No. 12-2471

United States Court of Appeals

For the Seventh Circuit

F. H.-T.,
Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General of the United States,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

BRIEF FOR HEBREW IMMIGRANT AID SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL OF THE DECISION BELOW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Since its founding in 1881, the central mission of *amicus curiae* Hebrew Immigrant Aid Society ("HIAS") has been to rescue Jews and others fleeing persecution, and to assist them to start their lives anew in peace and security in the United States and elsewhere. As the oldest international migration and refugee resettlement agency in the United States, HIAS has played a key role in the rescue and relocation of Jewish survivors of the Holocaust, more than 380,000 Jewish refugees from Iran and the former Soviet Union, and refugees of all faiths fleeing persecution in Vietnam, Bosnia, Kosovo, Sudan, and other dangerous places. In total, HIAS has assisted more than four and a half million people in their quest for freedom, helping them start new lives in the United States, Israel, Canada, Latin America, Australia, New Zealand and other countries around the world.

HIAS attorneys and accredited representatives have provided legal representation to asylum seekers in immigration courts, and HIAS has successfully represented numerous asylum seekers throughout the appellate process, up to and including the U.S. Courts of Appeals. In Washington, D.C., HIAS advocates for full and fair access to the U.S. refugee program and to asylum procedures in the United States. Through this experience, HIAS has learned how asylum applicants can be wrongly barred from asylum based on an overbroad application of the statutory bar for material support of terrorism. Specifically, HIAS believes that legitimate policies designed to bar the admission of individuals who provide material support to terrorists are

resulting in the denial of protection to bona fide refugees. For these reasons, HIAS has a deep interest in the outcome of this case, and believes, given its expertise, that it is well situated to assist this Court in resolving the important issues presented.

HIAS is filing a motion for leave to file in conjunction with this brief. Petitioner has consented to the filing of this brief, and Respondent has taken no position on the filing. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person (other than the *amicus curiae*, its members, or its counsel) contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The BIA's overbroad interpretation of the material support bar to asylum conflicts with both the language and the purpose of the Immigration and Nationality Act ("INA"), sweeping in approximately half of the population of Eritrea and large portions of other countries that have some of the most oppressive regimes in the world.

First, the bar for material support of terrorism has a requirement of unlawfulness that the BIA has not considered and that does not cover every war for independence. Specifically, the statute defines terrorist activity, as relevant here, to include only those activities that are unlawful where they are committed or would be unlawful under U.S. law if committed in the United States. Because not all wars for independence are unlawful, either under

foreign or domestic law, not all members of groups involved in independence struggles should be labeled terrorists under the INA. Here, the EPLF's fighting a war for independence is plainly lawful under Eritrean law, and that is the foreign law at issue—not the Ethiopian law that governed in the 1980s—because the INA refers in the present tense to whether the act *is* unlawful under the laws of the place where it is committed. Furthermore, there is no U.S. law that prohibits a theoretical war against a non-democratic U.S. government, and the laws governing rebellion against our democratic government are simply inapposite. Thus, because Petitioner knew only of the EPLF's war against Ethiopia—and not the EPLF's violence against civilians—he did not have knowledge of terrorist activity, and thus does not fall within the material support bar.

Second, the BIA's interpretation would subvert the INA's intent to grant asylum to persecuted individuals from around the world by excluding large portions of many countries. The purpose of the material support bar—as reflected in international law and explained in the statute itself—is to bar asylum for people who threaten the security of our country. However, there is no evidence or logic to suggest that Petitioner—and everyone else who is a member of a group involved in a struggle for independence—represents a threat to U.S. security. Indeed, that is why the INA requires unlawfulness to fall within the material support bar, rather than simply barring members of every group involved in any violence. Moreover, the purpose of the material support

bar was plainly not to exclude a large percentage of people in countries, like Eritrea, from which asylum is most needed.

ARGUMENT

I. PETITIONER SHOULD NOT BE BARRED FROM REMOVAL BECAUSE HE HAD NO KNOWLEDGE OF EPLF TERRORIST ACTIVITY

The Immigration and Nationality Act bars anyone from receiving asylum if he is a member of a group that he knows to be engaged in terrorist activity. The BIA erred in conflating the question whether Petitioner knew of any EPLF violence with whether he knew of any EPLF terrorism. However, as discussed below, not all "violence" is terrorism, and because Petitioner's knowledge did not concern terrorist activities, he should not be barred from being granted asylum.

A. Petitioner's knowledge that the EPLF was involved in a war for independence from Ethiopia does not constitute knowledge of terrorist activity under the Immigration and Nationality Act.

The INA clearly requires an applicant to have knowledge of his group's terrorist activity to fall within the statutory bar to asylum. The relevant statutory provision states that an alien is not eligible for asylum if he "is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(i)(VI).[1] The statute defines a "terrorist organization" as "a group of two or more individuals, whether organized or not,

[1] There is an exception, which is not relevant here, where the Secretary of State or the Secretary of Homeland Security acts within their "unreviewable discretion" to grant a waiver. *See* 8 U.S.C. § 1182(d)(3)(B)(i).

which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv)." *Id.* § 1182(a)(3)(B)(vi)(III). The described "activities" concern "terrorist activity." *Id.* § 1182(a)(3)(B)(iv). And "terrorist activity" means "any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves" a variety of conduct, including highjacking, kidnapping, assassination, or the use of a weapon with intent to endanger someone for other than monetary gain. *Id.* § 1182(a)(3)(B)(iii). In short, the material support bar applies only if, *inter alia*, the alien knew or should have known that his organization was involved in an activity that is unlawful where it took place or would be unlawful in the United States.

The activities about which Petitioner knew—specifically, that the EPLF engaged in violent acts against the Ethiopian military in the war for independence (*see infra* Part I.B)—are not unlawful under the laws of Eritrea or the laws of the United States.

1. The EPLF's engaging in a war for independence is not unlawful under the laws of Eritrea, and the laws of Ethiopia decades ago are irrelevant under the INA.

When considering whether the activity is "unlawful under the laws of the place where it is committed," 8 U.S.C. § 1182(a)(3)(B)(iii), the laws at issue are those currently in force in the given place. In other words, it does not matter whether the acts *were* unlawful under the laws that *were* in force at the time

the acts were committed if they are lawful now under the laws of the country that is in charge of the place where they were committed.

This interpretation necessarily follows from the language of the statute, which refers in the present tense to whether the act "*is* unlawful under the laws of the place where it *is* committed," *id.* (emphases added), not whether it *was* unlawful when it *was* committed. The plain meaning of "is unlawful" is that the act violates the law currently in force. Indeed, when Congress wanted to speak in the past tense on these issues, it did so, for example in stating that the test is whether "the organization was a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(i)(VI); *see also, e.g.*, *id.* § 1182(a)(3)(B)(i)(VIII) (barring asylum for an alien who "has received military-type training . . . from or on behalf of any organization that, at the time the training was received, was a terrorist organization").

Furthermore, this is the only reasonable interpretation where, as here, there is a new nation that governs the place where the activity occurred. If the new nation does not consider the action unlawful, then it is difficult to discern any reason why it would matter that the old nation did find it unlawful. In addition, this use of the new nation's laws prevents legitimate independence movements from being automatically labeled as terrorists.

It also ensures that courts need not delve into deciding which entity's laws count during a civil war or fight for independence. Here, the EPLF effectively controlled much of Eritrea and operated as a pseudo-government

during the 1980s. (AR386).[2] Consequently, Petitioner was essentially a member of the government in power, even if that government was not yet recognized by the international community because it did not fully take control until 1991. Another example illustrates the problem even more starkly. The United States did not recognize Soviet control over Estonia, even though the U.S.S.R. plainly was the governing power there for decades in the Cold War period. So for Estonians who fought for independence during that period, in violation of Soviet law, what would be the "laws of the place"? Plainly, the most sensible answer—and the one that accords with the present tense language of the statute—is to apply Estonian law, rather than the law of a Soviet government that the United States never recognized in the first place.

Furthermore, it would be bizarre to label Petitioner a terrorist simply because he belonged to a group that fought a war that ultimately decided that the group had a right to govern the area where Petitioner lived. The Eritreans had a claim that Ethiopia illegally annexed Eritrea in the early 1960s. (AR403-404, 566). The Eritreans did not prove their claim in a court of law because no court exists to press this claim, but they vindicated their claim in the manner that such claims of sovereignty are often vindicated, through war. There is no logical basis on which to treat this war as unlawful—assuming it did not violate the international law regarding warfare—simply because Ethiopia said so, given that the international community (including Ethiopia) has now accepted Eritrean sovereignty. Simply put, Congress's choice to judge lawfulness based

[2] Material in the Certified Administrative Record is cited as AR__.

on current law of the place at issue makes sense because the international community does not decide the legitimacy of conduct abroad based on the past law of a country that no longer governs the place. In addition, as discussed below, the BIA's interpretation would lead to absurd results, treating as terrorists approximately half of Eritrea and a huge percentage of the populations of many other countries.

Indeed, the court of appeals cases considering the issue of the material support bar and independence movements have accepted the possibility that the independence movement would not be covered if the nation no longer considers the activity unlawful. *See Annachamy v. Holder*, 686 F.3d 729, 734 & n.4 (9th Cir. 2012) (holding that "there is no political offense exception to the material support bar," but noting that "there may be an exception to the definition of 'terrorist activity' where the law of the country in question incorporates international law such that the conduct in question is no longer 'unlawful' under the country's domestic law" (internal quotation marks omitted)); *Khan v. Holder*, 584 F.3d 773, 781 (9th Cir. 2009) (same). In those cases, there was no evidence that the activity is now considered lawful, presumably because those independent movements did not create new nations with new laws. *See Annachamy*, 686 F.3d at 734 n.4; *Khan*, 584 F.3d at 781. But those new laws are apparent in this case.

Applying the proper interpretation here, it is clear that the EPLF's war for independence is not considered unlawful under the current laws of Eritrea. Eritrea achieved its independence in 1991 (AR559, 607), and it is governed by

the People's Front for Democracy and Justice, which was formed out of the EPLF (AR349). As a result, there is no doubt that the EPLF's fight for independence is now considered lawful in Eritrea. Indeed, the Eritrean Constitution expressly professes "Eternal Gratitude to the scores of thousands of our martyrs who sacrificed their lives for the causes of our rights and independence, during the long and heroic revolutionary struggle for liberation, and to the courage and steadfastness of our Eritrean patriots; and standing on the solid ground of unity and justice bequeathed by our martyrs and combatants." Constitution of Eritrea, Preamble, *available at* http://www.unhcr.org/refworld/docid/3dd8aa904.html. In any event, neither the IJ nor the BIA has suggested that the EPLF's activity is unlawful under Eritrean law.

2. The EPLF's engaging in a war for independence is not unlawful under United States law

Eritrea's war for independence is not unlawful under United States law except to the extent that it violated the international law governing armed conflict. The statutory test is whether the activity, "if it had been committed in the United States, would be unlawful under the laws of the United States or any State." 8 U.S.C. § 1182(a)(3)(B)(iii). Of course, viewed at a certain level of generality (i.e., waging war on the government), the Eritrean war for independence plainly violates U.S. law. However, it is absurd for the activity to be viewed so generally, particularly since the statute was intended to cover things like self-defense, *see McAllister v. Att'y Gen.*, 444 F.3d 178, 186-87 (3d Cir. 2006), which necessarily depend on the specific context. Thus, the

question is whether a war for independence against an oppressive, totalitarian regime that supposedly has no rightful claim to govern certain territory is unlawful under U.S. law.

The simple answer is that there is no U.S. law governing a war for independence against a non-democratic government. Indeed, the irony of the question is that the United States was founded on just such a war, one which England obviously deemed unlawful and one which we obviously did not. To be sure, the Declaration of Independence does not constitute governing U.S. law, but it does illustrate the point that the lawfulness of a war depends upon the war, and a war for independence is not per se unlawful. And quite obviously, the revolutionaries were not prosecuted after the Revolutionary War. Moreover, the United States' acceptance of Eritrea's independence—and of the EPLF as the legitimate governing entity in that country—attests to the fact that the fight for independence was not per se unlawful under United States law.

Because there is no domestic law on point, this Court could look to international law to fill the gap. *See, e.g.*, *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) ("Customary international law comes into play only 'where there is no treaty, and no controlling executive or legislative act or judicial decision.'" (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). But under international law, independence struggles are not unlawful, though unlawful atrocities may be. *See* Brief of Petitioner at 18-20; *see also, e.g.*, *Khan*, 584 F.3d at 786 (Nelson, J., concurring) ("a group is not automatically a terrorist organization simply by virtue of engaging in an armed

conflict"). And since the BIA has not identified any international law basis for the illegality of the Eritrean war for independence, this would not provide a legal basis for affirmance in any event.

B. Petitioner had knowledge only of EPLF's waging a war for independence, not of EPLF's terrorist activity

There is no evidence to suggest that Petitioner knew of any violations of the laws of war or attacks on civilians. To begin with, while the BIA stated that Petitioner "equivocated" about whether he knew about EPLF "acts of violence" (AR5), the reality is that Petitioner readily admitted that he knew the EPLF was part of a war against Ethiopia (AR368-69). He simply disputed that he personally saw any of the violence. (AR367). In any event, as discussed above, the issue is not his knowledge of violence generally, but of violence that could qualify as terrorism.

As to that issue, the BIA did not make a factual finding that Petitioner knew about civilian attacks – and certainly not that he had any such knowledge while he was a member of the EPLF. To be sure, the BIA mentioned that "while the respondent initially testified that he was not aware of any acts of violence perpetrated by the EPLF on civilians, he later testified that the EPLF had monthly 'political indoctrinations' where current events were discussed, including what they did and fought, and that he 'only heard that they were attacking the civilian trucks or killing civilians.'" (AR5). However, the BIA did not attempt to reconcile this testimony, presumably because it considers any war for independence to qualify as terrorist activity. *See Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006)). And if the BIA had done so, it would have found no basis

for suggesting Petitioner knew of EPLF attacks on civilians. Specifically, Petitioner testified only that the "political indoctrination" meetings discussed attacks on the Ethiopian military, and that is the conclusion that the IJ drew from this testimony. (AR141, 155, 367-68). There was no suggestion by Petitioner or the IJ that the meetings discussed attacks on civilians. As for whether he "heard that [the EPLF] were . . . killing civilians," this statement was in direct response to a question about whether "it was *after you came to the United States* that you heard that the EPLF might be violent." (AR368) (emphasis added). There is nothing in the testimony to suggest that Petitioner knew about civilian attacks *at the time he was a member of the EPLF*, and he explicitly refuted this idea. (AR361). In any event, to the extent there is any ambiguity on this point, this Court should remand for further factfinding. *See Kone v. Holder*, 620 F.3d 760, 763 (7th Cir. 2010) ("While our review is deferential, remand is appropriate when the BIA overlooks key aspects of an asylum-seeker's claim and might reach a different conclusion after a more complete evaluation of the record.") (internal quotation marks omitted); *see also id.* (noting that "remand to agency is [the] proper course when additional determination or explanation is necessary").

Furthermore, as a matter of law, there is no basis to presume that Petitioner must have known about attacks on civilian populations. Indeed, a circuit court has rejected a similar assumption that a low-level member of an organization who did not engage in any violent acts would necessarily know of an organization's terrorist activities. *See Daneshvar v. Ashcroft*, 355 F.3d 615,

628 (6th Cir. 2004) ("We would be hard-pressed to classify any minor who sold newspapers for an organization that supported an armed revolt against a tyrannical monarch as a terrorist."). Furthermore, this Court has held that for an organization to commit a terrorist act, the act must be directly or indirectly authorized by the organization. *See Hussain v. Mukasey*, 518 F.3d 534, 538-39 (7th Cir. 2008). In *Hussain*, the asylum applicant was a "high-level official of the organization," and the terrorist acts "were so frequent that Hussain could not have failed to learn about them—indeed, he admitted he knew about them—and to learn that they had not been denounced by the organization's leadership, of which he was a part." *Id.* at 539. Here, in contrast, it is undisputed that Petitioner was far from EPLF leadership and physically away from where the violence occurred. Thus, there is no basis to impute to Petitioner knowledge of attacks on civilians, let alone attacks authorized by the EPLF.

II. THE BIA'S INTERPRETATION, WHEREBY INDEPENDENCE MOVEMENTS ARE PER SE TERRORIST ORGANIZATIONS, WOULD DENY ASYLUM PROTECTION FOR AN ENORMOUS NUMBER OF INNOCENT PEOPLE, IN CONFLICT WITH THE PURPOSE OF THE ASYLUM STATUTE

A. Congress intended to extend asylum protections broadly, and not to exclude huge numbers of people that present no danger to the United States.

Congress meant to extend asylum protections widely to those individuals facing persecution around the world. The INA defines a "refugee" as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is 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 . . . .

8 U.S.C. § 1101(a)(42). The broad language in this definition plainly shows Congress did not intend to exclude from asylum protection large percentages of the populations of many countries.

Furthermore, Congress intended the material support bar as a limited exclusion only for those individuals who threaten the security of our country. International law, as reflected in the INA, makes clear that the material support bar should be limited to potentially dangerous refugees. The Supreme Court has recognized that "[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 [Refugee] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) (citing U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 [hereinafter U.N. Protocol]). The U.N. Protocol requires that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Refugee Convention, July 28, 1951, 1989 U.N.T.S. 150, Art. 33.1 (adopted in U.N. Protocol, art. I). The only exception relevant here is where "there are reasonable grounds for regarding [the refugee] as a danger to the

security of the country in which he is." *Id.*, art. 33.2 (adopted in U.N. Protocol, art. I).[3]

The United States has acceded to the U.N. Protocol. *See INS v. Stevic*, 467 U.S. 407, 416 (1984). Even assuming that the U.N. Protocol is not self-executing, the INA should still be interpreted to avoid any conflict with the U.N. Protocol. Under the *Charming Betsy* canon, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). Accordingly, as the Ninth Circuit recognized, "[u]nder *Charming Betsy*, we should interpret the INA in such a way as to avoid any conflict with the Protocol, if possible." *Khan*, 584 F.3d at 783.

Furthermore, the INA itself makes clear the relationship between the material support bar and the U.N. Protocol provision on excluding people who represent a threat to the nation's security. The INA provides that "an alien who

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[3] There is another international law provision that is arguably relevant, which states that the Refugee Convention:

> shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity ... ;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.

Refugee Convention, art. 1F. However, Petitioner's simply working for the EPLF—without being personally involved in violence of any kind—does not constitute a war crime, a serious non-political crime, or actions contrary to the purposes of the United Nations.

[has engaged in a terrorist activity] shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States." 8 U.S.C. § 1231(b)(3). Thus, both under international law and the statute itself, the clear purpose of the material support bar is to prohibit asylum for people who are security risks to the United States.[4]

The BIA's interpretation conflicts with this purpose. There is no danger from people like Petitioner who were members of independence groups that that they did not know were committing any terrorist acts. The BIA has not suggested that Petitioner presents any kind of danger, nor could the BIA do so based on the evidence. Petitioner joined the EPLF at age 15, and he asked to leave shortly after he joined, but he was forced to remain based on the fear that he would be killed if he left. (AR305, 351-55). He never harmed anyone or was even near the fighting during the war. (AR353-58). And he did not know of EPLF's attacks on civilians. *See supra* Part I.B. The idea that Petitioner is a danger to the security of the United States simply because he joined a group that was engaged in a war for independence—without engaging in any violence of his own, without any knowledge of attacks on civilians, and wanting to leave almost from the moment he arrived as a minor—is absurd.

Indeed, other examples illustrate the absurdity even more starkly. Under the BIA's interpretation, even members of groups that worked alongside the

[4] The Ninth Circuit treated this provision as evidence that the INA does not conflict with the U.N. Protocol, *see Khan*, 584 F.3d at 784, but the point is not whether they conflict, but whether the material support bar should be interpreted with this stated purpose in mind – and it obviously should.

U.S. military during the war in Iraq would fall within the material support bar because those groups were overthrowing the government of Saddam Hussein. For instance, an Iraqi woman named Anna and her two teenage daughters were denied asylum because she was formerly a member of the Patriotic Union of Kurdistan (PUK), which worked in opposition to Saddam Hussein and is now a mainstream political party in Iraq. *See* Marisa Taylor, *Why Are U.S.-Allied Refugees Still Branded as "Terrorists?,"* McClatchy Newspapers, July 26, 2009, available at http://www.mcclatchydc.com/227/v-print/story/72362.html; *see also, e.g.*, Felisa Cardona, *Saddam Hussein Foe in Immigration Limbo in Denver*, Denv. Post, Aug. 19, 2009, at B1, available at http://www.denverpost.com/technology/ci_13154773. And, in a 2009 floor speech, Senator Leahy noted that over 7,000 Iraqis were being denied lawful permanent residence under the material support bar even though they "pose no legitimate threat to the United States." 155 Cong. Rec. S8785, S8854–S8855 (daily ed. Aug. 5, 2009). The same is true for a number of individuals who fought alongside the United States in the Vietnam War. *See* "The Impact of the Material Support Bar," U.S. Refugee Admissions Program For Fiscal Year 2006 and 2007, Recommendations of the Refugee Council USA (September 2006) (available at www.rcusa.org). In fact, as an unsuccessful bill that was introduced by Congressman Pitts in 2006 acknowledged, "[c]urrent law defines terrorist organization so broadly that even the United States military is defined as a terrorist organization any time it enters another country uninvited." H.R. 5918. There is no logic to the idea that those people who are members of

groups that supported the United States in a war are a threat to the security of the United States.

In addition, as the Ninth Circuit recognized, if the BIA's view were adopted, it would likely preclude asylum for "armed resistance by Jews against the government of Nazi Germany." *Khan*, 584 F.3d at 781. It would also bar asylum for any individual who provided a safe house or other material support to the Jewish resistance fighters during World War II, any Tutsi civilians who banded together in groups of two or more to resist the Hutu militias during the Rwandan Genocide, and any Sudanese villagers who defended themselves against the Janjaweed militia during the genocide in Darfur.

As discussed above, there is no reason to accept these absurd results because there is a reasonable interpretation of the INA that avoids it. If Congress wanted all people involved in independence struggles to be barred from asylum, because it believed such people are a threat to security, Congress would have done so expressly. Instead, Congress based the material support bar upon the lawfulness of the conduct, so that violence does not constitute terrorist activity unless it is unlawful – and not all independence struggles are unlawful. Moreover, the INA already prevents asylum for those people involved in independence struggles who are truly dangerous. In particular, the statute bars asylum for an individual who "has engaged in a terrorist activity," "is likely to engage after entry in any terrorist activity", "is a representative . . . of . . . a terrorist organization," "endorses or espouses terrorist activity," or "has received military-type training . . . from or on behalf of . . . a terrorist

organization." 8 U.S.C. § 1182(a)(3)(B)(i). The applicant is also barred if he persecuted others, was convicted of a serious crime and thereby constitutes a danger to the community, has committed a serious non-political crime, or the catch-all, "there are reasonable grounds for regarding the alien as a danger to the security of the United States." 8 U.S.C. § 1158(b)(2)(A)(i). Thus, the BIA's overbroad interpretation of the material support bar is not necessary to achieve the purpose behind the bar.

B. A per se bar for any member of an independence movement that engaged in any violence would affect dozens of countries, and often exclude a large percentage of individuals in those countries from asylum protections

The BIA's approach would bar asylum for approximately half of Eritreans, along with countless more persecuted individuals across the globe who clearly need and deserve protection and are well outside the intended scope of the material support bar.

As to Eritrea, approximately half of the Eritrean population was involved with the EPLF. (AR387). Because it was widely known that the EPLF was fighting for Eritrean independence, just about all of these people would fall within the material support bar. Thus, regardless of whether they knew that the EPLF harmed civilians or violated the laws of war in any way, at least half of the people in Eritrea—many of whom require asylum protection given that country's serious human rights abuses—are barred from the protection of asylum law. There is nothing in the language or purpose of the material support bar to suggest that it should prevent asylum for half of a country.

More generally, since 1970, over 50 countries have attained independence. *See, e.g.*, Growth in United Nations membership, 1945-present, *available at* http://www.un.org/en/members/growth.shtml (listing new United Nations members). Most of these countries gained independence only after a struggle for independence that involved some form of violence. For example, in recent years, South Sudan, East Timor, Kosovo, Serbia, and Montenegro achieved independence only after prolonged wars against the previously ruling governments. There were also violent struggles against authoritative regimes in the former Eastern bloc countries that became independent in the 1990s and the African and Asian countries that became independent in the 1970s (*e.g.*, Bangladesh, Mozambique, Angola, and Zimbabwe).

Furthermore, in independence struggles, it is common for a significant percentage of the population to aid the independence struggle through taxes, contributions, non-monetary assistance, and speech, as well as through irregular military service. For instance, as much as 82% of refugees who had fled Burma could be labeled as providing material support for terrorist activity because of the widespread opposition to the oppressive regime there. *See* M. Nezer, *The "Material Support" Problem: The Jewish Perspective* at 12 (HIAS Policy Paper, 2007), *available at* http://advocacy.hias.org/document.doc?id=18 (citing January 2006 field investigation by the Immigration and Refugee Clinic and the International Human Rights Clinic, Human Rights Program, Harvard Law School, February, 2006).

Indeed, the BIA's interpretation would deny protection to many of the refugees who need it the most: they are members of groups involved in wars because they come from countries with some of the most brutal regimes and violent conflicts on earth. In particular, many of the countries that have attained independence in recent years have thereafter been implicated in persecution, torture, and other human rights abuses, making asylum eligibility for nationals of those countries particularly significant. For example, the State Department has made clear that in Eritrea there are "consistent and persistent reports of serious human rights violations," including "harsh and life-threatening prison conditions that included torture and incommunicado detention, which sometimes resulted in death; forced labor of indefinite duration through the mandatory national service program; and the severe restriction of civil liberties including freedom of speech, press, assembly, association, and religion." U.S. State Dep't, 2011 Human Rights Reports: Eritrea at 1, *available at* http://www.state.gov/documents/organization/186404.pdf. Similarly, in other recently independent nations, there are also serious human rights violations. [5]

[5] *See, e.g.*, U.S. State Dep't, 2011 Human Rights Reports: Zimbabwe at 1, *available at* http://www.state.gov/documents/organization/186469.pdf ("The most important human rights problems in the country remained the government's targeting for harassment, arrest, abuse, and torture of members of non-ZANU-PF parties and civil society activists, widespread disregard for the rule of law among security forces and the judiciary, and restrictions on civil liberties."); U.S. State Dep't, 2011 Human Rights Reports: South Sudan at 2, *available at* http://www.state.gov/documents/organization/187907.pdf ("The most serious human rights problems in the country included extrajudicial killings, torture, rape, and other inhumane treatment of civilians as a result of conflict between the SPLA and SAF, RMG attacks on SAF and SPLA security forces, government counterattacks, clashes between security forces and civilians, interethnic and intercommunal conflict, and civilian clashes related to cattle

The total effect of the BIA's overbroad interpretation of the material support bar is enormous. Assistant Secretary of State Ellen Sauerbrey stated in testimony before Congress that the material support bar was the main reason for a shortfall of over 12,000 refugee admissions during fiscal year 2006. Responses to Questions for the Record Submitted to Assistant Secretary Ellen R. Sauerbrey by Senator Edward M. Kennedy, Senate Committee on the Judiciary, Subcommittee on Immigration (Sept. 27, 2006), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109shrg32151/html/CHRG-109shrg32151.htm; *see also* Marisa Taylor, *Why Are U.S.-Allied Refugees Still Branded as "Terrorists?"*, McClatchy Newspapers, July 26, 2009, available at http://www.mcclatchydc.com/227/v-print/story/72362.html (noting that the number of people whose applications for refugee status, asylum, or green cards have not been processed because of the material support bar has risen from 5,304 in December 2008 to 7,286 in June 2009). To be sure, requiring knowledge of unlawful activity—and not treating all wars as unlawful—would not fully solve the problem of the overbreadth of the material support bar. But for many, like Petitioner, it would ensure that individuals who present no danger are not wrongly barred from asylum.

(continued…)

rustling. Conflict also resulted in approximately 250,000 internally displaced persons (IDPs) during the year."); U.S. State Dep't, 2011 Human Rights Reports: Timor-Leste at 1, *available at* http://www.state.gov/documents/organization/186522.pdf ("Principal human rights problems included police use of excessive force during arrest and abuse of authority; arbitrary arrest and detention; and an inefficient and understaffed judiciary that deprived citizens of due process and an expeditious and fair trial. Other human rights problems included gender-based violence, violence against children including sexual assault, corruption, uneven access to civil and criminal justice, warrantless search and arrest, and poor prison conditions.").

CONCLUSION

The judgment of the Board of Immigration Appeals should be reversed.

Dated: November 20, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,056 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 2007 in Bookman Old Style 12pt.

Dated: November 20, 2012

/s/ Brian J. Murray
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November 2012, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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