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# Simple Justice: Humanitarian Law as a Defense Against Deportation

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Jennifer Moore\*

*Each year, thousands of persons fleeing situations of military conflict in their home countries are denied refuge in the United States. These denials result in part from an asylum adjudication process that requires applicants to show that they are persecuted on an individualized basis, rather than that they fear generalized conditions of violence. Jennifer Moore explores the development of the humanitarian law defense to deportation, which seeks to compel immigration courts to recognize and apply international humanitarian law. Part I describes the evolution of the humanitarian law argument in immigration courts, and the lack of receptivity to the argument on the part of federal courts. Part II considers the relationship between humanitarian law and human rights law, and the possibilities for grounding defenses to deportation on international human rights law. The article concludes in Part III with an evaluation of the prospects for the future development of the humanitarian law defense, in light of recent legislative efforts to provide temporary refuge to certain classes of civil war victims.*

## I. INTRODUCTION

In 1984 Jesus del Carmen Medina, a Salvadoran seeking asylum in deportation proceedings brought against her by the United States Immigration and Naturalization Service ("INS") in Harlingen, Texas, made a motion for temporary relief from deportation on the ground that violations of the laws of war were occurring in her native country. Immigration Judge Michael Horn denied the relief requested, ruling that although the United States was bound by the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War ("the Fourth Geneva Convention"),<sup>1</sup> there was insufficient evidence that El Salvador was in breach of its Convention obligations.<sup>2</sup>

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1. Geneva Convention No. IV, the Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 33645, 75 U.N.T.S. 287 (entered into force for the United States Feb. 2, 1956) [hereinafter "Fourth Geneva Convention"].

2. *In re Medina*, No. A26 949 415 (Immigr. Ct., Harlingen, Tex. July 15, 1985), *aff'd on other grounds*, Matter of Medina, Int. Dec. #3078 (BIA Oct. 7, 1988). Medina testified before Judge Horn that as a result of military conflict between government and insurgent forces in El Salvador, many Salvadorans are reluctant to leave their homes after dark for fear of being caught in the cross-fire. Medina also testified that she was afraid she would be targeted as a suspected guerrilla upon return to El Salvador. See *In re Medina* at 4.

Six years later, in Washington, D.C. Immigration Court, Maria Elena Santos-Gomez, her mother, Leonor, and three-year-old son, Manuel Alonso, made a similar motion for relief from deportation to El Salvador. Immigration Judge Paul A. Nejelski ordered that the family not be deported to El Salvador for the duration of the civil war, based upon overwhelming evidence of the existence of a customary international norm requiring the provision of temporary refuge to individuals displaced by internal armed conflict.<sup>3</sup>

The *Medina* case heralded the beginning of concerted efforts by immigrants' rights advocates and scholars to develop the law of temporary refuge in United States courts. The essence of their evolving argument has been that in the event an individual flees an internal conflict in which civilians are victims of violence, both international agreements and customary international law provide a remedy in United States courts in the form of temporary relief from deportation until humanitarian law violations cease. The work of attorneys and international law experts bore fruit with the *Santos-Gomez* decision, when the immigration court recognized the customary norm of temporary refuge and granted the relief requested.<sup>4</sup>

This Article explores the development of the temporary refuge theory, addressing the component parts of the international defense to deportation, including treaty provisions, customary law and United States foreign relations law. It focuses on the impact of the various arguments for temporary refuge in particular United States courts, and concludes with an evaluation of the status of the theory and the prospects for its increased recognition in the future. Implicit in the analysis is the conviction that the law of temporary refuge contributes to the development of a conceptual framework for affirming the humanity and juridical personality of all immigrants.

## II. INTERNATIONAL LAW AS A DEFENSE TO DEPORTATION

### A. *Legal Roadblocks: The Limitations of Political Asylum Adjudication in the United States*

Temporary refuge is of most vital interest to individuals who are found not to qualify for relief under domestic legislation enacted to

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After the Board of Immigration Appeals affirmed the denial of relief, *Medina* was deemed eligible for legalization under the Immigration Reform and Control Act of 1987, hence the Fifth Circuit Court of Appeals declared her pending federal appeal moot.

3. *In re Santos-Gomez, Santos-Trejos and Ramirez-Santos*, Nos. A29 564 781, A29 564 785, and A29 564 801 (Immigr. Ct., Washington, D.C. Aug. 24, 1990). See *infra* note 78 and accompanying text.

4. *Id.* at 2.

provide legal status to victims of persecution in their native countries. In the Refugee Act of 1980,<sup>5</sup> Congress adopted the substance of article 1 of the 1967 United Nations Protocol Relating to the Status of Refugees ("the Protocol," or "the Refugee Protocol").<sup>6</sup> In article 1, the Protocol, in keeping with the 1951 United Nations Convention Relating to the Status of Refugees ("the Refugee Convention"),<sup>7</sup> defined a refugee as an individual with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion."<sup>8</sup> The Protocol also incorporated article 33 of the Convention, which forbids the forcible return of an individual whose "life or freedom would be threatened on account of" one of the five grounds enumerated in the refugee definition.<sup>9</sup> This prohibition against involuntary repatriation is known as the norm of *non-refoulement*.<sup>10</sup>

Thus the 1980 Refugee Act, as a result of incorporating relevant provisions of the Protocol, affords two specific forms of relief from deportation. Individuals who qualify as "refugees" under the "well-founded fear" definition are eligible for a discretionary grant of political asylum,<sup>11</sup> while individuals whose life or freedom would be threatened upon return to their native countries on one of the five enumerated grounds are eligible for a mandatory order withholding deportation, which the Attorney General must grant upon making the requisite findings.<sup>12</sup>

5. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in various sections of 8 U.S.C.).

6. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

7. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 152 at art. 1, § (A)(2).

8. Refugee Protocol, art. 1, § 2 incorporated the Refugee Convention definition by reference. Congress' adoption of the United Nations' non-ideological definition eliminated a previous bias in our domestic legislation favoring persons fleeing Communist regimes. 8 U.S.C. § 1101(a)(42)(A). See A. FRAGOMAN & S. BELL, IMMIGRATION PRIMER 196 (1985).

9. Refugee Convention, art. 33, § 1; Refugee Protocol, art. 1, § 1.

10. See G. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 82 (1983).

11. 8 U.S.C. § 1158(a). See, e.g., Matter of Salim, 18 I. & N. Dec. 311 (BIA 1982). The United States Attorney General may order a grant of asylum after weighing factors such as whether entry into the United States was legal, whether fraud was perpetrated on United States immigration officials, and whether the individual applied for refugee status in a United States consulate abroad.

12. 8 U.S.C. § 1253(h). This provision of the Act adopts the prohibitory language of article 33 of the Refugee Convention. See *supra* note 9 and accompanying text. Case law interpreting this provision has established that to be eligible for withholding, individuals must demonstrate a "clear probability" that they will be persecuted if forced to return to their native countries. I.N.S. v. Stevic, 467 U.S. 407, 430 (1984) (interpreting 8 U.S.C. § 1253(a)).

Withholding of deportation is a lesser form of relief than political asylum. One who is granted asylum cannot be deported to any country, and is eligible for adjustment of status to legal permanent resident after one year. Withholding merely signifies that an individual cannot be deported to the nation from which he or she fled, until his or her life or freedom is no longer

Individuals who flee to the United States from a country which is embroiled in an internal conflict face two problems when they apply for political asylum and withholding of deportation in the United States. First, many individuals are statutorily ineligible for either form of relief. They may fear being caught in the cross-fire of a guerrilla war but they are unprotected by the Refugee Act, which does not define persecution to encompass persons with a well-founded fear of civil war violence.<sup>13</sup>

Second, the claims of many civil war victims who are statutorily eligible for asylum or withholding of deportation under a proper reading of the Refugee Act are prejudiced by the fact that they come from nations in which persecution is widespread. Since the mid-1980s, federal courts have stated that although widespread conditions of violence and persecution are not in themselves sufficient for a grant of asylum, they strengthen petitions for such relief by establishing an objective basis for the well-founded fear alleged by asylum applicants.<sup>14</sup> Despite these rulings, immigration judges continue to penalize individuals who come from countries in which high percentages of the population are potential or actual targets of persecution.<sup>15</sup>

threatened. 8 U.S.C. § 1253(a). Furthermore, the individual still may be deported to another country.

The "well-founded fear" test for asylum eligibility embodies a more subjective and more generous standard of proof than the objective "clear probability" threshold which is applied in withholding of deportation cases. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987).

13. The United States Congress, in debating the Refugee Act, considered and rejected a definition of refugee which included victims of armed conflict. *See* S. 643, 96th Cong., 1st Sess., 125 CONG. REC. 23, 224-25 (1979). While both the Refugee Protocol and the United States Refugee Act limit refugee status to individuals who fear persecution on one of the five enumerated grounds, *see supra* text accompanying note 8, however, other international entities accord refugee status to individuals displaced by civil war. *See Organization of African Unity 1969 Convention on Refugee Problems in Africa*, art. 1, § 2 ("the term 'refugee' shall also apply to every person who, owing to . . . events seriously disturbing public order . . . is compelled to leave . . ."); 1984 Declaration of Cartagena (drafted by participants in the Colloquium on International Refugee Protection in Central America, Mexico and Panama, conducted under the auspices of the Government of the Republic of Colombia, and cosponsored by the United Nations High Commissioner for Refugees, the Regional Third World Studies Center and the Faculty of Law of the University of Cartagena de Indias [hereinafter Cartagena Convention] (copy on file at the HARVARD HUMAN RIGHTS JOURNAL office) (Conclusion #3: "the definition or concept of a refugee . . . is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes . . . persons who have fled their country because their lives, safety and freedom have been threatened by . . . internal conflict . . ."). *See also* Helton, *Assisting Central American Refugees*, *Chr. Sci. Mon.*, May 31, 1989, at 19.

14. *Bolanos-Hernandez v. INS*, 749 F.2d 1316, 1323 (9th Cir. 1984) ("the significance of a specific threat to an individual's life or freedom is not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened. If anything . . . that may make the threat more serious or credible"); *see also Hernandez-Ortiz v. INS*, 777 F.2d 509, 515 (9th Cir. 1985).

15. A representative of the United States Committee for Refugees commented that "[t]he BIA has arrived at a paradoxical position that, in effect, favors asylum seekers from less violent and dangerous countries, while essentially requiring a higher standard of persecution from

Individuals who flee persecution in a nation at war with itself face additional impediments within the asylum adjudication process when their government is friendly with the United States.<sup>16</sup> Throughout the 1980s, despite the non-ideological language used in the Refugee Act, individuals from Communist countries more easily obtained grants of asylum than those who fled nations favored by United States foreign policy. There exists substantial evidence to support allegations of ideological bias within the asylum-granting system.<sup>17</sup> Moreover, whether a nation is a recipient of a significant amount of military or economic assistance from the United States also tends to influence asylum adjudication.<sup>18</sup>

Despite the eleven-year history of the Refugee Act, the governing ideology of the nation of origin continues to indicate the likelihood of an asylum applicant's success.<sup>19</sup> Given the inherent limitations of

political areas where violence is now more widespread." AMNESTY INTERNATIONAL, REASONABLE FEAR: HUMAN RIGHTS AND UNITED STATES REFUGEE POLICY 26 (Mar. 1990).

16. Immigration Judges forward copies of every application for political asylum and withholding of deportation to the United States State Department Bureau of Human Rights and Humanitarian Affairs, which issues the Immigration Judge an opinion regarding the validity of the claim, often without a legal analysis of the applicant's case. See UNITED STATES COMMITTEE FOR REFUGEES, DESPITE A GENEROUS SPIRIT: DENYING ASYLUM IN THE UNITED STATES 29-30 (Dec. 1986), [hereinafter DESPITE A GENEROUS SPIRIT]; see also Anker, *Determining Asylum Claims in the United States*, EXECUTIVE SUMMARY 4 (Jan. 1990) ("one of the measures of ideological bias [in the asylum adjudication process] is the influence of the State Department's Advisory Opinion . . .").

Pursuant to new asylum regulations promulgated by the INS in July 1990, immigration judges now are permitted to decide asylum claims without considering the Bureau's advisory opinion if it is not made available within sixty days of the Bureau's notice of the application. See 55 Fed. Reg. 30,682 (1990) (to be codified at 8 C.F.R. § 208.11). This new regulation may help to depoliticize the asylum adjudication process.

17. See Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J. L. REF. 243, 253 (1984):

Statistics provided by the INS for fiscal year 1983 . . . [show that] seventy-eight percent of the Ethiopian . . . and forty-four percent of the Romanian cases decided received political asylum, all involving persons fleeing Communist-dominated regimes. On the other hand, asylum was granted in less than eleven percent of the Philippine . . . two percent of the Haitian, two percent of the Guatemalan and three percent of the Salvadoran cases.

*Id.* See also DESPITE A GENEROUS SPIRIT *supra* note 16, at 8 (citing statistics that reflect a double standard in the granting of asylum to petitioners from "unfriendly" governments as compared to those from "friendly" and anti-Communist governments); GOVERNMENT ACCOUNTING OFFICE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED DEPORTED 15 (1987) (statistics presented for 1984 indicate that only 2% of the Salvadoran applications were granted, in contrast to 49% of the Polish and 66% of the Iranian applications).

18. For example, while the Salvadoran government has received over \$4 billion in financial aid from the United States since 1980, a mere two to three percent of Salvadoran asylum claims were granted over the course of that same decade. Goldston, *Down the Salvadoran Drain*, N.Y. Times, Sept. 28, 1990, at A27, col. 2.

19. Data gathered for fiscal year 1989, indicates that 81% of the Soviet, 65.8% of the Ethiopian, and 90.9% of the Romanian cases decided resulted in positive asylum decisions. In contrast, asylum was granted in only 7% of the Philippine, 3.5% of the Haitian, 1.9% of the Guatemalan and 2.3% of the Salvadoran cases. AMNESTY INTERNATIONAL, *supra* note 15, at 3.

the refugee definition, combined with the operation of political factors within the asylum adjudication process, potential victims of civil war violence might well seek forms of relief from deportation other than those explicitly provided in the Refugee Act.

### B. Creative Response: Appeal to International Humanitarian Law

Given the historical and philosophical link between the United States Refugee Act and the United Nations Refugee Convention and Refugee Protocol, it was perhaps natural for asylum-seekers denied relief under domestic refugee law to seek alternative forms of relief under international law. In addition to prohibiting the deportation of individuals who face persecution upon return to their countries, pursuant to the *non-refoulement* provision of article 33 of the Refugee Convention,<sup>20</sup> international law also protects against the deportation of persons who face civil war violence upon return.

Public international law ("international law") comprises those obligations which are binding on states, and in some cases international organizations, in their dealings with each other and with individuals.<sup>21</sup> The primary sources of international law are treaties, which are signed by individual countries, and customary norms, which are rules widely recognized in practice by members of the world community, and complied with out of a conviction that they are legally binding (*opinio juris sive necessitatis*).<sup>22</sup>

Ratification of a treaty creates obligations on the international plane.<sup>23</sup> In contrast, under United States law all but self-executing treaty provisions must be incorporated into domestic legislation before they can be applied by United States courts. Self-executing provisions are those which are directly applicable by their own terms, and need not be specifically implemented by Congressional legislation.<sup>24</sup> Cus-

20. Refugee Convention, art. 33, § 1.

21. See M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 2 (1988).

22. *Id.* at 4-5, 38-40. The prohibition against torture is a rule which United States courts recognize as a norm of customary international law. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980). The Second Circuit found that this customary norm is part of United States law. See *id.* at 887 ("international law is part of our law") (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

Violations of a customary norm do not serve as evidence that the norm is not in force. Rather, when a government carries out an official policy of torture which it vigorously denies, this self-justifying behavior indicates the state's recognition of the binding character of the norm. Perluss & Hartman, *Temporary Refuge: Emergence of a Customary Norm* 26 VA. J. INT'L L. 551, 572 (1986) ("Evasive strategies used by states to avoid the customary norm . . . do not undercut the norm. Rather, these strategies implicitly suggest a recognition of its existence and obligatory character.")

23. M. JANIS, *supra* note 21, at 18.

24. *Id.* at 74.

tomary norms, in contrast, are by their nature self-executing, and never require implementing legislation.<sup>25</sup>

International humanitarian law is the subset of international law which deals specifically with the conduct of war, and encompasses principles governing the treatment of non-combatants and regulations controlling the use of weapons.<sup>26</sup> These humanitarian law rules, which seek to limit the impact of war on noncombatants, are of crucial interest to civilian victims of internal conflict and hence of greatest relevance to this analysis.

The Fourth Geneva Convention is the primary humanitarian law treaty protecting noncombatants who are potential victims of civil strife.<sup>27</sup> Article 2 of the Convention states, "[T]he present Convention shall apply to all cases of . . . armed conflict which may arise between two or more . . . High Contracting Parties . . ."<sup>28</sup> Article 2 signifies that, as a whole, the Convention applies to international rather than internal armed conflicts. Article 3 of the Convention, however, specifically establishes that "[i]n the case of armed conflict not of an international character,"<sup>29</sup> *i.e.*, internal conflicts, all civilians shall enjoy minimal protections, including the right to life, humane treatment and basic due process.<sup>30</sup> Moreover, article 1 of the Convention provides that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention *in all circumstances*."<sup>31</sup>

Article 4 of the Fourth Geneva Convention defines "[p]ersons protected by the Convention" as "those who . . . find themselves . . . in the hands of a Party to the conflict . . . of which they are not nationals."<sup>32</sup> The status of "protected persons" thus appears at first to encompass only civilians who were driven outside their nation of origin

25. See L. HENKIN, *INTERNATIONAL LAW: CASES AND MATERIALS* 155 (2d ed. 1987).

26. *Id.* at 802.

27. Fourth Geneva Convention, *supra* note 1 and accompanying text.

28. *Id.* art. 2.

29. *Id.* art. 3.

30. *Id.* art. 3 states:

In the case of armed conflict not of an international character . . . each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no part in the hostilities . . . shall in all circumstances be treated humanely . . . To this end the following acts are prohibited . . . :

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

31. *Id.* art. 1 (emphasis added).

32. Fourth Geneva Convention, art. 4.



by an international armed conflict, and who subsequently find themselves within the territorial boundaries of another party to the conflict.<sup>33</sup> Finally, the Fourth Geneva Convention specifically provides in article 45 that "[p]rotected persons shall not be transferred to a Power which is not a party to the Convention,"<sup>34</sup> and in article 147 that the "unlawful deportation . . . of a protected person" is a grave breach of the Convention.<sup>35</sup>

A tension exists within the language of the Fourth Geneva Convention between the extension of protections to all victims of armed conflict and the limitation of such protections to individuals displaced by international conflicts. This tension may be resolved in favor of a broader application of Convention principles by interpreting treaty provisions in light of evolving customary international law.

All four Geneva Conventions of 1949 codify several customary norms which had emerged prior to that time. Among these norms is the principle of protection, which stands for the proposition that "the State must ensure the national and international protection of persons who have fallen into its power."<sup>36</sup> Because the principle of protection is not limited in application to a particular type of armed conflict, it could well be argued that the Geneva Convention prohibitions against deportation contained in articles 45 and 147 extend to civilians forced to leave situations of internal as well as international armed conflict.<sup>37</sup>

Since its first use in the *Medina* case,<sup>38</sup> the humanitarian law defense to deportation has faced numerous obstacles in the courtroom. However, the argument possesses two basic attributes which have led advocates further to seek its acceptance. First, the humanitarian law prohibition against deportation turns an inherent weakness of the

33. See *id.* arts. 2, 4.

34. *Id.* art. 45.

35. *Id.* art. 147.

36. J. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 47 (1975) [hereinafter PICTET, HUMANITARIAN LAW]. The modern analog of the principle of protection is the customary norm of temporary refuge, which prohibits nations from forcibly returning individuals who have fled widespread conditions of violence stemming from internal conflict in their nations of origin. See Perluss & Hartman, *supra* note 22, at 554. An essential attribute of the norm of temporary refuge is the recognition on the part of the state that forcibly deporting an individual to a nation embroiled in an internal conflict in which civilians are targeted is fundamentally at odds with an obligation, first articulated in the principle of protection, "to ensure the . . . protections of persons who have fallen into its power." See J. PICTET, HUMANITARIAN LAW, *supra*, at 47. The principle of protection has been upheld in United States immigration court. See *In re Santos-Gomez, Santos-Trejos and Ramirez-Santos*, Nos. A29 564 781, A29 564 785, and A29 564 801 (Immigr. Ct., Washington, D.C. Aug. 24, 1990) at 10 ("this court finds a right to non-return to a country engaged in civil war which is . . . binding on this court"). But see *Echeverria-Hernandez v. INS*, 923 F.2d 688 (9th Cir. 1991).

37. See Parker, *Geneva Convention Protections for Salvadoran Refugees: An International Law Defense against Deportation and a Justification for Sanctuary*, 13 IMMIGR. NEWSL. 7, nn.59, 61 (1984).

38. *In re Medina*, No. A26 949 415 (Immigr. Ct., Harlingen, Tex. July 15, 1985), *aff'd on other grounds*, Matter of Medina, Int. Dec. #3078 (BIA Oct. 7, 1988).

asylum claim of civil war victims into a strength. While the existence of widespread violence and persecution resulting from internal conflict has weakened the asylum claims of many individuals, it is precisely these generalized conditions which serve as the basis for relief under international humanitarian law.<sup>39</sup>

Second, the use of humanitarian law as a defense against deportation in the context of a petition for asylum highlights the connection between war and persecution. Rather than de-emphasizing the epidemic level of abuses carried out against vast sectors of the civilian population in the petitioner's nation of origin, the humanitarian law argument assists advocates in demonstrating that widespread persecution of suspected opponents is a means by which parties to the conflict punish dissidence and instill terror as a means of control. The humanitarian law defense enables advocates, judges, and the public to understand that the atrocities of war often entail multiple cases of individualized persecution, and that targeted human rights abuses are a part of waging a vigorous military campaign.<sup>40</sup>

### C. Development of the Humanitarian Law Defense

#### 1. Initial Efforts: The *Medina* Case

The development of the modern humanitarian law defense to deportation achieved national prominence on September 9, 1984, when Jesus del Carmen Medina sought relief from deportation under the Fourth Geneva Convention of 1949, as well as under the asylum and withholding of deportation provisions of the Refugee Act of 1980.<sup>41</sup> Medina argued that the United States, as a signatory to the Fourth Geneva Convention, was obligated to grant her relief from deportation to El Salvador, a country in which violations of the minimal protections required by article 3 were occurring. She contended that this obligation is based on the United States' pledge under article 1 to "respect and ensure respect for the . . . Convention."<sup>42</sup> Medina's request for

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39. The customary norm of temporary refuge protects individuals who have fled "generalized violence." Perluss & Hartman, *supra* note 22 at 554. This "situational approach" required to determine eligibility for temporary relief from deportation contrasts sharply with the "individualist definition" of a refugee put forth in the Refugee Convention. *Id.* at 583.

40. See AMNESTY INTERNATIONAL REPORT 88 (1990) (documenting executions of large numbers of unarmed civilians by Salvadoran military personnel).

41. *In re Medina* at 2-3. Advocates have filed temporary refuge motions in deportation proceedings throughout the United States since the mid-1980s. *Medina* is emphasized here because it involved the first motion of its kind to be fully briefed, argued and decided on the merits.

42. Fourth Geneva Convention, arts. 1, 3. Article 3 of the Fourth Geneva Convention obligates "each Party to the [non-international] conflict" to respect the rights of civilians. See Fourth Geneva Convention, art. 3, § 1. Since the United States is not a party to the conflict in

relief was based on the logic that deporting an individual to a nation in which violations of humanitarian law are occurring is fundamentally at odds with a pledge to promote respect for the norms of humanitarian law.

After finding Medina ineligible for asylum and withholding of deportation,<sup>43</sup> Immigration Judge Michael Horn also denied her relief under the Fourth Geneva Convention,<sup>44</sup> subsequent to a full analysis of her humanitarian law claim. Judge Horn preliminarily held that he had jurisdiction to hear a Convention claim, based on the power delegated to him by Congress to determine deportability under the relevant provisions of the Immigration and Naturalization Act ("INA") or "any other law or treaty . . ."<sup>45</sup> Secondly, he ruled that in light of the Geneva Convention's clear "purpose . . . to prevent civilians from becoming direct victims of war, the Convention provisions according rights to civilians are self-executing in U.S. courts."<sup>46</sup> Horn ultimately concluded, however, that although article 1 imposes domestically enforceable obligations upon the United States, there was insufficient evidence that violations of article 3 were occurring in El Salvador.<sup>47</sup>

On appeal, the Board of Immigration Appeals ("BIA" or "Board"), upheld Judge Horn's denial of all three forms of relief requested but rejected his rationale. The BIA affirmed Horn's analysis that international law is United States law and must be applied by United States courts,<sup>48</sup> but found that article 1 is not a self-executing treaty provision

El Salvador, it has no independent obligation under article 3 to protect Salvadoran nationals from violations of their article 3 rights. Article 1 was essential to Medina's claim because it directly obligates the United States, as a signatory to the Convention, to "respect and ensure respect for the . . . Convention." See Fourth Geneva Convention, art. 1. For an analysis of the Geneva Convention rights of aliens in deportation proceedings see Kravitz, *Beyond Asylum and Withholding of Deportation: A Framework for Relief Under Geneva Convention IV of 1949*, 1 TEMPLE INT'L & COMP. L. J. 263, 282 (1987).

43. *In re Medina* at 10.

44. *Id.* at 28.

45. *Id.* at 12. Immigration and Nationality Act § 242(b), 66 Stat. 209 (1952) (current version codified at 8 U.S.C. § 1252).

46. *In re Medina* at 23, 18 (citing J. PICTET, PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 11 (1966) [hereinafter J. PICTET, PRINCIPLES]). Judge Horn stated, "[T]he Geneva Convention texts have been drafted solely for the benefit of the *individual*." *Id.* at 18-19 (emphasis in original) (citing J. PICTET, PRINCIPLES, *supra*, at 12). On this basis, he concluded that "the rights provided [in the Fourth Geneva Convention] . . . are self-executing and need no further domestic legislation to ensure their respect in the domestic forums of High Contracting Parties." *Id.* at 23.

For a similar view see Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT'L L. 550, 578 (1971) ("a treaty ought to be deemed self-executing if it involves the rights and duties of individuals").

47. *In re Medina* at 28. Judge Horn held that Medina had not met her "burden to prove by a preponderance of the evidence . . . the alleged violations of Article 3 in El Salvador." *Id.*

48. *Matter of Medina*, Int. Dec. #3078 (BIA 1988) at 14-15 (citing *The Paquete Habana*,

on the ground that it “does not evince an intent to create judicially enforceable rights in private persons.”<sup>49</sup> The BIA thus concluded that article 1 could not be read to obligate the United States, as a non-party to the conflict in El Salvador, to withhold deportation of a foreign national illegally present within its borders.<sup>50</sup>

In addition to the treaty-based humanitarian law claim, the BIA considered whether there might be an argument for relief under customary law. A number of humanitarian law scholars have noted that nations generally feel compelled to provide emergency relief from deportation to victims of civil strife.<sup>51</sup> These experts conclude that such actions are evidence of the existence of a customary norm of “temporary refuge.”<sup>52</sup> Despite the historical and contemporary examples of the provision of temporary refuge to individuals displaced by civil war, the BIA found that such conduct is undertaken on a vol-

175 U.S. 677, 700 (1900) (“[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination”).

49. *Id.* at 10.

50. The Board held that article 1’s language was analogous to United Nations Charter provisions which had been interpreted as non-self-executing. *Id.* at 10–11 (citing *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373–76 (7th Cir. 1985)). The Board neglected to point out that in *Frolova*, the Seventh Circuit articulated a test for reaching a determination regarding self-execution which included an inquiry into “(1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; [and] (3) the nature of the obligations imposed by the agreement . . .” *Frolova*, 761 F.2d at 373. In light of Pictet’s estimation that the overriding intention of the Fourth Geneva Convention was “to prevent civilians from becoming direct victims of war,” (J. PICTET, *PRINCIPLES*, *supra* note 46, at 11) the *Frolova* test supports a finding that article 1 is self-executing.

51. *See, e.g.*, G. GOODWIN-GILL, *supra* note 10, at 119 (“[a]dmission on a temporary basis, especially in situations of large-scale influx, remains an inescapable fact of life, and is practiced by states throughout the world”).

52. For an extensive discussion of the evidence of state practice and *opinio juris* underlying the norm of temporary refuge, see Perluss & Hartman, *supra* note 22.

Representative examples of state practice favoring the granting of temporary refuge include France and Britain providing temporary protection to Spanish Civil War refugees beginning in 1936, *see id.* at 559, and, during the 1980s, Sudan granting safe haven to individuals displaced by the internal strife in Ethiopia and Chad, *see id.* at 560, Pakistan sheltering civilians fleeing Afghanistan, *see id.* at 564, and Belize providing a general amnesty to Guatemalans and Salvadorans until such time as the conflicts in their respective countries were resolved. *See id.* at 567. As evidence of *opinio juris*, the governments of Pakistan, Djibouti, Thailand and Turkey, among others, have each referred to “universally accepted principles,” “humanitarian obligations” or “humanitarian responsibility” in official declarations characterizing the provision of temporary refuge to civil war victims in each of their respective countries. Moreover, United States Secretary of State Cyrus Vance, speaking to the Foreign Ministers of the Association of Southeast Asian Nations in July 1979, expressed the United States’ “support for the internationally recognized principles of temporary shelter and asylum.” *See id.* at n.124.

The Group of Experts on Temporary Refuge in Situations of Large-Scale Influx, which convened in Geneva in April 1981, also stated that although states had the discretion to grant or withhold asylum, they “should give at least temporary asylum” where life itself was at stake. *See* G. GOODWIN-GILL, *supra* note 10, at 118.

untary basis rather than out of a sense of legal obligation, and that the *opinio juris* necessary to support the existence of the norm was lacking.<sup>53</sup>

After ruling on the treaty-based and customary grounds for relief, the BIA also made two determinations based on domestic law. First, the BIA held that regardless of whether the Fourth Geneva Convention is directly applicable in United States courts, and irrespective of the purported existence of a customary norm of temporary refuge, the Refugee Act of 1980 constitutes controlling legislation, and hence overrules international humanitarian norms.<sup>54</sup> Secondly, the Board found that the Attorney General had not delegated to immigration judges or the BIA the authority to grant temporary relief from deportation on grounds other than those specified in the Immigration and Nationality Act.<sup>55</sup>

## 2. Further Elaborations: The Three-Pronged Approach

In the aftermath of the two *Medina* decisions, political asylum advocates around the country responded to the BIA's rejection of the humanitarian law defense to deportation.<sup>56</sup> Attorneys working on the temporary refuge arguments focused on three potential weaknesses of the humanitarian law defense. First, most immigration judges are not schooled in international law and therefore are not necessarily con-

53. The Board in *Medina* posed the question whether a hypothetical international conference convened to consider the plight of civil war victims would decide that such "displaced persons" ought to be included under the definition of refugee contained in article 1 of the Refugee Convention. Partly because the Board was of the opinion that such a conference would not take this action, it concluded that the norm did not exist. *Matter of Medina* at 16.

54. *Id.* at 17. The BIA's analysis relied upon two Supreme Court cases. In *Whitney v. Robertson*, 124 U.S. 190 (1887), the Court determined that a ratified treaty, like a statute, could be overruled by a subsequent statute, holding that the last expression of Congressional will governs. In *The Paquete Habana*, 175 U.S. 677, 700 (1900), the Court held that international customary norms were part of United States law and were to be applied by United States courts so long as there was no controlling domestic legislation.

55. *Matter of Medina* at 13. The BIA specifically held that it lacked the authority to grant "extended voluntary departure" ("EVD"), a discretionary form of relief from deportation which the Attorney General has granted to members of specific national groups including Ethiopians and Poles, on the grounds that "such authority has not been delegated by the Attorney General to the immigration judges or this Board." *Id.*

The INA provisions which authorize Immigration and Naturalization Service Operating Instruction ("INS OI") 242.10e(3), the regulation empowering the Attorney General to grant EVD, however, also authorize immigration judges and the BIA to grant "voluntary departure" to otherwise deportable aliens. Immigration and Nationality Act of 1952, § 242(b) (current version at 8 U.S.C. § 1252(b)). See Smith, *Temporary Safe Haven for De Facto Refugees from War Violence and Disasters*, 28 VA. J. INT'L L. 509, 523 (1988).

56. For example, the International Legal Defense Project, based at Catholic Charities of San Francisco, was founded in 1987 to develop and present arguments for temporary refuge under international treaty and customary law before the judges of the San Francisco Immigration Court.

vinced of their obligation or authority to consider international law.<sup>57</sup> Second, immigration judges have resisted recognizing that article 1 of the Fourth Geneva Convention is a self-executing treaty provision. Finally, the customary norm argument, although free from the self-execution problem, may be less compelling to judges as a basis for relief due to the amorphous nature of unwritten legal obligations. In response to these challenges to the temporary refuge theory, advocates and experts developed a comprehensive, three-pronged argument for relief under humanitarian law which addresses the jurisdictional as well as conventional and customary law issues.<sup>58</sup>

The three-pronged argument begins by establishing that international law is United States law<sup>59</sup> and emphasizes that under the Supremacy Clause of the United States Constitution, "all Treaties . . . shall be the supreme Law of the Land" on a par with federal statutes.<sup>60</sup> In addition, the Supreme Court has recognized that international customary law also is United States law, "to be ascertained and administered by the courts of justice . . ."<sup>61</sup> Finally, INA § 242(b) instructs immigration judges to consult the provisions of the INA or "any other law or treaty . . ." in determining deportability.<sup>62</sup>

The second prong of the argument seeks to establish that article 1 of the Fourth Geneva Convention obligates the United States to refrain from deporting foreign nationals when violations of article 3 are taking place in their countries of origin. This analysis applies the signatories' pledge in article 1, to "ensure respect for the . . . Convention in all circumstances . . .," to situations in which civilians are the victims of violence resulting from article 3 violations.<sup>63</sup> The argument requires

57. Refugee policy analysts have called for improved education of INS officials and immigration judges in domestic and international refugee law, as well as in international human rights law and the occurrence of human rights violations in particular countries around the world. While training programs existed during the 1980s, they were widely regarded as inadequate. See *Despite a Generous Spirit*, *supra* note 16, at 30–31, 42. Pursuant to new asylum regulations promulgated in July 1990, a new body of asylum officers with exclusive jurisdiction over administrative asylum applications will be trained in international and human rights law. See 55 Fed. Reg. 30,680 (1990); see also *infra* note 105.

58. For a full elaboration of the three-pronged theory, see Motion for Temporary Refuge and Memorandum of Points and Authorities [hereinafter Temporary Refuge Memorandum], *In re* Raquel de los Angeles Madrid-Norio, No. A24 292 084 (Immigr. Ct. San Francisco, Apr. 3, 1987); Temporary Refuge Memorandum, *In re* Coralia Luz Aguilar-Moreno, No. A27 196 226 (filed in Immigr. Ct., San Francisco Mar. 9, 1988); Supplemental Memorandum of Points and Authorities in Support of Motion for Temporary Refuge [hereinafter Supplemental Memorandum], *In re* Aguilar-Moreno, No. A27 196 226 (Immigr. Ct., San Francisco July 14, 1988).

59. Temporary Refuge Memorandum, *In re* Madrid-Norio at 3–5; Supplemental Memorandum, *In re* Aguilar-Moreno at 2–12.

60. U.S. CONST., art. VI, cl. 2.

61. The Paquete Habana, 175 U.S. 677, 700 (1900). The BIA recognized this proposition in the *Medina* case. See Matter of Medina, Int. Dec. #3078 (BIA 1988) at 14–15.

62. 8 U.S.C. § 1252(b) (1952).

63. See *In re* Medina at 22; see also Case Concerning Military and Paramilitary Activities in

courts to find that article 1 is self-executing, on the ground that it was intended to confer rights on individuals and to limit the brutality of war wherever possible.<sup>64</sup>

Due to the open-textured language of article 1 and the complexities of the self-execution doctrine, this prong of the argument is perhaps the most vulnerable. However, two alternative positions provide a defense against deportation. First, the more expansive customary principle of protection which anteceded and was codified by the Geneva Conventions also requires the United States to refrain from deporting individuals to situations characterized by violations of humanitarian law. This principle was never limited to the context of international conflicts.<sup>65</sup>

Second, a request for temporary refuge does not assert that article 1 obligates the United States to intervene affirmatively in the internal affairs of a foreign nation to prevent violations of article 3. Rather, the United States is asked not to cause further humanitarian law violations by forcing individuals to return to their native countries, where they are likely to become victims of civil war violence. Even if it is not deemed self-executing, article 1 prohibits the United States

and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (Judgment on the Merits of June 27) (article 1 obligates the United States "not to encourage persons or groups engaged in the conflict in Nicaragua to act in violations on the provisions of Article 3"); *but see In re Madrid-Norio*, No. A24 292 084 at 17 (Immigr. Ct., San Francisco Nov. 20, 1987) ("language of Article 1 does not relate to the provisions of Article 3").

64. An individual rights-oriented analysis of the doctrine of self-executing treaties suggests that articles 1 and 3 both should be deemed self-executing. As Senator Mansfield eloquently admonished the Senate on July 6, 1955, as that body prepared to ratify the Geneva Conventions of 1949: "[I]f only a few score of lives are preserved because of the efforts at Geneva, then the patience and laborious work of all who have contributed to that goal will not have been in vain." 101 CONG. REC. 9971 (1955). *See also In re Medina* at 24-25 ("[b]ecause the emphasis of the Geneva Conventions is so clearly the protection of the individual . . . it logically follows that in order to fulfill the purpose . . . of the [Fourth Geneva] Convention, an individual should be entitled to secure his rights under the Convention in any . . . Party's domestic courts whenever applicable"); *Head Money Cases*, 112 U.S. 580, 598-99 (1884) (a treaty is self-executing "whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined"); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1923) ("treaties for the protection of citizens" likely to be deemed self-executing); *Riesenfeld*, *supra* note 46, at 578 ("a treaty ought to be deemed self-executing if it [*inter alia*] involves the rights and duties of individuals"); *People of Saipan v. United States Dept. of Interior*, 502 F.2d 90, 97 (9th Cir. 1974) (court should consider "the immediate and long-range social consequences of self- or non-self-execution"); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) (court should weigh the circumstances surrounding the signing of the treaty); *but see Sei Fujii v. State of California*, 38 Cal.2d 718, 242 P.2d 617, 722 (1952) (article 56 of the Charter of the United Nations, under which nations "pledge . . . joint and separate action . . . for the achievement of the purposes set forth in Article 55" (which include "universal respect for . . . human rights"), deemed non-self-executing).

For a fuller analysis of the self-execution doctrine, see Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986).

65. *See* J. PICTET, *HUMANITARIAN LAW*, *supra* note 36, at 47.

from producing an outcome that would violate the spirit of the Fourth Geneva Convention.<sup>66</sup>

The third and last prong of the argument asserts that the customary norm of temporary refuge independently obligates the United States not to deport foreign nationals while humanitarian law violations occur in their countries of origin. Recognizing the extensive evidence that the practice of according temporary refuge has evolved into customary law, the United Nations High Commissioner for Refugees ("UNHCR") has stated that temporary refuge has achieved the status of a peremptory norm.<sup>67</sup>

Advocates also must clarify that the Refugee Act of 1980 does not constitute controlling legislation which supersedes the norm of temporary refuge,<sup>68</sup> since these two sources of law provide discrete forms of relief<sup>69</sup> to distinct classes of people. That the drafters of the Refugee Act declined to include victims of civil strife within the definition of a "refugee"<sup>70</sup> does not preclude civil war victims from all forms of relief. The Refugee Act of 1980 incorporates the language of the United Nations Refugee Convention and the United Nations Refugee

66. Iwasawa, *supra* note 64, at 645, states:

U.S. courts have consistently recognized that provisions of constitutions and statutes are the law of the land, whether or not they are self-executing. Non-self-executing treaty provisions should not be treated any differently, particularly in light of the Supremacy Clause of the U.S. Constitution which provides that all treaties, including non-self-executing ones, are "the Supreme Law of the Land."

*Id.* (citing *Carow v. Board of Educ. of New York*, 272 N.Y. 341, 347, 6 N.E.2d 47, 50 (1936) and U.S. CONST. art. VI, cl. 2).

The impact of non-self-executing treaty provisions may best be understood by considering the analogous force of non-self-executing Constitutional provisions. United States courts must enforce domestic statutes in a manner which upholds the principles embodied in non-self-executing provisions of the United States Constitution. *See id.* at 688.

As the Superior Court of New York held in 1895:

While a provision of the constitution may need legislation to enforce its principles, and give them affirmative effect, yet, without any legislation, such provision may have a negative force, in prohibiting acts in violation of its terms . . . *thus while, from lack of legislation, its principles cannot be affirmatively enforced, neither . . . can those principles be lawfully violated*, or any statute violating them be enforced.

*In re Sweeley*, 33 N.Y.S. 269, 272-73 (N.Y. Sup. Ct., 1895) (emphasis added).

67. U.N.H.C.R., REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES para. 22-23, U.N. Doc. E/1985/62 (1985).

Peremptory or *jus cogens* norms are those norms of international law from which no derogation is permitted. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

68. *See The Paquete Habana*, 175 U.S. 677, 708 (1900) (courts need only "give effect to [international rules] . . . in the absence of . . . [a] public act of their own government in relation to the matter").

69. Relief in the form of temporary refuge does not confer the equivalent of refugee status on individuals lacking a "well-founded fear of persecution." Rather, it accords temporary relief from deportation to victims of internal conflict, until it is safe for them to return to their nations of origin.

70. *See supra* note 13.



Protocol into domestic law. The Act does not, however, invoke the language of customary or treaty-based international *humanitarian* law.<sup>71</sup>

#### D. *The Impact of the Humanitarian Law Defense in United States Courts*

##### 1. Deportation Proceedings

The three-pronged humanitarian law argument for temporary refuge has not yet been successful in deportation proceedings in the United States. In *In re Madrid-Norio* and *In re Aguilar-Moreno*, two cases heard in San Francisco Immigration Court in 1987 and 1988, respectively, the presiding immigration judges found that although violations of humanitarian law were taking place in El Salvador, neither article 1 of the Fourth Geneva Convention nor customary law obligate the United States to grant relief from deportation to a civilian fleeing violence due to civil strife in that country.<sup>72</sup>

In the *Aguilar-Moreno* case, Judge Bernard J. Hornbach determined that the "any other law or treaty" provision of INA § 242(b), which sets forth the possible bases for a judicial determination of deportability, refers exclusively to United States statutes and treaties and excludes international customary law.<sup>73</sup> Moreover, Judge Hornbach explicitly stated that "[t]he authority of an Immigration Judge is limited to authority specifically granted by statute or regulation . . . . 'Immigration Judges . . . are creatures of statute . . . .'"<sup>74</sup>

Regarding the second, treaty-based, prong of the humanitarian law argument, Judge Hornbach concluded that the "ensure respect" lan-

71. See Helton, *supra* note 17, at 251. The class of individuals served by the Refugee Convention may be distinguished from those protected by the Fourth Geneva Convention: Several instruments of international law [such as] . . . the Convention on the Status of Refugees . . . have defined the term refugee. The definitions in question are valid for the particular purposes of law for which they are formulated but are too technical and too limited in scope to meet the requirements of the Geneva Convention.

PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1958) at 263-64 [hereinafter PICTET, COMMENTARY] (emphasis added).

In late 1990, the United States Congress amended the INA to create a new "temporary protected status" for individuals present in the United States who have been displaced from their nations of origin by civil war and other conditions of upheaval. Immigration Act of 1990, Pub. L. 101-649, § 301, 104 Stat. 4978 (to be codified at 8 U.S.C. § 244A (1990)). This indication of a specific legislative intent to protect civil war victims would supersede any alleged prior intent on the part of Congress to bar relief to such individuals. See *Whitney v. Robertson*, 124 U.S. 190, 195 (1887). Furthermore, the enactment of legislation providing temporary relief from deportation to individuals fleeing civil strife constitutes state practice in conformity with the customary norm of temporary refuge. See *supra* note 22 and accompanying text.

72. *In re Madrid-Norio*, No. A24 292 084 (Immigr. Ct., San Francisco Aug. 21, 1987); *In re Aguilar-Moreno*, No. A27 196 226 (Immigr. Ct., San Francisco Oct. 18, 1988).

73. *In re Aguilar-Moreno* at 9-10.

74. *Id.* at 21-22 (citing *Lopez-Telles v. INS*, 564 F.2d 1302 (9th Cir. 1977)).

guage of article 1 does not apply to non-international article 3 conflicts.<sup>75</sup> Next, Judge Hornbach ruled that in any event, article 1 is not a self-executing treaty provision, on the ground that it is "totally lacking in specificity and does not . . . evince a judicially enforceable right to 'temporary refuge.'"<sup>76</sup> Finally, Judge Hornbach held that the Refugee Act, as an "'inconsistent' . . . statute . . . enacted 'later in time,'" superseded alleged United States obligations under article 1 of the Fourth Geneva Convention.<sup>77</sup>

In 1990, immigrants' rights attorneys around the country greeted Judge Paul A. Nejelski's decision in the *Santos-Gomez* case<sup>78</sup> with great enthusiasm. For the first time, an immigration judge had refused, on purely international humanitarian law grounds, to order the deportation of an individual found otherwise deportable under domestic law.<sup>79</sup>

After hearing the Santos family's "tale of murder, rape and destruction,"<sup>80</sup> Judge Nejelski denied political asylum and withholding of deportation to Maria Elena Santos-Gomez, her mother, and her young son.<sup>81</sup> Having denied asylum and withholding, however, he went on to identify the central issue of the case as "whether this family must be forcibly returned to El Salvador by the United States government

75. *Id.* at 15. Specifically, Judge Hornbach ruled that the pledge by Geneva Convention signatories to "ensure respect for the . . . Convention in all circumstances . . ." only entails obligations between parties to an international conflict, and does not require that the United States "permit suits . . . in domestic courts" by individuals fleeing civil war violence in a country with which it is not at war.

76. *Id.* at 15-16; *but see supra* note 64 (analysis of authority asserting that treaties which involve individual rights should be deemed self-executing).

77. Judge Hornbach found that Congress' intent in passing the Refugee Act to "exclude persons displaced by civil or military strife . . ." from refugee status was fundamentally at odds with any Geneva Convention obligations to provide temporary relief from deportation to such individuals. *In re Aguilar-Moreno* at 19 (citing *Whitney v. Robertson*, 124 U.S. 190, 195 (1887); *but see supra* note 17).

78. *In re Santos-Gomez, Santos-Trejos and Ramirez-Santos*, Nos. A29 564 781, A29 564 785, and A29 564 801 (Immigr. Ct., Washington, D.C. Aug. 24, 1990).

79. *Id.* at 2.

80. *Id.*

81. Despite the petitioners' provision under duress of food, money and supplies to the guerrillas, their desire to avoid alienating either party to the armed conflict in El Salvador, and the harassment, rape and murder of a number of family members, in Judge Nejelski's view the three petitioners had not been sufficiently singled out for persecution to qualify for relief under the provisions of the Refugee Act. *In re Santos-Gomez* at 4-5, 6.

Neither the asylum nor the withholding of deportation provisions of the Refugee Act require that an individual already have been singled out for persecution to qualify for relief. *See* 8 U.S.C. §§ 1158(a) and 1253(a), and *supra* notes 11 and 12. Under the law of other circuits, the Santos-Gomez family's desire to remain neutral, the likelihood that they would be regarded by the Salvadoran military as having given support to the guerrillas, and the persecution of their family members might each constitute adequate grounds for the granting of political asylum. *See Bolanos-Hernandez v. INS* 479 F.2d 1316, 1324-25 (9th Cir. 1984) (neutrality is a political opinion); *Hernandez-Ortiz v. INS* 77 F.2d 509, 517 (9th Cir. 1985) (the imputation of political opinion is a sufficient basis for asylum); *Ramirez-Rivas v. INS*, 899 F.2d 864, 872-73 (9th Cir. 1990) (persecution of family members can constitute sufficient grounds for asylum).

to experience more murder, rape and destruction or whether these three can find a safe haven in this country until peace returns to their homeland."<sup>82</sup> Judge Nejelski then granted the petitioners temporary refuge under customary international law.<sup>83</sup>

Judge Nejelski acknowledged, as did Immigration Judges Horn and Hornbach in the *Medina* and *Aguilar-Moreno* cases, respectively, that "[f]or over 200 years, customary international law has been binding in United States courts of all kinds and has formed part of our domestic laws."<sup>84</sup> However, unlike Judge Hornbach in *Aguilar-Moreno*, who held that immigration judges cannot grant relief under international law not explicitly provided in the INA,<sup>85</sup> Judge Nejelski held that "[t]he Immigration Court has a special obligation to follow the law and not be swayed by the winds of politics. The Board and immigration judges are courts bound by the law, including international law. Indeed the Board has interpreted and been bound by international law on various occasions."<sup>86</sup> Moreover, Judge Nejelski found that as a matter of due process, immigration judges must hear customary law claims, since deportation proceedings are the "sole and exclusive procedure for determining deportability."<sup>87</sup>

Judge Nejelski next identified the source of international law on which the claimed relief might be granted. Distinguishing *Santos-Gomez* from the BIA's decision in *Medina*, Judge Nejelski stressed that the Santos-Gomez' claim derived "not from the Geneva agreements, but from humanitarian law generally."<sup>88</sup> In considering the BIA's suggestion in *Medina* that the existence of an alleged customary norm could be tested by convening an international conference to address the issue,<sup>89</sup> Judge Nejelski found that such a "'conference' . . . [had

82. *In re Santos-Gomez* at 2.

83. *Id.*

84. *Id.* at 7 (citing, *inter alia*, *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983); *The Paquete Habana*, 175 U.S. 677 (1900); *The Nereide*, 13 U.S. 388 (1815); RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 6, 1985), § 102, comment j).

85. *In re Aguilar-Moreno* at 21-22.

86. *In re Santos-Gomez* at 7 (emphasis added) (citing, *inter alia*, *Matter of Medina*, Int. Dec. #3078 (BIA 1988) at 14-15; *Matter of P-*, 9 I & N Dec. 362 (BIA 1961) (BIA will look to international law regarding dual nationality); *Matter of A- G-*, I.D. 3040 (BIA 1987); *Matter of Davis*, 16 I & N Dec. 514 (BIA 1978) (BIA will apply United Nations Convention on the Reduction of Statelessness)).

87. *Id.* at 13-14.

88. *Id.* at 9-10. Judge Nejelski found that the BIA in *Medina* denied relief under the provisions of the Fourth Geneva Convention but deferred its finding on the existence of a customary norm of temporary refuge "pending 'adequate indication [of] the state of customary international law.'" *Id.* at 10 (citing *Matter of Medina* at 16).

89. *Matter of Medina* at 16. The BIA in *Medina* concluded that if such a conference had convened on the day of its decision, it would likely have concluded that a norm of temporary refuge did *not* exist. *Id.* at 16. However, the BIA misstated the relevant issue as "whether displaced persons should now be included within the definition of 'statutory refugees' under the

been] held in the trial of this case" as a result of testimony given by experts in the field of humanitarian law.<sup>90</sup> He considered evidence indicating that safe haven had been provided by over twenty-eight different countries to individuals from twenty-five countries, and found that the petitioners had "demonstrated overwhelmingly the existence of a customary international norm of non-return to a country engaged in civil war."<sup>91</sup>

Finally, Judge Nejelski articulated a two-step analysis for determining temporary refuge eligibility. He held that petitioners must show that civil war existed in their country of origin, and that there was a "nexus" between the conflict and their decision to flee, demonstrated by the "immediate vulnerability of the family" or by indications that "the terrors of war are close at hand."<sup>92</sup>

## 2. Federal Court Consideration: International Law Arguments as a Bar Against Deportation and a Defense Against Criminal Prosecution of Sanctuary Workers

Despite the apparent progress of the humanitarian law defense to deportation in immigration court as evidenced by the *Santos-Gomez* decision, the defense has met with significant resistance in federal court. In *Echeverria-Hernandez v. INS*,<sup>93</sup> the Ninth Circuit Court of Appeals rejected the humanitarian law defense to deportation, affirming the denial of a motion for temporary refuge filed on behalf of a Salvadoran seeking asylum.<sup>94</sup> Additionally, two cases arising out of the sanctuary movement,<sup>95</sup> *U.S. v. Aguilar*<sup>96</sup> and *American Baptist Churches in the U.S.A. v. Meese* ("ABC v. Meese"),<sup>97</sup> reflect the hostility of federal courts to the humanitarian law defense during the 1980s.

1951 Convention and 1967 Protocol . . . ." *Id.* The norm of temporary refuge, however, does not seek to amend the definition of a refugee. See Perluss & Hartman, *supra* note 22, at 554; see also *supra* notes 71, 17 and accompanying text.

90. *In re Santos-Gomez* at 9.

91. *Id.* at 11-12.

92. *Id.* at 14-15.

93. *Echeverria-Hernandez v. INS*, 923 F.2d 688 (9th Cir. 1991). The petitioner has requested a re-hearing of her claim by the Ninth Circuit Court of Appeals. Petition for Rehearing and Request for Rehearing En Banc ("Petition"), *Echeverria-Hernandez v. INS*, No. 89-70236 (filed in the U.S. Court of Appeals for the Ninth Circuit, Jan. 25, 1991).

94. *Id.*

95. The sanctuary movement is characterized by nation-wide acts of civil disobedience in which individual churches, synagogues and other community groups provide shelter to Central Americans illegally residing in the United States who have fled persecution and civil strife in Central American countries, most notably El Salvador and Guatemala. See I. BAU, *THIS GROUND IS HOLY: CHURCH, SANCTUARY AND CENTRAL AMERICAN REFUGEES* 5-8 (1985).

96. *U.S. v. Aguilar*, 871 F.2d 1436 (9th Cir. 1989).

97. *ABC v. Meese*, 712 F.Supp. 756 (N.D. Cal. 1989).

In *U.S. v. Aguilar*, the Ninth Circuit upheld the convictions of a number of sanctuary workers under section 274(a) of the Immigration and Nationality Act.<sup>98</sup> The *Aguilar* appellants asserted that because the United Nations Protocol Relating to the Status of Refugees legalizes the presence of displaced Central Americans in the United States, regardless of whether they possess valid visas, the act of sheltering such individuals does not constitute a violation of the INA.<sup>99</sup>

The Ninth Circuit affirmed the convictions of the sanctuary workers and rejected their international claim. The court ruled that the Protocol requires individuals with a well-founded fear of persecution to present themselves to immigration officials before legal status is conferred.<sup>100</sup> Moreover, the Ninth Circuit held that the Protocol is not a self-executing treaty because the determination of refugee status is within the discretion of each signatory government.<sup>101</sup> Finally, the court held that although the "any other law" language of INA § 274(a) incorporates international law, "the Immigration Act's definition of 'law' does not include international norms; only conventions and treaties."<sup>102</sup>

In response to the prosecution of sanctuary workers, a number of sanctuary organizations mounted a class action suit, the *American Baptist Churches* case,<sup>103</sup> to block federal prosecutions of such organizations and to enjoin the Attorney General from deporting Central Americans seeking asylum. On a motion to dismiss filed by the defendants, Judge Robert F. Peckham dismissed most of the claims raised by petitioners, including their first amendment free exercise claim and their international humanitarian law claims.<sup>104</sup> *ABC* was resolved in a landmark settlement on December 19, 1990, in which

98. *U.S. v. Aguilar*, 871 F.2d at 1467; INA § 274(a)(2) and (3), as amended, 8 U.S.C. § 1324(a)(1)(c) (1980), provided that: "Any person . . . who . . . harbors . . . any alien . . . not lawfully entitled to enter or reside within the United States . . . shall be punished by a fine . . . or imprisonment . . ." (current version at 8 U.S.C. § 1324(a)(1)(c) (1988)).

99. INA § 274(a) imposed criminal penalties for the harboring of certain immigrants provided that they are "not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens . . ." 8 U.S.C. § 1324(a)(4). The defendants in the *Aguilar* case argued that the Refugee Protocol constituted "[an]other law" and entitled the Central Americans to reside lawfully in the United States, since, as individuals with a well-founded fear of persecution, they met the Protocol definition of "refugees." See *U.S. v. Aguilar*, 871 F.2d at 1454.

100. *Id.* at 1454-55.

101. *Id.* at 1454. The Ninth Circuit in *Aguilar* failed to distinguish between the discretion to grant refugee status and the absolute prohibition under article 33 of the Protocol against the *refoulement* of individuals whose life or freedom would be threatened upon return. Article 33 is arguably a self-executing treaty provision.

102. *Id.* at 1454. See also *In re Aguilar-Moreno* at 9-10; 8 U.S.C. § 1252 (1952).

103. *ABC v. Meese*, 712 F.Supp. 756 (N.D. Cal. 1989).

104. *Id.* at 771-73. Judge Peckham did not dismiss the petitioners' claim that the asylum adjudication process denied equal protection to Central Americans.

the INS agreed to readjudicate approximately 150,000 denied or pending asylum claims filed by Salvadorans and Guatemalans. The federal government also admitted that decisions based upon ideological considerations violated the Congressional intent underlying the Refugee Act of 1980.<sup>105</sup>

In their initial complaint, the petitioners asserted that the Attorney General violated both article 1 of the Fourth Geneva Convention and the customary norm of temporary refuge in deporting Central Americans seeking asylum.<sup>106</sup> In response to the treaty argument, Judge Peckham found that the protections accorded to civilians under article 3 apply only to the parties to an internal conflict,<sup>107</sup> and that article 1 is not self-executing because it lacks sufficient specificity and has "serious foreign policy implications."<sup>108</sup> In addressing the customary law claim, Judge Peckham concluded that "the practice of granting temporary refuge to persons fleeing armed conflict ha[s] . . . [not] . . . ripened into a norm of binding international law."<sup>109</sup> Moreover, he found that Congress in the 1980 Refugee Act "specifically rejected the asserted norm of temporary refuge [since it] . . . clearly intended that implementation of the new standards set forth in the statute would itself bring the United States into full compliance with its obligations under international law."<sup>110</sup>

In appealing the denial of a motion for temporary refuge to the Ninth Circuit in *Echeverria-Hernandez v. INS*,<sup>111</sup> attorneys for the ap-

105. The ABC settlement halts the deportation of all Salvadorans and Guatemalans pending the readjudication or initial determination of their asylum claims, establishes application procedures for the release of detained Salvadorans and Guatemalans, and requires the INS to grant Salvadorans and Guatemalans work authorization while their asylum claims are pending. Stipulated Settlement Agreement, *ABC v. Meese*, 712 F.2d 756 (N.D. Cal. 1989) (No. 85-3255) (*sub nom* *ABC v. Thornburg*) [hereinafter *Settlement*].

In the settlement, the INS agrees to adjudicate all Salvadoran and Guatemalan asylum claims in accordance with new asylum regulations promulgated in July 1990. These regulations establish, *inter alia*, a new body of asylum officers who will have exclusive jurisdiction to adjudicate administrative applications for asylum and who will be trained in international law and human rights law (*see* 55 Fed. Reg. 30,676 (1990) (to be codified at 8 C.F.R. § 208); *see also supra* note 57). Pursuant to the settlement, the sanctuary organizations which filed the lawsuit will play a central role in identifying individuals to conduct the training program. Under the terms of the settlement, the INS agrees that neither United States foreign policy nor INS border enforcement priorities are appropriate considerations in the fair evaluation of asylum claims.

106. *ABC v. Meese*, 712 F.Supp. at 767.

107. *Id.* at 769.

108. *Id.* at 770 (citing *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374-75 (7th Cir. 1985)).

109. *Id.*; *but see In re Santos-Gomez, Santos-Trejos and Ramirez-Santos*, Nos. A29 564 781, A29 564 785, and A29 564 801 (Immigr. Ct., Washington, D.C. Aug. 24, 1990) at 11-12 (respondents "demonstrated overwhelmingly the existence of a customary international norm of non-return to a country engaged in civil war").

110. *Id.* at 771.

111. *Echeverria-Hernandez v. INS*, 923 F.2d 688 (9th Cir. 1991).

pellant and amici curiae decided not to rely upon the entirety of the comprehensive three-pronged argument presented by other advocates. In light of the vulnerabilities of various elements of the treaty prong, including judicial skepticism regarding the scope and self-executing character of article 1 of the Fourth Geneva Convention, the petitioner instead concentrated on the customary law prong of the humanitarian law defense.<sup>112</sup>

Counsel for Echeverria cited evidence of widespread state practice and identified manifestations of *opinio juris*<sup>113</sup> which indicate that nations feel obligated to provide temporary relief from deportation to civil war victims.<sup>114</sup> While they did not make an independent argument for relief from deportation pursuant to the Fourth Geneva Convention, they cited the treaty as evidence of state practice in conformity with the customary norm.<sup>115</sup> Furthermore, amici urged the use of the Fourth Geneva Convention as an interpretive device for determining those circumstances under which the customary norm comes into play. They suggested that article 3 and its minimal protections against violence to life and human dignity should be used as a benchmark to determine whether humanitarian law violations are occurring in a given nation such that the norm of temporary refuge is in force.<sup>116</sup>

Counsel for the petitioner in the *Echeverria* case also argued that judges must consult customary international law in order to fully effectuate the intent of Congress in passing the Immigration and Nationality Act. In addition to citing the *Paquete Habana* principle that customary law is United States law, counsel cited a nineteenth-century case that held that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains,"<sup>117</sup> and a 1982 case which held that in order "to ascertain what Congress has authorized, one must consider the treaties, agree-

112. Brief for Petitioner at 3 [hereinafter Brief], *Echeverria-Hernandez v. INS*. This customary argument subsequently became the basis for Judge Nejeleski's decision to grant temporary refuge in the *Santos-Gomez* case.

113. See *supra* note 22 and accompanying text.

114. Brief, *Echeverria-Hernandez* at 8-21.

115. *Id.* at 18-20 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102, comment i (stating that international treaties are an attribute of state practice and constitute evidence of customary law)).

116. Amici urged the court to engage in a three-stage inquiry, determining first that a civil war exists, second that article 3 is being violated, and finally that the petitioner subjectively fears becoming a victim of the violence. Brief in Support of Amici Curiae, American Civil Liberties Union of Southern California, Human Rights Advocates and Professor Frank C. Newman, *Echeverria-Hernandez v. INS* [hereinafter Amicus Brief] at 4, n.2. This three-part analysis is similar to the two-part test utilized by Judge Nejeleski in the *Santos-Gomez* case. See *In re Santos-Gomez* at 14, 15 and *supra* note 92 and accompanying text.

117. Brief, *Echeverria-Hernandez* at 24 (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

ments and customary international law to which the United States subscribes . . . ."<sup>118</sup>

Finally, Echeverria's attorneys argued that the 1980 Refugee Act does not constitute controlling legislation because refugee law and the norm of temporary refuge provide distinct forms of relief to separate classes of people.<sup>119</sup> Furthermore, counsel asserted that the Refugee Act could not preclude the provision of all forms of relief to victims of war because the Attorney General is authorized to grant "extended voluntary departure" ("EVD") on a country-wide basis to individuals from nations embroiled in civil strife.<sup>120</sup> Petitioner's attorneys further submitted that even if the Refugee Act served in 1980 as a rejection of the notion that any form of relief should be extended to civil war victims, the norm of temporary refuge only fully emerged during the last decade. Thus under the *Whitney*<sup>121</sup> "last in time" rule, such a norm would overrule any inconsistent provision of that statute.<sup>122</sup>

After affirming the BIA's denial of Echeverria's claims to asylum and withholding of deportation, the Ninth Circuit rejected her claim to temporary refuge under customary humanitarian law.<sup>123</sup> The court found that the nations which provide temporary refuge to victims of internal conflict do not act "in the belief that the practice [is] . . . required by international law."<sup>124</sup>

118. *Palma v. Verdeyen*, 676 F.2d 100, 103 (4th Cir. 1982).

119. Brief, *Echeverria-Hernandez* at 25.

120. *Id.* at 25-26; see also *supra* note 55. EVD has been granted 16 times since 1960, including a number of instances since the Refugee Act was passed in 1980. See Brief, *Echeverria-Hernandez* at 16 (citing INTERPRETER RELEASES 1084, 1093 (Sept. 21, 1987)).

121. *Whitney v. Robertson*, 124 U.S. 190 (1887).

122. Brief, *Echeverria-Hernandez* at 26; Amicus Brief, *Echeverria-Hernandez* at 13; see also *supra* note 17 and 77. As an example of the growth of the norm since 1980, counsel for Echeverria cited the UNHCR's pronouncement in 1985 that temporary refuge has attained the status of *jus cogens*. Brief, *Echeverria-Hernandez* at 26 n.17; Amicus Brief, *Echeverria-Hernandez* at 13; see also *supra* note 67.

Counsel for Echeverria asserted that *jus cogens* norms overrule subsequent treaties as well as prior treaties. Whether such norms would also overcome subsequent legislation perhaps merits further exploration. The District Court for the District of Columbia offered an affirmative response to the question in dicta suggesting that *jus cogens* norms may have the same status as constitutional provisions. See Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 943 (D.C. Cir. 1988).

Further, the new "temporary protected status" provision of the INA, which extends temporary relief from deportation to individuals fleeing civil strife, would overrule any alleged prior legislative intent to use the Refugee Act to isolate civil war victims from all types of relief. See Immigration Act of 1990 § 301, Pub.L. 101-649, 104 Stat. 4978 (to be codified at 8 U.S.C. § 244A); *Whitney v. Robertson*, 124 U.S. at 195; see also *infra* notes 180-182 and accompanying text.

123. See *Echeverria-Hernandez* at 693-94.

124. Compare *id.* at 693 and *ABC v. Meese*, 712 F.Supp. 756, 770 (N.D. Cal. 1989) ("no court has decided whether the practice of granting temporary refuge to persons fleeing armed conflict has ripened into a norm of binding international law"); but see *In re Santos-Gomez* at 11-12 (respondents "demonstrated overwhelmingly the existence of a customary international norm of non-return to a country engaged in civil war").



The Court also found that the Refugee Act of 1980 and its "comprehensive program for the admission of refugees into this country" preempted Echeverria's claim to temporary refuge.<sup>125</sup> The court further concluded that the Attorney General's failure to grant extended voluntary departure to Salvadorans served as an additional basis for finding that international humanitarian law was preempted.<sup>126</sup>

Counsel for Echeverria filed a request for rehearing en banc<sup>127</sup> in which they assert that the Ninth Circuit did not properly evaluate the full range of evidence demonstrating the existence of the customary norm, and similarly failed to recognize the equal status of customary and treaty-based international legal obligations.<sup>128</sup> Petitioner's attorneys secondly urge that the Refugee Act of 1980 does not preempt the humanitarian norm of temporary refuge, since the "Act . . . simply brought the United States into conformity with the United Nations Protocol Relating to the Status of Refugees . . . [and] did not address . . . the issue of complying with the norm of temporary refuge for persons fleeing armed conflict."<sup>129</sup>

### *E. Strategies for Further Development of the International Law Defense to Deportation*

In light of the limited success of the humanitarian law defense in United States immigration courts and its rejection by the Ninth

125. The court failed to differentiate between the separate purposes of asylum and temporary refuge, or between the distinct characters of victims of persecution and victims displaced by armed conflict. Compare *Echeverria-Hernandez v. INS* at 694 and *ABC v. Meese*, 712 F.Supp. at 771 (in 1980 Congress "specifically rejected the asserted norm of temporary refuge").

126. See *Echeverria-Hernandez*, 923 F.2d 688, 695.

127. See Petition for Rehearing, *Echeverria-Hernandez* [hereinafter Petition] at 7-9.

128. *Id.*

129. Petition, *Echeverria-Hernandez* at 11. Petitioner also urges in her request for rehearing that the "temporary protected status" ("TPS") amendments to the INA (passed in November 1990, subsequent to her original request for temporary refuge) now preempt the norm of temporary refuge, hence the court erroneously addressed the international law issue in this case. See Petition, *Echeverria-Hernandez* at 4. Echeverria's attorneys have requested a stay of the proceedings until she has been given the opportunity to apply for temporary protected status. See Petition, *Echeverria-Hernandez* at 5-6.

This author believes that the new TPS provisions do not preempt the norm of temporary refuge because there is no evidence that Congress intended the amendment to constitute controlling legislation, and because it is doubtful that norms which have achieved *jus cogens* status may be preempted by subsequent legislation. See *infra* notes 180-182 and accompanying text.

The TPS provisions do not provide a comprehensive framework. Instead, the legislation merely gives the Attorney General the discretion to grant blanket relief to members of identified nationality groups with no opportunity to appeal such executive action. There is no indication that Congress intended such a harsh result. Rather, the author believes, the TPS amendments were passed to create additional protections under U.S. law for victims of internal conflict and are themselves evidence of state action in accordance with the customary norm of temporary refuge.

Circuit, immigrants' rights advocates need to assess critically the options for developing arguments for relief from deportation under international law. While proponents of the humanitarian law theory may choose to improve the three-pronged argument by eliminating its weaknesses and buttressing its strengths, they may also find the purely customary argument, which succeeded in the *Santos-Gomez* case, more compelling. Alternatively, attorneys may turn to additional sources of international law, found outside the bounds of humanitarian law as strictly defined and within the more expansive reaches of international human rights law.<sup>130</sup>

### 1. Variations on a Theme: Strengthening the Humanitarian Law Argument

One possible method for improving the humanitarian law defense is to address the reservations expressed by Immigration Judge Hornbach in the *Aguilar-Moreno* case.<sup>131</sup> By clarifying those aspects of the analysis which he found unconvincing, and to which other judges may react similarly, advocates may prove more successful when raising these claims in the future.

To overcome the notion that some immigration judges lack the authority to grant relief based upon international law, advocates should refrain from invoking the Immigration and Nationality Act. As Judge Hornbach's opinion illustrates,<sup>132</sup> when attorneys rely on the INA to demonstrate the relevance of international law, they risk creating the impression that the INA is the source of the authority to consider such norms. If, on the other hand, proponents of the humanitarian law theory anchor their arguments in the Supremacy Clause, *The Paquete Habana*,<sup>133</sup> and the principle that all United States courts must uphold international treaties and customary law when not overruled by U.S. statutes, they may persuade immigration judges that they

130. Humanitarian law norms recognizing the rights of civilians to be free from armed attacks and other assaults on their personal dignity operate in the context of armed conflict. See L. HENKIN, *supra* note 25, at 808. Human rights norms, which recognize that individuals are subjects of public international law and can bring claims against governments, for human rights violations are always in force, whether in war or in time of peace. See M. JANIS, *supra* note 21 at 74.

131. *In re Aguilar-Moreno*, No. A27 196 226 (Immigr. Ct., San Francisco Oct. 18. 1988). See *supra* note 78 and accompanying text.

132. Judge Hornbach declined to consider the customary norm of temporary refuge because he found that *Aguilar-Moreno* "hinge[d] her entire claim" on the "any other law or treaty" language of INA section 242(b), which he found to refer exclusively to statutes and treaties. See *supra* note 73 and accompanying text.

133. 175 U.S. 677 (1900). For a discussion of the Court's holding in the *Paquete Habana*, see *supra* note 54.

possess the discretion to apply international norms in deportation proceedings.

In responding to judicial failure to recognize that article 1 of the Fourth Geneva Convention applies to cases of internal conflict, attorneys can adopt the creative approach offered by amici in the *Echeverria* case.<sup>134</sup> Amici suggested in their brief to the Ninth Circuit that although in 1949 the scope of article 1's application may have been limited to international conflicts, the "ensure respect" pledge is now also applied in the civil war context as a result of evolving state practice.<sup>135</sup> Moreover, even if courts begin to acknowledge that article 1 applies to internal conflicts, advocates will need to strengthen their argument that this provision is self-executing.

Further, advocates need to attack the notion that the obligation to provide temporary refuge is inconsistent with Congress's intent in passing the Refugee Act to exclude civil war victims from the refugee definition.<sup>136</sup> Congress enacted the Refugee Act to bring the United States into compliance with international refugee law. The legislation did not address U.S. obligations arising under international humanitarian law.<sup>137</sup>

The *Echeverria* case represents the first consideration by a federal appeals court of the temporary refuge claim, and as such its rejection is both significant and daunting. Yet, the case also represents a maturation of the humanitarian law defense to deportation and as such may assist in rectifying some of the limitations of the three-pronged theory. Despite the Ninth Circuit's decision, further disciplined presentation of the customary argument presented in *Echeverria* may bear fruit in courts impressed, as was Judge Nejjelski, by "overwhelming [evidence of] the existence of a customary international norm of non-return to a country engaged in civil war."<sup>138</sup> Thus, advocates seeking to promote the use of humanitarian law should strengthen the *Echeverria* customary law theory by improving judicial understanding of the power of this particular customary norm.

The *Echeverria* court found that "the statements of various international bodies and officials . . . are resorted to by judicial tribunals,

134. See Amicus Brief, *Echeverria-Hernandez*.

135. *Id.* at 36-37. The *Echeverria* Amicus Brief points out that the International Committee of the Red Cross, which monitors compliance with all of the Geneva Conventions of 1949, has determined that article 1 now applies to civil wars. See Condorelli & Boisson de Chazournes, *Quelques remarques a propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'* in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES* (C. Scinarski, ed. 1984).

136. See *supra* notes 68-71 and accompanying text. See also *supra* note 129.

137. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432-33 (1987) (there is "abundant evidence of an intent to conform the definition of 'refugee' and our asylum law to the United Nations Protocol to which the United States has been bound since 1968 . . .").

138. See *In re Santos-Gomez* at 2, 11-12.

not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."<sup>139</sup> In effect, the court suggested that the expert opinion cited by Echeverria indicates that there ought to be a norm of temporary refuge, rather than that such a norm currently exists.<sup>140</sup>

The court is correct in suggesting that expert opinion is not inherently norm-creating, as are treaty provisions and state practice characterized by a sense of legal obligation.<sup>141</sup> The court also properly clarified that when experts testify to the current validity of a norm within the world community, their opinions merely serve as evidence of the existence of that norm. The Ninth Circuit failed to appreciate, however, that the expert testimony upon which the petitioner relied points to the current recognition of the norm by states and thereby serves as evidence of its existence.<sup>142</sup>

When the UNHCR declared in 1985 that temporary refuge had achieved the status of a preemptory or *jus cogens* norm, it did not presume to turn the notion of temporary refuge into a binding rule by institutional fiat. Rather, the UNHCR bore witness to the fact that the norm had achieved its *jus cogens* status through the widespread recognition by states of its binding force, implying obligations which overrule any efforts of individual states to avoid its dictates.<sup>143</sup> Proponents of the customary humanitarian law defense must stress that the norm of temporary refuge is more than a cherished hope for an uncertain future. Rather, experts and states alike recognize that the norm is currently in force as a binding rule from which no deviation is tolerated.<sup>144</sup>

It is unlikely that judicial reluctance to embrace the temporary refuge argument is purely a function of technical flaws in the legal analysis. Rather, the lack of receptivity on the part of the courts also may stem from an institutional aversion to humanitarian law claims.<sup>145</sup>

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139. See *Echeverria-Hernandez*, 923 F.2d 688, 693 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

140. *Id.* at 693.

141. See *The Paquete Habana*, 175 U.S. at 700; *supra* note 22; see also WILLIAMS & DE MESTRAL, AN INTRODUCTION TO INTERNATIONAL LAW 21 (1987) (declarations of agencies are "not . . . a 'source' but . . . an aid in determining custom").

142. Brief, *Echeverria-Hernandez* at 26, note 17.

143. See U.N.H.C.R., *supra* note 67 at paras. 22-23.

144. See *supra* note 88 and accompanying text.

145. For example, judges may resist accepting humanitarian law claims because they are apprehensive about setting a precedent which may have a wide-ranging impact upon immigration policy (the so-called "floodgate mentality"). Just as judges may allow the asylum claims of individuals to be prejudiced by the fact that they come from countries where persecution is widespread, see *supra* note 15 and accompanying text, they also may be reluctant to extend temporary relief from deportation to individuals who have fled civil war violence for fear that they will be followed by countless numbers of their compatriots.

If proponents of the temporary refuge argument hope to achieve actual relief for potential victims of civil strife, they may be wise to look beyond the four corners of the humanitarian law theory, to seek support in related areas of international law which have benefited from fuller and more favorable consideration by United States courts.

## 2. New Directions: Analogies to Human Rights Law

Within the past decade, both United States and international courts have been increasingly receptive to the claims of individuals alleging human rights violations. Advocates seeking temporary refuge for civil war victims might look to these cases as precedents for judicial consideration of international law claims, and as models for constructing creative arguments for relief from widespread outrages against human dignity.

### a. United States Courts: *Filartiga v. Pena-Irala* and *Rodriguez-Fernandez*

In 1980, the Second Circuit Court of Appeals found that the Alien Tort Claims Act ("ATCA")<sup>146</sup> provided jurisdiction for the federal courts to hear claims by aliens in the United States seeking compensation for violations of their customary human rights which occurred in other countries.<sup>147</sup> In reaching its conclusion, the court held that torture violates customary human rights law,<sup>148</sup> and that the customary prohibition against torture is a part of United States law.<sup>149</sup>

In 1981 the Tenth Circuit Court of Appeals ruled in *Rodriguez-Fernandez v. Wilkinson*<sup>150</sup> that the indefinite detention of Cuban aliens, prevented from entering the United States but unable to return to Cuba, violated the international human rights norm outlawing prolonged arbitrary imprisonment, and thereby constituted an abuse of

146. Alien Tort Claims Act, 62 Stat. 934, 28 U.S.C. § 1350 (1948).

147. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980). The question arose in an action brought by a father and daughter against a former member of the Paraguayan secret police alleging that he caused the death by torture and murder of their son and brother in Paraguay. *Id.* at 878.

148. *Id.* at 884. In concluding that "official torture is now prohibited by the law of nations," *id.*, the Second Circuit consulted various sources of customary international human rights law, including the Universal Declaration of Human Rights (article 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment") and the United Nations Declaration Against Torture. *See id.* at 882 and note 11 (citing the *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR Res. 71, U.N. Doc A/810 (1948) [hereinafter *Universal Declaration*] and the *Declaration of the Protection of All Persons From Being Subjected to Torture*, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975)).

149. *Id.* at 887. *But see* *Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542 (D.D.C. 1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1984) (ATCA provides jurisdiction but not cause of action for private suits brought by aliens).

150. 645 F.2d 1382 (10th Cir. 1981).

discretion by the Immigration and Naturalization Service.<sup>151</sup> The court held that "in upholding the plenary power of Congress over exclusion and deportation of aliens, the Supreme Court has sought support in international law principles . . . . It seems proper . . . to consider international law principles for notions of fairness as to [the] propriety of holding aliens in imprisonment."<sup>152</sup> In so ruling, the Tenth Circuit found that international law is not only a part of United States law, but also a source of the government's power to control immigration, and as such imposes limits on the exercise of that power.<sup>153</sup>

151. *Id.* at 1388-90 (citing the *Universal Declaration*, arts. 3 and 9; and the American Convention on Human Rights, July 4, 1977, 1144 U.N.T.S. 123, 147 (explaining that the norm against arbitrary imprisonment derives from both treaty-based and customary international human rights law).

152. *Id.* at 1388.

153. *Id.* But see *Fernandez-Roque v. Smith*, 734 F.2d 576, 582 (11th Cir. 1984) (detained excludable aliens have no due process right in a parole hearing). The *Rodriguez-Fernandez* principle, when taken to its logical end, challenges the longstanding "plenary powers" doctrine, which asserts that the power to control immigration predates the Constitution, and derives from the United States' status as a sovereign nation. *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893). Because its source is outside the Constitution, the immigration power has been thought to be unbounded by the Constitution, and hence largely immune from judicial review. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953) ("the power to expel or exclude aliens . . . [is] largely immune from judicial control"); *U.S. v. Aguilar*, 871 F.2d 1436, 1469 (9th Cir. 1989). Just as the power to regulate immigration is purportedly "extra-constitutional," immigrants are considered beyond the jurisdiction of the United States courts and deemed unprotected by the Constitution. *Landon v. Plasencia*, 459 U.S. 231, 232 (1982).

The plenary powers doctrine, while historically entrenched, is fundamentally flawed. The doctrine relies on a conceptual leap from the identification of an extra-constitutional source of the immigration power to the claim that the extra-constitutional exercise of that power is legitimate. Because the immigration power is inherent in sovereignty (see *The Chinese Exclusion Case*, 130 U.S. 581, 603-04 (1889)), the courts declare, it is somehow "immune from judicial inquiry or interference" (see *Harisiades*, 342 U.S. at 589). Yet it is just as plausible to conclude that exercise of the immigration power must be governed by the Constitution, which was created to subject *all* governmental powers to the rule of law. One should not

confuse . . . the nation as a whole with its constituent parts. [Though] [i]t can be granted *arguendo* that a nation has unlimited power in international law to exclude and to expel aliens, [i]t does not follow that the courts should refrain from determining whether the manner in which the national legislature exercises that power comports with the constitutional restrictions that the nation as a whole has elected to establish.

Legonsky, *Immigration Law and the Principle of Plenary Constitutional Power*, 1986 IM. & NAT. L. REV. 81, 96, 100.

*Rodriguez-Fernandez* suggests that judicial review of the immigration power is necessary to insure not only adherence to constitutional requirements, but also compliance with the dictates of international law. While a number of Supreme Court cases have found international law to be the underlying basis of the immigration power (see *United States v. Curtiss-Wright*, 299 U.S. 304, 318 (locating the source of immigration law in "the law of nations"); *Fong Yue Ting*, 149 U.S. at 708), the Tenth Circuit in *Rodriguez-Fernandez* holds that international law also should govern the due exercise of that power. See *Rodriguez-Fernandez*, 654 F.2d at 1388 ("[i]t seems proper . . . to consider international law principles for notions of fairness as to [the] propriety of holding aliens in detention"). The *Rodriguez-Fernandez* case suggests that courts may be willing to conceive international law not as a license permitting the United States to regulate immigration in any way it sees fit, but as a basis for challenging governmental policy.

In sharp contrast to *In re Aguilar-Moreno*, *ABC v. Meese*, and *Echeverria-Hernandez*, the *Filartiga* and *Rodriguez-Fernandez* decisions support the principle that petitioners may seek remedies in United States courts under international law. The inconsistent treatment of international law-based claims may be due to the courts' perception that the universal outcry against torture and arbitrary imprisonment is stronger than the global condemnation of the forcible return of civilians to internal armed conflict. Additionally, judicial fear of "opening the floodgates," which temporary refugee petitions may activate, was not a factor in the *Filartiga* and *Rodriguez-Fernandez* cases.<sup>154</sup> Nonetheless, the violence feared by those who flee civil strife often entails human rights abuses such as loss of life, "disappearance,"<sup>155</sup> torture and arbitrary imprisonment, which are carried out against large sectors of the civilian population.<sup>156</sup> Non-return of individuals to a country engaged in civil war may be needed to prevent violations of the very same human rights norms recognized in the *Filartiga* and *Rodriguez-Fernandez* cases. In light of the intimate connection between internal conflict and violations of the most fundamental human rights norms, it may be effective to base an argument for temporary refuge in both humanitarian and human rights law.

#### b. International Courts: *Velasquez-Rodriguez* and *Soering*

On July 29, 1988, the Inter-American Court of Human Rights held the government of Honduras responsible for the forcible disappearance and probable extra-judicial execution of Manfredo Velasquez-Rodriguez, a young Honduran student, and ordered the government to compensate his family.<sup>157</sup> The court held that Velasquez' disappearance constituted a violation of his right to life, humane treatment and personal liberty under articles 4, 5, and 7, respectively, of the American Convention on Human Rights ("the American Convention").<sup>158</sup>

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154. Perhaps it was easier for the Second Circuit in *Filartiga* to grant damages for the death by torture of one individual in what was likely an extraordinary case, than it might be for a judge to grant temporary refuge to a petitioner who is but one of a potentially large group of immigrants seeking to avoid deportation to a situation of widespread violence stemming from internal conflict.

155. Disappearance is the arrest and detention of individuals, often characterized by brutal interrogation, torture or extra-judicial execution, all without formal charges, procedures or official acknowledgement that the individual was ever in custody. See *Velasquez-Rodriguez Case*, Inter-Am. Ct. H.R., 35, OAS/ser L./V./III.19, doc. 13 (1988), paras. 3, 99, 149-53.

156. See AMNESTY INTERNATIONAL REPORT, *supra* note 40.

157. *Velasquez-Rodriguez Case*, paras. 185, 189.

158. *Id.* paras. 186-88.

The *Velasquez-Rodriguez Case* was the first contentious case to be heard by the Inter-American Court of Human Rights.<sup>159</sup> The court broke new ground in the adjudication of human rights claims by finding the government of Honduras responsible for a pattern of human rights abuses in which it may not have participated directly, simply because it tolerated their occurrence.<sup>160</sup> The court found that by failing to prevent the disappearance of Velasquez and by neglecting to punish its perpetrators, the government of Honduras violated its obligation to "ensure to all persons . . . the free and full exercise of . . . [Convention] rights and freedoms . . . ." under article 1 of the American Convention.<sup>161</sup>

Less than one year after the Inter-American Court's decision in *Velasquez-Rodriguez*, the European Court of Human Rights ruled in *Soering*<sup>162</sup> that the extradition by the British government of Jens Soering to the United States to face capital murder charges would constitute a violation of Soering's right to humane treatment under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>163</sup> The court reasoned that this prohibition, "also embodies an associated obligation not to put a person in a position where he will or may suffer such treatment or punishment at the hands of other States."<sup>164</sup>

The *Velasquez-Rodriguez* and *Soering* cases provide guidance in constructing arguments for obtaining a grant of temporary refuge in United States courts. Both cases suggest that governments can be held responsible for human rights violations which they do not commit, but nonetheless either tolerate<sup>165</sup> or indirectly cause.<sup>166</sup> The Inter-American Court found that Honduras must take affirmative action to prevent disappearances and to punish their perpetrators, in order to comply with its pledge to "ensure . . . free and full exercise of . . . rights . . ." in conformity with article 1 of the American Convention.<sup>167</sup> The court's analysis implies that to "ensure respect" for hu-

159. Shelton, *Judicial Review of State Action by International Courts*, 12 FORDHAM INT'L L. J. 361 (1989).

160. *Velasquez-Rodriguez Case*, paras. 178, 182.

161. *Id.*, paras. 161, 173, 174, 182.

162. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser. B) (1989).

163. *Id.*, paras. 80, 111. The court did not base its decision on the death penalty itself, but reasoned that in light of Soering's young age and impaired mental capacity at the time of the murders for which he was charged, the harsh conditions at the prison in which he would probably be incarcerated, and the likelihood of a six- to eight-year imprisonment while his appeals were exhausted, subjecting him to the "death row phenomenon," constituted inhumane treatment. *Id.*, paras. 81, 107, 108, 111; European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (1950) (entered into force Sept. 3, 1953).

164. *Soering*, para. 82.

165. See *Velasquez-Rodriguez Case*, para. 173.

166. See *Soering*, para. 82.

167. *Velasquez-Rodriguez Case*, paras. 173, 174.



humanitarian protections under article 1 of the Fourth Geneva Convention, courts in the United States should at least withhold the deportation of Salvadoran and other nationals to situations in which their basic human rights will be violated.<sup>168</sup>

*Soering* is perhaps of even greater significance in the context of temporary refuge because extradition, like deportation, "put[s] a person in a position where he will or may suffer . . . [degrading] treatment at the hands of [an]other State . . ." <sup>169</sup> Drawing on the logic of *Soering*, attorneys in the United States can argue that because the deportation of individuals fleeing civil war violence is likely to place them in situations in which they are targets of such violence, such action is inconsistent with the obligation to ensure respect for humanitarian norms.<sup>170</sup>

### c. An Expanded Concept of *Non-refoulement*

In addition to supporting the granting of temporary refuge under international humanitarian law by analogy to international human rights law, the *Velasquez-Rodriguez* and *Soering* cases suggest basing petitions for temporary refuge in human rights law itself. By expanding the humanitarian law concept of *non-refoulement* to human rights law, advocates may find available an additional form of relief against deportation.

The term *non-refoulement*, which originated in article 33 of the Refugee Convention, signifies that an individual should not be forcibly returned to a situation in which her "life or freedom would be threatened . . ." on one of the five grounds enumerated in article 1 of the Convention.<sup>171</sup> The norm of temporary refuge can be thought of as *non-refoulement* in the humanitarian law context: individuals may not

168. The "ensure free and full exercise" language of article 1 of the American Convention may appear to entail greater legal obligations than the "ensure respect" language of article 1 of the Geneva Convention. Compare *Velasquez-Rodriguez Case*, para. 173 (article 1 of the American Convention imposes a duty "to guarantee rights") with *In re Aguilar-Moreno*, No. A27 196 226 (Immigr. Ct., San Francisco, Mar. 9, 1988) at 15 (article 1 of the Fourth Geneva Convention is "lacking in [the] specificity [required to] evince . . . judicially enforceable rights"). The language of the two treaties and their authoritative interpretation suggests, however, that the pledge to "ensure free and full exercise" and the obligation to "ensure respect" do not impose meaningfully different standards of conduct on governments. Pictet suggests that the Geneva Convention pledge to "ensure respect" requires affirmative conduct on the part of governments. "[C]ontracting parties . . . should do everything in their power to ensure that the humanitarian principles are applied universally." See PICTET, COMMENTARY, *supra* note 71, at 16 (emphasis added).

169. *Soering*, para. 82.

170. A particularly compelling case against such forcible return to El Salvador stems from the role of the United States in supporting the conflict. See *supra* note 18 and accompanying text.

171. See *supra* note 9 and accompanying text.

be returned to a situation in which they would risk becoming victims of civil war violence.<sup>172</sup> The non-extradition ruling of *Soering*, indirectly supported by the *Velasquez-Rodriguez Case*, implies that a third international norm of *non-refoulement* may be evolving which forbids the forcible return of individuals to situations in which widespread violations of basic human rights are occurring, regardless of whether they also are characterized by armed conflict.<sup>173</sup> This concept of "human rights *non-refoulement*" might be derived from both the "ensure . . . free exercise" language of article 1 of the American Convention and the "ensure respect" language of article 1 of the Fourth Geneva Convention.<sup>174</sup>

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172. There is a natural connection between *non-refoulement* under international refugee law and *non-refoulement* in the humanitarian law context. International bodies have long recognized that traditional refugees often find themselves in situations of mass influx caused by civil strife, and that they may need temporary relief from deportation to civil war violence until their claims to asylum based on a "well-founded fear of persecution" can adequately be addressed. See Perluss & Hartman, *supra* note 36 at n.153 (stating that since 1959, the United Nations General Assembly has given the United Nations High Commission for Refugees ("UNHCR") the authority to provide assistance to individuals who do not meet the Convention definition of a refugee; G.A. Res. 1388, 14 U.N. GAOR Supp. (No. 16) at 20, U.N. Doc. A/4354 (1959); G.A. Res. 1673, 16 U.N. GAOR Supp. (No. 17) at 28, U.N. Doc. A/5100 (1961)).

In 1975, the United Nations made the leap from assisting groups of individuals fleeing widespread violence because there might be traditional refugees among them, to recognizing that civil war victims had legitimate claims to international protection in their own right. The United Nations General Assembly charged the UNHCR with protecting individuals who are in so-called refugee-like situations as a result of wide-spread conditions of social upheaval which they cannot prevent. G.A. Res. 3453, 30 U.N. GAOR Supp. (No. 34) at 92, U.N. Doc. A/10034 (1975).

173. While *Soering* does not constitute binding precedent in United States courts as it interprets a treaty to which the United States is not a party, it may be evidence of an evolving norm of *non-refoulement* in the human rights context and as such may shed light on United States obligations under customary international law. See *Filartiga v. Pena-Irala*, 630 F.2d at 882, note 11 (international treaties and declarations may be considered by U.S. courts as evidence of customary international law).

174. Article 3 of the Fourth Geneva Convention, which prohibits violations of civilians' rights to life, humane treatment and basic due process during time of war (see *supra* note 30 and accompanying text), demonstrates that the most serious humanitarian law violations also constitute violations of fundamental human rights norms. See American Convention on Human Rights, July 4, 1977, 1144 U.N.T.S. 123, 147 (article 4—Right to Life; article 5—Right to Humane Treatment; article 8—Right to a Fair Trial).

The connection between the temporary refuge form of *non-refoulement*, rooted in article 1 of the Fourth Geneva Convention and customary humanitarian law, and human rights *non-refoulement*, implied in article 1 of the American Convention, requires recognition by the world community that nations cannot "ensure . . . free exercise" of human rights if they forcibly return individuals to situations in which those rights are regularly violated on a massive scale. See American Convention, art. 1.

A basis for the extension of the norm of *non-refoulement* from the humanitarian to the human rights context may be found under the terms of the expanded competency of UNHCR itself. Since 1985, UNHCR has sought under its extended mandate to protect "persons who have been displaced from their countries owing to severe internal upheavals or armed conflict." Perluss & Hartman, *supra* note 36, at note 153 (citing Note on International Protection, Thirty-sixth Session of the Executive Committee of the High Commissioner's Programme, paras. 6, 36-37, U.N. Doc. A/AA.96/660 (1985) (emphasis added)).

Given the reluctance of United States courts to recognize the humanitarian law defense against deportation, however, immigrants' rights advocates pursuing relief against the deportation of civil war victims under human rights law will have to seek support beyond the *Soering* decision and the broad language in article 1 of the American and Fourth Geneva Conventions. Such support may be found in the 1984 Declaration of Cartagena, which presents an expanded conception of a refugee that embraces individuals fleeing large scale violations of human rights.<sup>175</sup>

[T]he definition [of refugee] . . . to be recommended for use in the region includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, *massive violation of human rights* or other circumstances which have seriously disturbed public order.<sup>176</sup>

This broader definition of refugee may extend *non-refoulement* under article 33 of the Refugee Convention to persons fleeing wide-spread human rights abuses as well as those with an individualized fear of persecution.

### 3. Legislative Reform

While advocates have been striving to achieve judicial recognition of the treaty-based and customary norm of temporary refuge, efforts also have been mounted on Capitol Hill to legislatively mandate protection for individuals fleeing civil war violence. Since the mid-1980s Congress has debated the Moakley-DeConcini bill, designed to extend safe haven to Salvadorans in the United States in light of the civil war occurring in their country. The bill's sponsors were responding to the failure of the Attorney General to designate Salvadorans as eligible for "extended voluntary departure."<sup>177</sup>

The Moakley-DeConcini bill failed in several successive legislative sessions until November 1990, when Congress amended the Immigration and Nationality Act to include a provision authorizing the Attorney General to bestow "temporary protected status" on the members of individually designated nationality groups residing in the

175. See *supra* note 22.

176. Declaration of Cartagena, *supra* note 13, Conclusions and Recommendations, #3 (emphasis added).

177. See *DESPITE A GENEROUS SPIRIT*, *supra* note 16 at 37-38.

United States.<sup>178</sup> A related provision mandates that the Attorney General extend temporary protected status to eligible Salvadorans for an eighteen-month period beginning on January 1, 1991.<sup>179</sup>

While the regulations implementing the temporary status provisions have not yet been promulgated by the Immigration and Naturalization Service, the new statutory language of the provision indicates that temporary protected status may be granted to individuals from any foreign state in which "the Attorney General finds that there is an ongoing armed conflict . . . and, due to such conflict, requiring the return of aliens . . . to that state . . . would pose a serious threat to their personal safety . . . ." <sup>180</sup>

The generic temporary status provision is significant because it establishes a statutory standard for the discretionary granting of temporary refuge to civil war victims. However, for nationals of states not designated as beneficiaries, or those from designated states who individually do not qualify for relief,<sup>181</sup> the humanitarian law defense will remain of vital significance. Moreover, the temporary protected status provision of the INA will serve as a basis for challenging the argument that the Refugee Act bars the provision of alternative forms of relief to individuals fleeing civil war.<sup>182</sup>

## CONCLUSION

As the humanitarian law defense to deportation continues to be presented in United States courts, advocates develop each prong of the argument with increasing sophistication. While the defense has yet to achieve widespread recognition, judges, even when denying petitions for relief, consistently have upheld the validity of international law as United States law.<sup>183</sup> Further, advocates have shed mean-

178. 8 U.S.C. § 244A (1990). The Attorney General has discretion to designate beneficiary nations after consultation with "appropriate agencies of the Government;" this decision is not subject to judicial review. 8 U.S.C. §§ 244A(b)(1) and 244A(b)(5)(A) (1990).

179. Immigration Act of 1990 § 303, Pub.L. 101-649, 104 Stat. 5036.

180. 8 U.S.C. § 244A(b)(1)(A) (1990). Temporary protected status also can be bestowed if the nation is experiencing an environmental disaster such as an earthquake, flood or drought, if the nation temporarily cannot insure the repatriation of its nationals residing abroad, or if it requests such designation. 8 U.S.C. § 244A(b)(1)(B) (1990).

181. The amendment imposes, among other requirements, the requirement that aliens from all designated countries have been continuously physically present in the United States since the date their state was designated, to be eligible for temporary protected status. 8 U.S.C. § 244A(c)(1)(A)(i).

182. Additionally, if the institutional aversion to humanitarian law claims is based in part on a judicial reluctance to grant relief for which large numbers of people may be eligible, then the existence of a legislatively-mandated administrative mechanism for providing blanket relief where necessary may reassure immigration judges that it is possible for them to grant relief on a case-by-case basis without "making public policy" in the courtroom. See *supra* note 145.

183. See, e.g., *Matter of Medina* at 14; *ABC v. Meese*, 712 F.Supp. at 770 and *supra* note 105.

ingful light on the doctrine of self-executing treaties and have established the evidentiary basis for determining the existence of customary norms. Moreover, they have identified relationships between humanitarian law and human rights law that may supplement and strengthen the humanitarian law argument.

By conceiving the plight of individuals seeking temporary refuge in the United States as the product of brutal conflicts raging in the nations from which they flee, as well as a politicized asylum adjudication process in the United States,<sup>184</sup> the humanitarian law defense to deportation directs attention to the causes of human flight, as well as to the need for judicial and political remedies. By expanding the conception of refuge, international humanitarian law recognizes that victims of generalized conditions of violence possess claims of entitlement to refuge that are as vital and as legitimate as those of persons persecuted on an individualized basis. In so doing, the argument contributes to the search for political solutions to the suffering taking place in Central America and other regions of the world.<sup>185</sup>

It is the urgency of the human condition amid the brutality of war that makes humanitarian law such an appropriate vehicle for challenging the prerogatives of sovereignty. It is difficult to envision a more opportune moment to restrain the exercise of sovereign power than when such limitations may prevent further human suffering. As the right to temporary refuge is asserted in United States courts, its proponents subject the immigration power to the rule of law, affirming the legal personality and human dignity of immigrants and citizens alike.

Whether United States courts will continue to look to international law as a basis for striking down excesses in governmental conduct remains to be seen, but it is clear that the conceptual and legal basis for such judicial action exists. If international legal standards of fairness can be utilized to help set limits on the exercise of governmental power over immigration, then perhaps "the measure of simple justice"<sup>186</sup> for immigrants which Justice Jackson sought in his dissent in *Mezei* will be less dream than reality.

184. See *supra* note 17 and accompanying text.

185. With respect to the prospects for a military solution in El Salvador:

It has become evident that . . . victory for either side is not in the cards. Even with 60,000 to 80,000 Salvadorans already dead, the war could continue for a long time.

. . . .

It is time to reassess objectives, to abandon our pursuit of a military victory and to make peace the overriding objective of U.S. policy.

Bell, *Victory Impossible: Peace Is the Only Policy*, L.A. Times, Dec. 3, 1989, at M3, col. 1.

186. See *Shaughnessy v. Mezei*, 345 U.S. 206, 228 (Jackson, J. dissenting) (Justice Jackson condemned Mezei's denial of "basic fairness" in hearing procedures, urging that the provision of due process to all immigrants was a matter of "simple justice").