PROTECTING THE PROTECTORS OR VICTIMIZING THE VICTIMS ANEW? "MATERIAL SUPPORT OF TERRORISM" AND EXCLUSION FROM REFUGEE STATUS IN U.S. AND EUROPEAN COURTS*

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I. INTRODUCTION

In recent years, the United States (U.S.) as well as European states have adopted numerous anti-terrorism laws based on concerns for national security, aimed at keeping persons with connections to terrorist networks

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out of the respective countries, or facilitating the forced return to their country of origin.[1]

While keeping the homeland safe represents a legitimate objective that would seem to justify a certain amount of hassle from airport security and various border checkpoints for visitors and other persons wanting to enter a country, the occasional stringent laws enacted have often had the side-effect of negatively affecting, if not intentionally targeting, persons in need of protection. As a result of anti-terrorism provisions such as the so-called material support bar included in the USA PATRIOT Act and similar legislative approaches in other countries, even refugees, defined by Article 1 A (2) of the 1951 Refugee Convention (Refugee Convention) as individuals with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion," have been prevented from receiving asylum or protection from *refoulement*, often in direct contravention of the provisions of the Refugee Convention and other applicable international law.[2]

While some of the shortcomings of overly broad anti-terrorism legislation and some of the most extreme examples of judicial overreach have been rectified—for example, by Executive Branch officials issuing *ad hoc* waivers to the material support bar—such waivers only help a fraction of all persons with legitimate claims to refugee status, are usually a matter of discretion which cannot be appealed, and, thus, in general violate the Refugee Convention, which conveys on all individuals with a well-founded fear of persecution a non-discretionary right to refugee status.[3] According to Article 1 F of the Refugee Convention, such a right may only be denied if one of the Exclusion Grounds applies, that is, if the person concerned has committed a crime against peace, war crime, crime against humanity, a serious non-political crime, or has been guilty of acts contrary to the purposes and principles of the United Nations.[4]

Some acts of terrorism may reasonably be subsumed under those grounds for exclusion from refugee status. The trouble with anti-terror legislation, however, is that there neither seems to be a generally agreed-

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1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 [hereinafter PATRIOT ACT].

2. *See* PATRIOT ACT, *supra* note 3, and United Nations Convention Relating to the Status of Refugees, art. (1)(A)(2), July 28, 1951, 189 U.N.T.S. 150 (entered into force on Apr. 22, 1954) [hereinafter Refugee Convention].

3. The claim in regard to the non-discretionary right to refugee status, given the well-founded fear precondition, may be based on art. 1, Refugee Convention, which states that "the term 'refugee' shall apply to any person" who has a well-founded fear of persecution.

4. Refugee Convention, *supra* note 5, art. (1)(F).

upon definition of terrorism, nor of what constitutes "material support" to acts of terrorism. As a result, some legislation based on concerns for national security include language that excessively broadens the scope of what may constitute terrorism, thus, leading to exclusion from refugee status of numerous persons who otherwise would have a legitimate claim to protection under the Refugee Convention. Furthermore, in some jurisdictions, the legislative concept of "material support" has assumed an ever-expansive posture, as also exemplified by the 2010 U.S. Supreme Court decision in *Holder v. Humanitarian Law Project*.[5] Holder ruled ruling that training blacklisted organizations in peaceful dispute resolution techniques, or providing even minimal support to resistance movements, or support under duress, leaving no choice of action, constitutes material support to terrorism leading to exclusion from refugee status.[6]

This paper seeks to identify the core provisions contained in various European and U.S. national security and asylum laws leading to exclusion from refugee status, and compare the various approaches taken with a view to definitions of "being involved in terrorism" and "providing material support to terrorism," and the legal consequences attached to either finding, that is, the level at which the exclusion from refugee the status bar is set. This paper will also scrutinize leading cases before national European and U.S. courts as well as the European Court of Justice (ECJ) in that regard, and evaluate additional paths to relief (that is, other safeguards against *non-refoulement*, Executive Branch waivers etc.).

While the aim is to assess where legislative or judicial overreach may be discernible (or the lack of legislative precision—intended or unintended—may have led to executive overreach and judicial impotence) and arrive at a more generally acceptable and legitimate definition of what reasonably should qualify for exclusion, preliminary findings seem to indicate that the heart of the problem, at least in part, may lie elsewhere—in the lack of clear-cut and open procedures for designating persons or organizations as engaged in terrorism, leaving a significant "margin of appreciation" for politicized decisions as to whom to include in the so-called terror lists in the first place.

Thus, uncovering some of the underlying, unhealthy conjunctions of undisclosed procedures for drawing up terror lists with too vaguely defined reasons for exclusion that prevent legitimate refugees from receiving rightful protection under the Refugee Convention, and hence, leading to the re-victimization of victims, will be at the core of this project.

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5. Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010).

6. *Id.* at 2713.

For the purpose of this paper, the ensuing discussion will concentrate on highlighting some aspects of the above outlined opposing forces; that is—on juxtaposing recent U.S. Supreme Court and ECJ decisions pertaining to material support bars, and exclusion from refugee status, and elaborating on the underlying—more than just a spurious effect of the process of drawing up so-called "terror lists" as one essential part of this problematic conjunction.

A detailed depiction and comparative analysis of various national jurisdictional approaches (such as laws and judgments pertaining to national security and exclusion) will be left for ensuing chapters. Here, the most apparent contrast between U.S. and European approaches, broadly speaking, as well as discernible flaws common to both, will be at the center of the discussion.

II. ANTI-TERROR LEGISLATION IN THE UNITED STATES

Not much attention had been paid to anti-terror legislation until the Anti-terrorism and Effective Death Penalty Act (AEDPA) of 1996[7] authorized the Secretary of State to designate groups of "foreign terrorist organizations" and, in turn, freeze all their assets.[8] It was first in the wake of the attacks in New York City and Washington, DC, on September 11, 2001, and the passing of the USA PATRIOT Act [9] that same year that content and consequences of such legislative efforts received broader attention, and provoked growing criticism, in the public sphere. [10] That same year that content and consequences of such legislative efforts eventually received broader attention, and provoked growing criticism, in the public sphere. From then on, in line with an ever expanding reach of terrorism legislation, the tense relationship between national security concerns on the one hand, and civil liberties, basic human rights and the rights of refugees (exemplified by the perhaps weakest group of people affected by such legislation) on the other hand, has left the opposing points of view seemingly irreconcilable.

At the core of this dispute is the seemingly ever expanding reach of anti-terror legislation where the AEDPA of 1996 entailed a public designation of a certain organization as terrorist organization (with concomitant inclusion in a "terror list") prior to the potential freezing of

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7. *See* Anti-terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 [hereinafter AEDPA].

8. *Id.* § 219.

9. *See generally* PATRIOT ACT, *supra* note 3.

10. *See e.g., Key Part of Patriot Act Ruled Unconstitutional*, WASHINGTON POST, Sep. 30, 2004, at A16.

that organization's funds.[11] It provided for an opportunity to challenge such designation, as well as for mandatory, periodic reviews of that status.[12] The USA PATRIOT Act, along with ensuing legislation further expanding the definition of what may constitute engagement in terrorism, incorporated few such safeguards against wrongful designations.[13]

The USA PATRIOT Act created three categories of "terrorist organization" with increasing levels of vagueness as to the reasons for inclusion.[14]

So-called Tier 1 designation pertained to groups officially designated as foreign terrorist organizations according to AEDPA, in line with the 1996 legislation that was still dependent on authorization of such designation by the Secretary of State.[15] Tier 1 designation included certain accountability, such as public designation; it also included, limited due process safeguards such as opportunity to challenge.[16]

Tier 2 expanded that definition to include groups of people that the Secretary of State, the Attorney General, and the Secretary of Homeland Security conclude *have* engaged in terrorist activity.[17] After reaching this conclusion, the officials still provided official notice by publishing the names of Tier 2 groups in the Federal Register.[18] Also, funds were not automatically frozen, however, members of the affected groups were automatically inadmissible to the United States.[19] Procedures for legal challenge were lacking, and the designation was based on acts of the past as well as projections into the future. It was sufficient for the organization to have been engaged in terrorist activities, or to be suspected of becoming engaged in terrorism in the future.[20]

The third type of terrorist group described in the USA PATRIOT Act, Tier 3, eventually opened the "flood gates" to potential arbitrariness by being breathtakingly wide.[21] It now included any "group of two or more individuals, whether organized or not, which engages in [terrorist

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11. *See* AEDPA, *supra* note 16, § 219(a)(1).
12. *Id.*
13. *See generally* PATRIOT ACT, *supra* note 3.
14. *Id.*
15. *See id.* § 411(a)(1)(A)(V)(aa).
16. *Id.* § 302(b)(8).
17. *Id.* § 411(a)(1)(F).
18. *See* PATRIOT ACT, *supra* note 3, § 411(a)(1)(G)(II).
19. *Id.* § 411(a)(1)(F).
20. *Id.* § 314(a)(1).
21. *Id.* § 411(a)(1)(F).

activity]."[22] This provision, for its exceeding vagueness mocked as "two guys and a gun,"[23] was problematic for various reasons.[24] Official notice was no longer required and the designation could not be challenged.[25] In addition, to be designated as engaged in terrorism, it was sufficient that even a sub-group of a nonviolent independence movement was (or had at some point in the past, or may be expected to be in the future) engaged in terrorism.[26] Furthermore, the definition appears to be circular, defining a "terrorist" as someone being "engaged in terrorism," and points to the potential flaws of the designation procedure.

"Terrorist activity" now included "any unlawful act involving explosives, firearms . . . or any other dangerous device with intent to endanger . . . the safety of one or more individuals *or*[27] to cause substantial damage to property."[28] The term "engaging in terrorist activity" henceforth entailed that those who provided "material support" to a terrorist organization, by this very act were deemed "to have themselves engaged" in terrorist activity, that is, membership of a terrorist organization was no longer a requirement. Finally, "material support" could consist of funds, transfer of funds, provision of food, shelter, training, even support of peaceful activities, as long as those trained were somehow connected with sub-groups that were, or have been, engaged in unlawful activities as described above.[29]

This exceedingly wide definition of "being engaged in terrorist activities," with ensuing punishment of perpetrators, both U.S. citizens (criminal offense) and refugees (denial of or exclusion from refugee status) was also the subject of a recent U.S. Supreme Court decision, which, in *Holder v. Humanitarian Law Project*,[30] essentially confirmed the current status quo in spite of a lack of exception for *de minimis* support or support under duress.[31]

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22. Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, § 212, 66 Stat. 163, 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2006) [hereinafter INA].

23. *See, e.g.*, Maryellen Fullerton, *Terrorism, Torture, and Refugee Protection in the United States*, 29(4) REFUGEE SURVEY Q. 4, 13 (2010).

24. *Id.*

25. *Id.*

26. *Id.* at 14.

27. Emphasis added.

28. *See* 8 U.S.C. § 1182(a)(3)(B)(iii)(V).

29. *Id.*

30. *See generally* Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010).

31. *Id.*

The case at hand, which had a complex 12-year prelude, involved two U.S. citizens and a number of domestic organizations who initiated a constitutional challenge to the material-support statute.[32] This statute makes it a federal crime to knowingly provide material support or resources to a foreign terrorist organization, punishable by a fine or imprisonment of up to fifteen years, or both.[33] If such support leads to the death of any person, the legal consequence shall be imprisonment for any term of years or for life.[34] The plaintiffs claimed that their wish to support non-violent activities of groups designated as foreign terrorist organizations by the Secretary of State (here, the Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), which aim to establish independent states for Kurds in Turkey and Tamils in Sri Lanka, respectively[35]) violated the Fifth Amendment's Due Process Clause on the ground that the statutory terms are impermissibly vague, and volative First Amendment rights to freedom of speech and association.[36] The plaintiffs asserted, in particular, that §2339B is invalid to the extent it prohibits them from engaging in certain specified activities, including training PKK members in the use of international law to achieve peaceful dispute resolution; teaching PKK members to petition the United Nations and other representative bodies for relief; and engaging in political advocacy on behalf of Tamils living in Sri Lanka, and Kurds living in Turkey.[37]

While the constitutional challenge, on the face, mainly pertained to the criminalization of certain conduct—even in the form of legal education and teaching, with a view to peaceful conflict resolution techniques offered by U.S. citizens, whenever the beneficiary of such support held some kind of ties to an organization placed on a terrorist-list—the implications might be even more serious to non-citizens, having fled their country of origin and applying, or having applied, for refugee status in the United States[38] Whereas U.S. citizens might risk imprisonment for knowingly supporting an organization designated by the Secretary of State as being engaged in terrorism, refugees risk not receiving protection from the persecution they tried to escape; even without the knowledge requirement contained in the

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32. *Id.* at 2712.

33. *See* 18 U.S.C. § 2339B(a)(1).

34. *Id.*

35. *See generally* Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010) (Although both groups engage in political and humanitarian activities, they have also committed numerous terrorist attacks, some of which have harmed American citizens).

36. *Id.*

37. *Id.* at 2714.

38. *Id.* at 2716.

penal statute—as the "terrorist" designation barring access to the United States does not depend on the person concerned actually and deliberately wanting to support a "terrorism designated" organization, or even knowing about such an affiliation.[39] Combined with the absence of exceptions for support provided under duress and *de minimis* support, the line demarking barriers to access seems to have been drawn far too broad. Based on 8 U.S.C. 1182, even an infant kidnapped for ransom by a designated terrorist organization, eventually freed (in exchange of money), fleeing her country of origin due to persecution according to a convention ground (1951 Refugee Convention), and now applying for refugee status, would, arguably, be an "inadmissible alien."[40]

To be sure, some remedies are available, including the option of *ad hoc* waivers being issued, or taking recourse to Article 3 of the Convention Against Torture.[41] However, such waiver may only be issued by the Department of Homeland Security.[42] In addition, it is regarded as a matter of discretion only, and may not be appealed.[43] The Convention against Torture[44] (CAT), on the other hand, may offer protection from *refoulement* in line with Article 33 of the 1951 Refugee Convention,[45] that is, it may prevent a refugee from being deported if he or she has a substantiated fear of being tortured upon return.[46] Such protection, however, would not prevent "exclusion" from refugee status, and, thus, would provide a much weaker and limited form of protection, even to legitimate refugees. Furthermore, it would generally not protect refugees whose fear of persecution does not rise to the level of torture required by the CAT. Finally, as the CAT provisions more often are activated in the case of people actually having actively engaged in terrorism, as opposed to people merely having been accused of providing "material support," taking

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39. *Id.* at 2714.

40. *See generally* 8 U.S.C. § 1182.

41. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51 (Dec. 10, 1984) (entered into force June 26, 1987) [hereinafter CAT].

42. *See* 8 U.S.C. § 1182(d)(3)(B)(1).

43. *Id.*

44. *See generally* CAT, *supra* note 52. The Convention against Torture (CAT), on the other hand, may offer protection from *refoulement* in line with Article thirty-three of the 1951 Refugee Convention, that is, it may prevent a refugee from being deported if he or she has a substantiated fear of being tortured upon return.

45. Refugee Convention, *supra* note 5.

46. *See* CAT, *supra* note 52, art. 3 ("[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture").

recourse to the CAT as the main source of relief against the threat of *refoulement* has, at times, the paradoxical consequences of favoring and giving "preferential treatment" to the least deserving, as may also be exemplified by the so-called Mullah Krekar case.[47] Newly proposed legislation, such as the Refugee Protection Act of 2010 would address some of those serious consequences, but currently it seems unlikely that a proposal would be passed anytime soon.[48]

III. ANTI-TERROR LEGISLATION AND EXCLUSION FROM REFUGEE STATUS DISCUSSION BEFORE THE EUROPEAN COURT OF JUSTICE

To be sure, anti-terror legislation in Europe neither started with 9/11 in the United States, nor with the Madrid train bombings in 2004, the London bombings in 2005, or the July 22, 2011 massacre in Norway—though all of these cruel attacks on civilians raised or renewed awareness of the potential weaknesses of an open society, if paired with ignorance and naïveté. Obviously, the concept of terror as a policy of political repression and violence had its genesis far earlier, and the term was first employed in connection with describing the reign (of terror) imposed by the Jacobins in the wake of the French Revolution.[49] But what really captured attention in the less distant past—and is at the core of the discussion here—was the link

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47. Mullah Krekar, a Kurdish Sunni Islamist leader who came to Norway as a refugee from Northern Iraq in 1991, had his refugee status revoked in 2003 due to terrorist acts carried out in Kurdistan by Ansar al-Islam, an Islamist group whose original leader Mullah Krekar was at the time. Since February 2003 Krekar has had an expulsion order against him which has been suspended pending Iraqi government guarantees that he will not face torture or execution. Norway is committed to international treaties which prohibit the expulsion of an individual without such a guarantee. The death penalty remains on the books in the Kurdistan region and while most death sentences have been changed into life sentences since the Kurdistan authorities took power in 1992, the exception pertains to the eleven alleged members of that very group (Ansar al-Islam), who were hanged in the regional capital of Arbil in October 2006. Since December 8, 2006 Mullah Krekar has been on the U.N. terror list, and on November 8, 2007, he had been judged by the Norwegian High Court as a "threat to national security." *See* Vilde Helljesen et al., *Høyesterett: Mulla Krekar fare fro rikets sikkerhet* [Norwegian High Court: Mullah Krekar a Threat to National Security], NRK (Nov. 8, 2011), http://www.nrk.no/nyheter/1.3987075 (last visited Mar. 11, 2012), *and* Norges Høyesterett [Supreme Court of Norway], Nov. 8, 2007, HR-2007-01869-A (case no. 2007/207) (Nor.). Despite repeated threats to the lives of various leading politicians in his country of refuge, he remains in Norway precisely because he might face the death penalty if deported to Iraq. *See, e.g.*, Paal Wergeland, *PST vurderer å pågripe Mulla Krekar* [PST Considers Arresting Mullah Krekar], NRK, June 11, 2010, http://www.nrk.no/nyheter/norge/1.7163982 (last visited Mar. 11, 2012).

48. S. 113, 111th Cong. § 2 (2010).

49. *Cf., e.g.*, Geoffrey Nunberg, *Head Games It All Started with Robespierre "Terrorism": The History of a Very Frightening Word*, *in* SAN FRANCISCO CHRONICLE, Oct. 28, 2001, *available at* http://articles.sfgate.com/2001-10-28/opinion/17622543_1_terrorism-robespierre-la-terreur (last visited Mar. 7, 2012).

between anti-terror legislation and immigration control.[50] The use of laws aimed at national security, may, thus, also negatively affect refugees, i.e. individuals with a well-founded fear of persecution, which, in its ultimate consequences, may lead to exclusion from refugee status.

As the question of refugees in Europe, prior to the 1980s, still primarily pertained to people having fled from the horrors and repercussions of the Second World War,[51] mass influxes from other continents and the creation of comprehensive legal provisions aimed at regulating and limiting immigration represent a comparatively newer phenomenon.[52] As an example of early cases, the German Federal Constitutional Court grappled with the question of exclusion based on material support of terrorism and related issues in the late 1980s, regarding a constitutional complaint based on the right to asylum enshrined in Article 16 of the German Constitution (or "Basic Law") of May 23 1949.[53] In that case, decided on December 20 1989, the Court held that the international order supported by the Federal Republic of Germany generally did not accept the employment of terrorist means as a form of political struggle and hence, as a point of departure, denied claims to "refugee status relevant" political persecution, where such persecution could be regarded as (legitimate) defensive action on the part of the state.[54] Such state action would only be regarded as illegitimate, where, for example, the particular intensity of state persecution suggests that the level of persecution in the sense of the Refugee Convention had been reached. However, even in the face of "refugee status relevant" persecution, a refugee who continues to lend support to activities deemed terrorist in nature in his (new) host country, would fall outside the protection offered by the constitutional right to asylum and be subject to exclusion from refugee status.[55]

But a comprehensive evaluation of the consequences of previous "material support" rendered, not least in light of a, by now, much more

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50. *See generally* PATRIOT ACT, *supra* note 3; INA, *supra* note 32.

51. And in fact, Article 1A(2) of the 1951 Refugee Convention defined a refugee as a person who, "[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted" is outside the country of his nationality or former habitual residence. Refugee Convention, *supra* note 5, art. 1(A)(2).

52. Jack I. Garvey, *Toward a Reformation of International Refugee Law*, 26 HARV. INT'L L.J. 483, 483–84 (1985).

53. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law], May 23, 1949, Bundesgesetzblatt [BGBI], art. 16 (Ger.), *available at* http://www.iuscomp.org/gla/statutes/GG.htm#Preamble (last visited Mar. 7, 2012).

54. *Cf.* Bundesverfassungsgericht [BVerfG] [Fed. Const. Ct.], Dec. 20, 1989, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 958/86, at 81, 142, 152 (Ger.).

55. *Id.*

coordinated European immigration and asylum policy, took place at a much later point in time.[56]

While legislation in regard to national security and immigration varies to a certain extent within Europe, and also still within the EU, increasingly there have been attempts at policy and legal integration, at least among EU member states and associated countries,[57] to which also a number of recent EU Directives in that area bear witness. Thus, while the present case originated in Germany, it reflects similar debates in other European countries and eventually was decided on the highest European judicial level.[58]

A. European Court of Justice Judgment on Preconditions for Exclusion from Refugee Status: Federal Republic of Germany v. B&D[59]

On November 9, 2010, the Grand Chamber of the ECJ rendered its judgment in *Federal Republic of Germany v. B & D.*[60] This decision pertained to the interpretation and proper application of Council Directive 2004/83/EC[61] on the granting of and exclusion from refugee status of a

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56. The creation of a Common European Asylum System (CEAS) was first envisaged at a European Council summit in Tampere, Finland, in 1999. *See also* Council Directive 2003/9/EC, 2003 O.J. (L31) 18 of Jan. 27, 2003, ¶ 2 (laying down minimum standards for the reception of asylum seekers). *See also infra*, interpretation of Council Directive 2004/83/EC pertaining to minimum standards for the qualification as refugees.

57. Norway, for example, is not an EU member, yet bound by most EU Directives.

58. Indicative of the importance accorded to this question of law, the proceedings in *Germany v. B & D* (*cf.* below) included separate written observations submitted on behalf of the European Commission, and the Governments of France, Netherlands, Sweden, United Kingdom, in addition to submission by the parties to the dispute. *See* Joined Cases C-57/09 & C-101/09, Fed. Republic of Ger. v. B & D, 2010 ECJ EUR-Lex LEXIS 950 (Eur. Ct. Just. Nov. 9, 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0057:EN:HTML (last visited April 24, 2012).

59. The following section is an expanded version of Tom Syring, *Introductory Note to the Court of Justice of the European Union: Preconditions for Exclusion from Refugee Status (Fed. Republic of Ger. v. B & D)*, 50 I.L.M. 114 (2011). Relevant parts of the Introductory Note are reproduced with permission from the Volume 50 No. 1 issue of the International Legal Materials ©2011 American Society of International Law. [hereinafter *Introductory Note by Tom Syring*].

60. Joined Cases C-57/09 & C-101/09, Fed. Republic of Ger. v. B & D, 2010 ECJ EUR-Lex LEXIS 950 (Eur. Ct. Just. Nov. 9, 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0057:EN:HTML (last visited Mar. 7, 2012) [hereinafter Joined Cases C-57/09 & C-101/09].

61. Council Directive 2004/83/EC, 2004 O.J. (L 304) 12 [hereinafter Directive 2004/83/EC]. This Directive, on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, has its legal basis in Article 63(1)(c) of the Treaty Establishing the

person associated with a reputed terrorist organization.[62] The decision forms part of a growing body of case law, emanating from proceedings before the Court of Justice of the European Union and the European Court of Human Rights concerning EU Member States' rights and obligations under the Common European Asylum System (CEAS).

Other recent cases involving one or several aspects of the EU asylum *acquis* include *M.S.S. v. Belgium and Greece*[63] (violation of the prohibition of inhuman or degrading treatment or punishment, and violation of the right to an effective remedy based on Member States' neglect of their duty to adequately treat asylum applicants and process their applications); *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*[64] (exclusion from refugee status based on protection or assistance received from organizations or agencies of the United Nations other than the UNHCR); *Aydin Salahadin Abdulla et al. v. Federal Republic of Germany*[65] (exclusion from refugee status based on ceased circumstance in applicant's country of origin); and *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*[66] (standard of evidence needed for existence of a serious and individual threat to applicant's life or person).[67]

B. The Relevant Law

In *Federal Republic of Germany v. B&D*, the Court relied on various EU and international instruments pertaining to the rights of asylum seekers and refugees.[68] Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection

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European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, with subsequent amendments. Consolidated version located in 2006 O.J. (C 321) 67. *See also* Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 1.

62. *See generally* Joined Cases C-57/09 & C-101/09, *supra* note 77.

63. M.S.S. v. Belgium and Greece, App. No. 30696/09, [2011] ECHR 108 (Eur. Ct. H.R. Jan. 21, 2011), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=880339&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (last visited Mar. 7, 2012). Judgments and other decisions of the European Court of Human Rights are available at http://echr.coe.int (last visited Mar. 7, 2012).

64. Case C-31/09, Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal, 2010 O.J. (C 221) 9 (Eur. Ct. Just. June 17, 2010).

65. Joined Cases C-175/08, C-176/08, C-178/08 & C-179/08, Aydin Salahadin Abdulla et al. v. Fed. Republic of Ger., 2010 O.J. (C 113) 4 (Eur. Ct. Just. Mar. 2, 2010).

66. Case C-465/07, Meki Elgafaji & Noor Elgafaji v. Staatssecretaris van Justitie, 2009 O.J. (C 90) 4 (Eur. Ct. Just. Feb. 17, 2009).

67. *Id.* ¶ 30.

68. *Introductory Note by Tom Syring, supra* note 76.

and the Content of the Protection Granted, intended to form the heart of CEAS, combines two forms of international protection: the traditional refugee protection regime under the 1951 Convention Relating to the Status of Refugees[69] (i.e., refugee status), and a subsidiary protection regime governed by international human rights law (i.e., subsidiary protection status).[70] The "Qualification Directive" expanded state responsibility for refugees by including other persons in need of international protection, making it one of the most significant pieces of European legislation introduced in the law of asylum.[71] Directive 2004/83/EC lays down minimum standards on the conditions third country nationals or stateless persons must meet to receive international protection in one of the EU Member States, as well as the content of the protection granted.[72] The Directive provides, *inter alia*, for the exclusion of a person from refugee status where serious reasons exist to believe that the applicant had committed a "crime against peace, war crime, or a crime against humanity,"[73] a "serious non-political crime,"[74] or has been guilty of "acts contrary to the purposes and principles of the United Nations."[75] Those provisions are based on Article 1(F) of the 1951 Refugee Convention.[76]

Also important to the ECJ's discussion was the role of the United Nations. On September 28, 2001, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, adopted Resolution 1373.[77] The Resolution declares that "acts, methods, and practices of terrorism," as well as "knowingly financing, planning and inciting terrorist acts," are contrary to the purposes and principles of the United Nations," stating that and calls upon all states to "[e]nsure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as

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69. Helene Lambert & Theo Farell, *The Changing Character of Armed Conflict and The Implications for Refugee Protection Jurisprudence*, 22 INT'L J. REF. L. 237–38 (2010). *See also* Refugee Convention, *supra* note 5.

70. Lambert & Farell, *supra* note 87, at 237–38.

71. *Id.*

72. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶¶ 17–18(a).

73. Directive 2004/83/EC, *supra* note 78, art. 12(2)(a).

74. *Id.* art. 12(2)(b).

75. *Id.* art. 12(2)(c).

76. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 102. *See also* Refugee Convention, *supra* note 5.

77. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 7.

grounds for refusing requests for the extradition of alleged terrorists."[78] In order to implement Resolution 1373, the Council of the European Union adopted Common Position 2001/931/CFSP on the use of specific measures to combat terrorism,[79] which, according to Article 1 (1), is applicable to "persons, groups and entities involved in terrorist acts" listed in the Annex.[80]

C. Background to the Case

The present case, in the form of a reference for a preliminary ruling from the German Federal Administrative Court, "*Bundesverwaltungsgericht*," deals with exclusion grounds in Article 12 (2) and status determination standards in Article 3 of the Directive.[81] Article 3 allows Member States to "introduce or retain more favourable standards for determining who qualifies as a refugee or a person eligible for subsidiary protection."[82] Article 3 was particularly important because of German constitutional provisions, mainly Article 16a (1) of the German Basic Law, "*Grundgesetz*," which states that "persons persecuted on political grounds shall have the right of asylum," without expressly excluding any category of persons from that right.[83] Finally, the ECJ also had to take a stance on the level of involvement required for a person to be regarded as falling under one of the exclusion grounds based on terrorist activities within the meaning of Articles 12(2)(b) and (c), and the modes for assessing a person's involvement.[84] The proceedings concerned the Federal Office for Migration and Refugees,' "*Bundesamt's*," rejection of B's application for asylum and recognition of refugee status, and its revocation of D's refugee status and right of asylum.[85]

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78. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1377, U.N. Doc. S/RES/1377 (Nov. 12, 2001) (basically reiterated the declaration of S.C. Res. 1373).

79. Council Common Position 2001/931/CFSP, on the Application of Specific Measures to Combat Terrorism, 2001 O.J. (L 344) 93 (Dec. 27, 2001) (last amended through Council Common Position 2005/936/CFSP, 2005 O.J. (L 340) 80).

80. *Id.*

81. *Id.*

82. Directive 2004/83/EC, *supra* note 78, art. 3 (i.e., protection offered, for example, to individuals found not to have a well-founded fear of persecution based on one of the Convention grounds (race, religion, nationality, membership of a particular social group, or political opinion), but, for example, granted stay on humanitarian grounds). *See also* Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 18(a)(c).

83. *Id.* ¶ 33.

84. *Id.* ¶ 55.

85. *Id.* ¶ 49.

The *Bundesverwaltungsgericht*, the final court of appeal, took the view that resolution of the disputes turned on the interpretation of Directive 2004/83/EC, stayed both proceedings, and referred a number of questions to the ECJ for a preliminary ruling, mainly:

> 1) Does it constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) of the Directive, if the person seeking asylum was a member of an organization which is included in the EU terror list, and the appellant has actively supported that organization's armed struggle?
> 2) Would exclusion under such circumstances require that the foreign national continue to constitute a danger?
> 3) Would exclusion require that a proportionality test be undertaken in relation to the individual case?;
> 4) Is availability of national or international protection against *refoulement* of relevance in considering proportionality?
> 5) Is it compatible with the Directive, for the purpose of its Article 3, to grant a right to asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12 (2) of the Directive is satisfied, or to uphold a right to asylum even if one of the exclusion criteria is satisfied and refugee status under Article 14 (3) of the Directive has been revoked?[86]

D. The Judgment of the Court

The Court held that support of an organization included on the EU terror list may, but did not automatically, constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) of Directive 2004/83/EC.[87] According to the Court, a finding that there are serious reasons for such an assessment is conditional, and should be determined on a case-by-case basis.[88] It will depend on the particular circumstances of the case and an individual's responsibility for carrying out the acts in question.[89] Where exclusion is found to apply, it is neither conditional on

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86. *Cf. Id.* ¶¶ 1, 67.

87. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 67(1). *See also* Directive 2004/83/EC, *supra* note 78, art 12(2)(b)(c).

88. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶ 99.

89. *Id.*

the respective person representing a present danger, nor on an assessment of proportionality in relation to the seriousness of the act committed.[90] Such balancing considerations pertain to whether the person concerned may be deported to his country of origin.[91]

Finally, applying Article 3 of the Directive, the ECJ held that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the Directive, provided that the alternative protection offered does not entail a risk of confusion with refugee status within the meaning of the Directive.[92]

E. Significance and Impact

In dismissing a separate proportionality test—balancing the seriousness of the act committed with the seriousness of the risk associated with the consequences of exclusion (i.e. *refoulement*)—the ECJ rejected the Opinion of the Advocate General and the submissions by the German, French, Dutch, and British governments advocating such approach.[93] Instead, the court concluded that the existence of exclusion grounds already presumed an assessment of proportionality and the particular circumstances of the case, and that applying a second proportionality test would unduly obscure legal clarity.[94]

Secondly, the judgment allows Member States to grant asylum to persons otherwise subject to exclusion, but stresses as a precondition that the status granted be sufficiently distinguishable from refugee status.[95] This, the Court ruled, will ensure that the international protection regime—which includes in particular, the dual purpose of Article 1(F) of the Refugee Convention (i.e., to deny the benefits of refugee status to those undeserving of it, and ensure that such persons do not misuse the institution of asylum)—will be preserved.[96]

Perhaps the most significant aspect of the judgment pertains to the Court's emphasis of the applicant's due process rights, and the Court's caution that individual responsibility must always be established, especially in the context of alleged affiliation with terrorist organizations.[97] Such

90. *Id.* at ¶¶ 105, 111.

91. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶¶ 104–11.

92. *Id.* at ¶ 109.

93. *Id.*

94. Joined Cases C-57/09 & C-101/09, *supra* note 77, ¶¶ 107.

95. *Id,* at ¶¶ 119-21.

96. *Id.*

97. *Id.* at ¶¶ 87-89.

wariness seems particularly relevant in light of criticism of certain aspects of the procedures employed in drawing up the terror lists.[98] The ECJ already pointed to these flaws in 2006 in the case of the *People's Mojahedin Organization of Iran* (PMOI)—where the Court of First Instance[99] ruled that a Council decision placing the PMOI on the terror list was unlawful,[100] which in turn led the Proscribed Organizations Appeal Commission (POAC) to characterize the ensuing decision of the United Kingdom (U.K.) Home Secretary to keep the PMOI on the terror list as "perverse."[101] Subsequent efforts on the part of France to appeal the judgment removing the PMOI from the EU list of terrorist organizations were finally dismissed by the Grand Chamber of the Court of Justice on 21 December 2011,[102] in essence reconfirming the former court's judgment and evaluation of the terrorist organization designation procedure as severely flawed.

The ECJ judgment thus reinforced the need for an individual assessment in cases dealing with alleged participation in prohibited acts and the need and individual right to international protection. The judgment also cautioned against the shortcomings in existing procedures for labeling a person or an organization as a supporter of terrorism, with likely impact on other domestic and international courts' decisions regarding the application of exclusion clauses, especially in terrorism related cases.

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98. *Cf.* notes 103 and 104.

99. This court is now generally referred to as the "General Court."

100. In its judgment of December 12, 2006, the Court found that decisions on the list of organizations and persons whose assets are to be frozen based on Regulation 2580/2001, adopted in implementation of Common Position 2001/931/CFSP, lacked an adequate statement of reasons, an opportunity for affected persons or bodies to raise defenses or objections, and effective legal remedies. *Cf.* Case T-228/2, Organisation des Modjahedines du peuple d'Iran [People's Mojahedin Organization of Iran] v. Council of the Eur. Union, 2002 O.J. (C 247) 20 (Ct. of First Instance Dec. 12, 2006), *available at* http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0228:EN:HTML (last visited Mar. 7, 2012).

101. Proscribed Organizations Appeal Commission [POAC], Appeal No. PC/02/2006, ¶ 19 (Judgment of Nov. 30, 2007), *available at* http://www.statewatch.org/terrorlists/PC022006%20PMOI%20FINAL%20JUDGMENT.pdf (last visited Mar. 7, 2012). For a comprehensive account of the PMOI case, *see* Tom Syring, *Fata Morgana and the Lure of Law: Rebuilding a War-torn State after Regime Breakdown: Prospects, Limits, and Illusions*, *in* REBUILDING SUSTAINABLE COMMUNITIES IN IRAQ: POLICIES, PROGRAMS AND INTERNATIONAL PERSPECTIVES 53, 67 (Adenrele Awotona ed., 2008).

102. *Cf.* Case C-27/09 P, France v. People's Mojahedin Organization of Iran (Grand Chamber Dec. 21, 2011), *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=117189&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=479256 (last visited Jan.12, 2012).

IV. PRELIMINARY CONCLUSION AND OUTLOOK

Anti-terrorism legislation and refugee law point to almost inevitable opposites: national security versus civil liberties. Striking the right balance between concerns for national security and the exigencies of refugees may be a challenging task and one involving, at times, unfair or seemingly incomprehensive decisions and consequences, as also exemplified by the Mullah Krekar case.[103] However, the nature of "need assessments" and judgments within that subject matter is such that one most often does not have the luxury of absolute certainty. Whether a person has a well-founded fear of being persecuted, and thus qualifies for refugee status, cannot always be verified. Nevertheless, where persecution and potentially death is at issue, erring on the side of life (*e.g.* by perhaps granting refugee status to a person who should not have qualified) should be the guiding principle.

By the same token, to the degree that it would not constitute a real risk to national security, setting the bar for material support of terrorism leading to exclusion from refugee status higher, rather than too low, seems to represent a preferable restatement of the courts' "margin of appreciation."

The balancing effort, as also pronounced as a requirement in the ECJ case, stresses the need for an individual evaluation of each particular refugee and his or her level of potential participation in "unlawful activities." However, irrespective of adequate attention being paid to the balancing effort in the face of the potential of flawed designations of organizations and people as "being engaged in terrorism," the paramount task seems to ensuring that the process of drawing up terror lists in the first place is scrutinized, and that wrongful designation as a terrorist organization may be legally challenged.

Wherever such due process safeguards are absent, victims may be victimized anew. Erring on the side of victimization, however, renders inhibited protectors *de facto* perpetrators—that's where the bar should be set.

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103. *See generally supra* note 50.