

Before the

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Wayne Smith and Hugo Armendariz

vs.

The United States of America

Case No. 12.561

BRIEF OF *AMICUS CURIAE*, POST-DEPORTATION HUMAN RIGHTS PROJECT

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I. INTERESTS OF *AMICUS CURIAE*

The Post-Deportation Human Rights Project (“PDHRP”), based at the Center for Human Rights and International Justice at Boston College, provides representation to individuals who have been deported from the United States; investigates the effects of harsh deportation policies on families and communities; and advocates, in collaboration with communities, for fundamental changes that will introduce legal predictability, proportionality, compassion, and respect for family unity into U.S. immigration law and policy. The PDHRP has a direct interest in ensuring that noncitizens in deportation proceedings have an opportunity to petition for discretionary relief from deportation based on family ties and other relevant factors.

II. INTRODUCTION

The petitioners in this action, Wayne Smith and Hugo Armendariz, are representative of hundreds of thousands of longtime legal residents of the United States who have been torn from their families and communities, without the opportunity to petition for humanitarian relief. The Antiterrorism and Effective Death Penalty Act of 1996¹ (“AEPDA”) and the Illegal Immigration and Immigrant Responsibility Act of 1996² (“IIRIRA”) drastically expanded the range of criminal convictions that result in mandatory deportation; eliminated a humanitarian waiver known as “212(c) relief,” which had allowed longtime residents to obtain a waiver of deportation based on family

¹ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

² Pub. L. No. 104-208, 110 Stat. 3009 (1996).

ties and other factors;³ established a lifetime bar on re-immigrating to the United States for any noncitizens deported on the basis of an “aggravated felony” conviction;⁴ and severely curtailed judicial review of deportation proceedings for those deported on the basis of criminal convictions.⁵ Since 1997, over 150,000 individuals have been put in removal proceedings as “aggravated felons.”⁶

Like Mr. Smith and Mr. Armendariz, many of those who have been ordered deported without any individualized assessment of their circumstances are parents who are forced to make an excruciating choice: either to endure lifelong separation from their children, or to uproot their children from the United States and subject them to difficult and often dangerous conditions abroad. Others who have been ordered deported under the 1996 laws are barely past childhood themselves: young people just taking their first steps into adulthood, who are banished for life from their families and communities because of crimes they committed as teenagers.

The mandatory deportation of long-time U.S. residents without regard to their individual circumstances implicates many of the rights enshrined in the American Declaration of the Rights and Duties of Man (“American Declaration”).⁷ This brief

³ This provision, codified at former 8 U.S.C. § 1182(c), allowed a lawful permanent resident who had resided in the U.S. for at least seven years, and had not been convicted of an “aggravated felony” for a term of imprisonment of more than five years, to be granted a discretionary waiver of deportation based on a balancing of equities.

⁴ The term “aggravated felony” was expanded dramatically in 1996 to include many minor and non-violent criminal infractions. See 8 U.S.C. § 1101(a)(43).

⁵ See 8 U.S.C. § 1252(a)(2)(C); Lenni B. Benson, “The New World of Judicial Review of Removal Orders,” Georgetown Immigration Law Journal, Vol. 12, p. 233 (1998). Congress partially restored judicial review through the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, Division B (2005). See 8 U.S.C. § 1252(a)(2)(D).

⁶ Transactional Records Access Clearinghouse Immigration Report, “How Often Is the Aggravated Felony Statute Used?” (2006), available at <<http://trac.syr.edu/immigration/reports/158>> (attached as Exhibit A).

⁷ As addressed in Petitioners’ Final Observations Regarding the Merits of the Case, mandatory deportation laws violate Articles XVIII (right to a fair trial), XXVI (right to due process of law), V (right to protection against abusive attacks on family life), VI (right to establish a family), and VII (right to protection for mothers and children).

focuses in particular on the violation of Article VII (right to protection for mothers and children) with regard to juvenile offenders, and the violation of Articles V (right to protection against abusive attacks on family life) and VI (right to establish a family) with regard to international adoptees.

III. BACKGROUND FACTS AND REPRESENTATIVE CASES

A. Juvenile Offenders

Although a juvenile delinquency adjudication is not grounds for deportation under the Immigration and Nationality Act,⁸ a juvenile who is sentenced as an adult in criminal court is subject to deportation if convicted of a deportable offense.⁹

Studies have shown that immigrants are, in general, less likely to commit crimes than native-born Americans.¹⁰ However, those who come to the United States as young children, and grow up facing poverty and discrimination, fall prey to many of the same social forces that push other American youth into criminal activity.¹¹

This phenomenon can be seen among young people who came to the United States as refugees from the “killing fields” of Cambodia and resettled in the United States. It is estimated that between 1.7 and three million people were killed in Cambodia

⁸ See Matter of Ramirez-Rivero, 18 I. & N. Dec. 135 (BIA 1981); Matter of C.M., 5 I. & N. Dec. 327 (BIA 1953).

⁹ See Morasch v. INS, 363 F.2d 30 (9th Cir. 1966); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2).

¹⁰ See Rubén G. Rumbaut, Roberto G. Gonzales, Golnaz Komaie, and Charlie V. Morgan, Debunking the Myth of Immigrant Criminality: Imprisonment Among First-and Second-Generation Young Men, Migration Policy Institute, June 1, 2006, available at <<http://www.migrationinformation.org/Feature/display.cfm?id=403>> (attached as Exhibit B).

¹¹ See Eyal Press, “Do Immigrants Make Us Safer?” New York Times, Dec. 3, 2006 (citing study by sociologists Alejandro Portes and Ruben G. Rumbaut that concludes that “[t]he learning of new cultural patterns and entry into American social circles does not lead in these cases to upward mobility but to exactly the opposite,” a process of “downward assimilation.”).

under the Khmer Rouge, out of a population of 7.3 million.¹² Cambodian refugees fleeing the genocide received minimal institutional guidance upon their arrival in the United States, due to the absence of Khmer speakers at schools, clinics, and job centers, and have suffered from very high rates of poverty and unemployment.¹³ Many of the Cambodian children resettled in the United States were exposed to little formal education in Cambodia or in refugee camps, which put them behind their peers when they arrived in U.S. schools.¹⁴ These children were forced to navigate their new surroundings – often in bleak, poverty-stricken neighborhoods that offered few opportunities for youth – with minimal assistance from their parents, who spoke little English and were still suffering from the trauma they experienced in Cambodia.¹⁵

Under these trying circumstances, many Southeast Asian youth have turned to gang membership for support. Gangs initially formed for protection after many Cambodians were picked on by other racial and ethnic groups, and some later turned to criminal activity for economic gain.¹⁶

¹² U.S. Dep't of State, Background Note: Cambodia, available at <<http://www.state.gov/r/pa/ei/bgn/2732.htm>> .

¹³ See Gary Kar-Chuen Chow, "Exiled Once Again: Consequences of the Congressional Expansion of Deportable Offenses on the Southeast Asian Refugee Community," Asian Law Journal Vol. 12 (April 2005), at 111, 115; Deborah Sontag, "In a Homeland Far From Home," New York Times, Nov. 16, 2003 (attached as Exhibit C).

¹⁴ See Bill Ong Hing, "Deporting Cambodian Refugees: Justice Denied?" Crime and Delinquency, Vol. 51, No. 2 (April 2005), at 275-76; Sontag, supra note 13.

¹⁵ A 2005 study of 586 adult refugees from Cambodia living in California found that every single respondent had been exposed to trauma before coming to the U.S., with 99% having experienced near-death due to starvation and 90% having had a family member or close friend murdered. The study found that two decades after their arrival in the United States, 62% of respondents still suffered from post-traumatic stress disorder, and 51% from depression. Grant N. Marshall et. al., "Mental Health of Cambodian Refugees Two Decades After Resettlement in the United States," Journal of the American Medical Association Vol. 294, pp 571-579 (2005) (attached as Exhibit D).

¹⁶ See Chow, supra note 13, at 120-22.

Many child refugees did not become naturalized U.S. citizens, leaving them vulnerable to deportation for criminal convictions.¹⁷ Over 1600 Cambodian refugees have been ordered deported to Cambodia, many of them for crimes committed as teenagers.¹⁸ Since Cambodia signed a repatriation agreement in 2002, approximately 162 former refugees have been returned to Cambodia; others who have been ordered deported may be returned at any time.¹⁹

The following cases represent some of the young people who have been ordered deported to Cambodia and other countries on the basis of juvenile offenses, without any consideration of age, refugee status, or other individual circumstances.

1. Kim Ho Ma

Kim Ho Ma, the second youngest of five children, was born in Cambodia in 1977. He was two years old when his family fled the reign of the Khmer Rouge. The family survived in refugee camps until granted permission by the United States to enter as refugees in 1985, where they were resettled in an inner-city neighborhood in Seattle. As a teenager, Ma became involved in a gang, and at age seventeen, he was convicted of first degree manslaughter, which requires a showing of recklessness rather than intent. It was his only conviction. Earning time off for good behavior, he served 26 months of a 38-month sentence. On the basis of his conviction, Ma was ordered deported to Cambodia in 1997, and was held in immigration detention for over two years, until a federal court ordered his release. Following his release from detention, he lived a quiet life with his

¹⁷ As children, they would have automatically become citizens upon their parents' naturalization. However, many factors, including poverty, language barriers, and a lack of understanding of the law, have kept Cambodian refugees from applying for U.S. citizenship. See Sontag, *supra* n. 13.

¹⁸ See Sontag, *supra* n. 13.

¹⁹ See Bruce Stokes, "Between Two Nations," National Journal, Jan. 13, 2007 at 57 (attached as Exhibit E).

family, and had no further trouble with the law. He was deported to Cambodia in 2002, leaving behind his entire family, all of whom are United States citizens or permanent residents. He is barred for life from returning to the United States.²⁰

2. Sombat Map Kay

Sombat Map Kay fled the Cambodian killing fields with his mother and two siblings after his father and sister were killed. Following several years in refugee camps, the family was admitted to the United States in 1985, when Kay was eleven years old, and resettled in Manchester, New Hampshire. In 1992, Kay was convicted of armed assault, armed robbery, and breaking and entering, all arising from a single incident that took place when he was seventeen. He was sentenced to four-to-ten years in prison. During his incarceration, Kay completed an intensive, six-month drug and alcohol abuse program as well as a high school equivalency course. He also received employment training and held a position as a grounds keeper on the janitorial staff. He was active in group programs such as basketball, football, and baseball.

Kay was placed in deportation proceedings in 1995, while serving his sentence; he applied for discretionary relief under Section 212(c) of the Immigration and Nationality Act, but his application was pretermitted in 1996 under the newly-enacted Anti-Terrorism and Effective Death Penalty Act. He was released from prison after serving five years of his sentence, and was placed in immigration detention for over two years, until a federal court ordered his release. He has had no further trouble with the law. Kay may be deported to Cambodia at any time, and will be subject to a lifetime bar

²⁰ See Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1102 (9th Cir. 2001); Lise Olsen, “Deportee Struggles to Find a Life in a ‘Foreign’ Land,” Seattle Post-Intelligencer, June 30, 2003 (attached as Exhibit F).

on returning to the United States. His entire extended family is in the United States; all of his relatives, with the exception of one elderly aunt whose whereabouts are unknown, either perished under the Khmer Rouge or fled as refugees.²¹

3. Nestor Najera-Trejo

Nestor Najera-Trejo came to the United States from Honduras as a lawful permanent resident in 1989, at the age of eleven. He and his younger brother joined their mother, a lawful permanent resident who had immigrated earlier, and their stepfather and two step-siblings, all of whom were U.S. citizens. Upon his arrival, Najera-Trejo entered the third grade in a public school in Brooklyn. He attended elementary school and junior high school in Brooklyn, working after school as a delivery boy at a supermarket across the street from his school, assisting his stepfather in his maintenance job, and volunteering at a local evangelical church where he attended services three times a week and participated in youth retreats. He was a member of the Boy Scouts and received an award for finding another troop member who got lost on a camping trip. When he was in the eighth grade, his mother took him for counseling due to her concerns that he was becoming defiant. In 1994, when he was sixteen years old and still in junior high school, he was arrested for carjacking. He testified that after smoking marijuana, he and a friend had decided to steal a car to go for a joy ride; he hit the driver of the car with a stapler, and his friend drove the car while he sat in the back seat. He pleaded guilty to all of the charges against him and was sentenced to a term of two-to-six years. While incarcerated, he took part in programs such as Hispanics in Progress and Alternatives to

²¹ See Kay v. Reno, 94 F.Supp. 2d 546, 547-48 (M.D. Pa. 2000); Pet. for Writ of Habeas Corpus, Kay v. Reno, 1:CV 99-251 (M.D. Pa. 1999) (attached as Exhibit G).

Violence, and took classes to complete his high school equivalency. On June 14, 1996, his mother became a U.S. citizen; although his younger brother obtained derivative citizenship through their mother, Najera-Trejo had already turned eighteen and was thus no longer eligible to do so. In 1996, he was deported after an immigration judge incorrectly denied him the opportunity to apply for 212(c) relief. He later returned to the U.S. to be reunited with his family, and in 2006, he was indicted for illegal reentry.²² Although a federal judge dismissed the indictment, finding that the removal order was fundamentally unfair and that there was a reasonable probability that Najera-Trejo would have been granted discretionary relief if the law had been correctly applied to his case, the government reinstated his prior removal order and he was once again deported.

4. Borom Chea

Borom Chea was born in a Cambodian slave camp and came to the United States as a refugee at the age of four. His mother raised him and his two siblings in Sacramento, California while working several jobs and attending college. She later reunited with her husband, opened a small grocery store, and moved her children out of the dangerous neighborhood in which they had been living. At the age of seventeen, Chea was arrested for a burglary along with five friends. Although he had no prior convictions, Chea was tried as an adult and sentenced to seven years in prison, while the others who took part in the act were processed as juveniles and received two years in the California Youth Authority. On the basis of his conviction, Chea was placed in immigration detention following completion of his sentence, and was deported to Cambodia. He left behind his

²² See United States v. Najera-Trejo, 2006 WL 2191349 (E.D.N.Y., July 31, 2006).

entire family, all of whom are U.S. citizens. As an “aggravated felon,” he is barred for life from returning to the United States.²³

5. Lundy See

Lundy See came to the United States as a refugee from Cambodia at the age of eight. At age sixteen, he was convicted of assault and served fourteen months in prison. He was ordered deported as an “aggravated felon,” and was held in immigration detention for two years following his release from prison.²⁴ He could be deported to Cambodia at any time, and will be barred for the rest of his life from returning to the U.S.

6. Dean Chambers

Dean Chambers immigrated to the United States from Jamaica with his family at the age of 2. In 1994, at age seventeen, he was convicted of robbery with a deadly weapon (a knife) and sentenced to four years in prison, with all but 18 months of the sentence suspended. It was his only conviction. Placed in deportation proceedings while serving his sentence, he applied for discretionary relief under Section 212(c) of the Immigration and Nationality Act. However, his application was pretermitted under the newly-enacted Anti-Terrorism and Effective Death Penalty Act. He was deported to Jamaica and is permanently barred from returning to the United States. His entire

²³ See Melissa Hung, “One Way Ticket to Cambodia,” East Bay Express, Nov. 20, 2002 (attached as Exhibit H); Keo Chea, “After Jail, Deportation: Cambodian Community is Being Punished Twice,” Network News: National Network for Immigrant and Refugee Rights, (Fall-Winter 2003), available at <www.nnirr.org/news/net_news/winter_2003.pdf> (attached as Exhibit I).

²⁴ See Bill Ong Hing, “Deported for Shoplifting?” Washington Post, Dec. 29, 2002, at B7 (attached as Exhibit J).

immediate family resides in the United States; all of the members of his family are either U.S. citizens or permanent residents.²⁵

B. International Adoptees

Prior to the enactment of the Child Citizenship Act of 2000,²⁶ children adopted internationally by United States citizens were not granted automatic citizenship by the United States at the time of their adoption. Rather, international adoptees were subject to a two-part process in which parents first petitioned for their foreign-born child to become a lawful permanent resident, and then were permitted to obtain citizenship for the child, after his or her arrival in the U.S., through an expedited naturalization process.²⁷ If the process was not completed entirely by the child's eighteenth birthday, the child was no longer eligible for the expedited procedure.²⁸

The Child Citizenship Act did not confer citizenship retroactively on foreign-born adoptees who had already turned eighteen as of February 27, 2001.²⁹ Thus, many individuals who came to the United States as adoptees continue to be subject to deportation, even for minor, non-violent offenses.

The following represent some of the international adoptees who have fallen under mandatory deportation laws due to their parents' failure to naturalize them before their eighteenth birthday:

²⁵ See Chambers v. Reno, 307 F.3d 284 (2d Cir. 2002); Brief for Petitioner-Appellant 2000 WL 34237493 (May 26, 2000).

²⁶ Pub. L. No. 106-395, 114 Stat. 1631 (2000), codified at 8 U.S.C.A. § 1433.

²⁷ See "INS Instructs on Expedited Naturalization Procedures for Adopted Children," 73 No. 3 Interpreter Releases 66 (Jan. 16, 1996).

²⁸ Id.

²⁹ See Drakes v. Ashcroft, 323 F.3d 189, 191 (2d Cir. 2003); U.S. v. Arbelo, 288 F.3d 1262, 1263 (11th Cir. 2002); Nehme v. I.N.S., 252 F.3d 415, 430–32 (5th Cir. 2001); Hughes v. Ashcroft, 255 F.3d 752, 758–60 (9th Cir. 2001).

1. Joao Herbert

Joao Herbert was born in Brazil and spent much of his early childhood as an orphan on the streets of Sao Paolo. He was adopted by an Ohio couple at the age of eight. When he was seventeen, his parents discovered that he had not automatically become a U.S. citizen upon his adoption, and submitted a naturalization application. However, Herbert turned eighteen before the processing of the application was complete. Soon after his eighteenth birthday, he pleaded guilty to attempting to sell marijuana and was sentenced to probation and participation in a drug treatment program. Despite the fact that he was a first-time offender who had served no jail time, he was placed in immigration detention for twenty months and then deported to Brazil as an “aggravated felon.” Herbert had no friends or family in Brazil and no longer spoke any Portuguese. Once in Brazil, he began teaching English and became known as “the English professor.” His father, who is quadriplegic, was unable to travel to Brazil to visit him. In May of 2004, Herbert was shot and killed in the industrial city of Campinas, 60 miles northwest of Sao Paolo.³⁰

2. John Gaul III

John Gaul III was born in Thailand and adopted by a Florida family as a toddler in 1979. He grew up in Tampa, Florida, attending a private high school where he played soccer, baseball and basketball. The Gauls did not realize until they applied for their

³⁰ Terry Oblander and Stephanie Sheldon, “Foreign Adoptee Fights Deportation While in Jail,” Cleveland Plain Dealer, Mar. 1, 2000 (attached as Exhibit K); Marilyn Miller and Gina Mace, “Loved Ones Honor Life of Man Deported, Killed,” Akron Beacon Journal, June 16, 2004 (attached as Exhibit L).

son's passport at age seventeen that he was not a U.S. citizen. They immediately filed an application to naturalize him, but Gaul turned eighteen before the process was completed. At age nineteen he was convicted of writing bad checks and stealing a car, and he served 20 months in prison. By the time he completed his sentence in late 1996, the law had changed and he was not eligible to apply for discretionary relief from deportation. An immigration judge ruled that the agency had taken too long to process Gaul's citizenship application, but that the 1996 law allowed him no discretion to halt Gaul's deportation. Gaul was placed in immigration detention upon his release from prison, and was subsequently deported to Thailand, where he knew no one. Gaul is barred for life from returning to the United States.³¹

3. **Daniel Heiskala**

Daniel Heiskala was born in South Korea and adopted by a U.S. couple, joining their three biological children. According to his parents, he came to the United States as "a half-starved five-year-old boy." The family lived on a farm in Michigan, and then later moved to North Carolina and eventually to Texas, where Heiskala attended West Lake Christian High School. He speaks no Korean and has had no contact with anyone in Korea since his adoption. In 1994, when Heiskala was in his early twenties, he was convicted of stealing a car and sentenced to seven to ten years in prison. He was paroled out after serving slightly more than two years, and has had no further convictions since that time. In 2003, he was put in deportation proceedings on the basis of the 1994

³¹ See Nancy Morawetz, "Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms," 113 *Harvard Law Review* 1936, 1952 (2000); American Bar Association, "American Justice Through Immigrants' Eyes" (2004), at 34, available at <http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeyes.pdf> (attached as Exhibit M).

conviction.³² Because he was convicted after a trial rather than on a guilty plea, the government has taken the position that he is ineligible for discretionary relief even though his conviction predates the 1996 amendments to the Immigration and Nationality Act.³³ His case is currently on appeal.

4. Jess Mustanich

Jess Mustanich was adopted from a convent in El Salvador when he was six months old by a couple from the United States. They adopted him under Salvadoran law and brought him back to the United States, but divorced before completing the adoption process under U.S. law. After a long legal battle, Mustanich's father was awarded custody. By that point, Mustanich was five years old. His father sought to resume the adoption process with the aim of obtaining citizenship for his son, but encountered difficulties because the agency that had helped the couple adopt was no longer operating. In the end, the adoption was never finalized. At one point, the father took a completed citizenship application to an Immigration and Naturalization Service office, but the clerk refused to accept it and gave him a phone number to call; although the father called the number and left repeated messages, he never received a return call.

Meanwhile, Mustanich had begun to have disciplinary problems at school and was in and out of counseling. Soon afterwards, he was taken into custody by the state

³² See Statement of Facts, Petitioner's Opening Brief, Choo Doc Kim v. Alberto Gonzales, No. 05-2485 (1st Circuit) (attached as Exhibit N).

³³ In INS v. St. Cyr, 533 U.S. 239 (2001), the Supreme Court held that discretionary relief from deportation under former INA Section 212(c) remains available for those whose convictions were the result of plea agreements and who, notwithstanding those convictions, would have been eligible for such relief at the time of the plea under the law then in effect. Several federal appeals courts have declined to extend St. Cyr's holding to those who were convicted after trial. See Dias v. INS, 311 F.3d 456 (1st Cir. 2002); Rankine v. Reno, 319 F.3d 93 (2d Cir. 2002); Chambers v. Reno, 307 F.3d 284 (4th Cir. 2002); Armendariz-Montoya v. Sonchik, 291 F.3d 1116 (9th Cir. 2002). But see Ponnapula v. Ashcroft, 373 F.3d 480 (3d Cir. 2004).

and began living in group homes. His father repeatedly asked judges and social workers in the juvenile justice system to resolve the boy's citizenship, but nothing was done. Shortly after Mustanich turned eighteen, his father came home one day and found that his house had been burglarized. Suspecting his son of being the culprit, he called the police in the hope that a brush with the law might set his son straight. He had no idea that he was putting in motion a process that would take his son away from him for good. Mustanich was convicted of burglary in April 1997. While serving his sentence at San Quentin, he received an additional four-year sentence for possessing a homemade knife; Mustanich, who is five feet tall, maintained that he needed the weapon to protect himself from older, bigger inmates. He was ordered deported on the basis of his convictions, and was placed in immigration detention upon completion of his sentence in 2003. His case is currently on appeal.³⁴

IV. ARGUMENT

A. **Mandatory Deportation of Juvenile Offenders Violates Their Right to Special Protection and Aid to Children (Art. VII) of the American Declaration.**

Article VII of the American Declaration provides that “all children have the right to special protection, care and aid.” Within the Inter-American system, “the rights of children have been accorded special priority and protection, because the youth of our

³⁴ See Leslie Berestein, “Foreign Adoptees Try to Avoid Deportation,” San Diego Union-Tribune, Sept. 13, 2005 (attached as Exhibit O).

hemisphere represent our future possibility to create a ‘system of personal liberty and social justice based on respect for the essential rights of man.’”³⁵

The Declaration’s special protections for children reflect a well-established principle of international law. Article 19 of the American Convention provides that “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.” The Inter-American Court has observed that the protection of children derives “from the specific situation of children, taking into account their weakness, immaturity or inexperience.”³⁶ Article 24 of the International Covenant on Civil and Political Rights (“ICCPR”), to which the United States became a party in 1992, provides that “[e]very child shall have . . . the right to such measures of special protection as are required by his status as a minor.” Article 3 of the Convention on the Rights of the Child (“CRC”) provides that “[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration.”

The Commission has repeatedly found that the American Declaration must be interpreted in light of evolving norms of human rights law:

[I]n interpreting and applying the American Declaration, it is necessary to consider its provisions in light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged. Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.³⁷

³⁵ Inter-Am. C.H.R., Report of the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System, Doc. OEA/Ser.L/V/II.106, Doc. 40 rev. (February 28, 2000), ¶ 163.

³⁶ Inter-American Ct. H.R., Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002 of August 28, 2002, Ser. A No. 17, ¶ 60.

³⁷ Inter Am. C.H.R., Ramon Martinez Villareal v. United States, Case 11.753, Report No. 52/02, Doc. 5 rev.1 at 821 (2002) ¶ 60 (citing Garza v. United States, Case No. 12.053, Annual Report of the IACHR 2000, ¶¶ 86-89).

The Inter-American Court has found that the CRC, having been ratified by almost all Organization of American States member states, reflects a broad international consensus (*opinio juris*) on the principles contained therein, and thus may be used to interpret not only the American Convention but other treaties relevant to human rights in the Americas.³⁸ Moreover, as a signatory to the CRC, the United States may not take actions that would defeat the convention's object and purpose.³⁹

In line with the enhanced protections afforded to children, international law requires that states take special measures with regard to juvenile offenders. Article 37(c) of the CRC requires that "[e]very child deprived of liberty shall be treated . . . in a manner which takes into account the needs of persons his or her age." The United Nations Standard Minimum Rules for the Administration of Juvenile Justice provides that "The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence."⁴⁰ Rule 17 provides that any

³⁸ Inter-Am. Ct. H.R., Juridical Status and Human Rights of the Child, *supra* n. 36, ¶¶ 29-30. See also Inter-Am. C.H.R., Domingues v. United States, Case No. 12.285, Report No. 62/02, ¶ 57. 192 out of a total of 194 countries having joined as parties to the CRC. The United States and Somalia are alone in the world in having not ratified the convention, although both have signed it.

³⁹ See Vienna Convention on the Law of Treaties, Art. 18. See also Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination," American Journal of Int'l Law, Vol. 79 (1985), at 285 (discussing U.S. obligations under Art. 18 of the Vienna Convention). When Ambassador Madeline Albright, as the United States Permanent Representative to the United Nations, signed the CRC on behalf of the United States in 1995, she declared:

The convention is a comprehensive statement of international concern about the importance of improving the lives of the most vulnerable among us, our children. Its purpose is to increase awareness with the intention of ending many abuses committed against children around the world. . . . The United States' participation in the Convention reflects the deep and long-standing commitment of the American People.

⁴⁰ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the United Nations General Assembly Resolution 40/33 of November 29, 1985 [hereinafter "Beijing Rules"], Rule 5.1.

disposition by a competent authority shall be guided by consideration of “the needs of the juvenile as well as [] the needs of society.”⁴¹

The special considerations mandated for juvenile offenders are based in part on the widely recognized principle that children have lesser culpability than adults. In the context of the death penalty, the Commission has noted that the prohibition on execution of children is “based on the idea that a person who has not reached the age of eighteen years is not fully capable of sound judgment, does not always realize the significance of his actions and often acts under the influence of others, if not under constraint.”⁴² Brain studies have shown that adolescents process information and make decisions differently from adults,⁴³ and under the standard diagnostic guide of the U.S. psychiatric profession, a child cannot be diagnosed with an anti-social personality disorder before the age of eighteen.⁴⁴ Longitudinal studies of adolescent offending have found that individuals often “age out” of antisocial behavior and mature into law-abiding citizens given the right circumstances.⁴⁵ The United States Supreme Court has recognized that “it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”⁴⁶

Reflecting this understanding of juvenile crime, the European Court for Human Rights has emphasized the age of the offender in considering whether a deportation is

⁴¹ Beijing Rules, Rule 17.1

⁴² Domingues v. United States, *supra* n. 38, ¶ 67 (citing Int’l Committee of the Red Cross, Commentary on the Fourth Geneva Convention Relative to Protection of Civilian Persons in Time of War (J.S. Pictet ed., 1958), at 346-47).

⁴³ See David E. Arredondo, M.D., “Child Development, Children’s Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making,” 14 Stanford Law & Policy Review 13, 15 (2003).

⁴⁴ *Id.* at 18 (citing Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2002)), at 704.

⁴⁵ See Kim Taylor-Thompson, “States of Mind/States of Development,” 14 Stanford Law & Policy Review 143, 156 (2003).

⁴⁶ See Roper v. Simmons, 543 U.S. 551, 570 (2005).

permissible under Article 8.2 of the European Convention, which permits interference with family life only where “necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” In Moustaquim v. Belgium, the Government argued that its deportation of the petitioner was justified by the petitioner’s extensive criminal record, which consisted of 147 charges in juvenile court, 22 of which resulted in adult convictions in criminal court.⁴⁷ The Court agreed with the Government that the deportation of Mr. Moustaquim pursued legitimate aims set forth in Article 8.2, namely the prevention of crime and disorder.⁴⁸ However, the Court determined that the deportation could not be regarded as “necessary in a democratic society” due to the fact that the offenses all took place when the petitioner was an adolescent.⁴⁹

A central element of the special consideration given to juvenile offenders under international law is the goal of rehabilitation. The Commission has noted the “broadly-recognized international obligation of states to provide enhanced protection to children, which includes ensuring the well-being of juvenile offenders, and endeavor their rehabilitation.”⁵⁰ The Commission has further held that Art. VII requires that “when the State apparatus has to intervene in the offenses committed by minors, it should make substantial efforts to guarantee their rehabilitation in order to ‘allow them to play a constructive and productive role in society.’”⁵¹ Article 14(4) of the ICCPR mandates that

⁴⁷ Eur. Ct. H.R., Moustaquim v. Belgium, Judgment of February 18, 1991, No. 12313/86, ¶¶ 10-15.

⁴⁸ *Id.*, ¶ 40.

⁴⁹ *Id.*, ¶ 44.

⁵⁰ Domingues v. United States, *supra* n. 38, ¶ 83.

⁵¹ *Id.* (citing Inter-Am. Ct. H.R., Villagran Morales and Others (“Street Children Case”), Judgment of Nov. 19, 1999, Annual Report 1999, para. 197 (citing Beijing Rules)).

procedures for children charged with crimes “take account of the age and the desirability of promoting their rehabilitation.”⁵² Under Article 40 of the CRC, a minor who has committed a crime is to be treated in a manner that takes into account “the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”

The young Cambodian refugees who have encountered trouble with the law illustrate the great potential that young people have to turn their lives around and become productive members of their community. Despite the hardships he experienced upon his return to Cambodia, Kim Ho Ma has found ways to help others there, volunteering to teach English to a young girl disfigured in an acid attack and assisting in the care of abandoned HIV-positive infant.⁵³ Toeun Chhin, convicted at nineteen for assault and possession of drug paraphernalia and subsequently deported at age twenty-six to Cambodia, is building a drug detoxification and rehabilitation center in the Cambodian countryside.⁵⁴ Lun Loeun, convicted as a teenager of firing an illegal handgun in a parking lot, got married and settled into a suburban life with his wife and two daughters before being deported to Cambodia in 2003.⁵⁵ Many Uch, convicted at eighteen for being an accomplice in an armed robbery and currently awaiting deportation to Cambodia, is a

⁵² In ratifying the ICCPR, the United States reserved the right “in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14.” Human Rights Watch has noted that “[t]he history of this reservation indicates that it was intended to permit—on an exceptional basis—the trial of children as adults and the incarceration of children and adults in the same prison facilities. The United States, as a co-sponsor of Article 14, was keenly aware of the breadth and scope of its language. There is nothing in its reservation to suggest that the United States sought to reserve the right to sentence children as harshly as adults who commit similar crimes.” See Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States, available at <<http://hrw.org/reports/2005/us1005/index.htm>> (attached as Exhibit P).

⁵³ See Olsen, *supra* n. 20.

⁵⁴ See Krista Mahr, “Convicted in America – sentenced to Cambodia,” The San Francisco Chronicle, July 1, 2005 (attached as Exhibit Q).

⁵⁵ See Sontag, *supra* n. 13.

loving father and runs a Little League baseball team for Cambodian children.⁵⁶ Thea Som, convicted at nineteen for aggravated assault and still in the United States awaiting deportation to Cambodia, is a literacy volunteer, a tutor for adults preparing for high school equivalency examinations, and a youth mentor.⁵⁷

Current U.S. law provides no opportunity within deportation proceedings for juvenile offenders to present evidence regarding their potential for rehabilitation or any other individual circumstances. Rather than assisting in the rehabilitation of these young people, U.S. law requires that they be deported to countries they have not set foot in since early childhood and where they have no family ties, no community support, no structure to support them in “play[ing] a constructive and productive role in society.”⁵⁸

Although United States courts have deemed immigration proceedings to be civil rather than criminal in nature,⁵⁹ it may be noted that for juvenile (as well as adult) offenders, deportation is a mandatory and direct consequence of their criminal convictions. In most cases, deportation proceedings take place while the individual is still serving his or her sentence. In this context, there can be no question that laws providing for mandatory deportation and lifetime banishment from the United States of children who commit crimes, with no consideration of any factors other than whether

⁵⁶ See Sontag, *supra* n. 13; Florangela Davila, “Cambodian refugee and former gang member lives a life in limbo,” *The Seattle Times*, June 1, 2006 (attached as Exhibit R).

⁵⁷ Chew, Amee, “Stop the Deportation of Spoken Word Artist Thea Som,” *Azine*, June 4, 2005, available at <<http://www.aamovement.net/community/theasom.htm>> (attached as Exhibit S).

⁵⁸ *Domingues v. United States*, *supra* n. 38, ¶ 83.

⁵⁹ See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893), commenting that a deportation proceeding “is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime.” Justice Brewer, in dissent, countered that “[i]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.” *Id.*, 149 U.S. at 740.

their conviction constitutes a deportable offense, implicate international legal standards with regard to the treatment of juvenile offenders. Such laws violate the requirement, explicit in the ICCPR and Beijing Rules, and recognized by the Commission as implicit under Article VII of the American Declaration, that states must endeavor to rehabilitate juvenile offenders. They also violate the requirement under Article 3 of the CRC that “[i]n *all* actions concerning children . . . the best interests of the child shall be a primary consideration” (emphasis added).

B. Mandatory Deportation of International Adoptees Violates Their Rights to Protection Against Abusive Attacks on Private and Family Life (Art.V) and to Establish a Family (Art. VI).

Article V of the American Declaration guarantees the right to protection of the law against abusive attacks upon private and family life, and Article VI guarantees the right “to establish a family, the basic element of society, and to receive protection therefore.” Taken together, these two articles “prohibit arbitrary or illegal interference with family life” by the State, except where such interference is justified by a “pressing need to protect public order, and where the means are proportional to that end.”⁶⁰

Under the Commission’s interpretive mandate, developments in international law regarding international adoption may inform the Commission’s interpretation of Articles V and VI of the American Declaration.⁶¹ The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (“Hague Convention”), which the United States has signed and has taken significant steps toward ratifying, requires in three separate articles that receiving states provide intercountry adoptees with the right to

⁶⁰ Inter-Am. C.H.R., “Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System,” *supra* n. 35, ¶¶ 162, 166.

⁶¹ See *supra* n. 37 and accompanying text.

reside permanently in the receiving state following an adoption.⁶² Article 21 of the CRC provides that “States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall . . . ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption.”

Mandatory deportation of any longtime resident of the United States, without an individualized hearing to consider of the nature of the individual’s criminal offense or the extent of his or her family ties, raises questions regarding the necessity and proportionality of the State’s actions.⁶³ In cases involving individuals who were adopted from abroad as young children, the effects of mandatory deportation laws are particularly arbitrary and disproportionate. When John Gaul was deported to Thailand for stealing a car and passing bad checks, he left behind his entire family and the only life he has known, returning to a country as foreign to him as it would be to any native-born American. Joao Herbert also left behind his entire family when he was deported to Brazil on the basis of a single marijuana charge; he spoke no Portuguese and knew no one in Brazil. Within three years of his arrival he had been brutally murdered. Jess Mustanich and Daniel Heiskala face the same prospect of life-long separation from their

⁶² Art. 5 of the Hague Convention provides that “[a]n adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State . . . have determined that the child is or will be authorized to enter and reside permanently in that State.” Art. 17 provides that “[a]ny decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if . . . it has been determined, in accordance with Article 5, that . . . the child is or will be authorized to enter and reside permanently in the receiving State.” Article 18 provides that “[t]he Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.”

⁶³ Employing a balancing test under Article 8 of the European Convention, the European Court for Human Rights has found on numerous occasions that deportations violated the right to private life and family unity. See, e.g., Eur. Ct. H.R., Beldjoudi v. France, Judgment of March 26, 1992, No. 12083/86; Berrehab v. the Netherlands, Judgment of June 21, 1988, No. 10730/84. This balancing test, in both the European and Inter-American contexts, is discussed in detail in Petitioners’ Final Observations Regarding the Merits of the Case.

entire families upon their deportation to countries that they have not seen since early childhood.

By subjecting adoptees to mandatory deportation, even for relatively minor offenses, United States immigration laws violate the rights of adoptees to establish a family and to be protected against abusive attacks on their family life. Such laws also violate the United States' obligations under the Hague Convention to permit adoptees to reside permanently in the United States, and its obligations under the CRC to ensure that children adopted from abroad enjoy safeguards and standards equivalent to those existing in the case of national adoption.

V. CONCLUSION

For the foregoing reasons, the Commission should find the United States in violation of the right to protection against abusive attacks on family life (Art. V), the right to establish a family (Art. VI), and the right to protection for mothers and children (Art. VII), as well as the right to a fair trial (Art. XVIII) and the right to due process of law (Art. XXVI) of the American Declaration.

Respectfully submitted,

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Dated_____