

# **THE FUTURE OF ASYLUM IN INDIA: FOUR PRINCIPLES TO APPRAISE RECENT LEGISLATIVE PROPOSALS**

*Bhairav Acharya\**

*India has a long history of sheltering refugees. The number of forced migrants who have received protection in India is one of the highest in the world. For a variety of ideological and practical reasons, India has refused to sign the 1951 Refugee Convention and shows little interest in joining the evolving international refugee order. Without a formal asylum regime, the Foreigners Act, 1946, a stringent deportation-oriented law, governs refugees unless they are given special leave to stay in India. In a few unconvincing cases, some courts have given asylum seekers a small measure of due process. Any suggestion that the courts have recognised the principle of non-refoulement is false.*

*In late 2015, Shashi Tharoor MP introduced the Asylum Bill, 2015 in the Lok Sabha with the aim of putting India “at the forefront of asylum management in the world.” While the bill is welcome in principle, it has several shortcomings. Future asylum law should be based on four principles which Tharoor’s bill should be measured against. The principles are: (i) asylum is multifaceted requiring different categories of protection; (ii) mixed migratory flows demand flexible processing mechanisms; (iii) mass influxes call for greater attention than individualised procedures; and, (iv) the goals of legislation are asylum management and refugee governance.*

*Asylum is conceptually diverse and predates refugee status but the two are often conflated. India has a sovereign right to grant asylum to a person who does not qualify for refugee status. Protection should be given to persecuted individuals, groups forced to flee, as well as those escaping environmental phenomena. ‘Disguised extraditions’ should be stopped. Mixed migration has only recently captured attention because of events in Europe even though it is an old reality in South Asia. The law should differentiate between various categories of refugees and migrants, assign each a relevant form of protection - if applicable, anticipate secondary movements, and protect the most vulnerable.*

---

\* Bhairav Acharya was the deputy director of the Public Interest Legal Support and Research Centre (PILSARC) which drafted the Refugees and Asylum Seekers (Protection) Bill, 2006. He can be contacted at [bhairav.acharya@berkeley.edu](mailto:bhairav.acharya@berkeley.edu) and [@bhairavacharya](https://www.linkedin.com/in/bhairavacharya). I am grateful to Ms. Paridhi Poddar, Mr. Aditya Ayachit, Ms. Ira Chadha Sridhar, Mr. Tejas Popat and Mr. Chaitanya Deshpande at the NUJS Law Review for their editorial assistance.

*The failure to protect mass influxes has damaged the credibility of the international refugee regime. India's experience calls for promoting the principle of non-refoulement, using differentiated protection procedures, intelligently managing refugee populations, and addressing secondary movements. Refugee situations should be proactively governed. Processing centres should be efficiently located. Evidence-based impacts on home communities should determine how refugee communities are hosted. Refugee camps must be demilitarised. The right against statelessness must be actualised. Durable solutions should be strategically pursued. Participatory citizenship models should be developed.*

## I. INTRODUCTION

On December 18, 2015, the Lok Sabha witnessed the extraordinary introduction of three bills to enact an asylum regime. Since the house first sat in 1952, no bill, neither from the government nor a private member, had attempted to create an asylum regime, although several members of Parliament had openly talked about the need for refugee protection.<sup>1</sup> The most prominent of those proposals was made by Shashi Tharoor who introduced the Asylum Bill, 2015.<sup>2</sup> Tharoor's bill was accompanied by bills by Rabindra Kumar Jena<sup>3</sup> and Feroze Varun Gandhi.<sup>4</sup> Although introduced together, Tharoor's bill was preceded by Jena's and followed by Gandhi's. On the day his bill was introduced, Tharoor wrote: "The bill [...] will put India at the forefront of asylum management in the world."<sup>5</sup>

This paper measures Tharoor's bill against his claim of creating a world-leading asylum management system.<sup>6</sup> Instead of a clause-by-clause analysis, this paper weighs Tharoor's bill against four principles which, I claim, are crucial to a future Indian asylum regime. The four principles relate to the

<sup>1</sup> E.g., LOK SABHA DEBATES, *Refugee Determination System*, 16th Lok Sabha, Session Number 4, May 5, 2015, *Question by Maheish Girri*, available at <http://mhais.nic.in/par2013/par2015-pdfs/ls-050515/6307.pdf> (Last visited on November 12, 2016).

<sup>2</sup> The Asylum Bill, 2015, 334 of 2015, Lok Sabha ('Tharoor's Bill').

<sup>3</sup> The Protection of Refugees and Asylum Seekers Bill, 2015, 290 of 2015, Lok Sabha.

<sup>4</sup> The National Asylum Bill, 2015, 342 of 2015, Lok Sabha.

<sup>5</sup> Shashi Tharoor, The Quint, *Three Laws for a More Liberal India*, December 18, 2015, available at <https://www.thequint.com/opinion/2015/12/16/three-laws-for-a-more-liberal-india> (Last visited on November 13, 2016).

<sup>6</sup> The intent of this paper is to offer a constructive critique of Tharoor's asylum proposal. It is not a criticism of Tharoor whose bill is welcome. The writer would be remiss not to draw the reader's attention to the following potential for bias: Tharoor's bill borrows heavily from an earlier legislative proposal in 2006 made by PILSARC, a legal advocacy and research centre established in 1987 and advised by the late Justice V.R. Krishna Iyer. That proposal was called the Refugees and Asylum Seekers (Protection) Bill, 2006 ('PILSARC's Bill'), available at <https://notacoda.files.wordpress.com/2014/08/refugees-and-asylum-seekers-protection-bill-2006.pdf>. PILSARC was led by Rajeev Dhavan, a Senior Advocate of the Supreme Court. The writer was retained by PILSARC and contributed to the drafting of PILSARC's bill.

different shades of asylum, the prevalence of mixed migration, the importance of mass influxes, and the need for asylum governance. The paper finds that although Tharoor's bill ought to be welcomed in principle, it largely falls short of the mark of a good asylum regime. As one of the first asylum bills in Parliament, it is a historic missed opportunity.

This paper is divided into four parts. Part II revisits India's existing refugee protection regime – a mix of legislation, executive action, and unwritten governmental policy – which Tharoor says his bill consolidates.<sup>7</sup> Part III sets out four propositions that underpin any intelligent asylum management. Each proposition is contextually explained, deconstructed, and weighed against Tharoor's bill. Part IV explains the links between asylum and Indian governance, and offers suggestions to improve Tharoor's bill.

## II. INDIA'S *AD HOC* ASYLUM PRACTICE

This Part discusses the law, policy, and practice of asylum in India to determine if Tharoor's claim that his bill "consolidates the prevalent executive policies, judicial pronouncements, and international norms" is true.<sup>8</sup> Subpart A outlines the definitions of the term "refugee" and the meanings of the undefined term "migrant." Subpart B presents historical and latest estimates of the numbers of refugees and migrants in India. Subpart C examines both India's reasons for staying away from the international refugee regime as well as its domestic statutory, constitutional, and practical framework of asylum.

### A. REFUGEES, MIGRANTS, AND MIXED FLOWS

Refugees and migrants are legally distinct. According to the 1951 Convention Relating to the Status of Refugees ('Refugee Convention') and the 1967 Protocol Relating to the Status of Refugees ('Protocol'), a refugee is a person who flees across an international border because of a well-founded fear of being persecuted in her country of origin on account of her race, religion, nationality, membership of a particular social group, or political opinion.<sup>9</sup> The Refugee Convention's definition is the most popular one in use around the world but broader descriptions also exist.<sup>10</sup> For instance, the African Union's 1969 Convention Governing the Specific Aspects of Refugee Problems in

<sup>7</sup> Tharoor, *supra* note 5.

<sup>8</sup> *Id.*

<sup>9</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, Art. 1(A)(2); Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267, Art. 1(2).

<sup>10</sup> Jane McAdam, *The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection* (UNHCR Research Paper, Paper No. 125, 2006), available at <http://www.unhcr.org/research/RESEARCH/44b7b7162.pdf>; International Justice Resource Center, *Asylum & The Rights of Refugees*, available at <http://www.ijrcenter.org/refugee-law/> (Last visited on October 25, 2016).

Africa ('OAU Convention') recognises that a person fleeing external aggression, occupation, foreign domination, or serious disturbances of public order, is also a refugee.<sup>11</sup> And, in 1984, a group of Central and South American governments adopted the non-binding Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America ('Cartagena Declaration') which further included people fleeing threats to their lives, safety, or freedom due to generalised violence, foreign aggression, internal conflicts, and massive human rights violations.<sup>12</sup>

On the other hand, migrants are a far broader category of people who leave their places of habitual residence to live elsewhere. This happens most often within a country as migrants move to follow better prospects, usually to large cities.<sup>13</sup> However, significant numbers of migrants also cross international borders.<sup>14</sup> Because there is no formal legal definition of a migrant, the term accurately describes high-income professionals moving between two advanced economies, people leaving impoverished areas, as well as people fleeing persecution.<sup>15</sup> So, all refugees are migrants – in the sense that refugees move away from their places of habitual residence, but not all migrants are refugees.<sup>16</sup> The distinction between the two is important because refugees, not migrants, are protected by international refugee law.

## B. REFUGEES AND MIGRANTS IN NUMBERS

According to the Office of the United Nations High Commissioner for Refugees (UNHCR), by the end of 2015, India hosted 2,01,381 refugees and an additional 6,480 asylum seekers, bringing the total number of persons of concern to UNHCR to 2,07,861.<sup>17</sup> Of these, UNHCR assisted 27,078 refugees and the remaining 1,80,783 persons of concern, of which 1,74,303 are refugees,

<sup>11</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa, September 10, 1969, 1001 U.N.T.S. 45 ('OAU Convention'), Art. 1(2).

<sup>12</sup> Cartagena Declaration, November 22, 1984, in Inter-American Commission on Human Rights, *Annual Report 1984-85*, 190-193, OAS Doc. OEA/Ser.L/V/II.66, doc.10, rev. 1.

<sup>13</sup> Martin Bell & Elin Charles Edwards, *Cross-National Comparisons of Internal Migration: An Update on Global Patterns and Trends 14-15* (Technical Paper, UN Department of Economic and Social Affairs Paper No. 1, 2013), available at <http://www.un.org/en/development/desa/population/publications/pdf/technical/TP2013-1.pdf> (Last visited on November 13, 2016).

<sup>14</sup> UN Department of Economic and Social Affairs, *International Migration Report 2015*, UN Doc. ST/ESA/SER.A/384 (September 2016), available at <http://www.un.org/en/development/desa/population/publications/migrationreport/docs/MigrationReport2015.pdf> (Last visited on November 13, 2016).

<sup>15</sup> International Organization for Migration, *Key Migration Terms*, available at <http://www.iom.int/key-migration-terms> (Last visited on October 13, 2016).

<sup>16</sup> *Id.*

<sup>17</sup> UNHCR, *Global Trends: Forced Displacement in 2015*, 58 (2016), available at <http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html> (Last visited on October 13, 2016).

were assisted by the Indian government.<sup>18</sup> In 2015, India ranked twenty-third on a list of countries hosting the highest number of refugees.<sup>19</sup>

When read in isolation, these statistics are incomplete for two reasons. First, they do not convey a historical sense of the large refugee populations India has hosted in its past. In total, over the second half of the twentieth century, India has hosted one of the largest populations of refugees and externally displaced peoples in the world.<sup>20</sup> These include around 1,00,000 refugees from Tibet,<sup>21</sup> 1,02,055 from Sri Lanka,<sup>22</sup> 17,270 from Myanmar,<sup>23</sup> and 47,471 Chakmas and Hajongs from Bangladesh<sup>24</sup> in addition to around 10 million refugees from erstwhile East Pakistan.<sup>25</sup> These vast numbers do not include the approximately 14 million people who sheltered and resettled in India as a result of the Partition of India and its accompanying violence.<sup>26</sup> Second, there are a large number of unrecognised refugees in India who remain uncounted. These include large populations of unregistered refugees from Nepal<sup>27</sup> and Bhutan<sup>28</sup>

<sup>18</sup> *Id.* By February 2016, the number of persons of concern had increased to 2,09,234. UNHCR, *Factsheet India*, 1 (February 2016), available at <http://www.unhcr.org/50001ec69.pdf> (Last visited on November 13, 2016).

<sup>19</sup> The Times of India, *10 countries with highest numbers of refugees*, June 22, 2015.

<sup>20</sup> Lydia DePillis, Kulkant Saluja & Denise Lu, The Washington Post, *A visual guide to 75 years of major refugee crises around the world*, December 21, 2015.

<sup>21</sup> Central Tibetan Administration *Tibet in Exile*, available at <http://tibet.net/about-cta/tibet-in-exile/> (Last visited on October 13, 2016).

<sup>22</sup> Arun Janardhanan, The Indian Express, *Explained: The Sri Lankan Refugee Question*, January 31, 2015.

<sup>23</sup> UNHCR, *Figures at a Glance*, available at [http://www.unhcr.org.in/index.php?option=com\\_content&view=article&id=3&Itemid=125](http://www.unhcr.org.in/index.php?option=com_content&view=article&id=3&Itemid=125) (Last visited on October 13, 2016). The figure is comprised of 14,300 mandate refugees and 2970 asylum seekers.

<sup>24</sup> Sangeeta Barooah Pisharoty, The Wire, *Chakma Issue Roils Arunachal as Supreme Court Decrees End to Their Statelessness*, December 17, 2015, available at <http://thewire.in/17017/chakma-issue-roils-arunachal-as-supreme-court-decrees-end-to-their-statelessness/> (Last visited on November 13, 2016). There are also Bangladeshi and Pakistani non-Muslims in India who fled religious persecution in their countries whose numbers are not known to the writer. See Government of the Dominion of India, Foreigners Order, 1948, No. 9/946-Political (E.W.) of 1948 (February 10, 1948) ('Foreigners Order') ¶ 3A; Passport (Entry into India) Rules, 1950, Rule 4(1)(ha).

<sup>25</sup> MARK CUTTS, UNHCR, *THE STATE OF THE WORLD'S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION* 61 (2000).

<sup>26</sup> *Id.*, 59. Estimates of the number of people displaced as a result of the Partition of India vary from 12 million to 15 million. Compare, The Economist, *The unruly end of empire*, July 19, 2007 ("some 12m people") with William Dalrymple, The New Yorker, *The Great Divide*, June 29, 2015 ("more than fifteen million people"). In total, 32.4 million people migrated. Prashant Bharadwaj, Asim Khwaja & Atif Mian, *The Big March: Migratory Flows after the Partition of India*, 43 ECONOMIC & POLITICAL WEEKLY 39 (Aug. 30, 2008) ("total migratory inflows of 14.5 million and outflows of 17.9 million").

<sup>27</sup> Vipul Naik, Open Borders, *Nepal and India: An Open Borders Case Study*, March 21, 2014, available at <http://openborders.info/blog/nepal-and-india-an-open-borders-case-study/> (Last visited on November 28, 2016) (Between 5 million and 10 million Nepalese).

<sup>28</sup> HUMAN RIGHTS WATCH, *Last Hope: The Need for Durable Solutions for Bhutanese Refugees in Nepal and India* 76 (May 2007), available at <https://www.hrw.org/reports/2007/bhutan0507/12.htm> (Last visited on November 28, 2016) (Between 15,000 and 30,000 Lhotshampas (ethnic Nepalese expelled from Bhutan)).

as well as asylum seekers who were denied asylum as a result of structural failures in UNHCR's refugee status determination mechanism.<sup>29</sup>

In 2015, there were 52,41,000 foreign migrants in India, the world's twelfth-largest population of migrants in a single country.<sup>30</sup> Again, this statistic does not tell the whole story. From 1960 to 1980, India was the world's most popular migrant destination after the United States, hosting a population of 94,11,000 foreign migrants in 1960.<sup>31</sup> Between 1980 and 2000, India fell to fourth place with 64,11,000 foreign migrants in 2000<sup>32</sup> as the expansion of the European Union (EU) resulted in millions of people exercising the EU's 'freedom of movement' to migrate within Europe. By 2010, Germany was the world's second-most popular destination for migrants and India had fallen to twelfth place.<sup>33</sup>

### C. CURRENT ASYLUM LAW AND PRACTICE

This Subpart is divided into three sections. Section 1 examines India's position in the international refugee regime. Section 2 assesses India's domestic law and policy regarding foreigners and asylum. Section 3 reveals the government's three approaches to refugee protection.

#### 1. India and the Global Refugee Regime

This section is divided into two subsections. The first subsection summarises India's discontent with the Refugee Convention. The second subsection highlights India's paradoxical attitude towards the larger interconnected global asylum regime.

##### a. Standing Apart from the Refugee Convention

144 countries have signed the Refugee Convention but India has not, making it an outlier in the international refugee regime. This is a curious anomaly for a country which has sheltered tens of millions of refugees during the life of the Convention. India's reasons for refusing to sign the Convention

<sup>29</sup> See Isabelle R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 13 FORDHAM INT'L L.J. 35, 35-37 (1989) (hypothetically illustrating the structural failure of refugee determination according to the UNHCR Statute).

<sup>30</sup> Migration Policy Institute, *Top 25 Destination Countries for Global Migrants over Time*, available at <http://www.migrationpolicy.org/programs/data-hub/charts/top-25-destination-countries-global-migrants-over-time> (Last visited on October 13, 2016).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

have never been clearly communicated; nevertheless four main grounds are apparent from official resources and the informed speculation of commentators.<sup>34</sup>

*First*, Delhi was irked by the Eurocentrism of the original Refugee Convention and its drafting process.<sup>35</sup> Despite being a founding member of the United Nations (UN) and one of the few independent countries from the Global South, India's input during the drafting of the Convention was marginal.<sup>36</sup> The first drafts of the Convention ignored non-European displacement and refugees,<sup>37</sup> reflecting a 'Europe only' approach to refugees which was carried forward into the draft placed before the General Assembly.<sup>38</sup> Meanwhile, India struggled to cope with the "largest mass migration in human history,"<sup>39</sup> caused by the colonial Partition of India which resulted in the forced cross-border displacement of 14.5 million people and the deaths of 1 million people.<sup>40</sup> The experience and circumstances of Partition survivors were similar to Europe's refugees but they did not qualify for protection under the Refugee Convention or the Statute of the Office of the United Nations High Commissioner for Refugees ('UNHCR Statute').<sup>41</sup> Indian objections to the Convention's Eurocentrism were dismissed by the drafting governments.<sup>42</sup>

<sup>34</sup> See generally B.S. Chimni, *Status of Refugees in India: Strategic Ambiguity* in REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA, 1947-2000 444-48 (Ranabir Samaddar ed., 2003); Myron Weiner, *Rejected Peoples and Unwanted Migrants in South Asia*, 28 ECONOMIC & POLITICAL WEEKLY 1738-41 (August 21, 1993); Sreya Sen, *Understanding India's Refusal to Accede to the 1951 Convention: Context and Critique*, 2(1) REFUGEE REVIEW: RE-CONCEPTUALIZING REFUGEES & FORCED MIGRATION IN THE 21ST CENTURY 134-135 (June 2015), available at <https://refugeereview2.wordpress.com/opinion-pieces/understanding-indias-refusal-to-accede-to-the-1951-refugee-convention-context-and-critique-by-sreya-sen/> (Last visited on November 13, 2016).

<sup>35</sup> PIA OBEROI, EXILE AND BELONGING: REFUGEES AND STATE POLICY IN SOUTH ASIA 16-18 (2006).

<sup>36</sup> See PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED, WITH A COMMENTARY 18, 22, 27 (1995) (recording only three Indian interventions during the drafting negotiations); United Nations Economic and Social Council ('UN ESC'), *Official Records: Fourth Year, Ninth Session, Supplement No. 1*, 60-61, E.S.C. Res. 248 (IX), U.N. Doc. E/1553 (August 8, 1949) (appointing thirteen governments, but not India, to an *ad hoc* committee to define refugees). But see Pia Oberoi, *South Asia and the Creation of the International Refugee Regime*, 19 REFUGE 36, 37 (2001) ("It is [...] not surprising to find that India was initially well represented in the debate on the creation of a new international refugee regime.").

<sup>37</sup> UN ESC, *Report of the Ad Hoc Committee on Statelessness and Related Persons*, 12-13, U.N. Doc. E/1618 (February 17, 1950); UN ESC, *Report of the Ad Hoc Committee on Refugees and Stateless Persons*, 8-9, U.N. Doc. E/1850 (August 25, 1950).

<sup>38</sup> G.A. Res. 429 (V), 48, 5th Sess., Supp. No. 20, Vol. I, U.N. Doc. A/1775 (December 14, 1950).

<sup>39</sup> Crispin Bates, *The Hidden Story of Partition and its Legacies*, BBC, March 3, 2011, available at [http://www.bbc.co.uk/history/british/modern/partition1947\\_01.shtml](http://www.bbc.co.uk/history/british/modern/partition1947_01.shtml) (Last visited on October 13, 2016).

<sup>40</sup> Prashant Bharadwaj et al., *supra* note 26.

<sup>41</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, UN Doc. A/RES/428(V) (14 December 1950); PETER GATRELL, THE MAKING OF THE MODERN REFUGEE 156-57 (2013).

<sup>42</sup> SARA E. DAVIES, LEGITIMISING REJECTION: INTERNATIONAL REFUGEE LAW IN SOUTHEAST ASIA 53-54 (2008).

*Second*, there remains discomfort with the Refugee Convention's imagination of a refugee solely as an individual rather than as a constituent of a group or community. Since it is the product of a European *weltanschauung*, the Convention's focus on individuated persecution is unsurprising.<sup>43</sup> But, for India, an individualist asylum system would ignore its unique national imagination and fluid conception of citizenship;<sup>44</sup> it might even ideologically betray the "idea of India."<sup>45</sup> Refugee individualism conceptually conflicts with mass influx situations because individuals in a mass influx are unable to prove individuated persecution,<sup>46</sup> leaving them vulnerable to refoulement.<sup>47</sup> For India,

---

<sup>43</sup> The modern epistemology of rights which invests individuals, not communities, with autonomy originated in Europe. *E.g.*, Richard Falk, *Cultural Foundations for the International Protection of Human Rights* in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 44, 45 (Abdullahi Ahmed An-Na'im ed., 1992); RHODA E. HOWARD, HUMAN RIGHTS AND THE SEARCH FOR COMMUNITY 25 (1995). *But see, e.g.*, UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 36 (2002). This model of citizen-subject rights was spread to India through the vehicle of colonisation. *E.g.*, BAXI, *id.*, 33-34. Colonisation transplanted the Westphalian nation-state system predicated on cultural homogeneity and, consequently, citizen-alien dichotomy. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 113-14 (2006); HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 278-279 (1973). Whereas immigration law erects barriers to entry to protect that homogeneity, asylum law creates exceptions on an individual basis. Randall Hansen, *State Controls: Borders, Refugees, and Citizenship* in THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES 253-254, 257-58 (Elena Fiddian-Qasmiyah, Gil Loescher, Katy Long & Nando Sigona eds., 2014).

<sup>44</sup> India's founders largely rejected homogenising narratives of nationhood in favour of state-supported multiculturalism and distinct communities. SUNIL KHILNANI, THE IDEA OF INDIA 153 (1998). *See also* ALFRED STEPAN, JUAN J. LINZ & YOGENDRA YADAV, CRAFTING STATE-NATIONS: INDIA AND OTHER MULTINATIONAL DEMOCRACIES 40-44, 50-54 (2011). The foundational rejection of homogeneity called other aspects of the European model of citizenship, as they applied to India, into question. *See* MAKARAND R. PARANJAPE, MAKING INDIA: COLONIALISM, NATIONAL CULTURE, AND THE AFTERLIFE OF INDIAN ENGLISH AUTHORITY 243 (2013); Binoda K. Mishra, *The Nation-State Problematic in Asia: The South Asian Experience*, 19 PERCEPTIONS 71, (2014). The existence of multiple nationalities in one country has tempered the citizen-alien dichotomy, making it easier for refugees to find shelter in India. That inclusivity was exemplified by former Foreign Secretary and National Security Adviser the late J.N. Dixit's response to *Lhotshampa* refugees staying in India instead of returning to Nepal: "Mother India will take care of them." Professor Mahendra Lama, Jawaharlal Nehru University, Address at the UNHCR Seminar on Refugee Protection: New Challenges (June 19, 2006).

<sup>45</sup> KHILNANI, *Id.*, 1-15; RAMACHANDRA GUHA, INDIA AFTER GANDHI 103-123 (2008). *See* GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 143-48 (1999) (describing the constitutional and legal commitment to unity in diversity).

<sup>46</sup> *But see* UNHCR, Executive Committee of the High Commissioner's Programme ('EXCOM'), *The scope of international protection in mass influx*, U.N. Doc. EC/1995/SCP/CRP.3 (June 2, 1995) (encouraging UNHCR to use positive group determination in the aftermath of mass influxes in Europe); Laura Barnett, *Global Governance and the Evolution of the International Refugee Regime*, 14 INT. J. REFUGEE LAW 238, 250 (2016) (explaining how mass influxes forced UNHCR to denounce formal and legalistic refugee determination processes).

<sup>47</sup> Refoulement (from the French 'refouler') refers to the practice of forcibly returning refugees to a place where they fear persecution. The principle of non-refoulement is the guarantee that such a forced return will not occur. The principle is "the most essential component of refugee status and of asylum." UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner)* ¶ 1, EC/SCP/2 (August 23, 1977), available at <http://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> ("UNHCR Non-Refoulement Note") (Last visited on October 13, 2016); UNHCR, *UNHCR Note on*

which has a history of receiving large mass influxes of refugees, the Refugee Convention's relative silence regarding mass influxes constitutes a continuing failure.<sup>48</sup>

*Third*, the Refugee Convention fails to deal with mixed migration,<sup>49</sup> which lacks a definition, although there is broad consensus on its features.<sup>50</sup> India has long faced mixed migration, particularly across its eastern land and sea frontiers.<sup>51</sup> Nevertheless, mixed flows were completely ignored by the international refugee regime until growing migration to Europe forced the issue to the top of the agenda. Europe's 'migrant crisis' comprises classic mixed

---

*the Principle of Non-Refoulement* (November 1997), available at <http://www.refworld.org/docid/438c6d972.html> (Last visited on October 13, 2016). The principle of non-refoulement is a *jus cogens* norm of international law. See generally Jean Allain, *The jus cogens Nature of non-refoulement*, 13 INT. J. REFUGEE LAW 533 (2001).

<sup>48</sup> See, e.g., UNHCR EXCOM, 48th Sess., 517th Mtg., Statement by the Indian representative, U.N. Doc. A/AC.96/SR.517 (November 3, 1997) at 14-15 ('48th EXCOM'); UNHCR EXCOM, 50th Sess., 541st Mtg., Statement by the Indian representative, U.N. Doc. A/AC.96/SR.541 (January 6, 2000) at 8 ('50th EXCOM'); UNHCR EXCOM, 51st Sess., 549th Mtg., Statement by the Indian representative, U.N. Doc. A/AC.96/SR.549 (November 22, 2000) at 5 ('51st EXCOM'); UNHCR EXCOM, 52nd Sess., 558th Mtg., Statement by the Indian representative, U.N. Doc. A/AC.96/SR.558 (October 16, 2001) at 2 ('52nd EXCOM').

<sup>49</sup> Vincent Chetail, *Sources of International Migration Law* in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 59-61 (Brian Opeskin, Richard Perruchoud & Jillyanne Redpath-Cross eds., 2012); Alexander Betts, *Towards a 'Soft Law' Framework for the Protection of Vulnerable Migrants* 2-3 (UNHCR Research Paper No. 162, August 2008), available at <http://www.unhcr.org/48b7f9642.pdf> (Last visited on October 13, 2016).

<sup>50</sup> Mixed migration flows include refugees, asylum seekers, economic and environmental migrants, victims of trafficking, and others. Their reasons for migrating may range from a single or many 'push' or 'pull' factors or a combination of them. Push factors include targeted persecution, generalised or disparate incidents of violence, real or perceived threats, and environmental degradation. Pull factors include economic opportunities, political freedoms, and educational opportunities. Migrants in a mixed flow may travel by air, land, sea, or a combination of them. Refugees and migrants often utilise the same means of transportation, which are often illegal, and travel together. See generally UNHCR, *Mixed Migration*, available at <http://www.unhcr.org/en-us/mixed-migration.html> (Last visited on October 13, 2016); Mixed Migration Hub, *What is mixed migration?*, available at [http://www.mixedmigrationhub.org/about\\_trashed/what-mixed-migration-is/](http://www.mixedmigrationhub.org/about_trashed/what-mixed-migration-is/) (Last visited on October 13, 2016); The Migration Observatory at the University of Oxford, *Mixed Migration: Policy Challenges* (March 24, 2011), available at <http://www.migrationobservatory.ox.ac.uk/resources/primers/mixed-migration-policy-challenges/> (Last visited on October 13, 2016).

<sup>51</sup> See generally UNHCR, *Global Appeal 2011 Update: India*, available at <http://www.unhcr.org/4cd96e919.pdf> (Last visited on November 29, 2016); Sahana Bose, *Illegal Migration in the Indian Sunderbans*, 45 FORCED MIGRATION REVIEW 22 (February 2014), available at <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/crisis/bose.pdf> (Last visited on November 29, 2016); Kathleen Newland, *Irregular Maritime Migration in the Bay of Bengal: The Challenges of Protection, Management and Cooperation* (Issue Brief No. 13, International Organisation for Migration – Migration Policy Institute, July 2015), available at <http://www.migrationpolicy.org/research/irregular-maritime-migration-bay-bengal-challenges-protection-management-and-cooperation> (Last visited on December 2, 2016); Sanjeev Tripathi, *Illegal Immigration from Bangladesh to India: Towards a Comprehensive Solution*, Carnegie India (June 29, 2016), available at <http://carnegieindia.org/2016/06/29/illegal-immigration-from-bangladesh-to-india-toward-comprehensive-solution-pub-63931> (Last visited on December 2, 2016).

flows of the type that India has talked about for several years.<sup>52</sup> UNHCR's first official response, the "10-Point Plan of Action,"<sup>53</sup> was published only in 2006, identifying five areas around the world for special attention. South Asia was not one of those areas, despite its familiarity with migration.<sup>54</sup> Mixed flows often coincide with conflict and other refugee-creating factors; consequently, mixed flows and mass influxes go together.<sup>55</sup>

*Fourth*, and finally, Delhi wants the Refugee Convention to contain strong 'burden sharing' provisions.<sup>56</sup> This is the argument: since the countries of the Global South which actually host the bulk of the world's refugees had no say in the making of the Convention, and since the Convention's drafters in the Global North have constructed regimes to prevent refugees entering their territories,<sup>57</sup> no demands should be made regarding how southern host countries actualise the Convention's core principles, unless the costs of the demands are shared by the North.<sup>58</sup> The argument resonates in India after its experience of sheltering around 10 million refugees in 1971 with inadequate foreign assistance.<sup>59</sup> Of the total costs of hosting the refugees, estimated at over half a billion

<sup>52</sup> 50th EXCOM, *supra* note 48, 8; 52nd EXCOM, *supra* note 48.

<sup>53</sup> UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action* (1st rev. January 2007), available at <http://www.unhcr.org/en-us/protection/migration/4742a30b4/refugee-protection-mixed-migration-10-point-plan-action.html> (Last visited on October 13, 2016); UNHCR, *Refugee Protection and Mixed Migration: the 10-Point Plan in Action* (December 1, 2012), available at <http://www.unhcr.org/en-us/publications/manuals/50ab86d09/refugee-protection-mixed-migration-10-point-plan-action.html> ('10-Point Plan') (Last visited on October 13, 2016).

<sup>54</sup> See generally Vartika Sharma, Lopamudra Ray Saraswati, Susmita Das & Avina Sarna, *Migration in South Asia: A Review* (Report, Population Council, June 2015), available at [https://assets.publishing.service.gov.uk/media/57a08970ed915d3cf000246/61263\\_Desk-review.pdf](https://assets.publishing.service.gov.uk/media/57a08970ed915d3cf000246/61263_Desk-review.pdf) (Last visited on October 13, 2016); Piyasiri Wickramasekara, *Labour Migration in South Asia: A Review of Issues, Policies and Practices* (Global Migration Policy Associates, International Migration Working Paper No. 108, 2011), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1913316](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1913316) (Last visited on October 13, 2016); Meghan Doherty, Brian Leung, Katie Lorenz & Amanda Wilmarth, *Understanding South Asian Labor Migration* (Office of South Asia Analysis, U.S. Government, 2014), available at <https://www.lafollette.wisc.edu/images/publications/workshops/2014-migration.pdf> (Last visited on October 13, 2016).

<sup>55</sup> Christoph Tometten, *Global Freedom of Movement as a Response to Mixed Migration*, 2 OXFORD MONITOR OF FORCED MIGRATION 80-81 (2012).

<sup>56</sup> 48th EXCOM, *supra* note 48, 14; 51st EXCOM, *supra* note 48.

<sup>57</sup> Barnett, *supra* note 46, 249.

<sup>58</sup> B.S. Chimni, *From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems*, 23 REFUGEE SURVEY QUARTERLY 66 (2004). See also Bonaventure Rutinwa, *Beyond Durable Solutions: An Appraisal of the New Proposals for Prevention and Solution of Refugee Crisis in the Great Lakes Region*, 9 JOURNAL OF REFUGEE STUDIES 312 (1996); Lucy Hovil, The Guardian, *Why is the cost of hosting refugees falling on the world's poorest states* (May 13, 2016), available at <https://www.theguardian.com/global-development/2016/may/13/why-is-the-cost-of-hosting-refugees-falling-on-poorest-states-kenya-dadaab-closing> (Last visited on October 13, 2016).

<sup>59</sup> Sumit Ganguly & Brandon Miliate, Foreign Affairs, *When Refugees Were Welcome: India in 1971 Vs. Europe Today* (September 22, 2015), available at <https://www.foreignaffairs.com/articles/india/2015-09-22/when-refugees-were>Welcome> (Last visited on October 13, 2016).

dollars,<sup>60</sup> UNHCR contributed between 120 million to 183 million US dollars.<sup>61</sup> India was forced to ask its citizens to pay a special tax to tide over the crisis.<sup>62</sup> The argument is more pointed in Africa. Since most refugees and migrants flee colonially-created conflicts,<sup>63</sup> Europe's ex-colonial powers are accountable for their protection.<sup>64</sup>

### b. Disinterest in the 'Refugee Regime Complex'

There are other instruments besides the Refugee Convention which bear on refugees and migrants such as the geographically-determinate OAU Convention and the issue-specific International Labour Organisation's (ILO) migrant workers conventions of 1949 and 1975.<sup>65</sup> The multiplicity of regimes has enabled would-be refugees to 'forum shop' and states to 'regime shift,' thereby injecting cross-institutional strategies into asylum policy.<sup>66</sup> According to Alexander Betts, this regime complexity has resulted in the traditional refugee regime, which was built around the Refugee Convention, giving way to a new 'refugee regime complex' - a global network of interdependent, independent, and overlapping refugee institutions which underpins contemporary migration and asylum.<sup>67</sup>

Despite facing multiple influxes of people from across South Asia and elsewhere, India has instituted neither geographic nor issue-specific regimes to address refugees or migrants.<sup>68</sup> It has eschewed regional frameworks,

<sup>60</sup> *Id.*

<sup>61</sup> David Myard, *Sadruddin Aga Khan and the 1971 East Pakistani Crisis* 27 (Research Paper, Global Migration Centre of the Graduate Institute of Geneva, Global Migration Research Paper No. 1, 2010), available at <http://graduateinstitute.ch/files/live/sites/heid/files/sites/globalmigration/shared/Publications/GMC%20-%20Global%20Migration%20Research%20Paper%20Series%201.pdf> (Last visited on October 13, 2016).

<sup>62</sup> Ganguly & Miliate, *supra* note 59. See also Dwarkadas Jivandas, *Refugee Relief Stamps of India*, Indian Postage Stamps, available at [http://www.indianpostagestamps.com/articles/Dwarkadas\\_Refuge\\_Relief.pdf](http://www.indianpostagestamps.com/articles/Dwarkadas_Refuge_Relief.pdf) (Last visited on October 13, 2016).

<sup>63</sup> PETER NOBEL, REFUGEES AND DEVELOPMENT IN AFRICA 21 (1987); Aderanti Adepoju, *Linkages between Internal and International Migration: The African Situation*, 50 INTERNATIONAL SOCIAL SCIENCE JOURNAL 389-90 (1998); Ogenga Otunnu, *Population Displacements: Causes and Consequences*, 21 REFUGEE 3 (2002).

<sup>64</sup> See, e.g., The New York Times, *Italy Agrees to \$5 Billion Libya Reparations*, August 30, 2008, available at <http://www.nytimes.com/2008/08/31/world/africa/31libya.html> (Last visited on December 2, 2016).

<sup>65</sup> Convention (No. 97) concerning Migration for Employment (revised 1949), July 1, 1949, 120 U.N.T.S. 1616; Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 24, 1975, 1120 U.N.T.S. 17426.

<sup>66</sup> Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSPECTIVES ON POLITICS 16-17 (2009).

<sup>67</sup> Alexander Betts, *The Refugee Regime Complex*, 29 REFUGEE SURVEY QUARTERLY 13-14 (2010).

<sup>68</sup> But cf., SAARC Regional Convention on Suppression of Terrorism, November 4, 1987, available at <https://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf> (Last visited on October 19, 2016) (proving that regional frameworks follow political will).

such as the EU's successful multilateral travel regime,<sup>69</sup> in favour of bilateral agreements such as those with Nepal<sup>70</sup> and Bhutan,<sup>71</sup> and event-specific domestic measures, such as the orders regarding Tibetan refugees.<sup>72</sup> The reluctance to create a refugee regime may be prompted by the costs of socio-economic protection, but that does not account for the absence of a territorial asylum framework to minimally preserve the principle of non-refoulement while protecting state interests.<sup>73</sup>

On the other hand, India is a member of UNHCR's Executive Committee ('EXCOM'), the body which helps to set the agenda for global refugee policy.<sup>74</sup> But its EXCOM contributions have been self-justificatory and self-congratulatory, ranging from denunciations of the international refugee regime<sup>75</sup> to reminders of India's generosity as a host country.<sup>76</sup> Both claims are accurate, but they do nothing to set out an Indian vision for enforceable asylum. The disinclination to create regional or issue-specific structures of its own to address refugees and migrants reveals the actual reason for its hostility to asylum law - political expediency.<sup>77</sup> The absence of an enforceable asylum

<sup>69</sup> Consolidated version of the Treaty on European Union, October 26, 2012, 2012 O.J. (C 326/1) 13, Art. 3(2); Consolidated version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326/1) 47, Arts. 21(1) and 45; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 [...], 2004 O.J. (L 158).

<sup>70</sup> Treaty of Peace and Friendship between the Government of India and the Government of Nepal, July 31, 1950, 94 U.N.T.S. 1302, Art. 7.

<sup>71</sup> India-Bhutan Friendship Treaty, February 8, 2007, Art. 5, available at <https://mea.gov.in/Images/pdf/india-bhutan-treaty-07.pdf> (Last visited on October 19, 2016).

<sup>72</sup> E.g., Ministry of Home Affairs, Order Regulating Entry of Tibetan Nationals into India, S.R.O. 1108 (Notified on December 26, 1950).

<sup>73</sup> H. Knox Thamess, Washington College of Law, *India's Failure to Adequately Protect Refugees*, available at <https://www.wcl.american.edu/hrbrief/v7i1/india.htm> ("India's argument that the Refugee Convention places the burden on the host state [...] is unfounded because signing the agreement would allow UNHCR to provide greater assistance to the refugee population [...]"). For an explanation of the concept of territorial asylum, see Kay Hailbronner & Jana Gogolin, *Asylum, Territorial* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2013), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e757> (Last visited on December 2, 2016).

<sup>74</sup> CORINNE LEWIS, UNHCR AND INTERNATIONAL REFUGEE LAW: FROM TREATIES TO INNOVATION 53 (2012); Allison Corkery, *The Contribution of the UNHCR Executive Committee to the Development of International Refugee Law*, 13 AUSTRALIAN INTERNATIONAL LAW JOURNAL 107 (2006); Brendan Joyce, *The Case for a Conclusion*, 35 FORCED MIGRATION REVIEW 44 (July 2010), available at <http://www.fmreview.org/disability-and-displacement/brendan-joyce.html> (Last visited on December 2, 2016).

<sup>75</sup> 48th EXCOM, *supra* note 48, ¶¶ 48, 67; 50th EXCOM, *supra* note 48, ¶ 27; 51st EXCOM, *supra* note 48, ¶ 10; 52nd EXCOM, *supra* note 48, ¶ 1.

<sup>76</sup> 48th EXCOM, *id.*, ¶ 70; 50th EXCOM, *id.*, ¶ 27; 51st EXCOM, *id.*, ¶ 10; 52nd EXCOM, *id.*, ¶ 5.

<sup>77</sup> Bhairov Acharya, *The Law, Policy, and Practice of Refugee Protection in India* (Working Paper, Public Interest Legal Support and Research Centre, December 2004), available at [https://www.researchgate.net/publication/256016766\\_The\\_Law\\_Policy\\_and\\_Practice\\_of\\_Refugee\\_Protection\\_in\\_India](https://www.researchgate.net/publication/256016766_The_Law_Policy_and_Practice_of_Refugee_Protection_in_India) ('Acharya \*1') (Last visited on October 13, 2016).

law permits the government to respond to asylum requests purely to gratify an instant political interest.<sup>78</sup>

## 2. Inchoate National Law

This section is divided into two subsections. The first subsection explores the stringent legal framework for foreigners and refugees in India, particularly the extraordinary width of the government's absolute power of deportation. The second subsection argues that, contrary to popular claims, the Constitution does not invest refugees with meaningful rights, not even the right against refoulement.

### a. *The Foreigners Act Framework*

India's *ad hoc* refugee system is made possible by the wide powers given exclusively to the Centre to act with unfettered discretion with regard to foreigners. In the nineteenth century, India's colonial government enacted the Foreigners Act, 1864, the first statute to ban, detain, and expel foreigners. The statute was heavy-handed, having been designed to promote colonial power and maintain social control.<sup>79</sup> But when the Second World War broke out, the colonial government found even the 1864 statute too lenient for the absolute powers it demanded, so it was replaced by the Foreigners Act, 1940.<sup>80</sup> After the war ended, and amidst the large-scale displacement that followed, the 1940 wartime legislation was further consolidated as the Foreigners Act, 1946 ('Foreigners Act').

The Foreigners Act is wholly devoid of nuance because it does not differentiate between people on intelligible criteria such as their purpose for entering India. It consequently fails as a people management law.<sup>81</sup> For instance, tourists, travellers, expatriate workers, fugitives, refugees, and migrants have widely divergent reasons for entering and staying in India, but the

<sup>78</sup> Compare Kallol Bhattacharjee, *The Hindu*, *Baloch leader Bugti to seek asylum in India*, September 21, 2016, available at <http://www.thehindu.com/news/national/will-soon-apply-for-asylum-in-india-baloch-leader-bugti/article9124389.ece> (Last visited on November 29, 2016) (granting asylum to a Pakistani dissident) with Hari Kumar & Jim Yardley, *The New York Times*, *India Denies Asylum to Snowden*, July 2, 2013, available at <http://india.blogs.nytimes.com/2013/07/02/india-denies-asylum-to-snowden> (Last visited on November 29, 2016) (denying asylum to an American dissident).

<sup>79</sup> See generally RADHIKA SINGHA, A DESPOTISM OF LAW: CRIME AND JUSTICE IN EARLY COLONIAL INDIA (2000); David Arnold, *The Police and Colonial Control in South India*, 4 SOCIAL SCIENTIST 3 (1976); Valerian DeSousa, *Strategies of Control: The Case of British India*, 24 SOCIOLOGICAL VIEWPOINTS (2008).

<sup>80</sup> The Foreigners Act, 1946, Statement of Objects and Reasons.

<sup>81</sup> Cf. The Immigration and Refugee Protection Act, 2001 (Canada) (recognising three broad classes of economic immigrants, family movements, and refugees with sub-classes under each category).

Foreigners Act treats them uniformly under a monolithic regime.<sup>82</sup> The Centre has used the Foreigners Act to compel foreigners to prove their identities;<sup>83</sup> present themselves at police stations;<sup>84</sup> control their movements,<sup>85</sup> activities,<sup>86</sup> and residences;<sup>87</sup> confine them in internment camps,<sup>88</sup> and, of course, to leave India.<sup>89</sup>

The sheer breadth of the law's deportation power, which has enabled the government to achieve deportations without even minimal judicial review, is revealing.<sup>90</sup> In 1955, the Supreme Court blessed this position<sup>91</sup> and in the intervening 61 years, it has not just reiterated the untrammeled deportation power,<sup>92</sup> it has also relieved the Centre of the requirement of complying with due process while effecting deportations.<sup>93</sup> This awesome power of deportation has been delegated and sub-delegated to such an extent that, in many states, a mid-level police officer can order a foreigner to leave India without even having to provide a reason.<sup>94</sup>

<sup>82</sup> Vincent Ferrer v. District Revenue Officer, 1974 SCC OnLine AP 191 : AIR 1974 AP 313 ¶ 2; Basheshar Nath v. CIT, AIR 1959 SC 149 ¶ 14; Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367 : (1955) 1 SCR 1284 ¶¶ 23-24.

<sup>83</sup> Ministry of Home Affairs, Foreigners (Production of Proof of Identity) Order, 1983, S.O. 145(E) of 1983 (February 25, 1983).

<sup>84</sup> Ministry of Home Affairs, Foreigners (Report to Police) Order, 1971, G.S.R. 1884 of 1971 (December 14, 1971).

<sup>85</sup> Foreigners Order, 1948, *supra* note 24, ¶ 3; Ministry of Home Affairs, Foreigners (Restriction on Movements) Order, 1960, G.S.R. 1454 of 1960 (December 6, 1960).

<sup>86</sup> Ministry of Home Affairs, Foreigners (Restriction on Activities) Order, 1962, G.S.R. 75 of 1962 (January 16, 1962).

<sup>87</sup> Ministry of Home Affairs, Foreigners (Restrictions on Residence) Order, 1968 (September 5, 1968).

<sup>88</sup> Ministry of Home Affairs, Foreigners (Internment) Order, 1962, G.S.R. 1463 of 1962 (November 3, 1962).

<sup>89</sup> Foreigners Order, *supra* note 24, ¶¶ 3, 5, 7.

<sup>90</sup> The Foreigners Act, 1946, §§ 3(2)(c) and (cc); RAJEEV DHAVAN, REFUGEE LAW AND POLICY IN INDIA 54 (2004) (pointing out that besides statutory deportation, there is a general power to refuse entry for non-fulfilment of entry conditions).

<sup>91</sup> Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367 : (1955) 1 SCR 1284, ¶ 36 ("The Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an *unrestricted right to expel* remains" (emphasis supplied)).

<sup>92</sup> Louis De Raedt v. Union of India, (1991) 3 SCC 554, ¶ 13; Sarbananda Sonowal v. Union of India, (2005) 5 SCC 665, ¶¶ 74-79.

<sup>93</sup> Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367 : (1955) 1 SCR 1284, ¶ 37; Abdul Sattar Haji Ibrahim Patel v. State of Gujarat, AIR 1965 SC 810, ¶ 10; Ibrahim v. State of Rajasthan, AIR 1965 SC 618, ¶ 8; Louis De Raedt, *id.*, ¶¶ 74-75; Sarbananda Sonowal, *id.*, ¶¶ 49-52.

<sup>94</sup> The Foreigners Act, 1946, § 12; State v. Ashfaq Ahmad, 1960 SCC OnLine All 93 : AIR 1961 All 115, ¶ 16-17; Abdul Jalil v. State, (1962) 1 Cri LJ 13, ¶ 6; Firoz Meharuddin v. SDO, 1960 SCC OnLine MP 58 : AIR 1961 MP 110, ¶¶ 23-24. But see State v. Abdul Rashid, 1960 SCC OnLine Pat 99 : AIR 1961 Pat 112, ¶ 15 (quashing police action absent a written order of delegation); Dawood Ali Arif v. Commr. of Police, 1958 SCC OnLine Cal 188 : AIR 1958 Cal 565, ¶ 5 (injuncting deportation because the instrument of delegation was not express and specific).

### b. Unconvincing Constitutional Symbolism

Some commentators - including, in an earlier article, this writer<sup>95</sup> - have claimed that refugees and asylum seekers enjoy constitutional protection while in India which, amongst other things, protects them from refoulement.<sup>96</sup> That is not true in any meaningful sense. In fact, some of those claims are patently false.<sup>97</sup> No right to non-refoulement has ever been read into Indian constitutional jurisprudence, nor can it be extrapolated. Arguments that Article 21 of the Constitution encompasses non-refoulement usually point to the Gujarat High Court's decision in *Ktaer Abbas Habib Al Qutaifi v. Union of India* ('Habib').<sup>98</sup> But, in fact, the Single Judge in Habib did not prohibit refoulement, he only ordered the government to re-examine its deportation order on humanitarian grounds. There are two reasons why Habib does not validate the non-refoulement principle: (i) it expressly permits deportations on the basis of public order and national security, and (ii) it is powerless against the Supreme Court's confirmation of the Centre's "unrestricted right to expel."<sup>99</sup>

What is incontrovertible is that in *National Human Rights Commission v. State of Arunachal Pradesh* ('NHRC'),<sup>100</sup> the Supreme Court ordered regional authorities to stop the harassment of a refugee community by the area's local inhabitants on the basis of an obvious, textualist interpretation of Article 21 of the Constitution. Since the Article uses the word "person"

<sup>95</sup> Acharya \*1, *supra* note 77, ¶4.

<sup>96</sup> E.g., Markandey Katju, *India's Perception of Refugee Law*, 1 ISIL Y.B. INT'L HUMAN. & REFUGEE L. 251 (2001); Veerabhadran Vijaykumar, *A Critical Analysis of Refugee Protection in South Asia*, 19 REFUGE 6 (2001). This claim was repeated by a senior UNHCR official. Erika Feller, Director of International Protection, UNHCR, Address to the First Meeting of the Australia New Zealand Chapter of the International Association of Refugee Law Judges (March 10, 2000), available at <http://www.unhcr.org/en-us/admin/dipstatements/42a407d72/address-ms-erika-feller-director-department-international-protection-unhcr.html> (Last visited on November 28, 2016).

<sup>97</sup> E.g., T. Ananthachari, *Refugees in India: Legal Framework, Law Enforcement and Security*, 1 ISIL Y.B. INT'L HUMAN. & REFUGEE L. 118 (2001) (claiming that "in the matter of Mohd. Sediq v. Union of India, 1998 SCC OnLine Del 572 : (1998) 47 DRJ 74, the High Court of Madras expressed its unwillingness to let any Sri Lankan refugees to be forced to return to Sri Lanka against their will." But in fact: (i) the case was heard in the Delhi High Court, (ii) it dealt with an Afghan unwilling to return to Afghanistan, and (iii) the court upheld his deportation. Mohd. Sediq v. Union of India, 1998 SCC OnLine Del 572 : (1998) 47 DRJ 74). Ananthachari's false claim has been widely circulated without verification. E.g., PARTHA S. GHOSH, MIGRANTS, REFUGEES AND THE STATELESS IN SOUTH ASIA 229 (2016); Nasreen Chowdhury, *Marginalization and Exclusion: Politics of Non-Citizen Rights in Postcolonial South Asia*, 42 REFUGEE WATCH 9 (undated), available at <http://www.merg.ac.in/rw%20files/RW42.pdf> (Last visited on October 13, 2016).

<sup>98</sup> Ktaer Abbas Habib Al Qutaifi v. Union of India, 1998 SCC OnLine Guj 304 : 1999 Cri LJ 919 ('Habib'), ¶ 18 (finding that Article 21 of the Constitution encompasses the principle of non-refoulement subject to "law and order and security of India").

<sup>99</sup> Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367 : (1955) 1 SCR 1284. Hans Muller was handed down by a five-judge Constitution Bench of the Supreme Court which, of course, unequivocally controls the Gujarat High Court's Single Judge.

<sup>100</sup> National Human Rights Commission v. State of Arunachal Pradesh, (1996) 1 SCC 742.

instead of ‘citizen,’ the court correctly held that the life and liberty of foreigners are protected on Indian soil.<sup>101</sup> Consequently, the inhabitants of an informally blockaded refugee camp were permitted access to healthcare and food. NHRC neither creates a refugee protection regime nor even mentions the non-refoulement principle; it only confirms that foreigners enjoy limited protections under Article 21.

Besides the minimal right to life and liberty, which does not protect against detention and deportation under the Foreigners Act, refugees arguably have the right not to be discriminated against in relation to other refugees.<sup>102</sup> That is all. In some cases, very few and far between, regarding very specific facts, some courts have required the government to meet procedural due process standards before restrictively regulating refugees.<sup>103</sup> Those cases must be confined to their facts because they are very clearly exceptions; indeed none of them were even declared reportable and they are no longer than a few unreasoned paragraphs.<sup>104</sup> No amount of spin can create a pro-refugee jurisprudence where none exists, and it is dangerous to persist with the claim that such a jurisprudence does exist because it deflects attention away from a worrying gap in Indian law.

### 3. State Approaches to Refugee Protection

An examination of independent India’s responses to refugees reveals three approaches to protection.<sup>105</sup>

<sup>101</sup> *Id.*, ¶ 20.

<sup>102</sup> The state may classify a group of people as a separate class and subject them to special law if the separate class is intelligibly different and the classification is rationally linked to the special law’s objective. *See generally* Charanjit Lal v. Union of India, AIR 1951 SC 41; Kedar Nath Bajoria v. State of W.B., AIR 1953 SC 404; Kathi Raning Rawat v. State of Saurashtra, AIR 1952 SC 123. Foreigners are a special class, hence unequal treatment within the class is axiomatically unreasonable. *See* Air India v. Nergesh Meerza, (1981) 4 SCC 335 : (1982) 1 SCR 438; Kathi Raning Rawat, *id.* *But see* Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367 : (1955) 1 SCR 1284, ¶¶ 23-24, 1295 (“[I]t is easily understandable that reasons of State may make it desirable to classify foreigners into different groups”).

<sup>103</sup> DHAVAN, *supra* note 90, 63.

<sup>104</sup> *E.g.*, P. Nedumaran v. Union of India, Civil Writ Petitions Nos. 12298 and 12343 of 1992 (Mad) (Unreported); Gurunathan v. Union of India, Civil Writ Petitions Nos. 6708 and 7916 of 1992 (Mad) (Unreported) (declaring UNHCR a competent agency to determine the voluntariness of Sri Lankan refugee repatriations); Malavika Karlekar v. Union of India, Criminal Writ Petition No. 583 of 1992, decided on 25-9-1992 (SC) (UR) (conditionally injuncting deportations to Myanmar while UNHCR refugee status determination was pending); Bogyi v. Union of India, Civil Rule No. 1847 of 1989 (Gau) (Unreported) (permitting an asylum seeker to apply to UNHCR for protection).

<sup>105</sup> Acharya \*1, *supra* note 77, 4.

*First*, mass influx refugees are channelled to temporary camps to be identified and given shelter.<sup>106</sup> No individualised refugee status determination process is conducted.<sup>107</sup> There is sometimes a minimal screening process to identify dangerous persons such as irregular combatants who may be subjected to restrictive measures.<sup>108</sup> Refugees receive varying levels of socio-economic protection.<sup>109</sup> Most mass influxes have prompted specific legal measures regarding the entry, stay, and protection of refugees.<sup>110</sup> At the end of the conflict or situation that created them, mass influx refugees are usually expected to return *en masse* to their country of origin.<sup>111</sup>

*Second*, politically sensitive individuals, usually from countries with which India has sensitive relations, are granted asylum in rare instances by the Centre without a formal finding of persecution. Rarely referred to asylees, such individuals include the Dalai Lama,<sup>112</sup> Bangladeshi writer Taslima Nasrin,<sup>113</sup> and, potentially, the Baloch dissident Brahmadagh Bugti.<sup>114</sup> Grants of asylum of this nature have usually accompanied a political conflict with the asylum seeker's country of origin and, as such, have prompted accusations of deliberate and non-humanitarian political subversion against the Indian government.<sup>115</sup>

---

<sup>106</sup> *Id.*, 5. See also Partha N. Mukherji, *The Great Migration of 1971: II: Reception*, 9 ECONOMIC & POLITICAL WEEKLY 401, 403 (1974); Samir Kumar Dar, *State Response to the Refugee Crisis: Relief and Rehabilitation in the East in REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA, 1947-2000* 123-42 (Ranabir Samaddar ed., 2003); Asha Hans, *Sri Lankan Tamil Refugees in India*, 13 REFUGEE 30 (1993).

<sup>107</sup> CUTTS, *supra* note 25, 66.

<sup>108</sup> Hans, *supra* note 106, 30; C. Valatheeswaran & S. Irudaya Rajan, *Sri Lankan Tamil Refugees in India: Rehabilitation Mechanisms, Livelihood Strategies, and Lasting Solutions*, 30 REFUGEE SURVEY QUARTERLY 32 (2001); The Statesman, *Refugee Movement will be Centre's Main Task*, 27 June 1971.

<sup>109</sup> LOUISE W. HOLBORN, PHILIP CHARTRAND & RITA CHARTRAND, *REFUGEES, A PROBLEM OF OUR TIME: THE WORK OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1951-1972* 718 (1975); Peter Grbac, *Politicising Protection: India and its 1971 Refugees*, 6 (Canadian Association for Refugee and Forced Migration Studies, Working Paper No. 6, 2015), available at <http://carfms.org/wp-content/uploads/2015/11/CARFMS-WPS-No6-Peter-Grbac.pdf> (Last visited on November 29, 2016).

<sup>110</sup> Acharya \*1, *supra* note 77, at 5.

<sup>111</sup> See Grbac, *supra* note 109, 7 (recounting India's firm position that the 1971 refugees had to return).

<sup>112</sup> Outlook, 'The Dalai Lama is Our Honoured Guest,' October 25, 2009, available at <http://www.outlookindia.com/website/story/the-dalai-lama-is-our-honoured-guest/262500> (Last visited on November 28, 2016).

<sup>113</sup> Randeep Ramesh & Richard Lea, The Guardian, *India tells Bangladeshi writer to stay hidden or leave*, February 15, 2008, available at <https://www.theguardian.com/world/2008/feb/15/india.religion> (Last visited on November 28, 2016).

<sup>114</sup> Dawn, *Brahmadagh Bugti to seek asylum in India*, September 20, 2016, available at <http://www.dawn.com/news/1284917> (Last visited on November 28, 2016).

<sup>115</sup> Sara Sidner, CNN, *Dalai Lama Thanks India for 50 Years in Exile*, April 2, 2009, available at <http://www.cnn.com/2009/WORLD/asiapcf/03/31/dalai.lama/> (Last visited on November 28, 2016); The Times of India, *Dalai Lama shouldn't engage in political activities: China to India*, March 26, 2009, available at <http://timesofindia.indiatimes.com/india/>

*Third*, and finally, citizens of countries not covered by the two preceding approaches are allowed to apply to be recognised as mandate refugees by UNHCR following an individualist determination procedure in accordance with the UNHCR Statute.<sup>116</sup> If they are recognised as refugees, they are given an identity document stating that they are refugees which is generally respected by local authorities.<sup>117</sup> However, UNHCR's operations in India are not protected by formal agreement with the Indian government and its identity documents have no legal validity.<sup>118</sup> Mandate refugees receive no support from the Indian government but the most vulnerable sometimes receive a subsistence allowance from UNHCR.<sup>119</sup>

### III. A CRITIQUE OF THAROOR'S BILL

This Part weighs Tharoor' bill against four principles which underpin a normative asylum framework. Subpart A introduces the four principles to facilitate the appraisal of Tharoor's bill. Subpart B calls for a nuanced view of asylum cognizant of its many historical forms. Subpart C proposes a framework for regulating mixed migration. Subpart D highlights the significance of mass influxes, particularly India's experience of them, and the crucial challenges they will pose for a future asylum regime. Subpart E underscores the importance of a coherent model of asylum governance.

#### A. PRINCIPLES TO FACILITATE APPRAISAL

In light of India's critiques of the international refugee regime, any legislative proposal which merely recreates the terms of the Refugee Convention would be incomplete. So too, a bill that does not take account of past state approaches to refugee protection would potentially be a failure. India presents a unique context for refugees. It is a country committed to the protection of refugees, democracy, and diversity but situated in the volatile South Asian region which has highly fluid population movements, almost no signatories to the Refugee Convention,<sup>120</sup> and was recently described as "the second

---

Dalai-Lama-shouldnt-engage-in-political-activities-China-to-India/articleshow/4315761.cms (Last visited on November 28, 2016).

<sup>116</sup> See UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1992) (setting out UNHCR's refugee status determination procedure).

<sup>117</sup> Jesuit Refugee Service, *Legal Rights of Refugees in India*, 9 (October 2015), available at <https://en.jrs.net/assets/Publications/File/Legal%20Rights%20of%20Refugees%20in%20India.pdf> (Last visited on November 28, 2016); UNHCR, *Global Appeal 2011 Update, India*, 1 (2012), available at <http://www.unhcr.org/4cd96e919.pdf> (Last visited on November 28, 2016).

<sup>118</sup> MaryBeth Morand & Jeff Crisp, *Destination Delhi: A review of the implementation of UNHCR's urban refugee policy in India's capital city*, ¶¶ 9, 29-31 (UNHCR, July 2013), available at <http://www.unhcr.org/51f66e7d9.pdf> (Last visited on November 28, 2016).

<sup>119</sup> *Id.*, ¶ 51.

<sup>120</sup> From the greater South Asian region, Afghanistan is the only signatory to the Refugee Convention. UNHCR, *States Parties to the 1951 Convention relating to the Status of Refugees*

most violent place on earth.”<sup>121</sup> An Indian asylum law must be cognizant of Indian exceptionalism.

Bearing India’s context in mind, this writer proposes that an intelligent asylum system is underpinned by four propositions. These propositions should inform the assessment of any proposed asylum regime including Tharoor’s bill. The propositions are:

*First*, there are different forms of protection. People become refugees for various reasons and not always because of fear of persecution.<sup>122</sup> Where persecution occurs, it varies in intensity and may be based on grounds that conventional refugee law does not recognise. Refugee determination may even be redundant because it arbitrarily privileges certain criteria over others.<sup>123</sup> Refugees have dissimilar protection needs and host countries have different circumstances. Consequently, future law must recognise that asylum is nuanced, exists in different forms, and accessible through differentiated procedures.

*Second*, mixed flows must be addressed. Refugees often move within large mixed flows of migrants which might include people fleeing generalised violence, torture, targeted persecution, as well as economic migrants, victims of trafficking, women and children at risk, and environmental displaces. Future asylum law must contain an effective mechanism to scrutinise mixed flows, differentiate between dissimilar categories of people, interdict dangerous individuals, and match those in need of protection with an appropriate form of asylum.

*Third*, mass influx protection is more pressing than individualised procedures. The sheer number of mass influx refugees who have sheltered in India is far greater than those who have undergone an individualised status determination procedure.<sup>124</sup> Mass influxes have high costs.<sup>125</sup> There is greater

---

<sup>121</sup> and the 1967 Protocol, available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (Last visited on November 29, 2016).

<sup>122</sup> Ejaz Ghani & Lakshmi Iyer, Vox, *Conflict and development*, March 23, 2010, available at <http://voxeu.org/article/conflict-and-development-lessons-south-asia> (Last visited on November 28, 2016).

<sup>123</sup> See OAU Convention, *supra* note 11, Art. I(2).

<sup>124</sup> Chatham House, *The Refugees Convention: Why Not Scrap It?*, 1, 3 (Summary of the International Law Programme Discussion Group at Chatham House on October 20, 2005), available at <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/ilp201005.pdf> (Last visited on November 29, 2016).

<sup>125</sup> See Arjun Nair, *National Refugee Law for India, Benefits and Roadblocks* 1, 2 (Institute of Peace and Conflict Studies, Research Paper 11, 2007), available at [http://www.ipcs.org/pdf\\_file/issue/51462796IPCS-ResearchPaper11-ArjunNair.pdf](http://www.ipcs.org/pdf_file/issue/51462796IPCS-ResearchPaper11-ArjunNair.pdf) (Last visited on November 29, 2016).

<sup>126</sup> See generally Uri Dadush & Mona Neibauer, *The Economic Impact of Forced Migration* (OCP Policy Centre, Policy Paper 16/05, 2016), available at <http://carnegieendowment.org/2016/04/22/economic-impact-of-forced-migration-pub-63421> (Last visited on November

potential for them occurring when socio-cultural affinities transcend political boundaries as they do in South Asia.<sup>126</sup> Consequently, future asylum law must devote significant attention to creating a comprehensive regime for protecting mass influx refugees.

*Fourth*, asylum must be managed and refugees must be governed. Refugee influxes have a range of impacts on host communities. Mass influxes pose enhanced security challenges. Refugee policy often swings between two extremes - on the one hand, refugees are viewed with suspicion and on the other hand, they are patronised.<sup>127</sup> Neither approach is optimal, both approaches are reactive. Future asylum law must recognise that asylum situations demand management, refugees require participatory quasi-citizenship, and the needs of local communities and India's interests must be secured.

## B. A NUANCED UNDERSTANDING OF ASYLUM

This Subpart is divided into three sections. Section 1 briefly explores the multifaceted nature of asylum. Section 2 distinguishes asylum from refugee status. Section 3 proposes four distinct categories of shelter based on the different meanings of asylum, refugee status, and other standards of protection.

### 1. Asylum is Conceptually Pluralistic

Asylum is not monochromatic, it is a concept which has evolved over several centuries and continues to display a wide variance of meanings.<sup>128</sup> Before it evolved into an institution in international law, asylum was an ecclesiastical concept affording refuge in a place of worship.<sup>129</sup> It has never been

29, 2016); European Parliament, *Economic Challenges And Prospects of the Refugee Influx*, December 2015, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572809/EPRS\\_BRI\(2015\)572809\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572809/EPRS_BRI(2015)572809_EN.pdf) (Last visited on November 29, 2016); Nikita Malik, Carnegie Endowment for International Peace, *The Cost of Syrian Refugees*, September 19, 2013, available at <http://carnegieendowment.org/sada/53049> (Last visited on November 29, 2016).

<sup>126</sup> See generally WILLEM VAN SCHENDEL, THE BENGAL BORDERLAND: BEYOND STATE AND NATION IN SOUTH ASIA (2005); Ronald Skeldon, *Migration in South Asia: An Overview in POPULATION REDISTRIBUTION AND DEVELOPMENT IN SOUTH ASIA* (Leszek A. Kosiński & K. Maudood Elahi eds., 1985); Daniel Naujoks, Migration Policy Institute, *Emigration, Immigration, and Diaspora Relations in India*, October 15, 2009, available at <http://www.migrationpolicy.org/article/emigration-immigration-and-diaspora-relations-india> (Last visited on November 29, 2016).

<sup>127</sup> See Anna Badkhen, Foreign Policy, *Refugees Don't Need Your Pity*, January 26, 2016, available at <http://foreignpolicy.com/2016/01/26/refugees-dont-need-your-pity-migrants-disposessed-senegal/> (Last visited on November 26, 2016).

<sup>128</sup> See generally ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM (1980); María-Teresa Gil-Bazo, *Asylum as a General Principle of International Law*, 27 INT J REFUGEE LAW 3 (2015).

<sup>129</sup> PRAKASH SHAH, REFUGEES, RACE AND THE CONCEPT OF ASYLUM 6-8 (2000).

defined by any international instrument.<sup>130</sup> Nevertheless, in 1950, the Institute for International Law, a wholly European body, said “‘asylum’ means the protection which a state grants [...] to a person who comes to seek it”<sup>131</sup> - a circular definition. The inability to pin down asylum’s definitional characteristics have enabled states to interpret it expansively.<sup>132</sup>

Viewed from a European prism, asylum predates the international refugee regime<sup>133</sup> and as a result, there are several modern differences between asylum and refuge.<sup>134</sup> That distinction has been judicially recognised in numerous cases.<sup>135</sup> The EU’s Qualification Directive recognises two forms of protection for forced migrants - refuge and subsidiary protection,<sup>136</sup> while some countries go further. For instance, in addition to refuge derived from the Refugee Convention and subsidiary protection derived from the Qualification Directive, Germany also provides for asylum protection and a deportation ban.<sup>137</sup> Outside the EU’s *acquis communautaire*, the richest legal source of difference between refuge and asylum is provided by Latin America which has championed a distinct interpretation of asylum.

The Latin American version of asylum specifically protects people persecuted for political reasons or accused of political offences, including leaders of political movements, civil wars, and coups.<sup>138</sup> It is codified in two conventions of the Organisation of American States (OAS) of 1954 which

<sup>130</sup> Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE J. COMP. & INT'L L 3 (1994); Guy S. Goodwin-Gill, *International Law of Refugee Protection* in THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES, *supra* note 43, 42.

<sup>131</sup> *Institute of International Law: Resolutions Adopted at Its Bath Session, September, 1950*, 45 AM. J. INT'L L. 15-23 (1951).

<sup>132</sup> Constitution of the Republic of Mozambique, 1990 (rev. 2004) Art 20(2) (ascribing asylum to persecution “on the grounds of [...] struggle for national liberation, for democracy, for peace and for the protection of human rights”); JAMES MILNER, REFUGEES, THE STATE AND THE POLITICS OF ASYLUM IN AFRICA 19-35 (2009).

<sup>133</sup> Gil-Bazo, *supra* note 128, 7. Asylum is ancient from an Indian perspective too. See generally SHAPUBJI KAVASJI HODIVALA, PARSIS OF ANCIENT INDIA (1920) (recounting the grant of asylum by a Hindu ruler to Zoroastrians (Parsis) fleeing from Sassanid Persia).

<sup>134</sup> Gil-Bazo, *supra* note 128, 7.

<sup>135</sup> E.g., Joined Cases C 57/09 and C 101/09 Bundesrepublik Deutschland v. B & D, [2010] ECR I-10979 (Federal Administrative Court of Germany (Bundesverwaltungsgericht)).

<sup>136</sup> Compare Directive 2004/83/EC of the European Council of April 29, 2004, 2004 O.J. (L 304) (“Qualification Directive”), Arts. 2(d), 2(f), 9, 10 with Directive 2011/95/EU of the European Parliament and of the Council of December 13, 2011 (recast), 2011 O.J. (L 337), Arts. 9, 10, 15, 18; See also Livia Elena Bacaian, *The Protection of Refugees and Their Right to Seek Asylum in the European Union*, 18 (Geneva University), available at <https://www.unige.ch/gsi/files/6614/0351/6348/Bacaian.pdf> (Last visited on November 29, 2016).

<sup>137</sup> Marcus Engler & Jan Schneider, *German Asylum Policy and EU Refugee Protection: The Prospects of the Common European Asylum System (CEAS)*, 2-3 (Focus Migration Policy Brief No. 29, May 2015), available at <http://www.bpb.de/gesellschaft/migration/kurzdossiers/207657/german-asylum-policy-and-eu-refugee-protection> (Last visited on November 30, 2016).

<sup>138</sup> José H. Fischel De Andrade, *Forced Migration in South America* in THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES, *supra* note 43, 653-55.

distinguish between territorial and diplomatic asylum (“OAS Conventions”).<sup>139</sup> Whereas the former is granted to someone already in the host state, the latter can be granted by diplomatic missions abroad making it possible to receive asylum extra-territorially. Julian Assange is a diplomatic asylee on the premises of Ecuador’s embassy in London.<sup>140</sup> As a tool to defend freedom of expression from authoritarian states, this version of asylum was adopted by the Pan-African liberationist movement to protect African anti-colonial leaders.<sup>141</sup>

## 2. Defining and Distinguishing Refugee Status and Asylum

Tharoor’s bill begins with the error of conflating refugee status and asylum.<sup>142</sup> Refugee status and asylum are terms that are frequently and erroneously used interchangeably in common parlance.<sup>143</sup> However, asylum is conceptually wider than refugee status. States can grant asylum in their discretion without regard for the Refugee Convention, even in direct contravention of it.<sup>144</sup> Tharoor’s bill is called an asylum bill but deals only in refugee status, and, as discussed in the next paragraph, it has a problematic definition of refugee status. The conflation of refuge and asylum is a mistake that Tharoor’s bill imports from PILSARC’s bill.<sup>145</sup>

In Tharoor’s bill, the refugee definition contains two parts.<sup>146</sup> The first part reproduces the Refugee Convention’s definition and adds “ethnicity” as an additional ground of persecution. The second part of the definition incorporates UNHCR’s extended mandate which derives from a paper discussed at the 33rd meeting of EXCOM’s Standing Committee in June 2005.<sup>147</sup> UNHCR

<sup>139</sup> Convention on Diplomatic Asylum, March 28, 1954, 1438 U.N.T.S. 101; Convention on Territorial Asylum, March 28, 1954, 1438 U.N.T.S. 127.

<sup>140</sup> See Organisation of American States, Resolution of the twenty-seventh meeting of Consultation of Ministers of Foreign Affairs, RC.27/RES.1/12 rev. 3 (August 24, 2012), available at [http://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-67](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-67) (reaffirming the inviolability of Ecuador’s diplomatic premises following its grant of asylum to Assange).

<sup>141</sup> E.g., The Constitution of the Republic of Mozambique, 1990; CRISTIANO D’ORSI, ASYLUM-SEEKER AND REFUGEE PROTECTION IN SUB-SAHARAN AFRICA: THE PEREGRINATION OF A PERSECUTED HUMAN BEING IN SEARCH OF A SAFE HAVEN 61-74 (2015).

<sup>142</sup> Tharoor’s Bill, *supra* note 2, Cl. 2(1)(d) read with Cl. 4(1).

<sup>143</sup> E.g., Rafael Torres III & Nancy Miller, Asian Journal, *Recent developments in asylum*, April 16, 2016, available at <http://asianjournal.com/immigration/recent-developments-in-asylum-2/> (Last visited on November 29, 2016).

<sup>144</sup> See Gil-Bazo, *supra* note 128, 4.

<sup>145</sup> PILSARC’s Bill, *supra* note 6, Cl. 2(c) read with Cl. 4.

<sup>146</sup> Tharoor’s Bill, *supra* note 2, Cl. 4(1) (“A person qualifies as a refugee for the purposes of this Act if such person – (a) is outside his country of origin and is unable or unwilling to return to or avail himself of the protection of that country because of a well-founded fear of persecution on account of race, religion, sex, nationality, ethnicity, membership of a particular social group or political opinion; or (b) has left his country owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order”).

<sup>147</sup> UNHCR EXCOM, *Providing International Protection Including through Complementary Forms of Protection* (33rd Meeting, EC/55/SC/CRP.16, June 2, 2005), available at <http://www.unhcr.org>.

refers to its extended mandate as “complementary protection” and does not equate it with refugee status. According to UNHCR, complementary protection corresponds to the notion of subsidiary protection under the Qualification Directive,<sup>148</sup> which is distinct from refugee status too.

Why is the distinction between refugee status and subsidiary protection significant? There are two reasons. First, according to the Qualification Directive, subsidiary protection is a class of asylum distinct from refugee status because of the absence of targeted persecution.<sup>149</sup> Instead, subsidiary protection turns on the existence of “serious harm” which is objectively defined but individually weighed.<sup>150</sup> Consequently, the standards of treatment which are owed to subsidiary protectees differ from those owed to refugees.<sup>151</sup> As subsidiary protection is minimally individuated, it does not apply to mass influx displaces who may only receive a most basic form of temporary protection.<sup>152</sup> Tharoor’s bill, without explanation, bands these categories of protection together, thereby treating unequals equally to permit a potential discrimination claim.<sup>153</sup> Second, Tharoor might argue that for people forced to flee their homes, the targeted-individuated-temporary distinction is a meaningless technicality. This is a compelling argument that has been made before.<sup>154</sup> However, if that is the case, Tharoor must explain why his bill chose UNHCR’s narrower conception of complementary protection instead of the wider criteria in the OAU Convention and Cartagena Declaration, which informed earlier regional and Indian refugee proposals.<sup>155</sup>

---

[refworld.org/docid/47fdfb49d.html](http://refworld.org/docid/47fdfb49d.html) (Last visited on November 29, 2016).

<sup>148</sup> UNHCR, *Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence* (Submission to the European Court of Justice, January 2008), available at <http://www.refworld.org/pdfid/479df7472.pdf> (Last visited on November 28, 2016); See also UNHCR EXCOM, *supra* note 147.

<sup>149</sup> UNHCR, *supra* note 148, 3; See also Hannah Postel & Owen Barder, Center for Global Development, *Towards Safety: Subsidiary Protection for Survival Migrants*, July 18, 2016, available at <http://www.cgdev.org/blog/towards-safety-subsidiary-protection-survival-migrants> (Last visited on November 29, 2016); See also, María-Teresa Gil-Bazo, *Refugee status, subsidiary protection, and the right to be granted asylum under EC law* (UNHCR Research Paper No. 136, November 2006), available at <http://www.unhcr.org/455993882.pdf> (Last visited on November 29, 2016).

<sup>150</sup> Qualification Directive, *supra* note 136, Art. 15.

<sup>151</sup> UNHCR EXCOM, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, 3-4, EC/50/SC/CRP.18 (June 9, 2000), available at <http://www.unhcr.org/excom/EXCOM/3ae68d140.pdf> (Last visited on November 29, 2016).

<sup>152</sup> *Id.*, 4-5.

<sup>153</sup> *Supra* note 102 and accompanying text.

<sup>154</sup> E.g., Gunning, *supra* note 29, 48-56. See also, ARISTIDE R. ZOLBERG, ASTRI SUHRKE & SERGIO AGUAYO, *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* 269-71 (1989).

<sup>155</sup> E.g., Asian-African Legal Consultative Organisation, Bangkok Principles on the Status and Treatment of Refugees, December 31, 1966, Art. I(I), available at <http://www.aalco.int/Final%20text%20of%20Bangkok%20Principles.pdf> (Last visited on November 29, 2016); Seventh Informal Regional Consultation on Refugees and Migratory Movements in South Asia, December 15-16, 2002, *Model Law on Refugees* (proposed by the ‘Eminent Persons Group’ chaired by Justice P.N. Bhagwati) (‘Model Law’) Cl. 3. For a brief history of the Model

### 3. Four Forms of Protection for India

In the view of this writer, there ought to be distinct classes of protection for (i) refugees fleeing objective criteria of the nature described in the OAU Convention,<sup>156</sup> the Cartagena Declaration, and UNHCR's extended mandate, usually travelling in a mass influx; (ii) refugees fleeing subjective persecution on the grounds described in the Refugee Convention; (iii) asylees fleeing political persecution or politically-motivated actions of the nature described in the OAS Conventions; and (iv) asylees fleeing specific events such as natural disasters and catastrophic environmental changes. Measured against that standard, Tharoor's bill missed the opportunity to create a wide-ranging and flexible asylum regime, with different forms of refuge and asylum for different circumstances, which would protect the largest number of people while permitting the government a measure of latitude over, for instance, non-refugee political asylees.<sup>157</sup>

### C. A FRAMEWORK FOR MIXED MIGRATION

This Subpart has three sections. Section 1 briefly investigates recent efforts to conceptualise mixed migration. Section 2 describes India's familiarity with the historic phenomenon of mixed migration and the resemblance between mixed migration and mass influxes. Section 3 highlights the components of a good mixed migration regime.

#### 1. Thinking about Mixed Migration

Mixed migration is both a new phenomenon and an old reality. In the Global North's refugee debate, the novelty of mixed migration is manifested by its uncertain nomenclature. India refers to the phenomenon as mixed migration;<sup>158</sup> to European policymakers, it is irregular migration; and in the

Law, see RAJEEV DHAVAN, REFUGEE LAW AND POLICY IN INDIA 36-54 (2004). See also Arun Sagar & Farrah Ahmed, *The Model Law for Refugees: An Important Step Forward?*, 17 STUDENT BAR REVIEW 73 (2005). For a 2001 version of the Model Law, see *Model National Law on Refugees*, 1 ISIL Y.B. INT'L HUMAN. & REFUGEE L. 19 (2001).

<sup>156</sup> But see Marina Sharpe, *The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions*, 58 MCGILL LAW JOURNAL 113-24 (2012) (arguing that is a widespread misconception that the OAU Convention is objective and group-based); George Okkoth-Obbo, *Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa*, 20 REFUGEE SURVEY QUARTERLY 117-22 (April 2001) (arguing that the OAU Convention's expanded refugee definition is often misconstrued).

<sup>157</sup> Bhairav Acharya, *The Wire, A Step in the Right Direction but Shashi Tharoor's Asylum Bill is Far From Perfect*, October 31, 2016, available at <http://thewire.in/76546/shashi-tharoor-asylum-bill-2015> ('Acharya \*2') (Last visited on November 19, 2016).

<sup>158</sup> E.g., 50th EXCOM, *supra* note 48; 52nd EXCOM, *supra* note 48. However, India hypocritically refers to mixed migration from Bangladesh as illegal immigration. E.g., Press Information Bureau, Government of India, *SOP for Repatriation of Illegal Bangladeshi Immigrants*, July

United States, it is illegal immigration.<sup>159</sup> There have been recent efforts in northern policy debates to conceptualise mixed migration.<sup>160</sup> According to the International Organisation for Migration (IOM),

“mixed flows concern irregular movements, frequently involving transit migration, where [refugees, asylum-seekers, economic migrants and other migrants]<sup>161</sup> move without the requisite documentation, crossing borders and arriving at their destination in an unauthorized manner”<sup>162</sup>

The recent rise of the mixed migration debate - as opposed to mixed flows themselves, which are older - owes in large part to events in Europe over the last two decades. The creation of the Schengen area, which enhanced internal mobility but reinforced Europe’s external borders, spurred mixed migration because it supplanted regular immigration routes to ex-colonial countries, thereby pushing migrants into irregular channels such as boats.<sup>163</sup> Growing alarm at the ineffectiveness of applying traditional refugee concepts,<sup>164</sup> such the Refugee Convention’s definition of a refugee and individualised status determination, prompted UNHCR to issue an “action plan” for mixed migration in 2006.<sup>165</sup> Europe’s current “migrant crisis” has dramatically increased awareness of mixed migration.<sup>166</sup>

---

<sup>159</sup> 23, 2014, available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=107327> (Last visited on November 29, 2016).

<sup>160</sup> Christal Morehouse & Michael Blomfield, *Irregular Migration in Europe*, 2 (Migration Policy Institute, December 2011), available at <http://www.migrationpolicy.org/research/TCM-irregular-migration-europe> (Last visited on November 19, 2016).

<sup>161</sup> For a discussion of how mixed migration affects refugee rights, see Johannes van der Klaauw, *Refugee Rights in Times of Mixed Migration: Evolving Status and Protection Issues*, 28 REFUGEE SURVEY QUARTERLY 59-86 (2009).

<sup>162</sup> International Migration Organization, *Challenges of Irregular Migration: Addressing Mixed Migration Flows*, 2 (Discussion Note, 96th Session, MC/INF/294, November 7, 2008), available at [http://www.iom.int/jahia/webdav/shared/shared/mainsite/about\\_iom/en/council/96/MC\\_INF\\_294.pdf](http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/en/council/96/MC_INF_294.pdf) (Last visited on November 22, 2016).

<sup>163</sup> International Migration Organization, *Irregular Migration and Mixed Flows: IOM’s Approach*, 1 (98th Session, MC/INF/297, October 19, 2009), available at [https://governing-bodies.iom.int/system/files/jahia/webdav/shared/shared/mainsite/about\\_iom/en/council/98/MC\\_INF\\_297.pdf](https://governing-bodies.iom.int/system/files/jahia/webdav/shared/shared/mainsite/about_iom/en/council/98/MC_INF_297.pdf) (Last visited on November 22, 2016). However, no doubt reflective of the novelty and uncertainty of the field, this description is outdated since IOM reverted to the term ‘irregular migration’ which, it now concedes, has “no clear or universally accepted definition.” International Migration Organization, *Key Migration Terms*, available at <http://www.iom.int/key-migration-terms#Irregular-migration> (Last visited on November 19, 2016).

<sup>164</sup> Ruben Andersson, *Europe’s Failed ‘Fight’ Against Irregular Migration: Ethnographic Notes on a Counterproductive Industry*, 42 JOURNAL OF ETHNIC AND MIGRATION STUDIES 1056-57 (2016).

<sup>165</sup> Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J.L. & POL’ 135 (2001).

<sup>166</sup> 10-Point Plan, *supra* note 53.

<sup>167</sup> E.g., Jeanne Park, Council on Foreign Relations, *Europe’s Migration Crisis*, September 23, 2015, available at <http://www.cfr.org/refugees-and-the-displaced/europe-s-migration-crisis/p32874> (Last visited on November 22, 2016); Salwa Shameem, Chicago Policy Review, *Crisis*

## 2. The Old Reality of Mixed Flows and Mass Influxes

For countries in the Global South where the nation-state was not as entrenched as in Europe, mixed migration is an older reality.<sup>167</sup> India has grappled with unwieldy mixed flows from Bangladesh for several decades, a mix of refugees, non-refugee displaces, and long- and short-term migrants, arriving in streams and waves.<sup>168</sup> In 2013, a UN study declared Bangladeshi migrants in India as “the single largest ‘bilateral stock’ of international migrants in the South.”<sup>169</sup> There has also been historic migration from Nepal.<sup>170</sup> Aided by an open border and pushed by a decade-long civil war, Nepalis in mixed flows sought refuge, temporary shelter, and employment in India.<sup>171</sup> Because the migration is unmonitored, there is no data on the size and pattern of Nepali migration.<sup>172</sup> Indeed, migration between developing countries, or ‘south-south migration,’ is largely ignored in the north-centric global migration debate, even

*at Europe's Doorstep: A Conversation with Eugenio Ambrosi about Refugees, Migration, and the European Response*, October 6, 2015, available at <http://chicagopolicyreview.org/2015/10/06/crisis-at-europees-doorstep-a-conversation-with-eugenio-ambrosi-about-refugees-migration-and-the-european-response/> (Last visited on November 22, 2016).

<sup>167</sup> *Supra* note 51 and accompanying text; *supra* notes 52 and 54.

<sup>168</sup> Jolin Joseph & Vishnu Narendran, *Neither Here nor There: An Overview of South-South Migration From Both Sides of the Bangladesh-India Migration Corridor*, 6-9 (International Institute of Social Studies, Working Paper Series, Volume 569, May 2013), available at <http://repub.eur.nl/pub/50138/wp569.pdf> (Last visited on December 2, 2016); Asia Foundation, *Labour Migration Trends and Patterns: Bangladesh, India, and Nepal 2013*, 39-40 (November 2016), available at <https://asiafoundation.org/resources/pdfs/LabourMigrationTrendsandPatternsBangladeshIndiaandNepal2013.pdf> (Last visited on November 22, 2016); Bose, *supra* note 51.

<sup>169</sup> United Nations, Department of Social and Economic Affairs, Population Division, *International Migration 2013: Migrants by Origin and Destination*, ¶ 6, September 2013, available at [http://www.un.org/en/ga/68/meetings/migration/pdf/International%20Migration%202013\\_Migrants%20by%20origin%20and%20destination.pdf](http://www.un.org/en/ga/68/meetings/migration/pdf/International%20Migration%202013_Migrants%20by%20origin%20and%20destination.pdf) (Last visited on November 22, 2016) (3.2 million Bangladeshi migrants in India). But this number is far below domestic estimates. E.g., S.K. Sinha, Governor of Assam, *Report on Illegal Migration into Assam Submitted to the President of India*, ¶ 16, November 8, 1998, available at [http://www.satp.org/satporgtp/countries/india/states/assam/documents/papers/illegal\\_migration\\_in\\_assam.htm](http://www.satp.org/satporgtp/countries/india/states/assam/documents/papers/illegal_migration_in_assam.htm) (Last visited on November 22, 2016) (19.2 million Bangladeshi migrants in India in 1998).

<sup>170</sup> Daniel Naujoks, Migration Policy Institute, *Emigration, Immigration, and Diaspora Relations in India*, October 15, 2009, available at <http://www.migrationpolicy.org/article/emigration-immigration-and-diaspora-relations-india> (Last visited on November 22, 2016).

<sup>171</sup> Vipul Naik, Open Borders Blog, *Nepal and India: An Open Borders Case Study*, March 21, 2014, available at <http://openborders.info/blog/nepal-and-india-an-open-borders-case-study/> (Last visited on November 22, 2016); Raju Bhattai, Open Borders, *Closed Citizenship: Nepali Labour Migrants in Delhi*, 5-6 (Paper presented at the conference on International Migration, Multi-local Livelihoods and Human Security: Perspectives from Europe, Asia and Africa, August 30-31, 2007, available at <http://www.mtnforum.org/sites/default/files/publication/files/1139.pdf> (Last visited on November 29, 2016).

<sup>172</sup> Anurag Acharya, Nepali Times, *They Don't Count, And Are Uncounted*, March 2, 2012, available at [http://nepalitimes.com/news.php?id=19064#.WBbOuSSS\\_3B](http://nepalitimes.com/news.php?id=19064#.WBbOuSSS_3B) (Last visited on November 22, 2016).

though it accounted for around 47 per cent of total international migration in 2005.<sup>173</sup>

When arriving in large numbers, mixed flows resemble a mass influx, a grey area because there is no commonly accepted numerical threshold for gauging mass influxes.<sup>174</sup> Consider the flow of people from Syria, currently the world's largest group of refugees and migrants,<sup>175</sup> entering the Schengen area in mixed flows and confounding EU asylum law. Under the African Union's expansive conception of refugee status, that entire mixed flow would receive asylum based on the *prima facie* existence of aggression and public disorder alone - assuming, of course, that Syria had signed the OAU Convention.

### 3. The Components of a Mixed Migration Regime

Once within a place of safety, a good asylum regime ought to parse mixed groups to identify the most vulnerable, differentiate between categories of people, and address secondary movements.<sup>176</sup> Parsing a mixed flow is akin to triage. It should occur as soon as the mixed group is within an area of safety and certainly before any formal asylum determination proceedings are conducted. UNHCR refers to this process as "profiling and referral."<sup>177</sup> It describes the identification of the most vulnerable persons within a mixed group such as unaccompanied children, women at risk, torture survivors, victims of trafficking, and others. As it is inspected, people in a mixed flow can receive differentiated actions such as special help for the most vulnerable and formal asylum determination procedures for asylum seekers.

Considering mixed migration has captured and now dominates the global refugee debate, it is difficult to understand why Tharoor's bill ignores it altogether. The statement of objects and reasons attached to Tharoor's

<sup>173</sup> Beatriz Campillo-Carrete, *South-South Migration: A Review of the Literature*, 14 (International Institute of Social Studies (IIS) and International Development Research Centre (IDRC) Working Paper No. 570, November 2013), available at [https://www.iss.nl/file-admin/ASSETS/iss/Documents/Research\\_and\\_projects/IDRC-MGSJ/Campillo\\_WP\\_South-South\\_migration\\_Lit-reviewannotated-biblio\\_22July\\_2013.pdf](https://www.iss.nl/file-admin/ASSETS/iss/Documents/Research_and_projects/IDRC-MGSJ/Campillo_WP_South-South_migration_Lit-reviewannotated-biblio_22July_2013.pdf) (Last visited on November 29, 2016).

<sup>174</sup> Bhatrai, *supra* note 171; UNHCR, *Global Consultations on International Protection/Third Track: Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, 3 (EC/GC/01/4, February 19, 2001), available at <http://www.refworld.org/docid/3bfa83504.html> (Last visited on November 29, 2016).

<sup>175</sup> UNHCR, *Facts and Figures about Refugees*, available at <http://www.unhcr.ie/about-unhcr/facts-and-figures-about-refugees> (Last visited on November 22, 2016).

<sup>176</sup> See Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 INTERNATIONAL JOURNAL OF REFUGEE LAW 567-677 (2003); Madeline Garlick, *The Road More Travelled? Onward Movement of Asylum Seekers and Refugees*, 51 FORCED MIGRATION REVIEW 42 (January 2016), available at <http://www.fmreview.org/destination-europe/garlick.html> (Last visited on November 22, 2016).

<sup>177</sup> 10-Point Plan, *supra* note 53, 126.

bill says that migration has not received legislative recognition, which is true, but the text of his bill does not even mention mixed flows and does not contain a single provision to create the special procedures and authorities necessary to deal with the phenomenon. Considering his early career with UNHCR, and the fact that mixed migration was talked about in the Lok Sabha in 2015 during his ongoing term there as a member of parliament, Tharoor's bill is simply out of touch with the contemporary asylum debate and India's migration realities.

Perhaps the failure of Tharoor's bill to address mixed migration is because the phenomenon was not addressed in PILSARC's bill of 2006. Chapter III of Tharoor's bill, where the special procedures necessary for mixed flows ought to be located, borrows heavily from Chapter III of PILSARC's bill which was not drafted with mixed migration in mind. But that does not explain why no new provisions were added to Tharoor's bill to take account of UNHCR's 10-Point Plan for mixed migration which was also released in 2006.

#### *D. THE SIGNIFICANCE OF MASS INFLUXES*

This Subpart has nine sections. Section 1 underscores the international refugee regime's failure to quantify a mass influx. Section 2 surveys the Eurocentrism behind the failure to protect mass influxes. Section 3 briefly revisits India's unstructured but notable record of mass influx protection. Section 4 draws four lessons for future mass influx protection based on past international failures and Indian practices. Section 5 identifies specific failures regarding the principle of non-refoulement in Tharoor's bill which would hurt mass influxes. Section 6 deals with 'disguised extradition,' the immigration law loophole which is often used against refugees. Section 7 calls for specialised procedures to parse mass influx groups leading to differentiated protection mechanisms. Section 8 revisits the immediate administrative and structural challenges posed by mass influxes. Section 9 talks about the need to address secondary movements.

##### 1. The Elusive Mass Influx Threshold

Debates on mixed migration often dovetail into mass influx discussions because the two phenomena are seamless in many respects. According to the EU's 2001 Temporary Protection Directive, a mass influx is the "arrival [...] of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival [...] was spontaneous or aided" who are unable to return to their country of origin "because of the situation prevailing in that country".<sup>178</sup> But, as UNHCR points out, there is no European

---

<sup>178</sup> Directive 2001/55/EC of the European Council of July 20, 2001, 2001 O.J. (L 212) ('Temporary Protection Directive'), Arts. 2(d), 2(c).

consensus on how many people constitute a mass influx,<sup>179</sup> so the Directive has never been activated.<sup>180</sup> In 2004, through a crucial EXCOM conclusion, UNHCR provided a structural description of a mass influx.<sup>181</sup>

The primary difference between a mass influx and a mixed flow is that, more often than not, the latter originates from many places whereas the former usually originates from a specific area. But mixed flows can originate from a single area too, and when that occurs in a time of conflict, it confuses the international refugee regime.<sup>182</sup> Unfortunately, the price of definitional imprecision is usually paid by migrants and asylum seekers. The inability to reach an understanding on terminology prevented the invocation of the Temporary Protection Directive in response to the exodus from Syria.<sup>183</sup>

## 2. The Discontents of Eurocentrism

Europe's wilful blindness regarding mass influxes goes back to the time the Refugee Convention was negotiated. Several European states were of the view that the duty of non-refoulement only applied to refugees already within their territories and not to those who had reached their frontiers and

<sup>179</sup> UNHCR, *Annotated Comments on Council Directive 2001/55/EC of 20 July 2001*, 5-6 (May 19, 2003), available at <http://www.refworld.org/docid/3ecdebc4.html> (Last visited on November 23, 2016). See also Kate Akkaya, Advanced Training Program on Humanitarian Action, Harvard University, Why is the Temporary Protection Directive Missing from the European Refugee Crisis Debate?, October 7, 2015, available at <http://atha.se/blog/why-temporary-protection-directive-missing-european-refugee-crisis-debate> (Last visited on November 23, 2016).

<sup>180</sup> Meltem Ineli-Ciger, *Time to Activate the Temporary Protection Directive: Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe*, 18 EUROPEAN JOURNAL OF MIGRATION AND LAW 14-15 (2016).

<sup>181</sup> UNHCR EXCOM, *International Cooperation and Burden and Responsibility Sharing in Mass Influx Situations* (General Conclusion on International Protection No. 100 (LV) of 2004, 55th Session, UN Doc. A/AC.96/1003), available at <http://www.unhcr.org/en-us/excom/exconc/41751fd82/conclusion-international-cooperation-burden-responsibility-sharing-mass.html> ("[M]ass influx situations may, inter alia, have some or all of the following characteristics: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers") (Last visited on November 23, 2016).

<sup>182</sup> Tometten, *supra* note 55, 79-80.

<sup>183</sup> See, e.g., Ineli-Ciger, *supra* note 180; Olga Mitrovic, European Politics and Policy, London School of Economics, *Used during the Balkan crises, the EU's Temporary Protection Directive may now be a solution to Europe's refugee emergency*, December 22, 2015, available at <http://blogs.lse.ac.uk/europppblog/2015/12/22/the-eus-temporary-protection-directive-as-a-solution-to-europes-refugee-crisis/> (Last visited on November 22, 2016); Joanne van Selm, EU Observer, *Temporary Protection: EU had plan for migrant influx*, October 14, 2015, available at <https://euobserver.com/opinion/130678> (Last visited on November 22, 2016); Cynthia Orchard & Dawn Chatty, Open Democracy, *High time for Europe to offer temporary protection to refugees from Syria?*, October 2, 2014, available at <https://www.opendemocracy.net/can-europe-make-it/cynthia-orchard-dawn-chatty/high-time-for-europe-to-offer-temporary-protection-to> (Last visited on November 22, 2016).

sought entry.<sup>184</sup> In other words, European states wanted to protect their ability to refuse entry to mass influxes by rejecting such refugees at the frontier. Over the years, the non-refoulement principle has been expansively recast to prohibit frontier rejections and entry refusals.<sup>185</sup> This is an important point to note because, as pointed out in Part III, Subpart D, Section 5 of this paper, Tharoor's bill enables the rejection of refugees and asylum seekers at India's frontiers.

Breaking first from Eurocentrism, the OAU Convention expressly prohibited refoulement at national frontiers.<sup>186</sup> By recognising that refugees flee objective criteria too such as serious public disorder,<sup>187</sup> it acknowledged that refugees are created for reasons other than targeted persecution on Westphalian ethno-cultural grounds.<sup>188</sup> On the other hand, there are claims that the OAU Convention's wide refugee definition was not intended to redress the failings of the Refugee Convention, but to accelerate African decolonisation.<sup>189</sup> Others have challenged the view that the Convention promotes group-based rather than individualised protection.<sup>190</sup> In any event, with a few exceptions,<sup>191</sup> many

<sup>184</sup> FRANCESCO CHERUBINI, ASYLUM LAW IN THE EUROPEAN UNION 91 (2015).

<sup>185</sup> Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion* in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 116-18 (Erika Feller et al eds., 2003); GUY S. GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 205-08 (2007). See also UNHCR EXCOM, *Protection of Asylum-Seekers in Situations of Large-Scale Influx* (General Conclusion on International Protection No. 22 (XXXII) of 1981, 32nd Session, Supp. No. 12A, UN Doc. A/36/12/Add.1, October 21, 1981), available at <http://www.unhcr.org/en-us/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html> (Last visited on November 22, 2016); UNHCR EXCOM, General Conclusion on International Protection No. 74 (XLV) of 1994 (45th Session, Supp. No. 12A, UN Doc. A/49/12/Add.1, October 7, 1994), available at <http://www.unhcr.org/en-us/excom/exconc/3ae68c6a4/general-conclusion-international-protection.html> (Last visited on November 22, 2016).

<sup>186</sup> OAU Convention, *supra* note 11, Art. II(3) ("No person shall be subjected [...] to measures such as rejection at the frontier [...]").

<sup>187</sup> But see Sharpe, *supra* note 156; Okkoth-Obbo, *supra* note 156.

<sup>188</sup> See generally Barnett, *supra* note 46 (explaining how the refugee regime is linked to the Westphalian state system); PATRICIA TUITT, FALSE IMAGES: LAW'S CONSTITUTION OF THE REFUGEE (1996) (critiquing the significance refugee law ascribes to alienage). See also ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION (1996) (describing the crisis in the Westphalian model); Josef Joffe, Foreign Affairs, *Rethinking the Nation-State: The Many Meanings of Sovereignty*, available at <https://www.foreignaffairs.com/reviews/review-essay/1999-11-01/rethinking-nation-state-many-meanings-sovereignty> (examining the relevance of classical sovereignty in an interconnected world) (Last visited on November 23, 2016).

<sup>189</sup> Okkoth-Obbo, *supra* note 156, 111-12.

<sup>190</sup> E.g., Micah Bond Rankin, Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on, 9-10 (UNHCR, Working Paper No. 113, April 2005), available at <http://www.unhcr.org/en-us/research/working/425f71a42/extending-limits-narrowing-scope-deconstructing-oau-refugee-definition.html> (Last visited on November 23, 2016); Jean-François Durieux, *The Many Faces of "Prima Facie": Group-Based Evidence in Refugee Status Determination*, 25 REFUGE 151 (2008), available at <http://refuge.journals.yorku.ca/index.php/refuge/article/viewFile/26037/24070> (Last visited on November 23, 2016).

<sup>191</sup> E.g., Roni Amit, *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (African Centre for Migration and Society, June 2012), available

African countries have impressive histories of mass influx protection made possible by expanding on the Refugee Convention's European notion of refugee status.<sup>192</sup>

When targeted persecution is a precondition for protection, people fleeing generalised violence are often left unprotected because they are unable to prove that they were singled out for persecution.<sup>193</sup> That is because it is easier for a person to prove targeted persecution when her peers are not persecuted; when an entire community is victimised, the standard of targeted persecution for that person to prove is higher. European courts have required people fleeing generalised violence to prove, above and beyond the threats to their life and liberty, a higher risk to themselves compared to the already heightened risk to their community.<sup>194</sup> This has resulted in an uneven corpus of differential risk in international refugee law.<sup>195</sup>

The Refugee Convention's European notion of refugee status imposes unfairly high penalties on rural non-elites, particularly illiterate or uneducated individuals unable to prove they were persecuted.<sup>196</sup> It also fails to protect people fleeing from community-enforced atrocities such as female

at <http://www.migration.org.za/newcms/uploads/docs/report-35.pdf> (Last seen November 23, 2016) (documenting bias and failures in South Africa's refugee and asylum system).

<sup>192</sup> D'ORSI, *supra* note 141, 75-84; PENELOPE MATHEW & TRISTAN HARLEY, REFUGEES, REGIONALISM AND RESPONSIBILITY 43-45 (2016).

<sup>193</sup> Walter Kalin, *Refugees and Civil Wars: Only a Matter of Interpretation?*, 3 INTERNATIONAL JOURNAL OF REFUGEE LAW 435-451 (1991); Matthew Albert, *Governance and Prima Facie Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx*, 29 REFUGEE SURVEY QUARTERLY 65-67 (2010); Hugo Storey & Rebeca Wallace, *War and Peace in Refugee Law Jurisprudence*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 349 (2001) *Note on International Protection: International Protection in Mass Influx (submitted by the High Commissioner)* (46th Session, UN Doc. A/AC.96/850, September 1, 1995)<http://www.refworld.org/docid/3ae68d404.html> (Last visited on November 29, 2016); UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugee* (April 2001), available at <http://www.refworld.org/docid/3b20a3914.html> (Last visited on November 29, 2016). See also Bonaventure Rutinwa, *Prima Facie Status and Refugee Protection* (UNHCR, Working Paper No. 69, October 2002), available at <http://www.unhcr.org/3db9636c4.pdf> (Last visited on November 23, 2016); Vanessa Holzer, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence* (UNHCR, Legal and Protection Policy Research Series, PPLA 2012/05, September 2012), available at <http://www.refworld.org/pdfid/50474f062.pdf> (Last visited on November 23, 2016).

<sup>194</sup> Adan v. Secy. of State for the Home Deptt., (1999) 1 AC 293 : (1998) 2 WLR 702 : (1998) 2 All ER 453, 455 ("In such a situation the individual or group has to show a well-founded fear of persecution over and above the risk to life and liberty inherent in the civil war") (House of Lords); Mohamed v. Ashcroft, 396 F 3d 999, 1006 (8th Cir 2005). See Luara Ferracioli, *The Appeal and Danger of a New Refugee Convention*, 40 SOCIAL THEORY AND PRACTICE 124-27 (2004).

<sup>195</sup> But see Prophete v. Canada, 2008 FC 331 (Federal Court of Canada); Minister for Immigration and Multicultural Affairs v. Haji Ibrahim, 2000 HCA 55 (High Court of Australia).

<sup>196</sup> Gunning, *supra* note 29, 35-36.

genital mutilation.<sup>197</sup> European attitudes towards mass influxes changed only when Europeans constituted those mass influxes, particularly after the Balkan wars in the 1990s,<sup>198</sup> resulting in the Temporary Protection Directive being adopted.

### 3. India's Experience of Mass Influxes

India has an exemplary but unsystematic history of protecting mass influx refugees. In 1971, around 10 million refugees from what is now Bangladesh found refuge in India - the "largest single displacement of refugees in the second half of the century."<sup>199</sup> But there was no systematic mechanism to parse the mass influx group, for example, to identify vulnerable and dangerous individuals.<sup>200</sup> The 1971 refugees were voluntarily repatriated *en masse* after the violence in Bangladesh subsided, bringing the crisis to an end.<sup>201</sup>

On the other hand, the Tibetan mass influx into India, beginning in 1959 and still continuing,<sup>202</sup> remains in search of a permanent solution.<sup>203</sup> For Sri Lankan Tamil refugees,<sup>204</sup> their stay in India has been marked by heavy surveillance following Prime Minister Rajiv Gandhi's assassination by one of their compatriots.<sup>205</sup> But a policy of suspicion cannot correct the original failure to screen the group when it entered India.<sup>206</sup> For Chakmas and Hajongs displaced

<sup>197</sup> But see UNHCR, *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, 5-6 (May 2009), available at <http://www.refworld.org/docid/4a0c28492.html> (Last visited on November 23, 2016).

<sup>198</sup> See generally JOANNE SELM-THORBURN, REFUGEE PROTECTION IN EUROPE: LESSONS OF THE YUGOSLAV CRISIS 81-84 (1998).

<sup>199</sup> CUTTS, *supra* note 25, 59. See also Ganguly & Miliate, *supra* note 59; K.C. Saha, *The Genocide of 1971 and the Refugee Influx in the East* in REFUGEES AND THE STATE: PRACTICES OF ASYLUM AND CARE IN INDIA, 1947-2000 (Ranabir Samaddar ed., 2003); ANTARA DATTA, REFUGEES AND BORDERS IN SOUTH ASIA: THE GREAT EXODUS OF 1971 (2012).

<sup>200</sup> See CUTTS, *supra* note 25, 66.

<sup>201</sup> CUTTS, *id.*, 68-71. But see Grbac, *supra* note 109, 7.

<sup>202</sup> See Yuji Kuronuma, Nikkei Asian Review, *Tibet's exiles in India confront an uncertain future*, August 18, 2016, available at <http://asia.nikkei.com/magazine/20160818-SONY-S-RENAISSANCE/Politics-Economy/Tibet-s-exiles-in-India-confront-an-uncertain-future> (Last visited on November 23, 2016).

<sup>203</sup> Sumegha Gulati, The Quint, *Tibetans in India: Are They Refugees or Diaspora?*, June 20, 2016, available at <https://www.thequint.com/india/2015/09/12/tibetans-in-india-are-they-refugees-or-diaspora> (Last visited on November 23, 2016). See also Berne-Wabern, Swiss Federal Office for Migration, *The Tibetan Community in India*, 16, 18 (2003), available at <https://www.sem.admin.ch/dam/data/sem/internationales/herkunftsstaender/asien-nahost/ind/IND-ber-tibetan-community-e.pdf> (Last visited on November 23, 2016).

<sup>204</sup> Arun Janardhan, Indian Express, *Explained: The Sri Lankan Refugee Question*, January 31, 2015, available at <http://indianexpress.com/article/india/india-others/explained-the-sri-lankan-refugee-question/> (Last visited on November 23, 2016).

<sup>205</sup> Valatheeswaran & Rajan, *supra* note 108, 25-28.

<sup>206</sup> JUSTICE M.C. JAIN COMMISSION OF INQUIRY, *Assassination of Rajiv Gandhi*, Interim Report ¶ 51 (August 1997).

by a dam and religious persecution in Bangladesh, Indian asylum has not yielded the kind of protection and generosity shown to other communities.<sup>207</sup>

#### 4. Four Lessons for Mass Influx Protection

There are four chief lessons from international practice and India's experience that should inform a future asylum regime. First, the duty to respect the principle of non-refoulement is overriding, and it extends to preventing frontier rejections and entry refusals. Second, there is a need for special procedures to parse mass influx groups, similar to those described in the previous section for mixed flows, to identify vulnerable persons; and a screening mechanism to prevent criminals, *genocidaires*, and other dangerous individuals from entering India.<sup>208</sup> Third, alongside different forms of protection, there must be different models of refugee management designed to quickly achieve a durable solution to end the mass influx. Fourth, there must be a mechanism to deal with secondary movements and asylum shopping.

#### 5. Strengthening Non-Refoulement

There should be an absolute bar against refoulement regardless of whether a person is on Indian soil or trying to get in, and regardless of what form of India's protection she seeks or already enjoys, whether that is refugee status, asylum, or any shade of either of them.<sup>209</sup> Tharoor's bill would derogate the principle in three ways. *First*, Clause 8 of his bill restricts the protection against refoulement to refugees only, not asylum seekers; and refugees are defined as people who have been formally granted asylum. So asylum seekers, both those whose asylum claims are pending as well those who have not filed claims yet, can be sent back as long the procedure for their removal complies with clause 9.

---

<sup>207</sup> Pisharoty, *supra* note 24; Ratna Bharali Talukdar, India Together, *Livelihood crisis for Chakma, Hajong refugees*, September 14, 2008, available at <http://indiatogether.org/refugee-human-rights> (Last visited on November 23, 2016); Mahanirban Calcutta Research Group, *The State of Being Stateless: A Case Study on Chakmas in Arunachal Pradesh*, 2009, available at <http://www.mrcg.ac.in/Statelessness.pdf> (Last visited on November 23, 2016); Samudra Gupta Kashyap, Indian Express, *Why Chakmas and Hajongs are India's nowhere people*, October 2, 2015, available at <http://indianexpress.com/article/explained/why-chakmas-and-hajongs-are-indias-nowhere-people/> (Last visited on November 23, 2016).

<sup>208</sup> Bonaventure Rutinwa, *Screening in Mass Influxes: The Challenge of Exclusion and Separation*, 13 FORCED MIGRATION REVIEW 35 (2002), available at <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR13/fmrl13.12.pdf> ('Rutinwa \*3') (Last visited on November 23, 2016).

<sup>209</sup> See Lauterpacht & Bethlehem, *supra* note 185, 118; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (January 26, 2007), available at <http://www.refworld.org/docid/45f17ala4.html> (Last visited on November 23, 2016); UNHCR Non-Refoulement Note, *supra* note 47. See also Rene Bruin & Kees Wouters, *Terrorism and the Non-Derogability of Non-Refoulement*, 15 INTERNATIONAL JOURNAL OF REFUGEE LAW 5-29 (2003) (arguing that the rule of non-refoulement protects terrorists too).

*Second*, Clause 8 permits frontier rejections because it qualifies the application of non-refoulement to “refugee[s] present within the national territory of India.” That would permit refugees at India’s frontiers, but not on its territory, to be turned away. If enacted, the clause would reverse India’s decades-old, unwritten policy of never rejecting asylum seekers at the frontier.

Through Clause 10(2), Tharoor’s bill tries to staunch the wound it inflicted on the non-refoulement principle by preventing “police officer[s] or [...] person[s] exercising powers under the Foreigners Act” from denying asylum seekers entry into India. But Clause 10(2) would be ineffective against members of India’s army and navy because they are not police officers and do not derive legal authority from the Foreigners Act while on active duty. That is a significant error because many Indian borders are controlled by the army or the navy.<sup>210</sup> An asylum seeker at such a border may be turned away by a soldier or sailor against whom Tharoor’s bill is unenforceable. The general *non-obstante* clause does not suffice.<sup>211</sup>

*Third*, through Clause 8, Tharoor’s bill restricts the protection of the non-refoulement principle only to those fleeing subjective persecution on the grounds listed in his Clause 4(1)(a). It explicitly does not protect people fleeing the objective criteria listed in his Clause 4(1)(b), which happen to be the grounds on which mass influxes will most probably receive asylum. In effect, besides enabling rejections at the frontier, Tharoor’s bill would allow mass influx refugees to be forced back to places where there are “serious and indiscriminate threats to life.”

## 6. Preventing Disguised Extraditions

A ‘disguised extradition’ occurs when a state uses its immigration law, instead of extradition law, to transfer the custody of a person to another state.<sup>212</sup> Usually, the former’s deportation power grants wider leeway to the

<sup>210</sup> See generally Centre for Land Warfare Studies, *Border Management: Guarding the Frontiers, Challenges to Border Management* (Seminar Report, July 17, 2014), available at [http://www.claws.in/images/events/pdf/1356231052\\_ChallengesToBorderManagement17JulyReport.pdf](http://www.claws.in/images/events/pdf/1356231052_ChallengesToBorderManagement17JulyReport.pdf) (Last visited on November 23, 2016); Gurmeet Kanwal, *India’s Borders*, 23 INDIAN DEFENCE REVIEW 192-94 (2008).

<sup>211</sup> See Aswini Kumar Ghosh v. Arabinda Bose, AIR 1952 SC 369 : 1953 SCR 1, 3 (finding that a non-obstante clause in a special law overrides the general law but not necessarily other special law); *distinguish* Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd., (1993) 2 SCC 144 : (1993) 1 SCR 340, 360 (clarifying that a non-obstante clause in a special law overrides the non-obstante clause of an earlier special law provided that both laws govern the same field); *accord* Shri Ram Narain v. Simla Banking and Industrial Co. Ltd., AIR 1956 SC 614 : 1956 SCR 603, 613; Ashoka Mktg. Ltd. v. Punjab National Bank, (1990) 4 SCC 406 : (1990) 3 SCR 649, 688; R.S. Raghunath v. State of Karnataka, (1992) 1 SCC 335, 341.

<sup>212</sup> International Law Commission, *Expulsion of Aliens*, ¶¶ 430-442 (58th Session, UN Doc. A/CN.4/565, July 10, 2006), available at <http://legal.un.org/docs/?symbol=A/CN.4/565> (Last

expelling state than the latter's due process regime.<sup>213</sup> Disguised extraditions enable states to bypass the 'political offence exception' in extradition law by which a state can refuse an extradition request if it believes it is for an offence of a political nature.<sup>214</sup> The political offence exception is recognised in Indian law.<sup>215</sup> Some jurisdictions also recognise a 'discrimination exception' if the requisition is informed by persecutory intent, but not India.<sup>216</sup>

Why is this significant? Asylum and extradition share an interface which permits removals for non-political offences only. For instance, Tharoor's bill excludes from asylum persons who have committed "serious non-political offences";<sup>217</sup> and the Extradition Act, 1957 exempts political offenders from extradition.<sup>218</sup> Hence, if a state wants to remove a political offender to face punishment elsewhere, it must effect a disguised extradition which is only possible if the person has been excluded from asylum.

To exclude a person from asylum, there must be serious charges of a non-political nature against her. There is no consensus on what constitutes a political offence, hence non-political offences are open to interpretation.<sup>219</sup> Acts of sedition or *lèse-majesté* are overtly political but terrorism, even when it is committed for a political purpose, is not.<sup>220</sup> In many jurisdictions, the decision as to what constitutes a political offence ultimately belongs to the executive.<sup>221</sup> So a trumped-up non-political charge or an accusation of terrorism may

---

visited on November 23, 2016). See also Paul O'Higgins, *Disguised Extradition: The Soblen Case*, 27 MODERN LAW REVIEW 521 (1964); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (2014).

<sup>213</sup> Compare R. v. Governor of Brixton Prison, ex p Soblen, (1963) 2 QB 243 : (1962) 3 WLR 1154 : (1962) 3 All ER 641 (CA) ('Soblen') (permitting the deportation of a fugitive because his presence was not conducive to the public good, not because he was wanted as a criminal elsewhere), with R. v. Horseferry Road Magistrates' Court, ex p Bennett, (1994) 1 AC 42 : (1993) 3 WLR 90 : (1993) 3 All ER 138 HL(E) (finding that forcibly returning an accused without regard for extradition procedures is an abuse of law).

<sup>214</sup> E.g., Sibylle Kapferer, *The Interface between Extradition and Asylum*, 26-32 (UNHCR Legal and Protection Policy Research Series, PPLA/2003/05, November 2003), available at <http://www.unhcr.org/3fe84fad4.pdf> (Last visited on November 23, 2016); O'Higgins, *supra* note 212.

<sup>215</sup> The Extradition Act, 1962, §§ 7(2) and 31(1)(a) read with § 31(2) and the Schedule. But see Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367 : (1955) 1 SCR 1284 ¶¶ 23-24, 1301 ("[T]he fact that [an extradition] request has been made does not fetter the discretion of Government to choose the less cumbersome procedure of the Foreigners Act when a foreigner is concerned"). See also R.C. Hingorani, *Deportation or Extradition: Re Soblen in Retrospect*, 6 JOURNAL OF THE INDIAN LAW INSTITUTE 120 (1964).

<sup>216</sup> Convention [...] Relating to Extradition between Member States of the European Union, October 23, 1996, 1996 O.J. (C 313), Art. 5(3).

<sup>217</sup> Tharoor's Bill, *supra* note 2, Cl. 5(1)(a)(ii).

<sup>218</sup> *Supra* note 215.

<sup>219</sup> Kapferer, *supra* note 214, 28.

<sup>220</sup> *Id.*, 30-31.

<sup>221</sup> E.g., Extradition of McMullen, In re, 989 F 2d 603, 613 (2nd Cir 1993); Hans Muller v. Supt., Presidency Jail, AIR 1955 SC 367 : (1955) 1 SCR 1284, ¶¶ 23-24, 1300-01. See generally David M. Lieberman, *Sorting the Revolutionary from the Terrorist: The Delicate*

be enough to deprive an asylum seeker of protection. To protect against this, Tharoor's bill should list the political offences that enable protection.

## 7. Special Procedures and Differentiated Protection

Mass influxes demand statutorily guaranteed special procedures. UNHCR's emergency handbook contains a list of minimum standards for mass influxes, which are broadly covered by Clause 36 of Tharoor's bill.<sup>222</sup> Whereas logistical needs can be left to subordinate legislation, the screening of mass influx groups to weed out criminals, *genocidaires*, dangerous elements, and fake claimants must be statutorily mandated.<sup>223</sup> Econometric analyses of twentieth century conflicts reveal that refugees are an important causal link between the onset and continuation of civil conflict, although their effects can be politically mediated.<sup>224</sup> Tharoor's bill lacks not just a screening mechanism, it is also missing an understanding of conflict diffusion.

Tharoor's mass influx proposals are borrowed almost verbatim from PILSARC's bill.<sup>225</sup> In the intervening decade, Europe's migrant crisis provides new cues for refugee policymakers which Tharoor's bill should have reflected. The most significant missing provisions pertain to differentiated asylum procedures. They are necessary because a mass influx contains different categories of people, it is not a homogeneous congregation.<sup>226</sup> This paper has already proposed four categories of asylum. Those who want to claim refugee status on the basis of subjective persecution should be allowed to undergo a full-fledged individual status determination procedure conducted by a professional asylum agency. People fleeing generalised violence should be granted *prima facie* group refugee status. Individuals accused of political crimes in their home countries should receive a time-bound asylum decision directly

*Application of the Political Offense Exception in U.S. Extradition Cases*, 59 STANFORD LAW REVIEW 181-212 (2006); Maria P. Imbalzano, *In Re Mackin: Is the Application of the Political Offense Exception an Extradition Issue for the Judicial or Executive Branch?*, 5 FORDHAM INTERNATIONAL LAW JOURNAL 565-597 (1982).

<sup>222</sup> UNHCR, HANDBOOK FOR EMERGENCIES 26-42 (2007).

<sup>223</sup> Rutinwa, *supra* note 208.

<sup>224</sup> See generally Idean Salehyan & Kristian Skrede Gleditsch, *Refugee Flows and the Spread of Civil War*, 60 INTERNATIONAL ORGANIZATION 335 (2006); Seung-Whan Choi & Idean Salehyan, *No Good Deed Goes Unpunished: Refugees, Humanitarian Aid, and Terrorism*, 30 CONFLICT MANAGEMENT AND PEACE SCIENCE 53 (2013); Kerstin Fisk, *Refugee Geography and the Diffusion of Armed Conflict in Africa*, 16 CIVIL WARS 255 (2014). But see Andrew Shaver & Yang-Yang Zhou, *Questioning Refugee Camps as Sources of Conflict* (September 24, 2015) (unpublished, under review), available at [https://scholar.princeton.edu/sites/default/files/ashaver/files/refugees\\_conflict\\_final.pdf](https://scholar.princeton.edu/sites/default/files/ashaver/files/refugees_conflict_final.pdf) (Last visited on November 29, 2016).

<sup>225</sup> Compare Tharoor's Bill, *supra* note 2, Cl. 30-33 with PILSARC's Bill, *supra* note 6, Cl. 25-28.

<sup>226</sup> E.g., Organization for Economic Cooperation and Development, Migration Policy Debates, *Is this Humanitarian Migration Crisis Different?* 6, 7 (September 2015), available at <https://www.oecd.org/migration/Is-this-refugee-crisis-different.pdf> (Last visited on November 29, 2016).

from the Centre. And, refugees from disasters and climate change should receive customised solutions.

## 8. Managing Mass Influxes

An asylum regime is not only about granting asylum, it is also about what comes afterwards - the actual governance of refugees. This broad point is discussed in more detail in Subpart E of this Part. The narrow point discussed here is specifically about managing mass influxes. Because they strain capacity and resources, mass influxes must be managed at a number of levels. Mass influx camps require municipal management,<sup>227</sup> local areas where refugees are located require proactive administration, particularly to prevent conflicts between refugees and locals;<sup>228</sup> and mass influxes as a whole must be brought to a swift conclusion without coercion or refoulement.

Refugees should not - to adapt a European term - be kept in 'orbit' by being forced to wander looking for protection, never being granted asylum but not being refouled either,<sup>229</sup> as the Chakmas have been.<sup>230</sup> For non-transient asylum, when quick *en masse* repatriation is not possible, a good asylum regime ought to integrate refugees into the workforce through a formal work-permit system, a measure first proposed to formalise and control Bangladeshi migration.<sup>231</sup> Because it does not contain a single proposal to manage mass influxes, Tharoor's bill is found wanting for substance.

<sup>227</sup> See Mac McClelland, The New York Times, *How to Build a Perfect Refugee Camp*, February 13, 2014, available at <https://www.nytimes.com/2014/02/16/magazine/how-to-build-a-perfect-refugee-camp.html> (Last visited on November 23, 2016); Elizabeth Cullen Dunn, Boston Review, *The Failure of Refugee Camps*, September 28, 2015, available at (Last visited on November 23, 2016).

<sup>228</sup> See Oliver Walton, *Preventing Conflict between Refugees and Host Communities* (Governance and Social Development Resource Centre, October 19, 2012), available at <http://www.gsdrc.org/docs/open/hdq845.pdf> (Last visited on November 23, 2016).

<sup>229</sup> INGRID BOCCARDI, EUROPE AND REFUGEES: TOWARDS AN EU ASYLUM POLICY 42 (2002); AGNES HURWITZ, THE COLLECTIVE RESPONSIBILITY OF STATES TO PROTECT REFUGEES 20-21 (2009).

<sup>230</sup> Gayatri Parameswaran & Felix Gaedtke, Al Jazeera, *Little to cheer for Chakma refugees in India* (June 22, 2012), available at <http://www.aljazeera.com/indepth/features/2012/06/20126207955292695.html> (Last visited on November 24, 2016).

<sup>231</sup> SANJOY HAZARIKA, RITES OF PASSAGE: BORDER CROSSINGS, IMAGINED HOMELANDS, INDIA'S EAST AND BANGLADESH 261-63 (2000); SANJOY HAZARIKA, WRITING ON THE WALL: REFLECTIONS ON THE NORTH EAST 141-142 (2008) ('HAZARIKA \*2'). *Accord* Nitin Pai, Business Standard, *Fixing the migration 'problem'*, July 30, 2012, available at [http://www.business-standard.com/article/opinion/nitin-pai-fixing-the-migration-problem-11207300019\\_1.html](http://www.business-standard.com/article/opinion/nitin-pai-fixing-the-migration-problem-11207300019_1.html) (Last visited on November 24, 2016).

## 9. Dealing with Secondary Movements

Tharoor's bill fails to take account of 'secondary movements'.<sup>232</sup> Asylum seekers, particularly in mixed flows, often transit through other countries before reaching their final destination. Such a country is considered a 'safe third country' if the asylum seeker would be safe there, or a 'first country of asylum' if it granted any form of protection to the asylum seeker.<sup>233</sup> The terminology is uncommon in India but the concepts are familiar: Tibetans enter India through Nepal where some have received asylum in the past;<sup>234</sup> Rohingyas have come from Myanmar through Bangladesh;<sup>235</sup> and others.<sup>236</sup> On the other hand, Lhotshampa refugees passed through India on their way to Nepal, so from Nepal's perspective, India could be a safe third country.<sup>237</sup>

From India's point of view, there are two questions: How should a future asylum regime respond to a protection request from a person who transited through a safe third country or received asylum *en route* to India? And what to do about people who make secondary movements from India?

<sup>232</sup> 'Secondary movements' describes the onward movement of asylum seekers "from initial areas of safety to newer destinations for the purpose of claiming asylum." Susan E. Zimmermann, *Irregular Secondary Movements to Europe: Seeking Asylum beyond Refuge*, 22 JOURNAL OF REFUGEE STUDIES 74-75 (2009). See also 10-Point Plan, *supra* note 53, 210; UNHCR EXCOM, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection* (General Conclusion on International Protection No. 58 (XL) of 1989, 40th Session, Supp. No. 12A, UN Doc. A/44/12/Add.1), available at <http://www.unhcr.org/en-us/excom/exconc/3ae68c4380/problem-refugees-asylum-seekers-move-irregular-manner-country-already-found.html> (Last visited on November 29, 2016).

<sup>233</sup> Legomsky, *supra* note 176, 575-76, 588-89.

<sup>234</sup> See generally Pawan Mathur, Tibetan Review, *Tibetan Refugees in Nepal*, September 13, 2014, available at <http://www.tibetanreview.net/tibetan-refugees-in-nepal/> (Last visited on November 24, 2016); ANN FRECHETTE, TIBETANS IN NEPAL: THE DYNAMICS OF INTERNATIONAL ASSISTANCE AMONG A COMMUNITY IN EXILE (2004). But see JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 280 (2005); Human Rights Watch, *Under China's Shadow: Mistreatment of Tibetans in Nepal*, April 1, 2014, available at <https://www.hrw.org/report/2014/04/01/under-chinas-shadow/mistreatment-tibetans-nepal> (Last visited on November 24, 2016).

<sup>235</sup> See generally Suchismita Majumder, Priyanka Mathur Velath, Kriti Chopra & Madhura Chakraborty, Rohingyas in India: Birth of a Stateless Community (Mahanirban Calcutta Research Group, Policies and Practices Paper 71, September 2015), available at <http://www.mrcg.ac.in/PP71.pdf> (Last visited on November 29, 2016); Cheena Kapoor, Deutsche Welle, *Rohingyas feel safe in India, but uncertainty looms*, September 12, 2016, available at <http://dw.com/p/1K0kk> (Last visited on November 29, 2016); Meher Ali, The Wire, *An Uncertain Refuge: The Fate of the Rohingyas in India*, November 15, 2015, available at <http://thewire.in/15624/an-uncertain-refuge-the-fate-of-the-rohingyas-in-india/> (Last visited on November 24, 2016).

<sup>236</sup> Legomsky, *supra* note 176, 591 (pointing out that India is a first country of asylum for many Sri Lankans who make secondary movements to Europe and North America); Dharvi Vaid, WION, *Somali refugees in India: The worst of the worst off*, June 14, 2016, available at <http://www.wionews.com/south-asia/somali-refugees-in-south-asia-the-worst-of-the-worst-off-103/> (Last visited on November 24, 2016).

<sup>237</sup> Acharya \*2, *supra* note 157.

International refugee law and policy offers no consensus.<sup>238</sup> The EU's Dublin Regulation, which attempts to arrest secondary movements to prevent 'asylum shopping' has largely failed in the face of current migration volumes.<sup>239</sup> For now, any proposed asylum regime should: (i) explicitly declare that the non-refoulement principle is binding, regardless of secondary movements; (ii) respect family unity; and (iii) act against human trafficking of asylum seekers. On all three counts, Tharoor's bill is silent.

### E. A COHERENT MODEL OF REFUGEE GOVERNANCE

This Subpart has three sections. Section 1 very briefly reviews the literature regarding the impacts of refugees on host countries, including the phenomenon of conflict diffusion, and revisits specific failures in India's governance of refugee situations. Section 2 discusses the dangers associated with refugee camps being militarised. Section 3 outlines specific measures for India to better govern refugee situations.

#### 1. Impacts on Host Countries and Communities

Refugees and migrants, particularly in mass influxes and mixed flows, pose unique challenges to the governments of host countries.<sup>240</sup> The presence of refugees and migrants has a range of cultural, environmental, and political effects on host communities.<sup>241</sup> In Europe, there is growing alarmism that

<sup>238</sup> Legomsky, *supra* note 176, 575-98. See Tometten, *supra* note 55, 84-86 (arguing that a global freedom of movement model is the only logical solution to secondary movements); Giulia Scalettaris, *Refugees and Mobility*, 33 FORCED MIGRATION REVIEW 58-59 (September 2009), available at <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/protracted/scalettaris.pdf> (arguing against seeing secondary movements as a problem) (Last visited on November 24, 2016).

<sup>239</sup> Susan Fratzke, *Not Adding Up: The Fading Promise of Europe's Dublin System* (Migration Policy Institute, March 2015), available at <http://www.migrationpolicy.org/sites/default/files/publications/MPIe-Asylum-DublinReg.pdf> (Last visited on November 24, 2016); Council of Europe, Committee on Legal Affairs and Human Rights, *After Dublin – the urgent need for a real European asylum system* (4th Session, Committee Opinion arising from Reference 4083 of 2014, CoE Doc. 13884, September 28, 2015), available at <http://www.assembly.coe.int/nw/xml/XRef/XML2HTML-en.asp?fileid=22095&lang=en> (Last visited on November 29, 2016). See also Minos Mouzourakis, 'We Need to Talk about Dublin' (Oxford Refugee Studies Centre, Working Paper Series No. 105, December 2014), available at <https://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf> (Last visited on November 24, 2016); Deutsche Welle, *Germany suspends 'Dublin rules' for Syrians*, August 25, 2015, available at <http://dw.com/p/1GLMQ> (Last visited on November 24, 2016).

<sup>240</sup> GIL LOESCHER, *REFUGEE MOVEMENTS AND INTERNATIONAL SECURITY (THE ADELPHI PAPERS)* 41-45 (2008).

<sup>241</sup> UNHCR EXCOM, *Social and economic impact of large refugee populations on host developing countries* (Standing Committee Report, EC/47/SC/CRP.7, January 6, 1997), available at <http://www.unhcr.org/en-us/excom/standcom/3ae68d0e10/social-economic-impact-large-refugee-populations-host-developing-countries.html> (Last visited on November 24, 2016); UNHCR EXCOM, *The role of host countries: the cost and impact of hosting refugees*

migration is accelerating a clash of civilisations.<sup>242</sup> In rural areas, refugees can spark a competition for resources and exacerbate social fault lines.<sup>243</sup> In India, while there certainly is friction between refugees and local communities,<sup>244</sup> more serious forms of conflict are absent although religiously-inspired nativism is escalating anti-refugee rhetoric.<sup>245</sup> In north-east India, ethno-religious conflict is clearly visible with regard to Bangladeshi migrants.<sup>246</sup>

---

(Standing Committee, 51st Meeting, EC/62/SC/CRP.18, May 31, 2011), available at <http://www.unhcr.org/en-us/excom/standcom/4de4f7959/role-host-countries-cost-impact-hosting-refugees.html> (Last visited on November 24, 2016). *But see* Roger Zetter, *Are refugees an economic burden or benefit?*, 41 FORCED MIGRATION REVIEW 50 (December 2012), available at <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/preventing/zetter.pdf> (Last visited on November 29, 2016); Ana Swanson, The Washington Post, *The big myth about refugees*, September 10, 2015, available at <https://www.washingtonpost.com/news/wonk/wp/2015/09/10/the-big-myth-about-refugees/> (Last visited on November 24 2016).

<sup>242</sup> See generally IAN BURUMA, MURDER IN AMSTERDAM: LIBERAL EUROPE, ISLAM, AND THE LIMITS OF TOLERANCE (2007); Henry Porter, Vanity Fair, *Terrorism, Migrants, and Crippling Debt: Is This the End of Europe?*, February 2016, available at <http://www.vanityfair.com/news/2016/01/europe-terrorism-migrants-debt-crisis> (Last visited on November 24, 2016); Patrick Sabatier, Yale Global, *A Clash of Civilizations in Europe?*, October 17, 2006, available at <http://yale-global.yale.edu/content/clash-civilizations-europe> (Last visited on November 24, 2016). For the original meaning and connotations of the phrase “clash of civilisations,” see SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER (2011); but cf., MAHMOOD MAMDANI, GOOD MUSLIM, BAD MUSLIM: AMERICA, THE COLD WAR, AND THE ROOTS OF TERROR (2005); Edward W. Said, The Nation, *The Clash of Ignorance*, October 4, 2001, available at <https://www.thenation.com/article/clash-ignorance/> (Last visited on November 24, 2016).

<sup>243</sup> Leah Berry, *The impact of environmental degradation on refugee-host relations: a case study from Tanzania*, 1 (UNHCR Research Paper No. 151, January 2008), available at <http://www.unhcr.org/47a315c72.pdf> (Last visited on November 24, 2016); Adrian Martin, Environmental Conflict between Refugee and Host Communities, 42 JOURNAL OF PEACE RESEARCH 330-33 (2005). See Melvyn C. Goldstein, *Ethnogenesis and Resource Competition among Tibetan Refugees in South India: A New Face to the Indo-Tibetan Interface* in HIMALAYAN ANTHROPOLOGY: THE INDO-TIBETAN INTERFACE 395-420 (James F. Fischer ed., 1978) (For an examination of refugee-host conflict in India).

<sup>244</sup> See, e.g., Harsimran Gill, Al Jazeera, *Refugees from Myanmar say 'Delhi is our future'*, December 10, 2015, available at <http://www.aljazeera.com/indepth/features/2015/12/refugees-myanmar-delhi-future-151203183015643.html> (Last visited on November 24, 2016).

<sup>245</sup> See generally Divyani Rattanpal, The Quint, *Are Myanmar's Rohingya Muslim Refugees a Threat to India?*, June 20, 2016, available at <https://www.thequint.com/india/2015/06/15/myanmar-to-jammu-a-rohingyas-journey-to-a-place-called-home> (Last visited on November 24, 2016); Krishna N. Das, The Sydney Morning Herald, *Indian PM Narendra Modi's party vows to strip Muslim immigrants of vote*, March 12, 2016, available at <http://www.smh.com.au/world/indian-pm-narendra-modis-party-vows-to-strip-muslim-immigrants-of-vote-20160311-gnghsp.html> (Last visited on November 24, 2016); Lovish Garg, The Wire, *If India Wants to Remain Secular, the New Citizenship Bill Isn't the Way to Go*, September 21, 2016, available at <http://thewire.in/67272/citizenship-amendment-bill-2016/> (Last visited on November 24, 2016).

<sup>246</sup> MYRON WEINER, SONS OF THE SOIL: MIGRATION AND ETHNIC CONFLICT IN INDIA 75-143, 265-79 (1978); E.N. RAMMOHAN, CONFLICTS IN THE NORTHEAST: INTERNAL AND EXTERNAL EFFECTS 91-110 (2011); HAZARIKA \*2, *supra* note 231, 87-126.

There is a large body of research identifying links between refugees and violent conflict.<sup>247</sup> The broad thrust of those arguments is that mass influx refugees bring with them the conflict they flee from, and in this way they diffuse civil wars and sub-state violence across borders.<sup>248</sup> Qualitative evidence in support of that claim exists in respect of mass influx refugee camps in various parts of Africa and the Balkans,<sup>249</sup> but there are also arguments that dispute the links between refugees and conflict diffusion.<sup>250</sup> How to prevent refugee-related conflict from spreading? The dominant thesis calls for diffusing refugee settlements through spatial distance but maintaining contiguity with demographically proximate areas.<sup>251</sup>

The Sri Lankans in India are a model case study of India's multi-faceted failure to govern refugees properly. In 1991, there were around 2,10,000 Sri Lankan Tamil refugees in Tamil Nadu housed in 243 camps.<sup>252</sup> Their welcome was influenced by kinship with their demographically proximate hosts.<sup>253</sup> But it soon went wrong. Militant groups brought the Sri Lankan conflict onto Indian soil by openly recruiting in the camps,<sup>254</sup> culminating in Rajiv Gandhi's assassination. Consequently, local communities turned on the refugees,<sup>255</sup> and the government created stringently-policed 'special camps' with "watch towers, focus lights, and machine-gun posts."<sup>256</sup> From one extreme, refugee policy fled to the other extreme.

---

<sup>247</sup> See generally ZOLBERG et al., *supra* note 154; LOESCHER, *supra* note 240; SARAH KENYON LISCHER, DANGEROUS SANCTUARIES: REFUGEE CAMPS, CIVIL WAR, AND THE DILEMMAS OF HUMANITARIAN AID (2006); ROBERT MUGGAH, NO REFUGE: THE CRISIS OF REFUGEE MILITARIZATION IN AFRICA (2006).

<sup>248</sup> Choi & Salehyan, *supra* note 224.

<sup>249</sup> Kristoffer Andre Grindheim, *Exploring the impacts of refugee camps on host communities* (Master's thesis, University of Agder, 2013), available at <https://brage.bibsys.no/xmlui/bitstream/id/84202/Grindheim,%20Kristoffer%20Andre%20oppgaven.pdf> (Last visited on November 24, 2016); Nils B. Weidmann, Patrick Kuhn & Varja Nikolic, *Refugees as Local Catalysts of Conflict? A Statistical Assessment* (February 2007), available at [https://www.researchgate.net/publication/251800145\\_Refugees\\_as\\_Local\\_Catalysts\\_of\\_Conflict\\_A\\_Statistical\\_Assessment](https://www.researchgate.net/publication/251800145_Refugees_as_Local_Catalysts_of_Conflict_A_Statistical_Assessment) (Last visited on November 24, 2016); Seraina Rüegger, *Conflict Actors in Motion: Refugees, Rebels and Ethnic Groups* (Doctoral thesis, ETH Zurich, No. 21561, 2013), available at <http://e-collection.library.ethz.ch/eserv/eth:7923/eth-7923-02.pdf> (Last visited on November 24, 2016).

<sup>250</sup> Shaver & Zhou, *supra* note 224.

<sup>251</sup> Heidrun Bohnet, *Large refugee populations, resource scarcity and conflict* (Second Annual General Conference of the European Political Science Association, June 21-23, 2012), available at [http://rc41.ipsa.org/public/Madrid\\_2012/bohnet.pdf](http://rc41.ipsa.org/public/Madrid_2012/bohnet.pdf) (Last visited on November 24, 2016).

<sup>252</sup> Bernard E. Weinraub, The New York Times, *Fear Grips Sri Lankans in South India*, May 31, 1991, available at <http://www.nytimes.com/1991/05/31/world/fear-grips-sri-lankans-in-south-india.html> (Last visited on November 24, 2016).

<sup>253</sup> Hans, *supra* note 106, 33.

<sup>254</sup> *Id.*, 30.

<sup>255</sup> NAVINE MURSHID, THE POLITICS OF REFUGEES IN SOUTH ASIA 80 (2013).

<sup>256</sup> Shahina KK, Open, *The Castaways: The Life of Sri Lankan Refugees*, September 16, 2016, available at <http://www.openthemagazine.com/article/dispatch/the-castaways-the-life-of-sri-lankan-refugees> (Last visited on November 24, 2016).

To re-establish order, the Sri Lankan camps were relocated across the State. Spatial distance between the camps lessened refugee concentrations which, in turn, reduced the perceived threat of resource competition with local populations and minimised intra-community conflict amongst the refugees.<sup>257</sup> Nevertheless, the Sri Lankans have deeply impacted their host community, even influencing the course of Tamil Nadu's politics.<sup>258</sup> That was never the case for Tibetan refugees who were deliberately dispersed across India very soon after the mass influx began.<sup>259</sup> Dispersal protected them from Chinese reprisals near the border but deprived Tibetans of demographic similarities, resulting in conflict, with their host communities.<sup>260</sup>

## 2. Militarisation of Refugees

Very often, to achieve political ends, host governments capitalise on the disaffection of refugees who were forced from their home countries. India did that when it militarised the Bangladeshi refugee camps in 1971 to aid the war that followed,<sup>261</sup> as well as when it secretly created a *de facto* Tibetan army.<sup>262</sup> While both strategies paid political dividends, there are concerns that militarising refugee camps increases their likelihood of being militarily attacked, resulting in civilians being killed.<sup>263</sup> Refugees may arm without state support too, particularly if their camps are near conflict zones, making it easy to establish supply lines.<sup>264</sup> In many refugee camps, especially in Africa, militarisation has seriously undermined asylum and caused increased violence against women.<sup>265</sup>

---

<sup>257</sup> LISCHER, *supra* note 247, 35.

<sup>258</sup> Hans, *supra* note 106, 32.

<sup>259</sup> GATRELL, *supra* note 41, 191.

<sup>260</sup> Rajesh S. Kharat, *Tibetan Refugees in India: Survival in Exile* in THE FLEEING PEOPLE OF SOUTH ASIA 271-72 (Sibaji Pratam Basu ed., 2008).

<sup>261</sup> DATTA, *supra* note 199, 28-29; SCOTT GATES & KAUSHIK ROY, UNCONVENTIONAL WARFARE IN SOUTH ASIA: SHADOW WARRIORS AND COUNTERINSURGENCY 119 (2014).

<sup>262</sup> Amitava Sanyal, Hindustan Times, *The Curious Case of Establishment* 22, November 15, 2009, available at <http://www.hindustantimes.com/india/the-curious-case-of-establishment-22/story-eiDenZvNioffFupLzNGOI.html> (Last visited on November 24, 2016).

<sup>263</sup> MAJA JANMYR, PROTECTING CIVILIANS IN REFUGEE CAMPS: UNABLE AND UNWILLING STATES, UNHCR AND INTERNATIONAL RESPONSIBILITY 146 (2004); D'ORSI, *supra* note 141, 133. See also UNHCR EXCOM, *Military or Armed Attacks on Refugee Camps and Settlements* (General Conclusion on International Protection No. 48 (XXXVIII) of 1987, 38th Session, Supp. No. 12A, UN Doc. A/42/12/Add.1), available at <http://www.unhcr.org/en-us/excom/exconc/3ae68c951c/military-armed-attacks-refugee-camps-settlements.html> (Last visited on November 24, 2016).

<sup>264</sup> Justin Pini, International Affairs Review, *Political Violence and the African Refugee Experience* (undated), available at <http://www.iar-gwu.org/node/19> (Last visited on November 24, 2016).

<sup>265</sup> See generally Barbra Lukunka, *UNHCR is my husband: Interpreting the nature of militarized refugee women's lives in Kanembwa refugee camp* (Masters thesis, American University, 2007), available at <http://gradworks.umi.com/14/48/1448704.html> (Last visited on November 24, 2016).

Most refugee laws contain boilerplate provisions prohibiting refugees from committing subversive activities.<sup>266</sup> PILSARC's bill did not even contain that. It failed to comprehend the importance of achieving a demilitarised state of asylum and Tharoor's bill is deficient too because it imports the same failure.<sup>267</sup> In the previous section, this paper recommends screening and other special measures for mass influxes. But that is not enough. Non-transient refugee camps should be moved away from borders and conflict zones; former combatants should be disarmed and rehabilitated; and fighting-age men and women should be prioritised for gainful employment. Further, while Indian authorities cannot prevent refugees from voluntarily returning to conflict zones, there should be an absolute bar against militarising refugees.

### 3. Governing Migration and Refugee Situations

India's traditional response to migratory flows, which may include refugees, has been control-oriented. It focuses on detection, apprehension, and deportations of unauthorised foreigners. But it is haphazard and therefore susceptible to political opportunism.<sup>268</sup> On the other hand, although popular elsewhere,<sup>269</sup> externalising the control-oriented approach by offshor-

---

<sup>266</sup> OAU Convention, *supra* note 11, Art. III(1).

<sup>267</sup> See further UNHCR, *Global Consultations on International Protection: The Civilian Character of Asylum: Separating Armed Elements from Refugees* (EC/GC/01/5, February 19, 2001), available at <http://www.unhcr.org/protection/globalconsult/3ae68f3c18/civilian-character-asylum-separating-armed-elements-refugees.html> (Last visited on November 29, 2016).

<sup>268</sup> See Sangeeta Barooah Pisharoty, The Wire, *Can the BJP Fulfil Promise to Deport Undocumented Immigrants If It Wins Assam?*, April 22, 2016, available at <http://thewire.in/30911/can-the-bjp-fulfill-promise-to-deport-undocumented-immigrants-if-it-wins-assam/> (Last visited on November 24, 2016); Deepshikha Ghosh, NDTV, *Come May 16, Bangladeshi immigrants must pack up: Narendra Modi*, September 22, 2016, available at <http://www.ndtv.com/elections-news/come-may-16-bangladeshi-immigrants-must-pack-up-narendra-modi-559164> (Last visited on November 24, 2016).

<sup>269</sup> See generally Alexander Betts, *The International Relations of the "New" Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR*, 22 REFUGEE 58 (2004); Sasha Lowes, *The Legality of Extraterritorial Processing of Asylum Claims: The Judgment of the High Court of Australia in the 'Malaysian Solution' Case*, 12 HUMAN RIGHTS LAW REVIEW 168 (2012); Karin Fathimath Afeef, *The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific* (Oxford Refugee Studies Centre, Working Paper No. 36, October 2006), available at <https://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp36-politics-extraterritorial-processing-2006.pdf> (Last visited on November 24, 2016); Sarah Leonard & Christian Kaunert, *The Extra-Territorial Processing of Asylum Claims*, 51 FORCED MIGRATION REVIEW 48 (January 2016), available at <http://www.fmreview.org/destination-europe/leonard-kaunert.html> (Last visited on November 24, 2016); Zara Rabinovitch, *Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing*, October 16, 2014., available at <http://www.migrationpolicy.org/article/pushing-out-boundaries-humanitarian-screening-country-and-offshore-processing> (Last visited on November 24, 2016); Elibritt Karlsen, Parliament of Australia, *Australia's offshore processing of asylum seekers in Nauru and PNG: A Quick Guide to statistics and resources*, June 30, 2016, available at [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1516/Quick\\_Guides/Offshore](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Quick_Guides/Offshore) (Last visited on November 24, 2016).

ing refugee processing to peripheral areas has never been tried in India. For instance, the EU's "hotspot" scheme shifts all refugee and migrant processing to single locations which conduct screening and asylum determination and also provide special care to the vulnerable.<sup>270</sup> An extreme version of offshoring, designed to deter migratory inflows, is Australia's 'Pacific Solution' which detains unauthorised arrivals in surrounding islands.<sup>271</sup> A future asylum regime should provide for hotspots but prohibit detentions.

There is a growing European effort to pre-empt migratory flows by attempting to mitigate 'push factors' in the migrants' countries of origin. The strategy includes efforts to generate employment and create infrastructure.<sup>272</sup> It is essentially a targeted financial aid programme. More controversially, direct intervention to pre-empt refugee situations in host countries is fraught with difficulty. If the push factor for refugees is conflict, at what point does a humanitarian intervention constitute an invasion; should interventions, even non-military ones, be unilateral? These are some of the questions a future asylum regime would have to grapple with. Let us not forget that in 1971, India engineered mass repatriations through military intervention.

The overriding governance goal for a host country dealing with a large refugee population is to achieve a durable solution for the crisis. Of the three types of durable solutions,<sup>273</sup> India is best placed to achieve local integration. It can do that by granting citizenship to refugees who meet eligibility criteria which a future asylum law should make clear. For instance, the Tibetan community in India which cannot return in the foreseeable future is effectively stateless. Such refugees should be automatically eligible for citizenship.<sup>274</sup> Future asylum law should set out a right against statelessness, followed by procedural provisions for acquiring citizenship within clear timeframes.

---

<sup>270</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Agenda on Migration, 6 (EU Doc. COM (2015) 240 final, May 13, 2015), available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf) (Last visited on November 24, 2016).

<sup>271</sup> Aulden Warbrooke, *Australia's 'Pacific Solution': Issues for the Pacific Islands*, 1 ASIA & THE PACIFIC POLICY STUDIES 337-340 (2014); Fiona McKay, *A Return to the 'Pacific Solution'*, 44 FORCED MIGRATION REVIEW 24 (September 2013), available at <http://www.fmreview.org/detention/mckay.html> (Last visited on November 24, 2016).

<sup>272</sup> Natalino Ronzitti, *The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?*, 1 BULLETIN OF ITALIAN POLITICS 128 (2009).

<sup>273</sup> 10-Point Plan, *supra* note 53, 186; UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern* (May 2003), available at <http://www.refworld.org/docid/4124b6a04.html> (Last visited on November 24, 2016); HATHAWAY, *supra* note 234, 913-14.

<sup>274</sup> See Phuntsok Wangyal v. Ministry of External Affairs, 2016 SCC OnLine Del 5344; Namgyal Dolkar v. Govt. of India, 2010 SCC OnLine Del 4548.

When refugees do not encounter fear and suspicion in their host countries, they often find patronisation.<sup>275</sup> That can have deleterious effects for refugees who exist outside the bounds of the citizen-state contract and are completely dependent on their host country's charity. Creating refugee self-governing institutions such as the Central Tibetan Administration, which has limited powers of government over Tibetan refugees, creates new models of participatory citizenship.<sup>276</sup> And, as recommended earlier in this paper, integrating refugees in the formal workforce through a work permit system will promote economic independence and contribute to national growth.<sup>277</sup> No doubt refugees must have the benefit of India's welfare system but because it is rent seeking and stunts participatory citizenship,<sup>278</sup> it should be the last resort.

#### IV. IMPROVING THAROOR'S BILL

This Part suggests how Tharoor's bill can be improved to achieve its objective of creating a world-leading asylum regime. It is divided into two parts. Subpart A highlights three important governance-related issues which will determine the success or failure of any future asylum regime. Subpart B is informed by the discussion in Part III and contains specific recommendations for Tharoor to consider.

<sup>275</sup> Karin Bashir, Open Democracy, *The Violence of the Word Refugee*, November 6, 2015, available at <https://www.opendemocracy.net/arab-awakening/karin-bashir/violence-of-word-refugee> (Last visited on November 24, 2016).

<sup>276</sup> Tashi Tsomo, Sikyong (The Prime Minister of the Tibetan Government-in-Exile), *Tibet is learning the tricks of democracy*, April 5, 2016, available at <http://www.sikyong2016.com/tibet-is-learning-the-tricks-of-democracy> (Last visited on November 24, 2016); Eva Herzer, International Campaign for Tibet, *Tibet: An Evolving Democracy in Exile*, December 11, 2001, available at <https://www.savetibet.org/tibet-an-evolving-democracy-in-exile/> (Last visited on November 29, 2016); Yeshe Choesang, The Tibet Post, *Tibetan election is a victory for democracy and change*, October 15, 2015, available at <http://www.thetibetpost.com/en/outlook/opinions-and-columns/4752-tibetan-election-is-a-victory-for-democracy-and-change> (Last visited on November 24, 2016).

<sup>277</sup> HAZARIKA *supra* note 231. But see, e.g., International Monetary Fund, *The Refugee Surge in Europe: Economic Challenges*, (Staff Discussion Note, SDN/16/02, January 2016), available at <https://www.imf.org/external/pubs/ft/sdn/2016/sdn1602.pdf> (Last visited on November 24, 2016); Janosch Delcker & Matthew Karnitschnig, Politico, *Refugees won't plug German labor gap*, January 6, 2016, available at <http://www.politico.eu/article/refugees-wont-plug-german-labor-gap-asylum-employment-skills-gap/> (Last visited on November 24, 2016).

<sup>278</sup> Jennifer Bussell, *Varieties of Corruption: The Organization of Rent-Seeking in India* (Goldman School of Public Policy, UC Berkeley, Working Paper, April 2013), available at <https://gspp.berkeley.edu/research/working-paper-series/varieties-of-corruption-the-organization-of-rent-seeking-in-india> (Last visited on November 23, 2016); Sugata Marjit & Vivekananda Mukherjee, *Market Liberalization and Rent Seeking in India* in COMPANION TO THE POLITICAL ECONOMY OF RENT SEEKING 411-415 (Roger D. Congleton & Arye L. Hillman eds., 2015).

## A. UNDERSTANDING HOW GOVERNANCE AND ASYLUM INTERSECT

Tharoor's bill is clearly the most comprehensive of the three bills introduced in Parliament. It takes several important steps towards an asylum regime. It clearly sets out inclusion, exclusion, and cessation criteria for refugee status;<sup>279</sup> attempts to enact the principle of non-refoulement;<sup>280</sup> prescribes procedures to apply for asylum;<sup>281</sup> creates institutions to determine asylum claims;<sup>282</sup> sets out a minimal rights regime;<sup>283</sup> and, with exceptions, is mindful of the rules of statutory construction. Although flawed, the bill includes preliminary frameworks for mass influx situations<sup>284</sup> and voluntary repatriations.<sup>285</sup>

But, as anyone who is structurally familiar with India's governance and judicial system knows, there are bigger, more wide-ranging criteria that determine the success or failure of regulatory regimes. Tharoor's bill intersects with three overarching constitutional and regulatory themes that will determine how his proposed asylum system functions: due process, federalism, and institutional capture.

### 1. Due Process and Related Safeguards

Tharoor's bill hits the nail on the head by carefully establishing a comprehensive due process regime. Due process is an unsexy but critical component of the law. Without it, the bill's various institutions and procedures would be meaningless. Procedure, according to Justice Hansraj Khanna, is the source of liberty.<sup>286</sup> He was talking about due process yet the concept did not begin its life with the Constitution, it had to be read into Article 21 of the Constitution over several decades,<sup>287</sup> a contested process that continues to this day.<sup>288</sup> As foreigners, refugees are vulnerable to a frightening lack of due

<sup>279</sup> Tharoor's Bill, *supra* note 2, Cl. 4-6.

<sup>280</sup> *Id.*, Cl. 8, 10(2).

<sup>281</sup> *Id.*, Cl. 10-15.

<sup>282</sup> *Id.*, Cl. 16-29.

<sup>283</sup> *Id.*, Cl. 35-37.

<sup>284</sup> *Id.*, Cl. 30-33.

<sup>285</sup> *Id.*, Cl. 34.

<sup>286</sup> ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521, ¶ 221 ("The history of personal liberty, we must bear in mind, is largely the history of insistence upon procedure.") (quoting from McNabb v. United States, 1943 SCC OnLine US SC 55 : 87 L Ed 819 : 318 US 332, 346 (1943) (Frankfurter, J)).

<sup>287</sup> Compare A.K. Gopalan v. State of Madras, AIR 1950 SC 27, and ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521, with Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : (1978) 2 SCR 621; Sunil Batra v. Delhi Admn., (1978) 4 SCC 494 : (1979) 1 SCR 392, Selvi v. State of Karnataka, (2010) 7 SCC 263. See further ABHINAV CHANDRACHUD, DUE PROCESS OF LAW (2011).

<sup>288</sup> Raj Bala v. State of Haryana, (2016) 1 SCC 463; Abhinav Chandrachud, The Hindu, *A tale of two judgments*, May 12, 2016, available at <http://www.thehindu.com/opinion/lead/a-tale-of-two-judgments/article8586369.ece> (Last visited on November 23, 2016).

process, especially in relation to deportation, because the Supreme Court has refused to update its decades-old position that the Centre's absolute expulsion power is unencumbered by due process.<sup>289</sup>

In the context of an asylum regime, substantive due process is necessary to protect against the excesses of the government's deportation prerogative including the power to detain foreigners pending deportation.<sup>290</sup> Procedural due process is required to build a regime of natural justice to accompany the asylum determination process and any restrictive actions concerning forcible migrants. Because a long line of cases have identified structural links between Articles 14, 19, and 21 of the Constitution, there are additional safeguards pertaining to arbitrariness and reasonableness which are available.<sup>291</sup> Of course, when operational, statutory actions under Tharoor's bill will also be judged according to the doctrines of proportionality and *Wednesbury* unreasonableness.<sup>292</sup> Tharoor's bill does right by due process which is not surprising considering the bill's due process provisions originated in the chambers of a practicing senior counsel of the Supreme Court.<sup>293</sup>

## 2. Federalism-Related Tensions

Is Tharoor's bill within the Union's competence? Yes, it clearly is.<sup>294</sup> But the States control public order and the police, both of which may be implicated during mass influx situations and in refugee camps.<sup>295</sup> Assuming his bill became law and the principle of non-refoulement became binding, it is not inconceivable that a state will refuse to enforce the law's duty to protect

<sup>289</sup> Sarbananda Sonowal v. Union of India, (2005) 5 SCC 665.

<sup>290</sup> For the power to detain pending deportation, see Foreigners Act, 1946, §§ 3(1), 3(2)(g); Foreigners Order, 1948, *supra* note 24, ¶¶ 3(2), 3(5); Passport (Entry into India) Act, 1920, § 5.

<sup>291</sup> (A) On arbitrariness, *see* E.P. Royappa v. State of T.N., (1974) 4 SCC 3; Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : (1978) 2 SCR 621; Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489. *But see* State of A.P. v. McDowell & Co., (1996) 3 SCC 709; Natural Resources Allocation, *In re*, Special Reference No. 1 of 2012, (2012) 10 SCC 1. (B) On reasonableness, *see* Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722; Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311; Malpe Vishwanath Acharya v. State of Maharashtra, (1998) 2 SCC 1; Virender Singh Hooda v. State of Haryana, (2004) 12 SCC 588. *But see* Subramanian Swamy v. CBI, (2014) 8 SCC 682.

<sup>292</sup> (A) The standard of unreasonableness necessary to trigger a judicial strike down of administrative action was set out in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpns., (1948) 1 KB 223 : (1947) 2 All ER 680. *See further* Tata Cellular v. Union of India, (1994) 6 SCC 651; Ranjit Thakur v. Union of India, (1987) 4 SCC 611. (B) On the doctrine of proportionality, *see* Om Kumar v. Union of India, (2001) 2 SCC 386; State of U.P. v. Sheo Shanker Lal Srivastava, (2006) 3 SCC 276; U.P. SRTC v. Shivaji, (2006) 13 SCC 637 : AIR 2007 SC 322; Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Assn., (2007) 4 SCC 669.

<sup>293</sup> Cf. PILSARC's Bill, *supra* note 6, Cl. 8-24.

<sup>294</sup> The Constitution of India, 1950, Art. 248 read with Schedule VII, List I, Items 10, 12, 14, 17, 18, 19.

<sup>295</sup> The Constitution of India, 1950, Schedule VII, List II, Items 1, 2.

refugees.<sup>296</sup> In such a situation, the Constitution unequivocally upholds the Centre which may direct the state to comply with Parliament's law,<sup>297</sup> failing which the President may find that the state's constitutional machinery has broken down,<sup>298</sup> justifying direct rule from Delhi.<sup>299</sup> In practice, there are a number of political and legal bridges to cross before states' governance can be displaced by the Centre.<sup>300</sup>

Regardless of the Centre's legislative competence, there are potential creases regarding fiscal federalism which need ironing out. The Union's place at the top of the federal hierarchy has been reinforced by its large effective tax base at the cost of the States.<sup>301</sup> To even out the resulting fiscal imbalance, there is an institutionally-mediated system of vertical resource redistribution to the States.<sup>302</sup> But the Constitution also provides for funds to be specially transferred from the Centre to the States to defray the costs of performing duties imposed on the latter by the former.<sup>303</sup> Tharoor's bill was accompanied by a hastily put together financial memorandum which mentions only the most obvious aspects of revenue expenditure, such as salaries, and fails to mention the amounts that will be charged to the States. State expenditure on refugees is a past and present reality which will no doubt grow to accommodate a future mass influx. It should have been legislatively anticipated.

### 3. Institutional Decline and Capture

Indian federal executive power, which is nominally exercised by the President, was allocated in 1961 to the Centre's ministries, departments, secretariats, and offices ("departments").<sup>304</sup> But contemporary Indian governance leans increasingly heavily on independent institutions that are not departments

<sup>296</sup> See Sonia Sarkar, *The Telegraph*, *Seeking Refuge*, September 30, 2015, available at [http://www.telegraphindia.com/1150930/jsp/opinion/story\\_45201.jsp](http://www.telegraphindia.com/1150930/jsp/opinion/story_45201.jsp) (quoting an Indian government official claim that India was not bound by the principle of non-refoulement) (Last visited on November 29, 2016).

<sup>297</sup> The Constitution of India, 1950, Art. 256.

<sup>298</sup> *Id.*, Art. 365.

<sup>299</sup> *Id.*, Art. 356.

<sup>300</sup> For rich early literature on President's Rule, *see generally* Bhagwan Dua, *Presidential Rule in India: A Study in Crisis Politics* 19 ASIAN SURVEY 611 (1979); A.G. Noorani, *Centre-State Relations In India*, 8 LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 319 (1975); RAJEEV DHAVAN, *PRESIDENT'S RULE IN INDIA* (1978); JUSTICE R.S. SARKARIA COMMISSION OF CENTRE-STATE RELATIONS, Report, 165-189 (January 1988). *See further* A.G. Noorani, *Frontline, President's Rule: Limits and Checks*, June 4, 2011, available at <http://www.frontline.in/static/html/fl2812/stories/20110617281204500.htm> (Last visited on November 23, 2016).

<sup>301</sup> Nirvikar Singh, *Fiscal Federalism* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 1249-50 (Sujit Choudhry, Madhav Khosla & Pratap Banu Mehta eds., 2016).

<sup>302</sup> *Id.*, 1250. The amount of Central tax revenue to be distributed to the states is determined by the Finance Commission established pursuant to Article 280 of the Constitution.

<sup>303</sup> The Constitution of India, 1950, Art. 258(3).

<sup>304</sup> The Constitution of India, 1950, Art. 73; Government of India (Allocation of Business) Rules, 1961.

and exist outside the regular framework of the government. Four permanent types of independent institutions exercise varying degrees of limited power -- constitutional commissions,<sup>305</sup> economic sectoral regulators,<sup>306</sup> professional self-regulators,<sup>307</sup> and rights-based commissions<sup>308</sup> (collectively, ‘institutions’). In broad terms, except for the economic sectoral regulators, all the institutions have failed after succumbing to mismanagement, corruption, or lost independence following governmental capture.<sup>309</sup>

The institutions remain an anomalously under-studied area of Indian governance and the rights-based commissions are almost totally unexamined.<sup>310</sup> The exception is the National Human Rights Commission (NHRC) which has been intermittently scrutinised to reveal widespread failures.<sup>311</sup> The NHRC’s disappointing career is emblematic of the all-round failures of other rights-based commissions. It was created to be a watchdog against state violence but even though its parent statute strongly insulated it from political interference, it is failing its mandate.<sup>312</sup> Today, the NHRC has withered into irrelevance, its own chairperson recently attacked its impotence.<sup>313</sup> What is more

<sup>305</sup> E.g., The Constitution of India, 1950, Arts. 315-323 (chartering the Union Public Service Commission); Art. 324 (chartering the Election Commission of India).

<sup>306</sup> E.g., Telecom Regulatory Authority of India Act, 1997, 24 of 1997, § 3 (establishing a telecoms regulator); Competition Act, 2002, 12 of 2003, § 7 (establishing the Competition Commission of India to secure fair market competition).

<sup>307</sup> E.g., Advocates Act, 1961, 25 of 1961, § 4 (creating the Bar Council of India to self-regulate professional conduct amongst lawyers and legal education); Indian Medical Council Act, 1956, 102 of 1956, § 3 (reconstituting the pre-independence Medical Council of India to regulate medical education and register new doctors).

<sup>308</sup> E.g., Protection of Human Rights Act, 1993, 10 of 1994, § 3 (constituting the National Human Rights Commission with quasi-judicial, *suo motu*, but recommendatory powers); National Commission for Women Act, 1990, 20 of 1990, § 3 (constituting an authority to protect women’s rights).

<sup>309</sup> G. Thimmaiah, *Finance Commission: Decline of a Constitutional Institution*, 37 ECONOMIC & POLITICAL WEEKLY 4664 (2002); Second Administrative Reforms Commission, *Social Capital: A Shared Destiny* 127 (Ninth Report, August 2008). See Indian Express, *EC seeks full independence from govt control*, January 8, 2016, available at <http://indianexpress.com/article/india/india-news-india/ec-seeks-full-independence-from-govt-control/> (Last visited on November 28, 2016).

<sup>310</sup> There are few wide-ranging reviews of the institutions. See generally PUBLIC INSTITUTIONS IN INDIA: PERFORMANCE AND DESIGN (Devesh Kapur & Pratap Bhanu Mehta eds., 2007).

<sup>311</sup> Vijayshri Sitapati, *India’s National Human Rights Commission: A Shackled Commission?*, 18 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 2 (2000); Rajeev Dhavan, *India Today, The NHRC chief must resign*, January 3, 2011, available at <http://indiatoday.intoday.in/story/the-nhrc-chief-must-resign/1/125367.html> (Last visited on November 21, 2016).

<sup>312</sup> See Harsh Mander, Indian Express, *Not NHRC’s finest hour*, October 6, 2016, available at <http://indianexpress.com/article/opinion/columns/muzaffarnagar-communal-riots-victims-up-national-human-rights-commission-3065627/> (Last visited on November 21, 2016); Anubhav Dutt Tiwari, Scroll, *Has the NHRC failed its mandate to protect and promote human rights in India?*, July 18, 2016, available at <http://scroll.in/article/811654/has-the-nhrc-failed-its-mandate-to-protect-and-promote-human-rights-in-india> (Last visited on November 21, 2016).

<sup>313</sup> Dhananjay Mahapatra, The Times of India, *NHRC a toothless tiger: Panel chief*, June 2, 2016, available at (Last visited on November 21, 2016).

worrying is how its independence has been compromised by an appointments-system steeped in political patronage.<sup>314</sup> Its last chairperson, former Chief Justice K.G. Balakrishnan, was dogged by accusations of corruption.<sup>315</sup> The failure of the rights-based commissions could be because “[they] [...] believe they are answerable to governments and not to citizens.”<sup>316</sup>

Tharoor wants to create a new rights-based commission called the National Commission on Asylum with appeals to a quasi-judicial tribunal known as the National Appellate Board for Asylum. That is an understandable proposal considering the alternative is to leave refugees to the whims of the Department of Internal Security.<sup>317</sup> On the other hand, there is an opportunity to learn from the failures of the rights-based commissions. Tharoor’s bill misses that opportunity. At a minimum, Tharoor’s proposed commission and tribunal should have mandated a pre-appointment cooling-off period, strengthened protections against governmental interference, increased transparency requirements, external performance audits, and more.

## B. SPECIFIC SUGGESTIONS TO IMPROVE THAROOR’S BILL

### 1. The Objects Clause

Clause 3 of Tharoor’s bill is a general objects clause of questionable utility.<sup>318</sup> It has been borrowed from PILSARC’s decade-old bill but ignores the lessons learned from Section 83 of the Patents Act, 1970.<sup>319</sup> For objects clauses to be successful, they should be narrowly tailored to signal an overriding policy objective to the judicial branch, leaving broad summaries of

<sup>314</sup> The Hindu, *Appointment of BJP member to NHRC slammed*, November 13, 2016, available at <http://www.thehindu.com/news/cities/Madurai/appointment-of-bjp-member-to-nhrc-slashed/article9339669.ece> (Last visited on November 21, 2016); Preeti Mehra, The Hindu, *Commissions and their omissions*, March 4, 2014, available at <http://www.thehindu.com/todays-paper/tp-opinion/commissions-and-their-omissions/article5748251.ece> (Last visited on November 21, 2016).

<sup>315</sup> Gyanant Singh, Daily Mail, *Former Chief Justice faces Supreme Court heat over corruption charges*, February 13, 2012, available at <http://www.dailymail.co.uk/indiahome/indianews/article-2100640/Former-Chief-Justice-K-G-Balakrishnan-faces-Supreme-Court-heat-corruption-charges.html> (Last visited on November 21, 2016).

<sup>316</sup> Mehra, *supra* note 314.

<sup>317</sup> Government of India (Allocation of Business) Rules, 1961, Schedule II, *Ministry of Home Affairs*, Part A, List II, List III.

<sup>318</sup> PILSARC’s Bill drew on Section 83 of the Patents Act, 1970, India’s only objects clause, which went into force in 2003 to aid grants of compulsory licences of unworked patents. Section 83 is a specific objects clause designed to achieve a precise objective.

<sup>319</sup> See NATCO Pharma and Bayer Corp., *In re, Compulsory License Application No. 1 of 2011* (Controller of Patents, Mumbai) 43-44; Bayer Corp. v. Union of India, 2013 SCC OnLine IPAB 25 : (2013) 2 MIPR 97, ¶¶ 20-21, 23; Bayer Corp. v. Union of India, 2014 SCC OnLine Bom 963 : AIR 2014 Bom 178.

a statute's general aims to a preamble.<sup>320</sup> It can be corrected by narrowing the objects clause to focus on the non-refoulement principle.

## 2. The Scope of Asylum

### *a. Who is an Asylee?*

This paper proposes a four-fold categorisation of asylum for the reasons discussed in Part III, Subpart B of this paper. Clause 4(1) of Tharoor's bill should be redrafted to state that an asylee is a person who:

- (i) is a refugee because she meets the criteria listed in Paragraph (b) of Clause 4(1) which reflects UNHCR's extended mandate for complementary protection plus the additional grounds listed in Article I(2) of the OAU Convention and Paragraph III(3) of the Cartagena Declaration;
- (ii) is a refugee because she meets the criteria listed in Paragraph (a) of Clause 4(1) which reflects the grounds listed in Article 1A(2) of the Refugee Convention plus the added ground of ethnic persecution contained in PILSARC's bill;
- (iii) has been granted discretionary asylum by the Centre; and,
- (iv) has been displaced as a result of a natural disaster or catastrophic climate change.

### *b. The Exclusion Clauses*

Clause 5(1)(a)(ii) which denies protection to people who have committed serious non-political crimes must be narrowly tailored. Learning from Dorji's case, Tharoor's bill should provide a clear list of serious non-political crimes, ideally in a schedule, to pre-empt disguised extraditions.

Clause 5(1)(a)(iii) excludes perpetrators of "inhuman acts" which are undefined. The term could be a reference to either crimes against humanity or torture.<sup>321</sup> Crimes against humanity are pre-existing exclusion grounds, hence redundant here.<sup>322</sup> Torture and inhuman acts are inseparable; the latter

<sup>320</sup> A. Thangal Kunju Musaliar v. M. Venkatachalam Potti, AIR 1956 SC 246; Burrakur Coal Co. Ltd. v. Union of India, AIR 1961 SC 954; Arnit Das v. State of Bihar, (2000) 5 SCC 488.

<sup>321</sup> Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 85, Art. 16(1).

<sup>322</sup> Tharoor's Bill, *supra* note 2, Cl. 5(1)(a)(i). Furthermore, an inhuman act is a crime against humanity only if it is committed "on national, political, ethnic, racial or religious grounds," not "for any reason whatsoever" as Tharoor's clause states. *Compare Statute of the International*

cannot be carved out willy-nilly.<sup>323</sup> This confusion can be avoided by adding a definition which is tenable in international law or deleting the provision from the bill altogether.

Clause 5(1)(b) has two linked parts. It excludes peoples who seriously threaten public order or national security if they commit a crime bearing a sentence of at least ten years' imprisonment. The clause should define "national security."<sup>324</sup> It should also replace the imprisonment threshold with a list of exclusion offences.<sup>325</sup>

Clause 5(1)(c) excludes people who have "the rights and obligations of an Indian citizen" recognised by "competent authorities of India." The term "competent authorities" should be defined.<sup>326</sup> This can be corrected if Tharoor includes a definition in his bill so that the maxim *lex specialis derogat legi generali* is fulfilled.<sup>327</sup> Tharoor's intent is unclear too.<sup>328</sup> If the clause was applied in India, it would lend credence to the view that India is above all a Hindu homeland.<sup>329</sup>

### 3. The Principle of Non-Refoulement

Clause 8 and Clauses 2(1) (b) and (e) of Tharoor's bill restrict the application of the duty of non-refoulement to persons already on Indian territory. That would enact a large loophole through which frontier rejections and

Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d Mtg., U.N. Doc. S/RES/955 (November 8, 1994), Art. 3 with Tharoor's Bill, *supra* note 2, Cl. 5(1)(a)(iii).

<sup>323</sup> Committee against Torture, *General Comment No. 2* (39th Sess., UN Doc. CAT/C/GC/2/CRP. 1/Rev.4, November 23, 2007); Ireland v. United Kingdom, 1978 ECHR 1 (European Court of Human Rights).

<sup>324</sup> Bhairav Acharya, *Biometrics and the Right to Privacy under the Microscope*, 12 DATA PROTECTION LAW & POLICY 5 (2015).

<sup>325</sup> The ten-year imprisonment threshold is too high because, for example, since the minimum sentence for rape is seven years, it could allow convicted rapists to slip through. But pushing down the threshold might exclude people who have committed victimless crimes and pose no physical harm to the community.

<sup>326</sup> Absent a definition, courts would attempt a harmonious construction with the Foreigners Act with the result that a mid-ranking policeman might be a competent authority.

<sup>327</sup> E.g., CTO v. Binani Cements Ltd., (2014) 8 SCC 319 : (2014) 3 SCR 1; St. Stephen's College v. University of Delhi, (1992) 1 SCC 558 (Kasliwal, J, dissenting); J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. State of U.P., AIR 1961 SC 1170 : (1961) 3 SCR 185; Ethiopian Airlines v. Ganesh Narain Saboo, (2011) 8 SCC 539.

<sup>328</sup> Clause 5(1)(c) of Tharoor's bill is copied from Article 1E of the Refugee Convention which was designed to exclude post-war ethnic-German displaced from refugee status since they were accepted *en masse* by Germany on the basis of ethnic affinity alone. The Article was influenced by the proto-European view of nations being ethno-cultural homelands. Such a notion of nationality that was rejected by India's founders. *Supra* notes 44, 46.

<sup>329</sup> Such a view informs the Citizenship (Amendment) Bill, 2016, 172 of 2016, Lok Sabha, which makes Hindu and other non-Muslim illegal migrants eligible for citizenship in certain conditions. *See also* Garg, *supra* note 245.

entry refusals would take place. Pursuant to discussion in Part III, Subpart D, Section 5 of this paper, the gaps in protection can be closed by:

- (i) extending the application of clause 8 to asylum seekers;
- (ii) deleting the reference to “national territory” in clauses 2(1)(b) and (e) and clause 8 so that the principle of non-refoulement applies at the frontier;
- (iii) deleting clause 10(2);
- (iv) making clause 8 binding against all agents of the Indian government;
- (v) specifically overriding immunity and non-enforceability provisions of military and naval law, to the extent that they pertain to refugees and asylum seekers; and,
- (vi) expressly applying clause 8 to people whose entry into India constitutes a secondary movement.

#### 4. Common Provisions for Mixed Flows and Mass Influxes

Tharoor’s bill lacks the specialised institutions and procedures required to deal with mixed flows and mass influxes, which share many characteristics. Pursuant to the discussion in Part III, Subparts C and D of this paper, the bill requires fresh provisions to:

- (i) mandate the swift identification of vulnerable persons;
- (ii) identify and distinguish asylum seekers from economic migrants;
- (iii) mandate screening of mixed flows and migrant groups;
- (iv) set out procedures for *prima facie* group-based protection;
- (v) set out fast-tracked procedures for short-term individualised protection;
- (vi) enact a specific detention power for unauthorised arrivals who do not fall within any protection category; and,
- (vii) enact a specific criminal offence for asylum-related people smugglers.

The bill also requires rule-making provisions to specifically empower the Centre to:

- (i) establish consolidated processing centres for mixed flows and mass influxes at selected border areas;
- (ii) spell out how the consolidated centres will function;
- (iii) enable profiling-based identification methods;
- (iv) create fair screening procedures;
- (v) build a minimal regime of due process for group and individualised protection procedures; and,
- (vi) create a due process regime for the detention power that stronger than what the Foreigners Act offers.

## 5. Provisions for Mass Influxes Only

Following the discussion in Part III, Subpart D of this paper, Tharoor's bill requires dedicated provisions for mass influxes only. Such provisions should:

- (i) define a mass influx based on an unambiguous numerical and time-bound threshold;
- (ii) enact a specific bar against refugee militarisation;
- (iii) recognise the overriding principle of family unity;
- (iv) prohibit penalties against unauthorised arrivals who fall within a protection category; and,
- (v) institute a work permit-based system to access formal employment.

## 6. A Right against Statelessness

India has signed neither the 1954 Convention Relating to the Status of Stateless Persons<sup>330</sup> nor the 1961 Convention on the Reduction of Statelessness.<sup>331</sup> There is a large incidence of statelessness in India.<sup>332</sup> It in-

<sup>330</sup> Convention relating to the Status of Stateless Persons, September 28, 1954, 360 U.N.T.S. 117.

<sup>331</sup> Convention on the Reduction of Statelessness, August 30, 1961, 989 U.N.T.S. 175.

<sup>332</sup> See generally Sitharamam Kakarala, Deepika Prakash & Maanvi Tiku, India and the Challenge of Statelessness (Report submitted to UNHCR India, National Law University of Delhi, 2012), available at <http://nludelhi.ac.in/download/publication/2015/India%20and%20the%20Challenges%20of%20Statelessness.pdf> (Last visited on November 29, 2016); Raghu Karnad, Bhairav Acharya & Rajeev Dhavan, Protecting the Forgotten and Excluded: Statelessness in

cluded residents of the complex warren of enclaves and exclaves along the border with Bangladesh, which has ostensibly been settled through a political agreement.<sup>333</sup> It continues to include descendants of Partition survivors,<sup>334</sup> Chakma and Hajong refugees,<sup>335</sup> members of the ethnic-Chinese community,<sup>336</sup> and Tibetan refugees.<sup>337</sup> Tharoor's bill should set out a general right against statelessness, perhaps linked to a time-based residency threshold, as well as a procedure to acquire Indian citizenship to end statelessness.

## 7. Strengthened Institutions

Learning from the failures of the institutions, Tharoor's bill should do more to protect the autonomy and efficiency of the bodies it seeks to create, namely the National Commission on Asylum and the National Appellate Board for Asylum. The bill should:

- (i) make the President the appointing authority for the Commission's Chief Commissioner and the Appellate Board's Chairperson;
- (ii) specify a minimum cooling-off period of at least three years between a judge demitting office and being appointed as Chief Commissioner or Chairperson;
- (iii) contain an absolute bar against members of political parties and their proxies holding office in any capacity in either the Commission or Appellate Board;

<sup>333</sup> South Asia (PILSARC Working Paper, 2006), available at <http://www.mcrg.ac.in/AddReadin g%5C2012%5CStatelessness.pdf> (Last visited on November 29, 2016).

<sup>334</sup> Ministry of External Affairs, *India and Bangladesh: Land Boundary Agreement*, 2011, available at [https://www.meaindia.gov.in/Uploads/PublicationDocs/24529\\_LBA\\_MEA\\_Booklet\\_final.pdf](https://www.meaindia.gov.in/Uploads/PublicationDocs/24529_LBA_MEA_Booklet_final.pdf) (Last visited on November 29, 2016); Hosna J. Shewly, Migration Policy Institute, *India and Bangladesh Swap Territory, Citizens in Landmark Enclave Exchange*, March 9, 2016, available at <http://www.migrationpolicy.org/article/india-and-bangladesh-swap-territory-citizens-landmark-enclave-exchange> (Last visited on November 29, 2016).

<sup>335</sup> Dan McDougall, The Guardian, The forgotten refugees who wait for justice after 60 years, August 4, 2007, available at <https://www.theguardian.com/world/2007/aug/05/india.theobserver> (Last visited on November 29, 2016).

<sup>336</sup> Feroze Varun Gandhi, The Hindu, *The State of the Stateless*, November 25, 2016, available at <https://www.amazon.com/Stateless-South-Asia-Chakmas-Bangladesh/dp/8132102363> (Last visited on November 29, 2016).

<sup>337</sup> Suvojit Bagchi, The Hindu, *Despite being born in India, Chinese-origin people stateless*, October 5, 2015, available at <http://www.thehindu.com/news/national/despite-being-born-in-india-chineseorigin-people-stateless/article7723410.ece> (Last visited on November 29, 2016).

<sup>338</sup> Tenzin Pelkyi, The Diplomat, *Tibet in Limbo: An Exile's Account of Citizenship in a World of Nation-States*, January 6, 2016, available at <http://thediplomat.com/2016/01/tibet-in-limbo-an-exiles-account-of-citizenship-in-a-world-of-nation-states/> (Last visited on November 29, 2016).

- (iv) require all members and staff of the Commission and Appellate Board, and their relatives, to fully disclose their assets on an ongoing basis;
- (v) mandate an external audit of the functioning of the Commission and Appellate Board on a regular basis and publish the results widely;
- (vi) mandate that all strategic and policy decisions regarding the Commission's functioning, especially in relation to an ongoing asylum situation, are made after public consultations with experts and stakeholders;
- (vii) specify a maximum time-frame for the Commission and Appellate Board to reach a final decision in relation to an applicant or asylee, enforced through punitive measures.