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## **Shelter from the Storm: An Analysis of U.S. Refugee Law as Applied to Tibetans Formerly Residing in India**

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# SHELTER FROM THE STORM: AN ANALYSIS OF U.S. REFUGEE LAW AS APPLIED TO TIBETANS FORMERLY RESIDING IN INDIA

EILEEN KAUFMAN\*

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\* Professor of Law, Jacob D. Fuchsberg Law Center, Touro College. The research reflected in Part III is based in part on fact-finding missions conducted by Tibet Justice Center. The article, however, represents the personal conclusions of the author and should not be understood to express or imply the formal conclusions of Tibet Justice Center. The author thanks Dean Lawrence Raful of Touro Law Center for his generous support which has made frequent trips to India possible. The author acknowledges with gratitude the editorial suggestions and assistance of Robert D. Sloane, the early conceptual guidance of Louise Harmon, and the careful editing of Matthew James, Ryan McCauley, and Roy Cho. © 2009, Eileen Kaufman.

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### I. INTRODUCTION

The story of the Chinese invasion of Tibet and the Dalai Lama's exile in 1959 has been well documented, as has the status of Tibetans in China in the half century since the Chinese invasion. What has not been documented is the plight of those Tibetans who, after fleeing Tibet, seek asylum in the United States after spending several years in India. Even when they can prove a well-founded fear of persecution if they are returned to China, Tibetans will nevertheless be ineligible for asylum if they are found to have "firmly resettled" in India. This article explores the status of Tibetans in India and concludes that even a lengthy stay in India does not qualify as firm resettlement within the meaning of United States immigration law.

The article is divided into three substantive sections. After an introduction

in Part I which contains an illustrative case study and a brief description of the continuing human rights abuses within Tibet, Part II provides an overview of the law of asylum and the role that firm resettlement plays. This section places the domestic law of asylum into the larger framework of history and international law which protects those with a well-founded fear of persecution and prohibits *refoulement*—the return of a refugee to the country where his or her life would be threatened. Because political asylum is about providing safe haven to refugees, those who have found permanent sanctuary elsewhere are ineligible. This ineligibility is expressed in U.S. law as the “firm resettlement” doctrine, which operates as a mandatory bar to political asylum. What qualifies as firm resettlement differs from circuit to circuit. Part II of this article analyzes the conflicting caselaw concerning the standard for proving firm resettlement and concludes that some circuits employ a totality of the circumstances test that is at odds with governing regulations. Part III of the article describes the status of Tibetans in India and analyzes the extent to which Tibetans have official status and whether they enjoy rights and privileges roughly equivalent to those enjoyed by Indian citizens. This section highlights distinctions between the Government of India’s treatment of the original wave of refugees and subsequent arrivals. Part IV of the article concludes that regardless of whether a totality of the circumstances test or an offer-based approach is used, Tibetans lack the official status required for firm resettlement within the meaning of federal immigration law and thus should not be considered ineligible for political asylum on that basis.

### *Case Study*

The nature of the problem addressed in this article and the real-life difficulty facing Tibetan asylum seekers is illustrated by the case of Dolma Tempa,<sup>1</sup> a young woman who fled China when she was nineteen years old, remained in India for six years, and then sought political asylum in the United States.<sup>2</sup>

Despite the fact that political demonstrations and support for the Dalai Lama were prohibited in Tibet, Ms. Tempa participated in demonstrations that called for an independent Tibet and a return of the Dalai Lama. In March of 1989, she and her sister and father participated in a pro Dalai Lama demonstration in front of the Jokhang temple in Lhasa, a demonstration that has come to be called the 1989 uprising. Approximately 1,000 Tibetans

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1. A fictional name has been used to protect her privacy.

2. Ms. Tempa and her three sisters, one brother, and parents lived in a one room house in Lhasa, Tibet with no toilet or running water. Ms. Tempa’s father worked as a cart-puller, hauling carts filled with construction stones and earning 80 cents to \$1 per day. These wages left his family impoverished, with inadequate food and clothing. Ms. Tempa’s mother often worked alongside her husband, and on one such day, Ms. Tempa’s eighteen month old brother was burnt to death in his home because he was not attended by either parent.

participated, prompting Chinese troops and tanks to pour into the area, using bullets and tear gas to disperse the demonstrators. Ms. Tempa's father was one of the demonstrators killed by Chinese soldiers during the demonstration. Ms. Tempa and her sister fled and hid at a Tibetan hospital until it was safe to venture home.

Other members of Ms. Tempa's family were also engaged in political activities; two uncles were imprisoned by the police. One was a member of the Dalai Lama's personal staff who had left Tibet in 1959 with the Dalai Lama and was arrested upon his return and imprisoned for 20 years. The Chinese authorities' awareness of the family's activities was made clear by the fact that the family permit displayed a special stamp that indicated their political activities.

Ms. Tempa decided to escape from China because she feared that she would be arrested and tortured due to her family's political activities. She escaped in a truck headed towards the border of Tibet and Nepal. Shortly before reaching the border, Ms. Tempa jumped out of the truck and was taken in by sherpas who assisted her in trekking over the Himalayas and crossing into Nepal. She was processed at the Tibetan government-in-exile office in Katmandu, Nepal, and sent to Dharamsala, India, where she stayed for two months in a reception area and then was sent to the Bir School, run by the Tibetan government-in-exile. After two and a half years at the Bir School, she was sent to the Mussoorie School where she studied tailoring for four and a half years. She was never given a registration card or any other official document during her six years in India, although she was aware that earlier arrivals had official papers. While in India, Ms. Tempa participated in the 1998 Tibetan hunger strike in Delhi which was staged by the Tibetan Youth Congress to protest a Chinese official's visit. One member of the group of demonstrators, Mr. Thupten Ngodup, self-immolated as an act of protest and in order to bring international attention to the plight of Tibetans.

Ms. Tempa came to the United States on a visitor's visa in August of 1998 and applied for political asylum. At her hearing, Ms. Tempa testified that she feared that if she were returned to Tibet, she would be arrested, imprisoned, and tortured. Her testimony was confirmed by her uncle, who appeared as a witness and described his own twenty year imprisonment in Tibet and the fact that Ms. Tempa's father had been killed in the 1989 uprising. The Immigration Judge found both Ms. Tempa and her uncle (who had testified before Congress about the plight of Tibetans) to be credible witnesses. The Immigration Judge also found Ms. Tempa's fear of persecution to be credible and supported by State Department reports about the likely outcome of returning a member of a politically active opposition family to Tibet: "There are many credible reports that prisoners are tortured, beaten and otherwise mistreated. Authorities reportedly used beatings, electric shocks, suspension

in painful positions, and other forms of torture or abuse.”<sup>3</sup> Thus, the Judge concluded that should Ms. Tempa be returned to Tibet there was a strong likelihood that she would be imprisoned and mistreated, and unless she was willing to renounce the Dalai Lama, subjected to solitary confinement and torture. Ms. Tempa’s application for withholding of removal was granted on the basis of this likelihood.<sup>4</sup> However, her application for political asylum was denied on the ground that she had firmly resettled in India. Although the Immigration Judge conceded that she was not given a residential certificate or other official documentation and that she lacked many of the fundamental rights enjoyed by citizens of India, he concluded that a six and a half year length of stay in India during which time she received schooling provided by the Tibetan government-in-exile amounted to firm resettlement.<sup>5</sup>

The denial of her application for political asylum meant that Ms. Tempa was subject to being placed in removal proceedings and deported to India.<sup>6</sup> However, her case was appealed to the Board of Immigration Appeals, which reversed the Immigration Judge’s determination to deny political asylum and remanded for a new determination based on an intervening Third Circuit decision clarifying the meaning of firm resettlement.<sup>7</sup> Upon remand, Ms. Tempa was granted political asylum. As a result, Ms. Tempa achieved legal status in the United States, applied for and became a United States citizen, married and has a United States citizen child.

Most asylum seekers are not as lucky. For fiscal years 1992-1997, only 7.66% of the applications for political asylum filed by Chinese, which includes Tibetans,<sup>8</sup> were granted.<sup>9</sup> Although the United States Citizenship

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3. Immig. Law Judge Decision A76119957 at 16 (May 24, 2000).

4. Withholding of removal does not protect a refugee from removal to any other country, nor does it result in permanent residency in this country. Withholding of removal is a country-specific form of relief which prevents the return of a refugee to his/her native country based on a probability of harm if the person were to be returned. 8 U.S.C. § 1231(b)(3). Firm resettlement is not a disqualification to withholding of removal. Other notable differences between withholding of removal and asylum is the range of benefits available to refugees who qualify for asylum: “financial support, housing, student financial aid, and other assistance resettling, permanent residence, and the right to travel abroad. Asylum can eventually lead to full citizenship. Asylum may also be extended to a refugee’s children and spouse, even if they would not independently qualify for asylum. Withholding offers none of these benefits, other than temporary employment authorization.” Dana R. Green, *Navigating North: How the Canadian Approach to Firm Resettlement Should Guide U.S. Implementation of the Refugee Conventions*, 40 COLUM. HUM. RTS. L. REV. 701, 713, 2009 (citations omitted). Green concludes that “from the refugee’s perspective, therefore, the firm resettlement bar can have an enormous impact.” *Id.*

5. Immigr. Law Judge Decision A76119957 at 17-19.

6. See DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 564 (3d ed. 1999). It should be noted that while the denial of asylum renders the alien deportable, the agency’s common practice is to grant “voluntary departure” which gives the alien thirty days to get her affairs in order and leave. In fact, the agency does not follow up unless the alien is arrested for a crime.

7. *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001). See *infra* text accompanying notes 151-56 for a discussion of *Abdille*.

8. The United States Citizenship and Immigration Service does not maintain separate data regarding Tibetans. See Vivian Chen, *The Enemy of My Friend, Am Law 200 Firms – Even Busy Ones with Busy China Practices – Are Eager to Help Persecuted Tibetans*, 7/2008 AM. LAW. 116, available at <http://www.law.com/jsp/article.jsp?id=1202423278031>.

and Immigration Service does not provide data on the number of cases per year where firm resettlement is raised as a bar to political asylum, immigration lawyers and NGOs that work with Tibetan exile communities report that firm resettlement is often an obstacle to Tibetans obtaining political asylum in the United States, because most Tibetans who flee China transit through Nepal or India and spend time there before coming to the United States.<sup>10</sup>

Further, as explained in Section II below, Tibetans who have resided for a number of years in India risk having their asylum petitions denied because both the agency and several federal circuit courts of appeals continue to use an outdated "totality of the circumstances" test to measure firm resettlement, in contrast to the "offer-based approach" used by the third circuit which is where Ms. Tempa's case was litigated.<sup>11</sup>

The number of political asylum applications by Tibetans is unlikely to decrease in the near future. The Chinese government's ongoing persecution of Tibetans has been well documented by governmental agencies and human rights organizations<sup>12</sup> and is reported to have escalated in recent years.<sup>13</sup> According to the United States State Department report on human rights practices in Tibet in 2008:

The government's human rights record in Tibetan areas of China deteriorated severely during the year. Authorities continued to commit

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9. THE TRIENNIAL COMPREHENSIVE REPORT ON IMMIGRATION, United States Citizenship and Immigration Service, 22 (3d ed.), available at [www.uscis.gov/files/article/tri3fullreport.pdf](http://www.uscis.gov/files/article/tri3fullreport.pdf). This statistic only covers affirmative applications for political asylum. It does not encompass defensive asylum cases where political asylum is raised in the course of a removal proceeding, nor does it include cases denied by the agency that are later renewed by Immigration Judges. *Id.* at 23. More recent data from the Department of Homeland Security reveals that the number of persons granted asylum in 2007 was 25,270, a decrease from previous years. Kelly J. Jeffery & Daniel Martin, *Refugees and Asylees: 2007, ANNUAL FLOW REPORT*, Department of Homeland Security, Office of Immigration Statistics 1 (July 2008), available at [www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_rfa\\_fr\\_2007.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2007.pdf). The total number of affirmative asylees in 2007 was 12,463, which also represented a decrease from previous years, as did the number of persons granted asylum defensively by an immigration judge or the Board of Immigration Appeals (12,807 in 2007). *Id.* China is the leading country of nationality for persons granted asylum in 2007 (15% for affirmative asylees and 35% for defensive asylees). *Id.* at 5.

10. "Mark Beckett, a lawyer at Latham & Watkins who has represented Tibetans in asylum hearings, said that [firm resettlement] trips up Tibetans because they usually come [to the United States] through other countries on forged papers." Edward Levine, *Language, Fear & Illegal Status Bars to Asylum*, DAILY NEWS, Feb. 15, 2001, cited in TIBET'S STATELESS NATIONALS: TIBETAN REFUGEES IN NEPAL, Tibet Justice Center 123 (2002).

11. See *infra* text accompanying notes 151-56 for a discussion of the Third Circuit's approach.

12. U.S. Comm'n on Int'l Religious Freedom, 2009 Annual Report 73-75, available at <http://www.uscirf.gov/images/AR2009/final%20ar2009%20with%20cover.pdf>; HUMAN RIGHTS SITUATION IN TIBET, ANNUAL REPORT 2007, Tibetan Centre for Human Rights & Democracy (2008); TIBET SINCE 1950, Human Rights Watch (2000).

13. U.S. State Dep't, 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119037.htm>; U.S. Dept. of State, 2007 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm>; United States Commission on International Religious Freedom, 2009 Annual Report, 73-75, available at <http://www.uscirf.gov/images/AR2009/final%20ar2009%20with%20cover.pdf>.

serious human rights abuses, including torture, arbitrary arrest, extrajudicial detention, and house arrest. Official repression of freedoms of speech, religion, association, and movement increased significantly following the outbreak of protests across the Tibetan plateau in the spring. The preservation and development of Tibet's unique religious, cultural, and linguistic heritage continued to be of concern.<sup>14</sup>

The State Department report is fully consistent with NGO reports which document consistent and widespread patterns of human rights abuses including arbitrary arrests and detentions, which increased almost threefold from 2006 to 2007,<sup>15</sup> torture in prison and during detention,<sup>16</sup> enforced or involuntary disappearances,<sup>17</sup> interference with freedom of expression including arrests for displaying pro-independence posters,<sup>18</sup> and interference with religious freedom.<sup>19</sup> According to the 2008 United States Department of State Report on International Religious Freedom in China, "the level of religious repression in the TAR (Tibetan Autonomous Region) and other Tibetan areas increased."<sup>20</sup> In 2009, the U.S. Commission on International Religious Freedom concluded that "in Tibetan Buddhist areas, religious freedom conditions may be worse now than at any time since the Commission's inception."<sup>21</sup>

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14. 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA, *supra* note 13. The report documents police firing indiscriminately at Tibetan demonstrators and protestors, arbitrary arrest and detention, widespread disappearances, torture, degrading treatment and extrajudicial punishment of detainees and prisoners, crowded and harsh prison conditions, denial of fair and public trials, harassment or detention of Tibetans who spoke to foreign journalists, severe restrictions on travel by foreign journalists into Tibetan regions, repression of religious freedom, and restrictions on freedom of movement of Tibetans. *Id.*

15. HUMAN RIGHTS SITUATION IN TIBET, ANNUAL REPORT 2007, *supra* note 12, at 27-32.

16. Ben Blanchard, *Torture Widespread, Routine in Tibet*, *Report Says*, REUTERS, Dec. 10, 2008; TIBET SINCE 1950, Human Rights Watch (2000); TORTURE IN TIBET, A Report Submitted to the United Nations Committee against Torture by the Secretary, Department of Information and International Relations, Central Tibetan Secretariat, Dharamsala-176215, India, available at <http://tibetjustice.org/reports/torture.html>.

17. HUMAN RIGHTS SITUATION IN TIBET, ANNUAL REPORT 2006, Tibetan Centre for Human Rights & Democracy 23 (2007).

18. HUMAN RIGHTS SITUATION IN TIBET, ANNUAL REPORT 2007, *supra* note 12, at 14-15.

19. U.S. Comm'n on Int'l Religious Freedom Annual Report, *supra* note 12, at 73-75; HUMAN RIGHTS SITUATION IN TIBET, ANNUAL REPORT 2007, *supra* note 12, at 51-71.

20. U.S. State Dep't, 2008 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM – CHINA (including Tibet) (Sept. 19, 2008), available at <http://www.state.gov/g/drl/rls/irf/2008/108404.htm>. This report, together with the 2007 Annual Report of the Tibetan Centre for Human Rights and Democracy, documents acts of repression including forced statements against the Dalai Lama; the reinvigoration of the patriotic re-education campaign; expulsion of nuns and monks from monasteries; banning of religious days; arrest, detention, and physical abuse of monks and nuns; suppression of religious activities venerating the Dalai Lama; interference with the process of selecting and training reincarnate lamas; prohibitions on giving children names considered blessed by the Dalai Lama; and restrictions of public religious teachings. *Id.*; Tibetan Centre for Human Rights & Democracy, HUMAN RIGHTS SITUATION IN TIBET, ANNUAL REPORT 2007, 51-71 (2008).

21. U.S. Comm'n on Int'l Religious Freedom Annual Report, *supra* note 12, at 73-74. The report states that:

[R]eligious repression and restrictions in Tibetan Buddhist areas continue unabated. Hundreds of Buddhist monks and nuns are in prison or subject to intense restrictions on their religious



A particularly repressive crackdown in Tibet began in mid-March 2008 in response to demonstrations marking the 49<sup>th</sup> anniversary of the 1959 historic uprising against Chinese rule. The United States House of Representative passed a Resolution condemning the response by the Chinese Government as "disproportionate and extreme, reportedly resulting in the deaths of hundreds and the detention of thousands of Tibetans."<sup>22</sup> The Resolution called on the Chinese Government to "end its crackdown on nonviolent Tibetan protestors and its continuing cultural, religious, economic, and linguistic repression inside Tibet."<sup>23</sup> As a part of its crackdown, China disbarred lawyers defending Tibetans who had been arrested<sup>24</sup> and failed to conform to minimum international standards of due process in trying those Tibetans accused of participating in protests.<sup>25</sup>

In anticipation of the 50<sup>th</sup> anniversary of the Tibetan uprising, Chinese authorities began a "strike hard" campaign on January 18, 2009 in Lhasa, the capital of Tibet.<sup>26</sup> Tibetan homes and businesses were raided and eighty-one people were arrested in the first week of the campaign.<sup>27</sup> Two of the eighty-one were arrested for having "reactionary" songs on their cell phones.<sup>28</sup> The reported purpose of the campaign was to detain those involved in the 2008 demonstrations and to warn off those who would support Tibetan independence.<sup>29</sup> This campaign has not been limited to Lhasa. Throughout Tibetan regions in western China, an unofficial state of martial law has been imposed, rendering one-quarter of China's territory a militarized zone.<sup>30</sup>

Given the persistent and worsening pattern of human rights abuses within

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activities, some monasteries and other holy sites are being forcibly closed or destroyed, and Chinese officials have stepped up campaigns to denounce the Dalai Lama and show loyalty to the Chinese communist rule.

*Id.* at 74.

22. House Resolution 1077, Apr. 9, 2008. <http://www.speaker.gov/legislation?id=0173>.

23. *Id.*

24. Jim Yardley, *Beijing Suspends Licenses of 2 Lawyers Who Offered to Defend Tibetans in Court*, N.Y. TIMES, June 4, 2008, at A12; 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: CHINA, *supra* note 13; U.S. Comm'n on Int'l Religious Freedom Annual Report, *supra* note 12, at 73-75.

25. *China: Tibet Protesters Denied Fair Trial Sentenced in Secret after Party Urges "Quick Hearings"*, Human Rights Watch, Apr. 30, 2008.

26. Maureen Fan, *China Raids Homes and Businesses in Tibetan Capital*, WASHINGTON POST FOREIGN SERVICE, January 28, 2009 at A16. China has recently renamed the anniversary "Serf Emancipation Day." Andrew Jacobs, *China Says 21 More People Will Go to Prison in Tibet Protests*, N.Y. TIMES, Feb. 12, 2009, at A17.

27. Andrew Jacobs, *China Says 21 More People Will Go to Prison in Tibet Protests*, NEW YORK TIMES, February 12, 2009 at A17; *China Detains 81 Ahead of 50<sup>th</sup> Anniversary of Tibetan Uprising*, N.Y. TIMES, Jan. 29, 2009, at A8.

28. *China Detains 81 Ahead of 50<sup>th</sup> Anniversary of Tibetan Uprising*, N.Y. TIMES, Jan. 29, 2009, at A8. The majority of those detained were found to have downloaded or sold prohibited music that was pro-Dalai Lama or pro-Tibetan independence. Andrew Jacobs, *China Says 21 More People Will Go to Prison in Tibet Protests*, N.Y. TIMES, Feb. 12, 2009, at A17.

29. Fan, *supra* note 26.

30. Edward Wong, *Fifty Years after Revolt, Clampdown on Tibetans*, N.Y. TIMES, Mar. 5, 2009, at A1; *China Steps up Massive Clampdown in Tibet*, WORLD TIBET NEWS NETWORK, Mar. 4, 2009, available at <http://www.tibet.ca/en/newsroom/wtn/5632>.

Tibet, the issue of whether Tibetans are eligible for political asylum in the United States remains critical.

## II. IMMIGRATION LAW, THE THEORY OF ASYLUM, AND THE FIRM RESETTLEMENT DOCTRINE

### A. *Immigration Law as a Rule of Regulation/Exclusion*

Despite the fact that 17<sup>th</sup> and 18<sup>th</sup> century settlers to the United States were immigrants, this country has long employed immigration law as a rule of exclusion.<sup>31</sup> Although it is widely believed that immigration restrictions did not begin until the late nineteenth century, in fact immigration was heavily regulated by the states in the one hundred years following the American Revolution.<sup>32</sup> Thus, states restricted the immigration of felons, paupers, those with communicable diseases, and, before the Civil War, freed slaves.<sup>33</sup>

Extensive federal restriction of immigration began in the 1870's and 1880's with passage of laws prohibiting immigration of convicts and of those likely to become a public charge, and imposing a fifty-cent head tax on immigrants.<sup>34</sup> In 1882, as a reaction to widespread anti-Chinese sentiment in California, Congress passed the Chinese Exclusion Act which barred Chinese immigration.<sup>35</sup> In 1889, the Supreme Court upheld the constitutionality of the exclusion of Chinese laborers and declared that Congress possessed plenary power over immigration as an inherent "incident of sovereignty."<sup>36</sup> Shortly thereafter, Congress passed the Immigration Act of 1891, which created the Bureau of Immigration, the progenitor of today's United States Citizenship and Immigration Services.<sup>37</sup>

Immigration law has always operated as a rule of exclusion, representing the sovereign's efforts to protect its borders and regulate entry.<sup>38</sup> This

31. PHILIP G. SCHRAG, *A WELL-FOUNDED FEAR, THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 17-18* (2000).

32. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUMBIA L. REV. 1833, 1835 (1993).

33. SCHRAG, *supra* note 31, at 18; Neuman, *supra* note 32, at 1841-85.

34. Victor C. Romero, *United States Immigration Policy: Contract or Human Rights Law?* 32 NOVA L. REV. 309, 312 (2008); see Neuman, *supra* note 32 at 1844, 1882.

35. SCHRAG, *supra* note 31, at 19. This law, which originally barred the immigration of Chinese labor for ten years, was made permanent in 1888. *Id.*

36. *Chae Chan Ping v. U.S.*, 130 U.S. 581, 609 (1889). While the Constitution explicitly confers upon Congress the power to regulate naturalization, it does not explicitly give Congress the power to regulate immigration. U.S. CONST., art. I, § 8.

37. The Bureau of Immigration was housed in the Treasury Department until 1903 when it was transferred to the Department of Commerce and Labor. In 1940, the Immigration and Naturalization Service was moved from the Department of Labor to the Department of Justice. In 2002, the Immigration and Naturalization Service was renamed the Bureau of Citizenship & Immigration Services and housed in the Department of Homeland Security, Homeland Security Act of 2002. See Lauren S. Sasser, *Waiting in Immigration Limbo: The Federal Court Split Over Suits to Compel Action on Stalled Adjustment of Status Applications*, 76 FORDHAM L. REV. 2511, 2514 (2008).

38. See e.g., HAKANN G. SICAKKAN, *DO OUR CITIZENSHIP REQUIREMENTS IMPEDE THE PROTECTION OF POLITICAL ASYLUM SEEKERS, A COMPARATIVE ANALYSIS OF EUROPEAN PRACTICES* 5 (2008). Sicakkan

regulation has often reflected racial or ethnic animus, as in the 1882 Chinese Exclusion Law,<sup>39</sup> the 1907 Gentleman's Agreement restricting Japanese immigration,<sup>40</sup> the Immigration Act of 1917 banning immigration from India and Southeast Asia,<sup>41</sup> the Immigration Act of 1924 imposing strict quotas based on nationality designed purposefully to preserve the dominance of the Anglo-Saxon population,<sup>42</sup> and the 1952 McCarran Walter Act that established special racial quotas for Asians.<sup>43</sup> The sovereign's right to use immigration law to regulate entry, even based on strictly racial criteria, was categorically endorsed by the Supreme Court in 1889:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.<sup>44</sup>

Despite the plenary nature of the sovereign's immigration power, the principles of asylum and *non-refoulement* stand as exceptions to the rule of exclusion and reflect ancient traditions of refugee protection.

## B. *Asylum as an Exception to the Rule of Exclusion*

### 1. *Theory of Asylum*

Asylum operates as an exception to the rule of exclusion represented by immigration law. "By granting the refugee status to an asylum seeker, the

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writes that "[T]he post-war notion of the state, which is originally based on the principles manifest in the Peace of Augsburg of 1555, Westphalia Treaty of 1648, and the Wilsonian principles of 1918, prescribes states' sovereignty as to whom to let in and whom to exclude from their territories." See also MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 62-63 (1983). Walzer argues that

The right to choose an admissions policy . . . is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination.

*Id.* Geoffrey S. Gilbert, *Right of Asylum: A Change of Direction*, 32 INT'L. & COMP. L. QUARTERLY 633, 647 (1983).

39. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

40. KEVIN R. JOHNSON, *THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS* 18 (2004).

41. Immigration Act of 1917, ch. 29, § 2, 39 Stat. 874 876 (amended 1952); see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 14 (1998).

42. Immigration Act of 1924, ch. 190, § 11, 43 Stat. 153, 159. This legislation linked immigration to the composition of the United States based on the 1890 census and thereby purposefully sought to preserve the dominance of the Anglo-Saxon population. MATTHEW J. GIBNEY, *THE ETHICS & POLITICS OF ASYLUM: LIBERAL DEMOCRACY & THE RESPONSE TO REFUGEES*, 138 (2004).

43. IRA J. KURZBAN, *IMMIGRATION LAW SOURCEBOOK* 9TH ED. 3 (2004).

44. *Chae Chan Ping v. United States*, 130 U.S. at 603; see Romero, *supra* note 34, at 315-16.

respective state to a very large extent abandons its right to decide on that persons' [sic] movements across its territory. Therefore, the case of asylum seekers is the only case where both a foreign individual and a state can each legally advance their claims for, respectively, *protection* and *sovereignty*."<sup>45</sup>

Asylum has its roots in many ancient societies and in Arab-Islamic and Judeo-Christian traditions. In pre-Islamic times, asylum functioned as a form of hospitality which is "essential in the desert where insecurity awaits one at every step, and the same is true of protection." This hospitality was reflected in traditions of *istijara* (the request for protection) and *ijara* (the granting of protection), which together constituted the "moral code of the desert," representing "the tribal humanism of the desert Arabs."<sup>46</sup> In Islamic times, asylum had its roots in the institution of *amân* (to safeguard), required by the Koran, which provides "if an idolator seeks asylum with you, give him protection so that he may hear the Word of Allah, and then convey him to safety."<sup>47</sup> This right to shelter was considered sacred and not subject to challenge, even when extradition of the asylum seeker was requested in exchange for the release of a Muslim. Thus, Islamic law can be said to reflect an early version of the *non-refoulement* principle.<sup>48</sup>

In the Judeo-Christian traditions, asylum was grounded in the notion that divinity, housed in sacred places, protected the pursued.<sup>49</sup> The Old Testament prescribed six cities of refuge where involuntary killers, including foreigners and some slaves, could temporarily escape punishment.<sup>50</sup> By the time of the Talmud, forty-eight additional cities of refuge were established and asylum was extended to intentional murderers.<sup>51</sup>

In ancient Greece, asylum was offered in the temple of the city's patron god and criminals were able to escape punishment so long as they stayed within the sacred temples. The Greek states extended asylum to debtors,

45. SICAKKAN, *supra* note 38, at 5.

46. Ghassan Maarouf Arnaout, *Asylum in the Arab-Islamic Tradition*, Office of the United Nations High Commissioner for Refugees 14-15 (1987), quoting W.M. Watt, the Scottish Episcopalian cleric who referred to this moral code as "humanism in the sense that it is primarily in human values, in virtuous and manly conduct, that it finds its meaning." *Id.*

47. *Id.* at 19-21 (quoting The Koran 9:6).

48. *Id.* at 22.

49. S. PRAKASH SINHA, *ASYLUM AND INTERNATIONAL LAW*, 5-6 (1971). This concept of asylum was not accepted everywhere; in parts of Asia and Africa it was not available until the last few centuries before the Christian era. *Id.* 5-7. For example, in India, the laws of Manu required punishment for crime, which was incompatible with the notion of asylum. *Id.* at 6. See also ANN CRITTENDEN, *SANCTUARY* (1988).

50. SINHA, *supra* note 49 at 8. Indeed, the Bible prescribes that cities be set aside for purposes of providing sanctuary "for the innocent who are pursued by the avenger of blood." Moshe Greenberg, *The Biblical Conception of Asylum*, 78 J. OF BIBLICAL LIT. 125-126 (1959); see Katalin Siska, *Historical and Legal Perspectives of the Right to Asylum and Extradition until the 19th Century*, MISKOLC J. OF INT'L L. 188 (2004); Barbara Bezdek, *Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation*, 62 TENN. L. REV. 899, 929 (1995). Among the many references in the Old Testament are Numbers 35:15, which provides: "These six cities shall be a refuge, both for the children of Israel, and for the stranger, and for the sojourner among them: that every one that killeth any person unawares may flee thither." King James Bible, Book of Numbers 35:15.

51. SINHA, *supra* note 49, at 8.

slaves and foreigners fleeing punishment in their own countries. The Ptolemies who followed the Greeks in Egypt provided asylum as a right of any fugitive, including foreigners. The Romans restricted the practice of asylum, offering it as a temporary protection from immediate vengeance but not as protection from trial and punishment.<sup>52</sup>

The Christian form of asylum required intercession by the clergy on behalf of a fugitive who sought sanctuary in the church.<sup>53</sup> In 313 A.D., Constantine's Edict of Toleration constituted the first official recognition of the church's ability to offer protection to fugitives. Several other edicts clarified and regulated the church's privilege of asylum. Ecclesiastical decrees prohibited the surrender of any fugitive, extended asylum beyond those innocently accused to all fugitives, including traitors, expanded the geographical reach of the church to include the bishop's residence and 35 steps beyond the church walls, and added such places of asylum as convents, monasteries, cemeteries, and hospitals. The ecclesiastical law of asylum was eventually codified in 1140, and then again in 1591 and 1725.<sup>54</sup>

Church asylum began to fade in significance with nation states asserting exclusive power over the administration of justice.<sup>55</sup> No longer was asylum treated as divine in origin and tied to the sanctity of the place, but rather operated as a prerogative of the sovereign.<sup>56</sup> This new form of territorial asylum was originally not extended to political crimes and was eventually supplanted by the practice of extradition. However, by the middle of the 18<sup>th</sup> century and continuing to the 19<sup>th</sup> century, denial of asylum for political exiles was seen as an "affront to the dictates of humanity" and the concept of political asylum was transformed into a juridical obligation:

The [French] Revolution considered it a duty of the countries to assist the oppressed and, by its Constitution, provided that the French people would give asylum to those foreigners who had been banished in their homeland for the cause of liberty. Political asylum thus became a practice imposed by circumstances, by principles of morality, and by a rule of positive law.<sup>57</sup>

The historical analysis of these early forms of refugee protection suggests that the theoretical underpinnings of asylum are grounded in notions of hospitality, morality and religion which compelled the society to offer protection and sanctuary to those fleeing retribution, including those who had

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52. *Id.* at 9-10; see IGNATIUS BAU, *THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEE* 138 (1985).

53. BAU, *supra* note 52, at 132-33.

54. SINHA, *supra* note 49, at 10-12.

55. *Id.* at 12.

56. *Id.* at 12-15; see also Gilbert, *supra* note 38, at 635 (traditional view of asylum law rejects the notion of asylum as an individual "right").

57. SINHA, *supra* note 49, at 19.

violated the law of a foreign state. While modern asylum law as practiced in the 20<sup>th</sup> and 21<sup>st</sup> centuries remains connected to these humanitarian instincts, it is as likely to reflect political considerations and be driven by foreign policy objectives.<sup>58</sup> Also, unlike its ancient antecedents, modern refugee law distinguishes between those fleeing persecution and those fleeing prosecution, and, with few exceptions, offers sanctuary only to the former.<sup>59</sup> The next section briefly examines the internationalization of asylum law and its adoption in the United States.

## 2. *Sources of Law: International Conventions and Domestic Law*

Modern international refugee law has its roots in the early to mid twentieth century and to a large extent reflects the international community's response to developments surrounding World War II.<sup>60</sup> Article 14 of the United Nations Universal Declaration of Human Rights provides that "everyone has the right to seek and enjoy in other countries asylum from persecution."<sup>61</sup> Although the Declaration itself imposes no obligations on the states, subsequent United Nations conventions establish the modern international framework for political asylum.

The protections afforded to refugees by the United States derive from the 1951 United Nations Convention Relating to the Status of Refugees<sup>62</sup> and the 1967 United Nations Protocol,<sup>63</sup> which collectively constitute "the principal international instruments established for the protection of refugees."<sup>64</sup> The Refugee Convention and the 1967 Protocol define refugee as "any person

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58. See IRVING H. JACOB, *THE NEW TROJAN HORSE, A CRITIQUE OF POLITICAL ASYLUM* 16-17, 36, 67(1989) (critical of the use of political asylum to advance foreign policy objectives such as the "moral crusade against Communism"); Kathleen Newland, *The Impact of U.S. Refugee Policies on U.S. Foreign Policy: A Case of the Tail Wagging the Dog?*, *THREATENED PEOPLES, THREATENED BORDERS* (1995); see also HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM*, 267-84 (1972); GIBNEY, *supra* note 42, at 132. Even in the 18<sup>th</sup> century, "the practice was often subject to the whims of the governments, subtle restrictions, and arbitrary interpretations. Considerations of political order prevailed over those of humanitarian order. By the end of the 18<sup>th</sup> century, certain treaties still expressly consented to the extradition of political fugitives. The governments which had once most strongly protested against the violation of political asylum, demanded the delivery or removal of political refugees." SINHA, *supra* note 49, at 19. Political considerations operated even during World War II, when hundreds of thousands of refugees were displaced and seeking asylum, political considerations delayed and often prevented them from finding safe haven. GIBNEY, *supra* note 42, at 133-46.

59. See *Handbook on Procedures and Criteria for Determining Refugee Status* ¶56, United Nations High Commissioner for Refugees, 1992. Section 56 describes a refugee as "a victim—or potential victim—of injustice, not a fugitive from justice." *Id.*

60. See generally *An Introduction to the International Protection of Refugees*, United Nations High Commissioner for Refugees, 1992; see also JAMES C. HATHAWAY, *THE DEVELOPMENT OF THE REFUGEE DEFINITION IN INTERNATIONAL LAW, THE LAW OF REFUGEE STATUS*, 1991.

61. United Nations General Assembly, 3d Session, Official Records I, Resolutions 71 (1948).

62. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (hereinafter "Convention").

63. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (hereinafter Protocol).

64. Introductory Note by the Office of the United Nations High Commissioner for Refugees to the Convention and Protocol Relating to the Status of Refugees 6. The 1951 Convention was designed

who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it.”<sup>65</sup> The conventions govern the treatment of those fleeing persecution<sup>66</sup> and prohibit *refoulement* (the return of a refugee to the territory where his life or freedom would be threatened).<sup>67</sup>

Although the UN Convention and Protocol are not self-executing, they are used as a source of interpretation, particularly the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.<sup>68</sup>

The United States ratified the Protocol in 1968 and, in 1980, enacted the Refugee Act of 1980<sup>69</sup> which incorporates the Protocol’s definition of refugee<sup>70</sup> and conforms to the Protocol’s prohibition of *refoulement* by providing for the withholding of removal of an asylee.<sup>71</sup> An asylee, like a refugee, is a person with a well-founded fear of persecution but, unlike a refugee, is physically present in the United States.<sup>72</sup> In other words, refugee status is available to persons applying from outside the United States and asylum status is available to persons seeking protection from within the United States.<sup>73</sup>

### C. *Doctrine of Firm Resettlement as a Bar to Asylum*

#### 1. *Statutory and Regulatory Framework*

The Refugee Act contains several statutory grounds for denial of asylum,

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to address the aftermath of WW II and thus applied only to events prior to 1951. The 1967 Protocol removed the limitation of the 1951 Convention. *See also*, Gilbert, *supra* note 38, at 637.

65. Convention, 189 U.N.T.S. 137, art. I (A)(2); Protocol, 606 U.N.T.S. 267, art. I (2).

66. Convention, 189 U.N.T.S. 137, arts. 2-34.

67. Convention, 189 U.N.T.S. 137, art. 33.

68. *See* Cardoza-Fonseca v. INS, 480 U.S. 421, 437-439 & n.22 (1987); IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 341(10<sup>th</sup> ed. 2006).

69. Refugee Act of 1980, 8 U.S.C. § 1101 et seq. (2008).

70. The Act defines a refugee as

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .

*Id.* at § 1101(a)(42).

71. 8 U.S.C. § 1231(b)(3) (2008). Withholding of removal is now referred to as restriction on removal pursuant to the Illegal Immigration Reform & Immigration Act of 1996. *Id.*

72. KURZBAN, *supra* note 43, at 347.

73. ANKER, *supra* note 6, at 4.

including a mandatory denial of asylum when the asylee has been firmly resettled in a third country. There is an inherent logic to the firm resettlement bar. If asylum is predicated on the need for sanctuary, it is not necessary for an individual who has already been offered meaningful protection by another country.

Until 1990, firm resettlement was merely one factor to consider in determining whether to grant political asylum.<sup>74</sup> However, in 1990, the federal regulations were changed to make clear that firm resettlement was a mandatory bar to asylum.<sup>75</sup> In 1996, Congress codified the mandatory prohibition of a grant of asylum to those who have firmly resettled by passing the Illegal Immigration Reform and Illegal Immigrant Act of 1996, which provides that a grant of asylum “shall not apply to an alien if the attorney general determines that the alien was firmly resettled in another country prior to arriving in the United States.”<sup>76</sup>

The operative standards for determining firm resettlement are found in 8 C.F.R. § 208.15, which provides:

An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

(a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or

(b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type

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74. Despite the fact that firm resettlement was not incorporated in immigration statutes, the Supreme Court held that firm resettlement “is one of the factors which the Immigration and Naturalization Service must take into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution.” *Rosenberg v. Woo*, 402 U.S. 49, (1971); see *Diallo v. Ashcroft*, 381 F.3d 687, 692 n.4 (7<sup>th</sup> Cir. 2004); see also *Abdille*, 242 F.3d at 483, n. 4 (recounting the history of the firm resettlement doctrine and explaining that firm resettlement was first introduced into U.S. immigration law in the Displaced Persons Act of 1948 and in the Refugee Relief Act of 1953 but did not appear in the Refugee Relief Act of 1957 and did not reappear in federal statutes until 1996). In 1989, the BIA held that firm resettlement was one factor to consider and not a mandatory basis for denying asylum despite the wording of the then relevant regulation, 8 C.F.R. § 208.8(f)(1)(ii). *Matter of Soleimani*, 20 I. & N. Dec. 99, 104 (BIA 1989). In 1990, the regulations were changed to make firm resettlement a mandatory bar to asylum. 8 C.F.R. § 208.14(c)(2) (2009); 8 C.F.R. § 202.13(c)(2)(i)(B) (2009). The mandatory bar was codified by Congress in the Illegal Immigration Reform & Immigration Act of 1996, 8 U.S.C. § 1231(b)(3).

75. 8 C.F.R. § 208.14 (2009).

76. Illegal Immigration Reform and Illegal Immigrant Act of 1996, 8 U.S.C. 1158(b)(2)(A)(vi). Even before 1996, the Supreme Court held that firm resettlement was a factor for mandatory consideration. *Rosenberg v. Woo*, 42 U.S. at 49.



of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country.<sup>77</sup>

This regulatory scheme suggests a two-part process. First, the government must make a threshold determination as to whether the asylee received an offer of firm resettlement. If an offer of firm resettlement is found, then the asylee can rebut the finding of firm resettlement by demonstrating either that the asylee's presence in the third country was merely a temporary consequence of escaping persecution or that the asylee's living conditions in the third country were substantially restricted, considering the asylee's rights and opportunities with respect to housing, employment, education, travel, public assistance, and naturalization.<sup>78</sup>

The statutory and regulatory firm resettlement bar is consistent with the framework created by the 1951 Convention Relating to the Status of Refugees. That Convention excludes from the definition of refugee any "person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country"<sup>79</sup> and any person who, though once a refugee, "has acquired a new nationality, and enjoys the protection of the country of his new nationality."<sup>80</sup> In order to be excluded under the Convention's definition, a person must have full national status or its equivalent.<sup>81</sup>

Under the United States regulations, the full protection of national status is not required but the person must have been offered permanent resident status, citizenship or some other type of permanent resettlement.<sup>82</sup> As previously noted, when there has been such an offer, the asylum seeker can nonetheless still qualify if he or she was in-flight from persecution or if the conditions within the country were significantly restricted considering opportunities regarding housing, employment, travel, education, public assistance, property ownership, and naturalization.<sup>83</sup> As the next section demonstrates, despite the surface clarity of the regulatory definition, the courts have struggled to determine which refugees are actually subject to the firm resettlement bar.

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77. 8 C.F.R. § 208.15 (2009).

78. *Id.*

79. Convention Relating to the Status of Refugees, July 28, 1951, art. I(E).

80. Convention Relating to the Status of Refugees, July 28, 1951, art. I(C)(3).

81. ANKER, *supra* note 6, at 447.

82. 8 C.F.R. § 208.15.

83. *Id.*

## 2. Case Law

### a. *Administrative Procedures; Federal Court Review; Patterns of Migration*

Asylum claims can be raised affirmatively before any removal proceeding is commenced or defensively in the course of a removal proceeding.<sup>84</sup> Asylum claims are initially decided by Asylum Officers. If the application for asylum is denied, the Asylum Officer refers the case to an Immigration Judge whose decisions can be reviewed by the Board of Immigration Appeals (BIA), which is the highest level of administrative authority.<sup>85</sup> The BIA reviews non-factual issues de novo and factual issues utilizing the clearly erroneous standard. Decisions of the BIA are appealed to the federal courts of appeals, which conduct a de novo review of legal questions but employ the substantial evidence test to review factual findings.<sup>86</sup> Findings of fact are upheld if supported “by reasonable, substantial, and probative evidence on the record considered as a whole”<sup>87</sup> and reversed only if a “reasonable adjudicator would be compelled to conclude to the contrary.”<sup>88</sup> A finding of firm resettlement is treated as a factual determination and thus is reviewed pursuant to the deferential substantial evidence test.<sup>89</sup>

The reported circuit court decisions concerning firm resettlement cover asylum applicants from a wide range of countries who traveled to and stayed in an equally wide range of third countries before coming to the United States

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84. See ANKER, *supra* note 6, at 5. Applications for political asylum are also considered applications for withholding of removal. 8 C.F.R. § 208.3(b) (2009). Withholding of removal codifies the obligation of *non-refoulement* (Article 33 of the UN Refugee Convention) and prohibits the removal of a non-citizen to a country if the person's life or freedom would be threatened. 8 U.S.C. § 1231(b)(3)(A). Although asylum and withholding of removal are companion forms of relief, there are notable differences between the two: (1) asylum confers legal status in the United States and can result in permanent residence whereas withholding or removal does not grant a legal status in the United States, see ANKER, *supra* note 6, at 524; (2) asylum is not country specific whereas withholding is country specific meaning it protects a person from return to the country of persecution; (3) asylum is a discretionary form of relief whereas withholding is mandatory meaning the IJ has no discretion to deny a valid claim for withholding of removal; (4) firm resettlement is a mandatory bar to asylum but is not applicable to withholding claims. *Salazar v. Ashcroft*, 359 F.3d 45, 52 (1st Cir. 2004); compare 8 U.S.C. 1158(b)(2)(A)(vi) (governing asylum) with 8 U.S.C. § 1231(b)(3)(B) (governing withholding). Additionally, (5) the standard for political asylum is less demanding than the standard for withholding which requires a showing that, upon deportation, the alien is more likely than not to face persecution. *INS v. Stevic*, 467 U.S. 407, 429-30 (1984).

85. 8 C.F.R. § 1003.1(b)(9); see ANKER, *supra* note 6, at 5.

86. *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004).

87. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

88. 8 U.S.C. § 1252(b)(4)(B); *Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006).

89. *Salazar v. Ashcroft*, 359 F.3d at 50 (“The BIA’s finding of firm resettlement must be upheld unless the evidence not only supports a contrary conclusion, but compels it.”); see also *Sall v. Gonzales*, 437 F.3d at 232; see also *Abdille v. Ashcroft*, 242 F.3d at 483; see also *Mussie v. INS*, 172 F.3d 329, 331 (4th Cir. 1999); see also *Diallo v. Ashcroft*, 381 F.3d at 695 (highly deferential standard of review); see also *Sultani v. Gonzales*, 455 F.3d 878, 881 (8th Cir. 2006); see also *Rife v. Ashcroft*, 374 F.3d 606, 610 (8th Cir. 2004); see also *Maharaj v. Gonzales*, 450 F.3d 961, 967 (9th Cir. 2006); see *Elzour v. Ashcroft*, 378 F.3d at 1150, n. 9 (failing to resolve whether the standard should be abuse of discretion or substantial evidence).

and seeking asylum. Patterns of migration are reflected in these cases that are consistent with documented asylum movements and trajectories and what has come to be called "secondary movements" of refugees.<sup>90</sup> These secondary movements include refugees whose initial trajectory before coming to the United States and seeking asylum was from Afghanistan to Australia;<sup>91</sup> Albania to Greece;<sup>92</sup> Armenia to Georgia and Russia;<sup>93</sup> Azerbaijan to Armenia<sup>94</sup> or Israel;<sup>95</sup> Bangladesh to India<sup>96</sup> or to UAE, Oman, and England;<sup>97</sup> Cambodia to Malaysia;<sup>98</sup> China to Cameroon<sup>99</sup> or Hong Kong;<sup>100</sup> Egypt to France<sup>101</sup> or Italy;<sup>102</sup> Ethiopia to Canada<sup>103</sup> or Eritrea<sup>104</sup> or Germany;<sup>105</sup> Fiji to Canada;<sup>106</sup> India to Canada;<sup>107</sup> Indonesia to Singapore;<sup>108</sup> Iran to Germany<sup>109</sup> or Spain;<sup>110</sup> Iraq to Denmark<sup>111</sup> or Germany;<sup>112</sup> Kuwait to Hungary;<sup>113</sup> Laos to France;<sup>114</sup> Mauritania to Mali<sup>115</sup> or Senegal;<sup>116</sup> Nepal to India;<sup>117</sup> Peru to Venezuela;<sup>118</sup> Somalia to Ethiopia<sup>119</sup> or South Africa;<sup>120</sup> Sri Lanka to UAE;<sup>121</sup> Sudan to Chad<sup>122</sup> or UAE;<sup>123</sup> Syria to

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90. See, e.g., Joelle Moret, Simone Baglioni & Denise Efonayi-Mader, *The Path of Somali Refugees into Exile*, SWISS FORUM FOR MIGRATION AND POPULATION STUDIES 46, 19 (2006).

91. *Sultani v. Gonzales*, 455 F.3d at 878.

92. *Lena v. Department of Homeland Security*, 223 F. Appx. 18 (2d Cir. 2007).

93. *Mikayelyan v. Mukasey*, 261 F. App'x 39 (9th Cir. 2007).

94. *Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999).

95. *Rife v. Ashcroft*, 374 F.3d at 606.

96. *Dalwar v. Gonzales*, 238 F. App'x 332 (9th Cir. 2007).

97. *Saiyid v. INS*, 132 F.3d 1380 (11th Cir. 1998).

98. *Cheo v. INS*, 162 F.3d 1228 (9th Cir. 1998).

99. *Rui Qu v. Gonzales*, 246 F. App'x 32 (2d Cir. 2007).

100. *Rosenberg v. Woo*, 402 U.S. 49; *Chinese American Civil Council v. Attorney General of the U.S.*, 566 F.2d 321 (D.C. Cir. 1977).

101. *Boktor v. Mukasey*, 264 F. App'x 664 (9th Cir. 2008).

102. *Zakhary v. Ashcroft*, 99 F. App'x 250 (1st Cir. 2004).

103. *Desta v. Ashcroft*, 329 F.3d 1179 (10th Cir. 2003).

104. *Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005); *Haile v. Gonzales*, 421 F.3d 493 (7th Cir. 2005).

105. *Mussie v. INS*, 172 F.3d at 329.

106. *Maharaj v. Gonzales*, 450 F.3d at 961.

107. *Kaur v. Gonzales*, 218 F. App'x 624 (9th Cir. 2006).

108. *Firmansjah v. Gonzales*, 424 F.3d 598 (7th Cir. 2005).

109. *Nahrhani v. Gonzales*, 399 F.3d 1148 (9th Cir. 2005).

110. *Farbakhsh v. INS*, 20 F.3d 877 (8th Cir. 1994).

111. *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001).

112. *Muhamed v. Gonzales*, 221 F. App'x 672 (9th Cir. 2007).

113. *Garadah v. Ashcroft*, 86 F. App'x 76 (6th Cir. 2004).

114. *Vang v. Gonzales*, 237 F. App'x 24 (6th Cir. 2007); *Vang v. INS*, 146 F.3d 1114 (9th Cir. 1997).

115. *Makadji v. Gonzales*, 470 F.3d 450 (2d Cir. 2006).

116. *Mbodji v. Mukasey*, 261 F. App'x 837 (6th Cir. 2008); *Sall v. Gonzales*, 239 F. App'x 975 (6th Cir. 2007); *Sall v. Gonzales*, 437 F.3d at 229; *Diallo v. Ashcroft*, 381 F.3d at 687.

117. *Tsering v. INS*, 165 F. App'x 907 (2d Cir. 2006).

118. *Salazar v. Ashcroft*, 359 F.3d at 45.

119. *Ali v. Ashcroft*, 394 F.3d 780 (9th Cir. 2005); *Shaib v. Gonzales*, 127 F. App'x 953 (9th Cir. 2005).

120. *Abdille v. Ashcroft*, 242 F.3d at 477.

121. *Alawwa v. Gonzales*, 127 F. App'x 309, (9th Cir. 2005).

122. *Oumar v. Mukasey*, 2008 WL 2566566 (2d Cir. 2008) (Summary Order).

123. *Abdalla v. INS*, 43 F.3d 1397 (10th Cir. 1994).

Canada;<sup>124</sup> and Tibet to India.<sup>125</sup>

In each of these cases, the government argued that the asylum applicant had firmly resettled in the third country and was thus ineligible for political asylum. In some, the circuit courts upheld the government's determination that the alien had firmly resettled in a third country;<sup>126</sup> in others the courts reversed the agency's determination of firm resettlement.<sup>127</sup>

As the next section indicates, the circuits differ on a number of key aspects of firm resettlement law including what initial showing the government must make to establish a *prima facie* case of firm resettlement, at what point the burden shifts to the alien, and what type of evidence ultimately suffices to establish firm resettlement. Most importantly, the circuits are divided on the fundamental question of whether an "offer-based" approach or a "totality of the circumstances" test should be used to evaluate firm resettlement.

### *b. Split in Circuits*

Although there is disagreement in the circuits with respect to significant aspects of the firm resettlement doctrine, the courts are in agreement that the government bears the initial burden of showing that the firm resettlement bar applies by showing "an offer of permanent residence status, citizenship, or some other type of permanent resettlement."<sup>128</sup> Once the government makes this showing, the burden shifts to the alien to rebut it or to demonstrate that

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124. *Elzour v. Ashcroft*, 378 F.3d at 1143.

125. *Choephel v. BIA*, 238 F. App'x 678 (2d Cir. 2007); *Choedon v. BIA*, 2006 U.S.App. LEXIS 9006 (2d Cir. 2006) (Summary Order); *see Wangchuk v. Department of Homeland Security, Immigration & Customs Enforcement*, 448 F.3d 524 (2d Cir. 2006) (ethnic Tibetan born in India); *Dhoumo v. BIA*, 416 F.3d 172 (2d Cir. 2005) (same).

126. *Firmansjah v. Gonzales*, 424 F.3d at 602 (firm resettlement in Singapore evidenced by permanent residence permit); *Nahravani v. Gonzales*, 399 F.3d 1148 (9th Cir. 2005) (firm resettlement in Germany evidenced by grant of permanent residency); *Rife v. Ashcroft*, 374 F.3d at 611 (firm resettlement in Israel evidenced by grant of Israeli citizenship and procurement of Israeli passport); *Desta v. Ashcroft*, 329 F.3d 1179 (10th Cir. 2003) (firm resettlement in Canada established by protracted stay, grant of landed immigrant status, and birth of Canadian citizen son); *Ali v. INS*, 237 F.3d 591 (6th Cir. 2001) (firm resettlement in Denmark established by grant of refugee status and issuance of Danish passport and residence permit); *Cheo v. INS*, 162 F.3d 1227 (three years of peaceful residence in Malaysia sufficient to raise presumption of firm resettlement).

127. *Haile v. Gonzales*, 421 F.3d 493 (alien cannot be said to have firmly resettled in Eritrea when alien had never been to Eritrea); *Ali v. Ashcroft*, 394 F.3d 780 (error to presume firm resettlement based on alien's five year stay in Ethiopia in light of alien's testimony that she was living illegally in Ethiopia and never received an offer of permanent residence); *Elzour v. Ashcroft*, 378 F.3d 1143 (no evidence to support government's determination that Syrian had firmly resettled in Canada; mere possibility that asylum will be granted by third country not sufficient; mere fact that alien worked in third country not sufficient).

128. *Maharaj v. Gonzales*, 450 F.3d at 972; *see Oumar v. Mukasey*, 2008 WL 2566566; *see also Sall v. Gonzales*, 437 F.3d at 234; *see also Diallo v. Ashcroft*, 381 F.3d at 692-693; *see also Abdille v. Ashcroft*, 242 F.3d at 490; *see also Abdalla v. INS*, 43 F.3d at 1399. In *Mussie v. INS*, the court held that

The INS bears the initial burden of producing evidence that indicates that the firm resettlement bar applies, and, should the INS satisfy this threshold burden of production, both the burden of production and the risk of non-persuasion then shift to the applicant to demonstrate, by a preponderance of the evidence, that he or she had not firmly resettled in another country.

one of the two exceptions contained in the regulation apply.<sup>129</sup> The government can satisfy its initial burden by introducing direct evidence of an offer of firm resettlement such as evidence of a grant of asylum, or a residence permit, or travel documents indicating permanence of status.<sup>130</sup>

The consensus among the circuits ends when it comes to the question of whether non-offer-based evidence carries the same weight and suffices to meet the government's initial or ultimate burden.<sup>131</sup> Some courts consider non-offer-based evidence and employ a "totality of the circumstances" test<sup>132</sup> while others reject that approach and focus on whether the country has made an offer of permanent resettlement.<sup>133</sup> As explained below, the offer-based approach more closely reflects the current statutory and regulatory framework and avoids the problem of vesting too much discretion in the courts.

### 1. *Totality of Circumstances Approach*

The totality of the circumstances approach determines whether the alien has firmly resettled in a third country by examining such factors as length of stay, employment, family contacts, and business and property connections in the third country. Prior to 1990, this approach made sense because firm resettlement did not operate as an absolute bar to asylum. When firm resettlement was merely a factor to consider in the agency's exercise of discretion in granting asylum, the adjudicator could properly look at the alien's length of stay in a third country and the alien's various ties to that country. However, in 1990, firm resettlement became a mandatory bar to asylum and the governing regulations refocused the inquiry from a totality of the circumstances approach to whether or not the third country made offer of permanent resettlement.<sup>134</sup>

The Second Circuit is one of the courts that continue to apply the totality of the circumstances test even after the 1990 change in law.<sup>135</sup> The rationale for

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172 F.3d at 332. The Third Circuit has held that the burden allocation is the same under the regulatory scheme applicable to asylum applications filed *before* April 1, 1997 and governed by 8 C.F.R. § 208.13(c)(2)(ii) and applications filed *after* that date and subject to the resettlement bar found in the federal statute, 8 U.S.C. § 1158(b)(2)(A)(vi). *Abdille v. Ashcroft*, 242 F.3d at 491.

129. *Diallo v. Ashcroft*, 381 F.3d at 693.

130. *Maharaj v. Gonzales*, 450 F.3d at 972.

131. *Id.*; see *Bonilla v. Mukasey*, 539 F.3d 72, 82 at n.3 (1st Cir. 2008) (declining to decide the issue); see also *Salazar v. Ashcroft*, 359 F.3d 45 (noting the conflict in the circuits and, in a case of first impression, declining to adopt a standard); see also Robert D. Sloane, *An Offer of Firm Resettlement*, 36 GEO. WASH. INT'L. L. REV. 47 (2004).

132. See, e.g., *Mussie v. INS*, 172 F.3d at 329; *Farbakhsh v. INS*, 20 F.3d at 877; *Cheo v. INS*, 162 F.3d 1227; *Chinese American Civic Council v. Attorney General*, 566 F.2d at 321.

133. See, e.g., *Abdille v. Ashcroft*, 242 F.3d at 487; see also *Garadah v. Ashcroft*, 86 F. App'x. 76 (6th Cir. 2004); see also *Diallo v. Ashcroft*, 381 F.3d at 693 (the focus is "on the actual existence vel non of an offer of permanent resettlement"); see also *Rife v. Ashcroft*, 374 F.3d at 611.

134. The applicable regulation requires an "offer of permanent residence status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 208.15 (2009).

135. *Oumar v. Mukasey*, 2008 WL 2566566 (under totality of circumstances approach, an offer of provisional refugee status, without more, is insufficient to establish firm resettlement in Chad,

retaining the totality of the circumstances test was explained in *Sall v. Gonzales*:

The underlying purpose of asylum regulations – to provide refuge to desperate refugees who reach our shores with nowhere else to turn – accords with reserving the grant of asylum for those applicants without alternative places of refuge abroad, regardless of whether a formal ‘offer’ of permanent resettlement has been received.<sup>136</sup>

The Second Circuit recognized that the regulation places “particular importance on the presence *vel non* of an actual offer,” but emphasized that other countries may have immigration systems less elaborate than the United States and that “offers” can exist without written documentation or formal state-issued identification cards. Thus, it is appropriate for the agency “to examine the specific circumstances of an applicant’s case to decide whether he has firmly resettled in a third country.”<sup>137</sup>

Applying this approach, the Second Circuit concluded that the agency’s determination that *Sall* was firmly resettled in Senegal was not supported by substantial evidence. Although the Second Circuit adopts the view that a lengthy, peaceful stay in a third country is sufficient to create a presumption of firm resettlement, the record in this case showed something other than a peaceful undisturbed stay. Thus, the Court concluded that the mere passage of five years, without more, does not constitute firm resettlement.<sup>138</sup> On remand, the Immigration Judge was directed to consider the totality of the circumstances including the alien’s intent to remain in Senegal, his family, business and property ties there, and whether he had the same rights, including the right to work and travel, that permanently settled persons enjoy.<sup>139</sup>

The Fourth and Tenth Circuits also continue to utilize the totality of the circumstances test, although not by name. *Mussie v. INS* involved a political asylum claim by a citizen of Ethiopia who fled to Germany via the Sudan and stayed in Germany for six years before entering the United States.<sup>140</sup> While in Germany, she applied for and received asylum status, obtained travel

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particularly given lack of evidence that Chad’s immigration laws afforded legal status to holder of certificate); *Rui Qu v. Gonzales*, 246 Fed.Appx. 32 (using a totality of circumstances test, Court concluded that agency erred in finding firm resettlement because although alien had a residence permit and worked in Cameroon for three and a half years, the agency failed to address whether the alien intended to remain in Cameroon, had any family or business ties there, and whether the alien enjoyed the legal rights enjoyed by permanently settled persons); *Choephel v. BIA*, 238 F. App’x 678 (totality of circumstances support determination that alien had firmly resettled in India); *Sall v. Gonzales*, 437 F.3d at 233.

136. *Sall v. Gonzales*, 437 F.3d at 233.

137. *Id.*

138. *Id.* at 234-36.

139. *Id.* at 235.

140. *Mussie v. INS*, 172 F.3d at 329.

documents, attended a government-paid school, received benefits, worked, paid taxes and rented her own apartment.<sup>141</sup> Although the government did not present evidence of a formal offer of permanent residency, the Fourth Circuit concluded that the agency had satisfied its burden. The Court stated that, “a duration of residence in a third country sufficient to support an inference of permanent resettlement in the absence of evidence to the contrary shifts the burden of proving absence of firm resettlement to the applicant.”<sup>142</sup> This, in effect, is the totality of the circumstances test, pursuant to which the government is said to meet its initial burden by relying on non-offer based factors such as length of stay, employment, and ties to the third country.<sup>143</sup>

Adopting an approach similar to the Fourth Circuit, the Tenth Circuit in *Abdalla v. INS*, implicitly employed a totality of the circumstances test in upholding the agency’s determination that Abdalla had firmly resettled in the UAE.<sup>144</sup> The factors relied on included a twenty year stay in the UAE and the possession of a residence visa, which created a rebuttable presumption of firm resettlement. Although the residence visa could be considered offer-based evidence, the Court did not refer to it as such, relying instead on a pre-1990 case that stands for the proposition that a lengthy stay in a third country is sufficient to shift the burden to the applicant.<sup>145</sup>

Finally, the Eighth Circuit has seemingly taken something of a middle ground in this split among the circuits. In *Rife v. Ashcroft*<sup>146</sup> and in *Sultani v. Gonzales*,<sup>147</sup> the Eighth Circuit agreed that offer-based evidence is an important factor and the proper place to begin the analysis.<sup>148</sup> However, the Eighth Circuit went on to hold that offer-based evidence will in some cases “not be dispositive.”<sup>149</sup> The Eighth Circuit cited with approval its holding in *Farbakhsh v. INS*, a case based on pre-1990 regulations, that a four year stay in Spain constituted firm resettlement even though the alien’s application for refugee status in Spain had not been acted upon.<sup>150</sup>

## 2. Offer-Based Approach

The Third Circuit was the first to explicitly reject a totality of the circumstances test for determining firm resettlement. In *Abdille v. Ashcroft*, the BIA denied a Somali native’s application for political asylum because he

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141. *Id.* at 330-31.

142. *Id.* at 332.

143. *See, e.g.*, *Sall v. Gonzales*, 437 F.3d at 235. In the view of those courts that have rejected this approach, those factors should not come into play unless evidence of a government offer is unavailable. *Abdille v. Ashcroft*, 242 F.3d at 487; *Maharaj v. Gonzales*, 450 F.3d at 976.

144. 43 F.3d 1397.

145. *Id.* at 1399-00, *citing* Chinese American Civil Council, 566 F.2d at 326.

146. 374 F.3d 606.

147. 455 F.3d 878.

148. *Rife v. Ashcroft*, 374 F.3d at 611; *Sultani v. Gonzales*, 455 F.3d at 882.

149. *Rife v. Ashcroft*, 374 F.3d at 611.

150. *Id.*

was found to have firmly resettled in South Africa.<sup>151</sup> In reversing and remanding that determination, the Court concluded that the plain language of the governing regulation makes clear that:

[T]he prime factor in the firm resettlement inquiry is the existence of an offer of permanent resident status, citizenship, or some other type of permanent resettlement. While recognizing that factors other than the issuance of such an offer may prove relevant to the firm resettlement question, we reject an alternative “totality of the circumstances” approach that would have us consider the existence of an offer as simply one component of a broader firm resettlement inquiry according equal weight to such non-offer-based factors as the alien’s length of stay in a third country, the economic and social ties that the alien develops in that country, and the alien’s intent to make that country his permanent home.<sup>152</sup>

The Court explained that the totality of the circumstances approach is contrary to the plain language of the agency’s definition of firm resettlement, which requires an offer of permanent resettlement and makes non-offer-based factors relevant only in determining whether one of the two exceptions to the firm resettlement bar applies.<sup>153</sup> The emphasis on the existence of a formal government offer rather than on the alien’s length of stay, employment, or social and economic ties is consistent with the general proposition that each nation has the authority to establish its own immigration policy. “Absent some government dispensation, an immigrant who surreptitiously enters a nation without its authorization cannot obtain official resident status no matter his length of stay, his intent, or the extent of the familial and economic conditions he develops. Citizenship or permanent residency cannot be gained by adverse possession.”<sup>154</sup>

While the Court rejected the totality of the circumstances approach, it did note that there may be cases where the government is unable to obtain direct evidence of a formal offer. In such cases, “non-offer-based elements can serve as a surrogate for direct evidence of a formal offer of some type of permanent resettlement, if they rise to a sufficient level of clarity and force.”<sup>155</sup>

Applying this governing standard to the facts at hand, the Third Circuit concluded that the question of whether Abdille had received an offer of some type of permanent resettlement was dependent on information concerning South Africa immigration law – information that was not in the record under

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151. *Abdille v. Ashcroft*, 242 F.3d at 477.

152. *Id.* at 480.

153. *Id.* at 486.

154. *Id.* at 487.

155. *Id.* Such circumstantial evidence may include length of stay in the third country, the alien’s intent to remain in that country, and the extent of social and economic ties developed by the alien. *Id.*



review. The agency relied on two South African government documents seemingly granting Abdille refugee status for two years. This was insufficient, in the Third Circuit's view, to constitute substantial evidence of an offer of permanent resettlement since on their face, the documents conferred temporary, not permanent status. The record was devoid of evidence concerning whether under South African immigration law, temporary refugee status is likely to be converted to permanent status. In remanding the case to the agency, the Third Circuit concluded that the INS, as the party initially seeking to rely on foreign law, had the threshold burden of establishing the content of South Africa law, but "once the INS introduces evidence sufficient to indicate that the firm resettlement bar will apply, the burden of proving relevant provisions of South African law will shift to Abdille."<sup>156</sup>

The Third Circuit's approach in Abdille was adopted by the Seventh Circuit in Diallo v. Ashcroft, involving a claim for political asylum by an alien who had fled Mauritania and stayed in Senegal for four years before coming to the United States and seeking political asylum.<sup>157</sup> The Court rejected the totality of the circumstances test, describing the "metamorphosis" of the law of firm resettlement since the regulatory changes of 1990.<sup>158</sup> In the view of the Seventh Circuit:

The word "offer" certainly implies some form of action on the part of the third country government. \* \* \* The "some other type of permanent resettlement" language, likely was added to account for the great variety in names and types of permanent offers of settlement in countries around the globe and was not meant to be a catch-all that would undue [sic] the requirement of a governmental offer.<sup>159</sup>

Thus, the Seventh Circuit concluded that it is error, post 1990, to continue to rely on a totality of the circumstances test.<sup>160</sup>

Applying that approach to the facts, the Seventh Circuit concluded that the Immigration Judge had completely ignored "the regulation's requirement to consider the existence of a formal offer or the lack thereof."<sup>161</sup> Instead, the Immigration Judge based its determination that Diallo had firmly resettled in Senegal solely on his four year stay, his employment, and his sharing an apartment with a friend and family member—an analysis representing the

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156. *Id.* This burden allocation is consistent with 8 C.F.R. § 208.13(c)(2)(ii) and 8 U.S.C. § 1158(b)(2)(A)(vi) which, according to the Court, place the initial burden on the government, and "should the INS satisfy this threshold burden of production, both the burden of production and the risk of non-persuasion then shift to the applicant to demonstrate, by a preponderance of the evidence, that he or she had not firmly resettled in another country." *Id.* at 491.

157. 381 F.3d 687 (7th Cir. 2004).

158. *Id.* at 693.

159. *Id.* at 695 n.5.

160. *Id.* at 693-94.

161. *Id.* at 695.

outdated totality of the circumstances test.<sup>162</sup>

The offer-based approach of the Third and Seventh Circuits was also adopted by the Ninth Circuit in *Maharaj v. Gonzales*.<sup>163</sup> The *Maharaj* case involved a claim for political asylum made by a family who fled persecution in Fiji and traveled to Canada before seeking asylum in the United States. The Maharajs lived in Canada for four years where they worked, had a child, sent their older children to a free public school, and received health benefits.<sup>164</sup> They applied for refugee status in Canada but left for the United States before the application was decided.

Maharaj's application for political asylum in the United States was denied by an Immigration Judge who found that the family's four year stay in Canada raised a rebuttable presumption of firm resettlement which Maharaj failed to rebut. The BIA summarily affirmed. After a panel of the Ninth Circuit denied Maharaj's petition for review, the petition was reheard by the Ninth Circuit en banc in order to determine "what evidence the Department of Homeland Security (DHS) must produce in order to meet its initial burden of showing that the mandatory bar applies, such that the burden shifts to the alien to show that he was not firmly resettled."<sup>165</sup>

In a decision that thoroughly analyzed the division of authority among the federal courts,<sup>166</sup> the Ninth Circuit rejected a totality of the circumstances test because it inappropriately reflects the law of firm resettlement as it developed under the pre-1990 discretionary regime.<sup>167</sup> Instead, the Court adopted the following framework for deciding firm resettlement questions:

[U]nder the plain language of [8 C.F.R.] §208.15, DHS bears the initial burden of showing that the government of the third country issued to the alien a formal offer of some type of official status permitting the

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162. *Id.* at 694-95.

163. 450 F.3d 961 (9th Cir. 2006). See Sarah Lynne Campbell, *Give Me Your Tired, Your Poor, and Your Country Shoppers: Reevaluating the Firm Resettlement Requirement in U.S. Asylum Law after Maharaj v. Gonzales*, 21 B.Y.U. J. PUB. L. 377 (2007) (critically evaluating the Ninth Circuit's approach).

164. 450 F.3d at 963.

165. *Id.* at 963-64. The Department of Homeland Security (DHS) has assumed the functions of the Immigration and Naturalization Service (INS). See Homeland Security Act of 2002, Pub.L.No. 107-296, 116 Stat. 2135, 2142, 2002, 6 U.S.C. §§ 101-557.

166. 450 F.3d at 973. Some circuits focus on direct, offer-based evidence of permanent resettlement and permit non-offer-based evidence only if direct evidence cannot be obtained. See, e.g., *Abdille v. Ashcroft*, 242 F.3d at 485 ("the prime element in the firm resettlement inquiry is the existence vel non of an offer of permanent resident status, citizenship, or some other type of permanent resettlement") (internal quotation marks omitted); *Diallo v. Ashcroft*, 381 F.3d at 693 (the "primary and initial consideration . . . is a simple one—whether or not the intermediary country has made some sort of offer of permanent resettlement"). Others utilize a totality of the circumstances test that looks at the "length of the alien's stay in the third country, receipt of benefits, familial ties, and business and property connections." *Maharaj v. Gonzales*, 450 F.3d at 973 (rejecting that approach); see, e.g., *Sall v. Gonzales*, 437 F.3d at 233 (underlying purpose of asylum consistent with denying asylum to alien with alternative place of refuge, regardless of whether a formal offer has been made); *Mussie v. INS*, 172 F.3d 329; *Farbakhsh v. INS*, 30 F.3d at 881; *Abdalla v. INS*, 43 F.3d at 1399.

167. *Maharaj v. Gonzales*, 450 F.3d at 973.

alien to reside in that country indefinitely. This burden can be made by direct evidence of an offer of some type of permanent resettlement, or if DHS shows that direct evidence of a formal offer is unobtainable, then surrogate, non-offer-based evidence may suffice for the initial showing if it is of sufficient force for the IJ reasonably to infer that the third country officially sanctions the alien's indefinite presence. As DHS bears the burden of showing receipt of an offer, it also bears the burden of showing that the non-offer-based evidence upon which it relies signifies some kind of entitlement to stay indefinitely. In either case, once DHS points to some evidence of an offer of some type of permanent resettlement, the burden shifts to the applicant to show that the nature of his stay and ties was too tenuous or the conditions of his residence too restricted, for him to be firmly resettled.<sup>168</sup>

Applying that governing standard to the facts, the Ninth Circuit concluded that the government had not satisfied its initial burden of showing that the Maharaj family had firmly resettled in Canada. The only offer-based evidence related to the fact that Maharaj had applied for refugee status and had left Canada before the application was decided. The Court explained that the application for refugee status would be sufficient to constitute an offer if Maharaj was entitled to refugee status and all that remained for his obtaining that status was some ministerial act. But, the record was silent on Maharaj's eligibility and the mere possibility that he could receive permanent refuge in Canada was insufficient to constitute an offer of permanent resettlement. Because DHS made no showing that offer-based evidence was unobtainable, the government was not permitted to rely on non-offer-based evidence, which consisted of four years residence during which time the family worked and received benefits. As the Court concluded, "one can be allowed to work, or receive benefits, without being offered permanent resident status or some other type of permanent resettlement in this country, and we suppose also in Canada."<sup>169</sup>

### 3. *Offer-Based Approach Consistent with Governing Authority*

This review of the caselaw reveals considerable disarray with respect to a number of issues. The first is whether the government's initial burden of proving firm resettlement—the burden of establishing a *prima facie* case—can be met by non-offer-based evidence. The Third, Seventh and Ninth Circuits reject non-offer-based evidence at this stage unless offer-based evidence is unavailable.<sup>170</sup> In contrast, the Second, Fourth, and Tenth Circuits employ a totality of the circumstances test and permit the govern-

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168. *Id.* at 976-77.

169. *Id.* at 978.

170. *See supra* text accompanying notes 151-69.

ment to establish a *prima facie* case based on non-offer-based evidence.<sup>171</sup> A second and closely related issue is whether a lengthy peaceful stay in a third country is sufficient to shift the burden to the applicant. Not surprisingly, those circuits that insist that the government's burden be met by offer-based evidence refuse to consider a peaceful length of stay as sufficient to shift the burden to the applicant, whereas circuits embracing non-offer-based evidence treat a lengthy peaceful stay as a rebuttable presumption.<sup>172</sup> The third issue involves the question of what ultimately constitutes firm resettlement as a matter of law. The split in the circuits here mirrors the split in what the government must show to make out a *prima facie* case: some circuits insist on an offer by the third country of some type of permanent resettlement while others embrace a broader totality of the circumstances test.<sup>173</sup>

These issues should be resolved in favor of the offer-based approach which more closely reflects the current regulatory scheme.<sup>174</sup> A totality of the circumstances test could be justified pre-1990 because during that period an alien's stay in another country was merely one factor to be considered in evaluating an asylum claim as a matter of discretion. Under that regime, "an adjudicator could consider factors such as the length of stay, ability to work, familial ties, economic conditions in the third country and the like in favor of, or against, a grant of asylum."<sup>175</sup> However, once firm resettlement became a mandatory bar to asylum, the analysis changed. As the Ninth Circuit noted, "The 1990 regulations 'deemphasiz[ed] the previously paramount question whether the refugee remains in flight,' and 'reoriented the central inquiry of firm resettlement to focus the adjudicator on the actual existence vel non of an offer of permanent resettlement.'"<sup>176</sup>

Further, under the current regulations, the government bears the initial burden of proving an offer of permanent resettlement and, in the absence of an offer, the applicant is eligible for asylum. Yet, in circuits adopting the totality of the circumstances test, by pointing to factors such as length of stay, employment, and family contacts, the government is essentially shifting the burden of proof to the applicant to disprove firm resettlement. This is contrary to the regulatory scheme. Unfortunately, it is consistent with the agency's Operations Instructions, which at Section 207.4, directs that firm resettlement should be evaluated based on whether the refugee is "accorded

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171. See *supra* text accompanying notes 135-45.

172. Contrast *Maharaj v. Gonzales*, 450 F.3d 961 with *Sall v. Gonzales*, 437 F.3d at 234 n.6.

173. See *supra* text accompanying notes 135-69.

174. See Dana R. Green, *Navigating North: How the Canadian Approach to Firm Resettlement Should Guide U.S. Implementation of the Refugee Conventions*, 40 COL. HUM. RIGHTS. L. REV. 701, 2009. Green concludes that the totality of the circumstances test conflicts with the governing regulations and violates the US' international commitment to non-refoulement. *Id.* She argues in favor of the US adopting the Canadian approach, which, *inter alia*, focuses on whether the applicant has a right to return to the country of "resettlement." *Id.* at 706, 738.

175. *Maharaj v. Gonzales*, 450 F.3d at 968 (quoting *Diallo*, 381 F.3d at 693).

176. *Id.* at 968-69 (quoting *Sloane*, *supra* note 131, at 57).

the same privileges made available to other alien residents of that country such as (i) opportunity to own property (ii) educational opportunities, (iii) issuances of travel documents and ease of travel, and (iv) availability of public assistance.”<sup>177</sup> Where the alien is afforded such privileges, the alien is presumed to have become firmly resettled. Although the presumption can be overcome by submission of countervailing evidence, the section concludes with the blanket declaration: “The burden of proof is upon the refugee to establish that firm resettlement has not been accomplished.”<sup>178</sup> This instruction is clearly inconsistent with governing regulations and improperly establishes an additional hurdle for the alien to overcome in order to establish eligibility for asylum.

A second and related reason for preferring the offer-based approach is that it is a clearer, more rigorous test that leaves less room for discretion. A test that requires an offer is likely to provide greater certainty, consistency, and uniformity. In contrast, because a totality of the circumstances test is necessarily amorphous, it vests considerable discretion with asylum officers, immigration judges and, ultimately, federal courts.<sup>179</sup>

Finally, the offer-based test more closely reflects the goals of international and domestic asylum law. As described earlier, asylum is about granting safe haven to those fleeing persecution. The firm resettlement doctrine bars a grant of asylum because someone who has been offered permanent sanctuary is no longer in need of relief. A totality of the circumstances approach to firm resettlement can be used to deny safe haven to someone who may not currently be at risk but who has no guaranty of permanent security. In contrast, the offer-based approach assures that asylum will be denied only when it is clear that the third country has, in fact, offered long term security. The offer-based approach better comports with federal law, leaves less room for discretion, and comes closer to effectuating the objectives of international refugee law.

The difference between the two tests will be further explored in the last substantive section of the article. After Part III explores the current status of Tibetans in India, Part IV will analyze whether Tibetans applying for political asylum after a lengthy stay in India are subject to the firm resettlement ban under either an offer-based approach or a totality of the circumstances approach.

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177. U.S. Citizenship & Immigration Service Operations Instructions § 207.4, *available at* [http://www.uscis.gov/propub/template.htm?view=document&doc\\_action=sethitdoc&doc\\_hit=1&doc\\_searchcontext=jump&s\\_context=jump&s\\_action=newSearch&s\\_method=applyFilter&s\\_fieldSearch=nxthomecollectionid|SLB&s\\_fieldSearch=foliodestination|OI207&s\\_type=all&hash=0-0-0-28771](http://www.uscis.gov/propub/template.htm?view=document&doc_action=sethitdoc&doc_hit=1&doc_searchcontext=jump&s_context=jump&s_action=newSearch&s_method=applyFilter&s_fieldSearch=nxthomecollectionid|SLB&s_fieldSearch=foliodestination|OI207&s_type=all&hash=0-0-0-28771) (hereinafter, “Operations Instructions”). This section directs that the question of firm resettlement “should be viewed in the light of 8 C.F.R. § 207.1(b).” *Id.* However, that regulation governs admission of refugees and thus does not apply to applicants for asylum who are in this country. *Cf.* 8 C.F.R. § 207.1(b).

178. Operations Instructions, *supra* note 177.

179. Since very few cases actually reach federal court, the ultimate outcome for most asylum seekers is the decision of the agency. *See* Sloane, *supra* note 131, at 62.

### III. THE STATUS OF TIBETANS IN INDIA

The legal status of Tibetans residing in India is a question of profound importance to those who seek political asylum in the United States and are confronted with the question of whether they have “firmly resettled” in India. Despite its importance, the question has remained largely unaddressed, in part because of an unwillingness to criticize the Government of India, which has shown extraordinary generosity toward Tibetan refugees, and in part because India’s policy toward Tibetan refugees has rarely taken the form of official policy or been reduced to writing.

In analyzing the question of the status of Tibetans in India, it is important to distinguish among four different waves of arrivals: (1) 1959 to 1963; (2) 1980 to 1993; (3) 1994 to 1999; and (4) 2000 to the present. This part of the article provides background regarding Sino-Indian relations, analyzes India’s attitude and treatment of Tibetan refugees in each of the four distinct time periods, describes India’s laws regarding foreigners, and explores the status of Tibetans in India with respect to a wide range of rights and opportunities relating to social, economic and political life. This section concludes that despite shifting attitudes and treatment of the four waves of arrivals, and despite India’s generosity in permitting Tibetan refugees to enter India and, with respect to the early arrivals, to develop settlements and schools, Tibetans have not been offered a permanent right to remain in India.

#### A. *Background—Sino-Indian Relations*

Tibet’s territory forms a natural buffer between India and China. Although the two countries share an extensive cultural background and contacts arising from, among other significant developments, the transmission of Buddhism from India to China in the first century AD, India and China had relatively little political contact before the twentieth century.<sup>180</sup> The British Empire’s colonial government attempted to make inroads in Tibet in the nineteenth and twentieth centuries, including by launching a military expedition in 1904 and negotiating trade agreements between British India and the Manchu dynasty of China, which purported to exercise authority over Tibet during this time.<sup>181</sup> Britain’s interest in Tibet arose from its imperialist expansion into

180. LIBRARY OF CONGRESS COUNTRY STUDY, INDIA (1995), available at <http://lcweb2.loc.gov/frd/cs/intoc.html>; see JOHN KEAY, INDIA, A HISTORY 113-14 (2001).

181. The 1904 military expedition, led by Francis Younghusband, culminated in the Lhasa Convention of 1904 which gave Britain exclusive trading rights in Tibet. See JULIE G. MARSHALL, BRITAIN AND TIBET, 1765-1947 (2003) xxi, 357; see also STANLEY WOLPERT, A NEW HISTORY OF INDIA 271. Despite the expedition’s success, shortly thereafter, a change of government in London led to a policy of non-interference with Tibet and a renegotiation of the Lhasa Convention in 1906. CONVENTION BETWEEN GREAT BRITAIN AND CHINA RESPECTING TIBET, 1906. By the 1906 Convention, Great Britain agreed not to annex Tibetan territory or interfere in the administration of Tibet. China, in turn, agreed not to permit any other foreign state to interfere in Tibet. The following year, Britain and Russia signed a treaty agreeing that both countries would deal with Tibet only through China. MARSHALL, *supra*, at 399. In theory, the 1906 and 1907 agreements gave China virtually unfettered

South Asia generally and, in particular, the desire to use Tibet as a market for its goods and as a trade route to China. It also feared Russian influence in Tibet.<sup>182</sup> Consequently, in the years between 1914 and 1947, Britain's primary objective was to retain Tibet as a buffer state between India and China.<sup>183</sup> During this period, travel restrictions between India and Tibet were eased and an increasing number of Tibetans traveled to India for education.<sup>184</sup> In the last thirty-five years of its colonial reign in India, Britain's position regarding Tibet's political status was ambiguous; it recognized China's claim to suzerainty over Tibet but simultaneously supported Tibet's claim to "de facto" independence.<sup>185</sup> Upon achieving its independence, India inherited these "consistent ambiguities" and unresolved problems between British India and China, including disputes over large sections of the border separating China and India.<sup>186</sup>

In the early years of India's independence, from 1947-1962, India enjoyed friendly relations with China. Prime Minister Jawaharlal Nehru believed that the two countries had much in common based on a "shared history of problems associated with colonization and common problems of poverty and underdevelopment."<sup>187</sup> In fact, India was the first country formally to recognize the People's Republic of China (PRC) on January 1, 1950.<sup>188</sup> Later that year, when the People's Liberation Army (PLA) occupied Tibet, India neither interfered with nor condemned the occupation.<sup>189</sup>

In 1954, India and China signed an eight-year agreement on Tibet in which the two countries agreed to the principles of Panch Sheel, including "respect for each other's territorial integrity and sovereignty, non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence."<sup>190</sup> This agreement effectively repudiated all earlier

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control over Tibet. *Id.* In 1910, Chinese troops invaded Lhasa and the Thirteenth Dalai Lama fled to India. After the fall of the Manchu Dynasty one year later, however, the Dalai Lama returned to Tibet in 1912 and expelled the Chinese troops. *Id.* at 334, 399. In 1914, England, China and Tibet signed the Simla Convention, which recognized Tibet's autonomy, including its right to select the Dalai Lama free from Chinese interference, but within the framework of Chinese suzerainty over Tibet. In particular, China agreed not to "convert Tibet into a Chinese province" or send troops into Tibet, and England agreed not to "annex Tibet or any portion of it" or to station military or civil officers in Tibet. *See* CONVENTION BETWEEN GREAT BRITAIN, CHINA AND TIBET, Simla, arts. 2 & 3 (1914). The Convention also provided a framework for negotiating trade agreements among the three countries. *Id.* at arts. 5-7. Yet Britain and Tibet continued to negotiate trade agreements bilaterally, without the participation of China. These agreements, among other things, established the "McMahon line," just north of Assam, as the border between India and Tibet. MARSHALL, *supra*, at 399-400.

182. MARSHALL, *supra* note 181, at xxi, 334.

183. *Id.* at 334.

184. *Id.* at 466.

185. *Id.*

186. *Id.* at xx - xxii.

187. BIPAN CHANDRA, MRIDULA MUKHERJEE, ADITYA MUKHERJEE, *INDIA AFTER INDEPENDENCE 1947-2000* 164 (2000).

188. *Id.*; *see* HERMANN KULKE & DIETMAR ROTHERMUND, *A HISTORY OF INDIA* 336 (1986).

189. KEAY, *supra* note 180, at 515; CHANDRA, MUKHERJEE & MUKHERJEE, *supra* note 187, at 164.

190. CHANDRA, MUKHERJEE & MUKHERJEE, *supra* note 187, at 150; *see* WOLPERT, *supra* note 181, at 364; LIBRARY OF CONGRESS COUNTRY STUDY, *CHINA* 532 (1987).

agreements signed by the Tibetan government with the British colonial government of India.<sup>191</sup> Although ostensibly about trade, the agreement also dealt with a wide range of other issues, including reciprocal rights to reside and travel between the two countries. It also revoked the right of Tibetans to settle in India indefinitely, which, until 1954, had resulted in the unrestricted migration of Tibetans into India and Indians into Tibet.<sup>192</sup> After 1954, Tibetans who wished to enter India were required to obtain Chinese passports and visas from the Indian Consulate in Lhasa or the Indian trade mission in Gyantse.<sup>193</sup> Because, however, the number of people crossing the Indo-Tibetan border remained limited, this did not become a significant issue between the Chinese and Indian governments, and violations of the requirement to obtain legal papers were not treated as serious infractions.<sup>194</sup>

Prime Minister Nehru believed that having lost Tibet as a natural buffer with China, India's security could best be guaranteed by establishing friendly ties with China, particularly given India's military inability to defend its border with China.<sup>195</sup> The phrase Hindi-Chini bhai-bhai ("India and China are brothers") came to symbolize India's foreign relations with China during this period.<sup>196</sup>

The situation changed in 1959 when a large scale revolt in Tibet against the Chinese occupation of Tibet was crushed by the Chinese military. Fearing for his safety, Tibet's spiritual and temporal leader, the Fourteenth Dalai Lama, and his retinue sought asylum in India. Prime Minister Nehru personally ordered that the Dalai Lama and his immediate retinue be granted asylum in India. In the four years following the Dalai Lama's escape in March 1959, approximately 40,000 Tibetans fled to India to avoid persecution by the Chinese authorities.<sup>197</sup> The Indian Government generously offered these refugees shelter and allowed them to reside and work, principally on construction and other labor projects, in India. Nehru did not, however, recognize the nascent Tibetan government-in-exile or permit it to undertake any political activities.<sup>198</sup> Initially, India regarded this influx of Tibetans as temporary and therefore housed them in makeshift refugee camps.<sup>199</sup> The arrival of the Dalai Lama in India marked the beginning of a delicate political

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191. Affidavit of Tsering Shakya, ¶ 1, Feb. 2004. Tsering Shakya is the director of Tibet Times; a member of the advisory board of the International Association of Tibetan Studies, the past director of research for the Tibet Information Network, and the author of highly-regarded books and articles on Tibetan history and culture. (on file with author) (hereinafter "Shakya Affidavit").

192. *Id.* Previously, many Tibetan aristocrats sent their children to be educated in British schools in India and merchants traveled freely between the two countries. *Id.*

193. *Id.*

194. *Id.*

195. COUNTRY STUDY, CHINA, *supra* note 190, at 532.

196. *Id.*; WOLPERT, *supra* note 181, at 364.

197. LOUISE W. HOLBORN, REFUGEES: A PROBLEM OF OUR TIME, THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951-72, at 720-21.

198. CHANDRA, *supra* note 187, at 168.

199. Shakya Affidavit, *supra* note 191, at ¶ 1.b.



dance by the Indian government, which, on the one hand, made extraordinary efforts to accommodate the large influx of Tibetan refugees, and, on the other, tried to avoid taking an official stance on Sino-Tibetan politics.

In 1962, war broke out between China and India ending the 1954 accord.<sup>200</sup> Chinese troops attacked and easily overran the northeastern border, where they met virtually no resistance from Indian forces. On November 9, 1962, Nehru appealed to the United States and Great Britain for help, but the next day, China unilaterally withdrew its forces from the region. The incident left India humiliated and Nehru reportedly never recovered from the defeat, which continued to haunt him until his death in 1964.<sup>201</sup>

India's relationship with China remained hostile during the 1960s and 1970s, the era of China's Cultural Revolution. China accused India of assisting rebels in Tibet and supported Pakistan in its 1965 and 1971 wars with India. In August 1971, India signed a Treaty of Peace, Friendship, and Cooperation with the Soviet Union prompting China's U.N. representative to denounce India as a "tool of Soviet expansionism."<sup>202</sup>

Beginning in December 1979, however, China and India attempted to improve their relations. They conducted eight rounds of border negotiations between 1981 and 1987. In February 1987, both countries deployed troops to the border area, but despite fears of a second border war, no major military clashes occurred.<sup>203</sup> Thereafter, relations between India and China improved gradually. In 1988, Prime Minister Rajiv Gandhi visited China and signed bilateral agreements on cultural ties, civil aviation, and science and technology. The two countries also agreed to work toward a peaceful settlement of their long-standing border dispute. China continued to insist, as it had since its invasion and annexation of Tibet in 1950, that Tibet constituted an inalienable part of China and therefore that it would not tolerate anti-China political activities by Tibetans living in India. The two countries held additional rounds of talks in an effort to resolve their border disputes between 1988 and 2003. But despite some progress in achieving mutual troop reductions in the border region, the talks did not resolve the dispute.

Another major shift in India's relationship with China occurred on June 24, 2003 when India's Prime Minister Atal Bihari Vajpayee signed a

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200. The Indian government soon recognized that while Indian workers suffered from altitude sickness in the high Himalayan passes along the Sino-Indian border, where roads and infrastructure were needed, Tibetans did not. Most of the Tibetans who had fled to India were therefore put to work by the Public Work Department as laborers on the rushed road building projects high in the Himalayas. In addition, some 10,000 Tibetans were recruited into the Indian army to serve in the special frontier forces. Even today, approximately 5000 Tibetans still serve in these forces. *Id.* at ¶¶ 1.c and 1.d.

201. CHANDRA, *supra* note 187, at 165-67, *see* DOMINIQUE LAPIERRE & LARRY COLLINS, FREEDOM AT MIDNIGHT 584 (1975).

202. LIBRARY OF CONGRESS COUNTRY STUDY, INDIA *supra* note 179; COUNTRY STUDY, CHINA, *supra* note 189, at 533.

203. COUNTRY STUDY, CHINA, *supra* note 189, at 533; LIBRARY OF CONGRESS COUNTRY STUDY, INDIA *supra* note 179.

"Declaration of Principles of Relation and Comprehensive Cooperation" with China's Prime Minister Wen Jiabao. In this document, India for the first time formally recognized Tibet as a "part of the territory of the People's Republic of China."<sup>204</sup> Up until this declaration, India had studiously avoided officially recognizing China's annexation of Tibet. In exchange, China agreed to start border trade through India's northeastern border state of Sikkim, signifying China's acceptance of India's claim to Sikkim. The joint declaration provides that India will not allow "anti-China political activities" by Tibetan exiles living in India.<sup>205</sup>

China's demand that India limit the activities and movement of Tibetan exiles in India may lead to a deterioration of the conditions facing Tibetans residing in or transiting through India in flight from persecution. As described more fully below, India's longstanding tolerance of its substantial Tibetan community appears to be waning and India is no longer willing to rely on a policy of voluntary repatriation.<sup>206</sup>

## B. *India's Shifting Approach to Tibetan Refugees*

### 1. *Tibetan Refugees In Flight from 1959 and Establishment of Settlements (1959–1979)*

The PLA invaded and occupied Tibet in 1950. In March of 1959, popular demonstrations against the Chinese erupted in Lhasa. Word of a request by the Chinese for the Dalai Lama to attend a theatrical show inside the Chinese military base and without his typical retinue prompted widespread fears that the Dalai Lama was about to be kidnapped. On March 10, 1959, approximately 30,000 Tibetans took to the streets, guarding the gates of Norbulingka where the Dalai Lama was housed and demonstrating in Lhasa for the expulsion of the Chinese from Tibet. In the ensuing days, tensions mounted as 40,000 Chinese troops massed in Lhasa. The first shots were fired on March 17<sup>th</sup> and later that night, as the Chinese started shelling the city, the Dalai Lama, his family, and a small entourage escaped from Norbulingka.<sup>207</sup>

Two days after the Dalai Lama's escape, Norbulingka was shelled and overtaken. Fighting raged in Lhasa over several days, leaving thousands of Tibetans dead and the city under the control of the Chinese. The Dalai Lama had intended to stop at a point near the Indian border but within Tibet, where he would re-establish his government and open negotiations with the Chinese. However, upon learning of the carnage in Norbulingka and Lhasa and

204. BBC News, *India and China Agree Over Tibet*, June 24, 2003, available at [http://news.bbc.co.uk/2/hi/south\\_asia/3015840.stm](http://news.bbc.co.uk/2/hi/south_asia/3015840.stm); Brahma Chellaney, *Vajpayee Kowtows to China*, JAPAN TIMES, July 8, 2003.

205. BBC News, *supra* note 204.

206. See *infra* text accompanying notes 253–61.

207. JOHN F. AVEDON, *IN EXILE FROM THE LAND OF THE SNOWS* 50–61 (1979); *FREEDOM IN EXILE, THE AUTOBIOGRAPHY OF THE DALAI LAMA* 131–38 (1990).

the announcement by Zhou Enlai dissolving the Tibetan government, the Dalai Lama decided to seek asylum in India. On March 31, 1959, the Dalai Lama and an entourage of eighty arrived in India, crossing from the small town of Mangmang on the Tibetan side of the border into the state of Assam.<sup>208</sup>

Upon arrival in India, the Dalai Lama was presented with a telegram from Prime Minister Nehru which read:

My colleagues and I welcome you and send greetings on your safe arrival in India. We shall be happy to afford the necessary facilities to you, your family and entourage to reside in India. The people of India, who hold you in great veneration, will no doubt accord their traditional respect to your personage. Kind regards to you. Nehru.<sup>209</sup>

Popular support for the Dalai Lama and the Tibetan cause left Nehru little choice but to permit the Dalai Lama and his entourage to enter India. Nehru had earlier announced the Dalai Lama's safe arrival in India to a standing ovation in Parliament. Nehru appreciated, however, that granting the Dalai Lama safe haven in India would likely be perceived by China as a violation of Panch Sheel and as a violation of India's commitment to non-alignment. Nehru therefore emphasized "that his support of the Dalai Lama was humanitarian only, based on a 'tremendous bond' growing out of centuries of spiritual and cultural exchange between India and Tibet."<sup>210</sup> That humanitarian support, he made clear, would not extend to permitting the Dalai Lama to use India as a base from which to advocate for Tibetan independence. Nehru hoped that by isolating the Dalai Lama and his retinue in a northern hill station, both he and the Tibetan cause would fade into obscurity.

India initially transported the Dalai Lama to Mussoorie, a hill station north of Delhi, where Birla House had been requisitioned by the Indian government for his use until long term plans could be formulated. Three days later, on April 24, 1959, Prime Minister Nehru conferred with the Dalai Lama in Mussoorie. Although the discussion was cordial, Nehru made clear that he intended to protect India's relationship with China by adhering to the 1954 Panch Sheel memorandum, and that he would not raise the question of Tibet's independence.<sup>211</sup>

As the Dalai Lama was settling into Mussoorie, thousands of Tibetans were following him into exile, sometimes as many as 1500 per week. Many died in transit or soon after arrival. Those who survived the perilous journey over the Himalayas generally arrived in India starving, exhausted, unaccus-

208. AVEDON, *supra* note 207, at 58-61; FREEDOM IN EXILE, *supra* note 207, at 141.

209. FREEDOM IN EXILE, *supra* note 207, at 144.

210. AVEDON, *supra* note 207, at 66.

211. *Id.* at 146-47.

tomed to the low altitude and the hot climate, and in need of medical care.<sup>212</sup> India's Ministry of External Affairs established two transit camps for them, one in Misamari near the Tibetan border with Assam, the other in Buxa Duar, near the Bhutanese border in West Bengal.<sup>213</sup>

By June 1959, 20,000 Tibetans had arrived in India and the numbers were increasing on a daily basis. Misamari alone housed 15,000 refugees between May and June of 1959.<sup>214</sup> The Government of India was not alone in providing relief to the refugees: participating in the relief effort was the Central Relief Committee, a coalition of opposition parties led by Acharya Kripalani of the Praja Socialists, who had earlier condemned Panch Sheel as "born in sin to put the seal of our approval on the destruction of an ancient nation."<sup>215</sup> The Central Relief Committee worked to obtain food, medical supplies and international aid for the refugees in the two camps. Other organizations participating in the relief effort included CARE, which provided 90% of all rations to the Tibetans at Misamari; the American Emergency Committee for Tibetan Refugees, which provided medical supplies and cash; the Church World Service and the Lutheran World Relief which provided powdered milk; and Catholic Relief Services and the YMCA, which provided other assistance.<sup>216</sup>

In June 1959, the Dalai Lama traveled to Delhi to convince Prime Minister Nehru to find alternative sites in cooler regions for the refugees because many were dying as a result of the heat and low altitude of the two initial settlements. The two leaders agreed that the Tibetans would be put to work on road construction projects in the Himalayas. Nehru also offered to establish a Society for Tibetan Education within the Indian Ministry of Education which would establish and fund schools specifically designed to provide a Tibetan education to the refugee children who were beginning to arrive in large numbers. Nehru announced the creation of the Society that same day.<sup>217</sup>

The Government of India also established handicraft centers for the refugees, including carpet-weaving workshops in Darjeeling and Dalhousie. These workshops became a model that other Tibetans followed with the assistance of international relief organizations, which also supported health care clinics and schools.

On June 20, 1959, immediately upon returning from his discussions with

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212. HOLBORN, *supra* note 196, at 718.

213. According to Holborn, "Three hundred bamboo huts were hastily constructed, and food, clothing, and medical supplies were rushed in, often from great distances. When the refugees arrived at the camps they were provided with rations, clothing, and cooking utensils, as well as some medical care. Serious cases were sent to hospitals in nearby towns." *Id.* at 718. For a description of conditions in the two camps, see AVEDON, *supra* note 207, at 76-77.

214. B.S. Chimni, *The Legal Conditions of Refugees in India*, 7 J. OF REFUGEE STUDIES (No. 4) 378, 389 (1994); HOLBORN, *supra* note 196, at 718-19.

215. AVEDON, *supra* note 207, at 70, 73.

216. HOLBORN, *supra* note 196, at 719.

217. FREEDOM IN EXILE, *supra* note 207, at 149-50.

Nehru, the Dalai Lama held a press conference. He repudiated the 1951 Seventeen Point Agreement, a treaty signed by representatives of the Dalai Lama under duress, that, among other things, declared Tibet to be a part of China. He also described a litany of atrocities committed by the Chinese since the PLA invasion and purported annexation of Tibet in 1950. Finally, he declared "Where I am, accompanied by my government, the Tibetan people recognize us as the government of Tibet. I will return to Lhasa when I obtain the rights and powers which Tibet enjoyed and exercised prior to 1950."<sup>218</sup> The Indian government immediately issued a communiqué stating that it did not recognize the Dalai Lama's government-in-exile.<sup>219</sup>

By September 1959, the number of Tibetan refugees had grown to 30,000.<sup>220</sup> Many had been moved to road camps in northern India. The Province of Mysore, in southern India, was the first to respond to the government's request for land for the refugees with an offer of three thousand acres in Bylakuppe.<sup>221</sup> In February 1960, 666 Tibetans moved to that settlement.<sup>222</sup> Every six months thereafter, another 500 traveled from the north to Bylakuppe. While intended to house three thousand refugees, eventually some 10,000 Tibetans settled on 5,500 acres in Bylakuppe.<sup>223</sup>

The Indian Government's policy toward the Tibetans arriving during this period has been described as follows:

While attempting to maintain the cultural autonomy of the Tibetan people, it nonetheless sought to avoid large concentrations of unsettled refugees which might attract attention. It refrained from officially seeking help from the international community, and sought to retain control over the use made of the very considerable assistance proffered by local and overseas voluntary agencies and their personnel. It did not seek UNHCR assistance, and in the GA, it abstained from voting on both the 1959 and the 1961 resolutions concerning the treatment of the Tibetan people by the Chinese People's Republic. During this period, policy was based on the hope that matters could still be arranged diplomatically so that the Tibetan refugees in India might return to their homeland.<sup>224</sup>

On April 29, 1960, a full year after the Dalai Lama's flight in the aftermath of the Lhasa Uprising, India relocated the Dalai Lama and his nascent government-in-exile to Dharamsala, another hill station in northern India. Dharamsala, which remains the seat of the Tibetan government-in-exile

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218. AVEDON, *supra* note 207, at 72; see FREEDOM IN EXILE, *supra* note 207, at 151.

219. FREEDOM IN EXILE, *supra* note 207, at 151.

220. *Id.* at 153.

221. HOLBORN, *supra* note 196, at 722.

222. FREEDOM IN EXILE, *supra* note 207, at 155; AVEDON, *supra* note 207, at 88.

223. AVEDON, *supra* note 207, at 89.

224. HOLBORN, *supra* note 196, at 720.

(TGIE) is considerably more remote than Mussoorie. Upon arriving there, the Dalai Lama appointed his sister to establish a nursery for Tibetan children, which eventually grew into the Tibetan Children's Village (TCV), a Tibetan school system run by the TGIE with branches throughout India educating 14,000 Tibetan children.<sup>225</sup> The Dalai Lama also established an extensive and comprehensive network of government departments to meet the needs of the growing Tibetan population.<sup>226</sup> In the summer of 1960, the TGIE held its first elections for representatives and drafted a Constitution, which was enacted in 1963.

During this period, the TGIE focused on relocating the influx of Tibetan refugees to agricultural settlements throughout India,<sup>227</sup> preserving Tibetan culture and religion, providing vocational training to adults and a Tibetan education to children, and establishing health services for the refugees.<sup>228</sup> By October 1964, 40,000 Tibetans had followed the Dalai Lama into India.<sup>229</sup> India established additional settlements for them and increasingly turned to the international community and voluntary aid organizations for humanitarian assistance. The Central Relief Committee developed a master plan that included additional settlements, vocational training, education, and medical care.<sup>230</sup>

Although some sources characterize Nehru's acceptance and welcome of the Dalai Lama and his entourage into India as a grant of political asylum,<sup>231</sup> this overstates their status and may be misleading, particularly if it is understood in legal terms. In fact, Indian authorities have categorically declared that "India does not give asylum status to refugees from any country."<sup>232</sup> As described below, India is not a signatory to the 1951 United

225. Tibetan Children's Villages, Historical Background, <http://www.tcv.org.in/history.shtml> (last visited May 31, 2009); see *infra* text accompanying notes 446-58 for a discussion of education available to Tibetans in India.

226. AVEDON, *supra* note 207, at 87.

227. See HOLBORN, *supra* note 196, at 722-25 (describing some of the successful and unsuccessful efforts to create settlements in different parts of India).

228. The major institutions established in Dharamsala include the Tibetan Institute of Performing Arts which maintains the music and dance of Tibetan culture; the Norbulingka Institute, which maintains Tibetan crafts including Thangka painting, wood working, brass molding, and furniture design; the Library of Tibetan Works and Archives, which is a depository of Tibetan artifacts and manuscripts; the Tibetan Medical and Astrology Institute, which preserves the ancient system of Tibetan medicine; and the Tibetan Children's Village, which houses and educates Tibetan children. See generally The Official Website of the Central Tibetan Administration, <http://www.tibet.net/> (last visited May 31, 2009).

229. HOLBORN, *supra* note 196, at 720-21.

230. For a detailed description of the master plan, see HOLBORN, *supra* note 196, at 727-36.

231. See, e.g., Immigr. & Refugee Bd. of Canada, Extended Response to Information Request, IND33125.EX, December 23, 1999, available at [http://www2.irb-cisr.gc.ca/en/research/ndp/ref/index\\_e.htm?docid=18&cid=0](http://www2.irb-cisr.gc.ca/en/research/ndp/ref/index_e.htm?docid=18&cid=0); Rahmatullah Khan, *India: India and its Refugees*, Roundtable of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons 106-10.

232. Government of India: Ministry of Home Affairs – Lok Sabha, Unstarred Question No. 4544 to be Answered on 22.04.2003, Question "Refugee Problem," No. 4544, filed by Shri P. Mohan, available at <http://164.100.24.208/lsg/quest.asp?qref=61070>.

Nations Convention Relating to the Status of Refugees or its 1967 Protocol, nor has India enacted domestic legislation regarding the protection of refugees.<sup>233</sup> Although the Government of India refers colloquially to this first wave of Tibetans as “refugees,” only the Dalai Lama and twenty others were formally recognized as refugees and even these individuals enjoy only de facto refugee status rather than true, de jure political asylum. In fact, India studiously avoids referring to the Dalai Lama as a refugee and instead refers to him as an “honored guest.” The Dalai Lama travels with an Indian travel document, which is not equivalent to a passport, and does not have refugee papers issued by the United Nations. Therefore, even the Dalai Lama does not enjoy the full international legal rights of an official refugee. He needs to obtain a separate visa for each trip from the country of destination and another one from India authorizing him to return.<sup>234</sup>

In sum, India and non-governmental humanitarian aid organizations provided extensive logistical, financial and practical assistance to the tens of thousands of Tibetan refugees who arrived during this period. But although India referred (and still does at times refer) to them informally as refugees, they do not, strictly speaking, qualify as refugees from the standpoint of either Indian or international law. Most hold Registration Certificates (RCs) which must be annually renewed and which give them a lawful, although impermanent, status during the period of the issuance.<sup>235</sup> The RC’s also enable the holder to obtain an Identity Card which, if stamped “No Objection to Return to India,” enables the holder to travel outside of India.<sup>236</sup> However, none of these Tibetans enjoy formal refugee status or the full range of protections afforded by the UN Refugee Conventions, including a guaranty of permanent resettlement.

However one classifies this informal arrangement, it ended in 1963. At that time, India ceased to recognize new arrivals from Tibet as “refugees” or provide them with official documentation or other forms of government assistance.<sup>237</sup>

## 2. *Refugees Arriving Between 1980 and 1993*

Because of China’s stringent control over freedom of movement during the

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233. B.S. CHIMNI, *INTERNATIONAL REFUGEE LAW* 463 (2000).

234. Memorandum of Robert Joseph Barnett dated Oct. 1999, ¶ 9 (hereinafter “Oct. 1999 Barnett Memo”) (on file with the author). Robert Barnett is a writer and researcher on contemporary Tibetan politics and an Adjunct Research Scholar at the East Asian Institute, a department of the School of International and Public Affairs of Columbia University. He is the author of numerous books and articles regarding Tibet. From 1987 until 1998, he was the Director of the Tibet Information Network.

235. *Immigr. & Refugee Bd. of Canada, Response to Information request*, ZZZ100699.E, February 6, 2006, available at <http://www2.irb-cisr.gc.ca/en/research/rir/?action=record.viewrec&gotorec=449889>.

236. Extended Response to Information Request IND33125.EX, *supra* note 231 (citing a United States Senate Foreign Relations Committee hearing on Tibet on May 13, 1997).

237. *Id.*; Interview by the Tibet Justice Center with Ngodup Dongchung, Dep’t of Security, Central Tibetan Admin., Dharamsala, May 1, 2009 (on file with the author).

years roughly corresponding to the Cultural Revolution, few Tibetans arrived in India between the mid 1960s and 1979.<sup>238</sup> But a second wave of Tibetans began to arrive in India beginning in about 1979 or 1980, when Deng Xiaoping initiated a program of comparative liberalization throughout China and within Tibet, which made travel from Tibet to India more feasible.<sup>239</sup> A larger contingent of Tibetans began to arrive in and after 1985 in response to reinvigorated repression in Tibet, which led many political activists to escape to India via Nepal.<sup>240</sup> Approximately 25,000 Tibetans arrived in India between 1986 and 1996, increasing the total Tibetan population by about 25 percent.<sup>241</sup>

Tibetans arriving directly from Tibet were immediately deported back to Tibet. By contrast, India allowed Tibetans arriving via Nepal to enter the country, although it did not officially recognize them, refer to them as refugees, or issue official documents of any sort.<sup>242</sup> One Central Tibetan Administration (CTA)<sup>243</sup> officer recounted that, in 1979, the central government of India issued strict instructions to provincial and other local authorities that RCs were not to be issued to newly arriving Tibetans;<sup>244</sup> their presence in India technically violated "the law of the land."<sup>245</sup> However, India turned a blind eye to the common practice whereby most new arrivals would obtain documents with the CTA's assistance by pretending to be unregistered children born to Tibetans who had settled in India many years earlier, at a time when the Indian government had been issuing RCs to new arrivals and their progeny.<sup>246</sup> Other Tibetans who arrived during this time claimed to be temporarily in India on pilgrimage but then remained in the country. Gradually, this second wave of arrivals became integrated into existing Tibetan settlements, monasteries, schools and other communities. Indian officials, although aware of this *de facto* emigration, did little or nothing to stop it.

238. Oct. 1999 Barnett Memo, *supra* note 234, at ¶ 13.

239. Extended Response to Information Request IND33125.EX, *supra* note 231.

240. Oct. 1999 Barnett Memo, *supra* note 234, at ¶ 13.

241. See U.S. Senate Foreign Relations Committee Hearing on Tibet, May 13, 1997, testimony of Maura Moynihan, Consultant, Refugees International, available at [http://www.tibet.ca/en/newsroom/wtn/archive/old?y=1997&m=5&p=20\\_3](http://www.tibet.ca/en/newsroom/wtn/archive/old?y=1997&m=5&p=20_3).

242. United States Bureau of Citizenship and Immigration Services, India: Information on Tibetan Refugees and Settlements, May 30, 2003, IND03002.ZNY, available at <http://www.unhcr.org/refworld/docid/3f51f90821.html>; Oct. 1999 Barnett Memo, *supra* note 234, at ¶ 15; Unclassified Cable No. 012480 from American Embassy New Delhi to Secretary of State Washington D.C., Dec. 19, 1997 (on file with the author); see also Response to Information Request ZZZ100699.E, *supra* note 235 ("Tibetans who arrived after 1979 are 'not officially recognized by the Indian government.'") (internal quotation marks omitted).

243. The Central Tibetan Administration was previously called the Tibetan Government-in-Exile. The change was made to accommodate India's reluctance to acknowledge a Tibetan government-in-exile.

244. Interview by the Tibet Justice Center with Karma Rinchen, Security Officer, Security Dep't, Dharamsala, Oct. 12, 2003 (on file with the author).

245. Extended Response to Information Request IND33125.EX, *supra* note 231.

246. Oct. 1999 Barnett Memo, *supra* note 234, at ¶ 16.



The absorption strategy collapsed, however, in the early 1990s because of a dramatic increase in the number of new arrivals. In the 1980s, on average, fewer than 1,000 Tibetans arrived annually. That number more than doubled by the early 1990s. In 1992, for example, 3,374 Tibetans arrived in northern India. Existing facilities could not accommodate this influx of immigrants. Consequently, latent tensions between some proximate Tibetan and Indian communities flared during this period as did tensions within the Tibetan community between the older generation and newer arrivals. As a result, the Tibetan Government in Exile, in consultation with the Indian Government, began to curtail the unofficial process whereby they furnished RCs to new arrivals and to reconsider its policy towards them.<sup>247</sup>

### 3. *Refugees Arriving Between 1994 and 1999*

India announced a new policy regarding Tibetans in 1994, after a serious incident of violence in April of that year between the Indian and Tibetan communities in Dharamsala. The incident grew out of an argument between a young Tibetan and Indian taxi drivers that quickly escalated into a larger incident where local citizens looted Tibetan homes and shops and destroyed Tibetan schools and government offices. After the incident, Indian politicians and newspaper editorialists criticized Tibetans for taking advantage of Indian hospitality and criticized the Indian Government for its tolerance of the Tibetan community.<sup>248</sup> The Tibetan Refugee Reception Centre in Dharamsala temporarily closed in May 1994 and the CTA developed a new policy for new arrivals.

The CTA announced this new policy on August 16, 1994. It called, in short, for voluntary repatriation: new arrivals would no longer be absorbed into the various Tibetan communities and settlements in India but instead encouraged to return voluntarily to Tibet. New arrivals would continue to receive some assistance, but only until they received an audience with the Dalai Lama, which, in practice, usually meant for about three months. But the CTA would no longer assist them in finding a job or obtaining an RC.<sup>249</sup> Children, however, would be permitted to remain in India to complete their education at one of the Tibetan schools. In January 1995, the CTA issued regulations specifying how long different categories of new arrivals could remain in India: first, monks between the ages of sixteen and twenty-five could remain for six months. After that, they would be required to pass examinations; if they failed, they would be asked to return to Tibet. Second, children between the ages of six and thirteen could remain in India to study, while children between the ages of fourteen and seventeen would be referred

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247. *Id.* at ¶¶ 17-19, 22.

248. *Id.* at ¶ 20.

249. *Id.* at ¶ 21; Tibet Justice Center interview with Tashi Wangdoo, Representative of the Dalai Lama, Delhi Office (September 22, 2003) (on file with the author).

to one of the TCV schools, and those between the ages of eighteen and thirty could study for one year after which they would be asked to return to Tibet.<sup>250</sup> Consequently, for example, of the 2,843 Tibetans who arrived in India 1996, the CTA asked 1,200 to return because of its inadequate resources.<sup>251</sup>

The upshot of this policy was that new arrivals could no longer depend on the CTA to assist them in obtaining RCs; without that assistance, few Tibetans managed to secure RCs, even fraudulently.<sup>252</sup> Tibetans who arrived after 1994 therefore faced an increasingly insecure environment.

Indeed, beginning in 1994, Indian officials increasingly patrolled Tibetan communities and conducted spot checks to determine whether Tibetans had RCs. One highly publicized incident occurred in 1995 when the police detained three Tibetan new arrivals and imprisoned two of them based on accusations that they were Chinese spies or informants.<sup>253</sup> In January 1998, Indian officials detained twenty-one new arrivals in Dharamsala and charged them under Section 14 of the Foreigner's Act for failure to produce a valid RC.<sup>254</sup> One of those detained was Lobsang Lungtok, a well known refugee, who was held for more than twenty days and threatened with deportation, which only international publicity and pressure on the Indian government prevented.<sup>255</sup> Reflecting these and similar developments, a March 1999 article in an Indian newspaper reported that a number of Tibetans had been deported and that the attitude of Indian authorities to Tibetans arriving after 1994 had significantly hardened.<sup>256</sup>

#### 4. *Refugees Arriving Between 2000 and the Present*

Coincident with a major effort to improve its relationship with China, India has increasingly taken proactive measures to stem the tide of Tibetan

250. Extended Response to Information Request IND33125.EX, *supra* note 231.

251. Those returning to Tibet often face detention and interrogation by China. *Id.*

252. Of 12,000 Tibetans arriving between 1993 and 1998, few were able to legally obtain documentation and without legal status, cannot receive government assistance or live in the settlements; they are dependent on the Tibetan community and have a harder time earning a livelihood. *Id.* The same is true for the 10,000 unsettled pre-1979 arrivals without status. *Id.* One member of the Tibetan parliament, who wished to remain anonymous stated, "Once the Tibetan government stopped issuing birth certificates, it became nearly impossible for newly arriving Tibetans to obtain RCs. There are rare cases in which Tibetans are still able to bribe Indian officials in order to get birth certificates." Interview by the Tibet Justice Center with an Anonymous Parliamentarian, Dharamsala, Oct. 18, 2003 (on file with the author).

253. Extended Response to Information Request IND33125.EX, *supra* note 231; Oct. 1999 Barnett Memo, *supra* note 234, at ¶ 28.

254. *Detention of 21 Tibetan Refugees in Dharamsala*, TIBET TIMES, Jan. 31, 1998; *Refugees Charged by Indian Police for Lack of Papers*, TIBET INFORMATION NETWORK, News Update, Feb. 4, 1998; *10 Tibetan People Have Been Arrested in Dharamsala*, TIBET TIMES, Jan. 10, 1998.

255. Lobsang Lungtok had been imprisoned in Tibet for eighteen months for posting a flier that criticized China for destroying Tibetan culture. *See Refugees Charged by Indian Police for Lack of Papers*, Tibet Information Network, Feb. 4, 1998; *see also* Extended Response to Information Request IND33125.EX, *supra* note 231.

256. Oct. 1999 Barnett Memo, *supra* note 234, at ¶¶ 28-32.

refugees into India. Furthermore, it no longer seems willing to rely on a policy of voluntary repatriation. The year 2003 marked a major shift in Sino-Indian relations and the opening of serious trade negotiations between the two countries.<sup>257</sup> In June 2003, India and China signed a "Declaration of Principles of Relation and Comprehensive Cooperation" accompanied by a Memorandum of Understanding in which India, for the first time, formally acknowledged Tibet as part of China. China agreed to open an important trading post on the border with India, and India agreed, among other things, to prohibit Tibetans from engaging in anti-Chinese activities in India.<sup>258</sup>

Improvements in Sino-Indian relations contribute to an increasing aversion on India's part to rely on a policy of voluntary repatriation. Another contributing factor is that conservative, nationalist politicians in India have called on the government to halt the influx of asylum seekers.<sup>259</sup> In response, India's Minister of State in the Ministry of Home Affairs, Vidyasagar Rao, stated in the Lok Sabha on August 21, 2001 that "as far as possible, influx of refugees are discouraged through various measures."<sup>260</sup>

According to a CTA Security Officer, "Tibetans without RCs can be arrested at any time. The local government will arrest Tibetans and then publish the arrests in the local papers to show they are doing something about refugees." He further explained that "when problems arise, such as a suspected spy in the area, police randomly check Tibetans to see whether they are carrying RCs. If the individual does not have an RC, he or she will be arrested and detained for a few months maximum. In these checks, usually twelve or thirteen Tibetans are arrested. Tibetans without RCs live in constant fear of the local police."<sup>261</sup>

In short, two forces have converged to threaten India's traditional tolerant attitude toward the influx of Tibetan refugees. First, India does not want to jeopardize its deepening ties with China; second, internal pressure exists to stem the tide of Tibetan refugees.

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257. In 2005, India and China set a target of \$40 billion in trade by 2010. The trade target has been reset to \$60 billion by 2010. Diwaker & Saibal Dasgupta, *India, China Aim for \$60 Billion Trade by '10*, THE TIMES OF INDIA, Jan. 15, 2008.

258. BBC News Report, *supra*, note 203; Chellaney, *supra* note 203; Oct. 1999 Barnett Memo, *supra* note 234, at ¶ 1. India's commitment to prohibit anti-China activities resulted in a demand by China that India block the November 2008 "Special Meeting" of Tibetans in Dharamsala. Saibal Dasgupta, *China Wants India to Block Dalai Lama's Dharamshala Meet*, INDIAN TIMES, Nov. 13, 2008.

259. Memorandum of Robert Joseph Barnett dated January 2003, ¶¶ 3-4 (hereinafter "Jan. 2003 Barnett Memo").

260. Government of India, Ministry of Home Affairs: Unstarred Question No 4256 in the Lok Sabha, "Refugees in the Country", placed by Shri Sadashivrao Dadoba Mandlik on August 21, 2001, available at <http://164.100.47.132/psearch/QResult13.aspx?qref=27021>.

261. Interview by the Tibet Justice Center with Karma Rinchen, *supra* note 244. An official from the Indian government confirmed that Tibetans may be and have been arrested for not having RCs. According to a District Supervisor of Police in Darjeeling, "Tibetans who are in Darjeeling illegally without RCs are arrested and deported. There is currently a Tibetan being detained for coming to India without the proper paperwork." Interview by the Tibet Justice Center with Rai, District Supervisor of Police, Government of India, Darjeeling, Oct. 30, 2003.

India's response to the arrival of the Karmapa Lama in January 2000 reflects its new position. The Karmapa Lama is the traditional leader of the Kagyu school of Tibetan Buddhism, one of the four schools, and ranks in importance and prestige just below the Dalai Lama and the Panchen Lama. In January 2000, he escaped from Tibet through Nepal to India. The incident publicly embarrassed China, which thereafter communicated to India that granting asylum or refugee status to the Karmapa would interfere with India's recently improved relationship with China. The Indian Government acquiesced in a compromise of sorts: despite international appeals on behalf of the Karmapa, it refused to grant him or his attendants the sort of "refugee" status granted to the Dalai Lama and his retinue in the aftermath of their flight from Tibet in 1959. Instead, India granted the Karmapa Lama and his attendants permission to remain in India on a "temporary" basis.<sup>262</sup>

A series of articles that appeared in prominent India newspapers in 2002, many of which concern new Tibetan arrivals accused of espionage, also may indicate a shift in India's recent attitude toward its Tibetan population. Unlike the charges of espionage leveled against Tibetans in the 1990s, the 2002 campaign targeted well-respected, well-known political dissidents who spoke out publicly and visibly against China. The espionage charges therefore lacked any real credibility and rather seemed designed to harass and intimidate Tibetans in India without RCs.<sup>263</sup> Among those named in these articles were the Karmapa Lama's sister, a nun named Ngodrup Palzom, and his principal adviser and tutor, a monk named Lama Tsewang.<sup>264</sup> Because they had largely orchestrated the Karmapa's escape, which publicly humiliated China, the allegations of espionage lacked credibility. Another member of the Karmapa's entourage, Jigme Gyatso, was also accused of espionage simply because he had been seen kissing a Chinese woman. The charge ultimately proved to have been completely fabricated. It emerges as part of a more general effort to promote a climate of distrust towards newly arrived Tibetans, particularly political dissidents and religious practitioners.<sup>265</sup>

Within two days of the detention of the Karmapa's sister, Indian officials began a crackdown on Tibetan refugees throughout the Kangra district of northern India which encompasses Dharamsala.<sup>266</sup> The Superintendent of Police announced a campaign to "enforce strict checking of all foreigners, including Tibetans."<sup>267</sup> The policy reminds police officers that the only

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262. Jan. 2003 Barnett Memo, *supra* note 260, at ¶¶ 5-6.

263. *Id.* at ¶¶ 7-10.

264. *Karmapa's Sister Interrogated*, TRIBUNE, Chandigarh, November 26, 2002. Lama Tsewang was refused re-entry to India on the grounds that he is a Chinese spy, *Escape: Karmapa Denies China Gameplan*, SUNDAY TRIBUNE, Chandigarh, Dec. 1, 2002; Jan. 2003 Barnett Memo, ¶ 14.

265. Jan. 2003 Barnett Memo, ¶ 10; *see also Karmapa's Aide's 'Affair' Alerts Government*, TIMES OF INDIA, Jan. 7, 2003.

266. Jan. 2003 Barnett Memo, ¶ 11.

267. *Police to Check Illegal Foreigners in Kangra*, TRIBUNE, Chandigarh, Nov. 29, 2002; *see also Two Foreigners Without Documents Held*, TRIBUNE, Chandigarh, Nov. 29, 2002.

Tibetans who should be issued RCs are those born in India and that "no Tibetan can live in India unless he is issued a registration certificate by the local police."<sup>268</sup> A newspaper quoted the Superintendent as stating that

[M]any Tibetans who had entered India illegally recently were able to get themselves registered with the foreign office with the help of Tibetan officials. He said steps were now being taken to check all applicants and issue registration certificates to only those who were proved to be born here. Instructions had been issued to subdivisional police officers also in this regard. The police planned to start a checking drive soon so that all Tibetans and foreigners staying illegally were found out and action taken.<sup>269</sup>

This appears to be the first published statement indicating that India was adopting a policy of pursuing not only Tibetans who lack RCs but also those whose RCs were obtained fraudulently by claiming to be born in India. Because virtually all Tibetans who arrived in India after 1979 obtained RCs in that manner, this new policy, if pursued aggressively, would devastate the Tibetan exile community in India.

In 2003, India implemented another change in policy. It decided to conduct its own screening process in Katmandu, Nepal, of the Tibetans seeking to enter India.<sup>270</sup> Until that point, UNHCR had interviewed Tibetans arriving in Nepal and generally declared them to be "of concern" to the High Commissioner.<sup>271</sup> This sufficed to authorize them to enter India at least for the purpose of traveling to Dharamsala, where they would be screened by the CTA.<sup>272</sup>

In February 2003, the CTA and the Indian Government agreed to an arrangement intended to provide a process for Tibetans to enter India legally.<sup>273</sup> The new policy provides that the Indian Embassy in Katmandu will issue travel documents called "Special Entry Permits" (SEPs) to Tibetans seeking to enter India.<sup>274</sup> Originally, there were four categories of SEPs: refugee, student, pilgrimage, and other. In approximately 2005, the designa-

268. *Police to Check Illegal Foreigners in Kangra*, *supra* note 267.

269. *Id.*

270. Interview by the Tibet Justice Center with Sonam Dagpo, Sec'y of the Dep't of Int'l Rel., Central Tibetan Admin., Dharamsala, July 14, 2005 (on file with the author); Interview by the Tibet Justice Center with Tsering Dhondup, Sec'y of the Dep't of Home, Central Tibetan Admin., Dharamsala, July 15, 2005 ("Dhondup I") (on file with the author); *see also* "Fleeing Tibetans get Help from Indian Embassy," Jan. 6, 2004, [http://www.friendsoftibet.org/databank/tibetafter/20050106-fleeing\\_tibetans\\_get\\_help.html](http://www.friendsoftibet.org/databank/tibetafter/20050106-fleeing_tibetans_get_help.html)

271. U.S. Bureau of Citizenship and Immigration Services, India: Information on Tibetan Refugees and Settlements, May 30, 2003, IND03002.ZNY, *supra* note 242.

272. *Id.*

273. Kashag (Tibetan Parliament) Circular 1069 (61) 2006-2007, <http://www.tibet.net/en/index.php?id=ann&annid=4>.

274. *Id.*

tion “refugee” was dropped.<sup>275</sup> There are now three different types of SEPs: (1) a student permit issued for the period of study; (2) a pilgrimage permit issued typically for three months which cannot be extended beyond six months; and (3) a permit designated “other” which is not limited to a fixed duration but is almost never granted.<sup>276</sup> Before 2003, everyone entering from Nepal entered illegally. With the SEP, Tibetans are now assured safe transit from Nepal to India, although the new policy has meant that many new arrivals in Nepal must wait longer before entering India than previously.<sup>277</sup>

Issuance of an SEP also provides an opportunity to obtain an RC, but only when the SEP is granted in the education category and theoretically in the “other” category. The holder of an SEP in the pilgrimage category is not eligible for an RC. Although the process of issuing SEPs began in 2003, the Indian Government did not begin to issue RCs to new arrivals with SEPs until October 2008.<sup>278</sup>

Another aspect of the agreement reached in 2003 between the CTA and the Indian Government was a one-time offer to provide RCs to unregistered Tibetans who had arrived before the SEP policy. Accounts vary as to how successful this initiative has been.<sup>279</sup>

### C. *Legal Overview*

India is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>280</sup> the International Covenant on Civil and Political Rights (ICCPR);<sup>281</sup> the International Covenant on the Elimination of all Forms of Racial Discrimination (ICERD);<sup>282</sup> the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW);<sup>283</sup> the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>284</sup> and the Convention on the Rights of the Child (CRC).<sup>285</sup>

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275. Interview by the Tibet Justice Center with N. Norbu, Director, Office of Reception Centres, Dharamsala, May 1, 2009 (on file with the author); Interview by the Tibet Justice Center with Ngodup Dongchung, *supra* note 237.

276. *Id.*; see Kashag Circular 1069 (61), *supra* note 273.

277. The average wait for an SEP is four to five months because the permit office has only two employees and issues only about seventy-five permits per month. Interview by the Tibet Justice Center with Tsering Dhondup (Dhondup I), *supra* note 270.

278. Interview by the Tibet Justice Center with Tsering Phuntsok, head of the Tibetan Settlement Office, Central Tibetan Administration, Dharamsala (May 3, 2009).

279. *Id.*; Interview by the Tibet Justice Center with Ngodup Dongchung, *supra* note 237.

280. International Covenant on Economic, Social, and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3.

281. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

282. International Covenant on the Elimination of all Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

283. International Covenant on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

284. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

285. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 44.

India is not, however, a signatory to the 1951 United Nations Convention Relating to the Status of Refugees (1951 Convention) or its 1967 Protocol. Nor has India enacted domestic legislation regarding the protection of refugees.<sup>286</sup> Consequently, UNHCR, the U.N. agency responsible for refugees, may play only a limited role assisting Tibetans in India.<sup>287</sup>

As is more fully described below, Tibetans in India generally are unable to acquire citizenship. The law deems them foreigners subject to the Foreigner's Act of 1946 and the Registration of Foreigners Act of 1939.<sup>288</sup> India's Foreigner's Act of 1946 defines foreigners as persons who are not citizens of India. The Act authorizes the central government to "make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating, or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein."<sup>289</sup> The Registration of Foreigners Act of 1939 provides the same definition of foreigner and authorizes the government to promulgate regulations requiring foreigners to report their presence and movements and produce proof of identity.<sup>290</sup>

The 1951 Convention embodies the customary international law principle of *non-refoulement*, which prohibits the return of a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."<sup>291</sup> But it is unclear whether India regards this principle as part of its national law: India is not a party to the 1951 Convention, and principles of customary international law may be enforced in India only if they do not conflict with domestic law.<sup>292</sup> But, *non-refoulement* is in tension with the 1946 Foreigner's Act, which India's courts construe to grant plenary power to the Indian government to expel a foreigner.<sup>293</sup> Still, *non-refoulement* may be implicit in Article 21 of the Indian Constitution, which guarantees the "right to life"<sup>294</sup> and has been held to

286. U.S. State Dep't, 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: INDIA § 2(d) (2007); CHIMNI, *supra* note 214, at 378, 379.

287. In the early 1960's, the UNHCR facilitated support from India for Tibetan refugees. This ceased in 1975 when the UNHCR withdrew operations from India. Since then, the UNHCR has no formal status in India and has taken the position that the needs of the Tibetan community are being addressed by the Central Tibetan Administration. Interview by the Tibet Justice Center with Mei-Meng Lim Kabaa, Deputy Chief of Mission, UNHCR India, Oct. 3, 2003 (on file with the author and confirmed by the author in telephone call to UNHCR Mission in Delhi on May 4, 2009); *see also* U.S. Comm. for Refugees and Immigrants, U.S. Committee for Refugees World Refugee Survey 2003 - India, June 1, 2003, available at <http://www.unhcr.org/refworld/docid/3eddc49312.html>.

288. Response to Information Request ZZZ100699.E, *supra* note 235.

289. Act No. 31 of 1946, Foreigner's Act § 3(1).

290. Act No. 16 of 1939, Registration of Foreigners Act of 1939, § 3.

291. United Nations Convention on the Status of Refugees, art. 33(1).

292. CHIMNI, *supra* note 214, at 380.

293. *Id.*; K.A. Habib v. Union of India, 1999 (105) CRLJ 919; 1998 INDLAW GUJ 69, ¶19.

294. The Indian Constitution provides that "No person shall be deprived of his life or personal liberty except according to procedure established by law." INDIA CONST., art. 21, *See* CHIMNI, *supra* note 214, at 380.

apply to non-citizens.<sup>295</sup> Indeed, the High Court of Gujarat has explicitly held that *non-refoulement* is encompassed in Article 21.<sup>296</sup>

Nonetheless, although in the early years India “scrupulously respected the principle of *non-refoulement*,”<sup>297</sup> some Tibetans reportedly have been forcibly repatriated to China in more recent years. Beginning in the 1990s, there have been credible reports of repatriation or threats of repatriation of unregistered Tibetans.<sup>298</sup> In 1998, a well-known former political prisoner from Tibet who sought asylum in India was detained for many months because he lacked an RC. Officials threatened him with deportation, which only an international campaign on his behalf prevented.<sup>299</sup>

Virtually all Tibetans attempting to enter India directly from Tibet, as opposed to via India’s border with Nepal, are repatriated without any judicial or quasi-judicial process. Because the border between Tibet and India is a military zone, India typically regards Tibetans entering directly from Tibet as military spies and deports them.<sup>300</sup>

#### D. *The Status of Tibetans Residing in India*

##### 1. *Current Population of Tibetans in India*

The estimates of the number of Tibetans in exile vary somewhat depending on the source. According to the CTA, 145,150 Tibetans reside in exile, 101,242 of whom live in India.<sup>301</sup> Other sources report slightly different estimates: the U. S. Committee for Refugees and Immigrants reports that 100,000 Tibetans live in India;<sup>302</sup> the U.S. Department of State reports that more than 125,000 Tibetans live in India, Nepal and Bhutan,<sup>303</sup> and the Central Tibetan Relief Committee reports that about 140,000 Tibetans reside

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295. Nat’l Human Rights Com’n v. State of Arunachal Pradesh, 1996 (1) SCC 742, 1996 INDLAW SC 1172 (1996) (dealing with the persecution of Chakma tribals living in Arunachal Pradesh).

296. K.A. Habib v. Union of India, 1999 (105) CRLJ 919; 1998 INDLAW GUJ 69, ¶19 The court noted that “The principle of ‘non-refoulement’ is encompassed in article 21 of the Constitution of India and the protection is available, so long as the presence of the refugee is not prejudicial to the national security.” *Id.*

297. CHIMNI, *supra* note 214, at 381.

298. Robert Barnett’s memorandum refers to credible incidents of forcible repatriation of Tibetans and to a 1999 Indian newspaper report of Tibetans being forcibly repatriated to China, Oct. 1999 Barnett Memo, *supra* note 234, at ¶¶ 5 & 31. However, Tibet Justice Center interviews of CTA officials, NGOs and residents of Dharamsala in April and May of 2009 indicate that there have been no recent deportations of Tibetans to China.

299. Oct. 1999 Barnett Memo, *supra* note 234, at ¶ 30.

300. Oct. 1999 Barnett Memo, *supra* note 234, at ¶ 26.

301. Introduction to Central Tibetan Administration, Department of Information and International Relations, Dharamsala, 2008, inside cover.

302. U.S. Comm. for Refugees and Immigrants, World Refugee Survey 2004 Country Report; see 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: INDIA, *supra* note 287, at § 2(d).

303. U.S. State Dep’t, Bureau of Population Refugees and Migration, FY 2009 Funding Opportunity Announcement for NGO programs benefiting Tibetan refugees in South Asia, <http://www.state.gov/g/prm/122028.htm> (last visited June 1, 2009).



in India, Nepal and Bhutan.<sup>304</sup> For India in particular, the highest estimate is that of U.S. Bureau of Citizenship and Immigration Services, which reports that the number of Tibetans in India alone is 110,000. This figure fluctuates because of the steady stream of new arrivals annually, but conversely, the annual decision by some Tibetans to return to Tibet.<sup>305</sup>

The estimated number of Tibetans arriving in India annually also varies, but most sources report that between 1,500 and 3,500 Tibetans arrive each year.<sup>306</sup> That number, however, has dramatically decreased since March of 2008, when the Chinese government began its crackdown in Tibet.<sup>307</sup> Their cited reasons for traveling to India, either temporarily or permanently, include escaping from persecution, reuniting with their families, getting a Tibetan education, and making a pilgrimage to see the Dalai Lama.<sup>308</sup>

## 2. Registration Certificates (RCs) and Identity Cards

### *Registration Certificates (RCs)*

In order to reside legally in India, Tibetans must possess a Registration Certificate, signifying that the holder has registered as a foreigner in India. The RC must be renewed annually or semi-annually depending on the place of issuance.<sup>309</sup> Whether or not Tibetan refugees in India can acquire RCs depends, to a large extent, on when they arrived in India. The early arrivals –

304. Central Tibetan Relief Committee, <http://tibetgov.net>.

305. See India: Information on Tibetan Refugees and Settlements, May 30, 2003, *supra* note 242.

306. See, e.g., Extended Response to Information Request IND33125.EX, *supra* note 231; U.S. Comm. for Refugees and Immigr., *supra* note 302. The U.S. State Department reports that between 1,500 and 3,000 Tibetans transit through Nepal to India each year. FY 2009 Funding Opportunity Announcement, *supra* note 304. In 1996, 2,843 Tibetans arrived in India; in 1997, there were 2,000 new arrivals; in 1998, there were 3,100 new arrivals. Extended Response to Information Request IND33125.EX, *supra* note 231. In 2000, there were 2,900. Rama Lakshmi, *Escaping Chinese, Tibetans Join Leader in India*, WASHINGTON POST, December 15, 2000. In 2002, 1,268 Tibetans traveled to India through Nepal. U.S. State Dep't, Country Reports on Human Rights Practices, China, 2003. In 2003, 3,500 Tibetans arrived in India. World Refugee Survey 2004 Country Report, *supra* note 307. In 2004, 2,427 Tibetan's approached the UNHCR on their way to India through Nepal. U.S. State Dep't, Country Reports on Human Rights Practices, China, 2004. In 2005, there were 3,395, with 3,352 that left for India. U.S. Dep't of State, Country Reports on Human Rights Practices, China, 2005. And in 2006, 2,946 left Tibet for India. United States Department of State, Country Reports on Human Rights Practices, China, 2006. The director of the Reception Centre in Dharamsala estimates that until March 2008, approximately 2,500-3,000 Tibetans arrived each year. Tibet Justice Center interview with N. Norbu, *supra* note 275.

307. Interview by the Tibet Justice Center with N. Norbu, *supra* note 275. According to Mr. Norbu, whose agency temporarily houses the new arrivals in a reception center in Dharamsala and oversees their processing, only 650 Tibetans arrived between March 10, 2008 and December 31, 2008. From January 1, 2009 to May 1, 2009 approximately 150-160 Tibetans arrived. *Id.*; see also *From a Refugee Shelter In India, Tibetan Monks Can Recount their Escape*, N.Y. TIMES, June 21, 2009, at 8 (reporting 550 new arrivals in 2008 and 176 from Jan. 1, 2009 to May 31, 2009).

308. Extended Response to Information Request IND33125.EX, *supra* note 231; see also Direct Relief International, Asia and Pacific Post, June 2004, <http://www.directrelief.org/PressCenter/Commentary/NotesFromTheField/AsiaPacificEntry.aspx?id=1956&blogid=432> (last visited June 1, 2009) (stating that the majority of the 2,500 to 3,000 new arrivals are fleeing persecution or repression).

309. Extended Response to Information Request IND33125.EX, *supra* note 231.

those following the Dalai Lama's flight from Tibet in 1959 and continuing into the early 1960's – were given RCs by the Indian government. Those who arrived in subsequent waves were generally unable to secure valid RCs.<sup>310</sup> Beginning in 2008, the Indian government began issuing RCs but only to a limited category of Tibetans.<sup>311</sup>

In or about 1979 or 1980, the Indian government ceased issuing RCs to new arrivals because India no longer considered Tibetans to be "refugees."<sup>312</sup> The only exceptions were for Tibetans born in India who were required to register after their eighteenth birthday. However, during the 1980s, India turned a blind eye to the widespread practice of absorption of new arrivals into the Tibetan community. The CTA would pretend that the new arrivals were only temporarily in India on pilgrimage and would be returning to Tibet or that the new arrivals had actually been born in India but had not registered. By falsely claiming to be unregistered children of members of the 1959 contingent, many of these Tibetans were able to obtain RCs.<sup>313</sup>

There are varying accounts regarding how difficult it was to obtain RCs during the 1980s. Most sources agree that it was particularly hard for Tibetans over thirty because of the requirement that Tibetans born in India had to apply for an RC before their eighteenth birthday.<sup>314</sup>

Beginning in the early 1990s, the CTA, in consultation with the Indian government, stopped facilitating the issuance of RCs and stopped issuing birth certificates.<sup>315</sup> As described earlier, the CTA abandoned its policy of absorption of the new arrivals into the Tibetan community and instead adopted a policy of voluntary repatriation. Without the assistance of the CTA, it was exceedingly difficult for the new arrivals to obtain an RC.<sup>316</sup> Most Tibetans did not have birth certificates and could not obtain them. Bribery became the only way to obtain an RC, which was not an option for those Tibetans unable to afford the bribe.<sup>317</sup>

Beginning in October 2008, the Indian government began issuing RCs to Tibetans who entered India with a Special Entry Permit in the category of education or "other." These RCs are stamped "long term stay permit," but,

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310. *Id.*

311. See *supra* text accompanying notes 273-78 and *infra* text accompanying note 318.

312. See Response to Information Request ZZZ100699.E, *supra* note 235. According to an interview conducted in 1996 with Mr. Sonam Topgyal, then Minister of the Department of Home for the Central Tibetan Administration, India does not recognize Tibetans who arrived after 1979 as refugees and does not provide them with Registration Certificates. Thus, their presence in India is illegal. Extended Response to Information Request IND33125.EX, *supra* note 231; *Tibetan Refugees in India: Declining Sympathies, Diminishing Rights*, Human Rights Features, April 30, 2008, available at <http://www.hrdc.net/sahrdc/hrfeatures/HRF183.htm>.

313. Oct. 1999 Barnett Memo, *supra* note 234, at ¶ 16.

314. See Interview by the Tibet Justice Center with Ugyen Sonam, Tibetan resident in Dharamsala, October 17, 2003 (on file with the author).

315. According to the Immigration and Refugee Board of Canada, the CTA stopped issuing birth certificates in 2002 or 2003. Response to Information Request ZZZ100699.E, *supra* note 235.

316. See India: Information on Tibetan Refugees and Settlements, May 30, 2003, *supra* note 242.

317. Interview by the Tibet Justice Center with Anonymous Parliamentarian, *supra* note 252.

like all RCs, need to be renewed annually or every six months, depending on the region. Tibetans with a Special Entry Permit in the "pilgrimage" category are ineligible for an RC. Since pilgrimage permits are typically issued for three months and may not be extended beyond six months, Tibetans who overstay their pilgrimage permit are illegal and the CTA is powerless to alter their status.<sup>318</sup>

In an effort to register Tibetans who arrived before the Special Entry Permit system was initiated, the CTA and the Indian Government agreed to a one-time offer to provide RCs to unregistered Tibetans. Pursuant to this agreement, the CTA encouraged unregistered Tibetans to come forward and place their name on a list, which would be presented to the Indian government and which would presumably result in issuance of RCs. Accounts vary as to how successful this initiative has been.<sup>319</sup>

Without an RC, Tibetans' presence in India is illegal. They are subject to harassment by the police, detention for up to three months, payment of a fine and occasionally deportation if there are suspicions of espionage. There are a multitude of stories about Tibetans being arrested and jailed for not having an RC.<sup>320</sup> As a result, Tibetans in India without an RC live in a constant state of fear and insecurity. Many do not travel outside their communities; many youth are afraid to venture outside after 6:00 p.m. Tibetans without RCs are often unable to find housing because landlords require proof of legal status, which results in undocumented Tibetans moving in with friends and family in severely overcrowded accommodations. They are unable to secure accommodations because guesthouses and hotels require an RC. Without an RC, they cannot open a bank account and they have difficulty finding work because most businesses will not hire Tibetans without RCs. Finally, without RCs, Tibetans are ineligible for employment in the CTA.<sup>321</sup>

Even for those Tibetans who do have RCs, there is no guarantee that the RCs will be renewed at the end of their term. Whether an RC is renewed is completely within the discretion of Indian authorities. Thus, Tibetan refugees, even those possessing lawful documents, live in a perpetual state of vulnerability.

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318. Interview by the Tibet Justice Center with N. Norbu, *supra* note 275; Interview by the Tibet Justice Center with Ngodup Dongchung, *supra* note 237. The central government of India has delegated authority and discretion to the local police to decide whether to issue an RC to a person with an SEP. The local authorities make the decision on a case by case basis. *Id.*

319. Interview by the Tibet Justice Center with Tsering Phuntsok, *supra* note 278; Interview by the Tibet Justice Center with Ngodup Dongchung, *supra* note 237.

320. See e.g., *Refugees Charged by Indian Police for Lack of Papers*, TIBET INFORMATION NETWORK, Feb. 4, 1998; Interview by the Tibet Justice Center with Anonymous Refugees, Dharamsala, May 2, 2009 (on file with the author).

321. See, e.g., Immigr. & Refugee Bd. of Canada, Response to Information request, ZZZ100699.E, *supra* note 235; Extended Response to Information Request IND33125.EX, *supra* note 231; see also Interview by the Tibet Justice Center with Ngodup Dongchung, *supra* note 237; Interview by the Tibet Justice Center with Tsering Dhondup, Deputy, Department of Security, Central Tibetan Admin., Dharamsala, May 1, 2009 ("Dhondup II") (on file with the author); Interview by the Tibet Justice Center with Tsewang Rigzin, President of the Tibetan Youth Congress, Dharamsala, May 1, 2009 (on file with the author); Interview by the Tibet Justice Center with Tsering Phuntsok, *supra* note 278.

### *Identity Cards*

Tibetans who possess RCs can obtain travel documents referred to as identity cards or identity certificates, which permit international travel. These identity cards resemble passports in that the cover is imprinted with the Ashoka pillar, the Indian national symbol, but they are yellow rather than dark blue.<sup>322</sup> Applications for an identity card are obtained in Delhi at the office of the Dalai Lama's Representative. The application is then forwarded to the Indian regional Passport Office in Delhi and then to the state in which the applicant resides. State officials then check to ensure that the applicant resides at the stated address.<sup>323</sup> The identity cards are issued by the Passport Office of the Ministry of External Affairs.<sup>324</sup>

The granting of an identity card is at the discretion of the Indian government but there are no reports of outright denials except when the applicant is found not to live at the designated residence. However, there are many reports of inordinate delays in the issuance of identity cards.<sup>325</sup> The process can take from three months to three years, although typically it takes one year.

The identity card must be stamped "No Objection to Return to India" (NORI) in order to return to India. NORI stamps are occasionally withheld, and can be withheld because of the applicant's political activities.<sup>326</sup>

Identity cards are valid for two years and are renewable.<sup>327</sup> When traveling internationally with an identity card, Tibetans are required to obtain a return visa at the Indian consulate in the country where the Tibetan is visiting before returning to India. Although there is no guarantee of obtaining a return visa, there are few reported cases of denial. There are reported incidents of problems at airports when officials are unfamiliar with Identity Cards. Some Tibetans report uneasiness about securing a return visa should the political climate in India change.

### *3. Citizenship*

Part II of the Constitution of India determines who are Indian citizens at the commencement of the Constitution. Article 5 provides that every person who, at the time of the commencement of the Constitution, was domiciled in India and either born in India or had a parent born in India or was ordinarily

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322. Unclassified Cable No. 004443, *supra* note 301.

323. Interviews by the Tibet Justice Center with Representatives of the Central Tibetan Admin., September-October, 2003 (on file with the author); *see also* Immigr. and Refugee Bd. of Canada, China/India: Information from the U.S. Dep't of State regarding Tibetans in India, September 13, 1999, ZZZ32810.E, available at <http://www.unhcr.org/refworld/docid/3ae6ad7e48.html>.

324. Unclassified Cable No. 004443, *supra* note 301.

325. Information from the U.S. State Dep't regarding Tibetans in India, *supra* note 316.

326. Unclassified Cable No. 004443, *supra* note 301; *see also* January 29, 1998 e-mail response from Ted Albers of INS HQRIC to query from John Shandorf at INS ZNY (on file with the author).

327. *Id.*

resident in India in the five years immediately preceding the commencement of the Constitution, is a citizen of India.<sup>328</sup> The Constitution does not make any provision regarding acquisition of citizenship after its commencement. Rather, the power to regulate citizenship and naturalization is given to Parliament in Article 11.<sup>329</sup>

Parliament has exercised its power to regulate citizenship by enacting the Citizenship Act of 1955, as amended by the Citizenship (Amendment) Acts of 1986 and 2003. The Act provides for the acquisition and termination of Indian citizenship after the commencement of the Constitution.<sup>330</sup> Section 3 of the Act governs citizenship by birth and provides that every person born in India (a) between January 26, 1950 and July 1, 1987, or (b) on or after July 1, 1987 but before the commencement of the Citizenship Act of 2003 and one parent is a citizen of India at the time of his/her birth, or (c) on or after the commencement of the Citizenship Act of 2003 and both parents are citizens of India or one parent is a citizen of India and the other is not an illegal migrant, "shall be a citizen of India by birth."<sup>331</sup>

Section 4 of the Citizenship Act governs citizenship by descent and provides that every person born outside of India (a) between January 26, 1950 and December 10, 1992 if the father is a citizen of India at the time of his/her birth or (b) on or after December 10, 1992 if either parent is a citizen of India at the time of his/her birth, is a citizen of India.<sup>332</sup> However, where the parent is a citizen of India by descent only, the son or daughter is not a citizen unless the birth is registered at an Indian consulate or either parent is, at the time of the birth, in government service.<sup>333</sup> The Citizenship (Amendment) Act of 2003 provides that after its effective date, a person cannot acquire citizenship by descent unless the birth is registered at an India consulate within one year of its occurrence or the commencement of the Act, whichever is later, or with permission of the Central Government.<sup>334</sup>

Section 5 of the Act provides for citizenship by registration, which is available to persons of Indian origin,<sup>335</sup> persons married to citizens of India, minor children of citizens, adult citizens of India, and persons registered as overseas citizens of India for five years who have resided in India for the

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328. Article 6 addresses migrants to India from Pakistan; Article 7 addresses migrants to Pakistan; Article 8 addresses rights of those of Indian origin residing outside of India.

329. INDIA CONST., art. 11.

330. Introduction, Statement of Objects and Reasons of the Citizenship Act of 1955 as amended by Citizenship (Amendment) Act of 1986 and Citizenship (Amendment) Act of 2003, Act No. 57 of 1955.

331. Citizenship Act of 1955, § 3, as amended by Citizenship (Amendment) Act of 1986 and Citizenship (Amendment) Act of 2003, Act No. 57 of 1955.

332. *Id.* at § 4.

333. *Id.*

334. The Citizenship (Amendment) Bill, 2003, Bill No. 39 of 2003, § 4.

335. Section 5 provides that "a person shall be deemed to be of Indian origin if he, or either of his parents, was born in undivided India." Citizenship Act, § 5, *supra* note 330.

previous two years.<sup>336</sup>

Section 6 of the Act provides for citizenship by naturalization. The qualifications for naturalization are set forth in Schedule III which require that the applicant (a) not be an illegal migrant (defined as a foreigner who has entered into India without valid travel documents or has remained beyond the permitted time); (b) denounce citizenship of any other country; (c) reside in India for the preceding twelve months; (d) reside in India for nine of the twelve years preceding that twelve month period; (e) have good character; (f) speak one language listed in the Eighth Schedule of the Constitution;<sup>337</sup> and (g) intend to reside in India.<sup>338</sup>

The Citizenship Rules of 1956, as amended in 1998, provide details regarding forms to be used for citizenship by registration and naturalization, including affidavits from “two respectable Indian citizens testifying to the character of the applicant,” certificates attesting to the applicant’s language proficiency, and an oath of allegiance.

Despite the provisions of Sections 3 and 6 of the Citizenship Act of 1955, it is exceedingly difficult, if not impossible for Tibetan refugees to become citizens of India. With respect to citizenship by birth, although Section 3 declares that every person born in India between 1950 and 1987 is a citizen of India, second generation Tibetans are nevertheless treated as foreigners subject to the Indian Foreigners Act, and not citizens of India. With respect to citizenship by naturalization, Tibetans who lack RCs are automatically ineligible because they would be treated as illegal migrants pursuant to section 2(1)(b).<sup>339</sup> Although Tibetan refugees who have been in India for ten years and who have RCs are theoretically eligible for citizenship pursuant to Section 6, few, if any, have succeeded in becoming citizens. Among the criteria of Section 6 is that the applicant must not be from a country that denies citizenship to Indians. This would seem to be satisfied by the Nationality Law of the People’s Republic of China which, at Article 7, provides that foreign nationals “who are willing to abide by China’s Constitution and laws” may be naturalized if they are near relatives of Chinese nationals, have settled in China, or have other legitimate reasons. However,

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336. *Id.*

337. The languages are Assamese; Bengali; Bodo; Dogri; Gujarati; Hindi; Kannada; Kashmiri; Konkani; Maithili; Malayalam; Manipuri; Marathi; Nepali; Oriya; Punjabi; Sanskrit; Santhali; Sindhi; Tamil; Telugu; Urdu. INDIA CONST., Schedule Eighth.

338. Citizenship Act, § 6, *supra* note 330.

339. *Id.* at § 2(1)(b). Section 2(1)(b) defines an illegal migrant as:

[A] foreigner who has entered into India (i) without a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf; or (ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time.

Citizenship (Amendment) Act of 2003, *supra* note 330 (amending § 2(1)(b) of the Citizenship Act of 1955).

despite the fact that the criteria of Section 6 can be met, citizenship by naturalization is not a realistic option for Tibetan refugees.

The conclusion that Tibetans do not secure citizenship despite their seeming eligibility pursuant to the provisions of the Citizenship Act has been confirmed by a variety of sources including the Immigration and Refugee Board of Canada<sup>340</sup> and the U.S. Embassy in New Delhi.<sup>341</sup> According to the High Commission of India in Ottawa, cited in a response to an inquiry to the U.S. Immigration & Naturalization Service (now the Bureau of Citizenship and Immigration Services), "Tibetan refugees do not have the right to acquire nationality even if they were born in India."<sup>342</sup>

In order to acquire citizenship by birth pursuant to Section 3, the Indian government requires a "no objection certificate" from the CTA.<sup>343</sup> Although many Tibetans believe that this requirement operates as an insurmountable obstacle, officials of the CTA maintain that it does not withhold approval.<sup>344</sup> The larger problem apparently is that Tibetans born in India before 1989 did not register their birth officially in the Indian government registry and their documentation of proof of birth is not acceptable to the Indian government.<sup>345</sup>

There are occasional reports of Tibetans obtaining citizenship by paying bribes of approximately 50,000 Rupees (over \$1000) but most Tibetans lack the financial resources to pay such a bribe and these claims are unsubstantiated.<sup>346</sup>

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340. Response to Information Request ZZZ100699.E, *supra* note 235; Immigr. & Refugee Bd. of Canada, Response to Information Request IND42508.E, March 26, 2004; Extended Response to Information Request IND33125.EX, *supra* note 231.

341. In April 1999, an unclassified cable from the U.S. embassy in New Delhi to the Secretary of State stated, "Tibetans born to Tibetan (non-Indian citizen) refugee parents between 1950 and 1986 do not automatically receive citizenship at birth." Unclassified Cable No. 002730, from the American embassy in New Delhi to the Sec'y of State in Washington D.C., April 1999 (on file with the author).

342. Response from John D. Evans at HQRIC of the U.S. Immigr. and Naturalization Serv., dated Jan. 29, 1998 (on file with the author).

343. Interview by the Tibet Justice Center with Ngodup Dongchung, *supra* note 237; Interview by the Tibet Justice Center with Jigme Jugney, Additional Sec'y of the Dep't of Home, Dharamsala, Oct. 12, 2003 (on file with the author); Interview by the Tibet Justice Center with Ravi Nair, Executive Director, South Asia Human Rights Documentation Center, Delhi, Nov. 4, 2003 (on file with the author); Interview by the Tibet Justice Center with Tsering Chophol, representative of His Holiness the Dalai Lama, Bylakuppe, Oct. 29, 2003 (on file with the author); Interview by the Tibet Justice Center with Karma Rinchen, *supra* note 244.

344. Interviews by the Tibet Justice Center with Ngodup Dongchung, *supra* note 237 and with Tsering Dhondup, (Dhondup II), *supra* note 321. Indeed, these two officials pointed out that the Tibetan Charter explicitly allows for dual citizenship and rejected the notion that citizenship in India would be inconsistent with the Tibetan struggle. Other CTA officials and NGOs viewed citizenship as sending a terrible message to those in Tibet: "it would be a huge source of disappointment for those who continue to suffer" in Tibet. Interview by the Tibet Justice Center with Thubten Samphel, Secretary of Department of Information & International Relations, Central Tibetan Administration, Dharamsala, Apr. 30, 2009 (on file with the author); *see also* Interview by the Tibet Justice Center with Tsewang Rigzin, *supra* note 321.

345. Interviews by the Tibet Justice Center with Ngodup Dongchung, *supra* note 237 and with Tsering Dhondup, (Dhondup II), *supra* note 321.

346. Interviews by the Tibet Justice Center with anonymous refugees. According to one recent interview, the rate had dropped to 30,000 rupees. Interview by the Tibet Justice Center with Anonymous Refugee, *supra* note 320.

Without citizenship, Tibetans are excluded from the political process.<sup>347</sup> They are ineligible to vote in Parliamentary, state,<sup>348</sup> and local panchayat elections.<sup>349</sup> As non-citizens, Tibetans are ineligible to hold Indian government jobs and obtain the perquisites that accompany such positions;<sup>350</sup> to own property, absent approval from the Reserve Bank of India which is rarely obtained;<sup>351</sup> and to obtain most seats in post-secondary institutions.<sup>352</sup>

Further, as non-citizens, Tibetans are subject to the Registration of Foreigners Act, 1939 and the Foreigners Act, 1946, which authorize the Central Government to impose a wide range of restrictions on foreigners.<sup>353</sup> The Registration of Foreigners Act, 1939 empowers the Central Government to require foreigners to report their presence to prescribed authorities at designated intervals;<sup>354</sup> to report their movements within India and internationally;<sup>355</sup> and to provide proof of identity to prescribed authorities and to hotel managers.<sup>356</sup> The Foreigners Act, 1946 empowers the Central Government to prohibit, regulate, and restrict foreigners' entry into India or their departure from India;<sup>357</sup> limit their freedom of movement;<sup>358</sup> require them to reside in a particular place;<sup>359</sup> require them to furnish proof of identity and to report to designated authorities at prescribed intervals;<sup>360</sup> require them to submit to photographing and fingerprinting at designated times by designated authorities;<sup>361</sup> require them to submit to medical examinations;<sup>362</sup> prohibit them from association with persons of a designated description;<sup>363</sup> prohibit them from engaging in designated activities;<sup>364</sup> and prohibit them from using or possessing designated articles.<sup>365</sup> The Foreigners (Amendment) Act of 2003 imposes stringent penalties for violations of provisions of the Foreigners Act of 1946. Section 14A provides that any foreigner who enters or stays

347. An August 1998 State Department Country Report entitled "Tibetan Refugees in India" confirms that Tibetan refugees "do not have the rights of Indian citizens such as voting or carrying an Indian passport." Information from the U.S. Dep't of State regarding Tibetans in India, *supra* note 310.

348. The Representation of the People Act 1950, Act No. 43 of 1950, § 16. The Act provides that "A person shall be disqualified for registration in an electoral roll if . . . not a citizen of India." *Id.*

349. *See, e.g.,* Himachal Pradesh Panchayati Raj Act, 1994, §121.

350. Extended Response to Information Request IND33125.EX, *supra* note 231.

351. *Id.*

352. *Id.*; Unclassified Cable No. 261108 from Secretary of State, Washington to American Embassy in New Delhi, Dec. 24, 1996 (on file with the author).

353. RAGINI TRAKROO, APARNA BHAT & SANHITA NANDI, REFUGEES AND THE LAW 79 (2002).

354. Registration of Foreigners Act, 1939, § 3(1)(a), Act No. 16 of 1939.

355. *Id.* at §§ 3(1)(b), (c), and (d).

356. *Id.* at § 3(1)(e).

357. The Foreigners Act of 1946, § 3(1), Act No. 31 of 1946.

358. *Id.* at §§ 3(2)(a),(b), (d), and (e)(ii).

359. *Id.* at § 3(e)(i).

360. *Id.* at § 3(e)(iii).

361. *Id.* at § 3(e)(iv).

362. *Id.* at § 3(e)(v).

363. *Id.* at § 3(e)(vi).

364. *Id.* at § 3(e)(vii).

365. *Id.* at § 3(e)(viii).



in India without valid required documents is subject to imprisonment for a term between two and eight years and a fine of between 10,000 and 50,000 rupees.<sup>366</sup> For all of these statutes, a foreigner is defined as a person who is not a citizen of India.<sup>367</sup> Thus, Tibetan refugees are foreigners within the meaning of these statutes and are subject to all of the restrictions imposed by these laws.

#### 4. *Freedom of Movement, Speech, Expression, and Assembly*

##### *Freedom of Movement*

Tibetans, like all foreigners in India, are permitted to travel domestically so long as they have a valid RC and as long as they secure permission from Indian authorities and report back to the local police upon their return.<sup>368</sup> Tibetans must carry their RCs whenever they travel in India.<sup>369</sup>

International travel requires an Identity Card issued by the Indian government.<sup>370</sup> In order to obtain an Identity Card, the applicant must have a valid RC. Obtaining an Identity Card sometimes requires payment of a bribe which many Tibetans cannot afford.<sup>371</sup> In order to return to India, the Identity Card must have a "No Objection to Return to India" (NORI) stamp. India is not obliged to accept the return of Tibetans with expired documents,<sup>372</sup> nor is there a legal basis for a Tibetan who lived in India with no documentation to return to India from abroad.<sup>373</sup>

Thus, both domestic and international travel is dependent on having an RC. As discussed earlier, except for the first wave of settlers and recent arrivals with Special Entry Permits in the category of education and "other", India has not been providing RCs to Tibetans which undermines their ability to travel, domestically or internationally.

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366. Foreigners (Amendment) Act, 2003, § 14A(b), Act No. 115 of 1998. Refugees with fraudulent documents may also be charged with violating provisions of the Indian Penal Code, e.g. § 463 (forgery), § 464 (making and using forged documents), see TRAKROO, ET AL., *supra* note 353, at 86-87.

367. Registration of Foreigners Act, 1939, Section 2(a); Foreigners Act, 1946, § 2.

368. Extended Response to Information Request IND33125.EX, *supra* note 231; see Foreigners Act of 1946, §§ 3(2)(a), (b), (d), and (e)(ii), Act No. 31 of 1946. The requirement that foreigners must report to local police both before and after traveling domestically is not strictly enforced. Interview by the Tibet Justice Center with Sonam Dagpo, *supra* note 270; Interview by the Tibet Justice Center with Tsering Dhondup, (Dhondup I), *supra* note 270.

369. Extended Response to Information Request IND33125.EX, *supra* note 231; Information from the U.S. State Dep't regarding Tibetans in India, *supra* note 316.

370. Extended Response to Information Request IND33125.EX, *supra* note 231; Unclassified Cable No. 002730, *supra* note 341. The Passport Act of 1967 governs the issuance of passports and other travel documents. Section 20 of the Act authorizes the government to issue travel documents to persons who are not citizens of India when "it is in the public interest to confer such documents." TRAKROO, ET AL., *supra* note 353, at 79; see also Passports Act, 1967, § 20, Act No. 15 of 1967.

371. Extended Response to Information Request IND33125.EX, *supra* note 231; Jan. 29, 1998 e-mail from Albers to Shandorf, *supra* note 319.

372. Extended Response to Information Request IND33125.EX, *supra* note 231.

373. Unclassified Cable No. 002730, *supra* note 341.

In 2006, the Indian government announced that it would no longer issue exit permits to Tibetans effective December 31, 2006. Exit permits are issued to Tibetans in India who have been invited by family members in other countries for family reunification.<sup>374</sup> The persons invited for family reunification have travel documents issued by the host country or by an international organization such as the International Red Cross as well as immigration visa clearance from the host country.<sup>375</sup> Apparently, this policy was designed to stop people from coming from Tibet and immediately going to the U.S. Embassy in Delhi demanding family reunification with family members already in the United States.<sup>376</sup>

### *Freedom of Speech, Expression and Assembly*

Although Article 19 of the Indian Constitution protects freedom of speech and expression and the right to assemble peacefully, the Constitution explicitly qualifies these rights.<sup>377</sup> The right to free speech and expression must yield to reasonable restrictions imposed by the state "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offense."<sup>378</sup> Similarly, reasonable restrictions may be placed on the freedom to assemble "in the interests of the sovereignty and integrity of India or public order."<sup>379</sup> While other constitutional rights are provided to "all persons," the provisions of Article 19 governing free speech and assembly are limited to "all citizens."<sup>380</sup> Thus, "a foreigner, not being a citizen, is not entitled to any of the rights under Article 19 or to remain in the territory of India."<sup>381</sup>

Since the early 1990s, the Government of India has become increasingly resistant to protests and demonstrations<sup>382</sup> and it is exceedingly difficult for Tibetans to organize political protests, at least outside of Dharamsala.<sup>383</sup> A

374. Kashag Circular 1069 (61), *supra* note 273.

375. *Id.*

376. As of August of 2007, it was unclear whether this new policy was being implemented. It is also unclear whether this policy resulted from pressure by the United States so that it would not be seen by China as encouraging Tibetans to leave in order to come to the United States. Interview by Tibet Justice Center with Robert Barnett, August 26, 2007; *see also* Tibet.net, *New Exit Permit Regulations to Facilitate Tibetans' Travel Abroad*, WORLD TIBET NETWORK NEWS, Dec. 14, 2006, available at [http://www.tibet.ca/en/newsroom/wtn/archive/old?y=2006&m=12&p=14\\_1](http://www.tibet.ca/en/newsroom/wtn/archive/old?y=2006&m=12&p=14_1).

377. INDIA CONST., art. 19, §§ (1), (2), & (3).

378. *Id.* at art. 19, § (2).

379. *Id.* at art. 19, § (3).

380. Compare Articles 14 (guaranteeing equal protection of the law to all persons) and 21 (guaranteeing due process to all persons) with Article 19 (protecting freedom of speech, expression and assembly to all citizens). *Id.*

381. DURGA DAS BASU, *SHORTER CONSTITUTION OF INDIA*, (12 ed. 1996).

382. Unclassified Cable No. 004443, *supra* note 301.

383. Extended Response to Information Request IND33125.EX, *supra* note 231. India has warned that any anti-China activity that causes a disruption will be dealt with in accordance with Indian law. *Tibetan Govt-in-Exile Demands UN Intervention*, AGENCE FRANCE-PRESSE, Mar. 16, 2008. In 2008, Indian External Affairs Minister, Pranab Mukherjee, announced that India will not tolerate

permit is required before Tibetans can legally demonstrate or protest and Indian police try to prevent assemblies and protests, particularly when Chinese dignitaries are visiting.<sup>384</sup> During such visits, the Indian government typically positions police around Tibetan settlements to prevent protests.<sup>385</sup> It is common for officials to deny a permit for the requested location and instead issue a permit for a remote location.<sup>386</sup> It is also common for Tibetans to be arrested for demonstrating outside the permit guidelines.<sup>387</sup>

India's effort to prevent political agitation against China has reportedly increased as its relationship with China has improved.<sup>388</sup> A Department of State document describes India's policy as follows:

Indian authorities prohibit Tibetans from engaging in overt political agitation, particularly if it is anti-Chinese. The presence of the Dalai Lama and thousands of his supporters in India has long been a neuralgic issue for China and a perennial bone of contention in the Sino-Indian political agenda. As Sino-Indian relations have improved over the last few years, both New Delhi and Beijing have made conscious efforts not to allow the Dalai Lama's presence to cast a shadow over the broader relationship. Nonetheless, the Indian government has circumspectly tried to avoid giving Beijing the impression that the issue is political rather than humanitarian and that the Dalai Lama is a political leader rather than a religious and cultural figure. New Delhi is not always successful in persuading Beijing when, for example, Tibetan exiles assemble in Dharamsala to hear the Dalai Lama's annual March 10<sup>th</sup> address on the anniversary of his 1959 flight into exile or when Tibetans protest Chinese policies in small street demonstrations. On such occasions, Indian authorities generally cite the "messiness" of democracies and ignore Chinese protests as best they can. New Delhi can, however, and has in the past, arrested Tibetan demonstrators in order to prevent them from engaging in 'political activities' as a means to placate Beijing and maintain normalcy in its relations with China.<sup>389</sup>

Some examples of police response to protests include: in November 1996, during Jiang Zemin's visit to India, 300 police officers used tear gas and

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any political activities against China. *India Will Not Tolerate Any Anti-China Activity*, THE HINDU, June 6, 2008. Despite these pronouncements, political demonstrations and protests against China's policies in Tibet are commonplace in Dharamsala.

384. *Id.* On Jan. 7, 1999, police tried to arrest Tibetans from protesting in New Delhi without first seeking permission to demonstrate. *Id.*

385. Interview by the Tibet Justice Center with Sonam Dagpo, *supra* note 270.

386. Interview by the Tibet Justice Center with Kelsang Phunsok, Pres. of Tibetan Youth Congress, Dharamsala, Oct. 12, 2003 (on file with the author); Interview by the Tibet Justice Center with Tsering Dhondup, *supra* note 270.

387. *Id.*

388. Unclassified Cable No. 004443, *supra* note 301.

389. *Id.*

water cannons against Tibetan protesters and detained fifty protesters;<sup>390</sup> in 1998, Indian police broke up a demonstration of hunger strikers in Delhi and forcibly removed the hunger strikers to a hospital;<sup>391</sup> on January 7, 1999, police tried to arrest Tibetans from protesting in New Delhi without first seeking permission to demonstrate,<sup>392</sup> leading China to express displeasure with India's failure to prevent Tibetans from demonstrating in front of the Chinese Embassy;<sup>393</sup> on October 20, 1999, riot police prevented Tibetan protesters from marching to the Chinese embassy;<sup>394</sup> and according to the Tibetan Youth Congress, on October 12, 2007, twenty-two activists were arrested during a demonstration by the group at the Chinese Embassy in New Delhi and four of those detained suffered serious injuries after being beaten while in police custody.<sup>395</sup>

The police arrested hundreds of Tibetan protesters in the months leading up to the Beijing Olympics. In March 2008, approximately one hundred Tibetans, mostly monks and nuns, set out from Dharamsala on a six-month protest march to the border of Tibet. The Indian government responded by obtaining a restraining order preventing the protesters from leaving Kangra District, where Dharamsala is located.<sup>396</sup> When protesters ignored the restraining order, they were arrested<sup>397</sup> and detained for fourteen days.<sup>398</sup> Indian officials in and around Dharamsala reportedly set up checkpoints on roads leading out of Dharamsala to ensure that Tibetan protesters did not leave the area.<sup>399</sup> Chinese leaders praised India's willingness to interrupt the protest march and followed up by calling on India to block the November 2008 "Special Meeting" convened by the Dalai Lama to discuss the future course of action for Tibetans.<sup>400</sup> In April 2008, police arrested a total of 680 Tibetan protesters engaged in demonstrations in Tohar, Delhi, and Mayapuri. Many of those arrested were protesting the arrival of the Olympic torch, and

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390. Extended Response to Information Request IND33125.EX, *supra* note 231.

391. See *India Halts Tibetan Hunger Strike*, BBC News, Apr. 28, 1998, <http://news.bbc.co.uk/1/hi/world/s/asia/84049.stm>.

392. *Tibetans Protest in New Delhi*, N.Y. TIMES, Jan. 7, 1999 at A6.

393. Extended Response to Information Request IND33125.EX, *supra* note 231.

394. *Id.*

395. *Tibetan Activists in Tihar Jail after Severe Beatings by Delhi Police*, WORLD TIBET NETWORK NEWS, Oct. 12, 2007.

396. Heather Timmons, *Tibetan Protest Marchers Vow to Reach Homeland*, N.Y. TIMES, Mar. 12, 2008.

397. *Indian Police Halt Tibetan March*, BBC News, Mar. 13, 2008, [http://news.bbc.co.uk/2/hi/south\\_asia/7293418.stm](http://news.bbc.co.uk/2/hi/south_asia/7293418.stm). "The police broke up the crowd and took away the protesters in five police buses." *Id.*

398. *India to Hold Tibetans Two Weeks*, BBC News, Mar. 14, 2008, available at <http://www.tibet.ca/en/newsroom/wtn/1050>; U.S. Comm. for Refugees and Immigr., World Refugee Survey – India, 2008 Summary, available at <http://www.worldrefugeesurvey.org/index.php?title=India>.

399. Phurbu Thinley, *Tibetan Exiles Resume "Return March to Tibet" Following China's Brutal Crackdowns in Tibet*, WORLD TIBET NEWS, Mar. 16, 2008, available at <http://www.tibet.ca/en/newsroom/wtn/1105>.

400. Saibal Dasgupta, INDIAN TIMES, Nov. 13, 2008.

some of the protesters were beaten and injured.<sup>401</sup> In July 2008, Delhi police forcibly removed Tibetan hunger strikers and eighty-six other Tibetans who were protesting the Beijing Olympics.<sup>402</sup> Furthermore, there are occasional reports that politically active Tibetans are unable to secure official documents, such as an RC or identity card.<sup>403</sup>

### 5. *Employment*

Thirty percent of Tibetans in India, and about fifty percent of those in the formal settlements, work in the fields of agriculture and animal husbandry. Another thirty percent or so sell and trade sweaters. The balance work in the service industry, manufacture handicrafts, weave carpets, and serve in the CTA.<sup>404</sup>

Severe overcrowding in the settlements is increasingly making it difficult for families who rely on agriculture to support themselves.<sup>405</sup> According to the Central Tibetan Administration, houses (sometimes consisting of only one room) originally designed to accommodate a family of five were housing up to twice that number by 1992.<sup>406</sup> Many of the settlements are located on drought-prone land, and only five percent are irrigated, which means that they can only produce one crop per year.<sup>407</sup> Because the farms no longer provide sufficient income, many farmers supplement their incomes by traveling to the cities to sell sweaters.<sup>408</sup>

Because the settlements were designed for short-term use, they have been

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401. U.S. Comm. for Refugees and Immigrs., World Refugee Survey – India, 2008 Summary, available at <http://www.worldrefugeesurvey.org/index.php?title=India>.

402. *Id.*

403. Jan. 29, 1998 e-mail from Albers to Shandorf, *supra* note 319; Unclassified Cable No. 004443, *supra* note 301.

404. Extended Response to Information Request IND33125.EX, *supra* note 231. An official of the Central Tibetan Administration estimates that 40 percent are involved in agriculture; 30 percent in informal sweater selling; 10 to 20 percent are involved in the service sector; and 10 percent are monks and nuns. A 2002 demographic study of Tibetan refugees in the settlements concluded that of the settlement population, 27 percent were attending school, 16 percent were engaged in farming, 6.4 percent in sweater-selling, 5.2 percent were full-time housewives, 5.1 percent in handicrafts such as carpet making, 5 percent in military service, 2.4 percent unemployed, and 16.4 percent too old or young to be working. Shusham Bhatia, Tsegial Dranyi & Derrick Rowley, *A Social and Demographic Study of Tibetan Refugees in India*, SOCIAL SCIENCE & MEDICINE 54, 411-22 (2002).

405. Interview by the Tibet Justice Center with Passang Dolma, General Secretary, Tibetan Women's Association, Dharamsala, Oct. 12, 2003; Interview by the Tibet Justice Center with Thupten Samphel, Secretary, and Sonam Dagpo, Additional Secretary, Department of Information & International Relations, Central Tibetan Admin., Dharamsala, Oct. 7, 2003.

406. LIFE IN EXILE, Central Tibetan Relief Comm., Dep't of Home, Central Tibetan Admin., p. 16 (1992); see also Immigr. & Refugee Bd. of Canada, Extended Response to Information Request, IND33125.EX, *supra* note 231.

407. Extended Response to Information Request IND33125.EX, *supra* note 231; see Unclassified Cable No. 261108, *supra* note 352.

408. Immigr. & Refugee Bd. of Canada, Extended Response to Information Request, IND33125.EX, *supra* note 231; Tibet Justice Center interview with Thupten Samphel, *supra* note 405. In 2008, government officials revoked a permit earlier granted to Tibetans to sell sweaters in Rohtak, in the state of Haryana. The permit rescission was apparently the result of pressure from local merchants. *Permit Rescinded for Tibetan Sweater Merchants in Rohtak*, WORLD TIBET NETWORK NEWS, Nov. 13, 2008, available at <http://www.tibet.ca/en/newsroom/wtn/4576>.

unable to sustain agriculture on a long-term basis. First, farmers initially made excessive use of chemical fertilizers and pesticides, causing the soil to deteriorate over time. Second, because the acreage was provided to Tibetans by means of long-term leases, the residents have been unable to create a permanent plan for a sustained economy. For the same reason, they have not been able to enter into business deals with other countries, for they possess no land or assets to serve as collateral.<sup>409</sup>

The growing disintegration of the agricultural economy of the settlements has led Tibetan youth and able-bodied adults to leave the settlements to look for better work elsewhere.<sup>410</sup> According to the United States Bureau of Citizenship and Immigration Services, Tibetans who do not reside in the settlements depend on stipends provided by the welfare office of the CTA, or work, where possible, in odd jobs, guesthouses, restaurants, and in other parts of the service industry.<sup>411</sup> The majority of Tibetans employed outside the settlement industries work as small shopkeepers, food-stand owners, and peddlers.<sup>412</sup>

The unemployment rate for Tibetans is high and constantly increasing. As non-citizens, most employment opportunities are closed to Tibetans, even those with valid RCs.<sup>413</sup> Tibetans are ineligible to hold government jobs, which are highly sought after in India<sup>414</sup> and include most jobs at universities, hospitals, and public works projects;<sup>415</sup> they cannot run large-scale businesses because as non-citizens they cannot secure the requisite licenses;<sup>416</sup> and they may not seek jobs with multinational corporations because Indian law requires multinational corporations to hire only Indian nationals.<sup>417</sup> A 1999 estimate put the unemployment rate at 18.5% for Tibetans between sixteen and fifty, with a considerably higher rate for those over the age of fifty and for female-headed households and recent arrivals.<sup>418</sup> A demographic study conducted by the CTA in 1998 showed even more dire conditions. It revealed that only 25.1 percent of Tibetans in India worked more than 183

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409. Tibet Justice Center interview with Dr. Kunchok Tsundue, Joint Secretary, Chief Planning Officer, Central Tibetan Administration, Dharamsala, Oct. 14, 2003.

410. *Id.*

411. See India: Information on Tibetan Refugees and Settlements, May 30, 2003, *supra* note 242.

412. Information from the U.S. State Dep't regarding Tibetans in India, *supra* note 316.

413. CHIMNI, *supra* note 212, at 393. According to the Immigration and Refugee Board of Canada, "Tibetans are free to work in the Indian economy, however, as non-citizens it is often difficult for them to find jobs." Extended Response to Information Request IND33125.EX, *supra* note 231 (internal citations omitted).

414. Extended Response to Information Request IND33125.EX, *supra* note 231.

415. Interview by the Tibet Justice Center with Tashi Wangdu, Representative of the Dalai Lama, Delhi office, Sept. 22, 2003.

416. Tibet Justice Center interview with Jamyang Dorhjee, Indian Tibet Coordination Office, Delhi, Sept. 23, 2003; Tibet Justice Center interview with Sonam Tsewang, hotel manager, Dharamsala, Oct. 17, 2003; Tibet Justice Center interview with Jigme Jugney, *supra* note 343; Tibet Justice Center interview with Dr. Kunchok Tsundue, Joint Secretary, Chief Planning Officer, Central Tibetan Admin., Dharamsala, Oct. 14, 2003.

417. Interview with Tsering Dhondup, *supra* note 270.

418. Extended Response to Information Request IND33125.EX, *supra* note 231.

days of the year, and a staggering 74.1 percent of the population was unemployed.<sup>419</sup> According to the U.S. Committee for Refugees “[m]any Tibetans in India are self-sufficient, but some, including elderly persons, female-headed families, and recent arrivals, must struggle to survive.”<sup>420</sup> Since 1999, the unemployment rate has considerably worsened, as Tibetan students graduate from Tibetan schools but cannot find jobs. Approximately 25 percent of the 800 high school graduates each year are unable to find employment. Unfortunately, the problem is even worse for university graduates: approximately 33 percent of the roughly 300 Tibetan college graduates are unable to find jobs within the Tibetan communities.<sup>421</sup>

Unemployment is widely considered to be the biggest single problem facing Tibetans in India (with housing coming a close second). CTA officials report that most new arrivals settle in and around Dharamsala and are unable to secure work.<sup>422</sup>

Underemployment is also a serious problem within the Tibetan community. The restrictions that prevent Tibetans from owning land or companies, together with the restrictions on attaining graduate education, result in a severe limitation on job opportunities for Tibetans. As a result, Tibetans are often unable to find jobs that match their educational background, and Tibetans are unable to secure an education that would enable them to obtain better jobs.<sup>423</sup>

To address the problems of unemployment and underemployment, the CTA encourages Tibetans to generate small income projects known as “micro-enterprises.” These projects are intended to convert Tibetans from “job seeker” to “job creator.” The Department of Home offers skills training and small loans to groups of three to four Tibetans and, because the amount of income generated by these micro-enterprises is low, the resulting businesses need not be registered as a corporation.<sup>424</sup> In 1999, the average annual income for a Tibetan was \$150 as compared to \$350 for Indian nationals.<sup>425</sup>

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419. Tibetan Demographic Study, 1999, Planning Council, Central Tibetan Admin., Dharamsala (2000).

420. India: Information on Tibetan Refugees and Settlements, May 30, 2003, *supra* note 242 (quoting U.S. Comm. for Refugees 2002 Report on Refugees Worldwide (USCR 2002)).

421. Interview by the Tibetan Justice Center with Tsering Dhondup, *supra* note 270.

422. Interviews by the Tibetan Justice Center with Tsering Phuntsok, *supra* note 278; Interview by the Tibet Justice Center with Dawa Tsering, immediate past head of Tibetan Settlement Office, Central Tibetan Admin., Dharamsala, May 3, 2009 (on file with the author).

423. Interview by the Tibet Justice Center with Kelsang Phuntsok, Tibetan Youth Congress, Dharamsala Oct. 12, 2003 (on file with the author).

424. Tibet Justice Center interview with Home Dep’t Sec’y, Central Tibetan Admin., July 15, 2005 (on file with the author); see The Official Website of the Central Tibetan Administration, Micro-Credit Available, <http://www.tibet.net/en/index.php?id=ann&annid=3> (last visited June 2, 2009).

425. Extended Response to Information Request IND33125.EX, *supra* note 231.

## 6. *Settlements/Housing, Health, Education, and Property Ownership*

### *Settlements/Housing*

Tibetan refugees live in thirty-seven official settlements and about seventy informal communities scattered throughout India. The Indian government initially created the settlements by leasing land in Himachal Pradesh, Ladakh, Arunachal Pradesh, Karnataka, Uttar Pradesh, Madhya Pradesh, South Sikkim, West Bengal, Maharashtra and Orissa for a term of ninety-nine years.<sup>426</sup> Almost half of the settlements rely principally on agriculture; one-third on both agriculture and industry; and one-fifth on the manufacture and sale of handicrafts.<sup>427</sup> Because the number of Tibetan refugees greatly exceeds the available resources, overcrowding afflicts most of the settlements, where as many as eight to ten Tibetans live in structures designed for five people. Furthermore, these structures were designed to be temporary shelters, and few have been renovated since the 1960s.<sup>428</sup>

The CTA appoints a settlement officer for each official settlement. In contrast, the deputy leader of each settlement is usually chosen by its residents. While the Indian government technically retains authority over the settlements, in fact, the CTA bears responsibility for their affairs.<sup>429</sup> The size of the settlements varies widely. Some settlements in northeastern India comprise fewer than 100 people. Mungod, in southern India, is home to more than 6,000 Tibetans.<sup>430</sup>

Because the Indian government did not facilitate the settlement of Tibetans who arrived after the first wave followed the Dalai Lama into exile in and after 1959, they received no land, housing, or assistance from the Indian authorities, and many continue to live in inadequate housing and to suffer from poor conditions. Very few Tibetans who have arrived after the initial wave—and particularly those arriving in the twenty-first century—can be accommodated in the already overcrowded settlements. For that reason, many live in or near Dharamsala.<sup>431</sup> The head of the CTA welfare office in Dharamsala reports that there is no available housing when Tibetans leave the transit school, where new arrivals between the ages of eighteen and thirty live for up to five years. And, the CTA does not have land to build any shelters. A serious problem also exists for the elderly because the CTA old age home is already beyond capacity.<sup>432</sup>

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426. *Id.*

427. *Id.*

428. *Id.*; LIFE IN EXILE, *supra* note 406, at 16; *see also* Unclassified Cable No. 261108, *supra* note 352.

429. India: Information on Tibetan Refugees and Settlements, *supra* note 242.

430. Bhatia, *supra* note 404, at 413.

431. *See* India: Information on Tibetan Refugees and Settlements, *supra* note 242.

432. Tibet Justice Center interview with Tsering Phuntsok, *supra* note 278.



Some Tibetans have settled in scattered communities throughout India.<sup>433</sup> Informal Tibetan camps exist in and around Kulu and Manali in northern India and outside of major cities, including Delhi.<sup>434</sup> The only new arrivals that the settlements sometimes can accommodate consist of some Tibetans joining families already residing in the settlements and monks or nuns who live in the monasteries within the settlements.<sup>435</sup>

In total, approximately 75 percent of the Tibetans in India reside in the settlements, and 40 percent of that number live in Karnataka, a state in southern India.<sup>436</sup> About 20,000 Tibetan monks reside in about 200 monasteries located in or near in 54 of the settlements.<sup>437</sup>

### *Health*

The CTA offers health services for Tibetans, including seven hospitals, five primary health care centers, forty-seven clinics, and two mobile clinics.<sup>438</sup> It also provides training in traditional Tibetan medicine in its Tibetan Medical & Astrological Institutes.<sup>439</sup>

Tibetans also may seek health care from village health centers run by state governments and subsidized by the federal government of India. These centers provide free health care to rural populations. Because the centers cannot meet the demand for their services, however, in practice it is often impossible for anyone, including Tibetans, to receive "free" health care without first paying a bribe.<sup>440</sup>

In terms of particular health issues, the Tibetan population in India suffers from a high incidence of tuberculosis. This is the result of overcrowded and unsanitary housing conditions, poor nutrition, and the lower resistance to tuberculosis of many Tibetans because of the difference in climate between Tibet and India.<sup>441</sup> The CTA has implemented a tuberculosis control program to try to address this serious health issue.<sup>442</sup>

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433. See India: Information on Tibetan Refugees and Settlements, May 30, 2003, *supra* note 242.

434. See ANDREW POWELL, *HEIRS TO TIBET - TRAVELS AMONG THE EXILES IN INDIA*, 1992; see also *LIFE IN EXILE*, *supra* note 406, at 3 and 29-31.

435. *Id.*

436. Tibet Justice Center interview with Sonam T. Khorlatsang, Reception Center, Central Tibetan Admin., Dharamsala, Oct. 9, 2003 (on file with the author).

437. *Young Monks Hone Skills in Tibetan Buddhism in Dharamsala*, WORLD TIBET NEWS, Sept. 23, 2007, available at <http://www.tibet.ca/en/newsroom/wtn/148>. An earlier study reported that there were 134 monasteries in or near Tibetan settlements in which over 10,000 monks and nuns reside. BHATIA, *supra* note 404, at 411 and 417.

438. The Official Website of the Central Tibetan Administration, Administration of Hospitals and Primary Health Centers, <http://www.tibet.net/en/index.php?id=248&rmenuid=12> (last visited June 2, 2009).

439. Extended Response to Information Request IND33125.EX, *supra* note 231.

440. Information from the U.S. State Dep't regarding Tibetans in India, *supra* note 312.

441. See Extended Response to Information Request IND33125.EX, *supra* note 231; The Official Website of the Central Tibetan Admin., Infectious Disease Control and Treatment, <http://www.tibet.net/en/index.php?id=249&rmenuid=12> (last visited June 2, 2009); Unclassified Cable No. 261108, *supra* note 352.

442. Official Website of CTA, *supra* note 432.

In addition, many Tibetan refugees suffer from gastric illnesses, diarrhea, skin diseases and respiratory diseases. The cause of many incidents of such illnesses is poor sanitation and hygiene, which, in turn, is the byproduct of an inadequate water supply in the settlements and informal Tibetan communities elsewhere in India. Some settlements, for example, lack adequate potable water to supply more than half of the drinking water required by their residents.<sup>443</sup>

A demographic study of the health status of Tibetans residing in the settlements found that skin conditions, upper and lower respiratory tract infections, fevers, diarrheal diseases, tuberculosis, parasitic and other infectious diseases "abound in the settlements."<sup>444</sup> Less than half of the children residing in the settlements receive vaccinations.<sup>445</sup>

### *Education*

The overwhelming majority of Tibetans in India receive an education, although post-secondary education is unavailable to most.<sup>446</sup> Approximately 80% of Tibetan children attend Tibetan schools, that is, schools established and operated by the CTA. Another five to ten percent attend non-Tibetan schools.<sup>447</sup>

Three categories of Tibetan schools should be distinguished. First, the Department of Education of the CTA, which is headquartered in Dharamsala, directly oversees the operation of some Tibetan schools. Second, the Central Tibetan Schools Administration, an independent institution that falls within the jurisdiction of the Indian Ministry of Human Resource Development, runs some schools for Tibetan children. Third, several well-known Tibetan schools, including, for example, Tibetan Children's Village (TCV) and Tibetan Homes Foundation, have been established by charities.<sup>448</sup>

The Dalai Lama prompted the establishment of TCV shortly after his arrival in India, as soon as it became clear that the Tibetans who had followed him into exile and their children would be unable immediately (or, indeed, for the foreseeable future) to return to Tibet. He therefore asked his sister, Tsering Dolma Takhla, to develop schools that would provide a Tibetan education to the exile population, which would include, for example, instruction in Tibet's history, culture, and language. She ran TCV until her death in 1964, at which time Jetsun Pema assumed responsibility for TCV. Jetsun Pema led the school until recently; in 2006, Tsewang Yeshe became its third president.

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443. Extended Response to Information Request IND33125.EX, *supra* note 231.

444. BHATIA, *supra* note 404, at 417.

445. *Id.*

446. Extended Response to Information Request IND33125.EX, *supra* note 231; Unclassified Cable No. 261108, *supra* note 352.

447. Extended Response to Information Request IND33125.EX, *supra* note 231.

448. *Id.*

Apart from the three schools described above, the CTA has established schools for older Tibetans who arrive in India and need educational and vocational training. Newly arriving Tibetans between the ages of eighteen and thirty spend up to five years in "transit schools," where they receive language instruction in English and Tibetan and vocational training.<sup>449</sup>

The growth of the Tibetan exile community has placed severe stress on the Tibetan educational system in India.<sup>450</sup> In the first six months of 2007, for example, 424 newly arrived Tibetan children were admitted to the various TCV schools,<sup>451</sup> but those schools lack adequate textbooks, educational materials, space for classes, and dormitories for the children.<sup>452</sup>

Most Tibetans do not attend college because they cannot afford it. The Indian government provides some assistance: it offers twenty scholarships per year to students graduating from CTA schools and two scholarships per year to Tibetans specifically to study medicine or dentistry.<sup>453</sup> The CTA provides an additional 500 to 600 scholarships per year. That number, however, is inadequate to meet the needs of the approximately 800 to 1000 students who graduate from the twelfth grade or its equivalent annually.<sup>454</sup>

Approximately 300 Tibetans graduate from college each year.<sup>455</sup> Although these graduates tend to be eager to continue their education, as non-citizens, they may not attend professional schools. These schools are closed to foreigners except for eight seats, which the Indian government sets aside annually, in engineering, medicine, pharmaceuticals, and printing technology.<sup>456</sup> In February 2009, the TCV inaugurated the first Tibetan college for the exile community in India. Named "The Dalai Lama Institute for Higher Education," the school is located in the south of India near Bangalore and is expected initially to house five hundred students.<sup>457</sup>

No discussion of education among the Tibetan exile community would be complete without reference to the robust tradition of religious education among Tibetans, which continues in India. Indeed, about 45 percent of the Tibetans who have arrived in India since the 1980s are monks. Between 1986 and 1996, that number increased to 60 percent. Some of these monks return to Tibet after completing their monastic studies, but most remain in one of the Tibetan monasteries established by the exile community in India. The overall

449. Interview by the Tibet Justice Center with N. Norbu, *supra* note 275.

450. *Id.*

451. Metok, NEWSLETTER FROM THE TIBETAN CHILDREN'S VILLAGES, Summer 2007, p. 5 (on file with the author).

452. Extended Response to Information Request IND33125.EX, *supra* note 231.

453. *Id.*

454. Interview by the Tibet Justice Center with Nangsa Choden, Dep't of Ed., Dharamsala, Oct. 12, 2003.

455. Interview with Tsering Dhondup, *supra* note 270.

456. Interview with Nangsa Choden, Dep't of Ed., *supra* note 444; see Extended Response to Information Request IND33125.EX, *supra* note 231.

457. *Dalai Lama Inaugurates First Tibetan College in India*, PHAYUL, Feb. 17, 2009, available at <http://www.phayul.com/news/article.aspx?id=23836>.

monastic population has more than doubled since 1980. This has led to serious overcrowding in the monasteries and nunneries, which, in turn, has created serious health problems.<sup>458</sup>

### *Property Ownership*

Tibetan refugees, as foreigners, cannot own real property absent approval from the Reserve Bank of India.<sup>459</sup> Tibetans with valid RCs may apply to the Reserve Bank for permission, but the process is difficult and time consuming. As a practical matter, it is only available to certain highly placed officials within the CTA.<sup>460</sup>

Most Tibetans residing in India do not, in any event, have enough money to purchase property, making the prohibition on land ownership largely an academic issue for the majority of Tibetans. Even those who do have enough money to purchase property generally find it more expedient to eschew the formal process of applying to the Reserve Bank of India. Instead, it is common practice for Tibetans to give money to Indian citizens who then purchase the property in their own name but with the informal understanding that it will be used by the Tibetan.<sup>461</sup> This system is based simply on trust and good faith and offers no protection to a Tibetan if the record title-holder asserts his or her ownership interest. Most of the land in Dharamsala where Tibetans live and do business is "owned" in this way. Even the Transit School, where new arrivals typically go for educational or vocational training, has an Indian citizen who is the owner of record.<sup>462</sup> The other option available to Tibetans who cannot purchase their own land is to rent storefronts from Indian citizens.

In addition to national proscriptions on land ownership absent approval from the Reserve Bank, individual states impose their own restrictions. For example, the State of Himachal Pradesh, which includes Dharamsala and other Tibetan regions, prohibits ownership of agricultural land by anyone not

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458. Extended Response to Information Request IND33125.EX, *supra* note 231.

459. Information from the U.S. State Dep't regarding Tibetans in India, *supra* note 312.; India's Foreign Exchange Regulation Act, 1973, Act No. 46 of 1973, § 31(1). The Foreign Exchange Regulation Act provides that "No person who is not a citizen of India . . . shall, except with the previous general or special permission of the Reserve bank, acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise an immovable property situate in India." *Id.* The Foreign Exchange Regulation Act was repealed by the Foreign Exchange Management Act, 1999, Act No. 42 of 1999, § 49(1), which went into effect on June 1, 2000. However, the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2000 provides at § 7 that "No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years." Notification No. FEMA 21/2000-RB, May 3, 2000.

460. Interview by the Tibet Justice Center with Penpa Tsering, Member Sec'y of Tibetan Parliamentary & Policy Research Centre, Delhi, Sept. 23, 2003 (on file with the author).

461. *Id.*

462. Interview by the Tibet Justice Center with Yonten Norbu, Principal of Sherab Gatsel Lobling, Tibetan Transit School, Dharamsala, Oct. 13, 2003 (on file with the author).

a citizen of India *and* a lawful resident of the state.<sup>463</sup>

### 7. *Relationship between Tibetans and Indians*

Although Tibetans in India generally enjoy a peaceful coexistence with Indians, there have been outbreaks of violence and anti-Tibetan sentiment. Beginning in the early 1990's, there were major conflicts in northern India coinciding with the dramatic increase in the number of Tibetans coming to India. For example, in 1991, portions of a settlement in Chautilla were burnt down shortly before a visit by a United States Congressman.<sup>464</sup>

Among the most serious clashes occurred in April 1994 in Dharamsala where groups of Indians looted Tibetan-owned stores and burned Tibetan government offices. This violence was sparked by an argument between a Tibetan youth and an Indian taxi driver. This clash led to the temporary closing of the refugee center in Dharamsala and to statements by Indian politicians and newspaper editorial writers criticizing Tibetans for taking advantage of Indian hospitality and criticizing the Indian government for its tolerance of the Tibetan community.<sup>465</sup>

In 1995, a campaign was waged within the state of Arunachal Pradesh to expel 12,000 Tibetans. Although this campaign was supported by a motion by the state government, the central government refused to support and was angered by the attempt to expel all Tibetans.<sup>466</sup>

In July 1999, in Manali in northern India, approximately 140 Tibetan shops and market stalls were attacked and burned after an Indian youth was killed by a Tibetan following a disagreement between the Tibetan and three Indians. The Tibetan market was reportedly "razed to the earth."<sup>467</sup>

In November 1999, the Dalai Lama reportedly considered relocating some offices of the CTA and his private residence to the Faridabad region "as the growing tension between the locals and the Tibetans is becoming a cause of worry."<sup>468</sup> This plan was ultimately rejected.<sup>469</sup>

On May 10, 2005, a political party in Mysore in southern India staged a demonstration calling on Tibetans to "quit India."<sup>470</sup> Demonstrators carried placards with anti-Tibetan slogans and urged the Indian government to oust all Tibetans, in part, to preserve India's relationship with China.<sup>471</sup>

In 2008, incidents of violence between Indians and Tibetans in Dharamsala led to a temporary, unofficial boycott by Tibetans of taxicabs, which are

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463. Himachal Pradesh Tenancy & Land Reforms Act, 1972 Himachal Pradesh Act 8 of 1974.

464. Oct. 1999 Barnett Memo, *supra* note 234, at ¶ 17.

465. *Id.* at ¶ 20.

466. Extended Response to Information Request IND33125.EX, *supra* note 231.

467. *Id.*

468. *Id.* (citing TRIBUNE, Nov. 25, 1999).

469. *Id.*

470. *Bhagat Singh Samithi Asks Tibetans to 'Quit India,' STAR OF MYSORE*, May 10, 2005.

471. *Id.*

predominantly owned by Indians.<sup>472</sup>

Whatever conflicts have arisen over the years, there is little question that the exile Tibetan community feels enormous gratitude towards India. In Spring 2009, to commemorate fifty years in exile, the CTA organized a series of events to officially thank the Indian government for its generosity.<sup>473</sup> At the same time, the Indian government instituted a community policing scheme entitled “self help for peace” designed “to ensure peace and harmony” between the Indian and Tibetan communities.<sup>474</sup> The program brochure refers to sporadic incidents of violence in the recent past and describes a series of initiatives aimed at resolving the resulting tension between the two communities. One such initiative is a neighborhood watch in which members of both communities patrol Dharamsala streets.<sup>475</sup>

#### IV. APPLICATION OF FIRM RESETTLEMENT DOCTRINE TO TIBETAN REFUGEES

As the last section demonstrates, Tibetans in India are not firmly resettled within the meaning of U.S. law, which requires an “offer of permanent resident status, citizenship, or some other type of permanent resettlement.”<sup>476</sup> While India has been extraordinarily generous in permitting Tibetan refugees to enter India, and, with respect to the early arrivals, to develop settlements and schools, India has not offered Tibetan refugees permanent resident status, citizenship or any other type of permanent resettlement.

The strongest argument for firm resettlement could be made with regard to the first wave of refugees, because India did treat them as *de facto* refugees and did provide generous assistance in the form of long term leases in the settlements, generous subsidies for education, health care and vouchers. However, even with respect to that first wave, India offered no permanent status, but instead provided RCs that had to be renewed on an annual basis. Members of that first wave of refugees are not citizens of India; they are not officially-recognized refugees since India is not a signatory to the 1951 Convention or its 1967 Protocol nor has India enacted domestic legislation

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472. Interviews by the Tibet Justice Center with residents of Dharamsala, May 2, 2009 (on file with the author).

473. One such event was held in Dharamsala on May 3, 2009 and was designed to thank Indian NGOs working with the Tibetan community. At one end of the meeting hall hung a poster that read “Thank you India – 50 Years in Exile” and each attendee received miniature Tibetan prayer flags inscribed “Thank you India.”

474. Interview by the Tibet Justice Center with Tsering Phuntsok, *supra* note 278.

475. *Self-Help for Peace*, Indian Gov’t Superintendent of Police Foreign Registration Office, 2009 (on file with the author). The neighborhood watch, which went into effect in April 2009, has reportedly resolved the problem of rogue local police stopping Tibetans purportedly to check RCs, but actually to obtain a bribe. Interviews by the Tibet Justice Center with residents of Dharamsala, *supra* note 472. Another aspect of the program involves counseling new arrivals with Special Entry Permits about how to obtain RCs.

476. 8 C.F.R. § 208.15.

regarding the protection of refugees.<sup>477</sup> Thus, they are officially designated as foreigners subject to the Foreigners Act and are not eligible to own property or hold public jobs and may not vote in any but CTA elections.

With respect to all subsequent arrivals, there can be no plausible claim of firm resettlement. As documented in Part III, India has refused to consider these arrivals as refugees. Consequently, the overwhelming majority of Tibetan refugees arriving after 1979 have been unable to lawfully secure registration certificates, meaning they have no legal status in India.<sup>478</sup> Without official documents, they cannot lawfully travel domestically or internationally, they cannot secure housing or employment, and they are subject to harassment by the police, as well as arrest and detention. Even Tibetans with valid RCs, including recent arrivals who have been able to obtain RCs based on their Special Entry Permits, are not permanently resettled. Indeed, the Special Entry Permit policy confirms the temporary nature of the status being conferred by the Indian government. With the rare exception of a permit in the "other" category, all permits are strictly limited in duration.<sup>479</sup> Given these circumstances, Tibetans have not been offered any permanent status and thus cannot be said to have firmly resettled in India within the meaning of United States immigration law.

This conclusion is not dependent on whether the jurisdiction utilizes an offer-based approach or a totality of the circumstances test.<sup>480</sup> In an offer-based jurisdiction, the focus would be on the existence vel non of an offer of some type of permanent resettlement. Putting aside the initial wave of refugees who did receive official, albeit temporary, documents from the Indian government, subsequent waves of refugees have been unable to secure valid documents because India does not consider them "refugees."<sup>481</sup> The wave of refugees that entered India between 1980 and 1993 were unable to secure valid documents but often obtained RCs by pretending to be unregistered children of members of the 1959 contingent. Although India turned a blind eye to the illegal absorption of refugees into the Tibetan community, policies changed in 1994 with the announcement of a new policy of voluntary repatriation, making even documents based on false information virtually impossible to obtain. At the same time, India intensified efforts to discourage any influx of refugees from Tibet and implemented campaigns to

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477. U.S. State Dep't, 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: INDIA, *supra* note 287, at § 2(d) (2007); CHIMNI, *supra* note 214 at 378, 379 (1994).

478. Beginning in October 2008, the Indian government began issuing RCs to Tibetans with Special Entry Permits in the education or "other" category. *See supra* text accompanying notes 278 and 318. But, Tibetans with Special Entry Permits in the pilgrimage category are not eligible for RCs and Tibetans with permits in the education category are eligible for RCs only during the period of their schooling. *See supra* text accompanying notes 276 and 318.

479. *See supra* text accompanying note 276.

480. *See supra* text accompanying notes 135-69.

481. Tibetans with a Special Entry Permit have been able to secure RCs since 2008 if their permit is for purposes of education or "other." *See supra* text accompanying note 318.

strictly enforce the requirement that the only Tibetans who should be issued RCs are those born in India and that “no Tibetan can live in India unless he is issued a registration certificate by the local police.”<sup>482</sup> Beginning in 1994 and intensifying in the 2000’s as India’s relationship with China improved, India’s policy toward Tibetans has hardened. India is increasingly taking proactive measures to stem the tide of Tibetan refugees and police authorities are increasingly patrolling Tibetan communities and conducting spot checks for valid RCs. Thus, the official policy of India for the last few decades, at least until the Special Entry Permit policy of 2003, is one that fails to offer Tibetans even temporary status, let alone a permanent offer of resettlement.

Under a totality of the circumstances approach, the result would be the same. Instead of focusing attention on the existence of a governmental offer, other factors such as length of stay, family, business and property ties, and rights and privileges in India would be analyzed to determine whether specific circumstances confronting Tibetans in India signify some type of entitlement to remain indefinitely.<sup>483</sup> Some courts might consider length of stay sufficient to shift the burden to the alien; others would require more than mere passage of time to establish a *prima facie* case.<sup>484</sup> But, regardless of what is sufficient to make out a *prima facie* case, the courts are in agreement that firm resettlement ultimately requires something more than mere passage of time. Thus, the mere fact that many Tibetans have resided in India for many years and have family ties there would not be sufficient to signify firm resettlement because the analysis requires an inquiry into other factors including the alien’s business and property ties and whether the alien enjoys the same rights, including the right to work and travel, that permanently settled persons enjoy.

As indicated above, most Tibetans lack valid documents and without such documents their presence in India is considered illegal.<sup>485</sup> This subjects them to spot arrest, detention and threat of deportation. As the Third Circuit said, “Absent some government dispensation, an immigrant who surreptitiously enters a nation without its authorization cannot obtain official resident status no matter his length of stay, his intent, or the extent of the familial and economic conditions he develops. Citizenship or permanent residency cannot be gained by adverse possession.”<sup>486</sup> This accurately describes the plight of the majority of Tibetans in India. Their lack of official documentation means they are in a perpetual state of vulnerability, unable to travel domestically or

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482. See *supra* text accompanying note 268.

483. See e.g. *Sall v. Gonzales*, 437 F.3d at 235.

484. Compare *Cheo v. INS*, 162 F.3d at 1229 (three year undisturbed stay created presumption) with *Farbakhsh v. INS*, 20 F.3d at 881 (listing factors to consider).

485. The Special Entry permit process that began in 2003 confers lawful status but only temporarily. A Tibetan who overstays the period of the permit, e.g. three months for pilgrimage, remains in India illegally and is not eligible for an RC. See *supra* text accompanying notes 273-76, 318.

486. *Abdille v. Ashcroft*, 242 F.3d at 487.



internationally, unable to secure housing because landlords require proof of legal status, unable to secure employment because most businesses will not hire Tibetans without RCs.

Even those Tibetans who have RCs should not be considered firmly resettled in India. Although they can travel lawfully within India, and abroad if they obtain an Identity Card, they are nonetheless not permanently resettled in India. The RCs must be renewed each year or every six months depending on the region and renewal is at the discretion of the Indian authorities. As non-citizens, Tibetans cannot vote, they are ineligible for government jobs, they are unable to own property without the approval of the Reserve Bank which is rarely given, they cannot obtain seats in post-secondary institutions, and they cannot own companies or shares of companies. Under Indian law, they are foreigners, subject to the Registration of Foreigners Act and the Foreigner Act which authorize the Government of India to impose a wide range of restrictions on their rights and freedoms.<sup>487</sup> With few exceptions, Tibetans have been unable to become citizens of India by descent or by naturalization, despite the provisions of the Citizenship Act.<sup>488</sup> In short, their status, although far more secure than the complete vulnerability of Tibetans who lack official documentation, remains far too tenuous to constitute firm resettlement. As noted above, the Special Entry Permit process initiated in 2003 underscores the temporary nature of the status being conferred by the Indian government.

## V. CONCLUSION

India has shown tremendous generosity toward Tibetans for the past fifty years, starting with the government's welcome of the Dalai Lama in 1959. What India has not done, however, at least since the first wave of refugees, is offer Tibetans permanent security. Thus, when these Tibetans come to the United States and seek asylum, they should not be subject to the mandatory firm resettlement bar. Regardless of whether a totality of the circumstances test or an offer-based approach is used, Tibetans have not been firmly resettled within the meaning of US immigration law and thus should not be denied asylum on that basis.

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487. See *supra* text accompanying notes 353-67.

488. See *supra* text accompanying notes 339-46.