

PRELIMINARY FINDINGS AND CONCLUSIONS

ON THE MATERIAL SUPPORT FOR TERRORISM BAR

AS APPLIED TO

THE OVERSEAS RESETTLEMENT OF REFUGEES FROM BURMA

Based on continuing research and a January 2006 Field Investigation

By
The Immigration and Refugee Clinic &
The International Human Rights Clinic, Human Rights Program
Harvard Law School

FEBRUARY 2006

ACKNOWLEDGEMENTS

AUTHORS

Project Coordinator

Tyler Giannini
Associate Clinical Director, Human Rights Program
Harvard Law School

Field Researchers

Sarah Rice
Manav Bhatnagar
Amy Roebuck

Legal Researchers

Jasmine Marwaha
Karoun Demirjian
Elizabeth White

FACULTY ADVISORS

Deborah Anker
Clinical Professor of Law &
Director, Immigration and Refugee Clinic
Harvard Law School

James Cavallaro
Clinical Professor of Law &
Clinical Director, Human Rights Program
Harvard Law School

I. EXECUTIVE SUMMARY

This report examines current U.S. laws that constitute the “material support for terrorism” bar, and the bar’s implications for overseas resettlement of refugees from Burma. President George W. Bush recognized in his most recent State of the Union address that:

[T]he advance of freedom is the great story of our time. . . . At the start of 2006, more than half the people of our world live in democratic nations. And we do not forget the other half—in places like Syria and *Burma*, Zimbabwe, North Korea, and Iran—because the demands of justice, and the peace of this world, require their freedom. . . .

We show compassion abroad because Americans believe in the God-given dignity and worth of . . . a refugee fleeing genocide.¹

As currently written and applied, the material support bar contravenes these statements of clear support for refugees fleeing Burma. A January 2006 research team from Harvard Law School interviewed more than 150 individuals that had fled Burma. The field research demonstrates that as many as 82% of these bona fide refugees may be labeled as engaging in “terrorist” activity and precluded from resettlement under the current interpretations of the law. This bar will affect thousands of other refugees from Burma who may apply for resettlement to the U.S.

Terrorism and material support for it are grounds for exclusion for overseas resettlement. Under current U.S. law, however, the definition of “terrorism” now encompasses the activities of opposition groups engaged in armed conflict in Burma over the past five decades, including those whose stated goal is to achieve a democratic federal government. The law does not provide for any interpretation of the context in which the conflict is occurring, including whether groups may be defending themselves against human rights violations or are supported by the U.S. (officially or otherwise). U.S. law further implicates any person in Burma who has ever given material support—willingly or not—to any such organization or person involved in the armed conflict. This combination of factors leads to the perverse result that refugees who have fled violent persecution at the hands of the Burmese military regime now will be denied safe harbor in the United States. In addition, the actions of the armed organizations—and anyone who has supported them—will be labeled “terrorist activity.” This would appear to align United States and Burmese military policy, thus undermining U.S. efforts to condemn the regime and move the country towards democracy.

The over-breadth of the current definition of material support should also give pause. The bar provides no exception for support given under duress or support that does not reach a significant level, which is inconsistent with standards traditionally applied in the refugee context. While U.S. law allows for a waiver, it has not yet been applied, and there are no guidelines for its use. As the waiver provision is currently constructed, it does not appear to allow for exemptions for many organizations connected to armed activity, or their members. Legislative reform must be undertaken to ensure that U.S. law does not undermine U.S. policy to promote democracy and provide a safe haven for refugees.

¹ President George W. Bush, *President George W. Bush’s Address Before A Joint Session of the Congress on the State of the Union*, Jan. 31, 2006 (emphasis added).

PART II

THE EXPANSION OF THE MATERIAL SUPPORT BAR

II. THE EXPANSION OF THE MATERIAL SUPPORT BAR

I. The Law

“Material support to terrorism” is a bar to admissibility for resettlement of overseas refugees to the U.S.² In recent years, the definition of “terrorist activity” has expanded enormously and now threatens to prevent the resettlement of bona fide refugees. A refugee can be denied admission to the U.S. for being a member of a “terrorist” organization, or for “engaging in terrorist activities.” “Terrorist” organizations can be considered under two broad categories: (1) those designated under Title 8, U.S. Code, §1189, or subsequently by the Secretary of State,³ (known as Tier I and II organizations) and (2) any two or more individuals, who engage in terrorist activities or have a subgroup that engages in terrorist activities (known as Tier III organizations).⁴ The definition of “engaging in terrorist activity” includes the use of any weapon or “dangerous device” with intent to endanger individuals or property other than for “mere personal monetary gain.”⁵ The definition also includes providing material support to any individual the actor knows or has reason to believe has committed or plans to commit a “terrorist: activity.”⁶ Such material support consists of “shelter, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, and weapons.”⁷ Material support may also encompass humanitarian aid, such as provision of medical assistance, religious materials, and even such basics as drinking water.⁸

A refugee who may have technically been a member of a “terrorist organization” or “engaged in terrorist activities” according to the U.S. law’s broad definition currently has one primary defense: lack of knowledge. This defense has been eroded by the USA PATRIOT and REAL ID Acts. To apply this defense, a person accused of being a member of or providing material support for “terrorist organizations” under Tier III must demonstrate by “clear and convincing evidence” that she did not know and should not reasonably have known about the organization’s “terrorist” activities.⁹ When an individual is accused of being a member or supporter of an organization that has been designated as a “terrorist organization” according to Tier I and II, lack of knowledge does not constitute a defense to exclusion.

The Secretary of Homeland Security and the Secretary of State, after consultation with each other and the Attorney General, may waive the application of the material support bar for a

² See Appendix: 8 U.S.C. §1182 (2005).

³ In consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in subclauses (I) through (VI) of clause (iv) of §1182. *Id.*, at (a)(3)(B)(vi)(II).

⁴ *Id.*, at (a)(3)(B)(vi).

⁵ *Id.*, at (a)(3)(B)(iii).

⁶ *Id.*, at (a)(3)(B)(iv)(VI)(bb).

⁷ *Id.*, at (a)(3)(B)(iv)(VI).

⁸ In *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004) a panel of the U.S. Court of Appeals for the Third Circuit explicitly held that the list of examples of material support in the INA is not exhaustive. In the case, Singh-Kaur was found to have given material support to a terrorist organization by providing food and shelter to members of a terrorist organization who were participating in religious gatherings.⁸ If providing food is considered material support, and the INA list is not exhaustive, this case could be used to broaden the definition of material support to include humanitarian aid.

⁹ See Appendix at (a)(3)(B)(i)(VI) and (iv)(VI)(dd)).

refugee supporting “an organization or individual engaged in terrorist activities.”¹⁰ A waiver may also be applied to a Tier III group that is designated as such because of a subgroup’s activity.¹¹

II. Issues of Concern

By failing to take into account the context of violence and an individual’s situation, including the elements of membership, duress, and age of consent, the law overreaches its purpose, and has been shown in practice to exclude legitimate non-terrorist refugees from U.S. protection. The following is a summary of the problematic issues with the current law that urge reconsideration.

Definitions

- Terrorist Organization:
 - The definition of “terrorist organization” that appears in the current law is based on the extent of force used by the organization, not taking into account the nature of the conflict. Therefore, a militant terrorist organization such as Al-Qaeda is not distinguished from an organization such as Nelson Mandela’s African National Congress.
 - Analysis of the context in which the organization or group is acting is not required by the law. Thus, groups that may be defending themselves from genocide or crimes against humanity are still considered “terrorist” groups. Similarly, groups that may be officially aligned with the U.S. (including those that have received official, public support from the U.S.) would be labeled “terrorist” groups if they used force against an established government. This same analysis also applies to the definition of “terrorist” activity.
 - Organizations with militant subgroups are also deemed “terrorist,” even if members may not support or even be aware of more militant subgroups.
- Terrorist Activities:
 - The definition encompasses the use of any “dangerous device” but does not define such weapons and could be interpreted to include any object that could be manipulated to cause harm.
- Membership:
 - Though “members” of a terrorist organization are barred from admission to the U.S., there is no clear delineation of this term.
 - Organizations may not have clear membership lists, or a process for membership.
 - Even among those that have such lists, “membership” activities may be minimal. An individual may be required to sign a membership pledge but afterward have no connection to the organization or its activities.

De Minimis Support

- The current law does not take into account the amount and nature of support when considering whether an individual has provided material support to a terrorist organization. Therefore, an individual who provides something as insignificant as a glass of water or a

¹⁰ *Id.*, at (d)(3)(B)(i).

¹¹ *Id.*

bowl of rice to a recipient who, unbeknownst to the supplier, is associated with a “terrorist” organization, could be inadmissible under the bar.

- This application contradicts traditional legal standards that are applied in the refugee context, where the risk to the host country is weighed against the rights of the refugee.

Duress and Involuntary Support

- Current U.S. law does not consider explicitly whether or not an individual’s membership or material support of a “terrorist” organization was voluntary.
- Even if an individual has been coerced to give such support, she is still considered inadmissible under the material support bar.

Age of Consent

- An individual who was a child when she gave support is also ineligible for admission under the bar.
 - This is particularly egregious in a situation in which a child is fundamentally dependent on the individuals she is accused of supporting (e.g., a child of parents affiliated with a “terrorist” organization).

Time Bar (Statute of Limitations)

- No consideration is given to the amount of time that has lapsed since an individual gave material support to a “terrorist” organization or participated in an armed conflict.

Intent

- The law does not take into account the intent of the individual accused of material support. Therefore, if an individual cooperates with a “terrorist” organization simply to gain passage out of a conflict area or to flee human rights abuses, he or she is deemed to have participated in “terrorist activity.”

Waiver

- The Secretaries of Homeland Security and State and the Attorney General have yet to exercise their authority to waive the bar in certain cases; the failure to apply the waiver has served to deny protection to deserving refugees.

PART III

THAM HIN REFUGEE CAMP

THAILAND

I. Summary of Implication of Material Support Bar for Tham Hin Camp Population

- Tham Hin camp has over 9,000 refugees, who are predominantly from the Karen ethnic minority in Burma. It has been announced that they can apply for resettlement to the U.S.
- Almost all of the refugees in Tham Hin fled Burma in early 1997 because of an offensive aimed at the Karen National Union (KNU), a political and armed group that has been fighting with the ruling military regime for autonomy and recognition for decades.
- The research team interviewed 40 individuals, of which 35 or 87.5% may be excluded by the current material support bar. Those interviewed ranged in age from 18 to 84, and include farmers, teachers, pastors, and members, including combatants, of the KNU. Those interviewed were mainly Christian though some were Buddhist or animist.
- Common forms of material support include taxation; affiliation with the KNU's educational, health and religious activities; and helping a relative who was a KNU member.

II. Background

The Karen people are one of the major ethnicities in Burma that has faced decades of oppression, including forced labor and portering, forced relocation, torture, and killings. The Burmese army is also well known for extorting money and fees from villagers, especially in border regions. The Tham Hin population primarily fled from Tenasserim Division in southeastern Burma. The KNU controlled significant areas of lands and had a functioning governmental structure in the region until the 1997 offensive.¹² Some residents in the Tham Hin camp reported never having seen a Burmese soldier during their entire lives, and only fled when the fighting approached their village during the military operation.

The KNU lost control over most of its territory during the Burmese army's 1997 military operations. During the attack, numerous villagers were overrun, and thousands fled to Thailand at three border crossings. The population in these three locations was consolidated into the camp at Tham Hin the same year. The camp has been criticized for its crowded conditions.¹³

III. Political and Armed Opposition: the Karen National Union (KNU)

The Karen political opposition and resistance date to the late 1940s. Fighting between Karen resistance and the Burmese military has been longstanding and widespread for decades.¹⁴ The KNU, which is the most recent incarnation of the resistance, urges political dialogue as the preferred way of pursuing "[the Karen people's] own destiny, for equality, democracy and establishment of a genuine federal union."¹⁵ The KNU states that political dialogue is not currently effective so that armed resistance must be used to secure the same goals.¹⁶ In KNU-

¹² Thailand Burma Border Consortium (TBBC), *Programme Report: January to June 2005*, at 60-61 (June 2005)[hereinafter "TBBC Programme Report"].

¹³ *Id.*, at 5.

¹⁴ While discussions of armed activity are important to analysis of material support, the authors do not seek to justify or advance a particular position on armed resistance or the use of force generally. The discussions below however highlight the question of whether all armed conflict and resistance amounts to "terrorist activity."

¹⁵ Office of the Supreme Headquarters, Karen National Union, Kawhtoolei, *KNU President Saw Ba Thin Sein's Address on 57th Anniversary of Karen Revolutionary Resistance*, January 31, 2006 (on file with authors).

¹⁶ *Id.*

controlled areas, the organization traditionally filled numerous government functions, including healthcare, education, and jobs. Refugees in Tham Hin also reported this to be the case (*see, e.g.*, Refugee Interview #25). Refugees also reported that KNU activities were small scale and primarily defensive in nature (*see, e.g.*, Refugee Interview #49).

A. Members and Combatants

According to UNHCR statistics, the Tham Hin population includes several hundred “political activist” and “former combatant” households, with several thousand family members living in these households.¹⁷ The research team spoke with several political members and combatants of the KNU. Under current U.S. law, members (combatants or not) may be excluded, and waiver provisions may be impermissible as presently drafted.

Retired Soldier turned Medic: He joined the KNU at the age of sixteen, and remained active in the army as an administrator until 1997 when he fled. After fleeing, he has been working as a medic. He asked to be removed from the official KNU membership, which happened in 2005 (Refugee Interview #50).

Seventeen-year-old KNU Information Department Assistant: He moved from an area controlled by the Burmese military when he was thirteen to go live with his sister who was a nurse and reside in a KNU-controlled area. His parents were taxed by both armies in his home village. After going to school, he was assigned to work in a KNU office doing administrative work in the Information Department, including conducting community organizing and human rights documentation training. He feared being a soldier, and after fleeing in 1997 to Tham Hin, he has had no more responsibilities for the KNU (Refugee Interview #25).

B. Subgroups

No one that the research team interviewed mentioned the existence of any subgroups of the KNU in Tham Hin.

IV. Material Support by Individuals¹⁸

Refugees commonly spoke of the KNU protecting them from human rights violations and persecution by the Burmese military, including during the 1997 offensive (*see, e.g.*, Refugee Interview #119 and #121). Many of the individuals in Tham Hin expressed their support for the KNU or for the idea of an autonomous Karen area (Kawhtoolei); one man said, “Our heart was with the KNU” (Refugee Interview #094). Another woman said, “[The KNU] are helping us, and we are helping them back” (Refugee Interview #126).

¹⁷ UNHCR, “Statistical Profile of the Refugee Population in Tham Hin Camp” (current to Jan. 4, 2006)(on file with authors). These members, especially “political activists”, may include small numbers of non-KNU individuals.

¹⁸ Some individuals fall within more than one category. The categories and illustrative cases highlight issues in question and the impacts on individuals and their families resulting from the potential scope of the material support bar or its unclear application to date.

A. No Material Support

Some individuals reported giving no material support to the KNU, but it was a small percentage, just five of 40 interviewees or 12.5%. The only consistent thread in such stories was among young people, who are now coming to adult age after nine years in Tham Hin (Refugee Interview #120 (eleven-years-old when he fled); #146 (fifteen-year-old woman at the time she fled); #096 (sixteen-years-old when he fled); #055 (eighteen-years-old when she fled); *see also* #002, #121, and #122 (household gave rice when they were children)).

B. *De Minimis* Support

Individuals reported giving very small, even trivial, amounts in some cases to the KNU or its members.

The Pastor: This pastor lived in an area where both the KNU and Burmese military operated; he was arrested for “allowing” KNU members to enter the village to celebrate Christmas in 1994. The Burmese military burned his home while he was in jail, and then he fled to Kawhtoolei. His only support to KNU members was giving small articles, like a hat, to a cousin (Refugee Interview #119).

C. Taxation

Refugees commonly reported (eighteen of 40 or 45%) the existence of a KNU tax system, which consisted of requesting food, mainly rice, and small amounts of money annually. Village leaders were often responsible for collecting the aid. The KNU also taxed minerals and trade in the area. While it was a tax system, villagers often said they gave willingly. Some refugees also described being caught in the middle between the two forces; taxation by both the State Peace and Development Council (SPDC) and the KNU could exacerbate the strain on households (*see, e.g.*, Refugee Interview #094).

The Farmer: He would pay a tax of one basket of rice a year to the KNU. The village leader would ask, and if the household could not afford the rice, the KNU “understood.” He felt happy to give. Though he was not a political supporter or a member of the KNU, if they asked, he tried to help them (Refugee Interview #001; *see also* #005 and #007).

Betel Nut Farmer: “[I]f we can’t give to the Karen, there is no problem for us, but for the Burmese they will beat us, that is why we try to pay the Burmese, but if we can’t pay the Karen, we don’t. [I] wouldn’t have given anything to the Karen if they hadn’t asked because [I] wanted to look out for [my] family first.” (Refugee Interview #124; *see also* #144).

The Household Tax—the Teenage Son of a Farmer: He fled to Thailand when he was nineteen during the attack in 1997. He lived with his parents, eight other siblings, and worked on the family farm. Each household, including his family, would give a basket of rice annually to the KNU (Refugee Interview #145; *see also* #121 and #122 (brothers eleven and thirteen indicating the same); #002 (indicating the same)).

D. Duress

In addition to taxation, at least one refugee described doing things for the KNU under duress.

The Pastor: In 1990, before he was a pastor, the KNU hid weapons in his village. Although villagers knew of the hidden weapons, they feared challenging the KNU. His father helped carry the weapons to the village: the village head assigned his father to this duty. Because the KNU exercised authority in the village, he complied. When the Burmese military later discovered the weapons, they took his father to the town of Tavoy, and executed him (Refugee Interview #119).

E. Affiliation with the KNU

Some refugees reported going to KNU-controlled areas to further their education. Once in these areas, some worked in education or health departments or churches associated with the KNU.

The Medic: She went to Kawhtoolei for medical training because her family was poor, and her parents could not afford more schooling. She trained for six months at the Karen District headquarters and then worked at the headquarters clinic. She was not paid, but her food and lodging were provided by the KNU. She worked in the civilian part of the KNU headquarters clinic, not the military wing, and never saw injuries from fighting. She never did any other kind of work for the KNU. She worked at the clinic from 1994 until 1997 when, at age nineteen, the Burmese offensive caused the village to flee to Thailand (Refugee Interview #125; *see also* #126 (describing similar path to becoming a teacher); #119 (a pastor); and #024 (a pastor)).

F. Age of Consent

Most refugees have been living in Tham Hin since 1997. Some young adults were small children living in Burma whose families gave KNU support. They themselves may have never consented to support the KNU.

Eleven-year-old Soldier's Daughter: Her father was a KNU soldier, and so she never gave anything to the KNU but was provided with food. Once, in 1995, some soldiers under her father's command were quartered at their house for five or six days before they went to work for the army. She drew water for the soldiers and her family during those days. She was eleven years old at the time, and fled to Tham Hin in 1997 (Refugee Interview #003; *see also* #095).

G. Time Bar (Statute of Limitations)

Some refugees were active in the KNU decades ago. Since there is no time bar for material support or membership, these refugees will be excluded.

The Soldier who retired in the 1960s: He cites his youth as a cause for joining the [KNU] army, though it was his will to help serve his people. He was assigned patrol duty and actively fought on five occasions, although he never was injured. [H]e left the KNU during a ceasefire in the mid-1960s as the death of many of his friends and colleagues had deterred him from continuing as a soldier (Refugee Interview #093; *see also* #049 (retired in 1985 after getting married)).

PART IV

MAI NAI SOI CAMP

THAILAND

I. Summary of Implications of Material Support Bar on Mai Nai Soi Camp in Thailand

- Mai Nai Soi camp has more than 18,000 individuals,¹⁹ but fewer than 100 have been referred to the U.S. for overseas resettlement.
- All of those interviewed had bona fide refugee claims resulting from forced relocation and forced labor imposed by the Burmese military or from suspected contact or support for the Karenni National Progressive Party (KNPP). The KNPP has both a political arm and an active fighting force whose goal is to secure an autonomous Karenni State in a united Burma.
- The research team interviewed 56 refugees. Most had been submitted for resettlement to the U.S. Of those interviewed (40 of 56 or 84%) provided some kind of material support to the KNPP.
- Common vectors of support included having relatives in the KNPP, contact with the KNPP while fleeing, and participation in quasi-taxation systems. There have also been instances of secondary persecution in the camp, including some indication that applying for resettlement may lead to discrimination against that population.

II. Background

In 1984, Karenni State was largely under the control of the KNPP.²⁰ The 1990s saw intensified militarization of Karenni State along with widespread forced relocation campaigns. Since the SPDC broke a ceasefire agreement with the KNPP in the mid-1990s, the two armies have continued to fight. The SPDC also has continued forced relocations of entire villages. Large portions of Karenni State, especially east of the Salween River, remain free fire zones.²¹ The SPDC has also practiced widespread extortion and forced labor in Karenni State.

Some of the refugees now in Mai Nai Soi have been in Thailand since 1993 (*see, e.g.*, Refugee Interview #108), and new individuals continue to arrive (Refugees Interviews #071, #072, #109, and #110). There are secondary persecution issues in the camps. Residents interviewed for resettlement were made to give up their jobs and were encouraged to get rid of their personal property (*see, e.g.*, Refugee Interview #074; *see also* Section IV.D: Duress below). There are reports that some residents who apply to resettle are considered to be abandoning the cause (Refugee Interview #058; *see also* Refugee Interview #148)).

III. Political and Armed Opposition: the Karenni National Progressive Party (KNPP)

After the Burmese independence, Karenni leaders established an informal political association, and the KNPP was officially founded as a party in May 2, 1957.²² The KNPP has been engaged in armed conflict with the Burmese military for decades. The KNPP has recently joined the Ethnic Nationalities Council (ENC) and adopted an official policy supporting the creation of a federal union in Burma. The leaders have proposed ceasefire talks with the SPDC since 2004,

¹⁹ TBBC Programme Report, *supra* note 12, at 3.

²⁰ *Id.*, at 60.

²¹ There are an estimated 92,500 internally displaced persons living in Karenni State. Thailand Burma Border Consortium, *Internal Displacement: and Protection in Eastern Burma* (October 2005) at 35, 80.

²² Refugee Interview #151 with Khu Oo Reh, Second Secretary of the KNPP, January 13, 2006 (on file with authors). Unless otherwise noted, information about the KNPP in this section was taken from this interview.

but they have been unable to negotiate specifics or execute talks. The KNPP remains militarily active, using small skirmishes to interrupt transport of military materials, or ambush advancing SPDC troops.²³ New arrivals reported fleeing fighting between the KNPP and SPDC (Refugee Interview #072).

A. Members and Combatants

The KNPP leadership estimated that there were approximately 1,000 political members of the KNPP, with 1,000 KNPP military and 500 local militia. One estimate placed active membership in the camp at 300 individuals (Refugee Interview #148). Eight interviewees formally declared themselves members of the KNPP, and another ten indicated that they had been combatants at some point in their lives. Under current U.S. law, members (combatants or not) may be excluded, and waiver provisions may be impermissible for them.

Member of Parliament (MP) and his family: One KNPP MP was a founding member of an opposition party and ran in the 1990 elections. When he came to the camp he wanted to continue his political involvement, so he became a member of the KNPP. He later served as an MP. One of the MP's daughters joined the KNPP when she was a teenager, after her father told her that if she wanted to be involved in politics, she needed to become a member so she would have real influence. She gives five baht (about seven U.S. cents) every month as dues, and works as a human rights trainer for young adults in the camp (Refugee Interviews #130 and #128).

Child Soldier turned Women's Rights Advocate: At the age of eleven, unable to afford school fees, she decided to go to the KNPP-controlled area. She met up with KNPP soldiers, and traveled with them for three months "for experience" on the frontline, cooking with the soldiers. She then entered military training for a month and a half. When a relative of a soldier asked her age, she was sent to school. After completing her schooling, she has worked to protect women from domestic violence and rape. Because the location of the office dedicated to domestic violence survivors is well known, her safety is constantly at risk, but she continues her work nonetheless (Refugee Interview #017).

B. Subgroups and Other Groups

The research team found no evidence of any subgroups within the KNPP. However, refugees did report having to support other armed groups (affiliated with the SPDC) under duress. One such group was the Karenni National People's Liberation Front (KNPLF), which broke from the KNPP in 1978, because the KNPLF wanted to pursue a communist government. The Karenni National Democratic Army (KNDA) and the Karenni National Solidarity Organization (KNSO) are other splinter groups that have small numbers of troops in the area.

IV. Material Support by Individuals

Most of the material support given was voluntary. However, when duress is broadly construed (i.e. those who gave under duress even once are included, although they might have given *de*

²³ KNPP Document 1, "Gunfights between the Karenni forces and Burmese troops after the major operation on the Thai-Karenni border in 2005", obtained January 13, 2006 (on file with authors).

minimus voluntary support at another time), nine of 56 interviewees (or 16%) reported giving such support against the will. Those who gave voluntarily did so because they believe that the KNPP is working for their freedom and protection.

A. No support

Some individuals reported that they had never given material support to the KNPP, but they constituted a small percentage of those interviewed (eight of 56 or 14.3%). Young people who fled Burma as children made up a part of this percentage (Refugee Interview #060 (twins who fled when they were eight years old); and #065 (sixteen-years old when she fled)). People in urban areas or areas controlled by SPDC or ceasefire groups before they came to Thailand also may not have given support (Refugee Interviews #063, #106, #107, #110 and #112).

B. *De Minimus* Support

Several refugees reported material support that was so small as to be of no aid to the organization. Examples include small amounts of tax and providing shelter once, or providing support only in the context of flight.

Medic who sold food to the KNPP: He lived near two SPDC bases, where frequent skirmishes with the KNPP broke out. When the KNPP would come through his village he would provide them food, for which they routinely paid him. He also took medicines from the KNPP to distribute to the area villages. He left because of the increased fighting between the KNPP, SPDC, KNPLF, and KNDA (Refugee Interview #109; *see also* #113).

C. Taxation

Depending on their income, villagers often gave small amounts of food and money from their farms as tax to the KNPP or KNPLF. The poorest farmers would give the equivalent of a few dollars a year.

The Farmer: He grew corn and rice, and the KNPP asked him for money and food. He said that they would ask for small amounts of food often, and 20-50 kyat once a year. The farmer indicated that he did not pay this tax voluntarily. In 1994, fighting between the KNPP and KNPLF came to the area, and he was forced to guide the KNPLF for eighteen days. After that, he fled to Thailand. During his flight he was beaten by an SPDC soldier, so badly that he still suffers from pain, more than ten years later. He said, "I am 45 years old, and my life has been a slave's life. . . . My life is always giving myself to other people. . . . All of our work was for soldiers" (Refugee Interview #013).

D. Duress

Refugees recounted instances of support under duress for the KNPP, KNDA, and KNPLF, including portering (Refugee Interviews #022 and #062), paying taxes or among medics, attending the wounded at a base during active conflict. Many refugees indicated they had provided a combination of *de minimis* support and support given under duress.

Medic: He fled Thailand because his village had received relocation orders, and his father had been badly tortured and injured while portering for the SPDC. The medic's father died as a result of his wounds while fleeing with his family. The medic (who was then thirteen) continued to flee under KNPP protection, sometimes carrying their packs. When he reached the camp, he went to school and later trained as a medic. In 2005, the Karenni National Health Department asked the medic to go to a KNPP base. He treated about twenty people with illnesses, and three or four people who were wounded in battle. He did not want to go, but he had to because he was asked, and he was told it was part of his job. He told the research team, "I was worried that I would be killed during that time; if I die no one will take care of my family" (Refugee Interview #127; *see also* #064 and #103 (other medics recounting the same)).

E. Affiliation with the KNPP

Teachers are normally members of the Karenni National Education Department (Refugee Interview #010). The medical clinics in the camp are directed by the Karenni National Health Department (Refugee Interview #128), which also issues orders to medics to go to the KNPP military base and takes 5% of the salaries of clinic workers to give to the KNPP (Refugee Interview #023). It is unclear if this sort of activity would render a person a "member" of the KNPP under the definition in U.S. law, but if so these people would all be barred with no waiver possible. Otherwise, they may be barred for material support, because they are contributing to agencies that are affiliated with the KNPP.

F. Age of Consent

There are cases in which a refugee has provided support only for his or her family member that is a member of the KNPP.

The Daughter: She was around ten when nearly a dozen KNPP soldiers came to stay in her house, after being invited by her parents. She did the regular household chores with her mother, such as cleaning, cooking and drawing water. This was the only time that she remembered ever seeing KNPP soldiers outside the camp (Refugee Interview #020; *see also* #061 (remembers giving support as a young child)).

G. Time Bar (Statute of Limitations)

Refugees sometimes make a decision of conscience or necessity to leave the KNPP. However, because of actions earlier, or in another phase of their life, they would still be barred.

The Reluctant Soldier: He joined the KNPP army in 1971, but was not very happy with life as a soldier, and in 1978 returned to his family. His wife died around 1980, and he became the primary caretaker of his children. Because he was subject to constant suspicion from the SPDC based on his KNPP membership, he sent his children to live with other relatives and rejoined the army in Shan State. He had worsening health problems and concerns about his children, so he asked the KNPP to let him retire in 1990. He remarried, and then came to Thailand in 1995. He has not done any work for the KNPP for fifteen years (Refugee Interview #068).

PART V

URBAN CHIN POPULATION

MALAYSIA

I. Summary of Material Support Bar’s Implication for Urban Chin Population in Malaysia

- The Chin refugee population in Malaysia is scattered in urban areas. As of January 2006, UNHCR had registered more than 6,500 refugees; thousands more remain unregistered.²⁴
- All the individuals the research team interviewed reported persecution; UNHCR confirms that 98% of those registered are designated as refugees.²⁵ The refugees report that religious persecution is severe; persecution also stems from suspected or actual connection, however minor, with the Chin National Army (CNA), a wing of the Chin National Front (CNF), which has aimed for democratic rule and self-determination in Chin State since 1988.
- The research team interviewed 58 Chin refugees (35 men and 22 women) in Kuala Lumpur, Malaysia. Of the interviewed (43 of 58 or 74%) had provided support to the CNA or CNF.
- Many individuals reported sympathy for the cause of the CNF and see them as protecting their religion and ethnic identity. Support is often limited and infrequent, while coming in a number of forms, including money, food, clothing, and sheltering CNA members.

II. Background

The Chin, a major ethnic group in Burma, are overwhelmingly Christian. Chin State, which borders India, has seen heavy militarization and widespread persecution by the Burmese Army, particularly since 1988. The Chin suffer severe religious and ethnic-based persecution. Consistent with previous reports, interviewed refugees complained of forced labor in the form of road building, camp building, and portering for military patrols; serving guard duty; having to clear brush around jungle treks to prevent ambushes on the military; and having to clean mudslides in the rainy season. The punishment for failing to complete assigned labor, falling asleep or performing poorly may include fines, physical abuse, and detention.²⁶

The majority of Chin refugees in Malaysia have come from Thantlang and Hakha Townships which has the highest CNA presence. Individuals flee alone or in small groups, and their escape is facilitated by relatives and a network of “brokers” that has been in place since at least the 1990s (*see, e.g.*, Refugee Interviews #139 and #150). Most of those interviewed highlighted the personal nature of persecution in Chin State—being targeted for arrest or torture often because of imputed or real contact with the CNA—reporting that this led them to leave their families behind.

III. Political and Armed Opposition: the Chin National Front (CNF) and Army (CNA)

The CNF and CNA were formed in 1988. The CNF is a member of the National Democratic Front, a coalition of ethnic armed opposition groups resisting the Burmese military

²⁴ UNHCR, “Active Cases Breakdown,” (December 31, 2005) in *Refugees in Malaysia* (Undated)(on file with authors). A leader of the Chin Refugee Committee (CRC) in Kuala Lumpur reported that number of Chin in Malaysia may be as high as 16,500 (Refugee Interview #150; *see also* Refugees International, *RI Bulletin*, March 28, 2005 (citing the CRC and estimating 12,000 Chin in Malaysia).

²⁵ Meeting with UNHCR Malaysia office, January 16, 2006.

²⁶ *See, e.g.*, Amnesty International, *Myanmar: Ethnic Minorities: Targets of Repression* (June 2002), ASA 16/014/2001, at 4; U.S. Department of State, *Country Report on Human Rights Practices-2001: Burma* (March 4, 2002).

dictatorship.²⁷ The group claims to have two goals: the restoration of the right of self-determination to the Chin people and the establishment a federal union in Burma based on principles of democracy and freedom.²⁸ The CNA is a small force, and according to those interviewed, normally travels in very small numbers (one to three people)(*see, e.g.*, Refugee Interview #27). The CNF has not signed a ceasefire agreement with the Burmese regime, and the CRC reports ongoing sporadic small-scale fighting into January 2006 (Refugee Interview #150). In November of 1988 the CNF created an armed wing—the CNA—whose exact size is difficult to determine. Human Rights Watch wrote that the CNA was “500 strong” in 2002²⁹ while the Chin Refugee Committee (CRC) in Malaysia contends that it is comprised of 1,000 soldiers.³⁰ According to the CRC, the Thantlang district is where the CNA primarily operates, as it is proximate to the Indian-Burmese border which they use to smuggle in supplies, funding and manpower. The CNA does not control much, if any, territory in Burma, and it focuses its attacks on military targets.³¹ There have been reports that the CNA may have killed civilians.³²

A. Members and Combatants

No one the research team interviewed identified his or herself as a member of the CNF or CNA.

B. Subgroups

No one the research team interviewed identified any subgroup within the CNA, though information was difficult to obtain and corroborate on this issue because no members or combatants were interviewed.

IV. Material Support by Individuals

As many as 74% of those interviewed may fall under the material support bar. Many individuals told the research team that they “support the CNA with our heart.” Some of those interviewed described reluctance in providing further support after they had been arrested by the SPDC. People who ideologically support the CNA may be overrepresented in the interview sample because the CRC selected individuals with connections to the organization.

A. No Material Support

A good portion of those interviewed (fifteen of 58, or 26%) had never given material support to the CNA. This is not surprising because the CNA is not very large and has not created institutions. Those who had not provided support fell into two main categories: those who were

²⁷ U.S. Department of Homeland Security, Citizenship and Immigration Services Responses, *Burma (Myanmar): Information on the Chin National Front/Chin National Army* (Feb. 26, 2004), available at UNHCR Refugee Agency <http://www.unhcr.org/cgi-bin/tehis/vtx/print?tbl=RSDCOI&id=414ee2e24> (last visited Feb. 28, 2006).

²⁸ The Chin National Front, “The Important Historic Events Of The Chins” (undated), at <http://www.chinland.org/chinfacts.html> (last visited Feb. 14, 2006).

²⁹ Human Rights Watch, “MY GUN WAS AS TALL AS ME” – CHILD SOLDIERS IN BURMA (October 2002), available at <http://www.hrw.org/reports/2002/burma/index.htm#TopOfPage> (last visited Feb. 14, 2006).

³⁰ The source of confusion, according to the CRC, is the overlap between CNF and CNA membership.

³¹ *See supra* note 27.

³² *See id.*, stating that in 1999 the Burmese government accused the CNF of killing a Buddhist monk.

related to CNA members or supporters but never gave aid to their relative members or who had no connection but were suspected of having one by the SPDC (Refugee Interviews #031, #041, #076, #077, #078, #083, #085, #115, #118, #142 and #143) and individuals subject to religious persecution (Refugee Interviews #033 (a religious education director who was raped by the SPDC); #038 (a merchant who was arrested for celebrating a church ceremony in her house); #044 (a pastor who had been badly tortured for celebrating the opening of a church); and #081 (was taken by the SPDC to become a monk at eight years old).

B. *De Minimis* Support

Sometimes villagers provided such low levels of support that their assistance would not be considered substantial.

The Curious Youth: In 2003, when he was sixteen years old, the curious youth was returning from working in India. He met some CNA members by a stream, and bought a political magazine that they had offered him. Later on the way to his village he was searched by the SPDC who found the magazine. Upon finding the material, the SPDC interrogated him and forced him to porter for a long time (Refugee Interview #080).

The Songwriter: In 1990, the songwriter composed a song to promote the liberation of the Chin and democracy to be used in the elections. It was widely distributed, and the SPDC arrested him and he was forbidden to write more political songs. In 1999 the SPDC arrested him again for composing a song celebrating 100 years of Chin Christianity. In September 1999 he was approached by the CNA, who had heard him on the radio, to write a song about the CNA. He agreed, and was working on the song, when he left to use the toilet one day and saw the SPDC approaching his house. He ran and left Burma then, in October 1999 (Refugee Interview #117).

C. Taxation

There were reports of an informal and irregular taxation-like system in some places (*see, e.g.*, Refugee Interview #139). However, most people described contributions as “donations” and voluntary. There were some refugees that reported small, quasi-regular donations that consisted mainly of food (Refugee Interviews #027, #032, #037, and #139).

The Treasurer: As treasurer of her church women’s group, this woman collected donations for the poor. She would give rice, half a chicken, or eggs to the CNA three or four times a year. Once, when she was carrying donations collected by several villages for the construction of a new church, she was stopped by the SPDC, searched, and accused of helping the CNA because of the money they found on her. The SPDC beat her badly, knocking her unconscious; she subsequently miscarried. Her pastor bribed the SPDC to take her to a hospital instead of jail, and when she was better, she fled (Refugee Interview #025; *see also* #138 (six-month pregnant woman beaten unconscious, resulting in a miscarriage)).

D. Duress

Those interviewed did not verbalize instances of duress, excepting the case below. However, there are reports of reluctance to support the CNA, especially among those who have felt persecution from the SPDC as a result of CNA action.³³ The research team found several instances of similar reluctance in which a refugee had given voluntary support and been persecuted by the SPDC for it—and then was hesitant to give again (*see, e.g.*, Refugee Interviews #029, #036, and #039).

The Bank Clerk: She supported the CNA “with [her] heart” and admired that they worked for “freedom, human dignity and rights.” She gave three donations of 2,000 kyat in 2002 and 2003 and allowed CNA members to stay in her house one night in 2003. The SPDC discovered the CNA members in her house, arrested and detained her for a week. The SPDC screamed sexual insults at her, accusing her of sexual involvement with the CNA and slapped her. Later, after her release, the CNA wanted to store backpacks in her house. She knew that the SPDC would be checking that day, so she asked them to go away. They put things in her house anyway, and when the CNA were arrested, the bank clerk fled in fear for her safety (Refugee Interview #029).

E. Affiliation with the CNA

No one spoke of having any official affiliation with the CNA. There were people, however, who were not members but expressed ideological identification with the movement (Refugee Interviews #025, #026, #027, #028, #034, #035, #082, #084, #088, #133, and #137).

The Childhood Sweethearts: The childhood sweethearts were married without their parents’ permission. The husband drove a jeep for hire, and was childhood friends with many founding members of the CNF. The wife owned a tea shop. They both would care for and nurse sick CNF members back to health when they fell ill, usually with fever, and would provide them medicine and a place to rest. The SPDC arrested the childhood sweethearts. They held the wife and deprived her of food for two days, while slapping and kicking her. After her release, her husband remained imprisoned. He was later released to the hospital, where he showed signs of psychological and mental illness which had not been present before. He refused to speak about his time in prison despite his wife’s repeated queries. After several weeks, he died. The wife fled after her husband’s death.

³³ *See supra* note 27.

PART VI

FINDINGS AND RECOMMENDATIONS

I. Findings and Recommendations

The field mission taken to Thailand and Malaysia in January 2006 by Harvard Law School's Immigration and Refugee Clinic and the International Human Rights Clinic of the Human Rights Program interviewed more than 150 individuals from Burma to understand more fully the implications of application of the "material support for terrorism" bar to refugees fleeing violent oppression and human rights violations committed by the Burmese regime and its military. Based on our research on conditions in Burma and Thailand before the trip, our on-site investigation in January 2006, and our review of U.S. and international law, we have reached the following conclusions:

- As currently constructed and applied, the material support bar contradicts stated U.S. policy towards Burma and efforts to support refugees from that country who have fled violence and widespread persecution. A vast majority of bona fide refugees would be labeled as "engaging in terrorist activity" under the current law, and potentially barred from resettlement. Similarly, organizations engaged in armed conflict with the Burmese military would be labeled "terrorist" organizations. Such designations could result in significant embarrassment to the U.S. government, including President George W. Bush, who has identified the ruling military junta in Burma as an outpost of tyranny.
- The international community, including the U.S. and the UN High Commissioner for Refugees (UNHCR), has worked to gain the support of the Royal Thai government and the Malaysian government for overseas resettlement of refugees from Burma. Both governments have been more supportive of resettlement efforts than in recent history. The material support bar would undercut recent progress and could potentially place strains on relations with the U.S. on this issue.
- The current legislation and interpretations of the law are overly broad and inflexible. The current waiver provision should be applied to Burma in the immediate term, but in the medium and long term, the waiver is inadequate because of its narrow scope. Legislative reform and/or interpretation should address these issues:
 - the context in which armed conflict is occurring. For example, groups defending themselves from genocide, crimes against humanity or human rights violations should not automatically be deemed to be engaged in "terrorist" activity. Similarly, those giving material support to such groups should not be barred from resettlement. This would include individuals from Burma, but also Rwanda, Darfur and other conflicts. Similar analysis should be applied to groups supported by U.S. policy;
 - those who provide support under duress should not be barred from resettlement. Support, even under the threat of death or torture, is currently grounds for inadmissibility;
 - a *de minimis* standard should be built into the material support standard bringing it in line with traditional application of the bar in the refugee context. Any support—no matter how trivial—is currently a bar;
 - an age of consent requirement should be established. For example, children—even those of very young ages—are currently implicated by the bar;
 - a time bar (statute of limitations) should be considered. For example, individuals forcefully resisting the Holocaust would be barred under the current law.

APPENDIX

RELEVANT U.S. CODE

8 USCA §1182 (2005)

(a)(3)(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) 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;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of Title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years, is inadmissible.

An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (VII) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe has renounced the activity causing the alien to be found inadmissible under this section.

(iii) “Terrorist activity” defined

As used in this chapter, the term “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 any of the following:

- (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.
- (IV) An assassination.
- (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.
- (VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) Engage in terrorist activity defined

As used in this chapter, the term “engage in terrorist activity” means, in an individual capacity or as a member of an organization—

- (I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;
- (II) to prepare or plan a terrorist activity;
- (III) to gather information on potential targets for terrorist activity;
- (IV) to solicit funds or other things of value for—
 - (aa) a terrorist activity;
 - (bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or
 - (cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization;
- (V) to solicit any individual—
 - (aa) to engage in conduct otherwise described in this subsection;
 - (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II);or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) “Representative” defined

As used in this paragraph, the term “representative” includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) Terrorist organization defined

As used in this section, the term “terrorist organization” means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

.....

8 U.S.C. §1182 (2005)

(d)(3)(B)

(i) The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may conclude in such Secretary's sole unreviewable discretion that subsection (a)(3)(B)(i)(IV)(bb) or (a)(3)(B)(i)(VII) of this section shall not apply to an alien, that subsection (a)(3)(B)(iv)(VI) of this section shall not apply with respect to any material support an alien afforded to an organization or individual that has engaged in a terrorist activity, or that subsection (a)(3)(B)(vi)(III) of this section shall not apply to a group solely by virtue of having a subgroup within the scope of that subsection. The Secretary of State may not, however, exercise discretion under this clause with respect to an alien once removal proceedings against the alien are instituted under section 1229a of this title.

(ii) Not later than 90 days after the end of each fiscal year, the Secretary of State and the Secretary of Homeland Security shall each provide to the Committees on the Judiciary of the House of Representatives and of the Senate, the Committee on International Relations of the House of Representatives, the Committee on Foreign Relations of the Senate, and the Committee on Homeland Security of the House of Representatives a report on the aliens to whom such Secretary has applied clause (i). Within one week of applying clause (i) to a group, the Secretary of State or the Secretary of Homeland Security shall provide a report to such Committees.