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IN RE SANTOS: EXTENDING THE RIGHT OF NON- RETURN TO REFUGEES OF CIVIL WARS

Charles W. Cookson II*

El Salvador is a country mired in an eleven-year-old civil war. Since 1980, the Farabundo Marti National Liberation Front (FMLN) and the Salvadoran government's armed forces have fought for control of El Salvador.¹ Current estimates number the FMLN's forces at six thousand combatants, supported by urban commando and militia groups.² There are 56,000 soldiers in the Salvadoran armed forces.³ This number includes 11,500 police officers, commonly known as the security forces.⁴

Government security forces committed various human rights violations in an effort to repress attempts at insurgency.⁵ Eventually, both the government security forces and the FMLN guerrillas had engaged in physical and psychological torture of the civilian population by indiscriminately bombing urban areas,⁶ threatening citizens and their families,⁷ detaining persons and depriving them of minimal living condi-

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*Com uma mãe assim,
eu queria ser criança para sempre.*

1. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1989, 101st Cong., 2d Sess., U.S. DEP'T OF STATE REPORT SUBMITTED TO THE SENATE COMM. ON FOREIGN RELATIONS AND THE HOUSE COMM. ON FOREIGN AFFAIRS, 569-70 (Joint Comm. Print 1990) [hereinafter COUNTRY REPORTS FOR 1989]. Congress consults these human rights reports when considering whether to extend assistance to foreign countries under the Foreign Assistance Act, 22 U.S.C. § 2151 *et. seq.* (1988) [hereinafter Foreign Assistance Act]. COUNTRY REPORTS FOR 1989, at 1. Violations of human rights, as defined by the Foreign Assistance Act, include torture or other cruel or degrading treatment; prolonged detention without charges; disappearances due to abduction or clandestine detention; and other flagrant denial of the rights to life, liberty, and the security of the person. 22 U.S.C. § 2151n(a) (1988).

2. COUNTRY REPORTS FOR 1989, *supra* note 1, at 569.

3. *Id.*

4. *Id.*

5. *Id.* at 570; AMNESTY INTERNATIONAL, 1988 ANNUAL REPORT 111-13 (1988) [hereinafter AMNESTY INT'L].

6. COUNTRY REPORTS FOR 1989, *supra* note 1, at 569-70; INTER-AMERICAN COMM. ON HUMAN RIGHTS, 1988-89 ANNUAL REPORT 166, OEA/ser. L./V./11.76, doc. 10 (1989) [hereinafter ANNUAL REPORT].

7. COUNTRY REPORTS FOR 1989, *supra* note 1, at 569, 573.

tions,⁸ torturing political prisoners,⁹ and committing other arbitrary violations of human rights.¹⁰ Human rights reports charge paramilitary death squads with murders and disappearances,¹¹ yet the majority of the individual members of the death squads remain unpunished.¹² Over 70,000 people have died as a result of this conflict.¹³ The conflict has disrupted the lives of 525,000 people still living in El Salvador;¹⁴ 55,000 Salvadorans have sought refuge in other Central American countries and in Mexico, and 550,000 have illegally emigrated to the United States.¹⁵ The magnitude of the Salvadoran refugee problem demonstrates the disorder created by the civil war during the 1980s. The United Nations General Assembly has adopted several resolutions addressing both human rights violations and the refugee problem in El Salvador.¹⁶ These resolutions urge all member-states to grant a safe haven to the refugees and to support the independent organizations that assist displaced Salvadorans remaining in El Salvador.¹⁷

8. *Id.* at 575-77; ANNUAL REPORT, *supra* note 6, at 167; AMNESTY INT'L, *supra* note 5, at 113.

9. AMNESTY INTERNATIONAL, EL SALVADOR 'DEATH SQUADS' - A GOVERNMENT STRATEGY 3-6 (1988) [hereinafter EL SALVADOR DEATH SQUADS].

10. COUNTRY REPORTS FOR 1989, *supra* note 1, at 570-79; ANNUAL REPORT, *supra* note 6, at 167; United Nations G.A. Res. 38/101, 38 U.N. GAOR Supp. (No. 47), U.N. Doc. A/38/680 (1984); *see also In re Sanchez and Escobar, I. & N. Dec. 2996 (B.I.A. 1985)* (stating the evidence presented indicated a country-wide state of anarchy in 1982 and the violence in El Salvador reached all segments of the civilian population); *In re Santos* in Deportation Proceedings, No. A29 564 781 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990) (finding the Board of Immigration Appeals' (BIA) description of the civil war in El Salvador in *In re Sanchez and Escobar* still reflects the prevailing conditions in El Salvador today); *Slowly, slowly*, 318 ECONOMIST 39 (March 16, 1991) (describing recent elections in El Salvador and United Nations-sponsored peace talks as bringing hope for an end to the civil war).

11. COUNTRY REPORTS FOR 1989, *supra* note 1, at 572-73; ANNUAL REPORT, *supra* note 6, at 166-67; AMNESTY INT'L, *supra* note 5, at 111-13; EL SALVADOR DEATH SQUADS, *supra* note 9, at 7-12.

12. COUNTRY REPORTS FOR 1989, *supra* note 1, at 572; G.A. Res. 101, 38 U.N. GAOR Supp. (No. 47), U.N. Doc. A/38/680 (1983); AMNESTY INT'L, *supra* note 5, at 113; *see EL SALVADOR DEATH SQUADS*, *supra* note 9, at 12-14 (describing how the legal framework operates to shield "death squad" activities).

13. ANNUAL REPORT, *supra* note 6, at 163.

14. COUNTRY REPORTS FOR 1989, *supra* note 1, at 582.

15. *Id.*

16. G.A. Res. 139, 40 U.N. GAOR Supp. (No. 53), U.N. Doc. A/40/1007 (1986); G.A. Res. 119, U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/700 (1985); G.A. Res. 101, 38 U.N. GAOR Supp. (No. 47), U.N. Doc. A/38/680 (1984).

17. G.A. Res. 139, 40 U.N. GAOR Supp. (No. 53), U.N. Doc. A/40/1007 (1986); G.A. Res. 119, U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/700 (1985); G.A. Res. 101, 38 U.N. GAOR Supp. (No. 47), U.N. Doc. A/38/680 (1984).

To remain in the United States, an alien must qualify for either asylum¹⁸ or withholding of deportation under the Refugee Act of 1980 (Refugee Act).¹⁹ The Refugee Act, which was incorporated into the Immigration and Nationality Act of 1952 (INA),²⁰ grants asylum to applicants who establish, by a preponderance of the evidence, that they have been persecuted in the past or that reasonable persons in similar circumstances would have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.²¹ Case law has established that an applicant

18. The term "asylum" comes from the Latin, meaning "an inviolable place where a person in flight from pursuit takes refuge." Khan, *Legal Problems Relating to Refugees and Displaced Persons*, I RECUEIL DES COURS 287, 316 (1976). It is used when a host country grants residence to an alien who has fled his or her native country and who applies for asylum in the host country, rather than in the host country's consular offices abroad. Comment, *United States, Canadian, and International Refugee Law: A Critical Comparison*, 12 HASTINGS INT'L & COMP. L. REV. 261, 263 (1988).

19. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C., and at 22 U.S.C. § 2601).

20. 8 U.S.C. § 1101 *et seq.* (1988). The federal government has plenary powers over questions of exclusion and deportation of aliens and immigration. *See* The Chinese Exclusion Case, 130 U.S. 581, 609 (1889) (stating that the power to exclude aliens is incident to the sovereignty held by the United States government, as part of those sovereign powers delegated by the Constitution); *see also* *Harisiades v. Shaughnessy*, 342 U.S. 580, 587-88 (1952) (stating the power to deport foreigners is inherent in every sovereign state).

21. 8 U.S.C. §§ 1101(a)(42), 1158 (1988). The attorney general has discretionary power to grant asylum. 8 U.S.C. § 1158(a) (1988). *See* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987) (establishing that a well-founded fear of persecution is a subjective standard). The alien's own testimony may suffice to prove a well-founded fear of persecution when the testimony is consistent and sufficiently detailed, even in the absence of corroborative evidence. *In re Mogharrabi*, I. & N. Dec. 3028 at 10 (B.I.A. 1987). The alien who can establish evidence of past persecution is eligible for asylum without showing a "well-founded fear of persecution." 8 C.F.R. § 208.13 (b)(1) (1991); *In re Chen*, I. & N. Dec. 3104 at 4 (B.I.A. 1989). The evidentiary burden of proof is on the applicant under both tests. 8 C.F.R. § 208.13 (1991). The BIA announced a four-part test to measure the reasonableness of an applicant's fear in *In re Mogharrabi*, I. & N. Dec. 3028, at 11 (B.I.A. 1987):

- 1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;
- 2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic;
- 3) the persecutor has the capability of punishing the alien;
- 4) the persecutor has the inclination to punish the alien.

Id.

Asylum is discretionary and may still be denied even if the applicant successfully establishes a "well-founded fear." 8 C.F.R. § 208.14(a) (1991). A grant of asylum lasts for an indefinite period of time. 8 C.F.R. § 208.20 (1991). The applicant may, after a period of one year, apply for permanent residency in the United States. 8 C.F.R. § 209.1 (1991).

may qualify for withholding of deportation²² by demonstrating a clear probability of persecution.²³

22. 8 U.S.C. §1253(h) (1988).

23. *INS v. Stevic*, 467 U.S. 407, 413 (1984). The "clear probability" standard is higher than that required for a grant of asylum, because it requires objective evidence which demonstrates that it is more likely than not that the alien will be persecuted if deported to his or her native country. *Cardoza-Fonseca*, 480 U.S. at 430. Widespread conditions of violence affecting the entire population in the applicant's native country are not sufficient to establish persecution. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1284-85 (9th Cir. 1984). While asylum is discretionary, the Immigration and Naturalization Service (INS) of the United States Department of Justice must grant withholding of deportation to all eligible applicants. *Carvajal-Muñoz v. INS*, 743 F.2d 562, 567-68 (7th Cir. 1984).

Even upon a showing of persecution, the INS shall deny asylum to an applicant where the asylum-seeker resettled in a third country, has a serious criminal conviction, where there are grounds to believe the refugee committed a serious crime, engaged in the persecution of others, poses a danger to the security of the United States or where a third country has made an outstanding offer to resettle the applicant and guarantee his or her safety. 8 U.S.C. § 1253(h)(2) (1988).

Compare § 1253(h)(2) with recent Italian immigration legislation which offers the following grounds for exclusion:

4. An alien who intends to apply for refugee status will not be allowed entry into the country when, upon objective examination by the border police it is ascertained that:

a) the alien has been granted refuge in another state. This is subject to the prohibition of deportation to a state where the alien will be persecuted on account of race, gender, language, nationality, religion, political opinion, social or personal conditions, or where the alien would be at risk of being deported to a third country which cannot guarantee protection from persecution;

b) the alien entered from a state, other than the state of his or her nationality, which is a signatory to the 1951 Geneva Convention, and where the alien resided for a period of time, excluding any necessary transit time in traveling to reach the Italian border. The same prohibition applies as in paragraph 4(a);

c) the alien is found in the conditions outlined in article 1, paragraph f of the 1951 Geneva Convention;

d) the alien has been convicted in Italy of a crime under article 380, paragraphs 1 and 2 of the Criminal Procedure Code, or constitutes a danger to the national security, or is associated with the mafia, with drug trafficking or with terrorist organizations. Decree-Law No. 416, Gaz. Uff. n. 303, Leg. Ital. I (Dec. 30, 1989) [hereinafter Decree-Law No. 416].

The Italian Parliament adopted a more liberal formulation of immigration legislation than it previously employed. First, it abolished the "geographical limitation" which barred non-Europeans from recognition as refugees under the 1951 Geneva Convention and the 1967 Protocol. Decree-Law No. 416, art. 1, para. 1; *see also* Perluss and Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551, 565 & n.73 (1986) (stating that non-European refugees were only entitled to remain in Italy in order to seek a more permanent solution if they met the United Nations High Commissioner for Refugees' (UNHCR) definition of refugee). Second, the Parliament stated that simple transit through another state no longer constitutes an action prejudicial to an asylum application. Decree-Law No. 416, art. 1, para. 4(b); Caggiano, *Asilo, Ingresso, Soggiorno ed Espulsione dello Straniero nella Nuova Legge sull'Immigrazione*, XLV, LA COMMUNITÀ INTERNAZIONALE 31, 41 (1990). It is interesting to note that in art. 1, para. 4 the Italian Parliament gave the border police unprecedented absolute authority to decide the fate of an asylum applicant who arrives

Much controversy has surrounded the United States government's policy toward illegal Salvadoran refugees. The United States Department of State policy holds that Salvadoran refugees seeking refugee status or asylum, in fact come to the United States primarily for economic reasons.²⁴ The Department of State claims the civil strife and generalized violence in El Salvador do not qualify Salvadoran refugees for asylum or withholding of deportation under the provisions of the INA.²⁵

Critics of the Department of State policy contend the deportation of Salvadoran refugees places the refugees in danger of bodily harm or death.²⁶ These critics also claim this policy violates international law; they demand that the United States grant temporary protection to all Salvadoran refugees until the conditions in El Salvador improve enough to allow for safe repatriation.²⁷ Specifically, critics charge the United

at the border. *Id.* at 42. Caggiano believes that it would have been more appropriate to allow competent central authorities to decide such cases. *Id.*

Italy recently received a wave of 20,000 refugees from Albania, putting the new immigration laws to a test. *Albania's Revenge*, 318 *ECONOMIST* 45 (March 16, 1991). The Italian government stated that these were economic, not political refugees, yet deputy prime minister Claudio Martelli, author of the immigration legislation, said that an exception would be made for those Albanians who wished to stay. *Id.* at 45-46. The incident seems to indicate that Italian authorities do not intend to liberally apply the immigrations laws, even as a country of first refuge, and that the system of preliminary scrutiny by border police can not contain massive refugee migration and is therefore unworkable.

24. HOUSE COMM. ON RULES, REPORT ON TEMPORARY SUSPENSION OF DEPORTATION OF CERTAIN DISPLACED SALVADORANS, H.R. REP. NO. 755, 99th Cong., 2d Sess., pt. 2, at 4 (1986) [hereinafter COMM. ON RULES REPORT] (indicating the State Department believes overpopulation and poverty, coupled with El Salvador's, long-standing practice of encouraging emigration led the refugees to seek entry into the United States). The Department of State issues an advisory opinion on each asylum case through its Bureau of Human Rights and Humanitarian Affairs (BHRHA) which includes a discussion of political conditions in the applicant's country. Comment, *supra* note 18, at 264. The INS may wait for the BHRHA to issue an advisory opinion before rendering a decision in an individual case. 8 C.F.R. § 208.11 (1991). These advisory opinions heavily influence the decision of whether or not to grant asylum. Comment, *supra* note 18, at 264. Critics argue that these advisory opinions lack objectivity because of the inherent political contradictions. *Id.* at 265. Opinions acknowledging human rights violations in countries receiving United States military aid would be contrary to section 2304 of the Foreign Assistance Act. *Id.* Section 2304(a)(2) prohibits the United States government from granting military aid to countries with persistent human rights violations. 22 U.S.C. § 2304(a)(2) (1988).

25. COMM. ON RULES REPORT, *supra* note 24, at 4.

26. *Id.* at 4-5.

27. *Id.* at 4. See also Comment, *supra* note 18, at 261 (describing the case of a Salvadoran whose denial of asylum and subsequent deportation ultimately ended in his violent death). Critics further contend that this denial of temporary protection results directly from the United States' supportive foreign policy towards the Salvadoran government. COMM. ON RULES REPORT, *supra* note 24, at 5. Granting temporary protection to refugees is equivalent to the United States admitting that the Salvadoran gov-

States with evading an international customary norm of non-return which prohibits the practice of repatriating refugees from the civil war in El Salvador.²⁸ The right of non-return contrasts with the established right of *non-refoulement*, which prohibits the repatriation of refugees who run the risk of persecution.²⁹ The right of non-return grants temporary refuge to persons seeking a safe haven from conditions of armed conflict or hostilities where repatriation would subject them to a danger of injury or death.³⁰ The right of non-return attaches until the refugees' own state can guarantee safe repatriation and protection from further violence.³¹ Until such protection can be guaranteed, the refugees may settle in any willing country that is able to ensure their safety and well-being.³² While the right of non-return does not involve a permanent

ernment is unable to maintain law and order. *Id.* See Note, *The Disproportionate Effect of the Entry Fiction on Excludable Aliens*, 9 B.C. THIRD WORLD L.J. 271, 293 (1989) (stating that the asylum process has become politicized, especially in the routine procedure of denials of asylum to Haitians and Salvadorans); see also Parker and Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 413 (1989) (stating that even when recognizing violations of humanitarian or human rights laws abroad, courts have invoked the political question doctrine in order to avoid interfering with the decision-making process or to avoid embarrassing the governments involved); *Baker v. Carr*, 369 U.S. 186, 210-11 (1962) (holding courts must decline judicial review of cases involving political questions which are more properly decided by other branches of the federal government). *Baker* stands for the proposition that the determination of a nonjusticiable issue rests on a number of factors: whether there is a constitutional commitment to a coordinate political branch to handle the issue; whether there are judicially discoverable and manageable standards to resolve the issue; whether there is an initial need for a nonjudicial policy determination; whether the resolution of the issue is impossible without undermining the constitutional authority of another branch of the federal government; whether there is a need for unquestioning adherence to a prior executive or legislative decision; and whether there is the potential for embarrassment because of conflicting pronouncements made by the executive or legislature on the same issue. *Id.* at 217.

28. Perluss and Hartman, *supra* note 23 at 569.

29. See *infra* notes 71-73 and accompanying text (defining *non-refoulement*).

30. UNHCR, Annual Report to the U.N. General Assembly, 40 U.N. GAOR Supp. (No. 12) at 6, U.N. Doc. A/40/12 (1985); Perluss and Hartman, *supra* note 23, at 568-69 (contrasting Canadian and United States treatment of Salvadoran refugees). *But see* Hailbronner, *Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT'L L. 857, 866 (1986) (finding state practice generally unresponsive of the concept of *non-refoulement* of refugees from civil wars as a norm of customary international law, because states fear losing control over their borders).

31. Perluss and Hartman, *supra* note 23, at 554.

32. *Id.* Third World countries almost never grant resettlement to refugees who have found temporary protection elsewhere. Hailbronner, *supra* note 30, at 865 & n.40 (citing Martin, *Human Rights and the Movement of Persons*, 78 AM. SOC'Y INT'L L. PROC. 346, 349 (1984)). Therefore, the asylum seeker must obtain a grant of indefinite stay in the country of first refuge or face repatriation. *Id.* at n.40.

asylum in the host country, it does forbid the forced repatriation of refugees to territories where their lives or freedom are at risk.³³

United States courts first recognized and applied the right of non-return in an asylum case for three undocumented Salvadoran refugees.³⁴ The Immigration Court for Washington, D.C. applied the right of non-return and found that the respondents were not eligible for asylum, but they did have the right not to be deported to their native country of El Salvador for the duration of the civil war.³⁵

This Note focuses on this novel application of the right of non-return. Part I examines the right of non-return as a norm of customary international law. Part II discusses the first international treaties offering protection to war refugees, and examines past litigation on the issue of granting the right of non-return in refugee asylum cases. Part III focuses on the proceedings in *In re Santos*³⁶ and the Immigration Court's analysis. Part IV discusses the need for the *Santos* decision and the effect of the Immigration Act of 1990,³⁷ which granted Salvadoran war refugees the right to temporary safe haven in the United States.³⁸

I. THE RIGHT OF NON-RETURN UNDER CUSTOMARY INTERNATIONAL LAW: DOES IT EXIST?

United States courts are expected to resort to international law as precedent in cases where there is no clear controlling law.³⁹ Where it is

33. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897, 902-03 (1986). *But see* Hailbronner, *supra* note 30, at 865-66 & n.41 (stating that paragraph two, article three, of the United Nations Declaration on Territorial Asylum allowed exceptions to the norm where national security concerns or protection of the host state's population was necessary, as might occur with a mass influx of refugees).

34. *In re Santos* in Deportation Proceedings, No. A29 564 781, 15-16 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.)(Aug. 24, 1990).

35. *Id.* at 16.

36. *Id.* at 15-16.

37. 8 U.S.C.A. §1254a (West Supp. 1991).

38. Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 5030, 5084 (1990). Bills that provided temporary safe haven for Salvadorans were first introduced in Congress in 1983. H.R. 4447, 98th Cong., 1st Sess., 129 CONG. REC. H10,191 (daily ed. Nov. 17, 1983); S. 2131, 98th Cong., 1st Sess., 129 CONG. REC. S16,606 (daily ed. Nov. 17, 1983).

39. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding that a standard practiced out of mutual respect and goodwill becomes a rule of international law by "the general assent of civilized nations"). In *Paquete*, the American Navy seized boats belonging to Cuban coastal fishermen operating off the Florida coast during the Spanish-American War. *Id.* at 678. The Supreme Court concluded that a customary norm relating to fishing boats evolved over time as an exception to the practice of seizing vessels during wartime. *Id.* at 708. Because coastal fishing boats supplied only the local economy and did not contribute to the war effort, they were exempt from seizure on humanitarian grounds. *Id.* at 707. Therefore, the Court found that the illegal seizure of

appropriate to apply international law,⁴⁰ the courts are authorized to apply it with the same precedential weight as federal common law.⁴¹ The United States Supreme Court defines the sources of international law as the works of legal authorities, the general usage and practice of nations, and the judicial decisions enforcing international law.⁴²

A principle of law becomes a norm of customary international law if it meets two requirements: many countries must follow it consistently,⁴³ and the practicing countries must recognize it as a legal obligation.⁴⁴ A

the fishing boats entitled the owners to receive damages for the violation of that newly evolved norm of customary international law. *Id.* at 714. The Court stated that:

International 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. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.

Id. at 700.

40. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964) (stating that courts invoke international law when the facts of the case demand it, and whenever resort to it appears necessary).

41. See *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623 (1983) (reiterating that international law is part of United States law); *Filartiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (noting that the law of nations has always been a part of the federal common law); Buergenthal, *The U.S. and International Human Rights*, 9 HUM. RTS. L.J. 141, 159 (1988) (stating that a rule of international law that is binding on the United States has the status of federal common law); Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT'L L. 450, 473-76 (1989) (describing the application of international law in the framework of the federal common law system).

42. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (finding the general consensus among legal commentators on the definition of the crime of piracy on the high seas as providing a sufficient source of international law for prosecution under a federal statute).

The Statute of the International Court of Justice defines the sources of international law as:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945).

43. Perluss and Hartman, *supra* note 23, at 555-56.

44. *Id.* at 556; see also *The North Sea Continental Shelf Cases (West Germany v. Den.; West Germany v. Neth.)*, 1969 I.C.J. 3, 44 (holding that in order to determine the existence of customary international law, courts must find that there is an extensive and virtually uniform state practice which occurs out of a sense of legal obligation).

The Inter-American Commission on Human Rights has defined the elements of a norm of customary international law as (1) a consistent state practice, (2) which is

norm of customary international law does not have to be universally followed to exist;⁴⁵ however, a norm binds only those states that have exercised it in the past.⁴⁶ Under the scope of international law, every private citizen enjoys certain rights which may not be violated by the individual's government and which will be recognized by any nation practicing that norm.⁴⁷

Extensive state practice in the field of human rights, for instance, has resulted in a prohibition against the infliction of torture and its emergence as a norm of customary international law.⁴⁸ Several international treaties codify the universal rejection of acts of torture and recognize the prohibition as a legal obligation.⁴⁹ This consensus has raised the norm against torture to the status of *jus cogens*.⁵⁰ A norm of customary international law falling under the status of *jus cogens* is binding on all states.⁵¹ No state is exempted from compliance, including those that do not recognize the norm or have objected to its recognition as obligatory.⁵² This is the case even in the absence of legislation recognizing

continued or repeated over a period of time, (3) a conviction that the practice is required under international law, and (4) acquiescence by other non-practicing states. Parker and Neylon, *supra* note 27, at 417.

45. Perluss and Hartman, *supra* note 23, at 556; Parker and Neylon, *supra* note 27, at 417.

46. Parker and Neylon, *supra* note 27, at 418. A state may avoid becoming bound by an emerging rule of customary international law, however, by consistently objecting to its validity. *Id.* at 418. See also Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 458 (1985) (stating that a country that persistently objects to a norm of customary international law is not bound by it, as long as the country manifested the objection during the emergence of the norm as a rule of customary international law).

47. *Filartiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (noting that international law confers fundamental rights upon citizens with respect to their own government, and specifying that the right to be free from torture is among them).

48. See *id.* at 880 (holding that the infliction of torture by a state official violated a universally recognized norm of the international law of human rights).

49. *Id.* at 881-84. The Court found that the United Nations Charter, June 26, 1945, 59 Stat. 1033, T.S. No. 993, the Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/183 (1948), and the American Convention on Human Rights, Nov. 22, 1969, art. 5, para. 2, O.A.S. Official Records, OEA/ser. K/XVI/1.1, doc. 65, rev. 1, corr. 2, reprinted in 9 I.L.M. 673 (1970), guaranteed the right of freedom from torture. *Id.*

50. Parker and Neylon, *supra* note 27, at 415. A rule of *jus cogens* is derived from principles that the legal conscience of mankind regards as indispensable to coexistence in the international community. *Id.* See *Filartiga*, 630 F.2d at 883 (stating that the court had little difficulty in ascertaining the universal renunciation of torture in modern state practice).

51. Parker and Neylon, *supra* note 27, at 416.

52. See Meron, *Geneva Conventions as Customary International Law*, 81 A.J. INT'L L. 348, 350 (1987) (presenting *jus cogens* acts as a moral and legal barrier against any detraction from the norm); Parker and Neylon, *supra* note 27, at 418-19

the norm, or in the presence of a convention, treaty or other legislation invalidating it.⁵³

Supporters of a right of temporary refuge from war claim there is proof of extensive state practice of that customary norm.⁵⁴ The custom of granting temporary refuge to persons fleeing internal conflicts in their homelands has grown during the twentieth century.⁵⁵ France and Great Britain together received over 200,000 Spanish Civil War refugees during the 1930's.⁵⁶ More recently, massive waves of refugees fled from internal armed conflicts in Africa, Southeast Asia, and Latin America.⁵⁷

The existence of *opinio juris*,⁵⁸ or a conviction that the practice is obligatory under international law, fulfills the second requirement for the establishment of a norm of customary international law.⁵⁹ Proponents of the right of non-return point to several sources of *opinio juris*; direct expressions of a legal obligation or of a legal right invoked by states⁶⁰ or international organizations,⁶¹ expressions of protest against breaches⁶² and consistent acquiescence to the practice of the norm.⁶³

(defining *jus cogens* as a binding peremptory norm that invalidates any contravening legislation).

53. Parker and Neylon, *supra* note 27, at 417-19, 427-31. Section 702 of the Restatement (Third) of Foreign Relations Law (1987) states that a treaty is void if it conflicts with a norm of international law which has the status of *jus cogens*. *Id.* at 430.

54. Perluss and Hartman, *supra* note 23, at 558-75.

55. *Id.* at 559. See also Khan, *supra* note 18, at 301-09 (describing instances of flights of refugees in Europe, Latin America, Africa and Asia in this century).

56. Perluss and Hartman, *supra* note 23, at 559 & n.32.

57. *Id.* at 559-68. In Africa, Somalia absorbed over 475,000 Ethiopian refugees by 1980. *Id.* at 560. The Sudan provided a safe haven for thousands of Ethiopians and Chadians fleeing civil war, and Zambia and Zaire provided refuge since 1975 for tens of thousands of Angolan civilians escaping that country's civil war. *Id.* at 560-61. In Southeast Asia, thousands of Cambodians, Laotians and Vietnamese sought refuge in Thailand. *Id.* at 562. Civil wars in Nicaragua, El Salvador and Guatemala displaced thousands of people who fled to countries of temporary refuge throughout Latin America, a large portion of which settled in Costa Rica, Mexico and Honduras. *Id.* at 567. See generally, *Poor Men at the Gate*, 318 *ECONOMIST* 9 (March 16, 1991) (predicting that economic pressures and overpopulation will increase migration of peoples from poor third-world countries to the developed states of Europe and North America); *Waiting for the Next Wave*, 318 *ECONOMIST* 42 (March 16, 1991) (stating that the issue of increased numbers of migrants, refugees and foreign workers was a matter of utmost concern in an Organization for Economic Cooperation and Development conference held in Rome in March of 1991).

58. See *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266, 276-77 (defining *opinio juris* as a sense that the practice of a customary norm of international law arises out of a legal obligation).

59. Perluss and Hartman, *supra* note 23, at 555-56.

60. *Id.* at 577.

61. *Id.* at 585-87.

62. *Id.* at 578.

Opponents, however, deny that sufficient uniform state practice of the norm of non-return exists.⁶⁴ They argue that efforts to include clauses imposing the more limited norm of *non-refoulement* in international conventions have failed due to resistance coming primarily from the nations of Eastern Europe, Asia and the Middle East.⁶⁵ In the critics' view, the practice of the norm of non-return emerges primarily from humanitarian concerns.⁶⁶ That practice, therefore, does not reflect a binding obligation on the part of the states to extend a safe haven to refugees who fall outside the protection afforded by the norm of *non-refoulement*.⁶⁷

II. PRIOR HISTORY

A. THE 1951 UNITED NATIONS CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 UNITED NATIONS PROTOCOL

In response to the growing need to protect refugees affected by, and displaced by wars, the July, 1951 Geneva Convention Relating to the Status of Refugees⁶⁸ (1951 Geneva Convention) defined the rights and duties of refugees. The 1951 Geneva Convention protects only those

63. *Id.*

64. Hailbronner, *supra* note 30, at 867, 873-80.

65. *Id.* at 867. Hailbronner concedes, however, that the right of *non-refoulement* exists as customary law in Western Europe, the Americas, and Africa, and is universal customary law in the making in other regions of the world. *Id.* Attempts by international organizations to impose an obligation on member states to grant asylum have also failed. G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 104-09 (1983). In effect, no obligation exists under international law to grant asylum; present obligations under international treaties relate only to restrictions on deportation, through expulsion or extradition, of refugees. Caggiano, *supra* note 23, at 33.

66. Hailbronner, *supra* note 30, at 876.

67. *Id.* at 880.

68. 1951 United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6529, T.I.A.S. No. 6577, 189 U.N.T.S. 137 [hereinafter 1951 Geneva Convention]. The Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* (1988), as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 105 (1980), uses the 1951 Geneva Convention's definition of refugee:

[T]he term refugee shall apply to any person who . . . as a result of events occurring before 1 January, 1951, and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country, or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear, is unwilling to return to it.

1951 Geneva Convention, art. 1, para. 2, 19 U.S.T. 6529, T.I.A.S. No. 6577, 189 U.N.T.S. 137.

Refugees falling under the definition of the 1951 Geneva Convention are commonly referred to as "Convention refugees." Perluss and Hartman, *supra* note 23, at 558 & n.28.

refugees affected by events occurring prior to January 1, 1951.⁶⁹ The United Nations Protocol of 1967 (1967 Protocol) extended the coverage to events occurring after that date.⁷⁰ The 1967 Protocol includes a principle of *non-refoulement* which prohibits a host state from returning a refugee to a country where the refugee would face persecution.⁷¹ Under *non-refoulement*, however, the refugee must qualify under one of the enumerated grounds that constitute persecution: race, religion, nationality, membership in a particular social group or political opinion.⁷²

Neither the 1951 Geneva Convention nor the 1967 Protocol grants protection to persons victimized and displaced by famine, drought, or civil war.⁷³ These refugees do not meet the traditional definition of "refugee" under the 1951 Geneva Convention and the 1967 Protocol because they do not face persecution on account of one of the enumerated grounds.⁷⁴ Nevertheless, these "humanitarian refugees" vastly outnumber "Convention refugees."⁷⁵ Many of the United Nations' member-states are reluctant to accept "humanitarian refugees" because they do not want to commit themselves to an obligation of uncertain scope that depends largely on events outside of their control.⁷⁶

Some countries, however, have undertaken regional efforts to broaden the definition of refugee in order to provide protection for individuals whose situations are not covered by the enumerated grounds.⁷⁷

69. 1951 Geneva Convention, art. 1, para. 2, 19 U.S.T. 6529, T.I.A.S. No. 6577, 189 U.N.T.S. 137.

70. 1967 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 [hereinafter 1967 Protocol]; Goodwin-Gill, *supra* note 33, at 897-98 and n.3.

71. Article 33 of the 1951 Geneva Convention obliges contracting states not to "refouler" or deport a refugee to territories where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group, or political opinion. 1951 Geneva Convention, art. 33, 19 U.S.T. 6529, T.I.A.S. No. 6577, 189 U.N.T.S. 137. In contrast to the right of non-return, the narrower right of *non-refoulement* requires a recognition of the refugee's status as falling under one of the aforementioned enumerated grounds. Perluss and Hartman, *supra* note 23, at 599. The norm of non-return applies to all refugees falling outside those groups, since otherwise they would be eligible for asylum protection. *Id.*

72. *See id.* (defining *non-refoulement*).

73. Goodwin-Gill, *supra* note 33, at 898.

74. Perluss and Hartman, *supra* note 23, at 599.

75. Hailbronner, *supra* note 30, at 857-58; UNHCR, Annual Report to the United Nations General Assembly, 40 U.N. GAOR Supp. (No. 12) at 3, U.N. Doc. A/40/12 (1985).

76. Khan, *supra* note 18, at 317-19.

77. *See* Perluss and Hartman, *supra* note 23, at 590 (discussing the Organization of African Unity's expanded definition of "refugee"); Goodwin-Gill, *supra* note 33, at 901 (noting the recommendations of the 1984 Cartagena Declaration on Refugees to expand the definition of "refugee" in Central American countries).

The 1969 Organization for African Unity Convention on Refugee Problems in Africa⁷⁸ expanded the definition of 'refugee' to include persons who flee their countries on account of foreign aggression, occupation, or serious disturbances of the public order.⁷⁹ The 1984 Cartagena Declaration on Refugees, endorsed by ten Latin American countries, urged expanding the definition of "refugee" to encompass persons who flee their country because of "threats of generalized violence," human rights violations, and "internal conflicts."⁸⁰ The United Nations High Commissioner for Refugees (UNHCR) expressed the norm of *non-refoulement*⁸¹ in *jus cogens* terms, thereby prohibiting a refugee's deportation to a country at war regardless of whether the refugee meets the 1951 Geneva Convention definition.⁸² Therefore, the UNHCR defi-

Only regional treaties, however, have addressed the prohibition on the mass expulsion of aliens. See Perruchoud, *L'Expulsion en Masse d'Etrangers*, ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 681 (1988) (stating that no universal treaty or convention in existence prohibits the mass expulsion of aliens); see also American Convention on Human Rights, Nov. 22, 1969, art. 22, para. 9, O.A.S. Official Records, OEA/ser. K/XVI/1.1, doc. 65, rev.1, corr. 2, reprinted in 9 I.L.M. 673 (1970) (prohibiting the mass expulsion of aliens); Protocol 4 of the European Convention on Human Rights, art. 4, in force May 2, 1968, reprinted in 7 I.L.M. 978 (prohibiting the mass expulsion of aliens); African Charter on Human and Peoples' Rights, art. 12, para. 5, OAU GAB/LEG/67/3/Rev.4 (1981), reprinted in T. Elias, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW 275 (2d ed. 1988) (prohibiting the mass expulsion of aliens). But see Perruchoud at 681-82 (observing that these treaties contain several safeguards exempting contracting parties in specific situations from complying with that prohibition); Yundt, *International Law and the Latin American Refugee Crisis*, 19 U. MIAMI INTER-AM. L.R. 137 (1987) (concluding that the present inter-American asylum system is inadequate to deal with the mass exodus of refugees).

78. Organization for African Unity Convention on Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45. The duty for the contracting states to grant temporary refuge, as determined by the conditions prevailing in the refugee's native country, prohibits deportation where it would pose a danger to the refugee's life, liberty or well-being under the grounds set forth in the Geneva Convention's definition of refugee and in situations of disruption of the public order. Perluss and Hartman, *supra* note 23, at 591.

79. Goodwin-Gill, *supra* note 33, at 900.

80. Colloquium of Cartagena, Cartagena Declaration on Refugees of Nov. 22, 1984, at 34 (Geneva 1985) (sponsors of the Declaration included the U.N. High Commissioner for Refugees and the states of Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela).

81. See Parker and Neylon, *supra* note 27, at 435-36 (discussing the right of *non-refoulement* as a *jus cogens* norm). The right of *non-refoulement* derives from human rights law and humanitarian law and, as a norm of *jus cogens*, it imposes an obligation on all states not to deport refugees back to countries at war. *Id.*; see also Sepulveda, *La Proteccion de los Refugiados en America. Alcances y Limitaciones*, ANUARIO JURIDICO INTERAMERICANO 233, 248 (1982) (stating that the norm of *non-refoulement* is an imperative right and a norm of *jus cogens*).

82. UNHCR, Annual Report to the U.N. General Assembly, 40 U.N. GAOR Supp. (No. 12) at 6, U.N. Doc. A/40/12 (1985). See Perluss and Hartman, *supra* note 23, at 600 (noting that the UNHCR's statement is a "highly significant and peremptory expression of the legally binding nature of temporary refuge"). The

dition allows a war refugee to remain in safe haven without showing specific persecution.⁸³

B. IN RE MEDINA

United States immigration courts confronted the issue of expanding the definition of refugee in *In re Medina*.⁸⁴ At the respondent's deportation hearing, the immigration court had denied the respondent's request for asylum and withholding of deportation.⁸⁵ Alternatively, she requested a stay of deportation⁸⁶ claiming that customary international law barred her repatriation to El Salvador.⁸⁷ The United States Board of Immigration Appeals (BIA)⁸⁸ addressed the issue on appeal of whether the same protection extended to "Convention refugees" should extend under customary international law to either civil war refugees or displaced persons uprooted by internal armed conflicts.⁸⁹ In addition, the BIA examined whether the Geneva Convention Relative to the Protection of Civilian Persons in Time of War⁹⁰ (the Fourth Geneva Con-

UNHCR's definition of *non-refoulement* has engendered some confusion because it goes beyond the traditional scope of *non-refoulement* to include the prohibition of returning refugees to a country where they may fear "serious dangers resulting from conditions of civil strife." *Id.* See also Parker and Neylon, *supra* note 27, at 413-14 (listing freedom from torture, genocide, human rights violations, apartheid, the right to life, and the rights of refugees as norms of *jus cogens*).

83. Perluss and Hartman, *supra* note 23, at 600.

84. *In re Medina*, I. & N. Dec. 3078 (B.I.A. 1988).

85. *Id.* at 2.

86. *Id.* at 3. The respondent requested what amounted to extended voluntary departure (EVD). *Id.* The Executive bestows EVD on designated aliens pursuant to a determination that deportation would place them in a life-threatening situation. Note, *Temporary Safe Haven for De Facto Refugees from War, Violence and Disasters*, 28 VA. J. INT'L L. 509, 522 (1988). See *infra* notes 113, 115 (discussing extended voluntary departure).

87. *In re Medina*, I. & N. Dec. 3078 at 3 (B.I.A. 1988).

88. See 8 C.F.R. § 3.1(b) (1991) (providing the Board of Immigration Appeals (BIA) with jurisdiction to hear appeals from decisions rendered by the immigration courts).

89. *In re Medina*, I. & N. Dec. 3078 at 2-3 (B.I.A. 1988).

90. Geneva 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. 3,365, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. Three other treaties signed on that date, together with the Fourth Geneva Convention, form the Geneva Conventions of 1949: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3,362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3,363, 75 U.N.T.S. 135; and the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3,316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter jointly cited as the Geneva Conventions of 1949].

vention) provided relief from deportation for the respondent.⁹¹ The BIA held that neither articles 1 or 3 of the Fourth Geneva Convention nor customary international law extend relief from deportation to refugees who fall outside the protection provided by the Refugee Act.⁹² The BIA also held that it did not have jurisdiction to withhold deportation or extend voluntary departure for persons who did not meet the definition of refugee under section 101(a)(42) of the Refugee Act.⁹³

In *Medina*, the BIA advanced several reasons for refusing to grant the right of non-return to persons who did not meet the 1951 Geneva Convention and the Refugee Act definition of "refugee".⁹⁴ First, the BIA found that the Fourth Geneva Convention applied almost exclusively to conflicts of international character⁹⁵ and only article 3 addressed conflicts of non-international character such as the civil war in El Salvador.⁹⁶ The BIA stated that the respondent had no recourse

91. *In re Medina*, I. & N. Dec. 3078 at 20 (B.I.A. 1988). The respondent conceded facts which established her deportability. *Id.* at 2. She applied at her deportation hearing for asylum and withholding of deportation under the INA. *Id.* In the alternative, she sought relief from deportation under the provisions of the Fourth Geneva Convention and under customary international law, claiming states are prohibited from repatriating war refugees. *Id.* at 14. The immigration judge found that the United States was bound by the Fourth Geneva Convention as a contracting party, and that articles 1 and 3 of the Convention provided a basis for denying deportation. *Id.* at 3. Nevertheless the court held that the respondent failed to meet the burden of showing that El Salvador was violating the Fourth Geneva Convention, and denied the withholding from deportation. *Id.*

92. *Id.* at 20.

93. *Id.* at 13; see 8 C.F.R. § 3.1 (1991) (delineating the jurisdiction of the BIA).

94. See *infra* notes 96-115 and accompanying text (enumerating the BIA's reasons for refusing to grant the right of non-return to persons who did not meet the definition of "refugee").

95. But see Perluss and Hartman, *supra* note 23, at 606-07 (asserting that state practice under the Fourth Geneva Convention has defined the duty not to deport refugees back to internal conflict zones).

96. *In re Medina*, I. & N. Dec. 3078, 4 (B.I.A. 1988). In 1977, the United Nations adopted the provisions of article 3 of the 1949 Geneva Convention in a treaty that addressed non-international armed conflicts. Protocol Additional to the Geneva Conventions of August 12, 1949, on the Protection of Victims of Non-International Armed Conflicts, *in force* Dec. 7, 1978, U.N. Doc. A/32/144 Annex II (1977), reprinted in 16 I.L.M. 1442 (1977).

Article 3 of the Geneva Conventions of 1949 reads in part:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely . . . To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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

(b) taking of hostages;

under article 3 because article 3 binds only the parties to a conflict, and the respondent did not allege the United States was a participant in the civil war.⁹⁷ Even if the United States had been a participant, the conflict would not have fallen within the scope of article 3 because conflicts between two contracting parties are deemed to be conflicts of an international character.⁹⁸ The BIA stated further that the language of article 1 does not indicate an intent to provide individuals with a private cause of action; therefore, it does not grant private rights of enforcement in the absence of congressional implementation of enabling legislation.⁹⁹

After demonstrating the inapplicability of the Fourth Geneva Convention, the BIA confronted the validity of respondent's argument based on the norm of non-return.¹⁰⁰ The respondent argued that the state practice of providing safe haven to war refugees now enabled her to seek withholding of deportation normally granted only to "Convention refugees."¹⁰¹ The court addressed three issues: (1) whether such a norm of customary international law exists; (2) whether controlling legislation exists which supersedes that norm; and, if not, (3) whether customary international law may provide relief from deportation for the respondent.¹⁰²

The BIA applied the established two factor test to determine the existence of a customary norm of international law.¹⁰³ The first factor

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

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

(2) The wounded and sick shall be collected and cared for.

Fourth Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3,365, 74 U.N.T.S. 287.

97. *In re Medina, I. & N. Dec. 3078 at 7* (B.I.A. 1988). An International Court of Justice decision, however, found that the Fourth Geneva Convention embodies customary norms which are binding on all states, even those states not participating in the conflict in question. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (Judgement of June 27).

98. *Id.*

99. *Id.* at 10. Congress has not enacted legislation that would create a private cause of action for persons in respondent's situation. *Id.* at 12. The court stated that Temporary Protected Status (TPS) legislation has not created an individual remedy in deportation proceedings for persons in respondent's situation. *Id.* See *infra* notes 174-185 and accompanying text (explaining the impact of TPS on war refugees in the United States).

100. *In re Medina, I. & N. Dec. 3078 at 14-19* (B.I.A. 1988).

101. *Id.* at 3, 14.

102. *Id.* at 15.

103. *Id.*

requires a consistent state practice of the custom.¹⁰⁴ The second factor requires a conviction that the rule is obligatory under international law.¹⁰⁵ The court found that the respondent failed to meet the second factor because she did not demonstrate that nations grant temporary refuge out of a sense of obligation under international law.¹⁰⁶

The BIA based its finding on the traditional sovereign right of states over their borders¹⁰⁷ and the failure of international treaties to include persons displaced by civil wars in their definition of refugee.¹⁰⁸ The BIA indicated, however, that proof of *opinio juris* of a binding norm of customary international law would exist if an international diplomatic conference convened and acknowledged that the norm's status was a custom practiced obligatorily by many states.¹⁰⁹ The BIA concluded that the pronouncements on the right of non-return suggested that temporary refuge was a humanitarian goal, rather than a present obligation practiced by the nations of the world.¹¹⁰

The BIA then analyzed the Refugee Act and categorized it as a controlling act precluding the application of the right of non-return.¹¹¹ The BIA found that Congress intended to provide comprehensive legislation to establish a resettlement and relief program for refugees when it adopted the Refugee Act.¹¹²

Next, the BIA found that even if customary international law provides a basis for the withholding of deportation, the immigration judge does not have the authority to allow such a request.¹¹³ The BIA stated

104. *Id.* at 15. See Perluss and Hartman, *supra* note 23, at 558-75 (delineating extensive state practices of the norm of temporary refuge).

105. *In re Medina, I. & N. Dec. 3078* at 15 (B.I.A. 1988). See Perluss and Hartman, *supra* note 23, at 575-78 (noting different ways of proving the existence of *opinio juris*).

106. *In re Medina, I. & N. Dec. 3078* at 15 (B.I.A. 1988).

107. *Id.*

108. *Id.* at 16.

109. *Id.*

110. *Id.*

111. *Id.* at 17.

112. *Id.* Section 101(b) of the Refugee Act of 1980 states:

[T]he objectives of the Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.

Refugee Act of 1980, Pub. L. No. 96-212, § 101(b), 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C., and at 22 U.S.C. § 2601).

The Conference Committee Report stated that the bill of the Refugee Act, as amended by the House of Representatives, incorporated the Geneva Convention's definition of refugee but rejected coverage of war refugees within its scope. H.R. CONF. REP. NO. 781, 96th Cong., 2d sess. 19 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 160.

113. *In re Medina, I. & N. Dec. 3078* at 18 (B.I.A. 1988).

that neither Congress nor the attorney general have delegated to the immigration judges the power to grant extended voluntary departure (EVD).¹¹⁴ Under the Refugee Act, that authority rests with the attorney general,¹¹⁵ who has granted discretionary EVD in the past to nationals of countries experiencing civil war or foreign aggression.¹¹⁶

The issue of whether the customary international norm of non-return provides a basis of relief from deportation for civil war refugees once again confronted an immigration judge in *In re Santos*.¹¹⁷ The respondents in *Santos* defended their right to remain in the United States under the right of non-return, even if their plight did not qualify them for asylum under the Refugee Act.¹¹⁸ The Immigration Court for Washington, D.C. agreed, holding the civil strife in El Salvador did not qualify the respondents for asylum but blocked their deportation until such hostilities ceased.¹¹⁹

III. MATERIAL FACTS AND ANALYSIS IN *IN RE SANTOS*

The respondents, Maria Elena-Santos, along with her mother, Leonor Santos-Trejo, and her son, Manuel Ramirez-Santos, lived in the town of El Porvenir, El Salvador.¹²⁰ They testified that the civil war had brutally disrupted the routine of their town, and that its inhabitants were subjected to bombings, executions, threats of death, and violence.¹²¹ The majority of individuals allegedly responsible for these acts

114. *Id.* at 19. The immigration courts can grant voluntary departure, which presumes that the respondent will promptly leave the United States. *Id.* The power to grant extended voluntary departure, which presumes that the respondent wishes to remain in the United States for an indefinite period, has not been delegated by the federal government to the immigration courts. *Id.* See generally Note, *Temporary Safe Haven for De Facto Refugees from War, Violence and Disasters*, 28 VA. J. INT'L L.A. 509 (1988) (examining extended voluntary departure and temporary safe haven for war refugees).

115. 8 U.S.C. §§ 1103(a), 1252(b) (1988).

116. *In re Medina, I. & N. Dec. 3078* at 19 (B.I.A. 1988). In several instances the federal government granted blanket extended voluntary departure (EVD) to nationals of certain countries reporting widespread violence inflicted on their civilian population. The EVD permits such nationals to remain temporarily in the United States until the hostilities cease and the refugees can return safely. COMM. ON RULES REPORT, *supra* note 24, at 3. Citizens from Cuba, the Dominican Republic, Czechoslovakia, Chile, Cambodia, Vietnam, Laos, Lebanon, Ethiopia, Uganda, Iran, Nicaragua, Afghanistan and Poland have benefitted from grants of EVD. *Id.* at 3-4.

117. *In re Santos* in Deportation Proceedings, No. A29 564 781, at 4 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990).

118. *Id.* at 2.

119. *Id.*

120. *Id.* at 4.

121. *Id.*

went unpunished because of the collapse of the local administrative and judicial systems.¹²²

The respondents' fear for their safety and their deteriorating economic situation led them to sell their possessions and flee the country.¹²³ They testified that if they were compelled to return to El Salvador, they would be forced to aid one of the sides in the conflict, and that would put their lives in serious jeopardy.¹²⁴ The respondents requested asylum under section 208(a)¹²⁵ of the Refugee Act, withholding of deportation under section 243(h),¹²⁶ and voluntary departure under section 244(e).¹²⁷ In the alternative, they asked for a recognition of their right to flee war, based on humanitarian law¹²⁸ and the doctrine of necessity.¹²⁹ Humanitarian law is applied in situations of international or civil armed conflicts to guarantee the protection of the rights of the victims of those wars.¹³⁰ The recognition of those rights would preclude the deportation of the respondents to El Salvador for the duration of the civil war.¹³¹

The Immigration and Naturalization Service (INS) argued that relief under the Refugee Act was the exclusive remedy available to the respondents.¹³² The immigration judge accordingly denied asylum under the Refugee Act on the grounds that the respondents failed to

122. *Id.* at 4-5.

123. *Id.* at 5.

124. *Id.* at 5. See COMM. ON RULES REPORT, *supra* note 24, at 5 (relating that private agencies in El Salvador report that in a situation of civil war, both sides in a conflict are suspicious of persons who sought refuge abroad, regardless of the reason).

125. 8 U.S.C. § 1158(a) (1988).

126. *Id.* at § 1253(h).

127. *Id.* at § 1254(e). *In re Santos* in Deportation Proceedings, No. A29 564 781, at 2 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990).

128. Respondents' Brief in Support of Right to Flee War and Not To Be Repatriated While The War Continues, at 4, *In re Santos* in Deportation Proceedings, No. A29 564 781 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990) [hereinafter Respondents' Brief].

129. *Id.* at 8-11.

130. See *infra* note 135 (listing the main sources of international humanitarian law).

131. Respondents' Brief, *supra* note 128, at 3.

132. The Immigration and Naturalization Service Trial Brief in Opposition to "Finding of Non-Deportability", at 2, *In re Santos* in Deportation Proceedings, No. A29 564 781 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990) [hereinafter INS Brief]; see *In re Medina*, I. & N. Dec. 3078 at 17-18 (B.I.A. 1988) (stating the INA, as implemented, is a controlling statute that precludes the application of customary international law to create a potential remedy from deportation).

establish objective evidence of past persecution.¹³³ In addition, the court found that they did not prove fear of persecution upon return to El Salvador on account of any one of the enumerated grounds required by the Refugee Act.¹³⁴

Nevertheless, the immigration court decided that the respondents would not be repatriated back to El Salvador because under customary international law the respondents had the right not to be deported to a country engaged in a civil war.¹³⁵ The court held the respondents were deportable but, based upon principles of humanitarian law, they would be sent to a third country, not at war, which would receive them and guarantee their safety.¹³⁶

IV. THE IMMIGRATION COURT'S ANALYSIS

In *Medina*, the BIA recognized that the right for temporary refuge from war emerged in the context of principles of humanitarian law, and that right reflected a general concern for the well-being of war refugees.¹³⁷ The BIA, however, rejected the right of non-return as a norm of customary international law because, in its view, state practice and *opinio juris* did not support that conclusion.¹³⁸ The BIA also held that the Refugee Act was controlling legislation which precluded the application of the norm of non-return.¹³⁹ The BIA concluded that war refugees were not entitled to the same benefits as those provided to

133. *In re Santos* in Deportation Proceedings, No. A29 564 781, at 5-6 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.)(decided Aug. 24, 1990).

134. *Id.* at 6. See *In re Sanchez and Escobar*, I. & N. Dec. 2996 (B.I.A. 1985) (concluding that harm resulting from civil war and anarchy does not constitute persecution, under the definition of "refugee" in § 1101(a)(42)(A) of the INA, based on the pre-1980 construction of the word "persecution" and on legislative rejection of the inclusion of "displaced persons" as persons who escape violent conditions caused by civil strife in a country).

135. *In re Santos* in Deportation Proceedings, No. A29 564 781, at 16 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.)(decided Aug. 24, 1990).

136. *Id.* Humanitarian law protects the victims of armed conflicts and regulates the conduct of all parties to an armed conflict. Its primary sources are: a) the Hague Convention of 1907, 36 Stat. 2277, T.S. 539, 205 Parry's T.S. 277 (instituting rules governing the conduct of armed conflict); b) the Geneva Conventions of 1949, *supra* note 89; c) the Protocol Additional I to the Geneva Convention of 1978, *in force* Dec. 7, 1978, U.N. Doc. A/32/144/Annex I (1977) (concerning international armed conflicts); and the Protocol Additional II to the Geneva Convention of 1949, *in force* Dec. 7, 1978, U.N. Doc. A/32/144/Annex II (1977) (concerning civil wars); d) United Nations resolutions; and e) rules of customary international law. Parker and Neylon, *supra* note 27, at 432-33, n.129-33.

137. *In re Medina*, I. & N. Dec. 3078 at 16 (B.I.A. 1988).

138. *Id.* at 15-16.

139. *Id.* at 18.

"Convention refugees" under the Refugee Act.¹⁴⁰ The BIA, however, left open the issue of whether state practice and *opinio juris* supported the inclusion of war refugees within the definition of refugee as expressed by the 1951 Geneva Convention and the 1967 Protocol.¹⁴¹

The immigration judge in his initial analysis in *Santos* addressed this issue and concluded that the right of non-return arises under humanitarian law, as a corollary to the doctrine of necessity.¹⁴² The immigration court in *Santos* distinguished the BIA's holding in *Medina*, declaring that present state practice established that the right of non-return arises under the Fourth Geneva Convention and humanitarian law generally.¹⁴³

The immigration court stated that respondents met the standards set forth in *Medina* for proving the existence of a norm of customary international law.¹⁴⁴ The court maintained that the expert witnesses convened at the trial, in conjunction with the evidence of state practice and *opinio juris* gathered as proof, established the present state of the right of non-return.¹⁴⁵ The court in *Santos*, however, stated that respondents were not entitled to the same benefits as "Convention refugees" entitled to asylum under the Refugee Act.¹⁴⁶ The respondents in *Santos* were only entitled to a minimal right to remain in the United States while the civil war in El Salvador persisted.¹⁴⁷

The court reasoned that the doctrine of necessity justified the flight of the refugees in the same way that necessity allows a ship in distress the right of entry to any port.¹⁴⁸ The court analogized the right of safe passage with the right of *necessitas vincit legem*,¹⁴⁹ which dictates that extenuating circumstances allow the crossing of property lines and does not constitute trespass.¹⁵⁰ The court determined that the existence of armed conflicts and human rights violations presumes a humanitarian need for a safe haven.¹⁵¹ The immigration judge did not hold the re-

140. *Id.* at 20.

141. *Id.* at 16.

142. *In re Santos* in Deportation Proceedings, No. A29 564 781, at 9 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990).

143. *Id.* at 9-10.

144. *Id.* at 10.

145. *Id.*

146. *Id.* at 13.

147. *Id.*

148. *Id.* at 9.

149. *Id.*; BLACK'S LAW DICTIONARY 1030 (6th ed. 1990) (defining *necessitas vincit legem* as the "necessity overcomes the law.")

150. *Id.*

151. *Id.* at 8. See also Respondent's Brief, *supra* note 128 (quoting Daniel Jacoby, Secrétaire Général de la Fédération Internationale des Droits de l'Homme, for the pro-

spondents could remain in the United States, and specifically ordered their deportation to a third country not at war.¹⁵² The practical effect of the immigration court's decision, however, was to allow the respondents to remain in the United States because of the small likelihood of a third country granting them temporary refuge.¹⁵³

The immigration court next addressed the tension between a government's sovereign power to restrict the movement of persons across its borders and the right of non-return.¹⁵⁴ Historically, wartime migrations of refugees justified non-compliance with traditional state rights of sovereignty over borders.¹⁵⁵ The right of non-return, therefore, is consistent with the traditional concepts of territorial sovereignty because it imposes on the host state only a passive obligation not to deport the refugees back to a country at war.¹⁵⁶ The court stated that this obligation is only temporary, lasting only until the end of the conflict creating the right of non-return.¹⁵⁷

The court then confronted the issue raised in *Medina* of whether the immigration courts have jurisdiction to grant relief under the right of non-return.¹⁵⁸ The court determined that the immigration courts in fact have exclusive jurisdiction by statute to decide questions of deportation at that stage.¹⁵⁹

position that armed conflict presents a prima facie risk to the lives and well-being of civilians).

152. *In re Santos in Deportation Proceedings*, No. A29 564 781, at 16 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990).

153. See Perluss and Hartman, *supra* note 23, at 598 (indicating the lack of resettlement opportunities in third countries).

154. *In re Santos in Deportation Proceedings*, No. A29 564 781, at 13 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990).

155. *Id.* at 9.

156. Perluss and Hartman, *supra* note 23, at 618.

157. *In re Santos in Deportation Proceedings*, No. A29 564 781, at 13 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990).

158. *Id.* See *supra* notes 114-117 and accompanying text (addressing the BIA's discussion of whether the immigration courts have jurisdiction to confer relief of withholding of deportation under the norm of non-return).

159. *Id.* at 14. The immigration court stated that proceedings before the immigration judge "shall be the sole and exclusive procedure for determining the deportability of an alien. . . ." 8 U.S.C. § 1252(b) (1988); that "the immigration judge shall have the authority to determine deportability and to make decisions, including orders of deportation; . . . to take any other action consistent with applicable law and regulations as may be appropriate." 8 C.F.R. § 242.8(a) (1991); and that "[t]he order of the special inquiry officer shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate." 8 C.F.R. § 242.18(c) (1991).

Finally, the court set forth a two-part test to evaluate the merits of other war refugees' requests for relief under the right of non-return.¹⁶⁰ The test placed the burden of proof on the war refugees to show that their flight was motivated by war.¹⁶¹ Initially, the war refugee has the burden of showing that his or her country of origin is undergoing a civil war,¹⁶² which creates a presumption of humanitarian need, and he or she must then show a nexus between the existence of war and their need to flee the country.¹⁶³ The immigration court found that the respondents in *Santos* satisfied the two-part test and adequately proved that they were victimized by the on-going civil war in El Salvador.¹⁶⁴ The respondents also provided ample proof that repatriation would expose them to a risk of harm or death.¹⁶⁵

V. ANALYSIS AND RECOMMENDATIONS

The right of non-return was recognized in *Santos* because domestic law did not protect civil war refugees from forced repatriation. The requirement of proof of persecution under the Refugee Act entitles "Convention refugees" to *non-refoulement* or asylum, but does not protect "humanitarian refugees" who flee war. This difference ignores the impending peril these "humanitarian refugees" face if forced to return to their native countries. Therefore, the right of non-return fills the gap created by that distinction by prohibiting deportation to a country undergoing civil war. The norm of non-return exhibits the values expressed by humanitarian laws with respect to the protection and security of the person in time of war.¹⁶⁶ Humanitarian law balances necessity and humanity,¹⁶⁷ and the doctrine of necessity has deep roots in the laws governing warfare.¹⁶⁸ The right to flee war which the respondents claimed in *Santos* is necessary because the refugee's own state cannot provide protection from the effects of the war to that indi-

160. *In re Santos* in Deportation Proceedings, No. A29 564 781, at 14-15 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990).

161. *Id.* at 14.

162. *Id.*

163. *Id.* The nexus can be satisfied by a showing of circumstances where the respondents were harmed or kidnapped or where their family members, or people in similar situations, were killed, harmed or kidnapped and the government offered no protection. *Id.*

164. *Id.* at 15.

165. *Id.*

166. Perluss and Hartman, *supra* note 23, at 602.

167. *Id.* at 620.

168. *Id.* at 602.

vidual.¹⁶⁹ Opponents of this grant of protection, however, can raise strong arguments for denying the right of non-return to civil war refugees. First, the immigration courts may not recognize the right of non-return as a norm of customary international law. Secondly, and most important, immigration courts may find legislation that precludes the application of customary international law.

The INA requires enforcement of all sources of law which relate to the immigration and naturalization of aliens, including customary international law.¹⁷⁰ Statutes such as the INA must be interpreted to conform with international law, unless Congress clearly intended to supersede international law.¹⁷¹ In fact, Congress excluded war refugees from the scope of the Refugee Act.¹⁷² Recently, however, Congress addressed the issue of providing temporary refuge for persons displaced by ongoing armed conflict in their homelands. Through section 302 of the Immigration Act of 1990 (Immigration Act),¹⁷³ Congress amended the INA to allow the attorney general to grant temporary protected status (TPS) to nationals of states where an ongoing armed conflict within the state would pose a serious threat to the safety of any alien required to return to that state.¹⁷⁴ As a practical matter this development will render it more difficult for a refugee to seek relief from de-

169. *Id.*

170. *See In re Santos* in Deportation Proceedings, No. A29 564 781, at 7-8 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990) (citing cases where the BIA interpreted and followed international law); 8 U.S.C. § 1103(a) (1988) (discussing the enforcement of all laws pertaining to immigration and naturalization); 8 U.S.C. § 1101(a)(17) (1988) (defining immigration laws as "all laws, conventions and treaties of the United States relating to the immigration, exclusion, deportation or expulsion of aliens."); *Palma v. Verdeyen*, 676 F.2d 100, 103 (4th Cir. 1982) (stating that in order to determine what Congress authorized, one must consider customary international law to which the United States subscribes).

171. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

172. *In re Medina, I.* & N. Dec. 3078, at 18 (B.I.A. 1988). Congress implemented the Refugee Act of 1980 in part to bring United States asylum laws in conformity with the 1967 Protocol. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987); H.R. CONF. REP. No. 781, 96th Cong., 2d Sess. 19, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 160. *See supra* note 111 (stating that Congress considered coverage of war refugees under the Refugee Act of 1980).

173. 8 U.S.C.A. § 1254a (West Supp. 1991).

174. *Id.* The United States granted temporary protected status to Salvadorans physically present in the United States as of September 19, 1990, and who registered for temporary protected status between January 1, 1991 and June 30, 1991. Immigration Act of 1990, Pub. L. No. 101-649, §303(a)(2), (b)(1)(C), 104 Stat. 5030, 5084 (1990). One of the key sponsors of the bill, U.S. Rep. Joe Moakley (D-Mass.), pushed for an extension of the enrollment deadline by four months, alleging that the excessive cost of filing fees caused a slowdown in registration. Kamen, *Immigration Fees Slashed For Eligible Salvadorans*, Wash. Post, May 18, 1991, at B5. In March of 1991 the attorney general designated the citizens of Kuwait, Lebanon and Liberia as eligible for temporary protected status. 56 Fed. Reg. 12,745-47 (1991).

portation under the customary norm of non-return. The United States Supreme Court has stated that customary international law is applied to fill the gaps between existing treaties, statutes and judicial decisions.¹⁷⁵ The amendment of the Immigration Act to the INA could constitute a definitive statement of the controlling legislative and executive act which precludes the application of customary international law.¹⁷⁶

Under the Immigration Act, the attorney general also has the right to designate citizens of a foreign state eligible for TPS where natural disaster or other extraordinary and temporary conditions make repatriation unsafe.¹⁷⁷ This approach represents a positive step toward recognition that necessity forces endangered civilian populations to seek relief not only from wars, but also from droughts and other natural disasters.¹⁷⁸

The question then becomes whether the TPS legislation moves the United States toward compliance with international law and the norm of non-return; TPS certainly gives refugees from the states designated by the attorney general greater benefits than the right of non-return. TPS gives them a right to remain in the United States,¹⁷⁹ permission to work for a period of time,¹⁸⁰ and permission to travel.¹⁸¹ In addition, TPS legislation brings United States refugee law closer to the UNHCR's position on *non-refoulement*¹⁸² by rejecting the requirement of specific persecution.

Nevertheless, TPS falls short of the UNHCR's definition because it reserves the right to designate countries eligible for relief under the Immigration Act to the attorney general. Therefore, war refugees who meet the *Santos* test of eligibility for temporary refuge might not become eligible for temporary refuge under TPS, because of the Act's grant of discretionary power to the attorney general. Thus, although

175. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that courts should resort to the customs of nations in the absence of a treaty or controlling executive or legislative act or judicial decision).

176. See *supra* notes 112-113 and accompanying text (stating the BIA found the INA to be a controlling legislative act which precluded the application of the norm of non-return).

177. 8 U.S.C.A. § 1254a(b)(B)-(C) (West Supp. 1991).

178. *But see* Perluss and Hartman, *supra* note 23, at 611-12 (noting that refugees of natural disasters are not entitled to the same protection of temporary refuge as are the refugees of civil wars).

179. 8 U.S.C.A. § 1254a(a)(1)(A) (West Supp. 1991).

180. *Id.* at §§ 1254a(a)(1)(B), (a)(2).

181. *Id.* at §§ 1254a(c)(4)(A), (f)(3).

182. See *supra* note 81 and accompanying text (discussing the UNHCR's definition of *non-refoulement*).

Congress has granted benefits to designated war refugees through the Immigration Act, future temporary refuge seekers could still invoke the norm of non-return in defense of their right to flee war. The norm of non-return as pronounced in *Santos* does not ask for asylum benefits or even TPS benefits. The refugee only asks for the minimal right to a safe haven from war. Certainly, the advent of TPS has made that approach more difficult because, just as *Medina* interpreted the Refugee Act as controlling legislation, immigration courts may interpret TPS legislation as the controlling law regarding war refugees.¹⁸³

Finally, the attorney general, a political appointee, holds full decision-making authority for the country-designation process under TPS.¹⁸⁴ Therefore, government foreign policy considerations may influence the process.¹⁸⁵ Consequently, possible disparate treatment of the country-designation process can still make the norm of non-return a viable defense of the right to flee war and to seek temporary refuge.

183. See *supra* note 111 (stating that Congress intended to provide comprehensive and uniform procedures regarding the resettlement of refugees when it passed the Refugee Act of 1980).

184. 8 U.S.C.A. § 1254a (a)(1)(A)-(B) (West Supp. 1991).

185. See Stipulated Settlement Agreement, *American Baptist Churches v. Thornburgh*, Civ. No. C-85-3255 RFP at 1 (N.D. Cal. 1990) (noting that Salvadoran and Guatemalan citizens in the United States raised challenges to the processing of their asylum claims pursuant to the Refugee Act of 1980). The settlement stated in part:

foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; the fact that the individual is from a country whose government the United States supports or with which it has favorable relations is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; whether or not the United States government agrees with the political or ideological beliefs of the individual is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution; the same standard for determining whether or not an applicant has a well-founded fear of persecution applies to Salvadorans and Guatemalans as applies to all other nationalities.

Id. at 2.

Salvadorans in the United States as of September 19, 1990, and Guatemalans in the United States as of October 1, 1990, are eligible for *de novo* adjudication of their asylum claims. *Id.* at 4. Thus, even though *In re Santos* was appealed by both parties, the appeal is closed administratively until the respondents' asylum claim is reheard.

See also Mathews, *500,000 Immigrants Granted Legal Status*, Wash. Post, Dec. 20, 1990, at A1 (reporting the federal government agreed to settle a case with over 80 religious and refugee organizations and reconsider political asylum requests from Salvadoran and Guatemalan immigrants). The settlement terminates all deportation proceedings of Salvadoran and Guatemalan immigrants until their cases can be reheard. *Id.* The suit charged that the government discriminated in the adjudication of the asylum process by weighing ideological considerations. *Id.* at A19. In 1986, the INS granted asylum to 53.6 percent of all applicants from Eastern Europe and the Soviet Union, and to 64.3 percent of all applicants from China, but only 4.6 percent of Salvadorans, 2.3 percent of Guatemalans and zero percent of Hondurans obtained asylum. Comment, *supra* note 18, at 265-66; Perluss and Hartman, *supra* note 23, at 616.

CONCLUSION

All refugee law concerns a right to flee life-threatening circumstances, whether that threat is ecological disaster, famine or war. The recognition and application of the right of non-return preserves that moral right in the context of war. The respondents in *Santos* conceded deportability, but they denied deportability to El Salvador in particular, because in their homeland their well-being and freedom would be at risk.

While asylum is a durable remedy, the right of non-return claimed by the respondents in *Santos* is only a temporary remedy. In the hierarchy of remedies available in refugee and asylum law, the right of non-return is the least intrusive on the sovereignty of the host country. The right only obliges the host country not to return the refugee to a country at war.¹⁸⁶ Refugees who flee war or drought certainly do not have a right to permanent asylum in another state if they cannot show a fear of persecution. These refugees, however, certainly have a right under humanitarian and customary international law not to be deported back to their drought-stricken or war-torn homeland.

186. *In re Santos* in Deportation Proceedings, No. A29 564 781, at 13 (U.S. Dep't of Justice, Exec. Office for Immigration Rev., Washington, D.C.) (decided Aug. 24, 1990).