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# Persecuted, Discriminated, and Rejected: The Firm Resettlement Bar to Colombian Refugees Living in Ecuador

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# Persecuted, Discriminated, and Rejected: The Firm Resettlement Bar to Colombian Refugees Living in Ecuador

Luis F. Mancheno\*

## ABSTRACT

*Recent reports produced by UNHCR and other international agencies indicate that Colombian refugees residing in Ecuador are facing new challenges in their path to safety and refuge from the armed conflict in Colombia. However, even though these refugees have presented credible claims of fear of persecution, the United States government has refused to allow them to resettle in the U.S. because these asylum seekers have already been firmly resettled in Ecuador. As a consequence, these Colombian nationals are unable to return to their country, experience harsh discrimination in their country of asylum, and are also legally barred from enjoying basic human rights in the United States.*

*The firm resettlement doctrine arose from a provision of the Convention with Regard to the Status of Refugees of 1951. The*

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*doctrine excludes a person from receiving refugee status if it is shown that, prior to arrival to the country where she now seeks asylum, she entered a third country and received an offer of permanent resident status, citizenship, or some other type of permanent resettlement.*

*U.S. courts have developed two approaches to the firm resettlement bar based on differing interpretations of the doctrinal phrase: “an offer of permanent resident status, citizenship, or some other type of permanent resettlement.” These are commonly referred to as the “formal offer” approach and the “totality of the circumstances” approach. The formal approach applies a literal reading of the phrase, while the totality of the circumstances approach emphasizes 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.*

*This article argues that the Department of Homeland Security should adopt a totality of the circumstances approach to interpreting the Firm Resettlement Doctrine. Specifically, for Colombian refugees who have been unable to resettle in Ecuador, a consideration of the totality of their circumstances would allow them to defeat the firm resettlement bar that currently precludes them from being resettled in the United States.*

*“[Ecuadorians] hear your accent and suddenly you are converted in their eyes from people to dirt . . . Everywhere you go here, the answer is no. It makes me so angry that there are so many Colombians in the street—refugees who can’t speak for themselves, denied at every turn . . .”*

—Colombian refugee living in Ecuador<sup>1</sup>

## I. INTRODUCTION

Persecuted in Colombia, discriminated against in Ecuador, and rejected by the United States, Colombian refugees are still not

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1. HUMAN RIGHTS INSTITUTE, GEORGETOWN UNIVERSITY LAW CENTER, UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR 34, (2006) [hereinafter *The Georgetown Report*].

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able to find a place that they can truly call home. For fifty years, the people of Colombia have been wracked by violence caused by disparate factions, including government security forces and narco-traffickers.<sup>2</sup> Today, approximately 396,000 Colombians have fled the country and have been recognized as refugees.<sup>3</sup> The Ecuadorian government has recognized 60,000 of these refugees.<sup>4</sup> For most Colombian refugees, however, local integration into Ecuadorian society is extraordinarily difficult, if not impossible: Colombians in Ecuador suffer from severe and pervasive social and economic discrimination and, as such, are often denied meaningful access to housing, employment, and education.<sup>5</sup> For these reasons, many of these refugees have sought resettlement in the United States. Unfortunately, they have faced an obstacle under U.S. law,<sup>6</sup> as the majority of Colombian refugees have been denied resettlement because, according to the U.S. government, they were (or are) firmly resettled in Ecuador.<sup>7</sup>

The firm resettlement doctrine arose from a provision of the 1951 Convention and Protocol Relating to the Status of Refugees. Under this doctrine, a person is excluded from receiving refugee status if it is shown that, prior to arrival to the country where she is seeking asylum, she entered a third country and received an offer of permanent resident status, citizenship, or some other type of permanent resettlement.<sup>8</sup> Given that Colombian refugees have been granted asylum in Ecuador, they are precluded from resettling in the US because of the “firm resettlement bar.” However, due to the extreme discrimination they experience, Colombian asylum seekers should not be considered to be “firmly resettled” just because of their legal recognition and residence in

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2. Stephanie Leutert, *Are Colombian Refugees Ecuador's Scapegoats?*, WORLD POLICY BLOG, (Dec. 14, 2011, 6:00 PM), <http://www.worldpolicy.org/blog>.

3. United Nations High Comm'r for Refugees, *2013 UNHCR Country Operations Profile – Colombia*, UNHRC (last visited Jan. 9, 2014), <http://www.unhcr.org/pages/49e492ad6.html> [hereinafter *UNHCR - Colombia*].

4. United Nations High Comm'r for Refugees, *2013 UNHCR Country Operations Profile – Ecuador*, UNHRC (last visited Jan. 9, 2014), <http://www.unhcr.org/pages/49e492b66.html> [hereinafter *UNHCR – Ecuador*].

5. See *The Georgetown Report*, *supra* note 1.

6. 8 C.F.R. § 208.15 (2007).

7. See *id.*

8. Immigration and Nationality Act, 8 U.S.C. § 1158(b)(2)(A)(vi) (2006).

Ecuador.

Part I of this Article will explore the firm resettlement doctrine and international obligations to refugees under the 1951 United Nations Convention and Protocol Relating to the Status of Refugees (hereinafter “Refugee Convention”). Part II will explore the United States Courts of Appeals’ split on which framework to employ when making firm resettlement determinations. Specifically, this Article will first cover the “formal offer” approach, holding that an applicant has firmly resettled only if the government of the third country has extended an offer of permanent residence. Later, it will cover the “totality of the circumstances” approach, where evidence of a direct offer is only one factor to be weighed equally amongst others, including the length of the applicant’s stay in the third country, familial ties, receipt of public benefits, and business property or connections. Part III will briefly discuss the 2012 Board of Immigration Appeals (BIA or Board) decision in *Matter of A-G-G* in an attempt to resolve this split, establishing a similar framework to the one adopted by the “formal offer” circuits.<sup>9</sup> Part IV will acknowledge the current conditions that Colombian refugees in Ecuador endure. Finally, Part V argues: (1) that the issue of Colombian refugees residing in Ecuador perfectly demonstrates why courts should discontinue the “formal offer” approach, and (2) that use of the “totality of the circumstances” approach will aid Colombian refugees currently residing in Ecuador to be admitted as refugees in the U.S.

## II. A BRIEF LOOK AT COLOMBIAN REFUGEES IN ECUADOR

Ecuador has the largest refugee population in Latin America; it mostly comprises of asylum seekers and refugees from Colombia.<sup>10</sup> As of June 2011, Ecuador had recognized over 54,500 Colombian refugees: about sixty percent of them live in urban areas,<sup>11</sup> while the remainder live close to the Ecuadorian-Colombian border in underdeveloped, isolated parts of the country

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9. 25 I&N Dec. 486, 504–06 (BIA 2011).

10. *UNHCR – Ecuador*, *supra* note 4.

11. Ana Guglielmelli White, *In the shoes of refugees: providing protection and solutions for displaced Colombians in Ecuador 2* (New Issues in Refugee Research, Research Paper No. 217, 2011), available at <http://www.unhcr.org/4e4bd6c19.pdf>.

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where there is limited infrastructure and access to services.<sup>12</sup> In these insecure areas, armed groups clash—typically due to drug-trade-related activity—and human trafficking and arms smuggling are rampant.<sup>13</sup> The security situation is precarious not solely in the border areas but elsewhere, as many refugees report threats in Quito and other cities in the south of the country.<sup>14</sup> The primary challenges that Colombian refugees have faced—such as access to employment, housing, education, and other basic services—are paired with the spread of discrimination and generally poor economic and social conditions affecting the Ecuadorian population.<sup>15</sup> Due to a lack of both economic resources and political will, Ecuador has not been able to protect these refugees and provide them with conditions at least similar to the ones enjoyed by Ecuadorian citizens; thus, even though recognized as refugees in Ecuador, Colombian refugees are not enjoying the benefits and rights conferred under the Refugee Convention of 1951.<sup>16</sup>

As of December 2013, the Office of the United Nations High Commissioner for Refugees (“UNHCR”)<sup>17</sup> estimates the population of Colombian refugees was up to 76,830.<sup>18</sup> Ecuador’s Constitution, which is strongly oriented towards human rights, recognizes the right to seek asylum.<sup>19</sup> Asylum procedures are regulated by

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12. *UNHCR – Ecuador, supra* note 4.

13. *Id.*

14. White, *supra* note 11, at 5.

15. *Id.* at 5–6.

16. *Id.*; Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) [hereinafter *Refugee Convention*].

17. The Office of the United Nations High Commissioner for Refugees was established on December 14, 1950 by the United Nations General Assembly. *About Us*, UNHCR (last visited Jan. 10, 2014), available at <http://www.unhcr.org/pages/49c3646c2.html>. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. *Id.* Its primary purpose is to safeguard the rights and welfare of refugees. *Id.* It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or resettle in a third country; it also has a mandate to help stateless people. *Id.*

18. UNHCR, UNHCR GLOBAL APPEAL 2012-2013: ECUADOR, available at <http://www.unhcr.org/4ec2310bb.html>.

19. *UNHCR – Ecuador, supra* note 4; see Georgetown University, *Republic of Ecuador – Constitution of 2008*, POLITICAL DATABASE FOR THE AMERICAS, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

national legislation.<sup>20</sup> In January 2011, Ecuadorian authorities introduced new rules for admissibility in order to reduce the number of manifestly unfounded asylum claims.<sup>21</sup> Those applicants not eligible for asylum have few options for appeal under the administrative regulation.<sup>22</sup> In May 2012, the Ecuadorian Government adopted Refugee Decree 1182, removing the broader refugee definition contained in the Cartagena Declaration<sup>23</sup> and introducing restrictive admissibility procedures.<sup>24</sup> Due to the more restrictive new asylum regime in Ecuador, resettlement gained importance and the number of candidates submitted for resettlement doubled from some 800 in 2011 to more than 1,600 in 2012.<sup>25</sup>

In this context, many Colombian refugees are desperately seeking to be resettled in a third country that could provide them with a better system of protection and guarantees. The United States, the country that takes the largest amount of refugees worldwide,<sup>26</sup> has repeatedly determined that due to the status of

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20. *UNHCR – Ecuador*, *supra* note 4.

21. *Id.*; see Stephanie Leutert, *Are Colombian Refugees Ecuador's Scapegoats?*, WORLD POLICY BLOG, (Dec. 14, 2011, 6:00 PM), <http://www.worldpolicy.org/blog/2011/12/14/are-colombian-refugees-ecuadors-scapegoats>.

22. UNITED NATIONS HIGH COMM'R FOR REFUGEES, UNHCR GLOBAL APPEAL 2012-2013 278, *available at* <http://www.unhcr.org/4ec2310bb.pdf>.

23.

The Cartagena Declaration on Refugees is a non-binding agreement which was adopted by the Colloquium on the International Protection of Refugees in Latin America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984. The Cartagena Declaration on Refugees bases its principles on the “commitments with regards to refugees” defined in the Contadora Act on Peace and Cooperation (which are based on the 1951 UN Refugee Convention and the 1967 Protocol). It was formulated in September 1984 and includes a range of detailed commitments to peace, democratization, regional security and economic co-operation. It also provided for regional committees to evaluate and verify compliance with these commitments.

*Cartagena Declaration on Refugees*, FAHAMU REFUGEE PROGRAMME (last visited Jan. 10, 2014), <http://www.refugeelaidinformation.org/cartagena-declaration-refugees#sthash.Yxydlopg.dpuf>.

24. *UNHCR – Ecuador*, *supra* note 4.

25. UNHCR, UNHCR GLOBAL REPORT 2012: ECUADOR, *available at* <http://www.unhcr.org/51b1d6470.html>.

26. U.S. DEP'T OF STATE, U.S. DEP'T OF HOMELAND SEC., U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2006: REPORT TO THE CONGRESS 2, 54 (2006), *available at*

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refugees in Ecuador, they are firmly resettled in that country and therefore are ineligible for resettlement in the U.S.<sup>27</sup>

## III. THE DOCTRINE OF FIRM RESETTLEMENT

A. *The International Approach to the Doctrine of Firm Resettlement*

The firm resettlement doctrine originates from the international definition of a refugee given by the 1951 Refugee Convention. This Convention, increased in scope and application by the 1967 Protocol (together, Refugee Conventions), established the basic international framework for the protection of asylum seekers. Article I expressly excludes from the definition of refugee any “person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country,”<sup>28</sup> as well as any person who, though once a refugee, “has acquired a new nationality, and enjoys the protection of the country of his new nationality.”<sup>29</sup> 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 the simple factual judgment that “[n]ational protection and status in a third country negate the need for international protection.”<sup>30</sup>

However, what degree of national protection in the first country of asylum—in particular, which “rights and obligations”—is sufficient to remove a person from the protection of the Refugee Conventions? The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status 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 “protection against deportation or expulsion” at a

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<http://www.state.gov/documents/organization/52475.pdf>.

27. 8 C.F.R. § 208.15.

28. *Refugee Convention*, *supra* note 16, at art. I(E).

29. *Id.* at art. 1(C)(3).

30. DEBORAH E. LANKER, *LAW OF ASYLUM IN THE UNITED STATES* 447 (3d ed. 1999).



minimum.<sup>31</sup>

Municipal laws of state 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, even if that protected status falls short of full citizenship. South African law, for instance, provides that a person does not qualify as a refugee if “there is a reason to believe that he or she . . . enjoys the protection of any other country in which he or she has taken residence.”<sup>32</sup> Article I(E) does “not require that the individuals in question . . . 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.”<sup>33</sup> On the other hand, Article I(E) of the 1951 Refugee Convention has been subjected to a far more expansive interpretation. One court in Canada, for example, held that it also encompasses the right to social services.<sup>34</sup> Beyond this, international law provides little guidance about the nature and extent of the national protection and rights acquired by Article I(E).

#### B. *U.S. Approach to Firm Resettlement*

United States statutes are patterned on the Refugee Conventions’ two-tiered analysis: persons who meet the definition of “refugee” are entitled to protection, unless they are barred by an exception, such as firm resettlement.<sup>35</sup> To obtain asylum, a person must first prove he or she is a refugee.<sup>36</sup> The U.S. defines

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31. UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶¶ 144–45 (2011), [hereinafter *UNHCR Handbook*].

32. Refugees Act 130 of 1998 ch. 1(4) (S. Afr.).

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

34. *See Hamdan v. Canada* (Minister of Citizenship & Immigration), 38 Imm. L.R. (2d) 20 [1997] (F.C.T.D) (holding that the “rights and obligations” referred to by Article 1(E) of the Refugee Convention also include the rights to work and to receive social services).

35. *Refugee Convention*, *supra* note 16, at art. 1(E).

36. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2006); *see also Balasubramaniam v. INS*, 143 F.3d 157, 161 (3d. Cir. 1998) (noting that it is plaintiff’s burden to show that she qualifies as a refugee in order to seek asylee status).

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a refugee as:

[a]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself or the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>37</sup>

Once a person's refugee status is determined, the government may present evidence that statutory provisions bar the refugee's asylum claim. These include firm resettlement, criminal conviction, commission of serious non-political crimes, terrorist activities, or other dangers to national security.<sup>38</sup> These statutory bars mirror those set forth in the Refugee Conventions.<sup>39</sup>

Firm resettlement is established as a bar to asylum by statute,<sup>40</sup> but it is defined by federal regulations.<sup>41</sup> Federal regulations consider a refugee firmly resettled if it is shown that, "prior to arrival in the United States," he or she entered a third country and "received an offer of permanent resident status, citizenship, or some other type of permanent resettlement."<sup>42</sup> The applicant may contest this result in two ways. First, by demonstrating "[t]hat his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country."<sup>43</sup> Alternatively, an applicant may rebut the presumption by showing "[t]hat the conditions of his or her residence in that nation were so substantially and consciously restricted by the authority of the country or refuge that he or she was not in fact resettled."<sup>44</sup> On its face, 8 C.F.R. § 208.15(b) is disjunctive and permits two forms of rebuttal: on temporal grounds, by showing that the settlement was brief and "in flight;"

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37. 8 U.S.C. § 1101(a)(42).

38. 8 U.S.C. § 1101 (b)(2)(A).

39. *Refugee Convention*, *supra* note 16, at arts. 1(E), 1(F).

40. 8 U.S.C. § 1158(b)(2)(A)(iv).

41. 8 C.F.R. § 208.15 (2007).

42. *Id.*

43. 8 C.F.R. § 208.15(a).

44. 8 C.F.R. § 208.15(b).

or on grounds of unacceptable conditions, by showing that the third country was unsuitable for permanent resettlement.

In making this latter inquiry into whether the third country was suitable for permanent resettlement, federal regulations require that the adjudicator,

consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily, available to other residents in the country.<sup>45</sup>

It is notable that 8 C.F.R. § 208.15(b) asks the adjudicator to compare the conditions under which the refugee lived in the third country to those of native citizens in the third country. The purpose of the statute becomes clear when viewed alongside the Refugee Conventions: these provisions reflect the Conventions' requirement that host countries treat refugees and citizens equally.<sup>46</sup> Neither the Convention nor 8 C.F.R. § 208.15 (nor any other U.S. law, for that matter) permit a refugee to seek protection in the U.S. on grounds that the economic, social, or political conditions in the U.S. are better for the refugee than in the third country. The statute directs the judge to ask whether the refugee experienced equal treatment within the third country, and not whether there is equal treatment between the third country and The United States.<sup>47</sup> Thus, the often-stated concern about providing a back door to economic migrants when modifying the firm resettlement doctrine is misplaced.<sup>48</sup> The purpose of this regulation is to determine whether the refugee was afforded rights equivalent to those of a citizen of the third country—however impoverished, undemocratic, or limited those citizen's

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45. *Id.*

46. *Id.*; *Refugee Convention*, *supra* note 16, arts. 16, 17, 20–24 (requiring that signatories award refugees and citizens equal treatment before the law, access to gainful employment, and welfare, respectively).

47. 8 C.F.R. § 208.15(b) (“[T]he asylum officer or immigration judge shall consider the conditions under which other residents of the country live . . .”).

48. *See id.*

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circumstances are. In the U.S., courts inquire into firm resettlement before inquiring into refugee status for the sake of efficiency. However, it is important to note that firm resettlement only affects meritorious applications for asylum. An applicant who cannot meet the definition of a refugee, including evidentiary standards such as credible fear of persecution on a protected ground, will not achieve asylum or withholding, regardless of the status of the firm resettlement doctrine.<sup>49</sup> For instance, if resettlement were removed entirely as a bar to asylum, economic migrants would still be barred from the asylum system because they would not fulfill the definition of a refugee.<sup>50</sup>

### C. *U.S. Jurisprudence*

Federal courts have developed two approaches to the firm resettlement bar based on differing interpretations of the phrase “an offer of permanent resident status, citizenship, or some other type of permanent resettlement.”<sup>51</sup> The two approaches are commonly referred to as the formal offer approach, adopted by the Third, Seventh, and Ninth Circuits,<sup>52</sup> and the totality of

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49. The dialogue surrounding firm resettlement is often charged with concerns about increasing numbers of asylum seekers or opening the asylum system to economic migrants. *See, e.g.*, Sarah Lynne Campbell, Note, *Give Me Your Tired, Your Poor, And Your Country Shoppers*, 21 *BYU J. PUB. L.* 377, 390–94 (2007) (arguing that “asylum may be used as a backdoor way to get legalized presence in the United States” and suggesting that applicants for asylum can “create an undue burden on the U.S. economy” in the same way as undocumented illegal immigrants). These concerns may have some merit regarding expanding the grounds for asylum – for example, whether it should be expanded to include persecution based on gender or economic status—but they are not relevant to the issue of the firm resettlement bar. This dialogue overlooks the fact that the resettlement inquiry comes after the court finds that the applicant has a legitimate claim for asylum. An economic migrant, who does not qualify for asylum, will never be subjected to the firm resettlement inquiry. *See generally* 8 C.F.R. § 208.15.

50. *See UNHCR Handbook, supra* note 31. The UNHCR Handbook specifically advises that economic migrants are not refugees. *See id.* at ¶¶ 62, 64 (“If [an applicant] is moved exclusively by economic considerations, he is an economic migrant and not a refugee . . . Objections to general economic measures are not themselves good reasons for claiming refugee status”).

51. 8 C.F.R. § 208.15; *see Abdille v. Ashcroft*, 242 F.3d 477, 484–85 (3d Cir. 2001) (distinguishing between the two approaches).

52. *See, e.g.*, *Diallo v. Ashcroft*, 381 F.3d 687, 701 (7th Cir. 2004) (holding that a refugee who lived and worked in Ethiopia for five years but never received permanent status was not firmly resettled); *Id.* at 694–95 (rejecting

circumstances approach, followed by the Second, Fourth, Eighth, Tenth, and D.C. Circuits.<sup>53</sup> The Fifth and Eleventh Circuits have not yet addressed the issue and the First Circuit has reserved the issue “for future decision.”<sup>54</sup> Additionally, in 2011 in an attempt to resolve the split between Circuits, the Board of Immigration Appeals (“BIA”) issued a precedential opinion in the case *Matter of A-G-G*, which established a four-step framework that largely follows the formal offer approach to the firm resettlement analysis.<sup>55</sup>

### 1. *The Formal Offer Approach*

The formal offer approach applies a literal reading of the phrase “received an offer of permanent resident status, citizenship, or some other type of permanent resettlement.”<sup>56</sup> In an important leading case, *Abdille v. Ashcroft*, the Third Circuit focused on cases which fall into this last “other type of permanent resettlement” category:

We conclude that the plain language of § 208.15 makes

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“the now out-dated ‘totality of the circumstances’ analysis”); *Abdille*, 242 F.3d at 486 (adopting the formal offer approach); *Maharaj v. Gonzalez*, 450 F.3d 961, 964 (9th Cir. 2006) (en banc) (“[W]e align ourselves with Judge Becker’s leading opinion for the Court of Appeals for the Third Circuit in *Abdille v. Ashcroft* . . .”).

53. See, e.g., *Sall v. Gonzalez*, 437 F.3d 229, 233–35 (2nd Cir. 2005) (per curiam) (acknowledging the persuasiveness of the “reasoning of those circuits that have applied the ‘totality of circumstances’ test,” but emphasizing the “particular importance . . . of whether he actually received an offer of permanent resident status”). This emphasis in *Sall* somewhat undermines the Court’s avowed support for the “totality of the circumstances” approach. See *Mussie v. INS*, 172 F.3d 329, 331–32 (4th Cir. 1999) (affirming a finding of firm resettlement in part based on staying in another country for six years, receiving government assistance, and renting a personal apartment); *Abdalla v. INS*, 43 F.3d 1397, 1400 (10th Cir. 1994) (considering the role of family ties in the firm resettlement analysis); *Farbakhsh v. INS*, 20 F.3d 877, 881 (8th Cir. 1994) (listing factors relevant to determination of firm resettlement, such as family ties and business or property connections) (internal quotation marks omitted); *Chinese Am. Civil Council v. Att’y Gen.*, 566 F.2d 321, 326 (D.C. Cir. 1977) (finding Chinese asylum applicants had firmly resettled during a lengthy stay in Hong Kong).

54. *Salazar v. Ashcroft*, 359 F.3d 45, 50 n.4 (1st Cir. 2004).

55. 25 I&N Dec. 486 (BIA 2011).

56. 8 C.F.R. § 208.15 (2007); see also *Abdille*, 242 F.3d at 485 (“Our principal guide in [interpreting the phrase] is the language and structure of 8 C.F.R. § 208.15, the INS’s own definition of firm resettlement”).

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clear that the prime factor in the firm resettlement inquiry is the existence of an offer of permanent resident status, citizenship, or some other type of permanent resettlement . . . [W]e reject an alternative “totality of the alien’s circumstances” approach that would have us consider the existence of an offer as simply one component of a broader firm resettlement inquiry according equal weight to such non-offer based factors as the alien’s length of stay in a third country, the economic and social ties that the alien develops in that country, and the alien’s intent to make that country his permanent home.<sup>57</sup>

In a later decision, the Ninth Circuit required either “direct evidence of an offer issued by the third country’s government or, where no direct evidence of a formal government offer is obtainable, by circumstantial evidence of sufficient force to indicate that the third country officially sanctions the alien’s indefinite-presence.”<sup>58</sup>

Under the formal offer approach, the protection must be explicit and specific: unofficial practices, such as tolerance of unregistered immigrants or systematic non-enforcement deportation, cannot constitute permanent resettlement. For example, in *Ali v. Ashcroft*, the Ninth Circuit rejected the BIA’s findings that a refugee, Deqa Ahmad Haji Ali, was firmly resettled in Ethiopia.<sup>59</sup> The BIA based its determination on the fact that Ali had lived and worked in Ethiopia for five years, “chose not to live in refugee camps,” and “was never bothered by the authorities.”<sup>60</sup> Reversing this finding, the Ninth Circuit held that “the fact that Ali fortuitously evaded detection by the government while living illegally in Ethiopia does not allow for a finding that Ali was firmly resettled in Ethiopia.”<sup>61</sup> Although Ali had created a life in Ethiopia, established familial and social ties there, and was

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57. *Abdille*, 242 F.3d at 480 (finding that a Somali refugee who had lived in South Africa on temporary asylum status, which would expire after two years, had not firmly resettled).

58. *Maharaj v. Gonzalez*, 450 F.3d 961, 964 (9th Cir. 2006) (en banc) (emphasis added).

59. *Ali v. Ashcroft*, 394 F.3d 780, 789–91 (9th Cir. 2005).

60. *Id.* at 784.

61. *Id.* at 790.

not literally “in flight”—conditions which might qualify her for firm resettlement under the “totality of the circumstances” approach—she did not have any legal right to work or stay in Ethiopia and lived under the constant threat of deportation. A similar case in the Seventh Circuit came to the same conclusion.<sup>62</sup>

Under the formal offer approach, courts have recognized that the possibility of an offer in a third country is not the same as an offer itself.<sup>63</sup> A refugee who reaches a third country, applies for asylum, and is given temporary leave to remain there while awaiting the outcome of his application has not firmly resettled. Rather, his residency is subject to revocation at any time. He has no concrete assurance that his asylum application will eventually be granted. Similarly, a refugee like Ali, who lives and works illegally for a long period of time in a third country, “cannot obtain official resident status no matter his length of stay, his intent, or the extent of the familial and economic connections he develops.”<sup>64</sup>

The Totality of the Circumstances Approach

The totality of the circumstances approach is a long-standing test for firm resettlement that predates both the Refugee Act of 1980 and other federal regulations.<sup>65</sup> At the time the Refugee Act was enacted, courts considered Congress’ intent to be “the creation of a safe haven for refugees still in flight from persecution, not those already settled and rebuilding their lives elsewhere.”<sup>66</sup> Although the doctrine has evolved as the statutory regime has changed, the approach continues to emphasize “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.”<sup>67</sup> This

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62. *Diallo v Ashcroft*, 381 F.3d 687, 701 (7th Cir. 2004) (holding that a refugee who lived and worked in Ethiopia for five years but never received permanent status was not firmly resettled).

63. *Maharaj*, 450 F.3d at 977–79.

64. *See, e.g., id.* at 977 (“[T]he fact that Canada offers a process for applying for some type of refugee or asylum status is not the same as offering the status itself”).

65. Robert D. Sloane, *An Offer of Firm Resettlement*, 36 GEO. WASH. INT’L. L. REV. 47, 51 (2004) (“[W]ell before the United States implemented the 1967 Protocol in 1980” the doctrine “evolved in a series of decisions by the Board of Immigration Appeals in the late 1960s.”).

66. *Id.* at 52.

67. *Id.* at 56.

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focus on “flight” leads a court to examine whether the refugee’s physical presence “in the United States is . . . reasonably proximate to the flight and not one following a flight remote in point of time or interrupted by an intervening residence in a third country reasonably constituting a termination of the original flight in search of refuge.”<sup>68</sup> Consequently, the totality of the circumstances approach favors refugees who take shorter, more direct routes to the United States. Courts following the totality of the circumstances approach will

consider the existence of a government-issued offer as simply one component of a broader firm resettlement inquiry according to 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[.]<sup>69</sup>

Under this approach, no explicit offer of permanent protection is required.<sup>70</sup> Neither does the court consider whether the refugee has the right to return to the third country where he previously resided. For example, prior to its adoption of the formal approach, the Ninth Circuit applied the totality of the circumstances test in *Cheo v INS*.<sup>71</sup> The Court upheld the immigration judge’s finding of firm resettlement where the petitioners, the Cheos, after fleeing their native Cambodia, had lived in Malaysia for three years without any molestation or persecution and “were not fleeing danger when they came to this country.”<sup>72</sup> The government presented no evidence to show whether the Cheos had a right to return to Malaysia or whether their three-year stay was legal.<sup>73</sup> Nevertheless, an offer of permanent legal residency was not necessary: “[t]hree years of peaceful residence established that the

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68. *Farbakhsh v. INS.*, 20 F.3d 877, 881 (8th Cir 1994) (quoting *In re Soleimani*, 20 I.&N Dec. 99, 106 (B.I.A. 1989)).

69. *Abdille v. Ashcroft*, 242 F.3d 477, 480 (3d Cir. 2001) (emphasis added). Courts may also consider the government assistance given to the refugee, travel or identity documents issued, educational opportunities, and family ties to the country. *See id.*

70. *Id.* at 485 (reviewing the leading totality of the circumstances cases and noting that “no explicit mention of the [formal] issuance of an offer of permanent resettlement” was required).

71. *Cheo v. INS*, 162 F.3d 1227, 1229 (9th Cir. 1998).

72. *Id.* at 1228 (internal quotation marks omitted).

73. *Id.* at 1229.



ground of ‘firm resettlement’ in Malaysia might apply,” shifting the burden of rebuttal to the Cheos.<sup>74</sup> “Critically, therefore, *Cheo* concluded that other facts besides the existence of an ‘offer’ can show firm resettlement.”<sup>75</sup>

## 2. *The BIA Approach after Matter of A-G-G-*

In 2011, the BIA attempted to resolve the circuit split by incorporating a new mandatory regime in the application of “firm resettlement” through its opinion in *Matter of A-G-G-*.<sup>76</sup> The applicant in this case was a Mauritanian citizen who had been arrested, beaten, and detained by Mauritanian soldiers in 1990.<sup>77</sup> This applicant was eventually forcibly deported to Senegal after being inadequately fed and forced to work as a slave in a camp in Mauritania.<sup>78</sup> The applicant lived in Senegal for the following eight years, when he married a Senegalese citizen, had two children, worked, and “received an identification number in the Senegalese Government’s registry of foreigners.”<sup>79</sup> In 1999, the applicant left Senegal and arrived in the U.S. where he affirmatively applied for asylum.<sup>80</sup> The Immigration and Naturalization Service (“INS”) denied his application and placed him in removal proceedings, where he renewed his application before the immigration judge.<sup>81</sup> The immigration judge granted his application, determining that he was credible, had a well-founded fear of future persecution, and had not firmly resettled in Senegal.<sup>82</sup>

Acknowledging the fact that the BIA had not yet issued a decision setting forth the proper framework to apply to firm resettlement determinations under current law, the BIA used *Matter of A-G-G-* to set forth a framework that involves a four-step analysis and follows exclusively on the existence of an offer.<sup>83</sup> Under the first step, the government bears the burden of

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74. *Id.*

75. *Maharaj v. Gonzalez*, 450 F.3d 961, 984 (9th Cir. 2006) (en banc).

76. 25 I&N Dec. 486 (BIA 2011).

77. *Id.* at 487.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.* at 487–88.

83. *Id.* at 501.

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presenting *prima facie* evidence that the applicant has received an offer for firm resettlement.<sup>84</sup> To carry this burden, the Department of Homeland Security (“DHS”)

should first secure and produce direct evidence of governmental documents indicating an alien’s ability to stay in a country indefinitely. Such documents may include evidence of refugee status, a passport, a travel document, or other evidence indicative of permanent residence . . . [If that type of evidence is not available,] indirect evidence may be used to show that an offer of firm resettlement has been made if it has sufficient level of clarity and force to establish that an alien is able to permanently reside in the country.<sup>85</sup>

Such indirect evidence may include:

the immigration laws or refugees process of the country of proposed resettlement; the length of the alien’s stay in a third country; the alien’s intent to settle in the country; family ties and business or property connections; the extent of social and economic ties; . . . and whether the alien had legal rights normally given to people who have some official status, such as the right to work and enter and exit the country.<sup>86</sup>

Furthermore, the BIA noted that DHS could meet its burden of proof under this prong by just showing the existence of the “legal mechanism” in the third country that would allow the alien to receive permanent residence, even if the applicant had not exercised that mechanism.<sup>87</sup>

In the second step of the Board’s firm resettlement framework, the alien can rebut the Government’s *prima facie* evidence of an offer of firm resettlement by “showing by a preponderance of the evidence that such an offer has not, in fact,

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84. *Id.*

85. *Id.* at 501–02.

86. *Id.* at 502.

87. *Id.* See also *Bonilla v. Mukasey*, 539 F.3d 72, 81 (1st Cir. 2008) (observing that when an alien is entitled to maintain the resident status permanently as long as it is renewed, firm resettlement should bar the alien from receiving asylum if the renewal of a resident stamp is an administrative requirement as routine as renewing one’s passport).

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been made or that he or she would not qualify for it.”<sup>88</sup> The Board added that the alien’s rebuttal may include evidence regarding how a law granting permanent residence to an alien is actually applied and why the alien would not be eligible to remain in the country in an official status.<sup>89</sup>

Under the third step, the immigration judge considers the totality of the evidence presented by the parties and determines whether the alien has rebutted the evidence of firm resettlement presented by DHS.<sup>90</sup> That is, if the immigration judge finds that the alien has not rebutted DHS’s evidence, the immigration judge will find the alien firmly resettled.

The final step is taken only if the immigration judge has determined that the applicant is firmly resettled. After this determination, the burden shifts back to the applicant to establish, by a preponderance of the evidence, that he or she is eligible for asylum under one of the two exceptions to the firm resettlement bar.<sup>91</sup>

#### IV. DETERMINING WHETHER COLOMBIAN REFUGEES ARE FIRMLY RESETTLED IN ECUADOR

For Colombians who have been recognized as refugees in Ecuador, the “formal offer” approach is barring them from being resettled in the U.S. because of the “formal offer” they receive from the Ecuadorian government. In fact, the situation of Colombian refugees makes the perfect case for doing away with the rigid “formal offer” approach and instead opting for the more humane approach adopted by the “totality of the circumstances” circuits.

If DHS and the “formal offer” approach circuits were to adopt the “totality of the circumstances” approach, they would look beyond the legal recognition that Colombian refugees have received in Ecuador and instead would focus on their living conditions.<sup>92</sup> This would include: the conditions in which a Colombian refugee lives in Ecuador compared to the living

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88. 25 I&N Dec. 486, 503 (BIA 2011).

89. *Id.*

90. *Id.*

91. *Id.* See also *infra* note 125.

92. See generally, *Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006); see also *Mussie v. INS*, 172 F.3d 329 (4th Cir. 1999).

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conditions of the local population; socioeconomic indicators such as access to fundamental services, education for children, access to work, and access to property ownership; psychosocial indicators such as the refugee's past history of persecution and circumstances of flight; efforts made on part of the refugee to improve his or her situation; and existence of pervasive discrimination in the host country based on the refugee's social, cultural or socioeconomic profile.<sup>93</sup>

In 2006, a team of thirteen researchers from Georgetown University Law Center with the collaboration of UNHCR Ecuador conducted a fact-finding mission regarding the living conditions of Colombian refugees in three different Ecuadorian cities.<sup>94</sup> A report about this research was published in May of 2006, and although slightly dated today, it found issues identical to the ones that organizations such as Asylum Access Ecuador<sup>95</sup> and UNHCR Ecuador,<sup>96</sup> reported in 2012.<sup>97</sup> The findings in this report clearly reflect an inability of Colombian refugees to find safety and enjoy living conditions similar to the ones in which their Ecuadorian counterparts live. Each one of the instances of abuse, discrimination, and lack of legal protection that Colombian refugees continually face constitutes a reason why many of these refugees should not be considered "firmly resettled" in Ecuador and is evidence of the lack of practicality and effectiveness of the "formal offer" approach. Each one of those instances explains why the rigid "formal offer" approach is a system that cannot be maintained in light of the U.S. international obligations under the Refugee Convention.

A. *Findings Made by The Georgetown Report in Ecuador*

The Georgetown Report found that although they retain

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93. *Id.*; see also *UNHCR Handbook*, *supra* note 31, at ¶¶ 4.9.2–4.9.5.

94. *The Georgetown Report*, *supra* note 1.

95. See Adina Appelbaum, *Challenges to Refugee Protection in Ecuador: Reflections from World Refugee Day*, GEORGETOWN PUBLIC POLICY REVIEW, June 2012, available at <http://gppreview.com/2012/06/26/challenges-to-refugee-protection-in-ecuador-reflections-from-world-refugee-day/>.

96. See UNHCR, UNHCR GLOBAL REPORT: ECUADOR 2011, available at <http://www.unhcr.org/4fc880c1a.html>.

97. See *id.* Therefore, the data collected by this report is currently useful when determining whether, under U.S. law today, a Colombian refugee would be considered firmly resettled or not in Ecuador. See *id.*

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asylum status, many Colombian refugees continue to be prevented from obtaining access to education, housing, and medical care.<sup>98</sup> In addition to this restricted access, female refugees reported having been victims of sexual abuse and exploitation.<sup>99</sup> The report also found indicators of pervasive institutional discrimination and prejudice against Colombians: Colombian refugees expressed feelings of insecurity and isolation within their host communities.<sup>100</sup> Of the forty-nine refugees interviewed by the Georgetown Fact Finding Group, ten percent of them were being referred to the UNHCR Resettlement Program because they lacked legal protection in Ecuador; forty-three percent were referred because of security risks; and another twenty-three percent were referred because of lack of local integration problems: because they were considered to be women at risk, or because of serious medical needs.<sup>101</sup>

Additionally, while the Ecuadorian Government has taken significant steps to provide protection to refugees, Colombian refugees struggle to access basic rights that their Ecuadorian counterparts enjoy:

[M]any recognized refugees expressed that their situations had not improved, or improved only slightly after a grant of refugee status. They complained of pervasive and systematic discrimination, lack of job opportunities, inability to find landlords willing to rent to Colombians, lack of educational opportunities for their children, inability to open bank accounts, police harassment and abuse, general deficiency of services and protection for recognized refugees, and a constant prejudice against Colombians.<sup>102</sup>

Furthermore, the barriers to basic rights were also related to the spread of discrimination against Colombians, discrimination that

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98. *The Georgetown Report*, *supra* note 1, at 38–39.

99. *Id.* at 42. “Colombian women are a particularly vulnerable population. A significant number are forced into prostitution and there are reports that the same people involved in trafficking drugs across the border are also involved in trafficking women and children.” *Id.*

100. *Id.*

101. *Id.* at 34.

102. *Id.* at 38.

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particularly affects Afro-Colombians and indigenous people.<sup>103</sup> The integration process takes place in a context dominated by profound economic and ethnic segregation.<sup>104</sup>

Colombian refugees described, in the *Georgetown Report*, how discrimination affects them on a daily basis, particularly in their access to employment and housing.<sup>105</sup> Fifty-two percent of the refugees surveyed felt discriminated against in Ecuador, specifically in relation to negative perceptions connected to nationality, gender, sexual orientation, refugee status, ethnicity and socioeconomic situation.<sup>106</sup> Moreover, public spaces were identified as the place where most refugees experienced discrimination, followed by the workplace, public institutions, and places of residence.<sup>107</sup>

According to the report, many Colombian refugees mentioned that when looking for housing or jobs they often hear, “[w]e do not hire Colombians,” or “[w]e do not rent to Colombians.”<sup>108</sup> These situations reduce the employment opportunities available to refugees, increase abuse from employers toward women and minorities (who are typically targets of even more discrimination),

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103. *Id.* at 44. “Afro-Colombians expressed particular concern for the prejudicial treatment that their children were face to endure. [One of the interviewees] complained that her seven year old son ha[d] been called racist epithets at school and had experienced harassment, badgering, taunting, and name calling on the street.” *Id.*

104. *Id.* at 43.

105. *Id.* at 40. “Twelve refugees described instances in which their employer refused to pay them or delayed payment. In these circumstances they had no legal recourse.” *Id.* Furthermore, “housing discrimination and predatory landlords also proved a persistent problem, relegating many Colombian refugees to several dilapidated neighborhoods in the cities of Quito and Ibara and camp life in Lago Agrio.” *Id.* at 40.

106. *See id.*

107. *Id.* at 38.

[A Colombian refugee] related various incidences of discrimination, lack of physical security and general difficulty with local integration. [The Colombian refugee] said that there is an omnipresence of prejudice: “to them we are thieves and murderers.” He asserted that his family had been ostracized—“even at church.” [Two Colombian refugees] ha[d] been denied apartments because of their nationality. They were particularly disturbed that Ecuadorians seem to associate them with the armed groups when they were actually the victims of these groups.

*Id.* at 38.

108. *Id.* at 40.

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and can become a serious barrier to integration. Housing discrimination and predatory landlords also proved to be a persistent problem. These landlords relegate many Colombian refugees to several dilapidated neighborhoods in the cities in the Ecuadorian Andes and to life in refugee camps close to the Colombian border.<sup>109</sup> One refugee recalled multiple landlords telling her that the apartment she was seeking had already been rented, although she knew otherwise.<sup>110</sup> The living conditions in the neighborhoods where many Colombian refugees can find shelter are inadequate: while pregnant with her first child, one refugee interviewed by the Georgetown team said she lived in one room in a small house with four other adults, and the room had neither a kitchen nor a bathroom.<sup>111</sup>

At the same time, discrimination can have a profound consequence on refugees' own self-perception. Discrimination is also expressed by verbal abuse on the streets, and in some cases, with physical violence. Women and children are particularly vulnerable to those situations. Refugees expressed that the discrimination in Ecuador makes them feel "without dignity" or as "useless or not worthy."<sup>112</sup>

Discrimination and xenophobia worsened when other dimensions such as race, gender and nationality are added (e.g. Afro-Colombian women). Accounts describe many instances of xenophobic treatment perpetrated by actors including even the authorities and the police: "in the northeastern region of Ecuador, there are frequent reports of xenophobic and discriminatory treatment of Colombians by Ecuadorians, including harassment and arrest by police forces."<sup>113</sup> Many refugees reported that Ecuadorians stereotype Colombian refugees in two ways: men are categorized as guerilla members or drug traffickers, and women are categorized as prostitutes.<sup>114</sup> Accounts also describe many other challenges faced by Columbian refugees:

[a]part from the challenges to access of employment and housing, many Colombian refugees encounter barriers to

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. White, *supra* note 11, at 6.

114. *Id.*

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access education for their children (particularly for teenagers), to the banking system, and to health services. While the government of Ecuador guarantees access to healthcare and education, in reality many refugees face many bureaucratic hurdles and requirements that impede access to schools for many children.”<sup>115</sup>

Additionally, Colombian refugees living in the border regions are often impacted by the lack of security and violence and other dangerous crimes in those areas.<sup>116</sup> For instance, these refugees naturally do not know whom (among local officials) to trust, because paramilitaries and guerillas are present in Ecuador.<sup>117</sup> For many refugees who face secondary persecution in Ecuador, the persecution is linked to the persecution they suffered in Colombia.<sup>118</sup> For others, even though the persecution does not appear to be linked to the persecution they faced in Colombia, their new persecution involves the same actors.<sup>119</sup> These refugees also lack trust towards the Ecuadorian armed forces and police who, in many instances, are the perpetrators of outright

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115. *Id.*

UNHCR estimate that only twenty-five per-cent of the school aged children of recognized refugees have access to education and are able to attend local schools. Despite an official commitment by the Ecuadorian government to allow recognized refugees to attend local schools, no government action has been taken to prevent local school districts from barring Colombian children from matriculation.

*The Georgetown Report*, *supra* note 1, at 40.

116. White, *supra* note 11, at 7 (“Ecuador’s border cities, and other localities that host a large number of refugees, are characterized by high levels of violence and crime, drug trafficking, arms smuggling and a high concentration of brothels.”).

117. Both Colombian paramilitaries and guerrilla groups operate within Ecuador, trafficking in drugs and arms and crossing back and forth over the border with ease. *See generally* International Crisis Group, *Colombian Borders: The Weak Link in Uribe’s Security Policy* (Sept. 2004).

118. *See* The Georgetown Report, *supra* note 1. “Irregular and armed groups have targeted certain refugees as ‘military objectives,’ offering bounties for the assassination or kidnapping of Colombian civilians who have crossed into Ecuador.” *Id.* at 36–37.

119. According to one of the refugees interviewed by the Georgetown Report, he encountered members of a Colombian irregular armed group at a refugee agency in Ecuador. *Id.* at 37. They extorted from him, threatened to kill him, intimidated his family, and warned him that if he did not fulfill their demands, they would tell his Colombian persecutors that they had located him. *Id.* at 37.



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brutalities.<sup>120</sup>

Furthermore, *the Georgetown Report* found that women and girls among this population are exposed to a high risk of sexual and gender based violence.<sup>121</sup> The Report stated that:

Women and girls from minority groups are in an even greater vulnerable situation. There is a greater need to provide protection and programs that focus on [sexual and gender based violence (“SGBV”)], particularly in areas in the border region. The lack of prevention, protection and prosecution of SGBV cases is prevalent.<sup>122</sup>

Finally, the report brought to light survival stories of sex trafficking and abuse of minors in the refugee population, the presence of which create a difficult context in which to work toward the prevention of SGBV.<sup>123</sup>

## V. RESETTLING COLOMBIAN REFUGEES FROM ECUADOR TO THE UNITED STATES

### A. *Colombian Refugees in The United States Program*

As discussed *supra*, the need for the legal and physical protection of Colombian refugees in Ecuador is urgent. Although

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The lack of police protection for persecuted Colombians exacerbates their secondary persecution. Many refugees described intimidation or abuse in the hands of the Ecuadorian police, which made them unable or unwilling to report incidents of abuse. One of the refugees females interviewed by the Georgetown Report explained that while she was working at a restaurant, a police officer stopped by and asked her to “help him” with social favors, and threatened to deport her if she didn’t comply.

*Id.* at 37–38.

121.

Sexual exploitation by Colombian and Ecuadorians was a recurring and insidious problem for the women . . . the single or widowed refugee women interviewed described instances of sexual exploitation, inappropriate sexual behavior by authorities, rape and sexual assault, or forced prostitution in Ecuador. Some married women and their husbands also complained of the climate of sexual exploitation and discrimination facing Colombian women and girls in Ecuador.

*Id.* at 42.

122. *Id.* at 44.

123. *Id.* at 42–44.

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the Ecuadorian government continues to make efforts to address this urgent need, Colombian refugees are still precluded from enjoying the same rights that their Ecuadorian counterparts do. Unfortunately, despite the fact that living conditions of Colombian refugees have not improved in the past decade, the Department of Homeland Security (“DHS”) has prevented more and more Colombian refugees from being resettled in the U.S. because they have considered them to be “firmly resettled” in Ecuador. This is evidenced when one compares the number of Colombian refugees admitted to the U.S. in 2004 and in 2009.<sup>124</sup> The U.S. government admitted ten times fewer Colombian Refugees in 2009 than in 2004.<sup>125</sup>

“Firm resettlement” continues to be the bar that precludes Colombians from resettlement in the United States. DHS’s interpretation of U.S. law has provided only narrow grounds for a waiver of the firm resettlement bar. More restrictive than the UNHCR guidelines, DHS’s administrative regulations define an individual as firmly resettled if another country offered her permanent status prior to her entry into the U.S.<sup>126</sup> The

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124. The highest number of Colombian refugees admitted by the U.S. was in fiscal year 2004, with a total of 577 refugees. US DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF REFUGEE RESETTLEMENT, REPORT TO CONGRESS A1 (2009), *available at* [https://www.acf.hhs.gov/sites/default/files/orr/fy\\_2009\\_annual\\_report\\_to\\_congress.pdf](https://www.acf.hhs.gov/sites/default/files/orr/fy_2009_annual_report_to_congress.pdf). However, from 2004 to 2009 the admission numbers declined. *Id.* In 2009, the U.S. only admitted 54 Colombian refugees. *Id.*

125. *Id.*

126. 8 C.F.R. § 208.15. This statute reads: “An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement unless he or she establishes:

- (a) That his or her entry into that country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or
- (b) That the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge shall consider the conditions under which other residents of the country live; the type of housing, whether permanent or temporary, made available to the refugee; the

regulations allow a waiver of the firm resettlement bar in narrow circumstances, only if the individual's conditions in her first country of asylum are "so substantially and consciously restricted by the authority of the country that he or she was not in fact resettled."<sup>127</sup> In determining whether conditions are sufficiently restricted (despite legal recognition in her country of asylum) to allow a refugee to be resettled, the U.S. considers the individual's housing situation, prospects and extent of employment, and enjoyment of basic rights.<sup>128</sup> However, DHS has permitted the waiver of firm resettlement to apply to significantly fewer refugees who genuinely lack prospects of local integration and who clearly need to resettle.<sup>129</sup> Due to the effect of the restrictive firm resettlement bar, most Colombian refugees in serious need of third country resettlement are prohibited from resettling in the U.S., which can, in turn, delay their resettlement to a third country.

B. *The "totality of the circumstances" approach consistency with the United States' International Obligations under the Refugee Convention and its Domestic Asylum System*

The circuits that follow the "formal offer" approach, and recently the BIA, have stated that one of the main reasons for adopting such a framework is the inconsistency between the "totality of the circumstances" approach and U.S. obligations under the 1951 Refugee Convention.<sup>130</sup> These obligations, as they relate to firm resettlement, flow from two parts of the Convention. The first part is the firm resettlement clause itself, which provides that the "Convention shall not apply to a 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*

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types and extent of employment available to the refugee; and the extent to which the refugee received permission to hold property and to enjoy other rights and privileges, such as travel documentation that includes a right of entry or reentry, education, public relief, or naturalization, ordinarily available to others resident in the country." *Id.*

127. *Id.*

128. *Id.*

129. See *The Georgetown Report*, *supra* note 1.

130. See David Norris, *Total[ity] Recall: Firm Resettlement Determinations After In Re A-G-G-*, 26 *GEO. IMMIGR. L.J.* 425, 441 (2012).

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to the possession of the nationality of that country.”<sup>131</sup> The plain language of this clause demonstrates that under the Convention, a refugee should be considered firmly resettled only when the country where he has taken residency has provided him with the same rights and obligations that the country provides to citizens or permanent residents in that country. The existence of a “formal offer” is only the beginning of the inquiry that the adjudicator has to make when determining firm resettlement.

The protection of refugees against refoulement<sup>132</sup> has also been argued by proponents of the “formal offer” approach as a benefit of the approach.<sup>133</sup> Firm resettlement and refoulement intersect primarily in the concept of “chain refoulement,” which arises when countries return refugees “to countries where protection against non-refoulement is not ensured, or to countries which may refuse entry, and which may refoule such persons to the country where they fear persecution.”<sup>134</sup> According to the proponents of the “formal offer” approach, the “totality of the circumstances” test will not prevent chain refoulement and might cause a refugee to be removed to a country where there are no guarantees that the person will not be removed therewith.<sup>135</sup> However, this argument does not take into consideration that the “totality of the circumstances” approach would—in such a situation—consider the danger of refoulement as a determinative factor when determining firm resettlement. The existence of a “formal offer” of official residency or refugee status is the principal inquiry made by the “totality of the circumstances” approach and the one that is given the most weight in the analysis.

A guarantee against the third country refusing entry or later

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131. *Refugee Convention*, *supra* note 16, at art. 1(E) (emphasis added).

132. *Id.* Non-refoulement has been defined in a number of international refugee instruments, both at the universal and regional levels; at the universal level, the most important provision in this respect is Article 33 (1) of the Refugee Convention. This provision states: “No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” *Refugee Convention*, *supra* note 16, at art. 33(1).

133. See Norris, *supra* note 130, at 442.

134. UNHCR, *An Overview of Protection Issues in Europe: Legislative Trends and Positions taken by UNHCR*, 1 EUROPEAN SERIES, Sept. 1995, at 96, available at <http://www.unhcr.org/46e65e1e2.html>.

135. See Norris, *supra* note 130, at 442.

deporting the applicant to the country where he or she fears persecution is needed in order to satisfy the burden of proof that the government carries in the “totality of the circumstances” approach. In fact, the “formal offer” approach and the framework established by the BIA in *Matter of A-G-G* present the same flaw that the proponents of the “formal offer” approach criticize.<sup>136</sup> Both approaches allow for a finding of firm resettlement without evidence of a direct offer in certain instances.<sup>137</sup>

The proponents of the “formal offer” approach also argue that an assessment of a refugee’s circumstances “modif[ies] and marginalize[s]” the principal question of firm resettlement.<sup>138</sup> However, an approach for firm resettlement that looks only for a formal offer and does not take into account an applicant’s intent, length of stay in the first country of asylum, and the living conditions in the third country overlooks and oversimplifies the purpose of the firm resettlement bar.

Opponents of the “totality of circumstances” approach have articulated concerns that such an approach wastes judicial resources, puts an undue burden on the applicant, and gives judges too much leeway leading to inconsistent results.<sup>139</sup> While too much discretion for judges could lead to inconsistent results, too little discretion makes it impossible for judges to make decisions about whether the refugee enjoyed rights similar to those given to local persons in the country of asylum. Thus, too little discretion allows the immigration system in the U.S. to fall short of international obligations under the 1951 Refugee Convention. A “totality of circumstances” approach would undoubtedly require more effort in gathering circumstantial evidence, but such a fact-finding process is also a necessary part of the “formal offer” approach. The role of judges is to evaluate the facts of individual cases, which are never the same. It would make little difference in the overall burden on judges if, in addition to looking for an offer of resettlement, judges were guided

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136. *Id.* (noting that it may be argued that the direct offer approach and the new *In re A-G-G* framework suffer from this same flaw, given that both approaches allow for a finding of firm resettlement without evidence of a direct offer in certain instances).

137. *See id.*

138. *See* Robert D. Sloane, *An Offer of Firm Resettlement*, 36 GEO. WASH. INT’L L. REV. 47, 60 (2004).

139. *See id.* at 63–64.

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to consider other specific circumstances or factors.

The main reason for many courts—and recently the BIA—to employ an offer-based test for determining resettlement is to simplify the question of firm resettlement. Judges want “helpful and comprehensive standards that [they] can use in their consideration of whether a petition for asylum can be granted or not.”<sup>140</sup> However, a strictly offer-based evaluation is not necessarily comprehensive. In some cases, looking only at concrete offers of residency could even neglect evidence that might not otherwise bar an asylum seeker.

*C. The Totality Of The Circumstances Approach Applied To Colombian Refugees*

Based on the regulations followed by DHS, a U.S. adjudicator does not look at the living conditions of the refugee applying for resettlement in the U.S. until the resettlement applicant applies for a waiver of the “firm resettlement” finding previously made by the adjudicator. The regulations followed by DHS largely emulate the “formal offer” approach carried out by the BIA and the majority of the U.S. Court of Appeals circuits. However, the “totality of the circumstances” approach, discussed *supra*, is the best solution for Colombian refugees currently residing in Ecuador, and the best approach to the firm resettlement inquiry.<sup>141</sup> Unlike the “formal offer” approach followed by the Ninth Circuit, courts following the “totality of the circumstances” would consider:

... the existence of a government-issued offer as simply one component of a broader firm resettlement inquiry according to the equal weight to such factors as the

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140. Matthew J. Fery, Note, *Determining Better Standards for Firm Resettlement, Judicial Discretion, and Immigration Administrative Practice: Diallo v. Aschcroft*, 381 F.3d 687 (7th Cir. 2004), 31 U. DAYTON L. REV. 505, 506 (2006).

141. The alternative to this approach, would be the “formal offer” approach followed by the Ninth circuit and a couple of others, under which Colombian refugees residing in Ecuador would be automatically barred from being resettled in the U.S. because of the refugee status recognition made by the Ecuadorian government. See Dana R. Green, Note, *Navigating North: How the Canadian Approach to Firm Resettlement Should Guide U.S. Implementation of the Refugee Conventions*, 40 COLUM. HUM. RTS. L. REV. 701, 705–06 (2009).

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 . . .<sup>142</sup>

For many of the Colombian refugees living in the circumstances described by the Georgetown Report, a consideration of the totality of their circumstances would allow them to defeat the "firm resettlement" bar that currently precludes them from resettling in the United States.<sup>143</sup> Consider the case of the dozens of Colombian female refugees who have been sexually exploited by the Ecuadorian authorities and community members—clearly these refugees have not been given the same legal guarantees and protections that their Ecuadorian counterparts enjoy; additionally, the lack of government assistance given to these refugees further prevents them from ever locally integrating into the Ecuadorian population.<sup>144</sup>

And, not only females refugees would be able to be resettled in the U.S. under the "totality of the circumstances" approach. Resettlement would be available to all Colombian refugees whose lives were threatened by local police officers, by Colombian armed groups who crossed the Ecuadorian border, and by other armed local groups who are affiliated with guerillas in Colombia.<sup>145</sup> Furthermore, all refugees who are victims of systematic discrimination by the Ecuadorian government and community would also likely be able to show under the "totality of the circumstances" approach that they have not had enough social and economic ties, educational opportunities, and government assistance and therefore are (or should be) eligible for resettlement in the U.S.

Observers involved with international migration to the U.S. have suggested two goals that any asylum system should accomplish.<sup>146</sup> First, asylum should protect the persecuted or seriously endangered.<sup>147</sup> Second, asylum should deter abuse of

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142. *Abdille v. Ashcroft*, 242 F.3d 477, 480 (3d Cir. 2001).

143. *See generally The Georgetown Report, supra* note 1.

144. *See id.*

145. *See generally id.*

146. Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 *GEO. IMMIGR. L.J.* 589, 589–90 (2000).

147. *Id.* at 589–90.

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the privileges and resources afforded to U.S. residents.<sup>148</sup> A more detailed approach to the firm resettlement bar helps to protect the truly desperate and to exclude those that have been offered protection elsewhere.<sup>149</sup> Adoption of the “totality of the circumstances” into DHS’s regulations would not open the door for all Colombian refugees residing in Ecuador to resettle in the United States. Rather, it would only allow protecting the truly desperate ones. The “totality of the circumstances” analysis implements a comparison with the living conditions that Ecuadorian citizens have in Ecuador. If Colombian refugees are facing similar conditions to the ones experienced by their Ecuadorian counterparts, then they would not be eligible to resettle in the U.S.<sup>150</sup>

## VI. CONCLUSION

For some Colombian refugees, local integration is a durable solution currently available. For others, return to Colombia could be a future solution if adequate conditions materialize. But, for many others, resettlement in a third country is the only option to achieve protection. While the Ecuadorian government has taken steps to provide refugee status to many Colombians, there are certain highly vulnerable persons within this population for whom the status granted by Ecuador provides neither a durable solution nor physical protection.

To be true to the statutory text and to honor the purpose of asylum, courts should adopt the “totality of circumstances” approach for determining resettlement with the change that a formal offer be the first factor considered and given most weight. In this way, courts are to look first for an offer, but must also consider other attendant and important circumstances. The existence or absence of a formal offer should not be dispositive, but should be merely the starting point for determining whether the alien is deserving of asylum protections.

The case of Colombian refugees is only one example of the

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148. *Id.*

149. *See* Maharaj v. Gonzalez, 450 F.3d 961, 974 (9th Cir. 2006) (reciting reasons why some courts have followed the totality of circumstances approach to find firm resettlement).

150. That is, unless these Colombian refugees have faced a new type of persecution while living in Ecuador.



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flaws of the “formal offer” approach. The adoption of the “totality of the circumstances” approach would be a way to allow the Colombian refugees who have not yet been provided with a durable solution or physical protection in Ecuador to be resettled in the United States. Moreover, the adoption of the “totality of the circumstances” approach would allow other refugees in the world, living under similar circumstances to the Colombians in Ecuador, to truly benefit from the protections accorded by the Refugee Convention.<sup>151</sup>

Since the adoption of the Refugee Convention in 1951, the U.S. Government has traditionally opened its doors to persons who legitimately face persecution in their home countries. Colombian refugees currently residing in Ecuador have not only faced persecution in their home country, but they have also experienced perverse discrimination in their country of asylum. The United States should not reject them. Under the “totality of the circumstances” approach followed by the Second, Fourth, Eighth, Tenth, and D.C. Circuits, these Colombian refugees would be able to finally call a country their home.<sup>152</sup>

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151. Another group of refugees who would likely benefit from the adoption of the totality of the circumstances approach are Haitian refugees, many of whom currently reside in the Dominican Republic. For a discussion of this distinct issue, see e.g., Eleanor Acer, *Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States*, 28 *FORDHAM INT'L L.J.* 1361 (2005).

152. See 8 C.F.R. § 208.15(a).