
NEW DIRECTIONS IN REFUGEE PROTECTION

COLLEEN V. THOUENZ

Since the 1980s, pressures have been mounting against the humanitarian principles that governed the international refugee protection regime established after World War II. Western receiving states are adopting highly restrictive measures to curtail and, to a large extent, restrict the future entry of refugees and asylum-seekers. Scholars and practitioners have been searching for a middle ground between the present trend towards exclusion and the precedent of relative openness. One solution is the concept of temporary protection status (TPS) which was introduced in a number of Western European states and in the United States in the 1980s. This study analyzes and compares the particular migration-related contexts of Germany and the United States, and the role TPS plays addressing the migration challenges that they face. While Germany and the United States have different approaches towards TPS, this concept faces numerous challenges in both states.

United States and Germany: States in Comparative Perspective

In recent years, Germany and the United States, for differing reasons, have both decided to formally extend TPS. Both countries share migration and refugee related concerns. The United States and Germany are target states for immigrants and refugees, exhibiting strong pull characteristics.¹ Both states have generous welfare systems that, as many have argued, attract migrants of all kinds, including refugees.² The pattern of refugee and migration flows in each country is influenced by its respective geopolitical and historical links. As regional hegemony in Europe and the Americas, Germany and the United States are often looked upon as countries of choice by refugees. Refugees and migrants from Eastern Europe and the former-Soviet Union tend to select

Colleen Thouez is a PhD candidate at The Fletcher School of Law and Diplomacy. She is pursuing field research in Brussels and Geneva. Her PhD thesis entitled "Theories of Cooperation for Migration-Related Matters within the European Union" will be completed next year. She has worked with several NGOs including the Open Society Institute's Forced Migration Projects in New York. She received her Master's Degree from McGill University.

Germany as their primary destination. This is due partly to the significant number of *Aussiedler*,³ but also to other historical, cultural and geographical ties which link Germany and these regions. Similarly, the United States' historical and geographical ties make it attractive to migrants from primary sending states and areas, such as Mexico, Central America, Vietnam and the Soviet Union.

Both Germany and the United States are continuing to exhibit parallel migration trends. In Germany growth has historically resembled levels of immigration proportional to those in the United States,⁴ although events such as

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the war in Yugoslavia led to exceptionally high numbers of refugees. Significant trends in migration policy include highly restrictive measures being implemented both at the national and inter-governmental levels, and the general recognition that temporary asylum in the past leads to permanent settlement in the future. As the prominent French scholar Patrick Weil argues, "when states admit someone on a temporary basis, they must consider that person as a permanent resident...because it is increasingly difficult to impose forced return."⁵

Despite the similarities between immigration challenges faced by the United States and Germany both countries address their refugee-related concerns differently. First, Germany is substantially smaller than the United States both in territorial size and population and is thus unable to admit large numbers of immigrants. It also had a much higher turn-over of migrants than the United States between 1954 and 1996. While in Germany, 26 million immigrants have been counterbalanced by 20 million emigrants, the U.S. emigration figure as a proportion of immigration is just 20 percent.⁶

Moreover, a new feature of citizenship in Germany is the notion of ethnoculture in which a homogeneous society is based on blood links, the so-called *jus sanguini*.⁷ For this reason Germany still refuses to consider itself a country of immigration, in marked contrast to the United States.⁸ This dichotomy in perceptions is reflected in the immigration practices of each country. In Germany naturalization is a discretionary act and the employment of undocumented aliens is virtually impossible. In the United States, until very recently, citizenship could be relatively easily acquired. The underground employment network in the United States, despite efforts to undermine it, is still widespread.

Moreover, Germany is at the center of a migration system that is being developed within the European Union. Its neighbors and fellow member-states are thus allies in the restrictive refugee and migration policies that are emerging. The resulting creation of a Fortress Europe has no parallel in the United States; its neighbors to the south are perceived as part of the migration problem rather than partners in preemptive and preventive efforts.

Refugees and Asylum in Germany

From the 1950s to the early 1970s, Germany engaged in bilateral guest worker agreements with sending countries in order to fill the labor shortages in its economy. Prior to such agreements, labor shortages were satisfied by migrants from nearby countries such as Italy and Yugoslavia.⁹

After the oil shock of 1973 to 1974, guest worker programs were terminated.¹⁰ The German government, however, found it difficult to remove migrant laborers from German soil. In order to stabilize the situation in the 1980s, Germany and other European nations engaged in active family reunification efforts which enabled the family members of guest workers to immigrate. This program increased immigration and the costs of social programs to settle the newcomers.

Once the phase of encouraging labor migration came to an end, Germany continued to face large numbers of persons requesting asylum from Communist regimes. Prior to the fall of the Soviet regime, Germany accepted the largest number of asylum-seekers of all Western European states. During the war in the former Yugoslavia, it harbored more Bosnian refugees than France, the United Kingdom and Belgium combined.¹¹ Indeed, in recent years, Germany has accepted more immigrants relative to its population than any other Western country. Because of its proximity to Eastern Europe, and certainly, since its reunification, Germany is often referred to as the gateway to the West.

In contrast, the 1990s marked the end of large-scale family reunification efforts, the beginning of a long-term commitment to the restriction of further entry, and the integration of those who already find themselves in Germany. Over the last decade, a shift in buffer zones has emerged, as states such as Poland, Hungary and the Czech Republic have begun to halt westbound migrants. This development reflects both changing political circumstances and a conscious effort on the part of Western European governments in general, and Germany in particular, to secure bilateral agreements with countries further to the east so that they will absorb migrants or, at the very least, control their passage to the west.

Because the concept of citizenship in Germany often results in the discretionary denial of asylum to settlers not of German origin, these migrants, accounting for 8.5 percent of the population, are becoming marginalized. With growing socioeconomic difficulties and rising unemployment, foreigners, especially minority group immigrants such as Muslims, are becoming the scapegoats of xenophobia. The large number of newcomers also produces incidents of social unrest, especially in former East Germany.¹²

The challenges posed by its foreign resident population are exacerbated by Germany's refusal to acknowledge its status as an immigration country. As Elmar Honekopp states:

It is obvious that at the very least, Germany needs to develop an immigration concept, thus acknowledging its status as a country of immigration. Discussion of such a concept would enable Germany

to more systematically address the consequences of immigration on different subsystems of society and to devise ways of controlling immigration which would recognize the need to accept certain groups of immigrants in the future.¹³

Criteria which must be met to be eligible for German citizenship include: permanent residence in Germany, integration or more precisely, cultural assimilation—not simply language competence but political and cultural orientation, a minimum of ten years residence in Germany, and discretionary determination as to whether naturalization of applicant would be beneficial for the public good.¹⁴

Some proposals for reform of German citizenship law suggest partial or total abandonment of *jus sanguinis*. They propose conditioning citizenship on acquisition rather than blood-links. Exceptions would be made to grant automatic citizenship for third generation immigrants born on German soil, who have at least one parent who was also born in Germany. The purpose of such a reform would be to bring the immigrant community into the fold of the German citizenry.¹⁵

Rather than more liberal-minded reforms, however, Germany in 1993 modified what had been Europe's most generous asylum laws to reduce the number of refugees seeking asylum. Public pressure and high unemployment levels are leading to changes in the law to deny asylum-seekers the right to work in Germany, for instance, while their claim is being processed. Other restrictive provisions include a safe third countries (STC) policy and the adoption of a list of safe countries. These provisions, discussed in the following section, have the effect of restricting asylum-seekers who come to Germany from neighboring countries or whose countries of origin have been deemed secure under German asylum law.¹⁶ A new fast-track procedure is being developed that will require the authorities to determine applications within 19 days and deport "promptly" upon denial.¹⁷ Germany has also focused on improving the conditions in sending countries so as to eliminate the flows of refugees and migrants from the outset.¹⁸ The tightening of restrictions led to a 60 percent decline in the number of refugees seeking political asylum in Germany between 1993 and 1994.¹⁹ In 1995, the successful asylum application rate was only 9 percent.²⁰

Refugees and Asylum in the United States

Unlike Germany, the United States is a country founded by immigrants. The history of citizenship laws in the United States dates back to the Civil War. Before that time, there had been only a few discriminatory laws, such as the Alien Sedition Act of 1798, aimed at deporting enemies of the state. While German citizenship can be automatically acquired only through blood links; automatic U.S. citizenship is conferred by *jus soli*—birth on American soil.²¹

After the large influx of European migrants between the 1870s and 1920s, immigration to the United States from countries such as Italy, Greece, Russia

and Poland was effectively halted. The Immigration Law of 1924, with its National Origins Clause permitted entry of 150,000 immigrants but required that the numbers for each country not exceed two percent of those already in the United States in 1890.

During the Cold War, immigration and refugee legislation became highly politicized, centering on refugees from the Soviet bloc. The Immigration and Nationality Act (INA) of 1952 established procedures which were used in a discriminating fashion to favor persons from hostile nations. It also provided the attorney general with the discretion to withhold deportation in cases where an alien would face physical persecution upon return to his or her home state.

In 1980 the Refugee Act was passed to provide a humanitarian interpretation of the definition of refugee consistent with that of the 1951 United Nations convention relating to the status of refugees. Actually, the 1980 Act "perpetuated the Cold War mentality that foreign policy considerations should control refugee determinations."²² It stipulated that only 50,000 refugees would be allowed entry into the United States per year, and provided the President with the power to admit additional refugees in extraordinary circumstances, which were often based on foreign policy considerations. The Foreign Operations Act of 1990 and the Immigration Act of 1990 continued the politicization of American refugee law. The Foreign Operations Act established a double standard such that Soviet Jews, Evangelical Christians, Ukrainian Catholics and selected Vietnamese, Cambodians and Laotians qualified as refugees if they could prove a "credible fear" of persecution as opposed to the more rigorous standard of "well-founded fear."²³ Similarly, the Immigration Act favored Polish, Hungarian, Panamanian and Nicaraguan individuals who were not to be repatriated due to the rapid democratic changes taking place in their respective countries, indicating a bias for individuals fleeing communist regimes.²⁴ One of the most obvious cases of preferential treatment was the United States refusal to admit any Salvadorans or Guatemalans during the late 1980s, while unconditionally admitting all Nicaraguans who sought asylum.²⁵

Similar to the family reunification efforts in Germany and Western Europe in the 1980s, the Immigration Act granted the largest number of allocations for relatives of U.S. citizens and permanent resident aliens.²⁶ While the family reunification phase in Germany bore similarities to the U.S. law, its striking difference was that most German residents being reunited with their families were not German citizens.

Another comparison can be made with respect to employer sanctions. The United States based its labor-related immigration policies on those developed

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in Germany and France a decade earlier.²⁷ In 1975 Germany imposed restrictions on employers hiring undocumented workers. In the United States, however, the expansive network of illegal employment was not challenged until the Immigration Reform and Control Act (IRCA) of 1986. IRCA barred employers from hiring illegal immigrants and threatened stiff penalties for those who did. It also provided amnesty in the form of permanent residency to undocumented aliens who could prove continuous residence in the United

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In 1995 during the implementation of the regulatory reform of the U.S. asylum process, a stipulation was made such that asylum applicants are now unable to work until 180 days after filing for asylum, which in most cases will be after the applicant has been interviewed.²⁹ As noted, a similar provision was added to the reforms of the German Asylum Law.

U.S. law also retains provisions similar to the German safe third country policy adopted in 1993. Asylum applicants who received permanent resettlement somewhere else would not be granted asylum in the U.S.³⁰ In the German case, however, the country of first asylum need not

be a country that granted asylum or resettlement, but can simply be the country of transit for the asylum-seeker. The individual would be returned to the country of transit in order for his or her claim to be adjudicated. This differs from the U.S. provision that refers to "permanent resettlement" such that an individual would have had his or her claim adjudicated and approved in the country of first asylum.

In the United States, as in Europe, there is a general desire to reduce refugee admissions for a number of reasons.³¹ First, notwithstanding the restrictive practices that are being adopted on both sides of the Atlantic and the clear difficulties in obtaining asylum, public perception remains strong that asylum is an easy vehicle for admission, and that too many asylum applicants are abusing the system.³² Second, particularly with respect to the United States, there is no longer a need to encourage emigration from the Soviet bloc. While 90,000 refugees were admitted in 1996, their number will be reduced to 83,000 for 1998.³³ As Mark Franken points out:

One gets the impression that in setting refugee admission levels for the next year and beyond, U.S. policymakers have determined that with the end of the Cold War and the winding down of the two major refugee programs (the former Soviet Union and Southeast Asia), refugee admissions should automatically drop. Consideration of other refugee groups...seems not to be high on anyone's

agenda...evidence of which is readily available...one of the most striking examples can be found in Africa, where there is only one U.S. refugee processing post for the entire continent.³⁴

This trend toward general tightening of U.S. entry requirements is clearly reflected in the Illegal Immigration Reform Act and the Illegal Responsibility Act of 1996. The Act includes controversial reforms, notably, the institution of a "credible fear" threshold that asylum-seekers must prove in order to have their application adjudicated. An individual would have to prove "credible fear" at the port of entry during an interview with an INS official thereby eliminating access to a court of law. If this threshold is not met, the person can be sent back to his or her country of origin, by a process known as "expedited exclusion."³⁵ This summary expulsion has raised similar concerns as those in Germany over STC. A U.S. bipartisan Commission on Immigration formed in 1996 stated its fear that a situation could develop such that if a "credible fear" of persecution could not be established, "[it] would result in sending people with legitimate claims back to repressive countries."³⁶ A category of offenses known as aggravated felonies, for which an intending immigrant may be excludable at the border, was first created in 1988 as part of the war on drugs and terrorism. This category was expanded under the 1996 immigration law to increase deportation of permanent residents for crimes now ranging from murder to petty theft to subway turn-style jumping.³⁷ Furthermore, foreign citizens entering the United States after September 30, 1996 without a visa were required to return to their home country to apply for one there. These reforms have been characterized as a massive crackdown on non-citizens in the United States where individuals who have resided in the United States for decades are deported for minor altercations with the law.

In recent months, however, the Clinton administration has taken steps to repeal some of the provisions implemented in the 1996 legislation. Among these changes is the exemption from deportation of thousands of refugees from civil wars in Central America whose status is irregular. In this case, the provision that would have obliged visa applicants to return to their home country to file applications has been suspended for thousands of illegal immigrants.³⁸

Refugee selection remains a consultative process between the White House and Congress. According to the former assistant secretary of the Bureau for Population, Migration and Refugees at the U.S. State Department, a number of criteria are considered ranging from U.S. domestic politics to whether the

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applicant is one of "interest" to the United States; family reunification efforts still play a role, though more limited.³⁹

Multilateral Restrictionism in Europe and America

In the last decade, the objectives of Western receiving states have converged.⁴⁰ Among these goals are restricting the number of newcomers, greater selection control over who is allowed to enter, integrating those already within the territory, and preempting future flows of refugees.⁴¹ These goals have translated into a system of "collective deterrence" within the European Union and to some extent, within the United States as well.⁴²

Within the EU, a number of agreements have been reached at the inter-governmental level that aim to restrict future entry of asylum-seekers and refugees. The Schengen Agreement of 1985 established a common prototype visa for EU-members.⁴³ The agreement seeks to eliminate borders within the EU by abolishing land frontier controls and checks at airports for flights between signatory states of the Schengen Convention. It also provides for the establishment of a common border police, judicial cooperation with respect to the adjudication of asylum claims, and a computerized information network for security-related matters.⁴⁴ A second agreement, the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (The Dublin Convention) of 1990 provides for the harmonization of asylum claims within the EU.⁴⁵ Once a claim has been adjudicated by one European Union signatory-state, the decision applies within the entire Union. With few exceptions, claims must be adjudicated by the country in which the asylum-seeker was first allowed entry, or by the state that issued a visa to that particular claimant.

The goals of both the Schengen and Dublin agreements incorporate the notion of a safe third country.⁴⁶ STC refers to transit countries through which asylum-claimants travel prior to entering the Schengen area. The STC provision requires that individuals return to the country of transit or the country of first asylum in order to make their claim. Thus, although the Dublin Convention stipulates that all asylum seekers are guaranteed to have their applications examined by one of the EU signatory states, STC makes it probable that a country outside the EU will adjudicate their claims. As Abell states, "...the continuous transfer of responsibility from one state to the next contravenes the Dublin Convention and the Geneva Convention."⁴⁷ STC is envisaged even in cases where a precedent of *refoulement*, i.e. forced return, has occurred once individuals are sent back to the country of transit.⁴⁸

Other agreements include The Convention on Crossing of External Borders of 1993, which remains unsigned. It addresses the admission to the Union's territory of citizens of non-European Union and non-European Free Trade Association (EFTA) member states. Readmission agreements also have been reached, notably that between the Schengen Group and Poland, which allows Polish citizens to enter the Schengen area visa-free in exchange for the understanding that Polish citizens will be sent back if required by the receiving

state and that all non-Polish citizens entering the Schengen area through Poland will be returned to have their claim adjudicated there.⁴⁹

A number of other provisions aimed at limiting the number of refugees and asylum-seekers have been adopted by Germany and other EU states, such as the notion of "safe country lists." Asylum-seekers originating in countries that are on a "safe country list," are sent back to their country of origin without adjudication of their claim.⁵⁰ In addition, airline carrier sanctions have been instituted to require that airlines that carry undocumented or improperly documented passengers be forced to absorb the costs of their return flight.

A second tier of decisionmaking after the intergovernmental level takes places within the Ad Hoc Group on Immigration (Ad Hoc Group), which drafts recommendations for approval by the ministers of immigration. While their resolutions do not have the same legal status as the intergovernmental agreements mentioned above, their conclusions are often incorporated by the ministers responsible for immigration.⁵¹

An intergovernmental exchange on asylum-related issues also includes consultation with the United States, Canada and Australia. These states have expressed interest in the initiatives set out by the Schengen Agreement, because the direct impact of heightened restriction throughout Europe has been the mounting number of asylum applications in these traditional countries of immigration.

In addition to these multilateral consultative agreements, the United States has endorsed its own forms of restrictionism, many of which are more rudimentary than those being developed throughout Europe. Proposed measures include: interdiction at sea, adjudicating claims at sea, building a wall along its Southern borders and talk of a precedent-breaking visa requirement for Canadians wanting to enter the United States.

Another trend on both sides of the Atlantic has been discussion regarding modifications to the definition of refugee. In Europe, many critics have argued that states are adopting a definition that is based on the lowest common denominator, for example specifying that the agent of persecution must be the government. In the United States, suggestions have also been made to restrict the definition of "refugee," although in recent court cases a more liberal interpretation has been adopted. As in the case of Fauziya Kasinga, where limited instances of female genital mutilation were considered adequate basis for asylum.⁵²

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TPS: the Debate in Germany

When the civil war broke out in Yugoslavia in 1991, the German government recognized the break-away states of Croatia and Slovenia before a deci-

sion had been made at the European level. Some argue that Germany's premature reaction was one of the reasons why other European states refused to "share the burden" of the refugees with Germany.⁵³ As previously stated, Germany absorbed approximately 350,000 Bosnian refugees out of 380,000 who made their way to Western Europe.⁵⁴ The German government, faced with the largest influx of asylum-seekers in its history, was able to secure public support for the acceptance of the refugees based on a provision referred to as "temporary protection status"(TPS). The heightened restrictionism that had already begun to characterize the asylum system throughout Europe in the 1980s was appeased by this humanitarian appeal for what would be a temporary refuge due to extraordinary circumstances.

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After the conclusion of the Dayton Peace Accords in 1995, which contained provisions for the repatriation of refugees, the German government prepared to return Bosnian refugees. The TPS provision expired in March 1996, and the German government planned to begin its repatriation effort in October 1996. Agreements reached with the Bosnia-Herzegovina authorities the previous year had outlined the return of one-third of the refugees by the end of 1996.⁵⁵ Two phases were envisaged: the first for single people, childless couples and individuals with criminal records to begin in October 1996, and the second phase scheduled for May 1997 was to include refugee families. Faced with growing opposition from international organizations and advocacy groups, the German government only repatriated 30,000 refugees who protested their return in addition to the 30,000 who had voluntarily returned home by June 1997.⁵⁶ In addition to the repatriation delay, other concessions were made, including the agreement not to send back 150,000 Bosnian refugees to areas that were under Serbian control, even though the refugees' TPS had expired.⁵⁷

Nevertheless, the repatriation effort continued to meet great opposition by refugee advocacy groups and international organizations, notably the United Nations High Commissioner for Refugees (UNHCR), which supervises such efforts. In October 1996, during the planning of the return, the United Nations high commissioner, Sadako Ogata, repeatedly urged that the time had not come to end TPS for the Bosnian refugees:

As conditions in Bosnia improve further, the time will come for the lifting of temporary protection...In the meantime, those unable to return to their home areas should not be pushed back as long as they will not have a decent roof over their head and a decent alter-

native solution in sight...The voluntary nature of repatriation is increasingly being undermined by a mounting number of forcible returns.⁵⁸

The UNHCR's representative in Bonn also argued that repatriation would not be voluntary if the refugees were sent back at that time.⁵⁹ By contrast, the German central government and ministers from the regional states argued that the civil war in Bosnia had ended, that provisions had been made for the repatriation of the refugees through the Dayton Accords, and that Bosnians should return to their country to contribute to its rebuilding as the Germans had been forced to do after World War II.⁶⁰ German representatives argued that TPS had been presented to the German people as a special provision. "Civil war refugees can only be taken in for a limited time...this provision [TPS] cannot be a hidden form of immigration," stated Interior Minister Manfred Kanther in May 1996.⁶¹ German Foreign Minister Klaus Kinkel suggested that the use of TPS in the future would depend on how the conclusion of the Bosnian case was handled. The readiness of the German citizens to take in war refugees in the future also depends on their awareness that those refugees will eventually return home.⁶²

TPS in the United States

The history of the temporary protection concept in the United States dates back to the INA of 1952, under which protection would be granted "for emergent reasons or for reasons deemed strictly in the public interest." During the Cold War, the executive branch used this authority to temporarily accept persons fleeing Communist countries.⁶³

Continuing the practice of Extended Voluntary Departure, TPS was formalized in the Immigration Act of 1990. Its purpose was explicit: to provide protection to aliens who should not be returned to situations of armed conflict or natural disaster. Unlike the German TPS, it applies solely to individuals who are already within the United States. Similar to the parole authority granted to the attorney general, the TPS provision under the 1990 act stipulates that an individual may jeopardize his or her status if he or she is likely to become a public charge.⁶⁴

In the 1980s, Central American refugees residing in the United States were extended TPS. Most of these individuals still remain in the United States, and the Congressional decision on November 12, 1997 granted many of them and all Nicaraguans automatic permanent residency.⁶⁵ Echoing the fears of German authorities today regarding the repatriation of Bosnian refugees, many critics see the permanency of TPS in the United States as its greatest weakness. As Michael S. Teitelbaum states, "Providing temporary refuge requires the willingness and capacity to terminate temporary status once the circumstances in the home country improve."⁶⁶ He argues that non-compliance with the temporary nature of TPS is being encouraged by interest groups and by what he refers to as the exceptionally litigious and slow-paced American legal

system.⁶⁷ It is true that representatives from refugee advocacy groups, such as the Lawyers Committee for Human Rights, have suggested that TPS must not be replaced by other measures such as sending financial assistance to the sending country. As Arthur C. Helton, director of the Forced Migration Projects at the Open Society Institute, suggests, many do perceive TPS as a permanent solution: "[The] Administration has been stingy with such measures [TPS] because the notion is that it's less expensive to protect people in the region than to provide *resettlement*."⁶⁸ (*italics added*)

Teitelbaum argues that TPS is a backdoor to permanent residence. The lengthy judicial process has become much more expedient. It is interesting to note that in the most recent example of leniency toward TPS recipients, conservatives in Congress eased the deportation orders called for by the 1996 legislation.

New Direction for International Refugee Protection?

Although Germany and the United States both employ TPS, their usage of this provision differs considerably. Germany has employed TPS for the admission of refugees in cases of select humanitarian emergencies. Because of the general restrictionism towards refugees and asylum-seekers throughout Europe and in Germany, TPS has been monitored so that it does in fact remain temporary. Nevertheless, the German government has faced mounting pressure to respect the international principles of *non-refoulement* and to not involuntarily repatriate Bosnian refugees.

In the United States, the context for the introduction of TPS is quite different. First and foremost, it does not represent a humanitarian instrument through which more refugees may be admitted expeditiously in cases of unexpected crises. The decision to allow a large number of refugees into the United States for humanitarian purposes is still a discretionary power vested in the President. Furthermore, the expiration of TPS has been less strictly applied in the United States, perhaps because of interest group pressure to allow the refugees to remain, but also because of trends in the domestic political debate centering on refugee and asylum issues. Recent back-peddling by congressional Republicans for what was perceived by many Americans as draconian immigration reforms in 1996 illustrates this point. The automatic granting of residence permits to TPS refugees from Central America also indicated differences in public pressure in both countries vis-à-vis migration-related issues. Although Germany has a high foreign residency population, such lenient decisions are not likely to be politically viable in the present context.

The greatest challenge for TPS both in the United States and in Germany is mobilizing the willingness to enforce the temporary status. With this precondition comes the issue of determining refugees can safely return to their place of origin, and what alternatives may exist if that time never presents itself. Representatives of UNHCR have argued in the German case that, despite the Dayton Accords, the conditions on the ground in Bosnia are not conducive to

voluntary repatriation. In both the cases of the Central Americans in the United States and Bosnian refugees in Germany, the willingness of the refugees to return is also at issue. Many Central Americans who received TPS were in the process of being deported because the civil wars in their countries had ended; they simply did not want to return to their country of origin. While conditions are still precarious in Bosnia-Herzegovina, German officials argue that Bosnians must be willing to return to their country of origin now that the repatriation provisions have been established and have been recognized by the Bosnian authorities. As German officials have argued, extending TPS into a form of permanent settlement will undermine it. As Hathaway has insisted, refugee policy must take into account the interest of states if it is to remain a viable instrument of refugee protection.⁶⁹ If states are only willing to accept a certain number of refugees in extraordinary cases, as in the Bosnian example in Germany, this provision must be nurtured so that states will be willing to use it again in the future. In Germany, the survival of TPS clearly depends on the temporary nature of the protection and on its citizens being reassured of this. Although in the United States the temporary nature of TPS seems to be undermined by the pressure of interest groups and domestic political debates, it is questionable whether TPS can sustain itself if it does not become unequivocally temporary as well.

TPS also may be challenged in cases where the situation does not improve in the home country. If the state providing TPS is unwilling to offer resettlement, a third country of resettlement would be necessary. For TPS refugees in the United States, they would have difficulty finding asylum in another country, because as Teitelbaum has argued, most countries will refuse asylum-seekers whose first asylum, or in this case TPS, country has been the United States. In the case of Germany, many of the Bosnian refugees who are truly not able to return to Bosnia find asylum in the United States.⁷⁰ Addressing the issue of where to send TPS refugees in Europe if conditions in their home country do not improve will likely fall on the shoulders of traditional immigration states, such as the United States, Canada or Australia. Although, as exemplified by the United States, these countries are becoming more restrictive too.

In the United States it is questionable whether TPS will sustain itself if it does not become unequivocally temporary.

Notes

1. "Pull" is a concept that was developed by E.G. Ravenstein in the 19th Century. It refers to the demographic and economic conditions in states of reception that incite international migration. William B. Wood, "Crossing the Line: Geopolitics of International Migration" in *Reordering the World: Geopolitical Perspectives on the 21st Century*

- eds. George J. Demko and William B. Wood (Boulder, CO: Westview Press, 1994), 194.
2. George Borjas, Kennedy School of Government, Harvard University, "Immigration and Welfare Magnets" speech at the Fletcher School of Law and Diplomacy, October 29, 1997.
 3. The word *Aussiedler* refers to ethnic Germans who have lived outside Germany (*Ubersiedler* was the term used for East Germans). Historically, *Aussiedler* and *Ubersiedler* received preferential treatment upon arrival in Western Germany: they were extended the benefits of automatic citizenship. Between 1988-1992, 1.4 million *Aussiedler* arrived in Germany. Hedwig Rudolph, "Dynamics of Immigration in a Nonimmigrant Country: Germany" in *European Migration in the Late Twentieth Century*, eds. Fassmann and Munz (Brookfield, VT: Edward Elgar Publishing Co., 1994), 117.
 4. OECD 1990 data for Germany as proportion of immigration to population 9.3 percent and the US 9.0 percent. *The Key to Europe: A Comparative Analysis of Entry and Asylum Policies in Western Countries Report*, prepared by the International Center for Immigration Policy Development for the Swedish Parliament Immigration and Refugee Commission (Stockholm, 1994), 53.
 5. Patrick Weil, Foundation Nationale des Sciences Politiques, Institut d'étude politique de Paris "Immigration Controls in the U.S., Europe and Japan" speech at Massachusetts Institute of Technology, November 25, 1996.
 6. One reason as explained by Munz was that Germany's figures include seasonal and guest workers. (Munz 1997)
 7. Acquisition of citizenship in this sense is a highly restrictive concept and rests on conditions beyond an individual's actions to acquire membership, but rather upon an individual's birth right. Jean Leca, "Nationalité et Citoyenneté dans l'Europe des Immigrations" in *Logiques d'états et immigrations*, eds. Jacqueline Costa-Lascoux and Patrick Weil (Paris: Editions KIMÉ, 1992), 15-16.
 8. Schmalz-Jacobsen, Commissioner for Foreign Affairs of the Federal Government of Germany, speaking at The Fletcher School of Law and Diplomacy, October 25, 1996.
 9. Sarah Collinson, *Europe and International Migration* (New York: Pinter Publishers, 1993), 167.
 10. Note that while active recruitment of labor migrants ended, foreign employment stock has still existed in all receiving states, and has indeed, continued to grow. Increasingly the origin of the foreign employment stock in Germany is of European Union nationals and accounts for 60 percent of the relative increase between 1992 and 1993. SOPEMI, *OECD Tendances des migrations internationales* (Rapport annuel, Paris: OECD, 1994), 90.
 11. Elizabeth Neuffer, "Germany Deporting Refugees to Bosnia Areas Held by Foes," *The Boston Globe*, March 31, 1997, A14.
 12. Michael Mandelbaum, "European Votes Show a Shared Ugly Mood," *Newsday* June 2, 1995, A45.
 13. Solon Ardittis, *The Politics of East-West Migration* (New York: St. Martin's Press, 1994), 152.
 14. Kay Hailbronner, "Citizenship and Nationhood in Germany," in *Immigration and the Politics of Citizenship in Europe and North America*, eds. William Rogers Brubaker (New York: U. Press of America, 1989), 68.
 15. *Ibid.*, 77.
 16. "Fewer Asylum-Seekers in June, but more overall in 1993; New Asylum Restrictions have an Effect," *The Week in Germany*, July 16, 1993.
 17. "Number of Asylum Seekers Plummet," *The Reuters Library Report*, August 5, 1993.
 18. This is particularly true with respect to countries from which *Aussiedler* have emanated. The purpose of to improve conditions and "encourage" these ethnic Germans to remain where they are. Hedwig Rudolph, "Dynamics of Immigration in a Nonimmigrant Country: Germany" in *European Migration in the Late Twentieth Century*, eds. Fassmann and Munz (Brookfield VT: Edward Elgar Publishing Co., 1994), 117.

19. "Foreign Asylum Seekers in Germany Decline," *Deutsche Presse Agentur*, April 4, 1996.
20. *Ibid.*
21. The Civil Rights Act (1866) established the right to citizenship for all those born on American soil who were not subject to any foreign power. Asian, especially Chinese immigrants, whose presence grew in the United States from 325 in 1849 to 20,000 in 1852, were discriminated against and were barred from acquisition of citizenship after 1866. The Chinese Exclusion Act (1882) specifically barred the Chinese entry into the United States. It was only after 1943 that Chinese residing in the United States became eligible for naturalization, when Chinese assistance was needed to counter the Japanese in WWII. Professor Dan Kanstroom, Boston College Law School, "Immigration and Citizenship Law in the United States and Germany," speech for EPIIC Series at Tufts University, Medford, MA, October 16, 1997.
22. Kenneth Regensburg, "Refugee Law Reconsidered: Reconciling Humanitarian Objectives with the Protectionist Agendas of Western Europe and the United States," *Cornell International Law Journal* 29 (1996): 234.
23. A precursor to this provision in the 1990 legislation was the 1980 Lautenberg Amendment in the 1980 Refugee Act, which allowed mainly Soviet Jews and Christian Evangelicals to *not* have to meet the individual standards; they could qualify for refugee status merely by showing acts of persecution committed against other persons in his or her standard profile in his or her geographic locale or acts regardless of the locale that gave rise to fear of persecution. "Repeal Mish-Mash of Obsolete Laws and Rein In Immigration," *The Orlando Sentinel* (July 24, 1997), A20.
24. Regensburg, 234.
25. In 1997, less than four percent of El Salvadorans and Guatemalans were granted political asylum, whereas acceptance rates for Nicaraguans was above 80 percent for the same year. *Los Angeles Times*, June 24, 1988.
26. Permanent resident aliens can reside and work in the United States without naturalizing.
27. Davis E. Simcox, ed., *U.S. Immigration in the 1980s: Reappraisal and Reform* (Boulder, CO: Westview Press, 1988), 229.
28. Arthur C. Helton, "The New Convention from the Perspectives of a Country of Employment: The United States Case," *International Migration Review* 25 (1991): 851.
29. Lydio Tomasi, ed., *In Defense of the Alien* (New York: Center for Migration Studies, 1997), 149.
30. Judge Shepard, INS Judge, MA, speaking at the Fletcher School of Law and Diplomacy, October 30, 1997.
31. Tomasi, 141.
32. Anker is referring solely to the United States here, although the general impression of abuse, especially of the persecution standard is the same in Europe, including Germany. Deborah Anker, "Mischaracterized Asylum Crisis Lydio," in *In Defense of the Alien*, ed., Tomasi (New York: Center for Migration Studies, 1997), 150.
33. The Immigration and Nationality Act stipulates that the "83,000 admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance to the following regional allocations...Africa...7,000; East Asia...14,000; Europe...51,000; Latin America-Caribbean...4,000; Near East-South Asia...4,000," *U.S. Newswire*, October 1, 1997.
34. Tomasi, 141.
35. *Ibid.*, 152.
36. William Branigin, "White House Leadership Sought on Refugee Matters: Panel recommends 'Correction' of Immigration Law," *The Washington Post*, June 7, 1997, A02.
37. Kanstroom, 1997.
38. "Tiny Stretch of Border, a Big Test for a Wall," *The New York Times*, December 8, 1997.
39. Phyllis Oakley, former Assistant Secretary of Population, Migration and Refugees, U.S. State Department, speaking at The Fletcher School of Law and Diplomacy, November 20, 1997.

40. W. Cornelius, P. Martin and J. Hollifield, eds., *Controlling Immigration: A Global Perspective* (Stanford: Stanford Press, 1994).
41. Sarah Collinson, *Europe and International Migration* (New York: Pinter Publishers, 1993).
42. Nazaré Albuquerque Abell, "Safe Country Provisions in Canada and in the European Union: A Critical Assessment," *International Migration Review* 31 (Fall 1997): 569-590.
43. Partners in the Schengen Agreement include the original signatories: France, Germany and the three Benelux countries, in addition to Italy, Portugal, Spain and Greece. Rosemarie Rogers and Emily Copeland, *Forced Migration: Policy Issues in the Post-Cold War World* (Medford: Fletcher School of Law and Diplomacy, Tufts University, 1993), 110.
44. *Ibid.*
45. The Dublin Convention was signed by all of the EU-member states with the exception of Denmark, which signed a year later. Nazare Albuquerque Abell, "Safe Country Provisions in Canada and the European Union: A Critical Assessment," *International Migration Review*, Center for Migration Studies, 31 (Fall 1997): 571.
46. The London Host Third Country Resolutions agreed to by the EU Ministers for Immigration in 1992 provides for the incorporation of the notion of host third countries into national legislation by the time the Dublin Convention enters into force. *Ibid.*, 574.
47. *Ibid.*, 573.
48. Daninele Joly, *Haven or Hell? Asylum Policies and Refugees in Europe* (New York: St. Martin's Press, 1996), 57.
49. Rogers and Copeland, 110.
50. EU states had initially planned to draft a common safe country list, but because of differences over which states should be on the list and because of fear of diplomatic reprisal, most states have drafted separate lists. The UNHCR was initially included in the assessment of whether a country was deemed "safe" or not. It was later replaced by "giving a 'specific place' to information of UNHCR." Elements to be considered in the assessment of a country were drafted and include: "previous numbers of refugees and recognition rates; observance of human rights, formally and in practice; democratic institutions; stability." "Cracks in the Wall: European Harmonization on Asylum in the Nineties" in Daniele Joly, *Haven or Hell? Asylum Policies and Refugees in the European Union* (New York: St. Martin's Press, 1996), 58.
51. Because the Ad Hoc group's recommendations do not need national parliaments' approval, they have often been criticized for their "secret" nature, opening the process to the charge of democratic deficit." *Ibid.*, 52.
52. Female Genital Mutilation was the principal consideration in the Fauziya Kasinga Case, decided June 13, 1996, File A73 476 695 (U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals).
53. The Commissioner for Foreign Affairs of the Federal Government of Germany, Ms. Schmalz-Jacobsen, speaking at The Fletcher School of Law and Diplomacy last year commented: "the intake of refugees by the German government was a reflection of: one, its once generous Asylum Laws which are a part of its Constitution and which are the result of its historical legacy when European Jews, persecuted by the Nazi regime, were forced to seek shelter; two, Germans' sense of responsibility for trying to secure stability in the Balkans heightened by a third factor—other European states refusing to take their share of the refugees as a lesson to Germany for its unilateral declarations of recognition of the break-away Balkan states." Speech given at The Fletcher School of Law and Diplomacy, October 25, 1996.
54. Interestingly, ex-Yugoslavia topped the 1994 list of countries from which asylum seekers had fled, followed by Turkey, Romania and only then Bosnia-Herzegovina. By August 1996, only 306 of Bosnian nationals were seeking asylum that month, compared to 2,367 from ex-Yugoslavia. "Germany Draws Far Fewer Asylum Seekers in 1994," *The Reuter European Community Report*, January 6, 1995.

55. "Minister Protests Against the Forced Repatriation of Refugees from Germany," *British Broadcasting Corporation*, March 27, 1997.
56. 30,000 Bosnian refugees were repatriated from Germany between January-March 1997. Elizabeth Neuffer, "Germany Deporting Refugees to Bosnia Areas Held by Foes," *The Boston Globe*, March 31, 1997.
57. "U.N. Urges Germany Not to Make Bosnians Go Home," *The Reuter European Community Report* (January 25, 1996).
58. "U.N. Commissioner Criticizes Forced Expulsions of Refugees," *Agence France Presse*, October 7, 1996.
59. Judith Kumin is the Representative of the U.N. High Commissioner for Refugees in Germany, from "U.N. Urges Germany Not to Make Bosnians Go Home," *The Reuter European Community Report*, January 25, 1996.
60. "Germany to Seek Better Coordination in Repatriating Bosnians," *Xinhua News Agency*, March 29, 1997.
61. *Deutsche Presse Agentur*, April 14, 1996.
62. "Germany Delays Decision on Expelling Bosnian Refugees," *Deutsche Presse Agentur*, May 3, 1996.
63. Regensburg, 233.
64. Helton, 851.
65. Backlash to the 1996 Immigration Bill which was considered too strict made Republicans in Congress backtrack and make concessions.
66. Michael S. Teitelbaum, "Immigration, Refugees and Foreign Policy," *International Organization* 38:3 (Summer 1985): 64.
67. *Ibid.*
68. "U.S. Under Pressure to Carry Bigger Lead," *USA Today*, November 17, 1992, 7A.
69. James C. Hathaway, "Can International Refugee Law be Made Relevant Again?" *World Refugee Survey* (1996):14-20.
70. Oakley.



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