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An Offer of Firm Resettlement

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AN OFFER OF FIRM RESETTLEMENT

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I. INTRODUCTION

The Attorney General lacks discretion to grant asylum to any refugee "if, prior to arrival in the United States, he or she entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement."[1] This rule, the doctrine of firm resettlement, is unique among the mandatory bars to asylum in the United States. It does not reflect a societal judgment about the moral fitness of an asylum applicant's character—as, for example, does the bar that prohibits granting asylum to persons with a history of violent criminal behavior.[2] Nor does it reflect a societal judgment of policy—as, for example, do the bars that prohibit asylum to persons who may represent a risk to the health or security of the U.S. citizenry.[3] The bar to asylum for refugees firmly resettled in third states rather originates in the international definition of a refugee, or more precisely, in the potential for the facts that constitute firm resettlement to disqualify an otherwise eligible refugee from asylum.

That, in any event, is the nature and theory of firm resettlement. In practice, it has sometimes become something very different: a regulatory loophole by which the Immigration and Naturalization Service (INS or Service)[4] attempts to remove refugees with other-

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1. 8 C.F.R. § 208.15 (2003); *see* Immigration and Nationality Act of 1952, § 208(b)(2)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi) (2003) (denying asylum to persons "firmly resettled in another country"); 8 C.F.R. § 208.13(c)(2)(i)(B) (2003).

2. 8 C.F.R. § 208.13(c)(2)(i)(A) (2003); *see also* 8 C.F.R. § 208.13(c)(2)(i)(E) (2003) (denying asylum to those who "ordered, incited or otherwise participated in the persecution" of individuals with specific characteristics).

3. 8 C.F.R. § 208.13(c)(2)(i)(C) (2003).

4. Since the preparation of this Article, the new Bureau of Citizenship and Immigration Services (BCIS) of the Department of Homeland Security has assumed responsibility for the initial stages of the asylum process. It remains too early to tell what effects, if any, this institutional reorganization will have, though it seems unlikely that the practice of the BCIS toward asylum seekers will differ materially from that of the INS on the issue of firm

wise valid persecution claims. At times, too, firm resettlement becomes a pretext for denying asylum to refugees thought to have chosen to seek sanctuary in the United States for economic reasons. The reason for this divergence between theory and practice lies partly with the Service. Asylum officers and INS trial attorneys sometimes seize upon firm resettlement as the sole available and colorable argument to advance in the face of otherwise valid asylum applications. But the fault also lies partly with the judiciary, which has misconstrued the firm-resettlement bar in a manner that enables its misuse or misapplication. In this Comment I aspire to explain how and why.

Part II examines the historical and legal evolution of the firm-resettlement bar. Part III contrasts the prevailing judicial interpretation—the totality-of-the-circumstances test—with the Third Circuit's recent decision in *Abdille v. Ashcroft*,[5] which, I argue, articulated a standard that manifests greater fidelity to the statutory and regulatory text, as well as to the purpose, of the firm-resettlement bar. Part IV shows, by way of two examples, how the predominant judicial approach enables, indeed may encourage, its misapplication. In short, dated administrative and judicial precedents establish that firm-resettlement inquiries require acutely fact-sensitive and discretionary judgments. Those precedents often fail to appreciate the significance of the federal government's redefinition of firm resettlement as a mandatory rather than a discretionary bar to asylum. Because the INS frequently resorts to a variety of non-offer-based factors in an effort to establish a prima facie case of firm resettlement—and because, more often than not, immigration judges set the bar of "clarity and force"[6] to which this evidence must rise in order to compel the asylum applicant to disprove firm resettlement at an unduly low level—firm resettlement effectively becomes, not a bar to asylum for otherwise qualified refugees, but an additional *criterion* for refugee status. The applicant then bears the burden to show the absence of firm resettlement in order to establish his or her eligibility for asylum.

This pattern of events reflects a misapplication of the law. In practice, it also operates to burden bona fide asylum seekers unduly and to waste administrative and judicial resources that would be better spent focusing on the paramount question in every

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resettlement. For the sake of clarity and consistency with the cited case law, I refer throughout this Comment to the INS rather than the BCIS.

5. 242 F.3d 477 (3d Cir. 2001).

6. *Id.* at 486-87 (citing Cheo v. INS, 162 F.3d 1227 (9th Cir. 1998)).

asylum case: the applicant's claim to refugee status. Firm resettlement should no longer be understood as one among many factors to be weighed by an adjudicator in the exercise of discretion. Discretion, to the extent that it continues to play any valid role in firm-resettlement determinations, should be far more constrained. To exercise that limited discretion appropriately requires an appreciation of both the objective of firm resettlement and the significance of its statutory redefinition as a mandatory bar. For these reasons, I conclude by emphasizing that unless and until Congress expresses a contrary intent, the doctrine of firm resettlement must be construed to conform to the paramount objective of international refugee law established by the 1951 Convention Relating to the Status of Refugees[7] and its 1967 Protocol:[8] to establish a robust regime of international protection for certain defined categories of persons deprived of genuine national protection.

II. The Development of the Firm-Resettlement Bar

A. *International Framework*

The doctrine of firm resettlement originates in the international definition of a refugee set forth in the 1951 Convention Relating to the Status of Refugees. The 1951 Convention, augmented in scope and application by the 1967 Protocol (collectively, Refugee Conventions), establishes the basic international framework for the protection of asylum seekers. Article I expressly excludes from the definition of a refugee, first, any "person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country";[9] and second, any person who, though once a refugee, "has acquired a new nationality, and enjoys the protection of the country of his new nationality."[10] These provisions reflect the central intention of the Refugee Conventions: to create an international regime that shields persons deprived of the rights and protections that national citizenship ordinarily affords. The legal doctrine of firm resettlement reflects

7. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention].

8. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

9. Refugee Convention, *supra* note 7, art. I(E), 189 U.N.T.S. at 154.

10. *Id.* art. I(C)(3), 189 U.N.T.S. at 156.

the simple factual judgment that "[n]ational protection and status in a third country negate the need for international protection."[11]

But what degree of national protection in a third country, precisely which "rights and obligations," suffice to remove a person from the Refugee Conventions' protection? The Handbook of the U.N. High Commissioner for Refugees (UNHCR) provides some guidance. A third state need not grant a person formal citizenship, as provided in Article I(c)(3); it is enough that he or she receives "most of the rights normally enjoyed by nationals," which means, at a minimum, "protection against deportation or expulsion."[12] Article I(E) of the 1951 Convention, however, is subject to a far more expansive interpretation. One Canadian court, for example, held that it reaches so far as to encompass the right to social services.[13]

At the same time, the municipal laws of states parties suggest that the Refugee Conventions do authorize exclusion of otherwise qualified refugees who have received some form of protected status in a third state that falls short of full citizenship. South African law, for instance, provides that a person does not qualify as a refugee if "there is reason to believe that he or she . . . enjoys the protection of any other country in which he or she has taken residence."[14] Article 1(E) does "not require that the individuals in question should enjoy the full range of rights incidental to citizenship. Given the fundamental objective of protection, however, the right of entry to the State and freedom from removal are to be considered essential."[15] Beyond this, international law provides little guidance about the nature and extent of the national protection and rights required by Article I(E).

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11. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 447 (3d ed., 1999).

12. Office of the U.N. High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶¶ 144, 145, U.N. Doc. HCR/PRO/4 (1979) [hereinafter UNHCR Handbook].

13. *See* Hamdan v. Canada (Minister of Citizenship & Immigration), 38 Imm. L.R. (2d) 20 (1997). In *Hamdan*, the Federal Court of Canada reversed and remanded the Canadian Refugee Board's exclusion of an Iraqi citizen, who had spent several years studying in the Philippines, under Article 1(E) of the Refugee Convention (as incorporated into the Canadian Immigration Act). *Id.* While the Federal Court acknowledged that the applicant could return to the Philippines, where he enjoyed the rights to reside permanently and to travel, it held that the "rights and obligations" referred to by Article 1(E) also include the rights to work and receive social services. *See id.* ¶ 7.

14. Refugees Act, 1998, Act No. 130, art. 4 (GG) (S. Afr.).

15. GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 94 (2d ed. 1996).

B. *The Doctrine of Firm Resettlement in U.S. Law*

1. Evolution of the Firm-Resettlement Bar

In the United States, Article I(E) would appear to undergird the firm-resettlement bar to asylum. In fact, the doctrine developed well before the United States implemented the 1967 Protocol in 1980. It evolved in a series of decisions by the Board of Immigration Appeals (BIA or Board) in the late 1960s. At issue in these cases was the status of Chinese asylum seekers who had fled communist China in the aftermath of its civil war, but then resided for some time in another state or sovereign territory (typically Hong Kong) before seeking asylum in the United States.[16]

The Supreme Court first addressed this issue in *Rosenberg v. Yee Chien Woo.*[17] The Immigration and Nationality Act (INA) at that time provided preferential treatment to aliens fleeing persecution in communist states.[18] Yee, a refugee from communist China, fled to Hong Kong in 1953 and remained there until 1959. He then traveled to the United States on business. Upon the expiration of his visitor's visa, Yee applied for an immigrant visa, claiming preference under the INA as an alien who had fled a communist state.[19] The Court declined to decide whether Yee's residence and status in Hong Kong, as a matter of fact, constituted firm resettlement.[20] But the Court rejected the Ninth Circuit's decision, which had

16. Matter of Ng, 12 I. & N. Dec. 411 (BIA 1967) (denying the asylum application of a Chinese refugee on the grounds that he held permanent resident status in Hong Kong, where he had attended school and his father owned a business); Matter of Chai, 12 I. & N. Dec. 81 (BIA 1967) (granting the asylum application of a Chinese refugee who had resided in Hong Kong for five years after fleeing China because he did not enjoy in Hong Kong "any right or privileges . . . inconsistent with refugee status"); Matter of Moy, 12 I. & N. Dec. 117 (BIA 1967) (denying the asylum application of a Chinese refugee who had acquired permanent resident status in Colombia, where he also owned a partnership interest in a business); Matter of Sun, 12 I. & N. Dec. 36 (BIA 1966) (denying the asylum application of a Chinese refugee who had resided in Taiwan for many years after fleeing China and in fact acquired Taiwanese citizenship). For a discussion of the INS's application of firm-resettlement doctrine to deny asylum to Chinese refugees who resided in Hong Kong prior to its reversion to Chinese sovereignty, see Frannie S. Mok, *Chinese Asylum Applications Under U.S. Immigration Policy: "Firm Resettlement" in Hong Kong,* 17 HASTINGS INT'L & COMP. L. REV. 183 (1993).

17. 402 U.S. 49 (1971).

18. *See* Immigration and Nationality Act of 1952, § 203(a)(7), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. § 1153(a)) [hereinafter INA]. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.) [hereinafter Refugee Act], amended the INA.

19. *See Yee Chien Woo,* 402 U.S. at 50-51.

20. *See id.* at 57 n.6 (declining to express an opinion on the district court's finding that Yee had not, as a matter of fact, firmly resettled in Hong Kong). Yee possessed identity papers enabling him to return to and reside permanently in Hong Kong. *Id.* at 56 n.5.

held that, as a matter of law, firm resettlement is irrelevant to an asylum application.[21]

The Court made clear, to the contrary, that firm resettlement is "one of the factors" that the INS must consider "to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution."[22] This construction of congressional intent, the Court emphasized, conformed to the "central theme" of refugee legislation: the creation of a safe haven for refugees still in flight from persecution, not those already resettled and rebuilding their lives elsewhere. Justice Black explained that Congress could not have "intended to make refugees in flight from persecution compete with all of the world's resettled refugees for the 10,200 entries and permits afforded each year under [§] 203(a)(7). Such an interpretation would subvert the lofty goals embodied in the whole pattern of our refugee legislation."[23]

The decision of the United States Court of Appeals for the District of Columbia in *Chinese American Civic Council v. Attorney General*[24] reaffirmed this approach. Again, the case involved Chinese refugees who had resided for many years in Hong Kong before seeking asylum in the United States, and again, the key to the court's decision rested on its finding that the individuals in question could no longer claim the status of refugees "in flight."[25] In the court's view, too much time had elapsed between the refugees' initial flight from China and the submission of their asylum applications. But the D.C. Circuit clarified that while it proved dispositive in *Chinese American Civic Council*, length of residency in a third state should not be deemed the sole factor relevant to a firm resettlement decision.[26] Judge Kaufmann, concurring, emphasized that contrary to the standard applied by the INS, "long residence" alone

21. *See* Yee Chien Woo v. Rosenberg, 419 F.2d 252, 254 (9th Cir. 1969) ("Whether appellee was firmly resettled in Hong Kong is not, then, relevant."), *rev'd*, 402 U.S. 49 (1971). The Supreme Court granted certiorari to resolve the conflict between this decision and *Shen v. Esperdy*, 428 F.2d 293 (2d Cir. 1970).

22. *Yee Chien Woo*, 402 U.S. at 56.

23. *Id.*; *accord* Shen v. Esperdy, 428 F.2d 293 (2d Cir. 1970).

24. 566 F.2d 321 (D.C. Cir. 1977).

25. *Id.* at 328; *see also* Kai Fun Chan v. Kiley, 454 F. Supp. 34 (S.D.N.Y. 1978) (affirming denial of Chinese refugee's asylum application, on the grounds that he lived, attended school, and worked in Hong Kong for four years and held permanent resident status there).

26. *Chinese Am. Civic Council*, 566 F.2d at 328 n.18 (noting that an applicant's "family ties, intent, business or property connections and other matters" may be relevant to the factual determination whether a refugee remains "in flight").

should not create an "irrebuttable presumption" of firm resettlement.[27]

In short, these decisions—rendered before the United States implemented its treaty obligations under the Refugee Conventions by domestic legislation—established, first, that firm resettlement is relevant to the disposition of an asylum claim, but second, that to determine whether a refugee has in fact been firmly resettled, an asylum officer or immigration judge should consider the totality of the circumstances. No one factor should be viewed as dispositive. Above all, the inquiry in every case must be whether, in view of the applicant's legal status and circumstances, the refugee remains "in flight," unable to avail himself of the effective protection of some third state.

2. The Refugee Act of 1980

In 1968, the United States ratified the 1967 Protocol and, by its incorporation of the substantive provisions of the 1951 Convention, for the first time expressly assumed international obligations toward refugees. Not until 1980, however, did Congress enact comprehensive legislation intended to implement these obligations. The Refugee Act of 1980 accomplished this objective by restructuring and codifying the asylum process.[28] Section 208 of the INA incorporated the 1951 Convention's definition of a refugee and vested the Attorney General with discretion to grant asylum to refugees, so defined.[29] It did not, however, codify any bar to asylum seekers deemed firmly resettled. While § 207 of the INA, which concerns the admission of refugees outside the United States, provided that the "Attorney General may . . . admit any refugee who is not firmly resettled in any foreign country,"[30] § 208, which concerns the admission of asylum seekers at the border or already resident in the United States, contained no analogous provision.

Federal regulations promulgated pursuant to § 208 nonetheless defined firm resettlement and instructed INS district directors to deny asylum to any alien found to be firmly resettled.[31] In several

27. *Id.* at 332 (Kaufmann, J., concurring).

28. *See generally* INA § 208, 8 U.S.C. § 1158 (setting forth the processes for aliens to seek asylum).

29. *See id.* § 208(b).

30. *Id.* § 207(c)(1).

31. 8 C.F.R. § 208.14 (1980) ("An alien is considered to be 'firmly resettled' if he was offered resident status, citizenship, or some other type of permanent resettlement by another nation and traveled to and entered that nation as a consequence of his flight from persecution, unless the refugee establishes . . . . that the conditions of his residence in that

early decisions, the BIA suggested that this bar also extended to limit the discretion of immigration judges.[32] In *Matter of Lam*,[33] for example, the Board concluded that despite the omission of an express reference to firm resettlement in the Refugee Act, "the inclusion in the new legislation of the firm resettlement doctrine is consistent with past recognition of the doctrine and its importance."[34] The Board's rationale in *Lam* essentially echoed that of the Supreme Court in *Yee Chien Woo*. "Firm resettlement," the Board wrote, "has long been part of our laws relating to refugees"; it is "inherent in the 'central theme'" of refugee legislation.[35]

Applying this implicit doctrine in *Matter of Portales*,[36] the BIA denied asylum to a group of Cuban refugees determined to be firmly resettled in Peru. The Board acknowledged the hardships the applicants faced there, but said that "[t]he living conditions and inability to obtain employment experienced by the applicants appear related to Peru's economy, rather than [to] the *conscious restriction* of benefits by the authorities of that country."[37] By emphasizing "conscious restriction," the BIA adopted the regulatory definition that limited the discretion of the INS to grant asylum to firmly resettled refugees. Thereafter, it seemed, the same standard would limit the discretion of immigration judges.[38]

3. The Board's Decision in *Soleimani*

The Board reversed course and rejected this view in *Matter of Soleimani*.[39] There, an Iranian Jew applied for asylum in the United States after residing for almost one year in Israel, where she attended language classes and recovered from a bout of pneumonia that required hospitalization. Israel's "Law of Return" appeared automatically to extend an offer of permanent residence and citizenship to any Jew. But Soleimani did not ask for, nor did the Israeli government expressly offer her, any such status. The immi-

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nation were so substantially and consciously restricted by the authority of the country of asylum/refuge that he was not in fact resettled."); 8 C.F.R. § 208.8(f)(1)(ii) (1980) (instructing INS district directors to deny asylum to aliens "firmly resettled in a foreign country").

32. Matter of Portales, 18 I. & N. Dec. 239 (BIA 1982); Matter of Lam, 18 I. & N. Dec. 15 (BIA 1981).

33. 18 I. & N. Dec. 15 (BIA 1981).

34. *Id.* at 19.

35. *Id.* (quoting Rosenberg v. Yee Chien Woo, 402 U.S. 49, 55 (1971)).

36. 18 I. & N. Dec. 239 (BIA 1982).

37. *Id.* at 242 (emphasis added).

38. *See* 8 C.F.R. § 208.14 (1980).

39. 20 I. & N. Dec. 99 (BIA 1989).

gration judge nonetheless found that, by virtue of Israeli law, she had received an implicit offer of permanent residence and therefore had been firmly resettled under the definition then set forth in 8 C.F.R. § 208.14, rendering her ineligible for asylum in the United States.[40]

The BIA overruled this decision and declared Soleimani eligible for asylum. First, the BIA held that the regulation instructing INS district directors to deny asylum to applicants found firmly resettled should be construed literally to apply solely to INS district directors; it should not be construed to constrain the discretion of immigration judges.[41] Consistent with *Yee Chien Woo*,[42] firm resettlement would remain but one factor to be considered in the exercise of discretion.[43] Yet at the same time, the Board agreed that a finding of firm resettlement ordinarily carried negative discretionary weight and would bar asylum in the absence of countervailing equities.[44] Second, the Board explained, an offer of firm resettlement must be concrete. It does not mean that an applicant may have been able to avail herself of resettlement procedures in a third state; it means an actual and specific resettlement offer.[45] The existence of Israel's Law of Return therefore did not, by itself, constitute an offer of permanent resettlement.

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40. *See id.* at 100-02.

41. *See id.* at 104 (citing Matter of Gonzalez 19 I. & N. Dec. 682 (1988) (holding that the BIA and immigration judges are not bound by the analogous provision of the Federal Regulations that bars asylum to those individuals found guilty of a serious crime pursuant to a final judgment)).

42. 402 U.S. 49 (1972).

43. *Soleimani*, 20 I. & N. Dec., at 103 (citing Matter of Pula, 19 I. & N. Dec. 467, 474 (1987) (holding that in exercising discretion with regard to an asylum application, "the totality of the circumstances and actions of an alien in his flight from the country where he fears persecution should be examined"), *superseded by regulation as stated in* Adriasian v. INS 180 F.3d. 1033, 1043-44 (9th Cir. 1999)).

44. *Id.* at 105; *see also* Farbakhsh v. INS, 20 F.3d 877, 881 (8th Cir. 1994) (applying the pre-1990 standard to deny, in the exercise of discretion, asylum to an Iranian applicant held to have been firmly resettled in Spain); *accord* Barou-Barukoff v. INS, No. 91-70440, 1993 WL 5173, at *3 (9th Cir. Jan. 11, 1993) (finding, under the pre-1990 discretionary standard set forth in *Soleimani*, that a Bulgarian refugee had been firmly resettled in Belgium and noting that, however sincere and credible, his "other [anti-communist and anti-drug] activities did not present compelling countervailing equities").

45. *See* ANKER, *supra* note 11, at 450 (noting that, under the rule established by *Soleimani*, "an offer [of firm resettlement] cannot be merely theoretical or inchoate"). *But see* Tsatourian v. INS, No. 96-70804, 1997 WL 800915, at *1 (9th Cir. Dec. 31, 1997) (upholding the BIA's denial of asylum to an Azerbaijani refugee alleged to have been firmly resettled in Armenia because, among other things, the U.S. State Department issued an advisory opinion stating that the "Government of Armenia has offered residence permits to refugees from Azerbaijan proper, who are assumed to be permanent residents of Armenia").

Third, the Board reiterated the theme of *Yee Chien Woo*—a theme that pervades modern firm resettlement decisions despite significant changes in the law since the date of the Board's decision in *Soleimani*: that the adjudicator should consider the totality of the circumstances in order to decide whether an applicant remains in flight from persecution and unable to resettle in a third state that offers her rights and protections tantamount to those of citizenship. Finally, the Board explained that where physical presence in the United States is "a consequence of" or "reasonably proximate to" flight from persecution, the fact of intervening residence in a third state does not alone establish firm resettlement.[46]

Soleimani established a relatively detailed and coherent framework to guide firm-resettlement decisions by asylum officers and immigration judges. It accomplished this by offering a well-reasoned interpretation of the law as it then stood. *Soleimani* remains good law today in most respects, and it continues to exercise a strong and for the most part positive influence on firm-resettlement decisions. The regulatory and statutory regime, however, has changed in a crucial respect since the Board's decision in *Soleimani*; specifically, firm resettlement is no longer part of the exercise of discretion.[47]

4. Regulatory and Statutory Modifications

In 1990, new federal regulations recategorized firm resettlement as a mandatory ground for denying asylum to otherwise eligible refugees, applicable to asylum officers and immigration judges alike.[48] These regulations effectively "overruled" *Soleimani* to the extent that the Board had held that immigration judges should consider firm resettlement as a discretionary factor. In *Yang v. INS*,[49] the Ninth Circuit sustained the new regulation as a valid exercise of administrative rulemaking authority under the well-known standard articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[50] Then, in 1996,

46. *See Soleimani*, 20 I. & N. Dec., at 106, 104-05.

47. *See* Matter of Pula, 19 I. & N. Dec. 467 (BIA 1987).

48. *See* 55 Fed. Reg. 30,674, 30,678 (Jul. 27, 1990) (codified at 8 C.F.R. § 208.14 (1990)); *see also* 8 C.F.R. § 208.15 (1991) (setting forth the definition of firm resettlement). The present regulations that deny asylum eligibility to refugees found "firmly resettled" and define "firm resettlement" are set forth at, respectively, 8 C.F.R. § 208.13(c)(2)(i)(B) (2003), and 8 C.F.R. § 208.15 (2003).

49. 79 F.3d 932 (9th Cir. 1996).

50. 467 U.S. 837, 843 (1984) (holding that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

as part of a package of major legislative revisions to the immigration laws,[51] Congress codified the mandatory nature of the firm-resettlement bar.[52]

The 1990 federal regulations modified the definition of firm resettlement, deemphasizing the previously paramount question whether the refugee remains in flight. While that idea, developed in decades of case law, remained present in the background, the new regulation reoriented the central inquiry of firm resettlement to focus the adjudicator on the actual existence *vel non* of an offer of permanent resettlement. The 1990 definition remains in force today.[53] An asylum seeker has been firmly resettled

> if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, *an offer of permanent resident status, citizenship, or some other type of permanent resettlement* unless he or she establishes:
> (a) That his or her entry into that country was a *necessary consequence* of his or her flight from persecution [and] that he or she remained in that country only as long as was necessary to arrange onward travel . . . ; or
> (b) That the conditions of his or her residence in that country were so *substantially and consciously restricted* by the authority of the country of refuge that he or she was not in fact resettled.[54]

Exceptions (a) and (b) to this generally *offer*-based inquiry mirror the concern that has reverberated throughout firm-resettlement decisions since *Yee Chien Woo*: that to retain entitlement to asylum, a refugee must remain in flight from persecution, unable to resettle in a third state in which he can enjoy a level of rights and protections tantamount to, if not identical with, those of citizenship. Title 8 C.F.R. § 208.15(b) also makes clear that if, despite "an offer of permanent resettlement," a refugee denies having been firmly resettled, an adjudicator should consider the totality of the circumstances, including the refugee's legal status and the actual conditions of his or her residence.[55] To facilitate that assess-

51. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of 8 & 18 U.S.C.). For an overview of IIRIRA's effect on U.S. refugee law, see generally Jaya Ramji, *Legislating Away International Law: The Immigration Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 STAN. J. INT'L L. 117 (2001).

52. *See* 8 U.S.C. § 1158(b)(2)(A)(vi) (2003); Andriasian v. INS, 180 F.3d 1033, 1043 n.16 (1999).

53. *See* 55 Fed. Reg. 30,674, 30,683-84 (Jul. 27, 1990) (codified at 8 C.F.R. § 208.15 (2003)).

54. 8 C.F.R. § 208.15 (2003) (emphasis added).

55. *Id.* § 208.15(b).

ment, § 208.15(b) provides a non-exhaustive list of factors that adjudicators "shall consider" to determine whether a refugee's conditions of residence have been "substantially and consciously restricted" by the authorities of a third nation.[56] These include the rights to housing, employment, travel, public relief, education, naturalization, and property.[57]

Note, however, that the plain meaning of the regulatory text instructs adjudicators to consider these factors only after they have made the preliminary finding of a genuine "offer of permanent resettlement." The totality-of-the-circumstances test does not directly inform that question. To the contrary, it may well obfuscate the question by diverting focus from a relatively straightforward inquiry—the existence *vel non* of a legal offer of permanent resettlement—to a host of extraneous factors about which, more often than not, the adjudicator knows little. Nonetheless, in part because of the influence of the seminal decisions of the Supreme Court and the Board in *Yee Chien Woo* and *Soleimani*, respectively, many decision-makers continue to apply, in effect if not name, a modified totality-of-the-circumstances test to the logically precedent question whether a third state made an actual legal offer of permanent resettlement.

III. Judicial Approaches to Firm Resettlement

A. *The Totality-of-the-Circumstances Test*

Since 1990, most federal courts have adopted, expressly or implicitly, a modified totality-of-the-circumstances test. In *Farbakhsh v. INS*,[58] for instance, the Eighth Circuit, albeit applying the pre-1990 regulations, sustained the Board's determination that an Iranian applicant had been firmly resettled in Spain.[59] Citing *Soleimani* for the proposition that "[f]irm resettlement is a factor to be considered in determining whether asylum should be granted as a matter of discretion,"[60] the Eighth Circuit emphasized the applicant's four-year residence in Spain, where he had an application for refugee status pending; his financial support from his family; his circumvention of "orderly refugee procedures by using a

56. *Id.*

57. *See id.*

58. 20 F.3d 877 (8th Cir. 1994).

59. *Id.* at 882. This decision, while rendered after 1990, applied the pre-1990 regulatory regime because the applicant filed for asylum before October 1, 1990, the date on which the mandatory firm-resettlement bar came into effect. *See id.* at 881 n.2.

60. *Id.* at 881 (citing Matter of Soleimani, 20 I. & N. Dec. 99 (BIA 1989)).

forged British passport"; and the absence of "countervailing equities in favor of asylum."[61] The Board also considered his age, health, and that "his stated reason for coming to the United States [from Spain] was economic."[62]

Under a discretionary regime, the above reasons would arguably provide fair grounds for denying Farbakhsh's asylum application. If firm resettlement is but one factor among many to be weighed in the exercise of discretion, then even in the absence of a genuine offer of permanent resettlement, circumstances such as long residence in and family ties to a third state may militate against a favorable exercise of discretion. But under the post-1990 regulatory (and now statutory) regime—whereby the inquiry focuses first and foremost on the existence *vel non* of an offer of permanent resettlement, which, if found, mandates rejection of an asylum application—applying the *Farbakhsh* analysis would be anachronistic, indeed wrong. Whatever the equities, at the time Farbakhsh applied for asylum, Spain had not made him an offer of permanent resettlement.[63] Many adjudicators nonetheless continue to resolve cases like *Farbakhsh* by applying, in practice if not name, the anachronistic totality-of-the-circumstances rule.

These contemporary cases typically focus on two discrete issues: first, whether the applicant remained in flight from persecution at the time he filed his application; and second, whether the totality of the circumstances indicates that his residence in a third state constitutes firm resettlement. In practice, these issues frequently overlap or become conflated in the course of the firm-resettlement inquiry. Whether an alien remains in flight often depends on whether he had resettled in a third state that extended him a certain level of rights and protection, enabling him to terminate his flight. For that reason, a number of federal circuit courts have held that where the INS furnishes evidence that suggests termination of the applicant's flight from persecution, the burden of proof shifts to the applicant to show—by reference to the totality of the circumstances—that he or she has not been firmly resettled.[64] Whatever

61. *Id.* at 882.

62. *Id.*

63. *See id.* at 880 (noting Farbakhsh's arguments that his application remained pending in Spain, where he had no right to work or attend school).

64. Cheo v. INS, 162 F.3d 1227, 1229-30 (9th Cir. 1998); *see also* Mussie v. INS, 172 F.3d 329, 331 (4th Cir. 1999) ("Once the 'evidence indicates' that an alien has been 'firmly resettled,' the alien bears the 'burden of providing by a preponderance of the evidence' that he has not been firmly resettled.") (quoting 8 C.F.R. § 208.13(c)(2)(ii)); *cf.* Abdalla v. INS, 43 F.3d 1397, 1399 (10th Cir. 1994) (finding the applicant's twenty-year residence in

its merits as an evidentiary rule,[65] in practice this presumption can, and often does, both modify and marginalize what should be the paramount firm-resettlement inquiry: the existence *vel non* of a legal offer of permanent resettlement. If an applicant stayed in a third state for a long time or resided in a third state at a time not reasonably proximate to his flight from persecution, then he must prove that the state did *not* make him an offer of permanent resettlement.[66] That presumption is often demonstrably wrong as a matter of fact. More critically, as a matter of law, it tends in practice to transform what should be a question distinct from the refugee-status inquiry into an additional *criterion* of refugee status.

B. *The Third Circuit's Decision in* Abdille v. Ashcroft

In *Abdille v. Ashcroft*,[67] the Third Circuit became the first federal court expressly to reject the totality-of-the-circumstances approach—and, equally important, to label it as such. A Somalian refugee applied for asylum after residing in South Africa with temporary, though evidently renewable, asylum status, which at that time took the form of a two-year exemption from South Africa's Aliens Control Act.[68] The Board held that he had been firmly resettled on this basis.[69] The Third Circuit reversed and remanded, adopting a construction of the firm-resettlement regulation based on fidelity to its text and structure.[70] "It is readily evident from the plain language of [8 C.F.R.] § 208.15," the court wrote, "that the prime element in the firm resettlement inquiry is the existence *vel non* of 'an offer of permanent resident status, citizenship, or some

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the United Arab Emirates sufficient "to suggest permanent resident status" and to shift the burden of proof to the applicant, where, unlike in *Cheo* or *Mussie*, the record disclosed the existence of some form of official permit or "visa" authorizing legal residence).

65. I do not mean to question this allocation of the burdens of proof and persuasion generally. Title 8 C.F.R. § 208.13(c)(2)(ii) provides that where the "evidence indicates" that a bar to asylum applies, the applicant "shall have the burden of proving by a preponderance of the evidence that" it does not. *See, e.g.*, Abdille v. Ashcroft, 242 F.3d 477, 491 (3d Cir. 2001). In the context of firm resettlement, however, the application of this presumption can and frequently does obfuscate the appropriate inquiry. *See infra* Part IV.

66. Andriasian v. INS, 180 F.3d 1033, 1043 (9th Cir. 1999) ("In the absence of direct evidence of an offer, a lengthy, undisturbed residence in a third country may establish a rebuttable presumption that an individual has the right to return to that country and remain there permanently.").

67. 242 F.3d 477 (3d Cir. 2001).

68. *Id.* at 481.

69. *Id.* at 482.

70. *Id.*

other type of permanent resettlement.'"[71] The Third Circuit therefore rejected what it characterized as

> [t]he alternative approach[, which] would have us consider the existence of a government-issued offer as simply one component of a broader firm resettlement inquiry according equal weight to such factors as the alien's length of stay in a third country, the economic and social ties that the alien develops in that country, and the alien's intent . . . .[72]

That approach, the Third Circuit said, had been implicit in the pre-Refugee Act decision of the D.C. Circuit in *Chinese America Civil Council v. Attorney General*,[73] and had been adopted in substance by the far more recent decisions of the Eighth and Fourth Circuits.[74]

At the same time, the Third Circuit equivocated somewhat. The court said that it did not intend to foreclose the possibility that where "the INS may not be able to secure direct evidence of a formal government offer of some type of permanent resettlement," it may be permissible for the Service "to rely on non-offer-based factors," which "can serve as a surrogate for direct evidence of a formal offer of some type of permanent resettlement, if they rise to a sufficient level of clarity and force."[75] The *Abdille* court declined to specify in detail the nature and type of evidence that the INS may be able to proffer to make out a prima facie case of firm resettlement in the absence of evidence of a formal offer. But the court suggested that there may well be such cases, and totality-of-the-circumstances evidence should not be deemed per se irrelevant.

Unfortunately, what the Third Circuit thereby framed as the exception—the need to make out a prima facie case of firm resettlement by indirect evidence rather than by evidence of a formal offer—is in practice the rule. Asylum seekers seldom arrive with documentation of a formal offer of permanent resettlement in a third state. Those states that tend to receive large refugee flows seldom treat refugees, either in law or practice, in an orderly manner that would enable adjudicators to conclude with confidence that an offer of some kind of permanent resettlement had or had not been extended. More often than not, the INS therefore resorts to a variety of non-offer-based factors as evidence in an effort to

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71. *Id.* at 485 (quoting 8 C.F.R. § 208.15 (2000)).

72. *Id.*

73. *See id.* (analyzing Chinese Am. Civil Council v. Attorney General, 566 F.2d 321 (D.C. Cir. 1977)).

74. *Id.* (citing and discussing Farbakhsh v. INS, 20 F.3d 877 (8th Cir. 1994), and Mussie v. INS, 172 F.3d 329 (4th Cir. 1999)).

75. *Id.* at 486-87 (citing Cheo v. INS, 162 F.3d 1227 (9th Cir. 1998)).

establish a prima facie case of firm resettlement. And the "level of clarity and force"[76] to which such evidence must rise in order to compel the asylum applicant to disprove firm resettlement tends to be very low.

Abdille remains a vital precedent, correctly decided in light of the statutory and regulatory regime now in force. It clarifies the nature of the modern firm-resettlement bar and the proper inquiry for determining whether that bar applies. Yet the most difficult issues presented by firm resettlement arise precisely in those circumstances that the Third Circuit addressed only in dicta. I do not mean to suggest that the *Abdille* court should have decided any of the myriad questions that could be presented in such circumstances. The court rightly resolved only those issues necessary to decide the appeal and remanded the case for further findings of fact that would enable the adjudicator to establish the existence *vel non* of an offer.[77] But the Third Circuit's dicta on the questions it declined to reach regrettably provide legal support for the very practice—reliance on the totality-of-the-circumstances test and non-offer-based factors—that its decision expressly rejects.

IV. Application of the Firm-Resettlement Bar in Practice

The vital difference between the *Abdille* rule and the totality-of-the-circumstances test becomes clear when we descend from the level of theory to that of practice. Few asylum cases reach the federal circuit courts. Published decisions on firm resettlement remain sparse and generally uninformative vis-à-vis the typical experience of asylum seekers faced with the firm-resettlement bar. The BIA is the court of last resort for most asylum cases. Since *Soleimani*, it has published no precedential decisions on firm resettlement.

A better indicium of the operation of the firm-resettlement bar in practice may be the INS's *Basic Law Manual*, upon which asylum officers and immigration judges rely to guide their exercise of discretion. After paraphrasing the text of 8 C.F.R. § 208.15, the *Manual* instructs asylum officers that

> [e]lements that should be considered in determining firm resettlement are: comparing the living conditions of the applicant to the other residents of the country; housing; whether its [sic] permanent or temporary; the types and extent of employment made available; the legal right to hold property; the types of

76. *Id.* at 487.
77. *See id.* at 497.

> rights and privileges permitted compared to the other residences [sic] such as travel documentation, education, public relief, and naturalization.[78]

The *Manual*, in other words, expressly instructs asylum officers and immigration judges to employ the totality-of-the-circumstances test. The "prime factor"—the existence *vel non* of a formal offer of permanent resettlement—is nowhere mentioned.[79]

As authority for the totality-of-the-circumstances test, the *Manual* first cites 8 C.F.R. § 207.1(c).[80] That subsection governs the admission of refugees from outside the United States, not the asylum process; and it sets forth a somewhat different definition of firm-resettlement.[81] The *Manual* then cites 8 C.F.R. § 208.15(b).[82] That subsection is also inapposite. It enumerates factors that an adjudicator "shall consider" if, but only if, it is necessary to decide whether, *despite* the existence of an offer of permanent resettlement, a third state has "substantially and consciously restricted" the conditions of the applicant's residence.[83] Finally, the *Manual* cites two cases—*Farbakhsh v. INS* and *Matter of Soleimani*—both of which were decided under the discretionary firm-resettlement regime that ended in 1990.[84]

The effect of the application of this test has been to distort the firm-resettlement inquiry, waste administrative and judicial resources, and needlessly burden meritorious applicants with the obligation to establish the *absence* of firm resettlement as yet

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78. IMMIGRATION AND NATURALIZATION SERVICE, THE BASIC LAW MANUAL 68 (1995).

79. *See Abdille*, 242 F.3d at 485 (quoting 8 C.F.R. § 208.15 (2000)).

80. Specifically, that subsection provides:

> (c) *Not firmly resettled.* Any applicant who claims not to be firmly resettled in a foreign country must establish that the conditions of his/her residence in that country are so restrictive as to deny resettlement. In determining whether or not an applicant is firmly resettled in a foreign country, the officer reviewing the matter shall consider the conditions under which other residents of the country live: (1) Whether permanent or temporary housing is available to the refugee in the foreign country; (2) nature of employment available to the refugee in the foreign country; and (3) other benefits offered or denied to the refugee by the foreign country which are available to other residents, such as (i) right to property ownership, (ii) travel documentation, (iii) education, (iv) public welfare, and (v) citizenship.

8 C.F.R. § 207.1(c) (2003).

81. *Id.*

82. *See* BASIC LAW MANUAL, *supra* note 78, at 68 (citing 8 C.F.R. § 208.15(b)).

83. 8 C.F.R. § 208.15(b) (2003).

84. BASIC LAW MANUAL, *supra* note 78, at 68 (citing Farbakhsh v. INS, 20 F.3d 877 (8th Cir. 1994), and Matter of Soleimani, 20 I. & N. Dec. 99 (BIA 1989)).

another criterion of refugee status. Two examples will illustrate the nature of the problem.[85]

A. *Tibetan Refugees "Firmly Resettled" in Nepal*

About 3000 Tibetan refugees flee the People's Republic of China annually.[86] By geographic necessity, the vast majority must transit through Nepal en route because they escape via the remote Himalayan regions that straddle Tibet and Nepal. For a variety of reasons, including lack of money, inability to obtain documents to arrange travel onward, and the existence of family members or friends in Nepal, many remain in Nepal for some time before finding the means to travel onward to a third state in which to seek refuge.[87]

Nepal is not a party to the Refugee Conventions, nor has it enacted any domestic refugee legislation.[88] It handles refugees on an ad hoc basis. Under the Immigration Act of 1992,[89] a refugee is simply an alien or foreigner, a person not a citizen of Nepal. The Act states that "[n]o foreigners shall be allowed to enter into and stay in the Kingdom of Nepal without obtaining a passport and visa."[90] It also authorizes the Ministry of Home Affairs to detain, fine, and deport persons for violations.[91]

Some 20,000 Tibetans nonetheless reside in Nepal pursuant to an unwritten arrangement that allows Tibetans who arrived in or before 1989 to remain in certain areas of the country. Still, they enjoy no legal status under Nepalese law and remain stateless persons under international law. Nepal allows them to live in certain isolated settlements, but they cannot own property, work, attend school, or travel freely. Nor can they seek naturalization. The Nepalese government also restricts their freedom of expression

85. The author serves as a member of the Board of Directors of Tibet Justice Center, in which capacity he provides expert affidavits on conditions for Tibetan refugees in Nepal and India. He also has represented Tibetan and Congolese asylum applicants faced with the firm-resettlement bar in, respectively, Nepal and South Africa, and conducted intake interviews with a variety of refugees from African states.

86. TIBET JUSTICE CENTER, TIBET'S STATELESS NATIONALS, TIBETAN REFUGEES IN NEPAL 7 (2002).

87. *See generally id.*

88. *Id.* at 47 ("No statute or regulation of Nepal defines or even refers to 'refugees.'").

89. The Immigration Act, No. 2049 (1992) (Nepal) (as amended by Immigration (First Amendment) Act No. 2050); *see also* SURYA DHUNGEL ET AL., COMMENTARY ON THE NEPALESE CONSTITUTION 86 (1998) (describing the government's broad discretion to regulate aliens' entry into Nepal).

90. The Immigration Act § 3(a) (Nepal).

91. *Id.* § 9, 10.

because, particularly in recent years, it has been concerned that any pro-Tibetan political expression within its borders threatens to upset its delicate relationship with China.[92] Tibetans who have arrived, and who continue to arrive, in flight from persecution after 1989 cannot remain in Nepal at all. They must leave within two weeks pursuant to an informal arrangement with UNHCR.[93] Many nonetheless remain illegally for some time, even though they may face incarceration, fines, and deportation if apprehended.[94]

Frequently, however, when a Tibetan asylum applicant has spent any time in Nepal before entering the United States, the INS alleges that he or she has been firmly resettled. Under the definition set forth in 8 C.F.R § 208.15, that allegation is manifestly false. Nepal does not presently, nor did it ever, make Tibetans an offer of some form of permanent resettlement. That the Service consistently alleges that Tibetan refugees who transited through Nepal have been firmly resettled reveals the extent to which a totality-of-the-circumstances approach continues to prevail in practice; for, applying *Abdille*, there simply could be no question of firm resettlement. Because, however, the INS frequently considers the question by looking at the totality of the circumstances, and because many immigration judges and asylum officers likewise conflate the § 208.15(b) circumstantial inquiry with the offer-based inquiry mandated by the regulations, Tibetan applicants often must establish the *absence* of firm resettlement for Tibetans in Nepal as part of their prima facie case. In effect, that decision calculus reverses the burden of proof. Both the regulations and the case law place the initial burden on the Service to make a showing of firm resettlement.

B. *African Refugees "Firmly Resettled" in South Africa*

A similar problem arises for a variety of refugees from African states who spend time in South Africa before seeking permanent refuge elsewhere. In 2002, South Africa hosted more than 20,000 refugees, consisting of persons arriving in flight from Somalia,

92. *See* TIBET JUSTICE CENTER, *supra* note 86, at 2-6; 59-83.

93. *See id.* at 7-10; 88-120.

94. *See, e.g.*, Tibet Information Network, *Tibetan Prisoners in Nepal Seek Royal Pardon*, Feb. 15, 2002, *at* http://www.tibetinfo.co.uk/news-updates/2002/1502.htm; Tibet Information Network, *Decline in Refugee Numbers as China and Nepal tighten Security on Tibetan Border*, Jan. 22, 2002, *at* http://www.tibetinfo.co.uk/news-updates/2002/0201.htm; Tibet Information Network, *Tibetans Sent Back Across the Border as Pressure Increases on Nepal*, Dec. 20, 2000, *at* http://www.tibetinfo.co.uk/news-updates/nu201200.htm; *see generally* TIBET JUSTICE CENTER, *supra* note 86, at 105-10; 114-20.

Angola, Congo-Brazzaville, and a variety of other African states.[95] Again, for a broad variety of reasons—including, most commonly, lack of money, inability to arrange travel onward, and in South Africa's case, a legal system of refugee protection that holds out the promise of permanent resettlement, but seldom delivers it—many refugees must remain there for some time before seeking refuge elsewhere.

South Africa ratified the 1951 Convention and its 1967 Protocol on January 12, 1996.[96] Before April 1, 2000, however, it made refugee status determinations on an essentially ad hoc basis.[97] Rampant corruption, bribery, and the absence of uniform standards for adjudicating asylum claims plagued this informal system.[98] On April 1, 2000, South Africa implemented the Refugees Act No. 19544 (No. 130) of 1998 by promulgating the Refugee Regulations 2000.[99] Under this system, asylum seekers must first apply for refugee status at one of the Refugee Reception Centres. There, a Refugee Reception Officer will interview the applicant. If satisfied as to the prima facie viability of his identity and claim, the officer will provide the applicant with an "Asylum Seeker Temporary Permit," also known as a "Section 22 Permit."[100] The applicant must then return on the date indicated on the permit—thirty days later—for an interview with a Refugee Status Determination Officer.[101] The Act authorizes officers "from time to time [to] extend the period for which the permit has been issued,"[102] and lengthy delays are commonplace. Asylum seekers often wait for months or even years for their initial status-determination interview.[103]

In theory, a Refugee Status Determination Officer must determine an asylum seeker's claim within 180 days after the applicant files "a completed asylum application with a Refugee Reception

95. U.S. Committee for Refugees, World Refugee Survey, 2002 Country Report: South Africa, *at* http://www.refugees.org/world/countryrpt/africa/2002/south_africa.cfm.

96. Telephone interview with Jaya Elizabeth Ramji, former *Robert L. Bernstein Fellow in International Human Rights*, University of Witswatersand Refugee Law Clinic, Republic of South Africa (Feb. 27, 2003).

97. *Id.*

98. *See generally* HUMAN RIGHTS WATCH, "PROHIBITED PERSONS": ABUSE OF UNDOCUMENTED MIGRANTS, ASYLUM-SEEKERS, AND REFUGEES IN SOUTH AFRICA (1998), *at* http://www.hrw.org/reports98/sareport.htm.

99. Refugees Act No. 19544 (No. 130) of 1998, Dec. 2, 1998 (S. Afr.); Refugee Regulations 2000, Vol. 418, No. 21075, Apr. 6, 2000 (S. Afr.).

100. *See* Refugees Act ¶ 22.

101. *See* Refugee Regulations ¶ 3.

102. Refugees Act ¶ 22(3).

103. Telephone interview with Jaya Elizabeth Ramji (Feb. 27, 2003).

Officer."[104] In practice, it takes months and often years for an asylum seeker to obtain a status determination interview in the first place, and months more to receive a decision. In the interim, asylum seekers cannot work or attend school. Most struggle to subsist while their asylum applications remain pending. Xenophobia and violence against refugees reportedly pervade South Africa.[105]

Even if an asylum seeker receives asylum after a refugee status-determination interview, it does not provide him with the right to acquire permanent legal status. It only permits him to remain in South Africa for two years.[106] Then, he must reapply for refugee status and establish his claim de novo in a new proceeding.[107] In this proceeding, the applicant bears the burden of proof to establish that the conditions that prompted his flight from persecution remain unchanged. Then, two years later, the applicant must again establish his asylum claim de novo.[108] After five years of continuous residence with refugee status, an applicant can apply for permanent residence, but the Standing Committee of the Department of Home Affairs must certify that he will remain a refugee "indefinitely."[109] The applicant bears this extraordinarily high burden of proof. As of January 24, 2003, according to South African lawyer Abeda Bhamjee, Director of the Refugee Unit at the University of Witswatersand Refugee Law Clinic, no refugee had ever received permanent resident status from the South African government.[110]

Again, applying *Abdille* or a similar offer-based test as required by the federal regulations, seldom can there be any question that an otherwise qualified refugee who resided temporarily in South Africa before seeking refuge in the United States has not been firmly resettled. But because the totality-of-the-circumstances test continues to predominate in practice, refugees who resided for any

104. Refugee Regulations ¶ 3.

105. *See* HUMAN RIGHTS WATCH, *supra* note 98.

106. Refugee Regulations ¶ 15(2).

107. Telephone interview with Jaya Elizabeth Ramji (Feb. 27, 2003).

108. Refugee Regulations ¶ 15(2)-(4); *see also* Refugees Act ¶ 5(1)*(c)* (refugee status ceases if "he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognized as a refugees have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee").

109. *See* Refugees Act 27(c) (refugee may "apply for an immigration permit . . . after five years' continuous residence in the Republic [of South Africa] from the date on which he or she was granted asylum, *if* the Standing Committee certifies that he or she will remain a refugee *indefinitely*") (emphasis added). In theory, this determination may be made from the outset; in practice, the Department of Home Affairs seldom, if ever, does that. Telephone interview with Jaya Elizabeth Ramji (Feb. 27, 2003).

110. Telephone interview with Jaya Elizabeth Ramji (Feb. 27, 2003).

length of time in South Africa frequently must establish the absence of firm resettlement as part of their prima facie case. And because unambiguous evidence of an offer of permanent resettlement in South Africa rarely exists—typically, because no such offer has been made—the INS resorts to supplying the court with totality-of-the-circumstances evidence about, inter alia, the length of the applicant's residence in South Africa, employment and living conditions, family ties, and other non-offer-based factors. Those factors, however, should only become relevant if the adjudicator must make an 8 C.F.R. § 208.15(b) inquiry—that is, if the adjudicator must decide whether, notwithstanding the existence of an offer of permanent resettlement, a third state has "substantially and consciously restricted" an applicant's conditions of residence in that state such that the mandatory bar should not apply.[111]

In short, in both of the above examples, what the Third Circuit framed as the exception—the need at times to make out a prima facie case of firm resettlement by indirect evidence rather than by evidence of a formal offer—in practice becomes the rule. More often than not, the INS resorts to a variety of non-offer-based factors as evidence in an effort to establish a prima facie case of firm resettlement. And more often than not, immigration judges and asylum officers set the bar of "clarity and force"[112] to which this evidence must rise in order to compel the asylum applicant to disprove firm resettlement at an inappropriately low level. Firm resettlement effectively becomes, not a bar to asylum for otherwise eligible refugees, with respect to which the Service bears the burden to make out a prima facie case, but rather an additional criterion of refugee status, which the applicant bears the burden to disprove to establish his or her eligibility. *Abdille* thereby unwittingly provides legal authority for the very general practice—reliance on the totality-of-the-circumstances test and non-offer-based factors—that its decision expressly rejects.

V. Conclusion

Asylum reflects a profound moral judgment made by the international community in the aftermath of World War II: that persons persecuted for certain reasons merit third-state protection. International law therefore protects certain shared values—the right to be free from persecution on account of political opinion, religion,

111. *See supra* note 57 and accompanying text.

112. *See* Abdille v. Ashcroft, 242 F.3d 477, 486-87 (3d Cir. 2001) (citing Cheo v. INS, 162 F.3d 1227 (9th Cir. 1998)).

race, nationality, or membership in a particular social group—through an international regime that shields and empowers persons, whatever their nationality, persecuted for these reasons. The domestic laws of states parties to the Refugee Conventions should conform to and enable the effective operation of this regime. That means, among other things, focusing asylum adjudications on persecution, not on an ad hoc totality-of-the-circumstances judgment about a variety of extraneous economic and legal circumstances prevailing in third states and an indeterminate set of minimal rights and protections that such states may or may not afford to different categories of refugees. Under U.S. law and regulations, those considerations matter, if at all, only to the extent that they inform the question whether a third state that did offer an asylum seeker permanent resettlement nonetheless "substantially and consciously restricted" the conditions of his or her residence.[113]

The prevailing totality-of-the-circumstances test tends in practice needlessly and unduly to burden genuine asylum seekers and to waste judicial and administrative resources. This incorrect, if not disingenuous, construction of a domestic regulation, perhaps motivated by a desire to curtail what may be deemed by some to be an undesirable flow of asylum seekers, obscures rather than cures the perceived problem. Virtually all refugees must travel through one or more third states en route to permanent refuge. To make their eligibility for asylum dependent on an additional criterion—namely, an ad hoc totality-of-the-circumstances judgment about an indeterminate level of available rights or protection in those third states—not only fails to respect the law and regulations, it also undermines the paramount purpose of asylum law: to establish a robust regime of international protection for defined categories of persons deprived of national protection.

113. *See* 8 C.F.R. § 208.15(b) (2003).