

# Finding a Meaningfulness Principle in Firm Resettlement Law: A Proposal for a More Robust Framework in Light of the Board of Immigration Appeals' Decision in *Matter of A-G-G-*

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## I. INTRODUCTION TO THE FIRM RESETTLEMENT BAR

Refugees are in a uniquely vulnerable position in our global community. As an effectively stateless person who nevertheless retains rights and protections, a refugee is both a beneficiary of the global community's goodwill and a perceived annoyance to states with domestic problems.<sup>1</sup> As one scholar stated, “[r]efugees,

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1. The United Nations Refugee Convention officially defines a “refugee” as an individual who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country.” United Nations Convention Relating to the Status of Refugees art. 1.A.2, July 28, 1952, *available at* <http://www.unhcr.org/3b66c2aa10.html>. The United States has adopted this definition virtually verbatim, and an asylum seeker will only be granted asylum in the United States if he or she satisfies

by their existence, constitute an irritant to the sovereign interstate system. . . . [T]he individual [refugee] remains invisible in the interstate system . . . .”<sup>2</sup>

The application of the firm resettlement bar exemplifies this balance-striking between a state’s legal obligations to refugees and its desire to limit the number of refugees admitted across its borders. The firm resettlement bar precludes a refugee who seeks protection in a destination country from receiving protection in that country if the refugee has already received<sup>3</sup> some offer of permanent resettlement in a third country.

The firm resettlement bar derives from international law.<sup>4</sup> Under this principle, Title VIII of the U.S. Code prohibits an asylum seeker who has firmly resettled from receiving relief in the United States.<sup>5</sup> A Department of Homeland Security (“DHS”) regulation defines the term “firmly resettled” as applying to “[a]n alien [who,] prior to arrival in the United States . . . 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 [one of two exceptions].”<sup>6</sup>

that definition of a “refugee.” 8 U.S.C. § 1101(a)(42)(A) (2006).

This Note uses the term “refugee” more generally to refer to an individual in flight from his or her country of origin due to either generalized or individualized persecution and who seeks refuge elsewhere, whether or not such an individual may satisfy the official definition of a “refugee” under the 1951 Convention or United States law. This is both for descriptive convenience, and also as a prescriptive suggestion that the officially accepted definition of “refugee” under the 1951 Convention and United States law may be inadequate to describe the plight of many of these individuals. To be sure, the definition of “refugee” does not play a central role in this Note.

2. Elspeth Guild, *Asymmetrical Sovereignty and the Refugee: Diplomatic Assurances and the Failure of Due Process*, Agiza v. Sweden and Alzery v. Sweden, in *CRITICAL ISSUES IN INTERNATIONAL REFUGEE LAW* 120–21 (James C. Simeon ed. 2010).

3. By its plain language and as a matter of historical practice, the firm resettlement bar only looks to whether a refugee has previously received an offer, not whether she might still receive an offer in a third country. Query whether this makes sense as a policy matter, since the firm resettlement bar is meant to exclude refugees who have present or potentially immediate protection elsewhere. One might say that the policy decision to focus on a previous offer of firm resettlement impliedly presumes that a refugee’s having received an offer elsewhere means that she can get another offer again. In practice that is not often the case. At any rate, this is an interesting distinction that warrants a separate discussion.

4. The term “firmly resettled,” and the principle it represents, was first articulated by the International Refugee Organization (IRO). Constitution of the International Refugee Organization, part I.A.3 (Dec. 15, 1946), available at <http://unhcr.org/3ae69ef14.html> (“the term ‘refugee’ also applies to persons who . . . have not yet been *firmly resettled*” (emphasis added)); *id.* at part I.D.c (“Refugees or displaced persons will cease to be the concern of the Organization . . . [w]hen they have, in the determination of the Organization, become otherwise *firmly established* . . . .” (emphasis added)). See Matter of A-G-G-, 25 I. & N. Dec. 486, 2011 WL 1826845, at \*\*3 (BIA 2011).

5. 8 U.S.C. § 1158(b)(2)(A)(vi) (2006) (for asylum seekers who have arrived on United States soil) and 8 U.S.C. § 1157(c)(1) (2006) (for overseas refugees applying to enter the United States). Similar to this Note’s broad usage of the term “refugee,” see *supra* note 1, this Note will use the term “asylum seeker” to refer generally to both asylum seekers who have already arrived in the United States, as well as overseas refugees applying to resettle here.

6. 8 C.F.R. § 1208.15 (2010).

The United States' adoption of the firm resettlement bar reflects its desire to balance its duties under the 1951 Convention Relating to the Status of Refugees, as extended through the 1967 Protocol,<sup>7</sup> with its concerns about shouldering an excessive share of the burden for the international refugee protection regime. As the Supreme Court stated in 1971 in its first and only decision interpreting the firm resettlement bar:

Congress [intended through its refugee legislation for] this country [to] fulfill its obligations to refugees, but also [to provide] an incentive to other nations to do likewise. [That legislation] was enacted to help alleviate the suffering of homeless persons and the political instability associated with their plight. It was never intended to open the United States to refugees who had found shelter in another nation and had begun to build new lives. Nor could Congress have intended to make refugees in flight from persecution compete with all of the world's resettled refugees for the [United States' refugee quota]. Such an interpretation would subvert the lofty goals embodied in the whole pattern of our refugee legislation.<sup>8</sup>

This Note does not take issue with the notion that the firm resettlement bar reflects the proper balance between an obligation to protect refugees and a desire to share that obligation with other countries, at least in principle. Rather, it takes issue with the lack of “accurate and precise judgments” in firm resettlement analysis.<sup>9</sup> This lack of robustness results in a jurisprudence that no longer considers the context and narrative behind the refugee's flight to the United States and thus loses sight of whether U.S. refugee law is effectuating the goals of the international refugee protection regime. Instead, it transforms the firm resettlement bar into an administrative loophole that makes it easier for the U.S. government to thwart even meritorious asylum cases.<sup>10</sup>

This lack of robustness stems from ongoing difficulty in answering the fundamental question underlying the firm resettlement doctrine: has the asylum seeker received an offer of permanent resettlement in a third country that is sufficient to discharge the United States' duties under the Refugee Convention and Protocol? In other words, firm resettlement jurisprudence is essentially a quest

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7. As the Supreme Court has explained, “Although the United States has never been party to the 1951 Convention, it is a party to the Protocol, which incorporates the Convention's definition in relevant part.” *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 438 (1987) (citing United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6225, T.I.A.S. No. 6577 (1968)). See also United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1951). Congress ratified the 1967 Protocol through H.R. CONF. REP. NO. 96-781, at 19 (1980).

8. *Rosenberg v. Woo*, 402 U.S. 49, 55–56 (1971).

9. Matthew J. Fery, *Determining Better Standards for Firm Resettlement, Judicial Discretion, and Immigration Administrative Practice: Diallo v. Ashcroft*, 381 F.3d 687 (7th Cir. 2004), 31 U. DAYTON L. REV. 505, 516 (2006).

10. See generally Robert D. Sloane, *An Offer of Firm Resettlement*, 36 GEO. WASH. INT'L L. REV. 47 (2004).

to determine whether the offer of residence that a refugee received in a third country is *meaningful* enough that the United States need not admit the asylum seeker in order to satisfy its obligations to the refugee protection regime.

The question of what constitutes a meaningful offer of permanent resettlement has vexed Immigration Judges (IJs) and federal courts for years.<sup>11</sup> There are two practical reasons for this confusion. First, offers of residence to refugees vary widely. Second, refugees rarely, if ever, arrive in the United States with documentation regarding their residency or status in another country.

First, as the Seventh Circuit articulated, “The ‘some other type of permanent resettlement’ language likely was added to account for the great variety in names and types of permanent offers of settlement in countries around the globe . . . .”<sup>12</sup> Along the spectrum of offer types, the edge cases are relatively straightforward. At one end of the spectrum are offers of permanent residency that are closely akin to U.S. legal permanent resident (LPR) status or citizenship. Examples of countries that make such offers include Brazil<sup>13</sup> and Canada,<sup>14</sup> which both make refugees eligible to apply for permanent residency.<sup>15</sup> Such offers of permanent residency expressly constitute offers of permanent resettlement within the meaning of the firm resettlement bar.<sup>16</sup>

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11. See, e.g., Fery, *supra* note 9, at 512 (“The exact parameters of what constitutes an offer of permanent settlement have been the subject of considerable discussion and debate among the courts.”).

12. Diallo v. Ashcroft, 381 F.3d 687, 695 (7th Cir. 2004). See also Fery, *supra* note 9, at 511–12 (“Since no binding precedent or elaborative authority exists on what constitutes firm resettlement, individual states, through their own jurisprudence and regulatory powers, have created their own standards toward determining whether a party was firmly resettled prior to seeking asylum.”).

13. *Permanent Residency in Brazil*, ANGLINFO, <http://brazil.angloinfo.com/countries/brazil/residency.asp> (last visited Oct. 6, 2011).

14. *Refugee Claims in Canada—After Applying*, CITIZENSHIP AND IMMIGRATION CANADA, <http://www.cic.gc.ca/english/refugees/inside/apply-after.asp> (Sept. 9, 2011). Canada has one of the world’s best immigration systems in terms of congruence between policy and enforcement and in terms of positive public opinion concerning immigration. See generally Jeffrey G. Reitz, *Canada: Immigration and Nation-Building in the Transition to a Knowledge Economy*, in *CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE* 97 (Wayne A. Cornelius et al. eds., 2d ed. 2004); see *id.* at 98 (“for Canada, the gap between policy goals and policy outcomes has been relatively small”).

15. I hasten to emphasize that “the fact that [a country] offers a process for applying for some type of refugee or asylum status is not the same as offering the status itself.” Maharaj v. Gonzales, 450 F.3d 961, 977 (9th Cir. 2006) (the firm resettlement bar did not apply to petitioners, even though they had a “safe, four-year residence in Canada, where they were able to work and receive benefits, and [had a] pending application for refugee status,” because they never received an offer of permanent residency from the Canadian government). However, the point remains that in Brazil and Canada, refugees can and do receive offers of permanent residency, and that these offers seem to be similar if not identical to LPR status in the United States.

16. 8 C.F.R. § 1208.15 (expressly including offers of “permanent resident status” or “citizenship”); see, e.g., Kai-Rui Pan v. Mukasey, 314 F. App’x 328, 330 (2d Cir. 2008) (petitioners were firmly resettled in Brazil, because there was evidence that they had received a “valid permanent residence visa” from the Brazilian government); Asheber v. Ashcroft, 97 F. App’x 733 (9th Cir. 2004) (petitioner was firmly resettled in Canada, where he had received permanent residence status); Lumio v. I.N.S., 11 F. App’x 799 (9th Cir. 2001) (same).

At the other end of the spectrum are offers of residency that might be characterized as begrudging permission to stick around. For example, due to Iraq's sectarian violence, Iraqi refugees have thronged into Jordan and other neighboring countries. According to one estimate, about 800,000 Iraqi migrants were living in Jordan as of April 2007.<sup>17</sup> However, these Iraqis have no legal status; the Jordanian government only recognizes Iraqis as "guests," which grants them neither "a clear legal status nor the right to work" and is expressly temporary.<sup>18</sup> Though I have not found any cases interpreting Jordan's "guest" status, such an explicitly temporary status would not appear to satisfy the definition of an offer of permanent resettlement, especially of the type tantamount to an offer of permanent resident status or citizenship.<sup>19</sup>

Firm resettlement jurisprudence deals mostly with cases that fall between these two extremes. Take a typical hypothetical example.<sup>20</sup> Jameela, a 25-year-old woman, flees the sectarian and war violence in Iraq to live with her extended family in the United States. En route, Jameela is stuck in Cairo, Egypt, because she does not have enough money to obtain a visa and plane ticket and stays for four years. There, she registers with the Office of the United Nations High Commissioner for Refugees (UNHCR), which provides her with a permanent refugee card. The Egyptian government accepts Jameela's permanent refugee card and coordinates with the regional UNHCR office to allow her to stay in Egypt until the UNHCR can help her find a country of resettlement.<sup>21</sup> Although this arrangement does not grant Jameela the right to work, she secures odd jobs in order to make a living and shares the rent for a two-bedroom apartment with three Palestinian refugee families. Like most refugees in Egypt, she does not

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17. Ibrahim Saif & David M. DeBartolo, *The Iraq War's Impact on Growth and Inflation in Jordan*, CENTER FOR STRATEGIC STUDIES, UNIVERSITY OF JORDAN, July 2007, at 5, available at <http://www.jcss.org/uploadeconomic/118.pdf>.

18. 2011 UNHCR *Country Operations Profile—Jordan*, UNHCR, <http://www.unhcr.org/pages/49e486566.html> (last visited Oct. 6, 2011); see also Nicholas Seeley, *The Politics of Aid to Iraqi Refugees in Jordan*, 40 MIDDLE EAST REPORT, Fall 2010, available at <http://www.merip.org/mer/mer256/politics-aid-iraqi-refugees-jordan> (Out of fear that "the crisis narrative would lead to Iraqis becoming like the millions of Palestinian refugees to whom Jordan already plays host," the Jordanian government has "argued that many displaced Iraqis were not refugees—instead, they were 'guests' whose stay would be temporary.").

19. One thing we can say about an offer of "permanent resettlement" is that, under the doctrine of *eiusdem generis*, we should interpret that general descriptor as limited by the two narrower descriptors preceding it. Thus, an offer of "permanent resettlement" is something tantamount to an offer of permanent resident status or an offer of citizenship. See 8 C.F.R. § 1208.15.

20. I have constructed this hypothetical based on various cases I have reviewed through my work with the Iraqi Refugee Assistance Project (IRAP), which was founded at Yale Law School in 2008 and is currently based at the Urban Justice Center in New York City. IRAQI REFUGEE ASSISTANCE PROJECT, <http://www.iraqirefugee.us> (last visited Oct. 7, 2011). A classmate and I co-founded the UCI Law chapter of IRAP at the end of 2009.

21. See *UN Refugees*, listed in *Types of Refugee Permits*, PASSPORTS, EMIGRATION & NATIONALITY ADMINISTRATION, <http://www.moiegypt.gov.eg/English/Departments+Sites/Immegration/ForignersServices/Ekamet/ALAgeen/ALLageen/> (last visited Oct. 7, 2011).

qualify for any other types of residency visas that would allow her to stay indefinitely,<sup>22</sup> though it is unlikely that the government would force her out. Has she received an offer of permanent resettlement?

It is hard to say. In accepting Jameela's UNHCR refugee card and formally recognizing her refugee status, one could argue that the Egyptian government has implicitly made her an offer to stay indefinitely and that this offer sufficiently resembles permanent residency. However, strictly speaking, the possibility of staying indefinitely does not constitute an offer of permanent residency. Indeed, not only did the Egyptian government fail to offer Jameela the option of applying for permanent residency,<sup>23</sup> but it had no such program available. On the other hand, Jameela was able to work and had a place to live, although neither was particularly stable, and her employment was, in fact, illegal. In this case, it is unclear whether the refugee has received an offer of permanent resettlement in the third country. As will be shown below, Immigration Courts and circuit courts have had to weigh multiple factors, including various forms of indirect (non-offer-based) evidence, to decide whether or not an offer to remain in a third country constitutes an offer of permanent resettlement.

The second reason for confusion in defining an offer of permanent resettlement is that refugees typically do not arrive in the United States with any substantial documentation that might prove the existence *vel non* (or not) of an offer. As Professor Robert D. Sloane wrote:

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 [former] INS therefore resorts to a variety of non-offer-based factors as evidence in an effort to establish a *prima facie* case of firm resettlement.<sup>24</sup>

Courts rarely decide firm resettlement claims based on direct evidence of an offer of permanent resettlement. Rather, where courts have held that a refugee was firmly resettled in a third country, they have often looked to non-offer-based

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22. See *Types of Residence Permits*, PASSPORTS, EMIGRATION & NATIONALITY ADMINISTRATION, <http://www.moiegypt.gov.eg/English/Departments%20Sites/Immegration/ForignnersServices/Visa/> (last visited Oct. 7, 2011).

23. An offer of permanent resettlement need not come in any particular form, and a third country may generally define what an alien must do in order to accept its offer. As relevant here, a third country's offer of permanent resettlement may consist of providing a defined class of aliens a process through which they are entitled to claim permanent refuge. If an alien who is entitled to permanent refuge in another country turns his or her back on that country's offer by failing to take advantage of its procedures for obtaining relief, he or she is not generally eligible for asylum in the United States.

*Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004).

24. Sloane, *supra* note 10, at 61–62.

evidence of firm resettlement.<sup>25</sup> This has led to an undesirable obfuscation of firm resettlement analysis,<sup>26</sup> which this Note seeks to remedy.

In attempting to resolve these problems, the circuit courts have split between two tests for determining what constitutes an offer of firm resettlement. The Ninth, Seventh, and Third Circuits have adopted the “direct offer” or “offer-based” approach,<sup>27</sup> which “focuses on the existence of an offer vel non, made by a government, of some type of permanent residence that would allow the alien to remain in that country indefinitely in some official status. . . . Under this approach, the courts look first to direct evidence of an offer . . . . If direct evidence is unobtainable, the courts look to indirect evidence of an offer . . . .”<sup>28</sup> The Second and Fourth Circuits have instead adopted a “totality of the circumstances” approach,<sup>29</sup> which “considers evidence of a direct offer of firm resettlement as only one factor to be considered with other factors that are not offer based, which we refer to as ‘indirect evidence.’”<sup>30</sup> Other circuits have remained undecided.<sup>31</sup>

The Board of Immigration Appeals’ (“BIA”) recent decision in *Matter of A-G-G* is a welcome step towards providing decision makers with guidance on how to conduct firm resettlement analysis. The *A-G-G* decision constitutes the BIA’s first time establishing a framework for determining firm resettlement.<sup>32</sup> In *A-G-G*, the Board incorporates both the direct offer and totality of the circumstances approaches and clearly lays out a burden-shifting process for adjudicating a firm resettlement claim. However, the *A-G-G* framework contains a defect that unfairly lessens the government’s burden of proving firm resettlement at the

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25. See, e.g., *Sultani v. Gonzales*, 455 F.3d 878, 882 (8th Cir. 2006) (admitting that “in some cases direct evidence of such an offer may be difficult or impossible to procure” and that “[c]onsequently, other factors may be considered to determine whether an alien’s stay in a third country was more than simply ‘a stopover en route to refuge in the United States’”); *Firmansjah v. Gonzales*, 424 F.3d 598, 603 (7th Cir. 2005) (holding that petitioner was firmly resettled in Singapore, based on her “admission in both her written application and oral testimony that she had received permanent resident status in Singapore,” although there was no direct evidence of that permanent resident status anywhere in the record); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1152 (9th Cir. 2005) (holding that petitioner was firmly resettled in Germany, based on such non-offer-based evidence as his marriage to a German woman and his ability to travel freely throughout the country, but no evidence whatsoever of some offer of residence by the German government).

26. Sloane, *supra* note 10, at 58.

27. See, e.g., *Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006); *Diallo v. Ashcroft*, 381 F.3d 687 (7th Cir. 2004); *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001).

28. *Matter of A-G-G*, 25 I. & N. Dec. 486, 2011 WL 1826845, at \*\*9 (BIA 2011).

29. See, e.g., *Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006); *Mussie v. INS*, 172 F.3d 329 (4th Cir. 1999).

30. *Matter of A-G-G*, 2011 WL 1826845, at \*\*9.

31. *Id.* (discussing pertinent First, Fifth, Sixth, Eighth, and Eleventh Circuit cases).

32. At least, this is the BIA’s first decision establishing such a framework since 1990, when the firm resettlement bar shifted from being a merely discretionary bar to a mandatory bar to asylum. *Matter of A-G-G*, 2011 WL 1826845, at \*\*11 (“[T]he Board has not issued a decision setting forth the proper framework to apply to firm resettlement determinations under current law since *Matter of Soleimani* [20 I. & N. Dec. 99 (BIA 1989)], when firm resettlement was applied as a discretionary factor.”).

expense of the asylum seeker. In Part II, I explain that the defect stems from the Board's incorporation of a practical error made by certain circuit courts that have adopted the totality of the circumstances test. This error leads to the absurd result that, in practice, the government is virtually never required to consider direct evidence of an offer of permanent resettlement, but is permitted to utilize extraneous, non-offer-based factors to construct its *prima facie* claim of firm resettlement. The asylum seeker, however, is not afforded a similar opportunity to construct a counter-case.

In order to fill this gap, I argue that the *A-G-G* framework should incorporate some meaningfulness principle that will rebalance the equities between the government and the asylum seeker. In Part III, I recommend constructing this meaningfulness principle by using the same non-offer-based factors that originated with the totality of the circumstances test, but applying these factors more contextually. In particular, I recommend that decision makers apply the meaningfulness principle by looking not only to the conditions of the asylum seeker's life in the country of alleged firm resettlement, but also to the conditions of the life that she would have in the United States.

In doing so, I also respond to three potential counterarguments. The first counterargument is that requiring a decision maker to compare a refugee's ties to a third country with her ties to the United States contravenes the language of the firm resettlement bar, which expressly considers only the refugee's conditions in the third country. I argue that a comparative analysis would better effectuate the purpose of the firm resettlement bar by allowing decision makers to obtain a clearer picture of how and why the asylum seeker came to request asylum from the United States, and therefore how and why the protection she received in the third country might have been insufficient.

Second, I will seek to allay concerns that incorporating a meaningfulness principle into firm resettlement law will incentivize unscrupulous country shopping by asylum seekers. I contend that some degree of country shopping is desirable because it leads to more durable solutions for refugees; the real concern is country shopping that abuses the asylum system. Third, I argue that establishing a more robust framework will not inherently increase the number of refugees the United States has to admit. A more robust framework would admit more of the types of refugees that our asylum law was meant to admit while foreclosing more of the claims that the firm resettlement bar was meant to exclude.

In Part IV, I conclude by summarizing my recommendations and advocating a more balanced, robust firm resettlement analysis. The purpose of the refugee protection regime is neither to provide refugees with the very best relief nor to shift them around like objects. Rather, the regime exists to provide refugees with some sense of dignity and well-being in order to allow refugees to start new lives,



not just *away* from the persecution they faced in their countries of origin, but also *toward* an existence that retains, within reason, “all that makes life worth living.”<sup>33</sup>

## II. THE BOARD’S NEW FIRM RESETTLEMENT FRAMEWORK IN *MATTER OF A-G-G*

### *A. The Board’s Decision in Matter of A-G-G*

In the 2011 *Matter of A-G-G* case, a Mauritanian man fled his native country due to persecution at the hands of its soldiers. After being involuntarily deported from Mauritania, he landed in Senegal, where he lived for over eight years. There, he married a local woman, had two children, found a job, and was issued an identification card by the Senegalese government. Thereafter, he traveled to the United States and sought asylum from the U.S. government.

The IJ adjudicating his asylum claim granted him asylum and held that he had not firmly resettled in Senegal. Instead of adjudicating the issue of whether this finding was valid, the BIA established a general framework for analyzing a firm resettlement claim and remanded the case to allow the IJ to apply it. That framework is the focus of this Note.

This is the first time that the BIA has established such a framework since at least 1990, when the firm resettlement bar shifted from discretionary to mandatory.<sup>34</sup> The BIA’s *A-G-G* framework is a welcome synthesis of the direct offer approach and the totality of the circumstances approach. The framework has four steps:

1. Initially, the government’s DHS attorney bears the burden of presenting prima facie evidence of firm resettlement.
  - A. First, the government should attempt to discharge this burden by presenting *direct evidence of an offer*. “In order to make a prima facie showing that an offer of firm resettlement exists, the 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.”
  - B. Failing that, the government can use *indirect evidence of an offer (i.e., non-offer-based factors)*. “If direct evidence of an offer of firm resettlement is unavailable, indirect evidence may be used to show that an offer of firm resettlement has been made if it has a sufficient level of clarity and force to establish that an alien is able to permanently reside in the country. Indirect evidence may include the following: the immigration laws or refugee 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

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33. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

34. *See infra* note 38.

the country; family ties and business or property connections; the extent of social and economic ties developed by the alien in the country; the receipt of government benefits or assistance, such as assistance for rent, food, and transportation; 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.”

- ❖ The distinction between purely direct and circumstantial evidence is critical for understanding my argument. Although the BIA labels the first set of items above as “direct evidence” and the second set as “indirect evidence,” these are misnomers.
    - Strictly defined, so-called direct evidence does not include “evidence of refugee status, a passport, a travel document, or other evidence indicative of permanent residence.” Instead, direct evidence could include a green card or its equivalent, an identification card listing the permanent residency status, or an official, written grant of permanent residency.
    - Evidence that merely “indicat[es]” the existence of such an offer should instead be called circumstantial evidence. This classification would distinguish such evidence from so-called “indirect evidence,” which, in spite of its label, is not indirect evidence of an offer, but rather evidence unrelated to an offer; this evidence is invoked not to provide circumstantial evidence of an offer, but rather to indicate a circumstance meaningfully equivalent to an offer.
    - Despite these issues, this Note uses the terms “direct evidence” and “indirect evidence” in the way that the BIA defines them—that is, “direct evidence” will consist of purely direct and circumstantial evidence, and “indirect evidence” will consist of non-offer-based evidence.
  - ❖ If the government cannot succeed in proving an offer through direct or indirect evidence, then the inquiry is over, and the IJ must find against firm resettlement.
2. If the government succeeds at Step 1, the asylum seeker can rebut the government’s evidence by showing by a preponderance of the evidence that such an offer has not been made or that she would not qualify for that offer.
  3. The IJ should then consider the totality of the evidence to determine whether the asylum seeker has rebutted the government’s evidence.

4. If the IJ finds that the asylum seeker has firmly resettled in the third country, the burden shifts to the asylum seeker to establish either of the two enumerated exceptions to firm resettlement.<sup>35</sup>

Step 1 reflects the BIA's synthesis of the direct offer approach and the totality of the circumstances approach. The BIA emphasized that

[d]espite these divergent approaches, there is consistency in the framework applied by the circuit courts. The courts agree that the DHS bears the initial burden of going forward with evidence indicating that the firm resettlement bar applies. . . . Both approaches provide for the consideration of direct and indirect evidence of an offer of permanent resident status, citizenship, or some other type of permanent resettlement. . . .<sup>36</sup>

The BIA's framework synthesizes the circuit courts' approaches by recognizing that both approaches contain the same two steps: first, consideration of direct evidence of an offer (reflected in Step 1A above), and second, where direct evidence is unavailable, consideration of indirect evidence of an offer (reflected in Step 1B above). However, as this Note will show next, the fact that "indirect evidence" expressly refers to non-offer-based factors creates a problem by effectively making Step 1A meaningless and by unfairly lowering the government's burden to establish a prima facie case for firm resettlement at the asylum seeker's expense.

### *B. The Meaningfulness Gap in the A-G-G- Framework*

As presently designed, the BIA's framework codifies an existing practical error by decision makers who adopted the totality of the circumstances approach. As Professor Sloane discussed in detail, the totality of the circumstances test originates from a pre-1990 regime during which the firm resettlement bar was only a discretionary bar.<sup>37</sup> Under that regime, courts looked to firm resettlement as only one factor among many other, non-offer-based factors to determine whether or not to grant asylum to a refugee.<sup>38</sup> As such, the firm resettlement doctrine was not so much a bar as one policy consideration in an open-ended asylum analysis.

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35. *Matter of A-G-G*, 2011 WL 1826845, at \*\*12–14.

36. *Id.*; see also Sarah Lynne Campbell, *Give Me Your Tired, Your Poor, and Your Country Shoppers: Reevaluating the Firm Resettlement Requirement in U.S. Asylum Law After Maharaj v. Gonzales*, 21 BYU J. PUB. L. 377, 382–84 (2007).

37. Sloane, *supra* note 10, at 58–59.

38. *Id.* Between 1957 and 1990, there was no explicit firm resettlement bar in either INS regulatory law or statutory law that applied to the adjudication of asylum claims. Nevertheless, the INS continued to consider firm resettlement as one factor in determining whether or not to grant asylum to an individual. In its 1971 decision *Rosenberg v. Woo*, 402 U.S. 49 (1971), the Supreme Court accepted and thus incorporated into federal common law the INS's practices. In *Woo*, the Supreme Court held "that the 'resettlement' concept is not irrelevant. It is one of the factors which the [former] Immigration and Naturalization Service must take into account to determine whether a refugee seeks asylum in this country as a consequence of his flight to avoid persecution." 402 U.S. at 56 (emphasis

In a discretionary regime, the fact that courts looked to non-offer-based factors was not problematic, even where there was no direct evidence of an offer. “If [an offer of] 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”—as well as in favor of—“a favorable exercise of discretion.”<sup>39</sup>

In a discretionary analysis, the existence *vel non* of an offer of permanent resettlement was not essential to a decision maker’s analysis; what mattered was the policy behind the firm resettlement doctrine. That is, the decision maker could have refused asylum if the facts suggested that doing so would effectuate the policy behind what we now call the firm resettlement doctrine—a balance between satisfying the United States’ duty to protect refugees and its need to share that obligation with other countries.

However, under the post-1990 regime in which firm resettlement is a mandatory bar, the totality of the circumstances approach has become inapposite and leads to absurd results.<sup>40</sup> DHS’s and Congress’s shift from a discretionary bar to a mandatory bar is in essence a statement that the policy underlying the firm resettlement bar can *only* be realized through an inquiry into the existence *vel non* of an offer of permanent resettlement.<sup>41</sup> Therefore, where direct evidence of an offer is available, the firm resettlement inquiry is over, and the decision maker must find that the refugee has resettled in the third country.

Direct evidence of an offer has remained dispositive since the firm resettlement bar first became a mandatory bar, and neither the BIA’s *A-G-G*-framework nor this Note’s recommended revisions change that. However, this shift to a mandatory bar regime means that where direct evidence of an offer is unavailable, courts should only consider non-offer-based factors *insofar as those factors serve as a proxy for direct evidence of an offer*. Anything less means that non-offer-based factors no longer act in service of “the paramount firm-resettlement inquiry”<sup>42</sup>—the existence *vel non* of an offer—but rather only serve to lessen the government’s burden of proving firm resettlement through a patchwork of inherently extraneous factors.

Under a mandatory bar regime, where there is no direct evidence of an offer of permanent resettlement, the consideration of only non-offer-based factors

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added). Thus, *Woo* effectively established a discretionary firm resettlement bar up until 1990, when the INS amended its regulations to make the firm resettlement bar mandatory. Congress adopted the mandatory bar in 1996 through its amendments to the Immigration and Nationality Act in that year. See also *Matter of A-G-G*, 2011 WL 1826845, at \*\*4–8 (outlining this same history); Campbell, *supra* note 36, at 379–81 (same).

39. Sloane, *supra* note 10, at 59.

40. *Id.*

41. *Id.* at 58.

42. *Id.* at 60.

constitutes a *lesser alternative* for proving the existence vel non of an offer, rather than a proxy for a vel non offer. This lesser alternative makes it easier for the government to invoke the firm resettlement bar at the asylum seeker's expense.<sup>43</sup> As discussed above, because there is rarely direct evidence of an offer, this lesser alternative is in practice not the exception, but the rule.<sup>44</sup> Indeed, courts following the totality of the circumstances test have ignored the logically precedent question of a vel non offer. Many courts have considered only non-offer-based factors in holding that asylum seekers were firmly resettled.<sup>45</sup>

The BIA's framework has implemented this error wholesale. Under the *A-G-G*-framework, courts are no longer required to resolve the logically precedent question of a vel non offer before moving on to non-offer-based factors. In Step 1 of the *A-G-G*-framework, the government is allowed either to use direct evidence of an offer of permanent resettlement (Step 1A); *or*, where there is no such evidence, to simply decline to present even circumstantial evidence of a vel non offer and instead opt for a lesser alternative: namely, patching together its firm resettlement case using extraneous, non-offer-based factors (Step 1B).<sup>46</sup> This essentially nullifies Step 1A since the government can always satisfy its initial burden by resorting to Step 1B (non-offer-based factors) as a lesser alternative to direct evidence of an offer of permanent resettlement. Therefore, the BIA's purported synthesis of the direct offer approach and the totality of the circumstances approach is fundamentally unsound. The BIA has not really synthesized the two approaches at all, but rather has effectively—though perhaps inadvertently—chosen the totality of the circumstances approach over the direct offer approach.

This error can be fixed in at least three ways, the third of which this Note recommends. The first solution is to remove Step 1B of the BIA's framework and

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43. *Id.* (“[I]t tends in practice to transform what should be a question distinct from the refugee-status inquiry into an additional criterion of refugee status.”); *see also id.* at 47–48 (This approach turns the firm resettlement bar into “a regulatory loophole by which the [government] attempts to remove refugees with otherwise valid persecution claims.”).

44. *Id.* at 61.

45. *Id.* at 58–60.

46. What makes all the difference is that there is an implied “or” between Steps 1A and 1B. This is not obvious at first glance, because the BIA's language states that DHS should “first” secure direct evidence of an offer, and only then “may” go on to consider non-offer-based factors. This seems to answer Professor Sloane's problem, but a closer reading shows it does not. Step 1B of the framework actually permits indirect evidence—that is, non-offer-based factors—to constitute an independent and sufficient basis for a prima facie case of firm resettlement. The BIA's framework would have properly remedied Professor Sloane's problem if it had instead incorporated an “and” between Steps 1A and 1B: if and only if there is direct evidence of an offer may the government consider non-offer-based factors. However, that is not how the BIA chose to synthesize the direct offer and totality of the circumstances approaches. Therefore, we must now confront a framework in which either direct or indirect evidence of an offer constitutes a sufficient basis for a prima facie case of firm resettlement, even though the language of the framework appears to give primacy to direct evidence.

require decision makers to consider only direct evidence of an offer of permanent resettlement. However, this solution simply takes decision makers back to square one: what does an offer of “permanent resettlement” mean? Notwithstanding that firm resettlement is now mandatory and offer-based, “if clear evidence of an offer does not exist, a court’s analysis should not end there.”<sup>47</sup> A pure direct offer approach would not only be problematic in theory, but mostly useless in practice because direct evidence of an offer of permanent resettlement is rarely available.<sup>48</sup> The fact that even those circuits which expressly adopted the direct offer approach have looked to non-offer-based factors in deciding firm resettlement reflects this approach’s practical limitations.<sup>49</sup>

The second solution is to simply return to a discretionary bar regime. Though tempting at first, this solution is not ideal. The purpose of firm resettlement law is to realize a balance of equities between the U.S. government and asylum seekers, and it appears that either a discretionary or mandatory bar regime can create that balance—provided that decision makers use the proper framework. Returning to a discretionary bar regime would therefore be missing the point. Incidentally, the firm resettlement bar was once a mandatory bar anyway, from the time when Congress enacted the Displaced Persons Act of 1948<sup>50</sup> until the time when Congress amended<sup>51</sup> the Immigration and Nationality Act of 1952.<sup>52</sup>

This Note advocates a third solution: retaining Step 1B and making it more robust. The BIA’s synthesis of approaches to defining firm resettlement is welcome because it comes closer to increasing this robustness. Courts that previously adopted the direct offer approach already looked to indirect evidence of an offer where direct evidence of an offer was absent.<sup>53</sup> The BIA’s framework not only incorporates that approach but also clarifies that such indirect evidence consists of the non-offer-based factors used by other courts. Conversely, for those courts that previously adopted the totality of the circumstances approach, the

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47. Fery, *supra* note 9, at 513.

48. See *supra* note 24 and accompanying text.

49. See, e.g., Fery, *supra* note 9, at 513 (“In the late-1990s, the Ninth Circuit Court of Appeals found that when direct evidence of an offer does not exist, other non-offer factors may be used to establish a presumption of firm resettlement.” (citing *Cheo v. INS*, 162 F.3d 1227, 1229 (9th Cir. 1998)).

50. Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, § 2(c)(1), 62 Stat. 1009, 1009 (“Eligible displaced person’ means a displaced person [who] on January 1, 1948, had not been firmly resettled . . .”).

51. Act of Sept. 11, 1957, Pub. L. No. 85-316, 71 Stat. 639.

52. *Matter of A-G-G-*, 25 I. & N. Dec. 486, 2011 WL 1826845, at \*\*2–4 (BIA 2011) (outlining this history).

53. See *supra* note 28 and accompanying text.

BIA's framework refocuses the inquiry back on the central question in the mandatory bar regime: the existence vel non of an offer.<sup>54</sup>

In an otherwise helpful framework, the error discussed above can be corrected by recognizing the error as a gap and then filling that gap. If Step 1B constitutes a lesser alternative to Step 1A, then courts should read some principle into Step 1B to render it *equivalent* to Step 1A. In other words, courts may cure the *A-G-G*-framework by implementing a meaningfulness principle to make indirect evidence an adequate proxy for direct evidence where direct evidence is not available. This Note posits that that principle should be the principle articulated below. This meaningfulness principle utilizes and expands on the non-offer-based factors in Step 1B to help determine what an offer of firm resettlement means.

### III. CONSTRUCTING A MEANINGFULNESS PRINCIPLE

#### *A. Composing a Meaningfulness Principle with Non-Offer-Based Factors*

In order to construct a meaningfulness principle, we need look no further than the same non-offer-based factors that have paradoxically caused the defect in the *A-G-G*-framework. The non-offer-based factors are not problematic per se, but rather because, under the current framework, they work asymmetrically in favor of the government by lowering the government's burden of establishing a prima facie case for firm resettlement. Decision makers can repair this asymmetry by contextualizing the non-offer-based factors so as to look not only at how the factors apply to the asylum seeker's life in the third country, but how the factors apply comparatively to the life the asylum seeker would have in the United States.

The non-offer-based factors inherited from the totality of the circumstances test, and which the BIA explicitly mentioned in *A-G-G*-, are:

- ❖ The immigration laws or refugee 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 developed by the alien in the country;
- ❖ The receipt of government benefits or assistance, such as assistance for rent, food, and transportation; 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>55</sup>

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54. This third solution has the added bonus of not requiring the BIA to overrule its decision in *Matter of A-G-G*-, but simply interpreting its language therein so as to avoid an absurd result.

55. *Matter of A-G-G*-, 2011 WL 1826845, at \*\*12.

At first glance alone, these factors suggest the sort of meaningfulness principle that would give substance to the definition of firm resettlement. Firm resettlement law is rife with value-laden words that relate to the meaningfulness of a refugee's life in a country: "safe homeland,"<sup>56</sup> "effectively accepted,"<sup>57</sup> "established roots,"<sup>58</sup> "a haven for homeless refugees,"<sup>59</sup> "a haven from persecution,"<sup>60</sup> "significant ties,"<sup>61</sup> etc. The non-offer-based factors listed in Step 1B speak directly to such value-laden concepts, and thus to the heart of firm resettlement law. For instance, if a refugee intended to stay in a country, then she also intended to develop "significant ties"; if she stayed for a long time, it is safe to say that she has been "effectively accepted"; if she has family ties and business or property connections, it is safe to conclude that she has "established roots" and found a "haven" from her previous life of suffering; and so forth.

But beyond that, the non-offer-based factors also comport directly with refugee rights under international law. Professor James Hathaway has compiled a virtually comprehensive list of these rights, which he derived in particular from the 1951 Refugee Convention and the 1967 Refugee Protocol, as well as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>62</sup> The most pertinent of those refugee rights for the purposes of firm resettlement law include the following:<sup>63</sup>

- ❖ The right to physical security;<sup>64</sup>
- ❖ The right to family unity;<sup>65</sup>
- ❖ Freedom of residence and internal movement;<sup>66</sup>

56. *Makadji v. Gonzales*, 470 F.3d 450, 454–58 (2d Cir. 2006).

57. *Id.*

58. *Rosenberg v. Woo*, 402 U.S. 49, 51 (1971).

59. *Id.*

60. *Sultani v. Gonzales*, 455 F.3d 878, 882 (8th Cir. 2006) (citing *Ali v. Reno*, 237 F.3d 591, 595 (6th Cir. 2001)).

61. 8 C.F.R. § 1208.15(a); *see also* 8 C.F.R. § 1208.15(b).

62. *See generally* JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005). On June 8, 1992, the United States ratified the ICCPR, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, although it did so with a series of Reservations, Understandings, and Declarations (RUDs) that are not directly related to refugees' rights. *U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights*, 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992), *available at* <http://www1.umn.edu/humanrts/usdocs/civilres.html>; 1 United Nations, Office of Legal Affairs, Treaty Section, Multilateral Treaties Deposited with the Secretary-General, at 206, U.N. Doc. ST/LEG/SER.E/26 (Apr. 1, 2009), *available at* <http://treaties.un.org/doc/source/publications/MTDSG/2009/English-I.pdf>. On October 5, 1977, the United States signed the ICESCR, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360, but it has never ratified the ICESCR. United Nations, *supra*, at 184.

63. Though other refugee rights in Hathaway's book are no doubt relevant to a decision maker's adjudication of a refugee's asylum claim, the rights I have chosen here are those which I believe speak directly to whether or not a refugee obtained "meaningful" residence.

64. HATHAWAY, *supra* note 62, at 439–60.

65. *Id.* at 533–60.



- ❖ The right to work, including the right to wage-earning employment;<sup>67</sup>
- ❖ The right to public relief and assistance;<sup>68</sup>
- ❖ The right to housing;<sup>69</sup> and
- ❖ So-called “rights of solution,” meaning rights to a durable solution to refugee crises, which include rights to repatriation, voluntary reestablishment, resettlement, and naturalization.<sup>70</sup>

As the table below shows, with two important exceptions, the non-offer-based factors listed in Step 1B correspond to the various rights that refugees possess under international law. Although this list of non-offer-based factors is not meant to be exhaustive,<sup>71</sup> the point remains that these factors are clearly consistent with international law.

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66. *Id.* at 695–719.

67. *Id.* at 730–86. Professor Hathaway explains that this is not “a right actually to secure work, only freely to seek work.” *Id.* at 739 n.50.

68. *Id.* at 800–13.

69. *Id.* at 813–29.

70. *Id.* at 913–90.

71. *See* Matter of A-G-G-, 25 I. & N. Dec. 486, 2011 WL 1826845, at \*\*12 (BIA 2011) (“Indirect evidence *may include* the following . . .” (emphasis added)).

<b>Non-Offer-Based Factor Included in Step 1B of the A-G-G-Framework, Derived from the Totality of the Circumstances Test</b>	<b>Corresponding Right(s) Under International Law</b>
The alien's intent to settle in the country	<ul style="list-style-type: none"> <li>• Freedom of residence</li> <li>• Rights of solution</li> <li>• Varied combinations of other rights (family unity, wage-earning employment, etc.) that depend on the refugee's situation and inform her desire to go to a country<sup>72</sup></li> </ul>
Family ties and business or property connections	<ul style="list-style-type: none"> <li>• Family unity</li> <li>• Right to work</li> </ul>
The extent of social and economic ties developed by the alien in the country <sup>73</sup>	<ul style="list-style-type: none"> <li>• Freedom of internal movement</li> <li>• Right to work</li> <li>• Right to housing</li> </ul>
The receipt of government benefits or assistance, such as assistance for rent, food, and transportation	<ul style="list-style-type: none"> <li>• Right to physical security</li> <li>• Freedom of residence and internal movement</li> <li>• Right to public relief and assistance</li> <li>• Right to housing</li> </ul>
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	<ul style="list-style-type: none"> <li>• Right to work</li> <li>• Rights of solution</li> <li>• Varied combinations of other refugee rights</li> </ul>

The first two non-offer-based factors—the immigration laws or refugee process of the third country and the length of the alien's stay in a third country—are not included in this list because they are unrelated to the nature of a refugee's life in a third country. They might instead be characterized as circumstantial evidence of an offer, and should therefore be seen as “direct evidence” as the BIA

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72. I will discuss this more below, *infra* text accompanying notes 79–88, when I respond to concerns about encouraging refugees to country shop.

73. One could argue that this non-offer-based factor corresponds with the ICESCR as a whole.

applies that label.<sup>74</sup> This is distinct from what are properly called the non-offer-based factors, which instead concern whether the asylum seeker's life in the third country was meaningful enough that denying asylum might still effectuate the aims of the international refugee protection regime.<sup>75</sup> As such, these first two factors will likely bleed into Step 1A of the BIA's framework, which looks to direct evidence of an offer of permanent resettlement.

In sum, the various non-offer-based factors enumerated in Step 1B of the BIA's firm resettlement framework give substance to a meaningfulness principle. The first two of these factors will likely overlap with Step 1A because they are more properly characterized as circumstantial evidence than non-offer-based evidence. The remaining factors go directly to what it means to have meaningful protection, and therefore to what it means to have an offer of permanent resettlement where there is no direct evidence of an offer of status tantamount to permanent residency or citizenship. This Note suggests that non-offer-based factors, including but not limited to those enumerated in Step 1B, should combine to create the meaningfulness principle.<sup>76</sup>

However, merely constructing a meaningfulness principle does not solve the gap within the *A-G-G* framework. To do that, decision makers must apply this principle properly.

#### *B. Applying the Meaningfulness Principle to the A-G-G Framework*

Without more, referring to the non-offer-based factors as a meaningfulness principle does not resolve the defect in Step 1B, which lessens the government's burden of establishing a *prima facie* case of firm resettlement at the asylum seeker's expense. This asymmetry stems from the fact that the BIA's framework allows the government to utilize non-offer-based factors in arguing against asylum, but does not allow the asylum seeker an equal chance to utilize the same factors in arguing for asylum.

While it is true that in Step 2 the asylum seeker has the option of responding to the government's *prima facie* case, Step 2 only allows the asylum seeker to rebut the government's case by showing "that such an offer has not in fact been made, or that he or she would not qualify for that offer."<sup>77</sup> Therefore, in rebutting the government's *prima facie* case for firm resettlement, the BIA's framework

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74. See discussion *supra* text accompanying notes 34–35.

75. *Id.*

76. I also refer the reader to a case note from 2006, Fery, *supra* note 9, in which Fery argues for something akin to a meaningfulness principle in firm resettlement analysis. Fery argues like I do that a consideration of "the big picture" is necessary for preventing a firm resettlement standard that is "much too vague and broad," *id.* at 517. Further, Fery argues, like I do, that consideration of non-offer-based factors "is relevant for courts in ascertaining whether the petitioner is firmly resettled, but also is helpful for determining more accurate and precise judgments," *id.* at 516, that is, more robust judgments.

77. *Matter of A-G-G*-, 25 I. & N. Dec. 486, 2011 WL 1826845, at \*14 (BIA 2011).

allows the asylum seeker to refer only to direct evidence of a vel non offer, *not* to non-offer-based factors.

In order to resolve this gap, this Note recommends placing the meaningfulness principle not only in the hands of the government, but also in the hands of the only person who can know what is meaningful for her: the asylum seeker. In Step 2, the asylum seeker should be allowed to invoke the non-offer-based factors placed at the government's disposal in Step 1B by arguing how they militate in favor of her starting a new life in the United States. Further, in Step 3, the IJ should regard the totality of the evidence as looking not only to the asylum seeker's life in the third country, but also to how it *compares* with the life she would have in the United States.

The question of whether the asylum seeker's life in the third country rises to the level of permanent resettlement should not be answered in a vacuum. Decision makers should view the totality of the evidence as part of a broader narrative that ends with why the asylum seeker desires to live in the United States. Therefore, the decision maker should consider evidence of not only the asylum seeker's previous life in the country of alleged firm resettlement, but also the asylum seeker's potential life in the United States. In this way, the meaningfulness principle might be characterized as a meaningful use of evidence.

Though the decision maker may consider the evidence of the asylum seeker's potential life in countries other than the United States or the country of alleged firm resettlement, the meaningfulness principle's main concern should be the evidence of the asylum seeker's potential life in the United States. The United States is only one player in a cooperative international refugee protection regime. Although it should do its best to effectuate the goals of that regime, it can only do so within the orbit of its responsibility. The U.S. government has no control over whether or not other countries will take in refugees.

Indeed, if U.S. decision makers decided that an asylum seeker was firmly resettled in a third country, the United States would send that asylum seeker back to the third country without being able to guarantee that the asylum seeker would receive protection in the third country; the decision about protection would remain vested exclusively with the third country's government. As such, an American decision maker's ambit consists only of what the United States can do for a refugee, as compared to what the country of alleged firm resettlement can do—or rather, has done—for her.

It would be improper to establish bright-line rules for how much weight each non-offer-based factor should receive under the revised firm resettlement analysis. However, one example illustrates certain guiding principles. Perhaps the most important non-offer-based factor is the capacity of the asylum seeker to work in the third country as compared to the United States. A job is foundational to the refugee's ability to start a new life, and thereby to truly escape her vulnerable state. Of course, a refugee-receiving country has no duty to, say,

provide a refugee with a \$150,000 salary. However, it would also be ludicrous to suggest that a refugee could ever survive on less than a living wage.

Thus, evidence of an asylum seeker's access to a living wage in a third country, either through government programs for refugees or family connections, would militate in favor of finding firm resettlement, whereas the same access in the United States would militate against finding firm resettlement. The threshold for "sufficient" protection is not about supplying the *most* meaningful solution to an asylum seeker, but rather about supplying a solution that is meaningful at all. Therefore, although the more robust firm resettlement framework is not meant to provide the refugee with a windfall, it should force the decision maker to consider whether the United States or the country of alleged firm resettlement would better provide the sort of minimally durable and feasible solution that would allow a refugee to be safe and secure.

There are three significant counterarguments to this framework. The first is that the plain language of the firm resettlement bar, both in U.S. law and international law, looks only to whether there was permanent resettlement in the third country; it says nothing about conditions in the United States.<sup>78</sup> However, the moment that decision makers consider non-offer-based factors at all, they have already moved away from the plain language of the bar and into the realm of equity and therefore context. To then argue that that context should be skewed almost entirely in the government's favor makes a farce of the firm resettlement bar and the balance-striking policy that it is meant to represent.

The apparent dichotomy between a refugee's actual life in a third country and her prospective life in the United States is false. The meaningfulness of such factors as length of stay, family ties, etc., is profoundly contextual. Take two men who have traveled from China to escape political persecution, one named Ming and the other named Wei. After their flight from China, Ming and Wei ended up in Australia. They have now arrived on U.S. soil and requested asylum. Neither the men nor DHS have been able to secure evidence of any formal offer of protection by the Australian government. Therefore, the IJs presiding over the men's cases must resort to adjudicating firm resettlement using the following non-offer-based evidence.

Neither man had social or economic ties to Australia, but each resided in Australia for three years before saving enough money to travel to the United States. In short, Ming and Wei had the same form and length of residence in Australia. Should Ming and Wei be returned to Australia, it is unclear what formal protection they would receive from the Australian government, if any. That said, the evidence shows that their ties to the United States differ greatly. Ming has

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78. See 8 C.F.R. § 1208.15; 1951 Convention, *supra* note 1, at art. 1.E ("This 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 to the possession of the nationality of that country.").

most of his immediate and extended family in the United States, including three siblings who can give him a job at a corner store when he arrives. In contrast, Wei has hardly any family in the United States. Most of his family is located in China or, through refugee resettlement, in Germany.

Because the evidence suggests that the men had the same form of residence in Australia, then without a consideration of the men's ties to the United States, if Wei is found to have firmly resettled then so must Ming. However, this creates a strange result. Granting asylum to Ming as opposed to Wei would do a dramatically better job of fulfilling the United States' obligations to the refugee protection regime, and therefore the purpose of the firm resettlement bar. It is almost assured that admitting Ming into the United States would enable him to obtain a durable solution to his flight from persecution: he would be able to work and thus earn a living wage, connect to a family network and thus make new connections leading to better personal and professional opportunities, and above all feel safe and secure once and for all.

In contrast, Wei's plight—though sympathetic—does not suggest that he would have any more durable of a solution by receiving asylum in the United States than in Australia. In fact, it appears that he would have a more durable solution were he to live with his extended family in Germany.<sup>79</sup> More than Ming, he appears to be the sort of refugee that Congress intended to redirect to a third country through the firm resettlement bar.

Under an overly formalistic firm resettlement analysis that only examines the men's lives in Australia, their cases appear identical. However, to say that Ming firmly resettled in Australia and thereby to foreclose his asylum claim in the United States would more likely flout one of the central purposes of the firm resettlement bar, which is to help the United States fulfill its obligations to the refugee protection regime. Conversely, to say that Wei is firmly resettled in Australia would more likely fulfill the purposes of the firm resettlement bar.

This interpretation of the men's situations is not meant to supplant a necessarily fact-intensive adjudication; indeed, it is not even clear that an IJ should conclude that either Ming or Wei was firmly resettled in Australia. Rather, this hypothetical is merely meant to illustrate that were an IJ to conduct a firm resettlement analysis on the men's claims, it would be overly formalistic and disingenuous for the IJ to look only to evidence of their lives in Australia while ignoring directly pertinent evidence of their prospective lives in the United States. To interpret the firm resettlement bar in such a formalistic manner divorces the

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79. Germany is another leader in refugee resettlement. See, e.g., *Asylum Levels and Trends in Industrialized Countries, First Half 2011: Statistical Overview of Asylum Applications Lodged in Europe and Selected Non-European Countries*, UNHCR, at 3 (Oct. 18, 2011), available at <http://www.unhcr.org/4e9beaa19.html> (explaining that Germany was third, following the United States and France, in refugee applications in the first half of 2011).

bar from its twin goals, as well as the goals of the refugee protection regime that it is meant to serve.

A second, related counterargument is that incorporating a meaningfulness principle into firm resettlement law will incentivize refugees to take advantage of the refugee system by country shopping. If there has been any recurring policy concern about admitting refugees into the United States, it has been this one. As one scholar stated, “If courts allow asylum based on . . . broad and vague [firm resettlement] standards, . . . a significant risk exists that many fraudulent claims could move through the system merely because no vel non offer of resettlement was made to the petitioner.”<sup>80</sup> Moreover, what scant legislative history there exists on the firm resettlement bar speaks directly to this concern.<sup>81</sup>

However, the refugee protection regime should allow for *some* degree of country shopping.<sup>82</sup> Country shopping unnerves decision makers and policy makers because it seems to indicate that some asylum seekers are not in fact genuine refugees, but individuals simply seeking to game the system. The concern, therefore, is not with country shopping per se, but with country shopping as an indication of refugees’ abuse of U.S. asylum law. For genuine refugees and asylum seekers with sincere claims, there are good reasons for allowing a bit of country shopping. Establishing better relationships between host governments and refugees fosters more durable and sustainable forms of protection, and therefore best effectuates the refugee protection regime.

In order to determine that fit, decision makers must apply a meaningfulness principle: they must ask where the refugee might be able to secure the minimal resources—in terms of economic stability, family ties, and so forth—that will give her a fighting chance to start a new life.<sup>83</sup> The refugee protection regime does not

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80. Fery, *supra* note 9, at 526.

81. See *Asylum and Inspections Reform: Hearing Before the H. Subcomm. on International Law, Immigration, and Refugees*, 103d Cong. 345 (1993) (statement of Michael T. Lempres, Former Executive Associate Commissioner for Operations, Immigration and Naturalization Service) (“I think that the very concept of asylum is offering protection to someone who is fleeing persecution. It is not intended to provide an individual with the ability to select in which of several safe countries he or she wants to live. I think that if you have come through, for example, London, under current law, if you have not firmly resettled, you are not returned to London. I would question that, because I think it makes good sense to return a person to a country where he is safe from persecution. If you have successfully avoided the persecution that has caused you to leave your home country, then the burden on the United States ought to be greatly diminished.”); *id.* at 300 (statement of Dan Stein, Executive Director, Federation for American Immigration Reform (FAIR)) (“Over the course of the 1980s in a couple of key settlements, the Department of Justice negotiated away its ability and its authority to take the circumstances of entry into consideration in adjudicating asylum claims. An aliens [sic], acting inconsistently with asylum status—that behavior should be a proper part of the adjudication record. [This includes such behavior as] forum shopping or nation shopping [and] passing through several safe countries . . .”).

82. Special thanks to my classmate, Joni Carrasco, also a third-year law student at UCI Law, for this important insight.

83. See, e.g., GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 394 (3d ed. 2007) (“A country may be ‘safe’ for asylum-seekers of a certain origin and ‘unsafe’

exist to give to every refugee the best possible form of protection. Not only is this not feasible, but it is wrong as a matter of existing law.<sup>84</sup> But just because a specific grant of refugee protection cannot be ideal does not mean that it should be meaningless. Although the refugee protection regime should not incentivize or condone abuses of asylum law, the need to prevent abuses does not militate in favor of a less robust firm resettlement framework, but rather a more robust one.

Moreover, the concern over country shopping loses its force when one realizes that there is no clarity or uniformity in the refugee protection regime such that refugees can realistically choose between adequate forms of protection. The reality is that signatories to the Refugee Convention are *not* executing their duties in a uniform way that ensures that refugees have meaningful lives wherever they go.<sup>85</sup> “[D]espite the front of unity at the level of refugee jurisprudence, the international refugee regime . . . is still highly fragmented . . . .”<sup>86</sup> Therefore, it is a mistake to suggest that a refugee is asking too much by requesting that she be resettled in the United States when doing so might offer her a better chance at creating a new life.

Such a suggestion is predicated on the illusion that the international refugee protection regime runs like a well-oiled machine. It does not. “Most of the world’s refugee movements are not subject to arranged distribution among receiving states. Spontaneity and anarchy, rather than organized distribution of asylum-seekers and refugees, constitute the norm.”<sup>87</sup> In light of the variance between offers of residency in different states and the lack of assurance that different refugees with different backgrounds and needs can receive sufficient protection in any particular country, firm resettlement analysis must retain a meaningfulness principle.

A final counterargument is that increasing the government’s burden of proving firm resettlement would force the United States to take in more than its

for others of a different origin, also depending on the individual’s background and profile. Removal will constitute unlawful deportation . . . unless it can be ascertained that each individual will be readmitted to the third country, will enjoy effective protection against *refoulement*, will have the possibility to seek and enjoy asylum, and will be treated in accordance with accepted international standards.” (quotations omitted).

84. See, e.g., 8 C.F.R. § 1208.15 (“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 . . .”).

85. See, e.g., HATHAWAY, *supra* note 62, at 6 (“Instead of a universal and comprehensive system of human rights law, the present reality is a patchwork of standards of varying reach, implemented through mechanisms that range from the purely facilitative to the modestly coercive.”); Guild, *supra* note 2, at 121 (“The result is substantial differences in recognition rates of refugees with the same nationality and circumstances in different host states.”).

86. Nergis Canefe, *The Fragmented Nature of the International Refugee Regime and Its Consequences: A Comparative Analysis of the Applications of the 1951 Convention*, in CRITICAL ISSUES, *supra* note 2, at 186; see generally HATHAWAY, *supra* note 62, at 6.

87. Asha Hans & Astri Suhrke, *Responsibility Sharing*, in RECONCEIVING INTERNATIONAL REFUGEE LAW 84 (James C. Hathaway ed., 1997).



fair share of refugees. This is a particularly acute concern because the United States is already a leader in admitting refugees when compared to other signatories to the Refugee Convention and Protocol.<sup>88</sup> However, because a rebalanced firm resettlement analysis is simply meant to increase robustness, adopting this Note's recommendations would in theory lead neither to more nor to fewer asylum seekers being admitted into the United States.

This Note does not argue that the meaningfulness principle should serve as a one-way ratchet in favor of refugees and against the government. It only argues that because the revised framework is more robust than previous firm resettlement frameworks, it would foreclose less meritorious asylum claims while admitting more meritorious asylum claims. In other words, the revised framework would admit more of those *sorts* of refugees who would best effectuate the goals of the refugee protection regime, without necessarily increasing or decreasing their *number*. For example, under the traditional totality of the circumstances approach, a decision maker might well decide that Wei from the above example has not firmly resettled because his ties to Australia are tenuous. However, under this Note's revised firm resettlement framework, a decision maker might decide that Wei has firmly resettled because his ties to the United States are comparably similar to his ties to Australia.

Admittedly, this Note's revised framework may nevertheless lead to decision makers granting more asylum claims. However, such an outcome would only reflect that in previous firm resettlement cases, decision makers often found refugees to be firmly resettled *even where such findings worked at cross-purposes with the refugee protection regime*. Such an outcome would mean that firm resettlement analysis had not been working. If so, it would be nonsensical to argue that we should abandon a more robust framework because it sheds light on the unworkability of previous frameworks. This Note does not necessarily advocate for more grants of asylum claims, but it certainly supports such a result if that result follows from a more robust firm resettlement analysis.

The fear that the U.S. government will take in more than its share of refugees is predicated on an assumption that but for restrictions on the refugee admissions process, there would be a flood of refugees into the United States. This is not a realistic concern for two reasons. First, the refugee protection regime itself has a throttling mechanism to prevent such a flood. Asylum seekers most often seek refuge in the United States through resettlement administered by the

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88. See, e.g., *Asylum Levels and Trends in Industrialized Countries*, *supra* note 79, at 9 ("The United States of America continued to be the largest single recipient of new asylum claims during the first six months of 2011, accounting for one out of five claims lodged in the 44 countries included [in the report]."); Eleanor Ott, *Get Up and Go: Refugee Resettlement and Secondary Migration in the USA*, UNHCR Research Paper No. 219 (Sept. 2011), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=4e5f9a079> ("Since 1975, the United States has resettled nearly three million refugees, more than all other countries combined.").

UNHCR, which takes the refugee's ties to the United States into consideration.<sup>89</sup> Therefore, where the UNHCR refers a refugee to the United States for resettlement, the refugee protection regime has already envisioned that that refugee is well suited for life here. That does not mean that the U.S. government is then required to admit that refugee, but it does mean that there has already been some threshold consideration of whether a refugee should be resettled in the United States before her case even becomes subject to U.S. refugee law.<sup>90</sup> Second, the United States is not necessarily refugees' preferred country of resettlement or asylum.<sup>91</sup> Asylum seekers are in dire straits. They are unable to return to their home countries or make lives for themselves in whichever countries they fled to. Insofar as the UNHCR or other agencies will acknowledge a refugee's preference for a resettlement country, such agencies may heed that preference. In general, however, refugees will take any relief they can get. They will not, therefore, rush to apply to the United States because they heard of a revision in U.S. firm resettlement law—a fantastic notion, to say the least. In practice, firm resettlement law will touch that limited number of cases where a refugee professes, either sincerely or fraudulently, that she wishes to live in the United States. It is then the job of the decision maker to consider that wish in light of the available evidence and the twin goals of the firm resettlement bar.

As a final reminder, the firm resettlement bar is an *exceptional* bar to otherwise meritorious asylum claims. It is not as if lowering the government's burden of proving firm resettlement also disables the government from arguing against the merits. Nevertheless, as previously discussed, courts have made it easier for the government to satisfy its burden without giving the asylum seeker any similar help. The revised framework proposed in this Note is meant to rebalance that asymmetry. It is meant to reverse the trend toward turning the firm resettlement bar into "an additional criterion for refugee status" and away from the exceptional bar that it was intended to be.<sup>92</sup>

To summarize, where direct evidence of an offer of permanent resettlement is available, the BIA's firm resettlement framework does not change: the inquiry should end, and decision makers should rule that the refugee has firmly resettled.

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89. UNHCR, *UNHCR Resettlement Handbook* (July 4, 2011), at 353–54, available at <http://www.unhcr.org/4a2ccf4c6.html>. It is noteworthy that some of the key factors that go into determining the country of submission, such as family unity and availability of health treatment, are identical or similar to the non-offer-based factors discussed in this Note.

90. See *Resettlement*, UNHCR, <http://www.unhcr.org/pages/4a16b1676.html> (last visited Nov. 14, 2011).

91. See, e.g., *Asylum Levels and Trends in Industrialized Countries*, *supra* note 79, at 3. Though the United States received more new asylum applications (36,400) than any other country in early 2011, it did not receive more by much. The following countries have comparable numbers, meaning that many asylum seekers did not seek out the United States as their first choice: "France was second with 26,100 asylum applications, followed by Germany (20,100), Sweden (12,600), and the United Kingdom (12,200)." *Id.*

92. Sloane, *supra* note 10, at 48.

But where only indirect evidence of an offer is available, decision makers should read a meaningfulness principle into the BIA's framework. That meaningfulness principle should consist of the non-offer-based factors inherited from the totality of the circumstances test. These non-offer-based factors include, but are not limited to, those factors enumerated in Step 1B. Further, decision makers should apply this meaningfulness principle to the BIA's framework by allowing the asylum seeker to invoke non-offer-based factors to argue in Step 2 that she was not firmly resettled in a third country. Decision makers should then regard the totality of the evidence contextually by comparing the life the asylum seeker had in the country of alleged firm resettlement to the life she would have in the United States.

#### IV. CONCLUSION

The BIA's recent decision in *Matter of A-G-G* provides a helpful framework that synthesizes previously conflicting approaches to firm resettlement law and promotes a more robust firm resettlement analysis. This Note argues that although the *A-G-G* framework is helpful, it contains a significant defect that, without more, would unfairly lower the government's burden of proving firm resettlement at the expense of the asylum seeker's ability to rebut that claim.

In order to cure that defect, courts must read a meaningfulness principle into the *A-G-G* framework. That meaningfulness principle should be composed of the various non-offer-based factors utilized in the so-called totality of the circumstances test. These factors—the extent of family ties, social ties, economic ties, and so forth—not only give substance to a meaningfulness principle, but also comport with refugees' rights under international law.

Professor Pheng Cheah recently wrote “that hospitality is the implicit essence and truth of the law . . . .”<sup>93</sup> This Note has attempted to reintegrate that spirit of hospitality into a field of law that should always have embraced it: firm resettlement law. In practice, firm resettlement analysis has largely been anything but robust, merely providing the government with another avenue to prevent a refugee from receiving asylum in the United States while weakening the refugee's ability to make her counter-case.

By reinforcing the BIA's new firm resettlement framework with a meaningfulness principle, the United States can ensure that those who have the best chance of making new, better lives in this country are allowed to do so, while safely returning others to third countries where they already have sufficient protection. There is a fundamental fairness in this that even a refugee who was denied asylum is likely to appreciate. For if an asylum seeker knows that there is some meaningfulness rationale behind her denial, she is more likely to accept that

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93. Pheng Cheah, *Necessary Strangers: Law's Hospitality in the Age of Transnational Migrancy*, in *LAW AND THE STRANGER* 26 (Austin Sarat et al. eds., 2010).

the equities were against her, instead of feeling that she had fallen victim to some arbitrary, technical legal standard.

In a system where refugees are effectively stateless because their countries of origin are unwilling or unable to protect them, allowing refugees to receive protection in another country gives them back their ability to eat, to work, to feel safe, and to communicate with their fellow human beings—that is, it gives them back their human dignity. Unfortunately, the refugee protection regime remains fragmented and unstable. As such, where a refugee-receiving country is able to inject some human dignity into its asylum laws and procedures, it should do so. A meaningfulness principle in U.S. firm resettlement law is essential to guaranteeing that the firm resettlement bar reflects an appropriate balance of equities between the U.S. government and the asylum seeker, rather than serving as a hammer which the U.S. government can use to shatter the asylum seeker's otherwise meritorious claim.