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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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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].


⁷ COUNTRY REPORTS FOR 1989, supra note 1, at 569, 573.
tions, torturing political prisoners, and committing other arbitrary violations of human rights. Human rights reports charge paramilitary death squads with murders and disappearances, yet the majority of the individual members of the death squads remain unpunished. Over 70,000 people have died as a result of this conflict. The conflict has disrupted the lives of 525,000 people still living in El Salvador; 55,000 Salvadorans have sought refuge in other Central American countries and in Mexico, and 550,000 have illegally emigrated to the United States. 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. 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.

8. Id. at 575-77; Annual Report, supra note 6, at 167; Amnesty Int’l, supra note 5, at 113.
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.
13. Annual Report, supra note 6, at 163.
15. Id.
To remain in the United States, an alien must qualify for either asylum or withholding of deportation under the Refugee Act of 1980 (Refugee Act). The Refugee Act, which was incorporated into the Immigration and Nationality Act of 1952 (INA), 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. 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, 1 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).


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).


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.

may qualify for withholding of deportation\textsuperscript{22} by demonstrating a clear probability of persecution.\textsuperscript{23}


\textsuperscript{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; \textit{see also} Perluss and Hartman, \textit{Temporary Refugee: 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, \textit{Astilo, Ingresso, Soggiorno ed Espulsione dello Straniero nella Nuova Legge sull'Immigrazione}, XLV, La Comunità 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. 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.

Critics of the Department of State policy contend the deportation of Salvadoran refugees places the refugees in danger of bodily harm or death. 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. 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 immigration 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. 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. 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. The right of non-return attaches until the refugees' own state can guarantee safe repatriation and protection from further violence. Until such protection can be guaranteed, the refugees may settle in any willing country that is able to ensure their safety and well-being. While the right of non-return does not involve a permanent
asylum in the host country, it does forbid the forced repatriation of refugees to territories where their lives or freedom are at risk.\[^3\]

United States courts first recognized and applied the right of non-return in an asylum case for three undocumented Salvadoran refugees.\[^4\] 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.\[^5\]

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*\[^6\] and the Immigration Court’s analysis. Part IV discusses the need for the *Santos* decision and the effect of the Immigration Act of 1990,\[^7\] which granted Salvadoran war refugees the right to temporary safe haven in the United States.\[^8\]

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.\[^9\] Where it is

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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).


35. *Id.* at 16.

36. *Id.* at 15-16.


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, the courts are authorized to apply it with the same preecedential weight as federal common law. 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.

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

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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.

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).

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).

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.


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

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
A norm of customary international law does not have to be universally followed to exist; however, a norm binds only those states that have exercised it in the past. 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.

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. Several international treaties codify the universal rejection of acts of torture and recognize the prohibition as a legal obligation. This consensus has raised the norm against torture to the status of jus cogens. A norm of customary international law falling under the status of jus cogens is binding on all states. No state is exempted from compliance, including those that do not recognize the norm or have objected to its recognition as obligatory. This is the case even in the absence of legislation recognizing

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).


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.  

Supporters of a right of temporary refuge from war claim there is proof of extensive state practice of that customary norm. The custom of granting temporary refuge to persons fleeing internal conflicts in their homelands has grown during the twentieth century. France and Great Britain together received over 200,000 Spanish Civil War refugees during the 1930's.  

More recently, massive waves of refugees fled from internal armed conflicts in Africa, Southeast Asia, and Latin America.  

The existence of opinio juris, 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. 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 states or international organizations, expressions of protest against breaches and consistent acquiescence to the practice of the norm.

(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).


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. 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. In the critics' view, the practice of the norm of non-return emerges primarily from humanitarian concerns. 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.

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 Refugees 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.

[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.


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. The United Nations Protocol of 1967 (1967 Protocol) extended the coverage to events occurring after that date. 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. 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.

Neither the 1951 Geneva Convention nor the 1967 Protocol grants protection to persons victimized and displaced by famine, drought, or civil war. 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. Nevertheless, these "humanitarian refugees" vastly outnumber "Convention refugees." 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.

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.

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.
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 Africa 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. 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.” The United Nations High Commissioner for Refugees (UNHCR) expressed the norm of non-refoulement 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. Therefore, the UNHCR defi-
nition 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 deportation 86 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 War 90 (the Fourth Geneva Con-
vention) provided relief from deportation for the respondent.\textsuperscript{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.\textsuperscript{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.\textsuperscript{93}

In \textit{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".\textsuperscript{94} First, the BIA found that the Fourth Geneva Convention applied almost exclusively to conflicts of international character\textsuperscript{95} and only article 3 addressed conflicts of non-international character such as the civil war in El Salvador.\textsuperscript{96} The BIA stated that the respondent had no recourse

\textsuperscript{91} \textit{In re Medina}, I. & N. Dec. 3078 at 20 (B.I.A. 1988). The respondent conceded facts which established her deportability. \textit{Id.} at 2. She applied at her deportation hearing for asylum and withholding of deportation under the INA. \textit{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. \textit{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. \textit{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. \textit{Id.}

\textsuperscript{92} \textit{Id.} at 20.

\textsuperscript{93} \textit{Id.} at 13; see 8 C.F.R. § 3.1 (1991) (delineating the jurisdiction of the BIA).

\textsuperscript{94} \textit{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").

\textsuperscript{95} \textit{But see} Perluss and Hartman, \textit{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).


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.  

Even if the United States had been a participant, the con-

flict would not have fallen within the scope of article 3 because conflicts
between two contracting parties are deemed to be conflicts of an inter-
national character.  

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 enforce-
ment in the absence of congressional implementation of enabling
legislation.  

After demonstrating the inapplicability of the Fourth Geneva Con-

vention, the BIA confronted the validity of respondent's argument
based on the norm of non-return.  

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."

The court addressed three issues: (1) whether such a norm of customary international law exists; (2) whether controlling leg-

islation exists which supersedes that norm; and, if not, (3) whether cus-
tomy international law may provide relief from deportation for the
respondent.  

The BIA applied the established two factor test to determine the ex-
istence of a customary norm of international law.  

The first factor

(c) outrages upon personal dignity, in particular humiliating and de-
grading treatment;

(d) the passing of sentences and the carrying out of executions with-
out previous judgement pronounced by a regularly constituted court,
affording all the judicial guarantees which are recognized as indis-

pensable by the civilized peoples.

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

U.N.T.S. 287.

Justice decision, however, found that the Fourth Geneva Convention embodies custom-
ary 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

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 Tempo-
rary Protected Status (TPS) legislation has not created an individual remedy in deporta-
tion 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).


101. Id. at 3, 14.

102. Id. at 15.

103. Id.
requires a consistent state practice of the custom. The second factor requires a conviction that the rule is obligatory under international law. 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.

The BIA based its finding on the traditional sovereign right of states over their borders and the failure of international treaties to include persons displaced by civil wars in their definition of refugee. 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. 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.

The BIA then analyzed the Refugee Act and categorized it as a controlling act precluding the application of the right of non-return. 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.

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. The BIA stated


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


Id.

Id.

Id. at 16.

Id.

Id. at 17.


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

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. The respon-
dents 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. 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.

III. MATERIAL FACTS AND ANALYSIS IN IN RE SANTOS

The respondents, Maria Elena-Santos, along with her mother, Leo-
nor Santos-Trejo, and her son, Manuel Ramirez-Santos, lived in the
town of El Porvenir, El Salvador. They testified that the civil war
had brutally disrupted the routine of their town, and that its inhabi-
tants were subjected to bombings, executions, threats of death, and vio-
lence. 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 re-
main in the United States for an indefinite period, has not been delegated by the fed-
eral 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).
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.
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.\textsuperscript{122}

The respondents' fear for their safety and their deteriorating economic situation led them to sell their possessions and flee the country.\textsuperscript{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.\textsuperscript{124} The respondents requested asylum under section 208(a)\textsuperscript{125} of the Refugee Act, withholding of deportation under section 243(h),\textsuperscript{126} and voluntary departure under section 244(e).\textsuperscript{127} In the alternative, they asked for a recognition of their right to flee war, based on humanitarian law\textsuperscript{128} and the doctrine of necessity.\textsuperscript{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.\textsuperscript{130} The recognition of those rights would preclude the deportation of the respondents to El Salvador for the duration of the civil war.\textsuperscript{131}

The Immigration and Naturalization Service (INS) argued that relief under the Refugee Act was the exclusive remedy available to the respondents.\textsuperscript{132} The immigration judge accordingly denied asylum under the Refugee Act on the grounds that the respondents failed to
establish objective evidence of past persecution. 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.

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. 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.

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. 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. The BIA also held that the Refugee Act was controlling legislation which precluded the application of the norm of non-return. The BIA concluded that war refugees were not entitled to the same benefits as those provided to

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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).
138. Id. at 15-16.
139. Id. at 18.
"Convention refugees" under the Refugee Act.\textsuperscript{140} The BIA, however, left open the issue of whether state practice and \textit{opinio juris} supported the inclusion of war refugees within the definition of refugee as expressed by the 1951 Geneva Convention and the 1967 Protocol.\textsuperscript{141}

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

The immigration court stated that respondents met the standards set forth in \textit{Medina} for proving the existence of a norm of customary international law.\textsuperscript{144} The court maintained that the expert witnesses convened at the trial, in conjunction with the evidence of state practice and \textit{opinio juris} gathered as proof, established the present state of the right of non-return.\textsuperscript{145} The court in \textit{Santos}, however, stated that respondents were not entitled to the same benefits as "Convention refugees" entitled to asylum under the Refugee Act.\textsuperscript{146} The respondents in \textit{Santos} were only entitled to a minimal right to remain in the United States while the civil war in El Salvador persisted.\textsuperscript{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.\textsuperscript{148} The court analogized the right of safe passage with the right of \textit{necessitas vincit legem},\textsuperscript{149} which dictates that extenuating circumstances allow the crossing of property lines and does not constitute trespass.\textsuperscript{150} The court determined that the existence of armed conflicts and human rights violations preserves a humanitarian need for a safe haven.\textsuperscript{151} The immigration judge did not hold the re-
spondents could remain in the United States, and specifically ordered their deportation to a third country not at war.\textsuperscript{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.\textsuperscript{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.\textsuperscript{154} Historically, wartime migrations of refugees justified non-compliance with traditional state rights of sovereignty over borders.\textsuperscript{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.\textsuperscript{156} The court stated that this obligation is only temporary, lasting only until the end of the conflict creating the right of non-return.\textsuperscript{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.\textsuperscript{158} The court determined that the immigration courts in fact have exclusive jurisdiction by statute to decide questions of deportation at that stage.\textsuperscript{159}

\begin{itemize}
\item \textsuperscript{153} See Perluss and Hartman, \textit{supra} note 23, at 598 (indicating the lack of resettlement opportunities in third countries).
\item \textsuperscript{155} \textit{Id.} at 9.
\item \textsuperscript{156} Perluss and Hartman, \textit{supra} note 23, at 618.
\item \textsuperscript{158} \textit{Id.} See \textit{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).
\item \textsuperscript{159} \textit{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).
\end{itemize}
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.\textsuperscript{160} The test placed the burden of proof on the war refugees to show that their flight was motivated by war.\textsuperscript{161} Initially, the war refugee has the burden of showing that his or her country of origin is undergoing a civil war,\textsuperscript{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.\textsuperscript{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.\textsuperscript{164} The respondents also provided ample proof that repatriation would expose them to a risk of harm or death.\textsuperscript{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.\textsuperscript{166} Humanitarian law balances necessity and humanity,\textsuperscript{167} and the doctrine of necessity has deep roots in the laws governing warfare.\textsuperscript{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-
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. Statutes such as the INA must be interpreted to conform with international law, unless Congress clearly intended to supersed international law. In fact, Congress excluded war refugees from the scope of the Refugee Act. 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), 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. As a practical matter this development will render it more difficult for a refugee to seek relief from de-

169. Id.
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. 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.

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. 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.

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, permission to work for a period of time, and permission to travel. In addition, TPS legislation brings United States refugee law closer to the UNHCR’s position on non-refoulement 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).
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).
180. Id. at §§ 1254a(a)(1)(B), (a)(2).
181. Id. at §§ 1254a(e)(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.

Finally, the attorney general, a political appointee, holds full decision-making authority for the country-designation process under TPS. Therefore, government foreign policy considerations may influence the process. 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).


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.