination

93. *Id.* at 948 (Osuna, J., concurring).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.* at 947 (Osuna, J., concurring). Moreover, members of Congress, who supported the addition of the Tier III bar in the INA via the USA PATRIOT Act and the REAL ID Act, have said as such. *See* H.R. 5918, 109th Cong. (2006), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-109hr5918ih/pdf/BILLS-109hr5918ih.pdf> ("[There are] unintended consequences of [the] overbroad bars on admission [by asylum].").

99. *S-K-*, 23 I. & N. Dec. at 941.

100. *Id.* at 947-48 (Osuna, J., concurring).

101. *See id.*

102. *See id.*

that supporting CNF does not bar an individual from asylum; essentially, CNF was not a terrorist organization.¹⁰³

How effective for asylum seekers was the federal government's response to its own department's evidence that CNF was not a terrorist organization? The answer is lost in an overtaxed administrative process: the DHS is currently reviewing over 7,500 asylum cases involving organizations like CNF, and those cases are placed on indefinite hold based on actual or perceived issues of terrorism-related provisions.¹⁰⁴

B. Possible Solutions for a More Precise Classification: Khan v. Holder

Like *In re S-K-*, *Khan v. Holder*, a case decided by the United States Court of Appeals for the Ninth Circuit, involved a foreign national who provided what DHS claimed was material support to a terrorist organization.¹⁰⁵ Unlike *S-K-*, the court in *Khan* proposed some changes to the Tier III definition to accomplish both goals of ensuring national security and protecting the persecuted, including incorporating international law to improve the definition of a Tier III terrorist organization.¹⁰⁶

Since the 1970s, Khan worked with, but was never an actual member of, the Jammu Kashmir Liberation Front (JKLF), a group with both militant and political factions that sought an independent Kashmir.¹⁰⁷ Khan testified that he worked only with the nonviolent political faction of JKLF.¹⁰⁸ However, Khan was barred from asylum because he had been a member of a group that had a militant subgroup engaged in terrorist activities.¹⁰⁹

The court rejected Khan's argument that actions considered illegal in the foreign national's country are only "unlawful" within the meaning of 212(a)(3)(B)(iii) list of terrorist activities if the actions violate the international law of armed conflict.¹¹⁰ Khan's argument

103. *S-K-*, 24 I. & N. Dec. at 289–90.

104. See HUMAN RIGHTS FIRST, *supra* note 91, at 1. A majority of these cases have been on hold for several years. *Id.*

105. *Khan v. Holder*, 584 F.3d 773, 775–76 (9th Cir. 2009).

106. *Id.* at 786–87 (Nelson, J., concurring).

107. *Id.* at 775–76 (majority opinion).

108. *Id.* at 776.

109. *Id.* at 777–78; see INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182 (a)(3)(B)(iii) (2006).

110. *Khan*, 584 F.3d at 781. INA § 212(a)(3)(B)(iii) includes as terrorist activities acts that are "unlawful under the laws of the place where [they are] committed (or which, if [they] had been committed in the United States, would be unlawful under the laws of the United States or any State)." The problematic issue of armed conflict and the use

echoes Board Member Osuna's opinion in *In re S-K-*, which predicted the paradoxical results of branding those who use arms in self-defense as terrorists under Tier III.¹¹¹ The court conceded this point, although it rejected its relevance since the INA does not currently allow for such an interpretation.¹¹²

The court's opinion hints at a possible solution to current Tier III classifications.¹¹³ A more effective Tier III definition would result if the statute included a definition of terrorist "armed conflict" as being illegal under international law standards.¹¹⁴

The majority's hints in *Khan* at changing the Tier III classification to a more useful and precise statutory bar are developed in Judge Nelson's concurring opinion.¹¹⁵ Judge Nelson notes that Tier III may become more useful if it incorporated certain aspects of international law, such as including how intentional targeting of noncombatants violates international law.¹¹⁶ Refining the Tier III classification to distinguish those who target noncombatants from those who engage in and support armed conflict would create a more effective bar to asylum for genuine terrorists.¹¹⁷

The majority and the concurring opinions' suggestions help set a basis for redefining Tier III to exclude those engaged in self-defensive armed conflict.¹¹⁸ In both *Khan* and *In re S-K-*, the courts strongly emphasized the inconsistent and ineffectual structure of Tier III and recommended a change based in international law.¹¹⁹ Moreover, in both cases, the courts admitted that the INA's statutory authority unfortunately trumps any kind of reasonable hesitations courts have to apply the Tier III bar.¹²⁰ These irrational consequences call for a statutory amendment.

of arms in self-defense is discussed in this comment's proposed multi-factor test. See *infra* Part IV.A-B.

111. See *S-K-*, 23 I. & N. Dec. 936, 946-49 (B.I.A. 2006) (Osuna, J., concurring), *aff'd in part, vacated in part*, 24 I. & N. Dec. 475 (B.I.A. 2008).

112. *Khan*, 584 F.3d at 781-82.

113. See *id.* at 781.

114. *Id.* at 786-87 (Nelson, J., concurring); see *infra* Part IV.A.2 for the international law standards of terrorist armed conflict.

115. See *id.* at 781 (majority opinion); *id.* at 786-87 (Nelson, J., concurring).

116. *Id.* at 786-87 (Nelson, J., concurring).

117. See *id.*

118. See *id.* at 781 (majority opinion); *id.* at 786-87 (Nelson, J., concurring).

119. See *id.* at 781-82 (majority opinion); see also *S-K-*, 23 I. & N. Dec. 936, 941 (2006), *aff'd in part, vacated in part*, 24 I. & N. Dec. 475 (B.I.A. 2008); *S-K-*, 23 I. & N. Dec. at 947-50 (Osuna, J., concurring).

120. See *Khan*, 584 F.3d at 787-88 (Nelson, J., concurring); *S-K-*, 23 I. & N. Dec. at 940-41; *S-K-*, *id.* at 947 (Osuna, J., concurring).

IV. REDEFINING THE TIER III CLASSIFICATION

A. The Need to Base the Undesignated Terrorist Classification in Domestic and International Laws

The essential problem with the current Tier III definition is that it focuses on the smoking gun rather than on who pulled the trigger, against whom, and why.¹²¹ The problem of defining terrorism is by no means new, nor is it an easy problem to solve, primarily because there is no international definition of terrorism.¹²² As a result, each government has passed its own domestic laws and procedures.¹²³ However, if the United States is to follow the bipartisan 9/11 committee’s warning to be “safer, stronger, and wiser”¹²⁴ in combating terrorism, and at the same time adhere to its international commitment of providing protection for the persecuted,¹²⁵ Congress must refine the Tier III definition.

1. The United States’ Approach to Defining Terrorism

To create a clearer definition of what constitutes an undesignated terrorist, and thus highlight the difference between a genuine asylee and a national security threat, it is necessary to evaluate U.S. definitions of terrorism.¹²⁶ The U.S. State Department defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents,” usually intended to influence an audience.¹²⁷ The United States Code also defines actions “intended to intimidate a civilian population” or “to influence the policy of a government by intimidation or coercion; or to affect the policy of a government by . . . assassination or kidnapping” as terrorism.¹²⁸ Taking these two authorities together, the United States describes terrorism as a

121. See *S–K–*, 23 I. & N. Dec. at 948 (Osuna, J., concurring).

122. See Kidane, *supra* note 63, at 316.

123. *Id.*

124. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, at xvi (2004) [hereinafter 9/11 COMM’N REPORT].

125. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) (citing Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter U.N. Protocol]).

126. See Kidane, *supra* note 63, at 370–71.

127. 22 U.S.C. § 2656f(d)(2) (2006).

128. 18 U.S.C. § 2331(1)(B)(i)–(iii) (2006).

strategic device intentionally used to further a political agenda by intimidating civilians.¹²⁹

The U.S. court system, as seen in the Ninth Circuit's majority and concurring opinions in *Khan v. Holder*, has also interpreted domestic law definitions of terrorism by comparing them to definitions of terrorism in international law.¹³⁰ Judge Nelson's concurring opinion notes that the Geneva Conventions outlaw deliberate targeting of noncombatants.¹³¹ Consequentially, defining armed conflict that violates international law as a terrorist activity creates a more precise classification consistent with twenty-first century terrorist strategies.¹³² Additionally, Judge Nelson observed that Tier III has adverse effects on U.S. policy because the Tier III bar discourages groups sympathetic to similar U.S. campaigns from aiding U.S. forces in the future.¹³³

The decision in *Khan* and other domestic legal definitions of terrorism help set a basis for redefining Tier III to exclude those engaged in self-defensive armed conflict.¹³⁴ These domestic legal contexts of terrorism can further benefit from international law sources of terrorism, as discussed below.¹³⁵

2. International Law's Approaches to Defining Terrorism

U.S. asylum law is inextricably tied to international law's definitions of asylum via the Refugee Act,¹³⁶ and it is significantly influenced by international law's definitions of terrorism via the U.N. Protocol.¹³⁷ The Supreme Court has noted that a primary purpose of the Refugee Act "was to bring United States refugee law into conformance with the [U.N. Protocol] to which the United States

129. See 22 U.S.C. § 2656f(d)(2) (2006); 18 U.S.C. § 2331(1)(B)(i)–(iii) (2006).

130. See *Khan v. Holder*, 584 F.3d 773, 778, 781 (9th Cir. 2009); *id.* at 786–88 (Nelson, J., concurring).

131. *Id.* at 787 (Nelson, J., concurring); see also Donald R. Rothwell, *Legal Opinion on the Status of Non-Combatants and Contractors Under International Humanitarian Law and Australian Law*, AUSTL. STRATEGIC POL'Y INSTIT. (Dec. 24, 2004), http://www.aspi.org.au/pdf/ASPIlegalopinion_contractos.pdf (stating that the Geneva Conventions makes important distinctions between combatants and non-combatants).

132. See *Khan*, 584 F.3d at 786–87.

133. *Id.*

134. See *supra* notes 126–33 and accompanying text.

135. See Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 26, 102 (2006); *infra* text accompanying notes 136–62.

136. See Meissner, *supra* note 25.

137. *Khan*, 584 F.3d at 786–88.

acceded in 1968.”¹³⁸ Yet this purpose is not fulfilled through Tier III, which places the U.S. military and its democratic supporters in the same category as the Taliban because both groups have used “firearms and explosives” in their respective war efforts.¹³⁹

Arguably, the difference between the U.S. military’s efforts in Afghanistan and Iraq and the Taliban’s campaigns are the purposes of their actions and the forms of their targets.¹⁴⁰ Using this basis, international law scholars have highlighted several factors to define the “faceless” undesignated terrorists in statutes like Tier III: the terrorist’s purpose and the terrorist’s target.¹⁴¹

Out of four common law jurisdictions—the United States, the United Kingdom, Canada, and Australia—the United States is the only government that does not consider purpose as an element of terrorist activity.¹⁴² What is terrorism’s target? Many scholars contend that terrorism targets noncombatants as well as combatants through “deliberate and systematic murder, maiming, and menacing of the innocent to inspire fear for political ends.”¹⁴³ Additionally, with terrorism, “violence is usually one-sided” and unarmed victims not involved in the conflict “cannot, through surrender, save their lives.”¹⁴⁴

These intended targets of terrorism are unarmed victims.¹⁴⁵ They are chosen randomly as “targets of opportunity” or selectively as “symbolic targets” and “serve as message generators.”¹⁴⁶ These

138. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

139. See INA § 212(a)(3)(B)(iii)(V), 8 U.S.C. 1182(a)(3)(B)(iii)(V) (2006); *Khan*, 584 F.3d at 786–87; Kidane, *supra* note 63, at 321–22.

140. See Binyamin Netanyahu, *Defining Terrorism*, in *TERRORISM: HOW THE WEST CAN WIN* 7, 9 (Binyamin Netanyahu ed., 1986) (explaining that what distinguishes terrorism from conventional warfare is that terrorists intentionally select innocent targets for the purpose of inspiring fear).

141. See Kidane, *supra* note 63, at 347–48 (discussing the definition of “terrorist act” developed at the International Suppression of the Financing of Terrorism Convention of 1999).

142. *Id.* at 349 (noting that the Immigration and Nationality Act does not include these factors).

143. Netanyahu, *supra* note 140, at 9.

144. Rianne Letschert & Ines Staiger, *Introduction and Definitions*, in *ASSISTING VICTIMS OF TERRORISM: TOWARD A EUROPEAN STANDARD OF JUSTICE* 14 (Rianne Letschert et al. eds., 2010); see also Michael Stohl, *Demystifying Terrorism: The Myths and Realities of Contemporary Political Terrorism*, in *THE POLITICS OF TERRORISM* 239 (Michael Stohl ed., 3rd ed. 1988) (comparing and contrasting freedom fighters who target the military or government, and terrorists who target innocent civilians).

145. Letschert & Staiger, *supra* note 144, at 14.

146. *Id.*

distinctions contrast with CNF, which engaged in armed resistance in self-defense against a totalitarian regime and not against noncombatants.¹⁴⁷

The purpose of most terrorism is also specific. Terrorism usually carries a politically ideological motive.¹⁴⁸ The International Convention for the Suppression of the Financing of Terrorism (the Convention), adopted by 171 state parties, is a primary source of international law's consensus of a terrorist purpose.¹⁴⁹ The Convention has been incorporated into the domestic immigration laws of most states, including U.S. laws.¹⁵⁰ The Convention provides that a person "commits an offense within the meaning of this Convention" if that person, either "directly or indirectly, unlawfully and willfully," *intentionally or knowingly* provides funds used in acts causing "death or serious bodily injury" to noncombatants.¹⁵¹

Further, the intention of terrorism is, "by its nature or context," to physically threaten civilians or coerce the state or international body to carry out the terrorist's whim.¹⁵² Acts with no political agendas, many scholars contend, are not terrorism but rather violent actions that violate a particular country's laws.¹⁵³ While some argue that a terrorist is the antithesis of a freedom fighter, this perspective falls into many terrorists' "semantic trap[s],"¹⁵⁴ which justify terrorist actions by calling them "liberation movements."¹⁵⁵

Despite these semantic traps, however, the United States does not view armed resistance as a legitimate purpose for armed conflict.¹⁵⁶ After ratifying the Convention, the United States objected to Jordan's armed-struggle exception to the Convention.¹⁵⁷ The United States'

147. See S-K-, 23 I. & N. Dec. 936, 941-42 (B.I.A. 2006), *aff'd in part, vacated in part*, 24 I. & N. Dec. 475 (B.I.A. 2008).

148. Kidane, *supra* note 63, at 314.

149. *Id.* at 313-14.

150. See *id.* at 313-15.

151. International Convention for the Suppression of the Financing of Terrorism, art. 2(1), Dec. 9, 1999, T.I.A.S. No. 13075 [hereinafter The Convention].

152. *Id.*

153. See Boaz Ganor, *Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?*, 3 POLICE PRAC. & RES. 287, 294 (2002).

154. *Id.* at 291-93.

155. *Id.*

156. See Kidane, *supra* note 63, at 349.

157. *Id.* at 315. Jordan also ratified the Convention, but stated that it did not consider armed struggles against foreign occupation as terrorist acts within the context of the Convention. *Id.* (quoting *Status of the International Convention for the Suppression of the Financing of Terrorism*, UNITED NATIONS TREATY COLLECTION 7 (Dec. 9, 1999), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVII-I-11.en.pdf>).

objection to Jordan’s exception “excludes any military operations by nonstate actors even if their military operations are against legitimate military objectives.”¹⁵⁸ This stance is puzzling, however, considering that the United States has recognized Nelson Mandela’s strategic guerrilla warfare¹⁵⁹ and CNF’s independence struggle as exceptions to armed conflict because they are armed resistance movements.¹⁶⁰

All of these distinctions between terrorists and asylees help narrow the Tier III classification to one that suggests terrorism is the intentional or threatened use of violence against civilians with the purpose of accomplishing a political agenda.¹⁶¹ The three factors that help clarify this definition are (1) “[t]he essence of the activity [is] the use of, or threat to use, violence”; (2) the activity’s purpose is to willfully achieve political changes; and (3) “[t]he targets of terrorism are civilians.”¹⁶²

B. A Multi-Factor Test: Drawing the Line between Terrorists, Freedom Fighters, and Those Who Support Them

Tier III ignores the underpinning factors of democratic armed resistance and the support of such efforts: who is the group targeting, and why?¹⁶³ This comment proposes that Congress amend Tier III to establish a reasonable nexus between a terrorist purpose, a terrorist target, and a terrorist activity. This individualized test defines as “undesigned terrorists” groups of two or more people, whether organized or not, who (1) for the purpose of achieving a political power-outcome or propaganda, (2) willingly exploit fear by systematically or randomly targeting noncombatants, and (3) engage in internationally proscribed violence, with the exclusion of certain

158. *See id.* at 349.

159. *See* Mimi Hall, *Mandela Is on U.S. Terrorist Watch List*, USA TODAY, May 1, 2008, at 2a (noting the statement of past U.S. Secretary of Homeland Security Michael Chertoff that the Mandela case “raises a troubling and difficult debate about what groups are considered terrorists and which are not”); *Law Removes Mandela from U.S. Watch List*, WALL ST. J., July 2, 2008, at A2.

160. *See* MICHAEL JOHN GARCIA & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 32564, IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION AND REMOVAL OF ALIENS 6–7 (2010).

161. Ganor, *supra* note 153, at 294; *see also* M. Cherif Bassiouni, *A Policy-Oriented Inquiry into the Different Forms and Manifestations of “International Terrorism,”* in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS, at xv, xxii–iii (M. Cherif Bassiouni ed., 1988).

162. Ganor, *supra* note 153, at 294.

163. *See id.* at 293; Kidane, *supra* note 63, at 343–44, 366.

politically dissenting activities.¹⁶⁴ The primary aim of this case-by-case determination is to ask whether an individual is an actual threat to the United States.¹⁶⁵

1. For the Purpose of Achieving a Political Power-Outcome or Propaganda

The test's first factor to consider is whether the group's purpose is to push a political agenda.¹⁶⁶ A politically-oriented purpose to achieve a power-outcome or propaganda is more specific than an aim to express a politically dissenting opinion.¹⁶⁷ There are two parts to this factor: (1) a politically-minded purpose, (2) to attain a power-outcome or propaganda.¹⁶⁸

First, under the Convention, a terrorist group must conduct its activities through purposeful action.¹⁶⁹ A group that unlawfully and willfully, and intentionally or knowingly aims to coerce a government or international organization to accomplish its own politically-minded agenda¹⁷⁰ is a terrorist group.¹⁷¹ This revised definition concentrates on the violent result to be achieved rather than the political opinion to be expressed.¹⁷²

Second, a motive-oriented approach to defining terrorism must also be based on whether the activity has a purpose to produce a political power-outcome or propaganda.¹⁷³ Though some may argue that a political purpose is too narrow of a criterion, it is effectively expansive.¹⁷⁴ It is intentionally broad to include ideological or religious aims that intend to effect some kind of violent change in government, regime, or politics of society.¹⁷⁵ Moreover, some scholars suggest that specific motives are "empirical regularities associated with terrorism" but are not necessary to define what

164. See Bassiouni, *supra* note 161, at xxiii; Ganor, *supra* note 153, at 294–95.

165. See Kidane, *supra* note 63, at 367.

166. See Ganor, *supra* note 153, at 294.

167. *Id.*; Kidane, *supra* note 63, at 365.

168. See Bassiouni, *supra* note 161, at xiii.

169. See The Convention, *supra* note 151, at art. 2(1).

170. This approach, which classifies as terrorist supporters those who intended to further a group's politically-minded purpose to produce a power-outcome or propaganda, is also found in the Convention. See The Convention, *supra* note 151, at arts. (3)–(5).

171. *Id.*

172. The U.S. Department of State also espouses the inclusion of a politically-minded purpose to coerce government bodies as a qualification of a terrorist. See *supra* Part IV.A.

173. See *supra* Part IV.A.1.

174. See Ganor, *supra* note 153, at 294.

175. See *id.*

terrorism is.¹⁷⁶ Instead, many authorities agree that a terrorist is motivated by a political aim to change the balance of power.¹⁷⁷

Despite the fact that in applying the first factor there will be some gray areas of determination, such as whether certain non-conventional guerrilla warfare qualifies as terrorism or armed conflict,¹⁷⁸ requiring a definition of terrorism to focus on a politically-oriented purpose draws a clearer line of distinction than a sweeping, generalized classification like Tier III because it does not allow a particular group to justify its means by the "worthiness" of its aims.¹⁷⁹

2. Willingly and Strategically Exploit the Fear of Noncombatants

The second factor of the test is whether the particular group uses its political agenda to willingly exploit the fear of noncombatants¹⁸⁰ through random or systematic strategies.¹⁸¹ An aim of terrorism is to take advantage of "the tremendous anxiety, and the intense media reaction evoked by attacks against civilian targets."¹⁸² By defining terrorism as a strategic attack against noncombatants rather than as one merely based on subjective violence, "we refute the slogan that 'one man's terrorist is another man's freedom fighter.'"¹⁸³

Relying on the first factor's motivation to produce a political power-outcome or agenda, the second factor specifies that terrorists

176. See Raymond D. Duvall & Michael Stohl, *Governance by Terror*, in *POLITICS OF TERRORISM*, *supra* note 144, at 231, 239.

177. See, e.g., Ganor, *supra* note 153, at 294.

178. See, e.g., Kidane, *supra* note 63, at 304–06, 364–65 (discussing the conflicts in defining Nelson Mandela's guerrilla warfare against the apartheid regime as terrorism). The U.S. Congress passed the 1986 Comprehensive Anti-Apartheid Act, urging South Africa to free Mandela, who had been convicted for treason, from prison. "It would not be sensible to conclude that Congress endangered the security of the United States or that the alien supporters of Mandela in this country were all deportable as terrorists endangering our national security." *Id.* at 365; see also Ganor, *supra* note 153, at 295–99 (discussing the distinctions between terrorism and guerilla warfare).

179. See Ganor, *supra* note 153, at 288.

180. The U.S. Department of Defense defines noncombatants as civilians and military personnel who are unarmed or who are not on duty at the time of the incident. U.S. DEP'T OF STATE, *COUNTRY REPORTS ON TERRORISM* 2010, at 242 (2011). A 2003 report also included military installations "when a state of military hostilities does not exist at the site" in the definition of noncombatants. U.S. DEP'T OF STATE, *PATTERNS OF GLOBAL TERRORISM* 2003, at xii n.1 (2004).

181. See BRUCE HOFFMAN, *INSIDE TERRORISM* (rev. & expanded ed. 2006).

182. See Ganor, *supra* note 153, at 295. The U.S. State Department and the U.S. Code also include this aspect as a definition of a terrorist. See *supra* Part IV.A.1.

183. See Ganor, *supra* note 153, at 298.

are ones who use “deliberate and systematic murder, maiming, and menacing of the innocent to inspire fear for political ends.”¹⁸⁴ Unlike the use of force for self-defense and in most armed conflict or war campaigns that target combatants, terrorist violence is usually one-sided because the victims are generally unarmed.¹⁸⁵

3. Engage in Internationally Proscribed Acts of Violence, Excluding Acts of Political Dissent

The test’s final factor determines if the group has engaged in internationally proscribed acts of violence.¹⁸⁶ This definition is reasonable because those who apply for asylum are foreign nationals who act under foreign laws.¹⁸⁷ However, the third factor creates several challenges: (1) the issue of the ineffectually expansive INA § 212(a)(3)(B)(iii)(V); (2) the issue of self-defense as a terrorist activity; and (3) the issue of classifying political dissent as a terrorist activity. Each of these challenges is addressed and is overcome by the reasonable parameters of the proposed third factor.

a. Revising the effectiveness of INA § 212(a)(3)(B)(iii)(V)

With the exception of section V, the activities identified as terrorist activities under the INA violate international laws of warfare or are international crimes against humanity.¹⁸⁸ Section V states that causing physical injury to persons or damage to property with the use of a dangerous device is a terrorist activity.¹⁸⁹ As previously discussed, § 212(a)(3)(B)(iii)(V) defines war efforts and most armed struggles as terrorist activities.¹⁹⁰

However, the first two factors of the test serve to clarify what it means to use a dangerous device to harm people or damage property with a terrorist purpose and a terrorist target.¹⁹¹ To use such force no

184. Netanyahu, *supra* note 140, at 9.

185. See Letschert & Staiger, *supra* note 144, at 14.

186. See M. Cherif Bassiouni, *International Terrorism*, in 1 INTERNATIONAL CRIMINAL LAW 765, 778.

187. This is recognized in INA § 212 (a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii) (2006); see also Kidane, *supra* note 57, at 677–78.

188. Compare INA § 212(a)(3)(B)(iii), 8 U.S.C. § 1182(a)(3)(B)(iii) (listing identified terrorist activities), with Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 75 U.N.T.S. 287 (identifying acts listed under INA § 212(a)(3)(B)(iii) as ones that violate laws or customs of war and crimes against humanity).

189. See INA § 212 (a)(3)(B)(iii)(V), 8 U.S.C. § 1182(a)(3)(B)(iii)(V).

190. See *supra* notes 51–56 and accompanying text.

191. See Ganor, *supra* note 153, at 288, 297–98; *supra* notes 166–85 and accompanying text (explaining the first two factors of the individualized test).

longer would include those who, like the SCNC, fought for their independence from military regimes that violated human rights.¹⁹² Rather, the third factor distinguishes these efforts from organizations like the Provisional Irish Republican Army, which specifically targeted civilians with the use of explosives to express a political agenda and change the balance of power.¹⁹³

b. Classifying self-defensive use of arms as a non-terrorist activity

The third factor also distinguishes those who use violence for self-defense from those who use violence to accomplish illegitimate aims.¹⁹⁴ Currently, the United States officially does not endorse the idea of defining armed struggles that violate an oppressive regime's laws as an exception to terrorism.¹⁹⁵ Yet in 1984, the U.S. Congress urged the South African government to free Nelson Mandela, who had been convicted of treason for his leadership of the anti-apartheid movement,¹⁹⁶ which was classified as armed conflict under international law definitions.¹⁹⁷ This blatant discrepancy in U.S. policies must be remedied by excluding self-defense from the implications of INA § 212(a)(3)(B)(iii)(V). Otherwise, victims like S-K-, who suffer grievous government human rights violations, like ethnic genocide,¹⁹⁸ will be unable to protect themselves against oppressive regimes or receive protection in the U.S.¹⁹⁹

Unlike terrorism, self-defense is violence intended for self-preservation rather than to perpetrate murder.²⁰⁰ This caveat is espoused by the International Criminal Tribunal for the Far East, which notes that any international or domestic law that "prohibits recourse to force, is necessarily limited to the right to self-defence."²⁰¹ Additionally, the U.N. Charter and the First Protocol to

192. See *supra* notes 1–5 and accompanying text.

193. See *McMullen v. INS*, 788 F.2d 591, 592–93, 595–97 (9th Cir. 1986), *overruled in part by* *Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005).

194. See *Kidane*, *supra* note 63, at 308.

195. *Id.* at 315.

196. See *id.* at 364–65.

197. See *id.* at 304, 314, 364–66.

198. See *supra* notes 84–85 and accompanying text.

199. See *DeYoung*, *supra* note 9.

200. See HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 76–77 (A.C. Campbell trans., M. Walter Dunne 1901) (1625)).

201. *War and Neutrality*, 15 ANN. DIG. & REP. PUB. INT'L L. CASES: YEAR 1948, at 356, 364 (H. Lauterpacht ed., 1953); see also YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* 181 (Cambridge Univ. Press, 4th ed. 2005) (discussing how the

the Geneva Conventions recognize the self-determinative right to self-defense to resist racist oppression or alien occupation.²⁰²

Excluding self-defense in the range of activities designated as terrorism also clarifies what it means to “engage” in terrorist activities under § 212(b)(3)(B)(iv).²⁰³ Many individuals who, for example, “materially” supported groups using arms in self-defense²⁰⁴ likely would not be barred from asylum because the revised definition would not designate the entities the asylum seekers supported as Tier III terrorist organizations.²⁰⁵

Classifying self-defensive armed conflict as conduct that is not a terrorist activity is also consistent with the United Nation’s commitment to peace.²⁰⁶ The U.N. Protocol provision was originally meant to cover “war crimes, genocide and the subversion or overthrow of democratic regimes”²⁰⁷ aimed at government officials,²⁰⁸ and was not intended to include armed resistance against totalitarian regimes.²⁰⁹ Although the issue of self-defense resistance where there is no racial oppression or alien occupation is currently controversial in international law,²¹⁰ the exclusion of the right to self-defense against regimes that violate international human rights as a terrorist activity is a step in the right direction.

c. Classifying acts of political dissent as non-terrorist activities

The final goal of the third factor is to distinguish between acts of political dissent and acts of terrorism.²¹¹ This requires the inclusion of a specific list of activities that are *not* terrorist activities under Tier III.²¹² Adapting a version similar to Australia’s approach is useful.

exclusion of self-defense in the use of unlawful force is found in domestic and international laws).

202. See U.N. Charter art. 51; Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Conflict (Protocol I), art. 1, ¶ 4, Dec. 4, 1979, 1125 U.N.T.S. 3.

203. See INA § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv) (2006).

204. See *supra* Part II.B.

205. See *supra* Part III.B.

206. See U.N. Charter art. 1; Convention of Status of Refugees, *supra* note 31, at art. 1F(c).

207. GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 184 (3d ed. 2007) (quoting U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Rec. of the Twenty-Fourth Meeting*, 2(a)(i), U.N. Doc. A/CONF.2.SR24 (Nov. 27, 1951)).

208. See *id.* at 186–89.

209. See *id.* at 184.

210. See Kidane, *supra* note 63, at 310.

211. See Ganor, *supra* note 153, at 295–96; Kidane, *supra* note 63, at 310–11.

212. See Ganor, *supra* note 153, at 295–96; Kidane, *supra* note 63, at 310–11.

Australia’s approach views armed resistance and the support of such efforts as legitimate within certain contexts.²¹³ It clearly states that political dissent does not constitute support for terrorism.²¹⁴ An action does not constitute a terrorist act if it:

- (a) is advocacy, protest, dissent or industrial action; and
- (b) is not intended:
 - i. to cause serious harm that is physical harm to a person; or
 - ii. to cause a person’s death; or
 - iii. to endanger the life of a person, other than the person taking the action; or
 - iv. to create a serious risk²¹⁵

This addition clarifies what kinds of actions are terrorist activities because it identifies what actions are not.²¹⁶ Under this revision, peaceful political activism like Sara’s support of the SCNC’s liberation movement²¹⁷ is more clearly a pro-democratic expression of political dissent, rather than support of a terrorist organization.²¹⁸

V. CONCLUSION

Statistics seem to indicate that the United States has continued its international obligation set forth in the Refugee Act of 1980: it grants asylum to foreign nationals from more than 105 countries each year.²¹⁹ But this data belies the underlying danger in the current state of U.S. asylum in cases of pro-democratic groups and their supporters.²²⁰

Because of the poorly constructed terrorist “safeguards” of Tier III, the United States has made enemies out of its allies. Tier III bars from asylum persons like the aforementioned Sara; individuals who were part of Afghan *mujahidin* groups that, with U.S. support, fought the Soviet invasion in the 1980s; and members of the main democratic opposition party in Zimbabwe, the Movement for

213. See Kidane, *supra* note 63, at 365.

214. *Id.*

215. *Criminal Code Act 1995* (Cth) s 100.1 (Austl.).

216. *Id.*

217. See *supra* notes 1–3.

218. See Kidane, *supra* note 63, at 365–66.

219. See Meissner, *supra* note 25.

220. See Dwoskin, *supra* note 15, at 2.

Democratic Change, whose leader, the Prime Minister of Zimbabwe, was praised by President Obama for his “courage and tenacity” in handling Zimbabwe’s political unrest.²²¹ These outcomes of the Tier III bar indicate that the United States has overcompensated in its response to national security concerns raised after 9/11.²²²

An ineffectual and inconsistent response like the Tier III classification does not resolve these challenges. The solution must not be, as is the current cause of the problem, to burden the overstrained DHS with discretionary waivers conferred at the whim of the Attorney General.²²³ Instead, the solution should be to amend Tier III to include a multi-factor test that focuses on a reasonable nexus between a terrorist activity, a terrorist purpose, and a terrorist target.²²⁴

The challenges of pinpointing an international definition for terrorism and of distinguishing the use of force in self-defense and in terrorism, though complicated, are not excuses to classify as terrorists those who aid the United States and advocate democracy. The multi-factor test does not resolve all the problems of defining terrorism, but it does provide a more effective reasonable basis to distinguish a member or supporter of a pro-democratic group from a terrorist.²²⁵

A multi-factor test as an amendment to the Tier III classification is the best solution for administrative delays²²⁶ and for the ineffective and inconsistent classifications of “undesignated terrorists” of U.S. allies who are eligible for asylum.²²⁷ Finally, the proposed individualized test furthers the Refugee Act’s true purpose:²²⁸ To protect the persecuted and keep out the terrorists.

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221. See HUMAN RIGHTS FIRST, *supra* note 91, at 4–5.

222. Andrew I. Schoenholtz & Jennifer Hojaiban, *International Migration and Anti-Terrorism Laws and Policies: Balancing Security and Refugee Protection*, TRANSATLANTIC PERSPECTIVES ON MIGRATION, INST. FOR THE STUDY OF INT’L MIGRATION, 1–3 (Feb. 2008), available at <http://www12.georgetown.edu/sfs/isim/Publications/GMF%20Materials/AntiTerrorismLaws.pdf>.

223. See HUMAN RIGHTS FIRST, *supra* note 91, at 1–2, 44.

224. See *supra* Part IV.B.

225. See *supra* Part IV.B.

226. See *supra* Part II.A.

227. See *supra* Part III.A.

228. See *supra* Part II.A.1.

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