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## Taking a Closer Look at the Plight of Third-Country Nationals: Making the Case Against Legislative Reform

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# **Taking a Closer Look at the Plight of Third-Country Nationals: Making the Case Against Legislative Reform**

CONNIE BAUSWELL SAYLOR\*

## INTRODUCTION

Currently, the United States considers a number of factors when deciding whether to grant asylum to an individual. These include: 1) whether or not the asylum seeker is firmly resettled in another safe country; and 2) whether the individual used fraudulent documentation in his or her attempt to secure asylum in the United States.

With the number of asylum seekers increasing, the United States is hoping to curb these numbers through the adoption of the "safe haven" doctrine. Under this doctrine, an asylum seeker's application must be considered by the first "safe" country through which he travels. This allows the United States to administratively turn away many applications that it would have otherwise considered in the past.

The dangers of the safe haven doctrine are illustrated by the European Community's (EC) implementation of similar legal rules. Many problems have resulted from the use of these rules. For example, the outer EC states bordering eastern Europe must handle a vastly greater proportion of applications for asylum than the more interior western European EC states. Furthermore, the adoption of the safe haven doctrine should be carefully scrutinized, because questionable criteria are used in deciding whether a particular country is, in fact, safe.

This Note explores the policy implications of the safe haven doctrine by examining its implementation by the EC. Additionally, it analyzes the effect the safe haven doctrine will have on the relationship between the United States and neighboring countries. Finally, based on this analysis, the Note concludes that the "firm resettlement" doctrine is a better legal rule for the adjudication of asylum applications than the safe haven doctrine.

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## I. CURRENT LAW IN THE UNITED STATES

A. *The Foundation for U.S. Immigration Law*

The 1951 Convention Relating to the Status of Refugees<sup>1</sup> and the 1967 Protocol Relating to the Status of Refugees<sup>2</sup> serve as the modern basis for all refugee law. The United States is a signatory to the 1967 Protocol, which incorporated the terms of the 1951 Convention. The enactment of the 1980 Refugee Act made these international documents part of U.S. law.<sup>3</sup>

Prior to the 1980 Refugee Act,<sup>4</sup> the United States had no statutory procedures for aliens seeking asylum within the United States or at its borders. Instead, the United States granted overseas admission to refugees almost exclusively from communist or Middle Eastern countries.<sup>5</sup> Hence, the Refugee Act's importance partly lies in its attempt to move away from ideological or geographic criteria in asylum decisions.<sup>6</sup>

In 1990, the United States put forth final regulations pursuant to the Refugee Act in hopes of moving further away from the use of ideological and geographic criteria, and to insure fairer procedures in the determination of asylum claims. These regulations came about after years of studies supporting the theory that the adjudication of asylum claims mirrored U.S. foreign policy.<sup>7</sup>

The Refugee Act adopts the internationally recognized definition of refugee as an individual who has:

- 1) left his country of nationality; and
- 2) has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . . .<sup>8</sup>

1. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter Geneva Convention].

2. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

3. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.) [hereinafter Refugee Act].

4. *Id.*

5. 8 U.S.C. § 1153(a)(7) (1978), *repealed by* Immigration and Nationality Act, § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1980); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 433 (1987).

6. *See* 8 C.F.R. § 208.13 (1995); *see also* Sarah Ignatius, *Restricting the Rights of Asylum Seekers: The New Legislative and Administrative Proposals*, 7 HARV. HUM. RTS. J. 225, 228-29 (1994).

7. Ignatius, *supra* note 7, at 228-29.

8. Geneva Convention, *supra* note 1, 19 U.S.T. at 6261, 189 U.N.T.S. at 152.

To qualify as a refugee, an applicant must be outside his country of origin and fall under one of the five "criteria" that define a refugee.<sup>9</sup> Furthermore, an alien must show a "well-founded fear of persecution" to be eligible for asylum as a refugee under 8 U.S.C. Section 1558(a). The Supreme Court has held that a refugee meets the "well-founded fear" standard if there is a "reasonable" possibility of actually being persecuted.<sup>10</sup> The threshold for this standard is not very high since the possibility of persecution may be as low as ten percent to satisfy the burden of a well-founded fear.<sup>11</sup>

Even if an applicant fits the legal definition of a refugee,<sup>12</sup> the Attorney General ultimately exercises discretion in granting asylum. Federal law states:

[T]he Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien *may be granted* asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1401(a)(42)(A) of this title.<sup>13</sup>

Note that the Attorney General is not required to grant asylum to *every individual* who fits within the category of refugee. Once an applicant meets this initial burden and qualifies as a refugee, he or she must still overcome the Attorney General's "discretionary hurdle."<sup>14</sup>

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9. 8 U.S.C. § 1101(a)(42)(A) (1994); *see also* Matter of T—, [Int. Dec. #3187 (BIA 1992)] (stating that asylum is not available on account of human rights abuses unconnected to the grounds enumerated in the INA—race, religion, nationality, membership of a particular social group, or political opinion).

10. Ignatius, *supra* note 6, at 227 (discussing implications of INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)).

11. *Id.*

12. *Cardoza-Fonseca*, 480 U.S. at 450.

13. 8 U.S.C. § 1158(a) (1994) (emphasis added).

14. *See* 8 C.F.R. § 208.14(e) (1995).

### *B. Firm Resettlement*

Under current U.S. law, the Attorney General's discretion is much narrower than in the past. Past asylum laws gave the Attorney General discretion in granting asylum if the applicant was "*firmly resettled*."<sup>15</sup> In *Matter of Soleimani*,<sup>16</sup> the court held that a finding by the Attorney General that an alien was firmly resettled in another country did not render the alien ineligible for asylum under Section 208 of the Immigration and Nationality Act.<sup>17</sup> Instead, firm resettlement was merely one factor to be considered in determining whether asylum should be granted.<sup>18</sup>

In contrast, under current U.S. law, a finding of firm resettlement requires a mandatory denial of asylum.<sup>19</sup> The only way to avoid this "status" is to establish one of two circumstances as true. First, a refugee can maintain eligibility if he or she shows that entry into a country of first asylum was necessary in his or her flight from persecution. The refugee must also demonstrate that the stay in that country was for only as long as necessary to arrange further travel and that no significant ties to that country were established. Second, the presumption of firm resettlement can be overcome by proving that the conditions in that country were so "substantially and consciously restricted" by the local authorities that they did not really constitute resettlement.<sup>20</sup>

### *C. Safe Country Status and Fraudulent Documentation*

Safe country status and fraudulent documentation are discretionary factors that the Attorney General weighs in evaluating an application for asylum. First, the Attorney General exercises discretion over the denial of the application of an alien who can be returned to some other country which he has travelled through en route to the United States if return to that country

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15. 8 C.F.R. § 208.15 (1995) (stating that an "alien is considered to be firmly resettled if, prior to arrival in the United States, he entered into another nation with, or while in that nation received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement . . . .")

16. *Matter of Soleimani*, [Int. Dec. #3118 (BIA 1989)].

17. 8 U.S.C. § 1158(a) (1994).

18. *Matter of Pula*, 19 I. & N. Dec. 467, 473-74 (1987).

19. 8 C.F.R. § 208.14(5)(d)(2) (1995). An applicant will be denied asylum if he or she has been "firmly resettled." *Id.*

20. 8 C.F.R. § 208.15(b) (1995).

would not cause the alien to be harmed or persecuted.<sup>21</sup> Moreover, Section 208 requires that any alien returned must have access to full and fair procedures in the determination of his asylum claim.<sup>22</sup> For example, suppose an asylum seeker travels to the United States from a country of persecution and his plane has an intermediate stop in Canada. Immediately upon arriving in Canada, he travels by land to the United States. Upon attempting to enter the United States, he could be sent back to Canada at the Attorney General's discretion.

The Department of Justice recently enacted a final rule that gives the Attorney General the discretion to deny asylum to asylum seekers who travel through a "safe country" on their way to the United States.<sup>23</sup> It provides that an asylum applicant:

Who is otherwise eligible may be denied asylum in the discretion of the Attorney General if the applicant can and will be deported or returned to a country in which the applicant would not face harm or persecution and would have access to a full and fair asylum procedure, in accordance with bilateral or multilateral arrangements with the United States governing such matters.<sup>24</sup>

Several comments address the potential impact of this rule.<sup>25</sup> Comments in support of the rule express a desire to prevent "forum shopping" and to encourage asylum seekers to seek refuge in the first "safe country" they enter.<sup>26</sup> Critics of the rule argue that refugees have a right to seek protection in the country of their choice.<sup>27</sup> Moreover, a policy of firm resettlement adequately protects the United States against the consequences of "forum shopping."

Some commentary indicates that the rule would benefit the United States, providing that a treaty or some other type of formal agreement sets out which countries are "safe."<sup>28</sup> Perhaps the determination should be based upon the following considerations. First, a country should be a signatory to the 1967

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21. 8 U.S.C. § 1253(h) (1994). This section, providing that the United States cannot return an alien to a country where his or her life or freedom would be threatened as a result of one of the listed reasons, was adopted from Article 33.1 of the Geneva Convention. Geneva Convention, *supra* note 1, 19 U.S.T. at 6225, 189 U.N.T.S. at 174.

22. 8 C.F.R. § 208.14(e) (1995).

23. 59 Fed. Reg. 62,284, 62,295 (1994) (to be codified at 8 C.F.R. § 208.14 (e)).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

Protocol. Second, the asylum seeker must not face harm or persecution in the safe country. Third, the asylum seeker must have access to full and fair procedures for the determination of his or her claim.<sup>29</sup> Other comments suggest that the United States conduct a careful review to determine those countries that grant procedural and legal safeguards similar to those granted to asylum seekers by the United States.<sup>30</sup>

After consideration of these comments, the Department of Justice stated that the discretionary authority granted by the rule depended upon the existence of bilateral or multilateral agreements with other nations. The government further found that since no such agreements existed, discretionary authority granted under the rule could not be exercised at that time.<sup>31</sup> Before the rule would be implemented, notice to the public would be given.<sup>32</sup> Despite the United States' denial, such a bilateral agreement does exist between the United States and Mexico.<sup>33</sup>

Second, the Attorney General exercises discretion over an alien, in that one who possesses fraudulent documents may be excluded from the United States. *In Re Salim* held that an alien's "manner of entry" or "attempted entry" is a proper and relevant discretionary factor to look at in an asylum application.<sup>34</sup> It held that the circumvention of ordinary procedures alone is sufficient to require a most unusual showing of "countervailing inequities."<sup>35</sup>

This view seems overly restrictive. Although invalid documents can adversely affect an asylum seeker's application, they should not have the effect of denying relief in virtually every case. Thus, as the Bureau of Immigration Appeals has noted in a more recent case, the Attorney General should consider other factors, such as the circumstances surrounding the use of fraudulent documentation in the flight from a country of persecution.<sup>36</sup> As a result, an alien who does not comply with ordinary procedures will not automatically be precluded from obtaining asylum.<sup>37</sup>

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. See BILL FRELICK, RUNNING THE GAUNTLET: THE CENTRAL AMERICAN JOURNEY THROUGH MEXICO (1991).

34. *Matter of Salim*, 18 I. & N. Dec. 311 (1982).

35. *Id.*

36. *Matter of Pula*, *supra* note 18.

37. 8 U.S.C.S. § 1158(5) (Law. Co-op. 1994 & Supp. 1995).

Nonetheless, an alien must show sufficient countervailing inequities to justify receiving asylum. Moreover, the United States tries to deter airline carriers from transporting aliens to the United States without fully investigating for proper documentation. Under U.S. law it is "unlawful for any person, including any transportation company . . . to bring into the United States from any place outside thereof (other than from foreign contiguous territory) any alien who does not have a valid passport and an unexpired visa . . . ."38 The penalty imposed upon the carrier is a fine of \$3,000 for each fraudulent applicant on board.<sup>39</sup>

#### *D. Due Process Concerns*

U.S. immigration law further divides aliens into two categories: deportable and excludable. Deportable aliens are those who have entered the United States and are present in violation of immigration law.<sup>40</sup> The main difference between a deportable and an excludable alien is the procedural rights which the United States must give the alien. The Supreme Court has long held that a deportable alien gets due process rights regardless of whether entry was legal or illegal.<sup>41</sup> Hence, an alien can be deported only after receiving those protections afforded under the U.S. Constitution.

In contrast, excludable aliens are those deemed to have not really entered the United States or who are apprehended at its border. Even though some of the aliens that fit into this category may be physically within the United States, the law treats them as if they are not in the country.<sup>42</sup> This group of aliens only receives certain statutory protections.<sup>43</sup>

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38. 8 U.S.C. § 1323(a) (1994).

39. 8 U.S.C. § 1323(b) (1994).

40. 8 U.S.C. § 1101(a)(13) (1994). This statutory provision defines "entry" as "any coming of an alien into the United States from a foreign port or place . . ." *Id.* However, courts have interpreted this to mean that an alien has formally entered the United States if he is free from official restraint and has evaded examination or inspection at the border. *See United States v. Oscar*, 496 F.2d 492, 493-94 (9th Cir. 1974).

41. *See Yamataya v. Fisher*, 189 U.S. 86 (1903).

42. *See supra* note 40.

43. *See Augustin v. Sava*, 735 F.2d 32, 36 (2d Cir. 1984).

## II. PROPOSALS TO REFORM CURRENT U.S. LAW

Following the worldwide trend to reduce the number of asylum applications, the United States has been negotiating with Canada and Mexico to put forth several legislative proposals to exclude many refugees from asylum.

### A. *Bilateral International Treaty Reforms*

The United States has been attempting to negotiate a reciprocal agreement with Canada for the return of asylum applicants who have passed through one country on the way to the other. Hence, if a refugee on his way to North America reached Canada first and then travelled to the U.S. border to ask for asylum, the United States could return the refugee to Canada because he set foot in Canada first.<sup>44</sup>

On the southern border, the United States is working with the Mexican government to establish a similar program in which the Mexican government apprehends and deports Central Americans trying to reach the U.S. border via Mexico. This plan has been criticized on several grounds. First, it reinforces the United States' theory that it owes nothing to refugees who have not reached its border.<sup>45</sup> Thus, if the Mexican authorities catch refugees before they can make it to the U.S. border, the United States has that many fewer applications to consider. Second, this plan has been attacked because Mexico is not a party to the Geneva Convention or the Protocol.<sup>46</sup>

In an effort to help alleviate the United States' concerns about third-country nationals, Mexican authorities have taken steps to deter Central Americans from entering the United States.<sup>47</sup> Ever since Carlos Salinas de Gortari began his tenure as President in 1989, the Mexican Directorate of Migration Services (*de Servicios Migratorios*) has pursued much more "aggressive" deportation policies.<sup>48</sup>

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44. See Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503, 504 (1993). Moreover, Canada has recently amended its asylum laws for the return of aliens to the United States.

45. See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S.Ct. 2549, 2562-63 (1993).

46. See Neuman, *supra* note 44, at 505.

47. See FRELICK, *supra* note 33, at 1. Mexico does nothing to stop Mexicans from coming into the United States because of the numerous economic benefits it derives from illegal migrations into the United States. *Id.*

48. *Id.*

Over approximately the past ten years, a "human chain" has been established in the Western Hemisphere. Every year, hundreds of thousands of Central Americans, fleeing poverty, war, and persecution, travel through Central America and Mexico in an effort to reach the United States border and apply for asylum.<sup>49</sup> With the enactment of the Immigration and Reform Control Act (IRCA) of 1986, the Immigration and Naturalization Service (INS) has tried to stop this migration pattern. In early 1989, the INS announced "Operation Hold the Line"—a plan to reduce Central American migration into the United States. Part of this plan involved negotiations with Mexican authorities to assist the United States in stopping Central Americans before they reached the United States border.<sup>50</sup>

Although the United States relies on Mexico to control the number of aliens who reach the U.S.-Mexico border, Mexico's procedures for asylum applications differ tremendously. Mexico has no adjudicatory process for the Central American aliens it interdicts. For example, in the first portion of 1990, over 80,000 undocumented aliens were apprehended in Mexico. With a few minor exceptions, all were deported back to Guatemala without receiving administrative or judicial hearings.<sup>51</sup> Moreover, Mexico does not return the aliens back to their native land. "Every day, Mexican officials take hundreds of people—Salvadorans, Nicaraguans, Hondurans, Guatemalans, and others—to the border and dump them into Guatemala without any hint of a process to determine if they might fear persecution in that or some other country."<sup>52</sup>

These actions violate Mexico's General Population Law. Article 42, Section VI states that "[r]efugees may not be returned to their countries of origin nor sent to any other, where their life, liberty, or security would be threatened."<sup>53</sup> Nonetheless, Central Americans have been treated with cruelty by Mexican officials. Among the abuses cited are "murder, gang rape, aggravated assault, kidnapping, extortion, and robbery."<sup>54</sup>

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49. *Id.* at 1-2.

50. *Id.* at 2.

51. *Id.* at 7.

52. *Id.*

53. *Ley General de Poblacion*, art. 42 (amended July 17, 1990).

54. FRELICK, *supra* note 33 at 13 (citing ELLEN L. LUTZ, *HUMAN RIGHTS IN MEXICO: A POLICY OF IMPUNITY* 4, 19-28 (1990)).

*B. Domestic Legislative Proposals for Reform*

Besides the U.S.-Canada-Mexico asylum treaties, several bills have been proposed in Congress which would seriously undermine current asylum procedures. The Expedited Exclusion and Alien Smuggling Enhanced Penalties Act of 1993 sought to amend the Immigration and Nationalities Act to exclude an alien who:

- 1) uses or attempts to use a fraudulent document to enter the United States, or to board a common carrier for such purpose; or
- 2) uses a document to board a common carrier and then fails to present such document to an immigration official upon arrival at a U.S. port of entry.<sup>55</sup>

Under this proposal, the only way an alien can avoid deportation for false documentation is to convince an immigration officer that such actions were necessary to depart from a country where the alien had a "credible fear of persecution or of return to persecution."<sup>56</sup> An alien who cannot overcome this initial burden has no recourse. A finding of entry without valid documentation or proof of cause allows for port of entry exclusion and deportation without administrative or judicial appeal.<sup>57</sup>

Also, Congressman Mazzoli (D-KY) introduced the Immigration Enforcement and Asylum Reform Act of 1993,<sup>58</sup> which purports to amend the Immigration and Nationality Act to provide procedures for the expedited exclusion of aliens who arrive without proper documentation.

The most recent bill regarding this issue, introduced on January 5, 1995, is the Immigration and Accountability Act of 1995.<sup>59</sup> This act alters the Immigration and Nationality Act by requiring the Attorney General to deny asylum if the alien cannot establish that it is more probable than not that the government of the country in which the alien last resided before coming to the United States would persecute the alien on account of the alien's race, religion,

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55. H.R. 2836, 103d Cong., 1st Sess. (1993).

56. *Id.*

57. *Id.* The only exception is a limited petition of habeas corpus. *Id.*

58. H.R. 2602, 103d Cong., 1st Sess. (1993).

59. H.R. 375, 104th Cong., 1st Sess. (1995).

nationality, or political opinion. If the alien cannot meet this burden, he is returned to his former residence, facing the possibility of persecution.<sup>60</sup>

This bill also amends Section 212(a)(6) of the Immigration and Nationality Act by adding a "section G," which states that an alien who seeks to enter the United States or to board a common carrier for the purpose of coming to the United States is excludable if found presenting fraudulent documents. However, if the officer determines that there is an absence of credible fear, the officer *must* declare the alien excluded, without further hearing or review.

These various bills attempt to curb the right to asylum by excluding, without judicial or administrative review, an alien who comes to the United States with fraudulent documentation, if that alien cannot show that this was a necessary consequence of leaving the country of persecution. Also, these bills try to amend current law so that aliens can be returned to a country where they will not face persecution. Thus, aliens may be returned to countries which they merely traveled through as they tried to make their way to the United States. These U.S. reforms mirror current EC law which excludes aliens if they have travelled through a "safe" third country.

### III. CURRENT EUROPEAN COMMUNITY LAW

As the European Community integrates, it continues its attempt to eliminate internal border controls among member states. The 1957 Treaty of Rome<sup>61</sup> laid the basic foundational provisions for freedom of movement within the EC. The treaty's provisions for freedom of movement for workers within the Community were extended to all EC citizens under the 1986 Single European Act<sup>62</sup> and the Maastricht Treaty.<sup>63</sup> The elimination of internal border controls has made it possible, especially in light of the Dublin and Schengen Agreements (discussed below), to assess an application for asylum one time, and one time only.<sup>64</sup>

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60. *Id.*

61. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

62. Single European Act, 1987 O.J. (L 169) 1.

63. Treaty on European Union, 1992 O.J. (C 191) 1.

64. Convention Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, June 19, 1990, 30 I.L.M. 84 [hereinafter Schengen]; Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 427 [hereinafter Dublin].

The EC states have also been negotiating the Dublin and Schengen Agreements. The Schengen Agreement tries to abolish border controls along the common frontiers of the parties and to shore up border controls at external frontiers and airports by coordinating migration and law enforcement policies.<sup>65</sup> The purpose behind this is to further integrate the EC territory, which has been nicknamed "Schengenland."<sup>66</sup>

Both the Dublin and Schengen Agreements address responsibility for asylum processing; each agreement providing that only one state is responsible for processing an application, thereby attempting to end the problem of "refugees in orbit." Thus, an applicant would be allowed to apply for asylum only one time, in one member state. If the refugee applies for asylum subsequently in another member state, that state can legitimately return the asylum seeker to the responsible state. Under these agreements, rules have been developed for determining the "responsible state" for an asylum applicant. The responsible state is the state that processes the alien's<sup>67</sup> application on behalf of the entire EC.

Wealthier member states justify these agreements on several grounds. First, the Geneva Convention and Protocol only prohibit the return of a refugee to a country where the life or freedom of that refugee would be threatened.<sup>68</sup> It does not, however, prohibit the return of refugees to countries where they would be safe.<sup>69</sup> Second, the more affluent EC states argue that refugees can be legitimately returned to the responsible state; although refugees have a right to asylum, they do not have a right to choose the country in which they will receive this asylum.<sup>70</sup>

Because most of the member states are linked to one another by common borders, the outer states, such as Germany, may logically assume the burden of asylum applications since many asylum seekers travel by land. Therefore, the European Community places the burden of screening applicants for fraudulent documentation upon the responsible state. In the process of integration, the EC has imposed stringent external border controls. Outer states must screen the applicant and decide whether to allow the applicant into

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65. Schengen, *supra* note 64.

66. Neuman, *supra* note 44, at 506-07.

67. Both agreements define an alien as a person who is not a national of any member state of the European Community. Schengen, *supra* note 64, at 85; Dublin, *supra* note 64, at 430.

68. Neuman, *supra* note 44, at 505.

69. *Id.* at 503; Geneva Convention, *supra* note 1, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

70. Neuman, *supra* note 44, at 505.

the European Community. If the refugee is refused and applies in another state, that state can legitimately send the applicant back to the responsible state.<sup>71</sup> The EC has also placed stricter controls upon asylum seekers entering the EC by air. Any airline carrier that brings a refugee into the EC with fraudulent documentation faces severe fines.<sup>72</sup>

As a result of the burden placed on the outer EC states, many member states have devised administrative loopholes to escape this burden. Germany serves as an excellent example of this trend, as it lies at the eastern border of the EC, with Poland and Czechoslovakia as its easterly neighbors. Faced with a tremendous number of applications from persons from Bulgaria, Romania, and the former Yugoslavia,<sup>73</sup> Germany sought a way to reduce the number of asylum seekers. Germany's solution was to pass a constitutional amendment to its liberal asylum laws.

Before Germany amended its constitution, it attracted more asylum seekers than any other EC state, largely because of its liberal asylum laws. Article 16(a) of the Constitution stated that "persons persecuted on political grounds shall enjoy the right to asylum."<sup>74</sup>

The amended Article 16a states:

1) Persons persecuted on political grounds shall enjoy the right of asylum.

2) Paragraph 1 may not be invoked by persons who enter from a member state of the European Communities or from a third country where the application of the Convention Relating to the Status of Refugees and the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] is guaranteed. Countries outside the European Communities to which sentence 1 applies shall be determined by law, subject to the approval by the Bundesrat. In such cases deportation measures may be carried out regardless of an appeal.

3) A law subject to the approval of the Bundesrat may determine the states whose legal situation, application of the law and general

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71. *Id.* at 508.

72. See *EC: Commission Plans For Refugees Mirror New British Bill*, GUARDIAN, Nov. 30, 1991.

73. Sam Blay & Andreas Zimmermann, *Recent Changes in German Refugee Law: A Critical Assessment*, 88 AM. J. INT. L. 361, 368 n.36 (1994).

74. *Id.* (citing 1993 BGBl. I. 1102).

political situation seem to ensure that there is no political persecution or inhuman or degrading treatment or punishment.

An alien originating in such a state will not be considered to be politically persecuted unless he produces reasons why he is politically persecuted contrary to the presumption of sentence 1.

4) In cases arising under paragraph 3, deportation measures will only be suspended by a court if there are serious doubts about the legality of the measure. This also applies to deportation measures in other manifestly unfounded cases. In that regard the scope of review can be limited and subsequent argument [verspatetes Vorbringen] disregarded. Details shall be prescribed by statute.

5) Paragraphs 1 to 4 are without prejudice to treaties between member states of the European communities or between member states and third states that make arrangements, with due regard to the obligations under the Convention Relating to the Status of Refugees and the Convention for the Protection of Human Rights and Fundamental Freedoms, whose application is guaranteed by the parties to these treaties, for the examination of applications for asylum, including the reciprocal recognition of asylum decisions.<sup>75</sup>

This amendment basically states four propositions. First, it maintains that persecuted individuals have a right to asylum. Second, individuals who come to Germany from a state that supports the notion of freedom from persecution will not be able to claim a right to asylum. Third, the German legislature, or Bunderstat, can draw up a list of countries which carry with them a rebuttable presumption of freedom from persecution.<sup>76</sup> Fourth, it recognizes the EC's asylum policy as set out by the Dublin and Schengen Agreements.<sup>77</sup>

Although the amendment still retains the right to asylum for those persecuted, it narrows the circumstances in which a refugee can successfully claim this right. The plight of the refugee trying to get into Germany is particularly acute if it is taken into account that all of Germany's neighbors are considered secure states under the constitutional amendment. Germany's new position is also problematic because it recognizes Poland and Czechoslovakia as "safe" countries. Most asylum seekers from Romania, Bulgaria, and the

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75. *Id.* at 363 (citing 1993 BGB1. I 1102).

76. The list of states are Austria, Czechoslovakia, Finland, Norway, Sweden, Poland, and Switzerland. *Id.* at 363.

77. *Id.* at 364.

former Yugoslavia seek asylum in Germany by travelling through either Czechoslovakia or Poland.<sup>78</sup> Unfortunately, these receiving countries may not be very "safe;" both Poland and Czechoslovakia lack the resources to properly act as a state of first refuge and handle the burden of adjudicating the massive number of applications.<sup>79</sup> Germany's inclusion of Czechoslovakia and Poland on the list of secure states raises some serious problems.

To be included on the German Legislature's list of safe states, a state must comply with the Refugee Convention and uphold the beliefs set forth in the European Convention on Human Rights.<sup>80</sup> The state must demonstrate that it strictly complies with the Geneva Convention's requirement of non-refoulement. These states must also give asylum seekers appropriate due process procedures in evaluating applications and have some sort of consistent process for adjudicating asylum applications. Given the current situation in Poland and Czechoslovakia, Germany's treatment of them as safe countries may well result in countless refugees unable to find a truly safe place to live.

#### IV. ANALYSIS

Having signed and adopted the 1967 Protocol into U.S. law, the United States recognizes its international obligation to refugees. The Preamble of the Geneva Convention and Protocol states that signatories "affirm[ed] the principle that human beings shall enjoy fundamental rights and freedoms without discrimination . . . [and] manifest [their] profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms . . . ."<sup>81</sup> Member states assist refugees in securing these freedoms through various means, such as providing asylum.

The end of the Cold War served as a catalyst for the demise of communism, creating a tremendous influx of aliens seeking asylum throughout the world. In response to this global change, the United States has had to re-evaluate its asylum procedures by devising ways to administratively limit the number of applications it considers. One way of achieving this end is to follow the European Community trend and automatically deny a request for asylum from any alien who has travelled through a safe third-country en route

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78. *Id.* at 371.

79. *Id.* at 371-72.

80. *Id.* at 365.

81. Geneva Convention, *supra* note 1, 19 U.S.T. at 6260, 189 U.N.T.S. at 150.

to the United States.<sup>82</sup> The United States, like the EC, is seeking ways to strengthen its sanctions against aliens who come to the country with fraudulent documentation.<sup>83</sup>

If the United States incorporates the “safe haven” doctrine into U.S. law, it will require a mandatory denial of asylum applications for those aliens who merely travel through a safe third country on their way to the United States. Current U.S. law only requires an automatic denial for “firm resettlement.” in a safe country. Although the United States may have discovered an “administrative loophole,” which would allow it to reduce the number of applications it must consider, it should still consider the plight of the refugee seeking asylum in the United States. Failure to do so only makes their bleak situation even worse.

The “firm resettlement” doctrine clearly treats refugees more favorably, evaluating their claims with more logical criteria. Firm resettlement requires that an individual has received “an offer of permanent residence status, citizenship, or some other type of permanent resettlement . . . .”<sup>84</sup>

Thus, the United States does not need to consider that application because the refugee’s fundamental rights and freedoms are protected in a very concrete way. Under laws which only require a mandatory denial in instances of firm resettlement, the United States retains a certain amount of flexibility with regard to its asylum procedures. The only situation requiring the United States to refuse a third-country asylum seeker will occur when the applicant has already established a “home” of some sort in another country. The willingness of that country to provide firm resettlement is probably an indication that the alien’s fundamental rights will be adequately protected. If, however, the applicant feels that he does not have this sort of secure residence,

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82. 8 C.F.R. § 208.14(e) (1995). The United States will also retain its current requirement of a mandatory denial of asylum to any firmly resettled individual. 8 C.F.R. § 208.15 (1995).

83. H.R. 375, *supra* note 59. Under article 31.1 of the Geneva Convention and Protocol, a member state “shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” Geneva Convention, *supra* note 1, 19 U.S.T. at 6275, 189 U.N.T.S. at 174. Although the blanket prohibition of asylum seekers with fraudulent documentation would violate the Geneva Convention and Protocol, the United States and European Community may legitimately refuse entry to aliens who come with fraudulent documentation, and do not present themselves and show a credible fear of persecution. Notice that article 31.1 uses the language “directly from a territory where their life or freedom was threatened . . . .” Hence, it seems plausible that an alien who comes to a country of asylum via a safe third country does not receive this protection. However, the question remains: what does “directly from” mean?

84. 8 C.F.R. § 208.15 (1995).

he may still receive asylum in the United States upon demonstration that his stay in the third-country lasted only as long as necessary to make further travel arrangements, or if it is shown to be a lack of true resettlement because the conditions in the country restricted the rights and freedoms of the alien significantly. Upon such a showing, the United States will further evaluate the application.

Adoption of a safe haven policy forces the United States to rely upon artificial criteria, such as geography and a particular refugee's travel route. Incorporating the safe haven doctrine into U.S. law pushes the United States in a direction that is worse than the previous method of adjudicating asylum applications based upon geography. At least under the prior system, which gave positive benefits to those of communist and Middle Eastern countries, geography could come to the aid of an applicant.

Under the safe haven criteria, the United States would use geography to shift some of its international obligations upon other countries. Ultimately, which countries bear the burden of resettlement is determined by the location of the persecutor and by the accidents of the refugee's mode of departure. Adopting the safe haven strategy tells asylum seekers that they must jump through certain administrative hoops to have their application evaluated by the United States.

Currently, refugees can flee their country of persecution by whatever means of travel are readily available to them. Often, refugees must flee quickly and do not have the "luxury" of mapping out their travel route in a careful manner. Under the safe haven doctrine, however, refugees seeking asylum in the United States would be forced to consider their travel plans more closely. To insure that their applications would not be denied automatically, aliens would not be permitted to travel through another safe country on their way to the United States. Instead, a refugee would be required to come directly to the United States. Those unable to adequately conform their travel plans would be simply out of luck in the United States.

In addition to the burden on refugees, the safe haven doctrine will elevate untested generalizations over demonstrated protection. This is best illustrated by considering the application of the safe haven doctrine in the European Community, particularly Germany. In an effort to reduce the number of applications it must receive as an easterly member state of the European Community, the German legislature has created a list of "safe" states. Countries such as Poland and Czechoslovakia are included on this list even though these countries lack the experience and resources to assure that genuine

refugees are not sent back to their country of persecution. Having devised a plan to preclude numbers of applicants, Germany has effectively denied asylum to refugees from some of the world's most notorious persecutors.

Undoubtedly, the safe haven doctrine would allow the United States to effectively deny asylum to thousands of applicants, even though there is ample evidence (as has been demonstrated earlier in this paper) that Mexico does not afford even minimally adequate protections to the rights of refugees. This result is well illustrated by the plight of the Central Americans. The United States, the wealthiest nation in the world, would effectively deny asylum to thousands of refugees within the same hemisphere. Central Americans seeking refuge often travel by land, attempting to reach the Mexico-United States border. In light of the United States' negotiations with Mexico for the return of Central American refugees, the United States seems to be recognizing Mexico as a safe country, even though Mexico is neither a member of the Geneva Convention nor Protocol, and its refugee policies have been vehemently criticized. If Mexico becomes a responsible state, thousands of Central Americans turned away by the United States will probably encounter either cruel persecution, or mistreatment by Mexican authorities. Thus, Central Americans, faced with living in a country of persecution or mistreatment by Mexican officials, must fight a losing battle.

## V. CONCLUSION

Current U.S. law requires a mandatory denial of an asylum application if that applicant is firmly resettled in another country. Discretionary factors to be considered are transit through a safe country and fraudulent documentation. However, there is movement to amend the law and require an automatic denial when an applicant has travelled to the United States through a "safe" country. If adopted, this new law will closely mirror the law of the European Community.

A close look at the EC illustrates some of the problems with the safe haven doctrine. Because of their geographic location, the "outer" EC countries assume a tremendous burden in the evaluation of asylum applications. This burden results because a refugee travelling by land will first enter one of the outer states on his or her way into the European Community. However, many of the external EC states have devised ways to shift their burden of evaluating so many applications, such as negotiating with "unsafe" non-EC countries for assistance with the applications. As a result, applications are evaluated by

countries, such as Poland and Czechoslovakia, who lack the experience and resources to effectively evaluate applications.

The same result will undoubtedly occur in the Western Hemisphere if the United States adopts the safe haven doctrine. Under this doctrine, the United States will allow the Mexican government to apprehend refugees before they reach the United States border. As a result of this binational effort, many Central American refugees will face persecution in their native land or harsh treatment by the Mexican authorities.

