The Case for Burma: Inconsistent U.S. Policies, Unjust Application of U.S. Law

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I. INTRODUCTION

The U.S. "War on Terror" has effectively become a war against the "other." The word "terrorism" is used so flippantly that legitimate refugees are being labeled terrorists, causing denial of their valid asylum and resettlement claims. Congress enacted the U.S. Patriot Act in 2001 and the REAL ID Act in 2005.[1] These two pieces of legislation strengthen antiterrorist laws, in part by amending the Immigration and Nationality Act (INA).[2] One goal of the changes is to make entering the

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1. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (Real ID Act of 2005), Pub. L. No. 109-13, 119 Stat. 231.

2. Immigration and Nationality Act, 8 U.S.C.A. § 1182 (2006).

United States more difficult for terrorists. This, of course, is a necessary and justified goal. However, the INA as amended is causing other far-reaching and unintended effects: an over-broadening of power, an inconsistent policy toward refugees, and an unjust application of a specific bar to admission to the United States.

Under the amended INA, immigration judges have gained broad personal discretion to label a group a "terrorist organization,"[3] notwithstanding the long-held power of the United States Department of State (State Department) and the Executive Office to do so officially. The INA also bars entry to legitimate refugees who have allegedly given material support to terrorist groups, without regard to the amount of support given or the refugee's intent in providing that support.[4] In addition, the bar does not only apply to refugees. Individuals who attempt to immigrate to the United States in any manner—through visa applications, asylum petitions, or adjustments to their immigrant status are all subject to this bar. As it is currently written, the INA has the potential to modify U.S. immigration law and undercut refugee status altogether. On its face, this provision appears to be just what the United States needs to strengthen its borders and fight its war on terror. After all, known threats to U.S. security should never be permitted to enter this nation. In reality, however, a clear definition of the word "terrorist" and a restriction of its careless overuse are needed to make our efforts more effective.

This Comment will show that the current application of the bar against refugees who have given material support to terrorist groups cannot be what Congress intended when it changed the law. Also, the Comment will suggest that the bar as currently applied is ineffective in fighting terrorism. More specifically, the focus of this Comment is on one specific consequence of the bar: the complete halt of the resettlement of over 130,000 Burmese refugees currently living in camps in Thailand and Malaysia.[5] These are populations who, after enduring years of human rights abuses and severe persecution, fled from Burma to neighboring countries. However, according to a recent study by Harvard Law School human rights program researchers, the refugees' U.S. resettlement applications are currently on hold because the INA, applied

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3. *Id.* § 1182(a)(3)(B)(vi)(III) (2006). Section 1182(a)(3)(B) is reproduced in its entirety *infra* Part IX.

4. *Id.* § 1182(a)(3)(B)(iv)(VI).

5. Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, § 2(6), 117 Stat. 864.

broadly as it is, labels them as either terrorists or terrorist supporters.[6] What is most devastating is that this result is in direct opposition to the United States' official policy towards the current Burmese government, which has been sanctioned[7] and labeled by the present administration as an "outpost[] of tyranny," along with North Korea and Iran.[8] The current regime, which came to power over a decade ago illegally and by force, invalidating legitimate democratic elections,[9] is extremely oppressive and exercises authority in a manner tantamount to crimes against humanity.

This Comment first presents a brief history of Burma and its current situation by referencing information gathered from interviews with Burmese refugees presently living in Malaysia and Thailand. Next, it analyzes the stated U.S. policy on Burma in contrast to the newly amended INA and provides an analysis on the danger of the inconsistent use of the word "terrorist." Furthermore, this Comment highlights some of the myriad of problems the amended INA creates, including its effect on refugee status as that term has always been defined, as well as potential effects on immigration law in general, the constraints it places on U.S. foreign relations with other nations and with international organizations, and the current interagency struggle that could further delay a resolution. Finally, this Comment presents some suggestions for change, both in the current law and in U.S. policy generally.

II. BACKGROUND ON BURMA'S POLITICAL AND SOCIAL HISTORY

Burma has been under military rule for most of the last fifty years. Relations among ethnic groups in Burma have long been strained, largely due to inconsistent rule and skewed representation during British colonialization. Burma gained independence in 1948, but efforts to unify

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6. TYLER GIANNINI ET AL., HARVARD LAW SCH., PRELIMINARY FINDINGS AND CONCLUSIONS ON THE MATERIAL SUPPORT FOR TERRORISM BAR AS APPLIED TO THE RESETTLEMENT OF REFUGEES FROM BURMA 6, 10, 14 (2006). In January 2006, in conjunction with the Immigration and Refugee Clinic, the Clinical Advocacy Project, and the Human Rights Program at Harvard Law School, this author was part of a research team that traveled to Asia and interviewed over one hundred refugees in an effort to determine how the bar is likely to affect overseas resettlement. In February 2006, the results of the field investigation were reproduced as *Preliminary Findings and Conclusions on the Material Support for Terrorism Bar as Applied to the Overseas Resettlement of Refugees from Burma* and circulated to various agencies in Washington, D.C. *Id.* This Comment references the report and refugee interviews, all of which are on file with the author.

7. Burmese Freedom and Democracy Act §§ 3-7.

8. *The Nomination of Dr. Condoleezza Rice To Be Secretary of State: Hearings Before the S. Comm. on Foreign Relations*, 109th Cong. 15 (2005) [hereinafter *The Nomination of Dr. Condoleezza Rice To Be Secretary of State*] (opening statement of Dr. Condoleezza Rice, Nominee to be Secretary of State).

9. CHRISTINA FINK, LIVING SILENCE: BURMA UNDER MILITARY RULE 71-72 (2001).

the nation were undermined by the assassination of General Aung San, the head of the transitionary government and arguably Burma's only strong hope for political transformation. In the following years, Burma generally experienced periods of parliamentary democracy, but continued to be plagued by economic and social strife. Ethnic conflict, political violence, and abuses of power hampered development and ultimately led to a military coup in 1962, which resulted in General Ne Win's rise to power.[10]

The Ne Win Era brought with it the "Burmese Way to Socialism," an economic reform program which demonetized the currency, wiping out citizens' hard-earned savings and leaving most of them destitute. The Burmese Way to Socialism also imposed ideological reform dedicated to reverting to traditional Burmese culture and society while moving away from the foreign influence of China and India. Citizens at large were urged to practice Buddhism, the country's most practiced religion and the way of life of the Burmese majority. Unfortunately, the introduction of the Burmese Way to Socialism further alienated and oppressed many ethnic minorities whose culture and religion differed and who were forbidden to oppose the government.[11]

For twenty-six years, the military ruled through a one-party dictatorship, often exercising martial law. Arresting, beating, or otherwise abusing those found to be in opposition to the government was common practice. Turmoil existed especially in the universities, where student groups often organized pro-democracy campaigns and occasionally took to the streets in protest. As a result, the government imposed strict censorship laws and commonly shut down the universities for months at a time. Violent insurgent ethnic minority groups also joined the rebellion.[12]

Antimilitary protests culminated in 1988. The government had again demonetized the currency, and the ensuing revolts resulted in a student massacre with numerous arrests. General Ne Win resigned a few months later, but his policies continued under the regime of his loyal successor, General Sein Lwin. Lwin's appointment sparked nationwide strikes and protests, which began on August 8, 1988, and lasted for six weeks. The military reacted with force, killing some 3000 protestors, most of whom were students or monks. A coup d'état reestablished power for the military, and the new regime was called the State Law and Order Restoration Council (SLORC), later changed to the State Peace

10. *Id.* at 1, 22-23, 29.
11. *Id.* at 32, 34, 40.
12. *Id.* at 31-32, 34, 42-43, 47.

and Development Council (SPDC). A system of "Burmanization" began with the hope of instilling national pride. Colonial transliterations were abandoned, and the nation's name was officially changed to Myanmar. Despite the regime change, many horrors of militaristic rule remained, and many suspected that General Ne Win maintained some kind of underground control of the government.[13]

The citizens of Burma realized that only a nationally unified campaign could make a difference. Thus, the National League for Democracy (NLD) was formed, with Aung San Suu Kyi, daughter of the late General Aung San, as its leader. The NLD and other newly formed parties campaigned for democratic elections. However, anyone who joined them was subject to arrest; the number of political arrests made by the government totaled 6000 by November of 1989. Finally, a democratic election was held in 1990. The military, now under General Saw Maung, agreed that the winner would form a provisional government and write a new constitution. Even though its leaders had long been under house arrest, the NLD won 392 of the 485 parliamentary seats. The military-backed party won ten seats and the remaining seats went to ethnic minority parties and independents.[14]

Despite the NLD's legitimate victory, the military voided the election results and the NLD was never able to gain power. The military continued to rule but realized that something had to be done to assert their legitimacy. They decided to convene a National Convention to write a new constitution and invited members of the prominent political parties to attend. The skepticism of some groups, including the NLD, was confirmed during the two-day event when the members discovered that the constitution had in large part already been written, and that there was no room for debate. Members of many ethnic minority groups who were invited were not allowed to speak.[15]

Since 1993, the National Convention has met sporadically, although the NLD and other groups have boycotted the sessions, due to their undemocratic nature and the government's continuing record of human rights abuses.[16] Aung San Suu Kyi remains under house arrest to this

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13. *Id.* at 50-52, 54-56, 62, 69-70, 94.
14. *Id.* at 63, 66-69.
15. *Id.* at 72, 82-84.
16. *See id.* at 83; U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Situation of Human Rights in Myanmar*, 11-12, U.N. Doc. E/CN.4/2004/33 (Jan. 5, 2004) (prepared by Special Rapporteur, Paulo Sérgio Pinheiro).

day.[17] In an effort to reach a peaceful resolution to the turmoil in Burma, she and her party, along with leaders of ethnic minorities, have continued to request a discourse with government leaders but have been denied.[18] Still today, the human rights situation in Burma is bleak, and heinous abuses are a part of everyday life. This history has resulted in thousands of internally displaced individuals and thousands of Burmese refugees living in camps in the neighboring countries of Thailand and Malaysia.[19]

Three specific ethnic minority groups—the Karen, the Karenni, and the Chin—make up the majority of refugees living in Thailand and Malaysia who have been identified by the United Nations High Commission on Refugees (UNHCR) as eligible for resettlement in the United States. Members of the Karen and the Chin are predominantly Christian; because of their ethnicity and their religion, they are often the target of horrific abuse at the hands of the Burmese government. However, individuals from these three groups have fled from Burma under slightly different circumstances.[20]

The first group, the Karen, fled by the thousands when, in 1997, the SPDC waged a major military offensive in the Tenasserim Division of southeastern Burma. Prior to the offensive, the Karen National Union (KNU), an organization dedicated to democracy in Burma and the recognition of the Karen people, controlled and governed much of the area. As part of its plan to clear the area, the SPDC military attacked hundreds of villages and eventually overran them. As a result, over 9000 Karen refugees fled across the border into Thailand, and the Thai government created the now UNHCR-controlled refugee camp of Tham Hin. All individuals in this camp are eligible for resettlement in the United States.[21]

The second group, the Karenni, make up the majority of a different refugee camp located in northern Thailand, called Mai Nai Soi. The individuals living in this camp fled from persecution in Burma as early as 1993, and others continue to come to the camp today. In Burma, the Karenni State has been less stable than the Karen-populated areas. At certain times, it was viciously ruled by the SPDC, while at other times it

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17. Hanna Ingber, Editorial, *Two Coups Miles Apart*, HARTFORD COURANT, Sept. 22, 2006, at A11.

18. *Human Rights in Burma: Where Are We Now and What Do We Do Next?: J. Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations & Subcomm. on Asia and the Pacific, H. Comm. on International Relations*, 109th Cong. 52 (2006) (statement of Tom Malinowski, Washington Advocacy Director, Human Rights Watch).

19. *See* GIANNINI ET AL., *supra* note 6, at 6, 10, 14.

20. *See id.* at 6, 10, 14.

21. *Id.* at 6.

was completely ignored. Part of the territory is controlled by the Karenni National Progressive Party (KNPP), an organization whose goal "is to secure an autonomous Karenni State in a united Burma."[22] During the 1990s, the SPDC intensified its militarization of the territory and its persecution of the Karenni villagers. There are approximately 100 Karenni refugees living in the Mai Nai Soi camp who have applied for resettlement in the United States.[23]

The third population is made up of a group of Chin refugees living in urban areas in Malaysia. Of all the ethnic groups in Burma, the Chin are among the smallest in number.[24] An organization called the Chin National Front (CNF) has "aimed for democratic rule and self-determination in Chin State since 1988."[25] The Chin fled severe abuse and discrimination in Burma, but the situation in Malaysia is not much better. In Malaysia, which is a predominantly Muslim country, the Christian Chin face extremely harsh discrimination, resulting in a secondary form of persecution.[26] For example, the government is reluctant to give the refugees work permits, fearing their integration into Malaysia, and is eager to have these refugees resettled elsewhere.[27] As a result, the United States is the most likely option for resettlement of Chin refugees, while Malaysia may be a better place to integrate Muslim refugees from Burma into Malay society. Although UNHCR has more than 6500 registered Chin refugees, thousands remain unregistered because of the discrimination.[28]

The Karen, the Karenni, and the Chin have lived through unthinkable oppression in Burma, and continue to struggle as refugees in countries that are less than thrilled to have them. Many of them face secondary persecution. Some of the refugees have spent their entire lives within the camps. All of those who have applied for resettlement to the United States are eager to begin a new life. As one refugee stated:

> Life in the camp is not secure. There are no jobs. Nutritious food is scarce. We know that staying here means we can't improve our way of life. We want to become citizens of a better country. We would like to thank every

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22. *Id.* at 10.

23. *Id.*

24. *See* Cent. Intel. Agency, The World Factbook: Burma, http://www.cia.gov/cia/publications/factbook/print/bm.html (last visited Oct. 3, 2006).

25. GIANNINI ET AL., *supra* note 6, at 14.

26. Refugees Int'l, Visual Mission: Burmese Chin Refugees in Malaysia, http://www.refugeesinternational.org/content/report/detail/5499 (last visited Oct. 2, 2006).

27. U.S. Comm. for Refugees & Immigrants, Malaysia, http://www.refugees.org/article.aspx?id=1504&rid=1179#allow_work (last visited Oct. 2, 2006).

28. GIANNINI ET AL., *supra* note 6, at 14.

> country that takes refugees—because refugees are stateless persons, and because once they are accepted, they will never be stateless again.[29]

The United States has agreed to resettle the refugees from Burma.[30] Unfortunately, despite the United States' official policy on Burma, the amended INA is likely to prevent the refugees from going anywhere soon.

III. U.S. POLICY ON BURMA

The United States has a long-standing policy of condemning the situation in Burma. In the past few years, each branch of government has been more and more vocal on the issue. Congress has made its own findings regarding the gruesome military regime in Burma, stating in part that:

> (2) The SPDC has failed to enter into meaningful, political dialogue with the NLD and ethnic minorities and has dismissed the efforts of United Nations Special Envoy Razali bin Ismail to further such dialogue.
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> (4) On May 30, 2003, the SPDC, threatened by continued support for the NLD throughout Burma, brutally attacked NLD supporters, killed and injured scores of civilians, and arrested democracy advocate Aung San Suu Kyi and other activists.
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> (5) The SPDC continues egregious human rights violations against Burmese citizens, uses rape as a weapon of intimidation and torture against women, and forcibly conscripts child-soldiers for the use in fighting indigenous ethnic groups.
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> (6) The SPDC is engaged in ethnic cleansing against minorities within Burma, including the Karen, Karenni, and Shan people, which constitutes a crime against humanity and has directly led to more than 600,000 internally displaced people living within Burma and more than 130,000 people from Burma living in refugee camps along the Thai-Burma border.
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> (11) The SPDC has integrated the Burmese military and its surrogates into all facets of the economy effectively destroying any free enterprise system.
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29. Interview with Refugee #58, in Mai Nai Soi Camp, Mae Hong Son, Thail. (Jan. 10, 2006) (on file with author) [hereinafter Refugee Interview #58].

30. U.S. DEP'T OF STATE, BUREAU OF PUB. AFFAIRS, BURMA: A HUMAN RIGHTS DISASTER AND THREAT TO REGIONAL SECURITY 1 (2006), *available at* http://www.state.gov/documents/organization/72944.pdf.

(14) The policy of the United States, as articulated by the President on April 24, 2003, is *to officially recognize the NLD as the legitimate representative of the Burmese people* as determined by the 1990 election.
(15) The United States must work closely with other nations, including Thailand, a close ally of the United States, to highlight attention to the SPDC's systematic abuses of human rights in Burma . . . .[31]

In response to these findings, Congress passed the Burmese Freedom and Democracy Act of 2003 (Act).[32] The title of the Act states that its purpose is, in part, to "sanction the ruling Burmese military junta, [and] to strengthen Burma's democratic forces."[33] The Act bans all trade that supports the military regime, a sanction that will be in effect until the government has met several conditions, including cooperating with ethnic groups and democratic movements; releasing all political prisoners; and allowing for fundamental freedoms of speech, press, association, and religion.[34] Furthermore, the Act freezes the assets of the members of the Burmese regime, urges financial institutions to oppose granting loans to the country, and bans visas for any member of the SPDC or the Union Solidarity Development Association.[35]

More importantly, the Act authorizes the President to "use all available resources to assist Burmese democracy activists dedicated to nonviolent opposition to the regime in their efforts to promote freedom, democracy, and human rights in Burma."[36] Further still, Congress "encourages the Secretary of State to highlight the abysmal record of the SPDC to the international community and . . . support . . . Burma's democratic movement including the National League for Democracy and Burma's ethnic groups."[37]

Secretary of State Condoleezza Rice apparently took this encouragement seriously, for in her 2005 Senate confirmation hearing, she publicly called Burma one of the world's "outposts of tyranny."[38] This description is consistent with President Bush's position on Burma. In his 2006 State of the Union address, President Bush stated:

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31. Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, § 2, 117 Stat. 864, 864-65 (emphasis added).
32. *Id.*
33. *Id.*
34. *Id.* § 3(a)(1)-(3).
35. *Id.* §§ 4-6.
36. *Id.* § 8(a).
37. *Id.* § 7.
38. *The Nomination of Dr. Condoleezza Rice To Be Secretary of State*, *supra* note 8, at 15.

> [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, Burma, Zimbabwe, North Korea, and Iran—because the demands of justice and the peace of this world require their freedom. . . .
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> . . . We show compassion abroad because Americans believe in the God-given dignity and worth of . . . a refugee fleeing genocide.[39]

The President has not forgotten this stance. As recently as March 16, 2006, the President renewed his strategy of preemptive attacks on U.S. foes, and Burma was on the list of countries he condemned.[40] The *Washington Post* reported: "Without saying what action would be taken against them, the strategy singles out seven nations as prime examples of 'despotic systems'—North Korea, Iran, Syria, Cuba, Belarus, Burma and Zimbabwe."[41] President Bush has stated, "America will stand with the allies of freedom to support democratic movements in the Middle East and beyond, with the ultimate goal of ending tyranny in our world."[42] Sadly, as Part IV of this Comment explains, under the current law with respect to Burmese refugees, this is simply not true.

IV. LEGAL ANALYSIS OF THE "MATERIAL SUPPORT FOR TERRORISM" BAR

A. "Terrorist Activity"

Several aspects of the "material support for terrorism" bar, as found in the newly amended Immigration and Nationality Act, are problematic. The bar covers anything remotely related to terrorism and terrorist activity, and as a result, it adversely affects refugees who are not terrorists. While the most devastating provision for refugees is found in the definition of "material support," this Part will analyze other poorly conceived portions of the INA as well.

The breadth of the law is overwhelming. For example, "terrorist activity" is defined in part, as one might guess, as the hijacking or sabotage of any aircraft, vessel, or vehicle;[43] but the definition also

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39. Address Before a Joint Session of the Congress on the State of the Union, 42 WEEKLY COMP. PRES. Doc. 145, 146, 148 (Feb. 6, 2006).

40. Peter Baker, *Bush To Restate Terror Strategy; 2002 Doctrine of Preemptive War To Be Reaffirmed*, WASH. POST, Mar. 16, 2006, at A01.

41. *Id.*

42. Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. Doc. 126, 131 (Feb. 7, 2005).

43. 8 U.S.C.A. § 1182(a)(3)(B)(iii)(I) (2006).

includes "the use of any . . . 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."[44] "Terrorist activity" is further defined as any attempt or threat to do the same.[45] For example, under the INA, a person who threatens to throw a sharp object at someone or someone's property has engaged in a terrorist activity. The code does require that the activity be unlawful under the laws of the place where it is committed.[46] However, even with this minor restriction, the definition could potentially mean that any individual who engages in an altercation—even without actual harm or injury—has engaged in terrorist activity and is forever barred from admission to the United States. There are no practical exceptions to this bar.

The requirement that the conduct be "unlawful under the laws of the place it is committed" is in itself problematic.[47] Imagine a country run by an undemocratic government where the freedoms of speech, expression, and assembly are not guaranteed. Anyone who makes a threat against that regime could be engaging in terrorist activity. Moreover, assume that the same country has passed a law stating that anyone who supports the U.S. war in Iraq is a terrorist, and that conduct supporting the U.S. war effort is unlawful. Then suppose that an individual in that country begins an assembly, supporting the U.S. "liberation of Iraqis." During a march, tempers flare and a group of demonstrators smash the windshield of a well-known member of the U.S. opposition. Because the conduct is unlawful in the hypothetical state, under the United States' own law, the vandal would have engaged in terrorist activity by supporting the U.S. mission. As it is written, the law prohibits some individuals from supporting the United States. If the conduct in the above hypothetical occurred within the United States, the crime would more likely be mere vandalism, but certainly not terrorist activity.

With respect to Burma, the typical example is similar. In Burma, being a member of some democratic organizations is unlawful.[48] Suppose a member of such group, an individual who is known in his village for his support of nonviolent regime change, one day encounters an official of the SPDC. The official searches the individual and finds in

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44. *Id.* § 1182(a)(3)(B)(iii)(V).
45. *Id.* § 1182(a)(3)(B)(iii)(VI).
46. *Id.* § 1182(a)(3)(B)(iii).
47. *Id.*
48. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Working Group on Arbitrary Detention, *Civil and Political Rights, Including the Questions of: Torture and Detention*, 68, U.N. Doc. E/CN.4/2002/77/Add.1 (Dec. 11, 2001).

his possession a Bible, which is marked as published outside of Burma, in neighboring India—another unlawful act under Burmese law. The SPDC official, knowing of the individual's reputation and seizing upon his crimes, begins to beat him severely with his gun. In pure self-defense, the individual grabs a stick to knock the gun away and knocks the SPDC official down, injuring him. The individual is likely to be hunted by the SPDC and will need to flee the country. However, under the INA, the individual has engaged in terrorist activity. It would be useless for him to seek refuge in the United States—he would be barred from admission. The individual, a Christian activist working for democracy and peace, would be forever barred from entering the United States because the INA makes no provision for individuals of nations whose regimes are contrary to fundamental notions of liberty.

B. "Terrorist Organization"

A second problem with the INA is the manner in which groups may be deemed "terrorist organizations." The law sets out three tiers of terrorist organizations.[49] The first tier includes those organizations specifically designated by the Secretary of State and gives specific guidelines for designation, notification, and sanction of these groups.[50] The second tier includes those organizations that have been designated by the Secretary of State, in consultation with either the Attorney General or the Secretary of Homeland Security.[51] As of October 2005, the State Department reported forty-two official terrorist organizations.[52] Groups listed include Al-Qaeda, Mujahedin-e Khalq Organization (MEK), Hizballah (Party of God), Shining Path (Sendero Luminoso, SL), Revolutionary Armed Forces of Colombia (FARC), the Irish Republican Army (IRA), the Palestinian Liberation Front (PLF), and Aum Shinrikyo.[53]

The new law also sets out guidelines for the designation of a third tier of terrorist organizations to be determined by immigration officials. Third-tier organizations include "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, [terrorist activities]."[54] This third tier is clearly a "catch-all"

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49. 8 U.S.C.A. § 1182(a)(3)(B)(vi); *id.* § 1189.
50. *Id.* § 1182(a)(3)(B)(vi)(I).
51. *Id.* § 1182(a)(3)(B)(vi)(II).
52. *See* U.S. Dep't of State, Office of Counterterrorism Fact Sheet: Foreign Terrorist Organizations (FTOs) (Oct. 11, 2005), http://www.state.gov/s/ct/rls/fs/37191.htm [hereinafter Office of Counterterrorism Fact Sheet].
53. *Id.*
54. 8 U.S.C.A. § 1182(a)(3)(B)(vi)(III).

provision. It allows any group an immigration officer dislikes to be informally deemed terrorists; unlike the guidelines for the other two tiers, there is no requirement that the list be published, that anyone be notified of the designation, or that official sanctions be issued. The problems associated with this lack of accountability are obvious: it is sure to lead to inconsistent decisions, with some jurisdictions granting admission to the same individuals that other jurisdictions would bar as "terrorists." Thus, a couple of bandits meeting together for one night and conducting unlawful activities can be labeled a terrorist organization by an immigration judge.

With regard to Burma, there is potential for the third tier of terrorist organization designations to encompass the KNU, the KNPP, and the CNF. Each of these organizations was formed with the general goal of obtaining autonomy for the ethnic minority it represents. Through the years, armed resistance wings of these groups have developed, all with varying levels of actual combat and limited levels of success in furthering their goals. In looking at each of these organizations, it would not be difficult to find conduct that constitutes "terrorist activity" as defined in the amended law. However, the activity appears to be defensive in nature and generally on a small scale when compared to what is commonly thought of as terrorist activity (i.e., transnational terrorist bombings). Given the nature of the Burmese regime, the history of its people, and the goals and policies of these groups, it does not make sense for the United States to label these groups as terrorist organizations.

The sheer breadth of the third tier of terrorist designations is not the only problem with the revisions. The INA also considers soliciting members or funds for tier-three groups to be "engag[ing] in terrorist activity."[55] Thus, an individual may invite others to join a group that is later deemed to be a terrorist group, and unless he can show by clear and convincing evidence that he "should not reasonably have known" that the group was a terrorist organization, he has engaged in terrorist activity.[56]

In Burma, there are dozens of groups opposed to the current regime, many of whom are working towards democracy. None of these groups has been officially designated as Foreign Terrorist Organizations by the U.S. government.[57] Most, however, are illegal organizations under the Burmese regime. Moreover, and perhaps most problematic to Burmese refugees, is the provision that states that any individual who

55. *Id.* §§ 1182(a)(3)(B)(iv)(IV)(cc), (V)(cc).
56. *See id.*
57. *See* Office of Counterterrorism Fact Sheet, *supra* note 52.

affords material support to a third-tier group has engaged in terrorist activities and is barred from entry into the United States.[58]

C. "Material Support"

The "material support for terrorism" bar denies admission to the United States to any individual who

> commit[s] 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 . . . to a [tier three] terrorist organization . . . or to any member of such an organization. . . .[59]

Thus, with regard to "material support" there is no minimum limit to the amount of support given, there is no provision for consent in giving the support, and there is no exception for support given under duress. Because of circumstances unique to Burma, these are oversights that cannot be ignored.

In Burma, the circumstances under which this "support" is given often vitiate any suspicion that so-called supporters of these groups are terrorists. For example, refugees have reported giving extremely low levels of "support," occasionally small amounts of money and in most cases only rice, to the resistance groups who represent them.[60] Failing to disallow such groups from conducting their activities could also possibly be construed as support.[61] Another example of de minimus support is prevalent among Karenni refugees, with respect to the KNPP organization. As previously discussed, the KNPP have, at times, physically controlled territory in Karenni State in Burma.[62] When the SPDC waged attacks in the area, they often left landmines in their wake.[63] The KNPP routinely patrol these areas, most of which are located near small villages and in the surrounding jungle terrain.[64] In order for an individual to flee into neighboring Thailand, he or she must cross the

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58. 8 U.S.C.A. § 1182(a)(3)(B)(iv)(VI).
59. *Id.*
60. *See, e.g.*, GIANNINI ET AL., *supra* note 6, at 8.
61. *See id.* A pastor was arrested in Burma for "allowing" the KNU members to enter the village to celebrate Christmas. His only direct support to KNU members was giving small articles, such as a hat, to a cousin. *Id.*
62. *See supra* Part II.
63. Refugee Interview #58, *supra* note 29.
64. *Id.*

mine fields.[65] Sometimes the only way for individuals to flee Burma safely is to follow the KNPP troops, who know the paths that avoid landmines while carrying items belonging to this illegal organization, such as cooking supplies, along with them.[66] In some instances, this is the only contact an individual has with the KNPP during his or her entire life.[67] Yet, since there is no minimum level of support required in the INA bar, this conduct alone is potentially enough to keep a refugee from entering the United States.

The age of consent is also a factor regarding Burmese refugees. In the above example, the individual who accompanied the KNPP while fleeing Burma was only sixteen years old.[68] At no other time in her life had she ever laid eyes on KNPP members, and she followed them to the Mai Nai Soi camp solely because she feared for her life.[69] This cannot be the meaning of "material support" that Congress intended when amending the INA. A more common example involves the children of organizational members. A child who performs regular household chores for his or her parents arguably has supported members of a third tier organization.[70] Yet, there is no way the child acted with the intent to support a terrorist group; the child's conduct was that of any other small child growing up in village life. The law provides no minimum age of consent and neglects to require intent to support terrorists whatsoever. This is problematic because it sweeps in individuals who do not actually or meaningfully support these groups and whose conduct is involuntary.

Further, the neglect of a consent requirement is problematic because some of the "support" is given under duress.[71] Again, ethnic minority organizations in Burma are opposed by the SPDC. Often, being affiliated with these groups, working with them, or even having minimal contact with them is an offense in Burma that results in severe

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65. Interview with Refugee #65, in Mai Nai Soi Camp, Mae Hong Son, Thail. (Jan. 11, 2006) (on file with author) [hereinafter Refugee Interview #65]; *see* Interview by Tyler Giannini with Refugee #127, in Mai Nai Soi Camp, Mae Hong Son, Thail. (Jan. 11, 2006) (on file with author).

66. Refugee Interview #65, *supra* note 65; Interview by Manav Kumar Bhatnagar with Refugee #106, in Mai Nai Soi Camp, Mae Hong Son, Thail. (Jan. 12, 2006) (on file with author) [hereinafter Refugee Interview #106].

67. Refugee Interview #65, *supra* note 65; Refugee Interview #106, *supra* note 66.

68. Refugee Interview #65, *supra* note 65; Refugee Interview #106, *supra* note 66.

69. Refugee Interview #65, *supra* note 65; Refugee Interview #106, *supra* note 66.

70. *See* GIANNINI ET AL., *supra* note 6, at 13.

71. It is worth noting that the problem of supporting a group while under duress first arose in U.S. case law with respect to Colombian refugees. *See, e.g.*, Arias v. Gonzales, 143 Fed. App'x 464 (3d Cir. 2005). Notwithstanding the utter lack of choice in these situations, asylum seekers are often denied. *See, e.g.*, *id.*

punishment.[72] This well-known fact of life in Burma is exemplified by the following example:

> [A bank clerk] 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.[73]

Other instances of duress are more direct. With respect to the KNPP, for example, individuals were often forced to porter for the armed wing of the organization if they did not pay taxes.[74] Additionally, those who worked as medics were often forced to go to combat areas to treat soldiers who were wounded during battles with the SPDC.[75] If the medics refused, they would lose their jobs or their salaries would be cut.[76] Even though the medics feared for their lives, the KNPP's control of the local infrastructure was such that they had no choice. One refugee explained that "[h]e did not want to go, but he had to because he was asked, and he was told it was part of his job. He [said], 'I was worried that I would be killed during that time; if I die no one will take care of my family.'"[77]

The problems with the third-tier group designation arises again with respect to circumstances unique to Burma. In the areas where the ethnic minorities are found, the groups organized to represent them often act in a governing capacity quite similar to that of an American city council and mayor. For example, in Karen-populated areas, all the churches, schools, hospitals, and social services are headquartered and administered by the KNU.[78] In order to maintain these public services—many of which are not otherwise available to ethic minorities—the KNU solicits taxes from the villagers.[79] Virtually anyone who grew up or lived in a KNU (or

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72. GIANNINI ET AL., *supra* note 6, at 17.
73. *Id.*
74. *Id.* at 12.
75. *Id.*
76. Interview with Refugee #64, in Mai Nai Soi Camp, Mae Hong Son, Thail. (Jan. 11, 2006) (on file with author).
77. GIANNINI ET AL., *supra* note 6, at 13.
78. *Id.* at 6-7.
79. *Id.* at 8.

KNPP, or CNF)-controlled village would have paid taxes to that group. This "support" is enough to bar admission to the United States, even though the amount of money is trivial, and the purpose of the money is to maintain hospitals or to pay school teachers.

But the issue does not stop there. Continuing the same example, it could be said that anyone who works in a KNU school as a teacher, or church as a pastor, or hospital as a medic is directly affiliated with, if not a member of, a terrorist organization under the INA. It would not matter if the person completely disagreed with the principles of the KNU. Furthermore, the length of time an individual is affiliated with one of the tier-three groups or the amount of time that has passed since the affiliation was terminated is not relevant to the question of material support. A soldier who fought in armed resistance against the SPDC thirty years ago, but has never touched a weapon since, would still be barred under the INA. There is also no provision made for those who affirmatively abandon the efforts of a so-called "terrorist"; since the law has no time restraints, the bar to admission can apply to conduct or affiliation occurring at any time in a person's life. Thus, the unique situation that Burmese refugees face and the unjust application of the material support for terrorism bar make it likely that the overwhelming majority of their resettlement applications will be denied.

V. OTHER CONSEQUENCES OF THE LAW: STRAINS ON U.S. FOREIGN RELATIONS

The effects of the INA's material support for terrorism bar are unexpected from the viewpoint of those involved in overseas resettlement and have consequences for actors other than the refugees wishing to enter the United States. The Thai and Malaysian governments have made no indication to the United States that they are aware of the bar; one may assume that those governments are not planning to maintain refugee protections for these groups because they are expecting the United States to resettle them. The United States, by backing out of its promises to resettle refugees, is certain to strain relations between the respective governments. The likely result is that Thailand and Malaysia will follow the U.S. example and stop allowing Burmese refugees into their countries altogether. The would-be legitimate refugees, having nowhere to go, will remain in Burma, where they will suffer for the rest of their lives.

The strain on U.S. relations that will result from the material support bar extends beyond those foreign governments who are expecting U.S. cooperation. The UNHCR is the primary agency in charge of the resettlement of refugees. Put simply, the UNHCR

prescreens refugees who want to resettle and then recommends them to particular countries who have agreed to resettlement.[80] The refugees then go to additional interviews by officials from their prospective resettlement countries before their applications for resettlement are either accepted or denied.[81] The process ordinarily runs relatively smoothly, albeit not flawlessly, because the UNHCR is quite familiar with the ordinary bars against admission in particular countries. The amendments to the INA, however, have undermined the efforts of many UNHCR case workers and international NGOs who work with them. Thousands of refugees who have been prescreened, basically on the word of the United States, will ultimately be denied. It seems the resources of all of these organizations will have been wasted.

As a result of the bar and its consequences, it is likely that the UNHCR will simply stop referring refugees to the United States. However, other countries, such as New Zealand, Australia, Finland, and the United Kingdom, do not have the capacity to take in the same number of refugees that the United States does. Other countries cannot, to put it bluntly, take up our slack. So, again, it is the refugees who will suffer. The United States will not meet its quotas for refugee resettlement, it will be admonished by other nations and by international organizations, but it will continue to act contrary to its policy of protecting refugees. These effects alone are enough to warrant an immediate remedy. The law must be changed.

VI. WHOSE PROBLEM IS IT?

The major actors in the U.S. government who can take action to alleviate the problems caused by the changes to the INA are the Executive Office, as advised by the National Security Council; the State Department; and the Department of Homeland Security (DHS). Notwithstanding the powers each of these departments hold to influence the application of laws, the law itself provides a waiver that could theoretically be used for legitimate nonterrorist refugees whose actions happen to qualify as "terrorist activity" under the INA.[82] However, there is no evidence of the waiver having ever been used in practice; a specific use of the waiver is not mentioned in the law. Even so, a discretionary waiver is a bit disingenuous in fighting a war on terror. After all, what does it mean to categorically group an organization or an act under the

80. U.N. HIGH COMM'N FOR REFUGEES [UNHCR], DEP'T INT'L PROT., RESETTLEMENT HANDBOOK, at vi/2, vi/31-32 (2004).

81. *Id.*

82. 8 U.S.C.A. § 1182(d)(3)(B)(i) (2006).

broad label of terrorism, and then pick out a few "terrorists" who are "safe" to enter? The prospect of a waiver for certain terrorists suggests that there is a kind of hierarchy of terrorism—that there are good terrorists, who we will allow to enter, and bad terrorists, who will be forever barred. Furthermore, is the INA really suggesting that immigration officials make this decision?

These questions suggest why the waiver has never been used; however, they do not explain the original congressional purpose for including such a waiver in the law. For the waiver to be granted, the State Department, DHS, and Attorney General must consult with each other.[83] Unfortunately, the prospect of these three sectors of the government working toward an agreement is bleak given the hard stance the DHS (and particularly, the Immigration and Customs Enforcement agency of that department) has taken on this law.

A case before the Board of Immigration Appeals (BIA), *In re Ma San Kywe*, spelled out the DHS's position with regard to the INA.[84] In that case, the DHS officer argued against granting asylum to a forty-three-year-old Baptist Chin woman, claiming that she had engaged in terrorist activities by funding the Chin National Front.[85] The DHS position on the law was that when determining whether an organization is engaged in terrorist activity, the nature of a group was irrelevant, as was the nature of the regime.[86] This suggests that all groups that oppose their governments are terrorist organizations, even when the national regime is an illegitimate dictatorship and the organization's policy is to promote democracy. Under this interpretation of the law, a person providing material support to the Taliban to fight the Northern Alliance would be barred for engaging in terrorist activities.[87]

The DHS official did concede that one may need to determine whether a government is the lawful government of the state.[88] Such a reading would implicate Burma's unlawful military regime as well as the Taliban and other de facto governments. The DHS official stated further that there is no de minimus exception to the level of support given to terrorist groups.[89] However, as previously discussed, in the case of refugees from Burma, the amount and level of support do matter. The

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83. *Id.*

84. Transcript of Hearing at 17-20, *In re* Ma San Kywe, No. A97901756 (B.I.A. Jan. 26, 2006) [hereinafter Transcript of Hearing].

85. *Id.* at 2; *In re* S-K-, 23 I. & N. Dec. 936, 937 (2006).

86. Transcript of Hearing, *supra* note 84, at 20-23.

87. *See id.* at 22-23.

88. *Id.* at 23.

89. *Id.* at 19.

law cannot exist as it does, void of exceptions, and be justly applied. Perhaps in an attempt to highlight the absurdity of this law, one BIA officer posed the following hypothetical to the DHS official:

> [BIA Officer to DHS Official]:
>
> > [A]re there any limits to the scope of this language that we all agree is very broad because if you read the language literally, there [is the] situation of the . . . Iraqi national that provided information to the U.S. Marines who went in to rescue Jessica Lynch. . . . Did that person provide material support to a terrorist organization?
>
> [DHS Official response]:
>
> > Indeed. I mean . . . the position of the Department is . . . extremely broad. The Congress intended it that way. . . .[90]

The DHS application of the rule is simply preposterous. Suggesting that Congress intended this bar to apply to legitimate refugees from Burma who have long suffered oppression is inaccurate and inconsistent with Congress's mandate to support ethnic minorities in Burma. The DHS clearly has it wrong.

Each time the DHS official was asked about a serious hypothetical, for example, how the INA would apply in the case of Jessica Lynch's rescue, or to members of the Northern Alliance, he pointed to the 8 U.S.C.A. § 1182(d)(3) waiver as a means of avoiding an otherwise unjust result.[91] Yet, as discussed earlier, the waiver has never been used, and no established guidelines are written into the law.[92] However, even if the waiver were effective and functional, it is not likely to have any meaningful effect for overseas refugees like the 9000 or so the United States is supposed to resettle. This is because the overseas resettlement process does not occur in a court of law. Thus, there is no process for judicial review. Instead, the determination of a DHS official, which is based on one twenty-minute interview in a refugee camp, is generally the final word. Since the waiver must be granted with approval of the Secretary of State, the Attorney General, and the Secretary of the DHS,[93] it is highly unlikely that an individual refugee applying for resettlement would reap any benefit the waiver may have.

So, whose problem is this to solve? The DHS is certainly guilty of over-broadly applying the law as written. In the end, however, it is Congress who wrote the bad law. A recent *Washington Post* editorial references some of the problems caused by the law and encourages

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90. *Id.* at 25.
91. *Id.* at 22, 25.
92. 8 U.S.C.A. § 1182(d)(3) (2006).
93. *Id.* § 1182(d)(3)(B)(i).

Congress to fix them.[94] It states: "This problem can be solved only by Congress. If this mess is not what [advocate for the REAL ID Act and House Judiciary Committee Chairman F. James] Sensenbrenner had in mind, he ought to do something to clean it up."[95] Some congressmen have already begun to get involved. New Jersey Representative Christopher H. Smith and Florida Representative Ileana Ros-Lehtinen wrote a letter to Michael Chertoff, the Secretary of the DHS, stating that while the "procedure should ensure that terrorists do not abuse refugee status or the asylum laws of the United States," it "should also properly weigh situations in which individuals are acting under duress or are legitimately resisting illegitimate and tyrannical regimes."[96] This letter is evidence of the miscommunication between Congress and the DHS. The two entities have contrary ideas on how the law should be applied. In response to clear statements from congressmen on how the law should or should not be used, a DHS spokesperson said, "Part of the consternation over this issue is that this process is taking some time."[97] And so it goes. Perhaps we are to assume that, as far as the DHS is concerned, the refugees have all the time in the world. After all, they have already spent their entire lives hoping for some relief—what harm will it do them to wait for government agencies to agree?

VII. SUGGESTIONS FOR REFORM

The INA as applied has incredibly far-reaching and unjust ramifications for Burmese refugees; however, the problems it causes could be alleviated with only a few revisions to the language of the law. First, the third-tier group designation must be severely restricted, if not altogether eliminated. There is no need for a third category because the law already provides for the State Department and other branches of government to officially identify terrorist organizations. Identifying and combating terrorism is our nation's top priority. One would think that those at the highest levels of government would be better positioned to identify a terrorist organization than an immigration judge. Indeed, the State Department has already designated forty-two groups as terrorist organizations, and the list is not exhaustive.[98] Moreover, there is no

94. Editorial, *Real Injustice*, WASH. POST, Mar. 18, 2006, at A20.

95. *Id.*

96. Rachel L. Swarns, *Provision of Antiterror Law Delays Entry of Refugees*, N.Y. TIMES, Mar. 8, 2006, at A20 (stating also that Senators Joe Lieberman and Ted Kennedy wrote similar letters to DHS).

97. *Id.*

98. Office of Counterterrorism Fact Sheet, *supra* note 52.

check on the third-tier designation, which grants too much power to immigration officials. Eliminating the third-tier designation would not put our nation at any greater risk for a terrorist attack, because people who have committed, or who have the intent to commit, crimes serious enough to rise to the level of terrorism as commonly perceived are already covered by the law.

Moreover, the revisions to the INA were drafted broadly, presumably to ensure its applicability to unanticipated situations—the scenarios Congress could not foresee. Now that the law has been through a bit of a test run, and we have seen its adverse and inconsistent effects, it is time to restrict the law based on what we know. We know that the law can be applied to keep out refugees the United States has promised to accept. At a minimum, the provision must be amended to require that immigration judges and officials make further inquiries into the nature of the "terrorist" groups and the people they oppose. It makes no sense to designate those who support the United States as terrorists. Those who are violent only in self-defense or because they have suffered decades of international apathy and abuse from an oppressive dictatorship should not be punished for being or supporting terrorists.

Another, bolder option would be to write a "group waiver" into the law. There is no reason why the law cannot be amended to say, for example: "The United States does not consider the CNF (or other persecuted, pro-democratic organization) to be a terrorist organization." Granted, the fear of the unknown arises here. What happens if the groups evolve? What happens if their mission changes? But there could be a provisional exception, barring such a change in circumstances, that would protect Burmese opposition groups from the harsh realities of this law.

At the very least, there should be an exception for the groups who do not pose a threat to the United States. The regime in power and the nature of the opposition groups must be taken into consideration. At least one panel on the Board of Immigration Appeals (BIA) would endorse such an exception. In *In re Izatula*, the BIA granted asylum to an individual who was found to have supported the mujahedin in Afghanistan.[99] Despite the fact that the mujahedin was an unlawful organization under the laws of Afghanistan, the Board stated that there was

> no basis in the record to conclude . . . that any punishment which the Afghan Government might impose on the applicant on account of his

99. *In re* Izatula, 20 I. & N. Dec. 149, 151, 154 (B.I.A. Feb. 6, 1990).

> support for the mujahedin would be an example of a legitimate and internationally recognized government taking action to defend itself from an armed rebellion. . . . [I]n Afghanistan, "[c]itizens have neither the right nor the ability peacefully to change their government. Afghanistan is a totalitarian state . . . ."[100]

The language the panel uses to describe the regime in Afghanistan would just as accurately describe the current Burmese regime. Burmese nationals, especially ethnic minorities, have neither the right nor the ability to bring about change in a peaceful and democratic manner. The concurring opinion in *Izatula* questions the reasoning of the majority opinion, stating that "[t]he Board . . . has no authority to make pronouncements concerning the legitimacy of sovereign nations."[101] This is because, contrary to the current U.S. policy on Burma, at the time of the *Izatula* decision the United States did not have a policy stating affirmatively that it did not recognize the Afghan government. The concurring member went on to state that, in addition to considering the political system of a country, "such factors as the nature of the crime and the severity of the punishment vis-a-vis the crime committed should be considered."[102]

The nature of the crime with respect to material support given to Burmese opposition groups can only be considered in light of the sometimes extreme circumstances under which that support is given. Thus, there should be limits on the levels of support, provisions concerning consent of those giving support, and exceptions for those who are forced to give support under extreme duress. By definition, that the support is "material" cannot mean that any amount of support suffices. "Material" does not mean "trivial." If Congress intended for any level of support to bar admission, it would never have included the term "material." Furthermore, in order to support a group such that an individual's actions constitute a threat to security, the individual must have voluntarily consented to the support. It does not follow that one who was forced at gunpoint to give support to a group will pose any threat at all to the United States. Rather, the individual is most likely ideologically opposed to the group (otherwise, duress would not have been necessary in the first place) and is now traumatized by the entire experience. The United States should not ignore the plight of these victims, and exacerbate their trauma by labeling them "terrorists."

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100. *Id.* at 153-54 (citation omitted).
101. *Id.* at 155-56 (Vacca, Board Member, concurring).
102. *Id.* at 157.

VIII. CONCLUSIONS

This Comment is not advocating a softer policy on terrorism. Actual terrorists should be treated as serious and dangerous criminals. However, this Comment is advocating for a serious, well-defined meaning of the word "terrorist," and a more careful use of the term. Terrorism is a universal problem. It is common to advocate for a universal definition to a universal problem, but efforts to do so with regard to defining the word "terrorist" have become lost in foreign policy and political debates. Among the world's nations, those who are considered "terrorists" will differ depending on the speaker's perspective. Many agree that one country's terrorist is another country's revolutionary. The situation in Burma may be described as pure domestic terrorism, at most, and more realistically, as civil war. What makes a person a terrorist is not his or her ethnicity, race, or even membership in a group. Rather, it is the crimes committed that make a person a terrorist—it is the threat that he or she poses.

The way the word is being used in the United States, the word "terrorist" encompasses more individuals than the word "enemy" does. A critical determination for the designation of a terrorist, a terrorist organization, or terrorist activity must include the threat posed to a particular country or to international peace. Al-Qaeda is a terrorist organization because it poses a serious and legitimate security threat to the United States and to other countries. The reality of that organization's danger has been proven by its actions. On the other hand, the Burmese opposition groups discussed in this Comment pose no threat whatsoever to the United States, and there has never been any evidence to the contrary.

Finally, the INA undermines U.S. credibility both with refugees and with international organizations and foreign governments. The law is utterly inconsistent with the U.S. policy on Burma. The law is also inconsistent with the effort to fight terrorism, because it is ineffective and grants too much power to lower-level officials. The law needs to include a clearer, narrower definition of the word "terrorist." The INA must also account for circumstances like those in Burma, where illegitimate governments are opposed by advocates of democratic reform using force only in self-defense after continued persecution. It must restrict the level of "support" that would bar a refugee seeking admission to the United States. In sum, the law must make clear that the United States does not believe that all refugees are terrorists, and that we are committed to focusing on the true terrorists and protecting the victims of their crimes.

IX. FULL TEXT OF RELEVANT CODE

8 U.S.C.A. § 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 highjacking 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).