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**MEMORANDUM ON THE RESTRICTIONS PLACED BY US LAW
ON THE CHIN NATIONAL FRONT**

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To: Zing Cung
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The Chin National Front (CNF) has asked the Center for Constitutional Democracy (CCD) to analyze the restrictions placed upon its activities in the United States by American law. The CNF is particularly interested in its right to organize, raise funds, lead seminars, and discuss its activities. This memorandum addresses those questions. It will also consider the restrictions placed upon the activities of other resistance groups, which are identical to the restrictions placed upon the CNF except that some groups have different asylum rights.

Chin people in the United States enjoy all the same rights and privileges as everyone else, as do members of the Chin National Front. Chin and CNF citizens of the

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US have the same rights as do other Americans; Chin and CNF permanent residents have the same rights as other permanent residents; and Chin and CNF refugees have the same rights as other refugees. In other words, US law does not single out the CNF or Chin people for differential treatment.

In the United States, people are allowed to do whatever they wish unless the law specifically prohibits it. The background assumption of the law is freedom: all is permitted unless forbidden. In other words, when people wonder whether it is legal to commit an act, the answer is always yes in the absence of a law to the contrary. For that reason, the starting assumption is that the CNF and Chin people may organize, raise funds, and so forth, unless we discover a law that specifically forbids it.

American law specifically forbids a range of behaviors, and the CNF is subject to these laws, just as everyone else is. Members of the CNF may not rob banks, cheat on their taxes, deal drugs, etc. In this regard, Chin people are treated no differently than anyone else. But certain laws are especially relevant to the CNF as an armed resistance group in a foreign country, and of course these laws are not generally applicable to other people in America.

Three sets of laws are especially important. First, US law places special restrictions on terrorist groups. In particular, if the US lists the CNF as a terrorist group, then CNF members and supporters may not seek asylum in the US, nor may people in the US may lend material support to the CNF. This memorandum concludes that the CNF and the other resistance armies are not terrorist group for purposes of the material support ban, but they may well be considered to be terrorists under the asylum ban. Second, US law commands people in the US to be neutral with respect to foreign conflicts in certain ways. In particular, people in the US may not enlist in the CNF while on US soil, and CNF members may not launch an armed expedition against the SPDC from US soil. Finally, if CNF people become part of the government of Burma after the 2010 elections, they may become subject to new US sanctions.

I. Restrictions on Terrorist Organizations

US Law puts two important restrictions on those that it considers terrorists: they may not seek asylum, and people in the US may not lend them material support.

A. Asylum

1. Pre-2008 Activity

The Immigration and Nationality Act automatically denies asylum to any applicant who has provided material support for a terrorist organization. See 8 U.S.C. § 1182(a)(3)(B). If the CNF is listed as a terrorist organization, then its members and supporters may not seek asylum in the US. Congress has, however, specifically provided that the activity of the CNF prior to 2008—the date of passage—shall not be considered to be terrorist in nature. The Consolidated Appropriations Act (CAA) of 2008 provides in pertinent part: “AUTOMATIC RELIEF FOR THE HMONG AND OTHER GROUPS THAT DO NOT POSE A THREAT TO THE UNITED STATES-For purposes of section 212(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)), the Karen National Union/Karen Liberation Army (KNU/KNLA), the Chin National Front/Chin National Army (CNF/CNA), the Chin National League for Democracy (CNLD), the Kayan New Land Party (KNLP), the Arakan Liberation Party (ALP), the Mustangs, the Alzados, the Karenni National Progressive Party, and appropriate groups affiliated with the Hmong and the Montagnards shall not be considered to be a terrorist organization on the basis of any act or event occurring before the date of enactment of this section. Nothing in this subsection may be construed to alter or limit the authority of the Secretary of State or the Secretary of Homeland Security to exercise his discretionary authority pursuant to section 212(d)(3)(B)(i) of the Immigration and Nationality Act (8 U.S.C. § 1182(d)(3)(B)(i)).” See Consolidated Appropriations Act of 2008, Pub. L. 110-161, section 691(b). Because this provision is so important to the CNF, it may be advisable to reproduce it and make it available to Chin people in the United States.

The CAA also provides that certain other groups shall not be considered terrorists based on their activities before 2008—in particular, the KNU/KNLA, the CNLD, the KNLP, the ALP, and the KNPP. The other resistance groups, however, have no such protection: they may be deemed terrorists for their activities either before or after 2008.

2. Post-2008

It is, however, important to observe that the CAA provides only that the CNF and the other listed groups may not be considered terrorist organizations *based on activities before 2008*; it leaves open the possibility that the CNF and the other listed groups could be branded terrorists because of their activities thereafter. As noted, the other groups could be considered terrorist for activities at any time.

Accordingly, all the ethnic resistance groups must be careful, to the extent possible, that their members not commit activities that the US government might consider terrorist. Procedurally, the CNF might be named a terrorist group in one of two ways. First, the Department of State has the power officially to designate groups as “foreign terrorist organizations.” Importantly, however, this official list does not include all terrorist organizations but only those that pose a threat to US security or the security of US nationals abroad. See 8 U.S.C. § 1189(a)(1)(C). To date, the State Department has not so listed the CNF or any other Burmese resistance group.

Second, under section 1182(a)(3)(B), immigration judges may decide that the CNF is a terrorist organization and so deny asylum to a member or supporter even if the CNF does not pose a security threat to the US. For example, in one case handed down before the CAA, the Board of Immigration Appeals held that an armed group such as the CNF could be a terrorist organization even though it might have been using “justifiable force to repel attacks by forces of an illegitimate regime,” *Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006).

US law defines terrorism quite specifically, and it is important that the members of the CNF be very aware of this definition, so that they can avoid being labeled terrorists. 8 U.S.C. § 1182(a)(3)(B)(iii) provides a list of those specific acts that the US

considers terrorist: hijacking or sabotaging a conveyance (such as an airplane); kidnapping a person and demanding that someone else (such as a government) do something in exchange for the person's release; a violent attack upon an internationally protected person (such as a diplomat); an assassination; the use of biological or chemical weapons; or the use of other weapons "with intent to endanger, directly or indirectly, the safety or one or more individuals or to cause substantial damage to property."

I believe that the CNF and other resistance groups do not generally hijack planes, kidnap people, or use chemical or biological weapons. They may, however, assassinate people, and of course they routinely use weapons to endanger the safety of soldiers in the Tatmadaw. Because the statute defines both of these acts as terrorist in nature, the CNF and other resistance groups could be considered terrorists for purposes of the asylum law—though not, as we shall see, for the material support ban.

According to some precedent, even freedom-fighters can be considered terrorists, despite the fact that they are resisting unjust authority. For example, in *Khan v. Holder*, the Ninth Circuit rejected a claim that "1182(a)(3)(B)(iii) incorporates international law, and thus excludes legitimate armed resistance from the definition of terrorist activity." The Court acknowledged that its reading would include "within the definition of 'terrorist activity' many actions that we generally do not consider to be terrorist in nature," such as Jewish resistance to Nazi Germany. Nonetheless, the Court insisted that the "text does not make an exception for actions that are legal under international law." In short, although resistance to the SPDC may be just, it may also be terrorist activity under US law. 584 F.3d 773, 781 (9th Cir. 2009).

There are two legal tools that may help keep the CNF from being labeled a terrorist organization. First, a court may conclude that Congress did not intend that resistance to the SPDC should be considered terrorist activity. Second, the Secretary of State has the power to exempt groups and persons from the law forbidding asylum to terrorists.

a. Congressional Intent

In the CAA, Congress declared that the activity of the CNF in resisting the regime should not be considered terrorist activity before 2008. Congress limited this exemption to activity before 2008 because it could not be sure what the CNF would be doing thereafter: the CNF might use chemical weapons or massacre villages of innocent civilians, behavior that is terrorist by any definition. But implicitly, Congress seemed to be saying that resistance to the SPDC *of the sort that the CNF undertook before 2008* should not be considered terrorist. But if that type of resistance was not terrorist in nature before 2008, then it should not be considered terrorist after 2008 either. In other words, Congress was *explicitly* saying that resistance was not terrorist before 2008, but it was also *implicitly* saying that resistance was not terrorist thereafter. It excluded activity after 2008 only because it worried that the CNF might adopt new and more troublesome tactics, and it wanted to exclude those. For that reason, so long as the CNF does not change its style of resistance, it should not be considered a terrorist organization under the asylum law.

I think it likely that this argument would prevail in a court of law, but several caveats are in order. First, no court has so held, and it is impossible to know for sure how the courts will ultimately rule, because the argument is based on an inference about Congress' intent, not Congress' express instructions. Until a court rules to the contrary, immigration officials are free to consider Burmese freedom fighters to be terrorists. Second, bringing a court claim of this sort will be costly, time-consuming, and inconvenient: an immigration judge must first rule against an asylum application, and then the applicant will have to appeal to an Article III court. Third, even if the argument prevails, only resistance of the sort undertaken before 2008—i.e. combat between two militaries, not action against civilians or kidnapping or anything else—would not be considered terrorist in nature. If they wish to hold open the possibility of asylum for their members, the armed resistance groups must therefore restrict their activities to conventional fighting.

Finally, even if the argument prevails, it proves only that post-2008 resistance to the SPDC *by the CNF and other listed groups* does not constitute terrorism. Resistance by the non-listed groups might still be deemed terrorist under US law. It might be possible to convince a court that Congress implicitly intended that resistance to the SPDC *by anyone* should not be considered terrorist, but that would require yet a further inference. A court might conclude that Congress listed particular groups for a reason: if Congress had really meant to immunize the activity of all Burmese resistance groups, it would presumably have said so.

b. Secretarial Discretion

The other tool to keep Burmese freedom-fighters from being labeled terrorist is the Secretary of State's power to exempt groups from the exclusion of terrorists. The Consolidated Appropriations Act of 2008 gives the Secretary "sole unreviewable discretion" to decide that the exclusion "shall not apply with respect to an alien within the scope" of the exclusion. Consolidated Appropriations Act of 2008, Pub. L. 110-161, section 691(a)(amending 8 U.S.C. § 1182(d)(3)(B)(i)). Secretary of State Clinton is very aware of the situation in Burma and is sympathetic to the Burma democracy movement. She will likely rely on the judgment of Assistant Secretary of State Kurt Campbell, who is even more aware of the situation on the ground in Burma. He will very likely choose to exempt groups that are genuine freedom-fighters so long, again, as they avoid more troubling tactics such as biological warfare.

The Secretary's discretion does have a limit: she may not exempt certain aliens from the terrorist ban. Happily, I do not believe that any of the Burmese resistance groups are the sort that she cannot exempt. First, the Secretary may not exempt aliens "within the scope of (a)(3)(B)(i)(II)"—i.e. "one that is likely to engage after entry in any terrorist activity." Members of the CNF and other armed groups must therefore be extremely careful not to engage in acts that might injure Americans or American property; if they do, courts will be far more likely to conclude that they will commit

terrorist acts after entry to the US. Second, the Secretary may not exempt Tier I or Tier II groups under 1182(a)(3)(B)(vi). Tier I groups are those listed by the Secretary as posing a threat to US security; Tier II groups are those listed by the Secretary in the Federal Register as terrorist organizations, whether they pose a threat to US security or not. Neither the CNF nor any other Burmese armed resistance group appears on either of those list; therefore, the Secretary may exempt them. Third, the Secretary may not exempt groups that have committed terrorist acts against democratic governments, but the SPDC is not a democratic government, so the Secretary may exempt those resisting the SPDC. Finally, the Secretary may not exempt groups “engaged in a pattern or practice of terrorist activity that is directed at civilians.” The CNF and the other armed groups must therefore be very careful not to attack civilians, not even civilian government officials.

In short, the Secretary of State has the authority to exempt Burmese resistance groups from the law refusing asylum to terrorists. She is likely to use this authority so long as the armed groups confine themselves to conventional combat.

B. Material Support

18 U.S.C. §2339B makes it unlawful for a person within the jurisdictional reach of the US to give material support to a foreign terrorist organization. Giving such support can result in substantial civil and criminal penalties. If the CNF were a terrorist organization, Chin people in the US could not give it money or even offer food or a place to stay when CNF members visit. For that matter, the Center for Constitutional Democracy could not offer professional assistance, and I could not be writing this memo.

To violate the provision, a person must have knowledge that the organization is engaged in terrorist activity. The definition of terrorist activity under 18 U.S.C. §2339B is the same as under 8 U.S.C. §1182(a)(3)(B), discussed in the preceding section. In fact, 2339B refers to the asylum definition in 1182 by code number. As elaborated in the preceding section, the CAA of 2008 specifically provides that the CNF and certain other

groups are exempt from 1182 for all activities undertaken prior to 2008. The CNF and the other listed groups could be considered terrorists based on activity after 2008, and the other resistance groups could be considered terrorists for activity undertaken at any time.

More importantly, 2339B forbids giving material support only to those terrorist organizations formally designated by the Department of State under 1189(a)(1)(C) as posing a threat to US security. See 18 U.S.C. § 2339B(g)(6). To date, the Department of State has not so listed the CNF or any other Burmese resistance group. For that reason, people in the US may support the CNF and other groups without worry: the prohibition on material support does not provide for punishment. Again, it is important that the armed resistance groups do nothing that would cause the Secretary to add them to the list.

II. The Neutrality Act

US law also prohibits people in America from interfering in a foreign war. The goal is to keep America from becoming embroiled in foreign conflicts not of its own choosing: if foreign nations discover that people in the US are supporting their enemies, they might commence hostilities against the US or US nationals. The most important restrictions are two: people in the US may not enlist in foreign armies, and they may not launch military expeditions against foreign countries from the United States.

A. Service in a Foreign Army

US law forbids American citizens, while within the US, from serving in a foreign army against a country with whom the US is at peace: “Any citizen of the United States who, within the jurisdiction thereof, accepts and exercises a commission to serve a

foreign prince, state, colony, district, or people, in war, against any prince, state, colony, district, or people, with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.” 18 U.S.C. § 958.

Conceivably, this provision could be read to bar American citizens, while in the US, from serving in the CNF. Americans are forbidden from agreeing to serve a “foreign prince, state, colony, district, or people,” and the CNF could fall within this language because it could be regarded as the army of the Chin people. Americans are allowed to serve in a foreign army against a country with which the US is at war, but the US is not technically at war with Burma, however much the US government may condemn the SPDC. Ergo, Chin people may not accept and serve a commission in the CNF. It bears emphasis, however, that this provision forbids US citizens from serving in a foreign army only while the citizens are in the US: it does not forbid them from travelling abroad to serve.

But another provision forbids all persons within the United States—non-citizens as well as citizens—from enlisting in foreign armies, even though the service itself may occur outside the United States: “Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined under this title or imprisoned not more than three years, or both.” 18 U.S.C. § 959(a). Again, the provision does not forbid people to enlist in an army of a country at war with a country with which the US is also at war, see 18 U.S.C. § 959(b), but the US is not at war with Burma.

The provision does not, however, forbid a person in the United States from travelling abroad to enlist in a foreign army, though it does forbid paying someone else to travel abroad to enlist in a foreign army. For that reason, the CNF and other groups

should be careful not to enlist people in the US. If people in the US want to enlist, they should travel to Burma and enlist there.

B. Military Action from the United States

US law also forbids anyone within the US from preparing military action against a foreign state: “Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.” 18 U.S.C. § 960.

In other words, while they are in the US, CNF members and supporters may not “set on foot”—i.e. initiate—military action against the SPDC, nor may they provide “means” or money for such action. This prohibition, however, extends only to “military or naval expedition[s] or enterprise[s] to be carried on from thence”—i.e. from the United States. People in the US may therefore support the CNF and other armed groups in two ways. First, supporters may furnish the means and the money for the non-military purposes of the CNF, as opposed to supporting a military expedition. To make sure not to violate US law, the CNF will want very carefully to keep records of how it spends monies raised in the US.

Second, the Neutrality Law prohibits only military expeditions “to be carried on from” the United States—in other words, operations launched from the US, with the US as its base, rather than from overseas. Historically, the statute was designed to prohibit filibustering: private armed expeditions by Americans against foreign states. The CNF must be very careful not to plan, raise funds for, or initiate attacks against the SPDC

launched from the US. But the statute does not forbid support for a military operation carried out from some other base, such as Chin State. But the Chin struggle for freedom is not an American filibuster; it is a home-grown Burmese conflict. For that reason, I think that it would be legal for CNF supporters to send money even for the CNF's military operations, because those operations are not carried on from the US.

In addition, other provisions prohibit any person in the US from conspiring with other people—whether those people are inside or outside the US—to murder, kidnap or maim anyone who is outside the US, see 18 U.S.C. § 956(a)(1), or to damage or destroy public property or railroad, canals, bridges, airport, airfields, or other public utilities, see 18 U.S.C. § 956(b). In other words, while they are in the US, CNF members and supporters may not plan to kill, kidnap, or injure people in the SPDC or the Tatmadaw, and they may not plan to blow up public property or sabotage transportation networks.

III. Sanctions

Currently, the US sanctions investment in Burma, certain exports to Burma, and certain imports to Burma. These sanctions fall on the resistance groups the same as everyone else. But the US also personally sanctions certain high-ranking members of the SPDC, making it hard for them to travel and mover their money around overseas. At present, these sanctions apply only to a few individuals, but after the elections, the US will need to consider whether to expand these sanctions to members of the new government. If the CNF or the other armed groups hold office in the government, they face the possibility of new US sanctions being applied to them.