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CAMBODIAN NATIONALITY LAW AND THE REPATRIATION OF CONVICTED ALIENS UNDER THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT

Jana M. Seng

Abstract: Currently the U.S. Immigration and Naturalization Service (“INS”) is indefinitely detaining thousands of aliens who have already completed their criminal sentences. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) allows the INS to detain these convicted aliens while initiating a removal proceeding for deportation to their native country. Absent from the IIRIRA is a provision addressing whether the INS may indefinitely detain convicted aliens who cannot be deported because the United States has no repatriation agreement with the alien’s native country. Justification for the indefinite detention rests on the assumption that the United States will secure a repatriation agreement in the near future. However, an analysis of Cambodia’s methods for determining citizenship and the lack of uniformity in international “proof of nationality” law demonstrates that a repatriation agreement is not likely to occur. For this reason, the U.S. Supreme Court should preclude the INS’ practice of indefinite detention and require an immediate release of indefinite detainees after they have served their sentence where the native country has no repatriation agreement with the United States and has not shown a willingness to accept the detainees’ return.

I. INTRODUCTION

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”),¹ putting into effect strict deportation provisions against aliens who have been convicted of crimes that range from aggravated felonies to misdemeanors.² The IIRIRA instructs the Immigration and Naturalization Service (“INS”) to initiate removal proceedings against convicted aliens and to deport them to their country of

¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C.). In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) was passed by a bipartisan majority in Congress and signed by President Clinton in response to the public’s anti-crime and anti-immigration sentiments. The IIRIRA is an attempt to slow illegal immigration by increasing the number of border patrols, limiting judicial review, and introducing new penalties for a variety of immigration control violations. See Trevor Morrison, *Removed from the Constitution? Deportable Aliens’ Access to Habeas Corpus Under the New Immigration Legislation*, 35 COLUM. J. TRANSNAT’L L. 697, 697 (1997).

² See 8 U.S.C. § 1227(a)(2) (2000) for a list of “deportable” crimes, including crimes of moral turpitude, aggravated felony, high speed flight, possession of controlled substance, possession of a firearm, domestic violence, stalking, child abuse, and failure to register and falsification of documents.

nationality after they have completed their sentences in the United States.³ The Attorney General has ninety days after the removal order becomes administratively final to remove the alien.⁴ However, some convicted aliens cannot be removed within the ninety-day statutory period and have remained in INS detention indefinitely because their countries of nationality lack a repatriation agreement with the United States and refuse to accept their return.⁵ The countries where most of the indefinite detainees are from and where the United States currently has no repatriation agreement with are Cambodia, Cuba, Laos, or Vietnam.⁶

The IIRIRA's deportation provision has grave consequences for many aliens. For example, the INS may initiate deportation proceedings against convicted aliens without regard to the alien's legal resident status⁷ or long-term residence in the United States.⁸ As a result, many aliens have been forced to return to countries to which they have few or no ties.⁹ Frequently, the deportation of these aliens results in the forced separation of families¹⁰ and may undermine the financial stability of the family unit.¹¹

³ *Id.* § 1231(a).

⁴ 8 U.S.C. § 1231(a)(1)(A)-(B) provides for the detention, release, and removal of aliens ordered removed:

[W]hen an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days . . . [and the] removal period begins on the latest of the following: (i) The date the order of removal becomes administratively final; (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order; (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(A)-(B).

⁵ See *Varied Routes Led Immigrants to INS Custody*, SEATTLE P-I, June 17, 1999, at B1 [hereinafter *Varied Routes*] (giving reasons that include lack of proper documentation of citizenship, fraud in obtaining documents, and successive government's refusal to acknowledge the prior government's form of identification).

⁶ See Barry Newman, *Slender Mercies: U.S. Moves Swiftly to Deport Aliens with Prison Records*, WALL ST. J. EUROPE, July 12, 1999, available at 1999 WL-WSJE 18408832.

⁷ See 8 U.S.C. § 1101(a)(20) ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.").

⁸ 8 U.S.C. § 1231(a).

⁹ See *Varied Routes*, *supra* note 5.

¹⁰ For reports of the disruption of the family unit as a result of the deportation of convicted aliens under IIRIRA, see Chris Hedges, *Spousal Deportation, Family Ruin as Breadwinners Are Exiled*, N.Y. TIMES, Jan. 10, 2001, at NY Region; Jenifer Hanrahan, *Blind Justice: Does Immigration Law Cross a Line When It Rips Families Apart?*, SAN DIEGO UNION-TRIB., May 21, 2000, at D1; Anthony Lewis, *Cases That Cry Out*, TULSA WORLD, Mar. 26, 2000, at 6; Susan Levine, *On the Verge of Exile: For Children Adopted From Abroad, Lawbreaking Brings Deportation*, WASH. POST, Mar. 5, 2000, at A1; Lise Olsen, *Old Convictions Haunting Families Starting New Lives*, SEATTLE P-I, Apr. 7, 1999, at A1.

¹¹ Olsen, *supra* note 10.

In addition, the IIRIRA deportation provision is exhausting administrative resources.¹² Aliens waiting for their deportation occupy jails and detention centers; currently those who cannot be deported will remain there for an indefinite period.¹³ Estimates of the number of indefinite detainees held throughout the United States as of February 2001 have ranged from 3,000 to 4,500.¹⁴ Furthermore, deportation proceedings have recently increased. In 1999, the INS deported 62,359 immigrants for criminal offenses, an increase of seventy-two percent from 1996, the year of IIRIRA's enactment. Consequently, indefinite detainees have flooded the INS offices and courts with habeas corpus petitions challenging their detention.¹⁵

Using Cambodia as a model, this Comment argues that the INS should release convicted aliens who have completed their sentences and are being detained indefinitely because the United States does not have a repatriation agreement with the detainee's country of nationality. Part II examines the indefinite detention loophole of the IIRIRA and highlights the case of Kim Ho Ma, a Cambodian national who successfully sought judicial release from indefinite detention. Part III briefly describes how IIRIRA fits in with international standards for repatriation. Part IV provides a history of the political instability and the rise of nationalism in Cambodia as a background for understanding why repatriation of Cambodian criminal aliens will be difficult. Part V outlines Cambodia's nationality and citizenship laws. Part VI argues that Cambodia's xenophobia and exclusive nationality policies will hinder negotiation of a repatriation agreement with the United States. Part VII recommends that the INS release indefinite detainees who have completed their sentences and cannot be repatriated to their country of nationality.

II. THE IIRIRA INDEFINITE DETENTION LOOPHOLE

The IIRIRA is silent on the length of time the INS may hold a convicted alien and the INS therefore maintains that it has the authority to

¹² *FY2001 Budget for the FBI, DEA and INS: Hearing of the Commerce, Justice, State and Judiciary Subcommittee of the Senate Appropriations Committee*, 106th Cong. (2000) [hereinafter *Hearing*] (discussing the fiscal year 2001 budget for the INS).

¹³ *Id.*

¹⁴ See Florangela Davila, *Immigrants' Case Going to High Court*, SEATTLE TIMES, Feb. 21, 2001, at B1; Monica Whitaker, *Laotian in Legal Limbo Tougher Legislation Often Makes Trouble With the Law an Even Bigger*, TENNESSEAN, Oct. 23, 2000, at 1A.

¹⁵ Since the enactment of IIRIRA, the number of habeas petitions filed by detainees seeking release from detention have increased significantly, causing an administrative backlog. See *Hearing*, *supra* note 12.

detain such aliens for an unlimited amount of time.¹⁶ This has resulted in the indefinite detention of aliens who have completed their sentences.¹⁷ Contrary to the INS position, the Ninth Circuit held in *Ma v. Reno* that indefinite detention is unlawful and ordered the release of indefinite detainees held in INS custody.¹⁸ Even so, the INS continues to hold convicted aliens that cannot be repatriated¹⁹ while the U.S. Supreme Court reviews the issue.²⁰

A. *The IIRIRA Allows the INS to Detain Aliens Indefinitely*

The IIRIRA specifically authorizes the U.S. Attorney General on behalf of the INS to detain²¹ and remove an alien from the United States who has been found guilty of the crimes enumerated in 8 U.S.C. § 1227(a)(2).²² The deportation consequence of criminal convictions applies to both illegal aliens and to lawful permanent residents.²³ After a removal order becomes administratively final, the Attorney General “shall” remove the alien from the United States “within a period of 90 days” (referred to as the “removal period”).²⁴ Furthermore, an alien may be detained beyond the removal period where the alien is deemed “a risk to the community or unlikely to comply with the order of removal[.]”²⁵ Thus, aliens may be detained beyond the ninety days after their final administrative removal order while waiting for their deportation.²⁶

However, absent in the statute is how long the Attorney General may detain an alien when the deportation order cannot be effectuated.²⁷ The INS

¹⁶ *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3257 (U.S. Oct. 10, 2000) (No. 00-38); *see also Varied Routes*, *supra* note 5.

¹⁷ *See infra* Part II.A.

¹⁸ *Ma*, 208 F.3d at 821; *see also* discussion *infra* Part II.B.

¹⁹ *See Hedges*, *supra* note 10; Hanrahan, *supra* note 10; Lewis, *supra* note 10.

²⁰ *See Davila*, *supra* note 14.

²¹ 8 U.S.C. § 1231(a)(2).

²² *Id.* § 1227(a)(2).

²³ For example, an aggravated felony conviction invokes the same strict exclusionary and deportability standards that apply to all aliens, regardless of their status. *See* Bruce Robert Marley, *Exiling the New Felons: The Consequences of the Retroactive Application of Aggravated Felony Convictions to Lawful Permanent Residents*, 35 SAN DIEGO L. REV. 855, 873 (1998).

²⁴ 8 U.S.C. § 1231(a)(1)(C).

²⁵ *Id.* § 1231(a)(6).

²⁶ The use of indefinite detention to deter repeat offenses is a questionable objective, particularly when an alien has only committed a minor offense or when a detainee has exemplified rehabilitative behavior. *See Ma v. Reno*, 208 F.3d 815, 819 (9th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3257 (U.S. Oct. 10, 2000) (No. 00-38) (disapproving of the Attorney General’s characterization of *Ma* as a “danger to the community”).

²⁷ *Id.* at 821.

argues that its authority to “detain [aliens] beyond the removal period” means that it can detain convicted aliens *indefinitely*.²⁸ Thus, it is foreseeable that a convicted alien who has committed a misdemeanor that renders him deportable can remain in INS custody for life, unless the United States is able to negotiate a repatriation agreement with the receiving country.²⁹ Justifications advanced by the INS for indefinite detention rest on the assumption that a repatriation agreement can be secured in the near future because international law dictates that a country must readmit its nationals.³⁰

Recently the United States established a delegation to negotiate a repatriation agreement with Cambodia, realizing that the increased number of convicted Cambodian aliens would result in an undesirable population of indefinite detainees.³¹ Nevertheless, Cambodian officials oppose a repatriation agreement. Cambodia maintains that the detainees either do not have requisite documents, or that the documents are insufficient to prove nationality.³² In addition, many detainees have been in the United States most of their lives, leading Cambodian officials to believe that the detainees should serve their punishment in the United States and thereafter be reintegrated into American society.³³ Moreover, Cambodia does not have the resources to rehabilitate the detainees.³⁴ Thus, the possibility that the detainees will commit crimes in Cambodia is great since many of the detainees are believed to lack the family support, language, and relevant employment skills to become productive citizens in Cambodia.³⁵

²⁸ *Id.*

²⁹ *See infra* Part VI.

³⁰ For arguments in favor of long-term detention, see *Varied Routes*, *supra* note 5. *See also infra* Part III.

³¹ Telephone Interview with Jean Christensen, District Director for Immigration and Naturalization Service, U.S. Embassy in Bangkok (May 10, 2000).

³² Telephone Interview with Nou Hak, Political Consular, Cambodian Embassy in Washington, D.C. (May 10, 2000) [hereinafter *Nou Hak*].

³³ Lise Olsen, *Men Without Countries' Create a Class of Unremovables*, SEATTLE P-I, Apr. 6, 1999, at A1. A similar reason was provided by a Vietnamese police chief regarding the acceptance of convicted aliens ordered deported from the United States: “When they left my country they were small children, they went to the camps and then they went to your inner cities and became hardened criminals. We don’t want them.” *Id.* Vietnam, like Cambodia, does not have a repatriation treaty with the United States and similarly has not offered repatriation to the indefinite detainees ordered deported to its country. *Id.*

³⁴ *Nou Hak*, *supra* note 32.

³⁵ *Id.*

B. *Ma v. Reno*

Until *Ma*, most courts upheld the power of the INS to indefinitely detain criminal aliens.³⁶ In *Ma*, the Ninth Circuit affirmed the habeas corpus petition of a Cambodian native who had completed his prison sentence but was being held indefinitely by the INS after Cambodia refused repatriation.³⁷ *Ma*'s personal background is similar to that of other convicted Cambodian nationals who are currently in detention or have been in detention and cannot be repatriated.³⁸ Most often they are males in their late teens to early twenties when convicted; they have sought asylum in the United States at an early age and have become legal permanent residents; most have not returned to Cambodia since fleeing the country; and most are not fluent in their home language.³⁹

When he was two, *Ma* fled Cambodia with his family in fear of persecution by the communist Khmer Rouge.⁴⁰ They sought asylum in Thailand's refugee camps, living there for four years before lawfully entering the United States in 1985.⁴¹ Soon after, *Ma* became a legal permanent resident. He lives in Seattle, Washington and has not returned to Cambodia since his escape at age two.⁴²

When *Ma* was seventeen, he was convicted of manslaughter for his involvement in a gang-related shooting.⁴³ Due to good behavior and because this was *Ma*'s only criminal conviction, he served only two years in prison.⁴⁴ However, after *Ma* completed his sentence, the INS found him to be a "danger to the community"⁴⁵ and detained him for deportation to

³⁶ See, e.g., *Zadvydas v. Underdown*, 185 F.3d 279, 279 (5th Cir. 1999) cert. granted, 69 U.S.L.W. 3257 (U.S. Oct. 10, 2000) (No. 99-7791) (holding that long-term detention of removable aliens who have been ordered deported does not violate substantive due process); *Ho v. Greene*, 204 F.3d 1045, 1057 (10th Cir. 2000) (concluding that because § 1231(a)(6) was silent as to any time duration, "Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens").

³⁷ *Ma v. Reno*, 208 F.3d 815, 818 (9th Cir. 2000), cert. granted, 69 U.S.L.W. 3257 (U.S. Oct. 10, 2000) (No. 00-38).

³⁸ Interview with Jay Stansell, Federal Public Defender, in Seattle, Wash. (May 2, 2000) [hereinafter Jay Stansell].

³⁹ *Id.*

⁴⁰ Interview with Kim Ho Ma in Seattle, Wash. (June 8, 2000) [hereinafter Kim Ho Ma].

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 8 U.S.C. § 1231(a)(6) authorizes the Attorney General to detain an alien beyond the removal period if the Attorney General determines that the alien is a "risk to the community or unlikely to comply with the order of removal."

Cambodia.⁴⁶ Manslaughter is a deportable crime under the IIRIRA.⁴⁷ Ma's order of removal became final on October 26, 1998,⁴⁸ but the INS could not remove him within the ninety-day removal period because the United States does not have a repatriation agreement with Cambodia. Ma's family and friends were also unsuccessful in persuading the Cambodian government to accept Ma into the country.⁴⁹ By the time he filed his habeas corpus petition, Ma had been in INS custody for nearly two years after completing his sentence.⁵⁰

Ma's petition was one of five cases⁵¹ consolidated to consider the IIRIRA indefinite detention issue in the Ninth Circuit Court of Appeals.⁵² Like Ma, many other indefinite detainees are from Southeast Asian countries that do not have repatriation agreements with the United States.⁵³ In *Ma*, the Ninth Circuit interpreted the IIRIRA deportation provision as granting the INS authority to detain aliens only for a *reasonable* amount of time beyond the statutory removal period.⁵⁴

In light of the *Ma* decision, the INS released indefinite detainees being held in the Ninth Circuit.⁵⁵ However, *Ma* conflicts with decisions from the Fifth⁵⁶ and Tenth Circuit Court of Appeals.⁵⁷ Thus, the INS continues to indefinitely detain criminal aliens within those jurisdictions.⁵⁸ The Supreme Court has granted certiorari to hear *Reno v. Ma* and resolve the conflict.

⁴⁶ The determination that Ma was a "risk to the community" was made by an INS deputy director despite the fact that Ma's manslaughter conviction was his only criminal conviction and an INS report that documents the strong likelihood of rehabilitation for Ma if released. *Ma v. Reno*, 208 F.3d 815, 819 (9th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3257 (U.S. Oct. 10, 2000) (No. 00-38).

⁴⁷ See 8 U.S.C. § 1227(a)(2).

⁴⁸ *Ma*, 208 F.3d at 819.

⁴⁹ Kim Ho Ma, *supra* note 40.

⁵⁰ *Ma*, 208 F.3d at 818.

⁵¹ The four other cases are *Batyuchenko v. Reno*, 56 F. Supp. 2d 1163 (W.D. Wash. 1999); *Huynh v. Reno*, 56 F. Supp. 2d 1160 (W.D. Wash. 1999); *Phan v. Reno*, 56 F. Supp. 2d 1158 (W.D. Wash. 1999); and *Sivongxay v. Reno*, 56 F. Supp. 2d 1167 (W.D. Wash. 1999).

⁵² See *Ma*, 208 F.3d at 819. At the time that Ma filed petition for habeas corpus, over 100 detainees filed habeas corpus petitions seeking release from INS detention. The district court designated five lead cases that presented issues common to all petitioners and directed the parties to brief and argue those issues before five district court judges. The five district court judges issued a joint order establishing a legal framework to apply to each individual case. Judge Robert S. Lasnik issued the opinion in *Ma v. Reno*. *Id.* at 815.

⁵³ Other Southeast Asian countries that have refused to readmit criminal aliens from the United States are Laos and Vietnam. See *Varied Routes*, *supra* note 5.

⁵⁴ *Ma*, 208 F.3d at 818.

⁵⁵ See Carri Geer, *Immigrants Finally Find Freedom*, LAS VEGAS REV.-J., July 10, 2000, at 1B.

⁵⁶ See *Zadvydas v. Underdown*, 185 F.3d 279, 279 (5th Cir. 1999) *cert. granted*, 69 U.S.L.W. 3257 (U.S. Oct. 10, 2000) (No. 99-7791).

⁵⁷ See *Ho v. Greene*, 204 F.3d 1045, 1057 (10th Cir. 2000).

⁵⁸ Alex Tizon, *Should Sentence Alone Set Captivity? Cambodian's Case Illustrates Argument*, SEATTLE TIMES, Feb. 15, 2000, at B1.

III. IIRIRA AND INTERNATIONAL STANDARDS FOR REPATRIATION

Under international law, every state has a duty to admit its nationals.⁵⁹ However, each state promulgates its own nationality laws and has discretion to determine what evidence is sufficient proof of nationality. A consequence of the lack of uniform nationality laws is that certain individuals can become "stateless." Thus, to the extent that the IIRIRA relies on the uniformity of nationality laws to effectuate its deportation provision, its indefinite detention loophole is exacerbated.

A. *The Duty of Sovereign States to Grant Admission to Their Nationals*

The principle that every state has a duty to admit its own nationals is widely accepted as a customary international rule of law.⁶⁰ International law regulates the movement of persons across state borders, and thus imposes certain duties, such as the duty to admit nationals, on the states so that such movement occurs effectively. However, it is unclear to whom the duty to admit nationals is owed. One argument is that the duty is owed between states and that the duty is a corollary of the right of states to expel non-nationals from its territory.⁶¹ This right to expulsion is subject to limitations. For example, its exercise is confined only to aliens, only in the event of the lawful exercise of states' rights, and only in those cases in which a foreign state is prepared to permit the expelled person to settle in its territory.⁶² Furthermore, the extent to which a state is free to expel aliens who have effectively acquired nationality by virtue of long-term residence is a matter for debate.⁶³

The duty of admission has also been viewed as a duty owed to the national seeking reentry.⁶⁴ In this context, the duty is corollary to the individual's right to return to "one's own country" as recognized in article 13(2) of the Universal Declaration of Human Rights ("Universal

⁵⁹ See *infra* Part III.A.

⁶⁰ RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 133 (2d ed. rev. 1988).

⁶¹ *Id.* at 133-34.

⁶² *Id.*

⁶³ GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 201, 255-61 (1978). Proponents of the doctrine of "legitimate expectations" of the alien who is admitted for any substantial period of time, especially one who is admitted for permanent residence, advance the argument that such aliens have interests which warrant more protection than those who have just arrived. This follows the belief that such "alien who is deported suffers a punishment distinctive by reason of his alienage, and the longer he has been resident in the host country, the greater will be the hardship." *Id.* at 261.

⁶⁴ PLENDER, *supra* note 60, at 134-37.

Declaration”): “[e]veryone has the right to leave any country, including his own, and to return to his country.”⁶⁵ Although the Universal Declaration is not a legally enforceable instrument,⁶⁶ the international community’s repeated reliance on it as a normative instrument has given rise to a universally binding customary law.⁶⁷ Furthermore, modern human rights treaties, such as the International Covenant on Civil and Political Rights (“ICCPR”)⁶⁸ and the International Convention on the Elimination of All Forms of Racial Discrimination (“Convention on Discrimination”)⁶⁹ have developed to give more detailed legal effect to the Universal Declaration.⁷⁰ Cambodia is a signatory to both instruments.⁷¹ The international community narrowly construes “one’s own country” to mean a country in which nationals or citizens live or have lived.⁷² This right to return is enforceable not merely by the individual but by interstate action, such as by court order or by legislation.⁷³

In summary, international laws such as the ICCPR and the Convention on Discrimination delineate the duty to admit nationals. Cambodia, as a signatory to both conventions and a member of the international community, therefore has a duty to admit its nationals.

B. Non-Uniform Nationality Laws Exacerbate the IIRIRA Indefinite Detention Loophole by Creating “Stateless” Individuals

Each state decides for itself what constitutes nationality and how nationality can be proven. As a result, some individuals may not be able to demonstrate nationality in any country, thereby becoming “stateless.” This

⁶⁵ Universal Declaration of Human Rights art. 13(2), U.N. GAOR, 3d Sess. at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

⁶⁶ The Universal Declaration is not a treaty and thus has no force of law. Its purpose is to provide goals and principles that each country should aspire to achieve. THOMAS BUERGENTAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 29 (1988).

⁶⁷ *Id.* at 31-33.

⁶⁸ Article 12(4) provides that “[n]o one shall be arbitrarily deprived of the right to enter his own country.” International Covenant on Civil and Political Rights, art. 12(4), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR].

⁶⁹ Article 5(d)(ii) provides that States Parties would undertake to guarantee everyone “[t]he right to leave any country, including one’s own, and to return to one’s country.” International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, art. 5(d)(ii), 660 U.N.T.S. 195, 220 [hereinafter Convention on Discrimination].

⁷⁰ PLENDER, *supra* note 60, at 134-35.

⁷¹ Stephen P. Marks, *The New Cambodian Constitution: From Civil War to a Fragile Democracy*, 26 COLUM. HUM. RTS. L. REV. 45, 70 n.88, 94 n.152 (1994).

⁷² HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 56-60 (1987).

⁷³ PLENDER, *supra* note 60, at 134.

exacerbates the IIRIRA indefinite detention loophole, which rests on the premise that every alien is eventually deportable.

1. *International Standards for Nationality Laws*

To effectuate the deportation provision of the IIRIRA, the receiving state must (1) recognize the nationality of the individual seeking admission to its territory and (2) recognize its duty to admit those nationals. Thus, the United States' power to expel aliens under the IIRIRA is correlative to and is dependent on the receiving state's willingness to grant admission to nationals.

A state's recognition of its nationals and its duty to admit nationals is a matter associated with the sovereignty of the state and is thus left within national jurisdiction.⁷⁴ Article 1 of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws ("Convention on Conflicts") provides that "[i]t is for each State to determine under its own law who are its nationals" and article 2 further provides that "any questions as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."⁷⁵ Thus, international law leaves to each sovereign state the inherent right to promulgate laws and regulations as it sees fit. However, limitations to these rights are recognized in cases where their exercise would be inconsistent with international conventions, international custom, and principles of law generally recognized with regard to nationality.⁷⁶

The most pertinent international instruments relating to the law of nationality are the conventions relating to statelessness and discrimination. The Convention Relating to the Status of Stateless Persons ("Convention on Statelessness") provides that an individual may not be deprived of his nationality so as to render him stateless.⁷⁷ A stateless person is one "who is not considered a national by any state under the operation of its law."⁷⁸ Although Cambodia is not a signatory to the Convention on Statelessness, its obligation under the Universal Declaration of Human Rights dictates a similar goal as the Convention on Statelessness. Article 15 of the Universal Declaration states that "[e]veryone has a right to a nationality," and "[n]o

⁷⁴ P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 65 (2d ed. rev. 1979).

⁷⁵ Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, art. 1, 2 179 L.N.T.S. 89, 99 [hereinafter Convention on Conflicts].

⁷⁶ *Id.* art. 1.

⁷⁷ Convention Relating to the Status of Stateless Persons, *opened for signature* Apr. 26, 1954, 360 U.N.T.S. 117, 136

⁷⁸ *Id.* art. 1.

one shall be arbitrarily deprived of his nationality[.]”⁷⁹ The Convention on Statelessness has been interpreted to prevent the same undesirable situation of statelessness.⁸⁰ The Convention on Discrimination is also relevant to nationality laws.⁸¹ Specifically, article 5 emphasizes the need to avoid discrimination in the treatment of state nationals who wish to cross its borders.⁸² Cambodia ratified the Convention on Discrimination in 1994.⁸³

2. *International Standards for Proof of Nationality*

International law recognizes that proof of nationality is within the domestic jurisdiction of each sovereign state.⁸⁴ For example, article 2 of the Convention on Conflicts⁸⁵ establishes that “[a]ny question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that State.”⁸⁶ Typically, an individual who claims that his nationality entitles him to enter a state commonly bears the burden of proving his national status.⁸⁷

What is considered acceptable evidence varies according to the jurisdiction. A number of states follow a combination of *jus soli* and *jus sanguinis* methods in determining nationality.⁸⁸ Evidence of birth in the territory is sufficient in *jus soli* states.⁸⁹ By comparison, proof of descent from parents that are nationals is necessary in *jus sanguinis* states, which adhere to the principle that a child’s nationality follows that of the parents.⁹⁰ Proof of nationality in *jus sanguinis* states is more difficult. It involves not only evidence of descent from the parent who is a national, but also evidence of the parent’s nationality.⁹¹

⁷⁹ Universal Declaration, *supra* note 65, art. 15.

⁸⁰ THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 307 (Gudmundur Alfredsson & Asbjorn Eide eds., 1999).

⁸¹ Convention on Discrimination, *supra* note 69, at 216.

⁸² *Id.* art. 5.

⁸³ Marks, *supra* note 71, at 94 n.152.

⁸⁴ WEIS, *supra* note 74, at 204.

⁸⁵ Convention on Conflicts, *supra* note 75, art. 2, 179 U.N.T.S. at 101.

⁸⁶ *Id.* art. 2.

⁸⁷ PLENDER, *supra* note 60, at 149.

⁸⁸ WEIS, *supra* note 74, at 95. *Jus soli* means “law of the soil.” GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 205 (6th ed. 1992). *Jus sanguinis* means “law of the blood.” *Id.* at 206.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 217.

Typically, official documents such as a passport or consular certificate suffice as evidence of nationality.⁹² Where valid documents are not available, another method of determining nationality is the “effective link” doctrine developed in the *Nottebohm* case (*Liechtenstein v. Guatemala*).⁹³ In *Nottebohm*, the International Court of Justice held that that a person is a national of a country if he or she has a specific, effective link to the country, such that there is a genuine connection between a state and the person.⁹⁴ The Court defined nationality as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”⁹⁵ Habitual residence is recognized as an important factor in the determination of an individual’s effective link to a country.⁹⁶ The effective link doctrine can be useful particularly where nationality cannot be established by documentary evidence, as is common with refugees who have fled their countries in fear of war or violence.⁹⁷

In the absence of documentary evidence of nationality, international tribunals occasionally allow secondary evidence of nationality or evidence from which nationality may be inferred, such as voting in elections, holding public office, or offering witness testimony as corroborative evidence of nationality.⁹⁸ The Convention on Conflicts was an early attempt to resolve conflicts of nationality laws and defined nationality in terms of habitual residence or other close connection.⁹⁹ Article 5 of the Convention on Conflicts provides that “a third State shall, of the nationalities which any such person possesses, recognize exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.”¹⁰⁰

In summary, although sovereign states have a duty to readmit their nationals, each state has wide discretion in determining who is a national.

⁹² *Id.* at 222-36; see also RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* 68 (1983).

⁹³ *The Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4, 23 (Apr. 6). See also VON GLAHN, *supra* note 88, at 207.

⁹⁴ *Nottebohm*, 1955 I.C.J. at 24.

⁹⁵ *Id.* at 23.

⁹⁶ DONNER, *supra* note 92, at 61.

⁹⁷ Amnesty Int’l, *Nationality, Expulsion, Statelessness and the Right to Return*, AI INDEX: ASA 14/01/00 (Sept. 2000), at 14, Amnesty Int’l Library (Bhutan), at <http://www.amnesty.org>.

⁹⁸ WEIS, *supra* note 74, at 216.

⁹⁹ Convention on Conflicts, *supra* note 75, art. 5, 179 L.N.T.S. at 101; see WEIS, *supra* note 74, at 163.

¹⁰⁰ *Id.*

This discretion has led to conflicts amongst the states. Furthermore this conflict aggravates the IIRIRA indefinite detention problem by creating "stateless" individuals.

IV. POLITICAL INSTABILITY AND THE RISE OF NATIONALISM: A FRAMEWORK FOR UNDERSTANDING CAMBODIA'S NATIONALITY LAWS

Cambodia's history is crucial to an understanding of the country's political instability, exclusionist laws, and social circumstances that hinder its duty to admit nationals and preclude an immediate repatriation agreement with the United States. Cambodia's political instability and xenophobia arise from a history of foreign invasion and serving as a vassal state for foreign interests.¹⁰¹ Having achieved independence in the twentieth century, the government has cultivated policies that are based on nationalism and are arbitrary in practice.¹⁰²

A. *Brief History of the Political Instability in Cambodia*

Cambodia's struggle for sovereignty dates back to the thirteenth century and involves repeated foreign invasions, occupations, and coups by Thai and Vietnamese regimes.¹⁰³ The two regimes repeatedly fought on Cambodian soil for control over Cambodian territory.¹⁰⁴ With France's intervention in 1862, Cambodia secured protection from further encroachment upon its land but retained only partial independence.¹⁰⁵ It was not until almost 100 years later that the Cambodian government was given administrative control of most state functions and the Cambodian military gained autonomy within certain provinces.¹⁰⁶ The French continued to control foreign policy, the judicial system, finances, customs, and military operations outside of the autonomous provinces.¹⁰⁷ In 1953, Cambodia finally won its independence from France and enjoyed a period of peace and

¹⁰¹ See generally DAVID P. CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR, AND REVOLUTION SINCE 1945* (1991) [hereinafter CHANDLER (1991)]; ELIZABETH BECKER, *WHEN THE WAR WAS OVER* (1986); FRANÇOIS PONCHAUD, *CAMBODIA: YEAR ZERO* (1977).

¹⁰² See *infra* Part V.

¹⁰³ Marlowe Hood and David A. Ablin, *The Path to Cambodia's Present*, in *THE CAMBODIAN AGONY* xix (David A. Ablin & Marlowe Hood eds., 1987).

¹⁰⁴ David P. Chandler, *The Burden of Cambodia's Past*, in *CAMBODIA AND THE INTERNATIONAL COMMUNITY: THE QUEST FOR PEACE, DEVELOPMENT, AND DEMOCRACY* 35 (Frederick Z. Brown & David G. Timberman eds., 1998).

¹⁰⁵ ROBERT G. SUTTER, *THE CAMBODIAN CRISIS & U.S. POLICY DILEMMAS* 8 (1991).

¹⁰⁶ Donald M. Seekins, *Historical Setting*, in *CAMBODIA: A COUNTRY STUDY* 24 (Russell R. Ross ed., 3d ed. 1990).

¹⁰⁷ *Id.*

stability until the mid-1960s.¹⁰⁸ During that time, the North Vietnamese forces established bases in Cambodia's provinces operating against South Vietnam.¹⁰⁹

Cambodia's infrastructure was further undermined when the United States began a series of bombings, between 1969 and 1973, against the North Vietnamese bases established in Cambodia in an effort to prevent a communist takeover of South Vietnam.¹¹⁰ In 1970, General Lon Nol succeeded in taking control of Cambodia's government.¹¹¹ Despite Cambodia's attempt to remain neutral, Cambodia was forced to serve as a battlefield for the United States and the South Vietnamese on the one side, and the North Vietnamese on the other.¹¹² In January 1973, the parties signed an agreement ending the war and U.S. troops withdrew from Cambodia.¹¹³

Shortly thereafter, civil unrest broke out in Cambodia. On April 17, 1975, the communist Khmer Rouge, led by Pol Pot, defeated the Lon Nol forces.¹¹⁴ The Khmer Rouge set out to restructure Cambodian society, including rejection of all foreign influences.¹¹⁵ The Khmer Rouge abolished formal education, eradicated money, and ultimately destroyed the Cambodian economy by heavily relying on a communal agrarian economy.¹¹⁶ Cities, towns, and hospitals were forcibly evacuated, and family life was virtually abolished.¹¹⁷ In addition, the Khmer Rouge initiated a mass persecution campaign against ethnic minorities, intellectuals, urban elites, and members of the former regime.¹¹⁸ During its reign (1975-1979), the Khmer Rouge killed approximately two million Cambodians.¹¹⁹

¹⁰⁸ DAVID P. CHANDLER, A HISTORY OF CAMBODIA 173-98 (2d ed. 1992) [hereinafter CHANDLER (1992)].

¹⁰⁹ SUTTER, *supra* note 105, at 11.

¹¹⁰ CHANDLER (1991), *supra* note 101, at 184.

¹¹¹ *Id.* at 202-10.

¹¹² SUTTER, *supra* note 105, at 12.

¹¹³ *Id.* at 10.

¹¹⁴ CHANDLER (1991), *supra* note 101, at 236-46.

¹¹⁵ Naranhkiri Tith, *The Challenge of Sustainable Economic Growth and Development in Cambodia, in CAMBODIA AND THE INTERNATIONAL COMMUNITY: THE QUEST FOR PEACE, DEVELOPMENT, AND DEMOCRACY*, *supra* note 104, at 107.

¹¹⁶ See CHANDLER (1991), *supra* note 101, ch. VIII; BECKER, *supra* note 101, ch. VII.

¹¹⁷ François Ponchaud, *Social Change in the Vortex of Revolution, in CAMBODIA 1975-1978: RENDEZVOUS WITH DEATH* 151 (Karl D. Jackson ed., 1989).

¹¹⁸ See generally GENOCIDE AND DEMOCRACY IN CAMBODIA: THE KHMER ROUGE, THE UNITED NATIONS AND THE INTERNATIONAL COMMUNITY (Ben Kiernan ed., 1993); see also CHANDLER (1991), *supra* note 101, ch. VIII; BECKER, *supra* note 101, ch. VII.

¹¹⁹ MARJOLEINE ZIECK, UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES: A LEGAL ANALYSIS 134 (1997).

In 1979, Vietnam invaded Cambodia in an alleged effort to cease the slaughtering of ethnic Vietnamese in Cambodia and the Khmer Rouge's aggressive incursions into Vietnam.¹²⁰ Vietnam defeated the Khmer Rouge and controlled Cambodia until 1989¹²¹ when international pressure and political and economic strains forced Vietnam to withdraw its troops. Cambodians were finally allowed to rebuild their country as a sovereign state.¹²²

B. *Political Instability and Cambodian Nationalism*

The foreign incursions, bombings, and revolution destabilized, if not destroyed, Cambodia's economic, political, and social structures. With the withdrawal of Vietnam in 1989, Cambodia became a sovereign state and began the process of rebuilding the country's economic and political infrastructure from scratch. However, by that time, over half a million people had fled Cambodia and sought refuge in neighboring countries.¹²³ Meanwhile, Vietnamese immigrants continued to migrate to Cambodia.¹²⁴ The continued residence of Vietnamese immigrants and the memories of past invasions gave rise to an anti-Vietnamese sentiment that has pervaded all levels of Cambodian society.¹²⁵ For example, Cambodians commonly use the term "youn" to refer to the Vietnamese; roughly translated, "youn" means "foreign barbarian."¹²⁶ It is also common in Cambodian politics to treat the Vietnamese as scapegoats for the demise of the country.¹²⁷ In fact, political parties have gone so far as to suggest the establishment of a massive deportation program in their campaign platforms.¹²⁸ Thus, what began as cultural animosity towards Vietnamese and other foreigners has developed into ethnic background-based nationalism.

¹²⁰ Seekins, *supra* note 106, at 6.

¹²¹ CHANDLER (1991), *supra* note 101, at 317.

¹²² Jennifer S. Berman, *No Place Like Home: Anti-Vietnamese Discrimination and Nationality in Cambodia*, 84 CALIF. L. REV. 817, 838 (1996).

¹²³ ZIECK, *supra* note 119, at 138.

¹²⁴ Seekins, *supra* note 106, at 3. Vietnamese began settling in the Mekong Delta, a Cambodian territory from the 1620s to the mid-1880s, leading to Vietnam's annexation of that area. *Id.*

¹²⁵ Nhan T. Vu, *The Nondemocratic Benefits of Elections—The Case of Cambodia*, 8 CASE W. RES. J. INT'L L. 395, 402-03 (1996).

¹²⁶ *Id.* at 402.

¹²⁷ Berman, *supra* note 122, at 839.

¹²⁸ *Id.* at 840.

The population of Cambodia has been fairly homogeneous, with ethnic Khmers accounting for the vast majority of the population.¹²⁹ The term “Khmer” refers to ethnic Cambodians whose ancestors are also ethnic Cambodians. In 1962, Khmers comprised eighty percent of the population; in 1981, Khmers comprised ninety percent or more of the population.¹³⁰ The Khmer Rouge genocide and the civil war in the 1970s forced many Cambodian citizens to flee their country without documentation of their ties to the country.¹³¹ Over half a million people fled Cambodia and sought refuge in neighboring countries in 1979 to early 1980¹³² and some eventually resettled in third countries, such as the United States, France, Australia, and Canada.¹³³ As a result of limited documentation, the Cambodian government has difficulty verifying the national status of refugees, particularly those who successfully sought asylum in third countries.¹³⁴ In addition, nationality and immigration laws often preclude refugees from returning to Cambodia.¹³⁵

C. *Development of Democracy*

Cambodia was isolated from the rest of the world during the reign of the Khmer Rouge and after the Vietnamese invasion.¹³⁶ In an effort to bring Cambodia back into the international community, representatives of nineteen countries participated in the Paris Peace Conference on Cambodia¹³⁷ and signed a set of accords (“Paris Accords”) in 1991.¹³⁸ The Paris Accords

¹²⁹ Robert K. Headley, Jr., *The Society and Its Environment, in* CAMBODIA: A COUNTRY STUDY, *supra* note 106, at 83. See also U.S. Department of Commerce, National Trade Data Bank, Cambodia: World Factbook (May 6, 1999), available at <http://www.tradeport.org/ts/countries/Cambodia/wofact.html>.

¹³⁰ Headley, Jr., *supra* note 129, at 83.

¹³¹ ZIECK, *supra* note 119, at 138-39.

¹³² *Id.*

¹³³ Headley, Jr., *supra* note 129, at 86.

¹³⁴ Amnesty Int'l, *supra* note 97, at 14.

¹³⁵ See *infra* Part V.

¹³⁶ David Chandler, Commentary, *How to Slice a Century of Cambodian History*, PHNOM PENH POST, Dec. 24, 1999, at <http://www.phnompenhpost.com>.

¹³⁷ The nineteen countries were Australia, Brunei, Cambodia, Canada, China, France, India, Indonesia, Japan, Laos, Malaysia, the Philippines, Singapore, Thailand, the Union of Soviet Socialist Republics, the United Kingdom, the United States, Vietnam, and Yugoslavia. Paris Conference on Cambodia: Agreements Elaborating the Framework for a Comprehensive Political Settlement of the Cambodia Conflict, U.N. Doc. A/46/608-S/23177, Annex, pmb. (1991) reprinted in 31 I.L.M. 174 (1992) [hereinafter Paris Accords].

¹³⁸ The agreements signed in Paris on October 23, 1991, include a set of four documents: (1) Final Act of the Paris Conference; (2) Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, with Annexes [hereinafter Settlement Agreement]; (3) the Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia; and (4) the Declaration on the Rehabilitation and Reconstruction of Cambodia. *Id.*

aimed to “restore and maintain peace in Cambodia”¹³⁹ and vowed that Cambodia would never return to “the policies and practices of the past.”¹⁴⁰ The Paris Accords sought to end Cambodia’s internal conflict by providing for international supervision and recognition of the country’s sovereignty and independence.¹⁴¹ The Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (“Settlement Agreement”) is the principal accord of the Paris Accords and contains annexes discussing arrangements of the transitional period, military aspects of the settlement, elections, repatriation of refugees and displaced persons, and constitutional principles.¹⁴²

Following the signing of the Paris Accords, Cambodia adopted a new constitution and established a new government.¹⁴³ The Settlement Agreement set forth a framework for establishing the new constitution and provided several human rights guarantees.¹⁴⁴ The Constitution of the Kingdom of Cambodia,¹⁴⁵ which took effect in 1993, established a democratic government and enumerated the rights and obligations of its citizens.¹⁴⁶ The Paris Accords also created the United Nations Transitional Authority in Cambodia (“UNTAC”) to supervise elections and provide stability during the country’s transition to democracy.¹⁴⁷ UN peacekeepers occupied Cambodia from 1991 and 1993, during Cambodia’s transitional phase towards democracy to ensure peace and a fair and free election.¹⁴⁸

Following the 1993 election, Cambodia achieved a short period of peace and political stability under the nationally elected coalition government,¹⁴⁹ dominated by the National United Front for an Independent,

¹³⁹ *Id.* at 183.

¹⁴⁰ The Paris Accords recognize that “Cambodia’s tragic recent history requires special measures to assure protection of human rights, and the non-return to the policies and practices of the past[.]” *Id.*

¹⁴¹ Steven R. Ratner, *The Cambodian Settlement Agreements*, 87 AM. J. INT’L L. 1, 5 (1993).

¹⁴² Settlement Agreement, *supra* note 138.

¹⁴³ Marks, *supra* note 71, at 56.

¹⁴⁴ Settlement Agreement, *supra* note 138.

¹⁴⁵ THE CONSTITUTION OF THE KINGDOM OF CAMBODIA, in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1994) [hereinafter CAMBODIA CONST.].

¹⁴⁶ *Id.* ch. III.

¹⁴⁷ Paris Accords, *supra* note 137, at 186, 189.

¹⁴⁸ The UNTAC was considered the largest peacekeeping operation ever mounted by the United Nations; “UNTAC deployed 15,900 peacekeeping troops, 3600 civilian police, and approximately 3000 administrators and election officials. The UN personnel was supported by tens of thousands of Cambodians, recruited mainly to help organize the elections.” PIERRE P. LIZEE, PEACE, POWER AND RESISTANCE IN CAMBODIA: GLOBAL GOVERNANCE AND THE FAILURE OF INTERNATIONAL CONFLICT RESOLUTION 10 (2000).

¹⁴⁹ The coalition of four elected parties included the FUNCINPEC party, the CPP, the Buddhist Liberal Democratic Party (“BLDP”), and the MOLINAKA party. In a 120-member national assembly, FUNCINPEC received fifty-eight seats and the CPP received fifty-one seats. Marks, *supra* note 71, at 58.

Neutral, Peaceful and Cooperative Cambodia (“FUNCINPEC”) party and the Cambodian People’s Party (“CPP”). Prince Norodom Ranariddh of the FUNCINPEC party led as First Prime Minister and Hun Sen of the CPP held the position of Second Prime Minister. However, this sharing of power quickly ended in July 1997 when Hun Sen and the CPP staged a coup to overthrow the government and declared themselves the governing party.¹⁵⁰ The coup resulted in the death of innocent people, unlawful mass arrests, torture, and intimidation of political parties.¹⁵¹ As for its long-term impact, the coup has not only reversed many of the positive steps taken toward democracy and economic development,¹⁵² but has plunged the country into instability and chaos.¹⁵³

In short, Cambodia has an extremely turbulent political history and its democratic system remains fragile. It is against this background of instability and nationalist policies that a repatriation agreement between the United States and Cambodia is being negotiated.

V. OVERVIEW OF CAMBODIA’S NATIONALITY LAWS

The Constitution, the Nationality Law, and the Sub-decree on Khmer Nationality Identity Cards (“Identity Card Law”)¹⁵⁴ are the most relevant sources of law that deal with Cambodian nationality. The Constitution enumerates the rights and obligations of Khmer citizens.¹⁵⁵ The Nationality Law explains, among other things, who is a Khmer citizen.¹⁵⁶ The Identity Card Law provides guidance about what kind of evidence is sufficient to demonstrate citizenship.

¹⁵⁰ See Khatharya Um, *One Step Forward, Two Steps Back: Cambodia and the Elusive Quest for Peace*, in *SOUTHEAST ASIAN AFFAIRS* 71-85 (1998).

¹⁵¹ *Id.* at 71, 73.

¹⁵² See generally Sophal Ear, *Cambodia and the ‘Washington Consensus,’* in *CAMBODIA: CHANGE AND CONTINUITY IN CONTEMPORARY POLITICS* (Sorpong Peou ed., forthcoming Spring 2001).

¹⁵³ Um, *supra* note 150, at 80-84. See also Sorpong Peou, *Hen Sen’s Pre-emptive Coup: Causes and Consequences*, in *SOUTHEAST ASIAN AFFAIRS*, *supra* note 150, at 98-100.

¹⁵⁴ Sub-Decree on Khmer Nationality Identity Cards (adopted by the Prime Minister July 26, 1996) (Cambodia) [hereinafter Identity Card Law], in *LAWS AND REGULATIONS OF CAMBODIA*, available at http://www.bigpond.com.kh/Council_of_Jurists (last visited Feb. 21, 2001).

¹⁵⁵ CAMBODIA CONST., *supra* note 145, ch. III.

¹⁵⁶ Law on Nationality (adopted by the National Assembly Aug. 20, 1996) ch. I, art. 2 (Cambodia) [hereinafter Nationality Law], in *LAWS AND REGULATIONS OF CAMBODIA*, *supra* note 154.

A. *The Constitution Limits Cambodia's Duty to Admit Nationals*

Although the Settlement Agreement provides for the right of displaced Cambodians to return home,¹⁵⁷ Cambodia's Constitution limits the duty to readmit "Khmer citizens" only.¹⁵⁸ The Settlement Agreement provides that "[a]ll persons in Cambodia and all Cambodian refugees and displaced persons shall enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant international human rights instruments."¹⁵⁹ The Universal Declaration provides for the right to return to one's own country.¹⁶⁰ Nevertheless, the Constitution is silent on the rights of undocumented Cambodians, particularly ethnic minorities, to travel in or return to Cambodia. Specifically, article 33 provides that "Khmer citizens shall not be deprived of their nationality,"¹⁶¹ and article 40 states that "Khmer citizens shall have the right to travel and settle abroad and return to the country."¹⁶² Thus, although the Cambodian government does have a duty to admit nationals to its territory, the scope of the constitutional duty is limited to "Khmer citizens."

There are two problems with the "Khmer citizen" approach found in the Cambodian Constitution. First, this approach grants no rights to the undocumented non-citizens residents of Cambodia. Such an exclusion of non-citizens violates the ICCPR,¹⁶³ which states that "everyone lawfully within the territory" has a right to "liberty of movement and freedom to choose his residence."¹⁶⁴ The second problem is that the Cambodian Constitution does not define "Khmer citizen."¹⁶⁵ Thus, the Cambodian legislature was given discretion to define who is a citizen.¹⁶⁶ In 1994, Cambodia adopted an Immigration Law that detailed the procedures and requirements non-citizens must meet to qualify for citizenship.¹⁶⁷ However, the Immigration Law still provided no guidance about who is a Khmer

¹⁵⁷ See Settlement Agreement, *supra* note 138, art. 20, pt. V; see also Universal Declaration, *supra* note 65, art. 13(2).

¹⁵⁸ See Cambodia Const., *supra* note 145, arts. 33, 40.

¹⁵⁹ Settlement Agreement, *supra* note 138, art. 15, pt. III. Pertinent human rights convention include the ICCPR, *supra* note 68, the International Covenant on Economic, Social, and Cultural Rights, and the Convention on Discrimination, *supra* note 69. See also Ratner, *supra* note 141, at 25-26.

¹⁶⁰ Universal Declaration, *supra* note 65, art. 13(2).

¹⁶¹ CAMBODIA CONST., *supra* note 145, art. 33.

¹⁶² *Id.* art. 40.

¹⁶³ See ICCPR, *supra* note 68, art. 12(4).

¹⁶⁴ Marks, *supra* note 71, at 126.

¹⁶⁵ Berman, *supra* note 122, at 821-22.

¹⁶⁶ Nationality Law, *supra* note 156, pmbl.

¹⁶⁷ Law on Immigration (adopted by the National Assembly Sept. 22, 1994) (Cambodia), in LAWS OF CAMBODIA 113-28 (Sok Siphana ed., 1998) [hereinafter Immigration Law].

citizen.¹⁶⁸ In 1996, Cambodia enacted a Nationality Law¹⁶⁹ in an attempt to resolve the issue of who is a Khmer citizen.¹⁷⁰

B. *Cambodia's Nationality Law*

The drafters of the Nationality Law sought to evade criticism that government officials wished to rid the country of residents who were not of Khmer descent.¹⁷¹ Thus, the Nationality Law adopted a combination of the *jus sanguinis* and *jus soli* principles for determining how a person acquires Khmer nationality. Article 4(1) provides the *jus sanguinis* principle, granting citizenship to a child “regardless of the place of birth” if the child was born from a parent who has Khmer nationality or citizenship.¹⁷² Article 4(2) imparts the *jus soli* principle, granting citizenship to a person “born in the Kingdom of Cambodia[,]” including any child who is “born and living legally in the Kingdom of Cambodia.”¹⁷³

C. *Proof of Nationality Under the National Identity Card Law*

Cambodia's Nationality Law provides that the Identity Card Law governs proof of nationality.¹⁷⁴ The Identity Card Law provides that identity cards can be granted only to Khmer citizens.¹⁷⁵ Article 4 provides that government officials shall consider the following factors when deciding whether to issue an identity card: (1) birth certificates; (2) judgments of the court stating that such persons were born from fathers or mothers who have Khmer nationality; (3) royal decrees proclaiming the recognition of the request for Khmer nationality by the concerned persons; (4) royal decrees proclaiming the recognition of the application for Khmer nationality by the concerned persons; (5) documents or evidence proving that the concerned persons were born in Cambodia to fathers or mothers who were born in Cambodia; (6) documents or evidence proving that the concerned persons

¹⁶⁸ Berman, *supra* note 122, at 817.

¹⁶⁹ Nationality Law, *supra* note 156.

¹⁷⁰ See Sokhet Ros, *Cambodia: Nationality Law Gets the Nod After Heated Debate*, CAMBODIA TIMES, Aug. 26, 1996, available at 1996 WL 11707210.

¹⁷¹ Berman, *supra* note 122, at 821. Human rights activists speculated that Cambodia's legislature was reluctant to define nationality because it did not want Vietnamese residents to seek citizenship. Some also speculated that the Cambodian legislature was prepared to deport all of its ethnic Vietnamese residents back to Vietnam following the enactment of the nationality law. *Id.* at 822.

¹⁷² Nationality Law, *supra* note 156, art. 4(1).

¹⁷³ *Id.* art. 4(2).

¹⁷⁴ *Id.* art. 5.

¹⁷⁵ Identity Card Law, *supra* note 154, art. 3.

used to have Khmer nationality, or documents or evidence proving that the concerned persons were born to fathers or mothers who had Khmer nationality; and (7) any documents which could prove that such person is a Khmer citizen.¹⁷⁶ The Ministry of Interior examines the evidence of nationality, makes a determination, and receives approval from the Royal Government.¹⁷⁷ Khmer national identity cards are valid for ten years from the issue date and must be renewed thereafter.¹⁷⁸

VI. MANY CAMBODIAN REFUGEES CANNOT DEMONSTRATE APPROPRIATE PROOF OF NATIONALITY BECAUSE OF CIVIL UNREST, CHANGING LAWS, AND CORRUPTION

For the most part, Cambodia's nationality-related human rights problems are not attributable to a failure to recognize such human rights in its laws,¹⁷⁹ such as the Constitution or the Nationality Law. In accordance with international human rights norms, Cambodia's Constitution and the Settlement Agreement impose a duty, although it is limited, to admit nationals. Likewise, the Nationality Law provides a relatively broad definition of who is a Khmer citizen. Instead, the crucial problem lies with both the Cambodian government's frequent disregard for the authority of the Constitution, and the power of corrupt officials.¹⁸⁰ For example, the Identity Card Law establishes overly stringent procedures for demonstrating evidence of nationality. This is particularly troubling for Cambodian refugees who fled the country without documentation and have resettled in other countries. Many of these refugees cannot provide adequate proof of nationality by documentation or establish an "effective link" to Cambodia.

A. *Difficulties Establishing Proof of Nationality by Documentation*

There are several reasons why Cambodian refugees cannot establish nationality by documentation. The official documentation of some refugees was destroyed or lost during the years of civil unrest.¹⁸¹ Some have documentation that the government considers insufficient or old, because the

¹⁷⁶ *Id.* art. 4.

¹⁷⁷ *Id.* art. 5.

¹⁷⁸ *Id.* art. 2.

¹⁷⁹ Marks, *supra* note 71, at 55.

¹⁸⁰ *Id.*

¹⁸¹ *See infra* Part VI.A.1.

laws for citizenship verification have changed over time.¹⁸² Others have obtained their documentation fraudulently from corrupt officials.¹⁸³

1. *Lack of Documentation Because of Civil Unrest*

Cambodia's history of civil unrest has forced a massive departure of its citizens into neighboring countries and abroad,¹⁸⁴ and as a result, many Cambodian refugees do not have official birth certificates or any other identification to establish their citizenship.¹⁸⁵ Over half a million of Cambodia's residents¹⁸⁶ fled during the decades of turmoil, and in most of those cases, citizenship records were lost or destroyed.¹⁸⁷ The 1975 revolution inspired a massive refugee departure.¹⁸⁸ The Vietnamese invasion of Cambodia in 1979 led to another major exodus of refugees.¹⁸⁹

For those Cambodians who returned to Cambodia relatively quickly, the documentation problem was not as serious. By their continued residency, they were eventually able to obtain some documentation, such as government-issued family books used as a form of citizenship identification or government identification cards.¹⁹⁰ However, nationality has been more difficult to prove for those Cambodians who did not return. As most refugees who escaped persecution had little or no contact with Cambodia for years, their options for obtaining nationality documentation became limited.¹⁹¹ In short, political instability has caused hundreds of thousands to flee Cambodia with no means of obtaining documentation.

2. *Inadequate Documentation Because of New Laws*

Because the current government may not recognize Cambodian identification cards issued from previous regimes,¹⁹² even those Cambodians who do possess identification can face citizenship documentation

¹⁸² See *infra* Part VI.A.2.

¹⁸³ See *infra* Part VI.A.3.

¹⁸⁴ ZIECK, *supra* note 119, at 131-38.

¹⁸⁵ Berman, *supra* note 122, at 870.

¹⁸⁶ ZIECK, *supra* note 119, at 138.

¹⁸⁷ Amnesty Int'l, *supra* note 97, at 37.

¹⁸⁸ ZIECK, *supra* note 119, at 133.

¹⁸⁹ *Id.* at 138.

¹⁹⁰ Marks, *supra* note 71, at 78.

¹⁹¹ See Amnesty Int'l, *supra* note 97, at 37.

¹⁹² Sotheacheath Chea, *Cambodian? The ID Issue*, PHNOM PENH POST, Feb. 4, 2000, Full Edition, at <http://www.phnompenhpost.com>.

problems.¹⁹³ The current Cambodian government is generally unwilling to recognize old identification cards, fearing that the cards were sold to aliens or illegally issued by corrupt officials.¹⁹⁴ Thus, some of those who fled Cambodia with identification may not be recognized as nationals upon their return.¹⁹⁵

Furthermore, nationality verification systems continue to change. Following the Peace Accords, the United Nations established the UNTAC in Cambodia to create a neutral political environment to hold free and fair elections.¹⁹⁶ UNTAC supervised the first national election in Cambodia in 1993 assisting with registration of eligible voters.¹⁹⁷ This system identified citizens by providing identification cards to Cambodian citizens under the State of Cambodia.¹⁹⁸ UNTAC acknowledged the citizenship of any resident who was born in Cambodia or who had lived in Cambodia for a minimum of five years.¹⁹⁹ However, following the departure of UNTAC, the new regime instituted a new identification system in 1999, replacing the registration papers issued and recognized by UNTAC and previous governments.²⁰⁰ These frequent policy changes impose an undue burden on undocumented citizens to verify their nationality. In addition, such changes allow government officials excessive discretion in determining who is a qualified citizen entitled to the rights protected under the Constitution.

3. *Corruption and Fraudulent Documentation*

Concerns over illegal immigrants fraudulently obtaining nationality identification have led officials to question the legitimacy of identification cards, especially when the person who possesses the card is an "undesirable," i.e., an ethnic minority.²⁰¹ Without question, corruption flourishes in Cambodia, in large part because the military, the police, and other civil servants are not well paid.²⁰² Although Cambodian citizenship

¹⁹³ *Id.*

¹⁹⁴ Chea, *supra* note 192.

¹⁹⁵ See generally *Controversial Cambodian Nationality Law to Go to Parliament*, DEUTSCHE PRESSE-AGENTUR, Dec. 8, 1995, available at LEXIS, News Library, Asia/Pacific Rim Archive.

¹⁹⁶ Ratner, *supra* note 141, at 14, 21, 25.

¹⁹⁷ *Id.* at 13-19.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 235.

²⁰⁰ Chea, *supra* note 192.

²⁰¹ See, e.g., Ros, *supra* note 170. A Cambodian politician expressed the fear that is prevalent in Cambodia, "[t]here are many illegal immigrants from Vietnam and Thailand and they hold fake identification papers which are given to them by corrupt Cambodian officials." *Id.*

²⁰² See General Accounting Office, *Cambodia—Limited Progress on Free Elections, Human Rights, and Mine Clearing*, Briefing Report to the Chairman and Ranking Minority Member, Committee on

requirements are rigid, problems on applications are often over-looked when the applicant offers money or gifts to the reviewing official(s).²⁰³ In addition, the laws are often unclear and applied at the discretion of government officials who lack basic training and skills to properly execute the laws.²⁰⁴

For example, corrupt officials and weak border control have allowed Cambodia to become a common transit point for illegal aliens and a safe haven for those seeking to evade the law.²⁰⁵ Many pay thousands of dollars to purchase false documents in order to reach destinations via Cambodia.²⁰⁶ Between January and March 2000, Cambodia deported 700 illegal Chinese immigrants.²⁰⁷ When Cambodian police found these illegal aliens, they were awaiting documentation to enter such countries as Australia, the United States, and France.²⁰⁸ The government blames the influx of illegal immigrants on police corruption.²⁰⁹ Others blame this immigration problem on a lack of training and supervision of immigration officials.²¹⁰ As a result of these problems with illegal immigrants, the Cambodian government has adopted exclusionist immigration and nationality laws.²¹¹

In summary, political instability, changing laws, and corruption aggravate the nationality documentation problem in Cambodia and result in statelessness for many undocumented Cambodians. Furthermore, without a fair and reliable nationality documentation system, Cambodia is unlikely to reach a repatriation agreement with the United States.

International Relations, House of Representatives, GAO/NSIAD 96-15BR, Briefing Section II, Feb. 29, 1996 [hereinafter *Limited Progress*].

²⁰³ Electronic Interview with Ratha Panh, Cambodian attorney in Phnom Penh, Cambodia from April 1996 to April 1999 (May 22, 2000) [hereinafter Ratha Panh].

²⁰⁴ *Limited Progress*, supra note 202.

²⁰⁵ *Cambodian Police Nab 98 More Illegal Chinese Immigrants*, AGENCE FRANCE PRESSE, Oct. 18, 1999, available at LEXIS, News Library, Agence France Presse File; Marjorie Miller, *In Europe, Wave of Illegal Migration Has Deadly Cost*, L.A. TIMES, July 15, 2000, at A1.

²⁰⁶ *Id.*

²⁰⁷ *Cambodia Deports More than 60 Illegal Immigrant Chinese*, JAPAN POL'Y & POL., Mar. 6, 2000, available at LEXIS, News Library, Asia/Pacific Rim Stories.

²⁰⁸ See supra notes 205 and 207.

²⁰⁹ *Cambodia to Give Cash for Tip on Illegal Immigrants*, ASIAN POLITICAL NEWS, Nov. 1, 1999, available at LEXIS, News Library, Asia/Pacific Rim Stories. Cambodia's police chief, Hok Lundy, stated that "hundreds of illegal Chinese immigrants and an estimated 70,000-100,000 Vietnamese are living illegally in Cambodia." *Id.*

²¹⁰ Ratha Panh, supra note 203.

²¹¹ *Will Immigration Law Lead to Mass Expulsion?*, INTER PRESS SERVICE, Oct. 19, 1994, available at 1994 WL 2722877.

B. *Difficulties Establishing Proof of Nationality by the "Effective Link" Doctrine*

Absent acceptable documentary evidence, the "effective link" doctrine can establish citizenship.²¹² Habitual residence and sufficient connection with the country are important factors in establishing an "effective link."²¹³ Under the Identity Card Law, residence and a willingness to maintain ties with the country as important criteria in determining nationality. However, corruption and the broad discretion given to Cambodian officials are difficult hurdles to overcome for those refugees who resettled elsewhere but wish to return.

Each state decides for itself what constitutes adequate proof of an "effective link" where documentary evidence is not available.²¹⁴ In Cambodia, if the resettled refugee has no citizenship documentation, officials often conduct an interview to decide whether to readmit the refugee.²¹⁵ The officials consider several factors, including where the refugee was born, family ties to Cambodia, when the refugee left Cambodia, how long the refugee has lived in his or her current country, and how well the refugee speaks Khmer.²¹⁶ Applicants for new identification cards must present, at a minimum, proof of former long-term residence in Cambodia, fluency in the Khmer language, and familiarity with Cambodian culture.²¹⁷ It may be necessary to confirm former residence by means of testimony from neighbors or others who can confirm the former residence of the individual concerned. These discretionary factors can be difficult to prove and can provide opportunities for abuse of power by officials.

The ethnic Vietnamese's flight from their Cambodian homes after the Siem Reap massacre in 1993, illustrates the negative impact of this discretion.²¹⁸ After the ethnic Vietnamese fled, the Cambodian government later prevented their return, claiming that they were Vietnamese with no history of residence or right to return.²¹⁹ However, when the United Nations and human rights groups such as Amnesty International conducted interviews to determine the effective link of the individuals to Cambodia,

²¹² The Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 24.

²¹³ *Id.*

²¹⁴ WEIS, *supra* note 74, at 204. As a general rule, the choice of law in determining nationality is the law of the State whose nationality is to be proved. *Id.*

²¹⁵ Nou Hak, *supra* note 32.

²¹⁶ *Id.* The above stated factors are also considered in the naturalization procedure in Cambodia. See Nationality Law, *supra* note 156, art. 8

²¹⁷ *Id.*

²¹⁸ Amnesty Int'l, *supra* note 97, at 15-16.

²¹⁹ *Id.*

they concluded that the refugees had significant ties to the country.²²⁰ Many had lived in Cambodia for generations, yet this evidence was insufficient to the Cambodian government, who claimed they lacked sufficient official documentation to prove citizenship.²²¹ Some had identity cards, but the cards were issued under previous governments. Under significant international pressure, the Cambodian authorities worked in cooperation with the United Nations High Commissioner for Human Rights (“UNHCR”), and Cambodian non-governmental organizations to create a register of ethnic Vietnamese refugees from Cambodia.²²²

The broad discretion accorded Cambodian officials in making nationality decisions is not the international norm. For example, in other countries that have experienced an influx of refugees, the countries of origin have usually recognized that it is impracticable or impossible to verify the identity of each individual, and have accepted UNHCR or other records as reliable evidence.²²³ Despite this trend, Cambodia continues to deny such evidence.²²⁴

In short, the “effective link” doctrine in concert with the Identity Card Law provides a means to determine citizenship without documentation. However, a refugee’s ability to establish an “effective link” to Cambodia becomes more difficult the longer the refugee is away from the country. In addition, the Identity Card Law leaves the “effective link” determination to the discretion of Cambodian officials, who have a history of abuse of power and disregard for human rights.

VII. CURRENT EFFORTS TO NEGOTIATE A REPATRIATION AGREEMENT WITH CAMBODIA

A United States delegation is currently attempting to negotiate an agreement with Cambodia to repatriate convicted aliens.²²⁵ Although Cambodian officials have conducted interviews with detainees seeking admission to the country, they have not agreed to repatriate any of the convicted aliens. The interviews were conducted in the form of a questionnaire, the purpose of which was to determine whether an “effective link” exists between the detainee and Cambodia.²²⁶ The questionnaire

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Nou Hak, *supra* note 32.

²²⁵ Christensen, *supra* note 31.

²²⁶ Nou Hak, *supra* note 32.

focuses on the detainee's residency in Cambodia and includes the following lines: "address before departing for the United States," "present address," "occupation and place before 1970," "occupation and place from 1970-1975," "occupation and place from 1975-1979," and "occupation and place from 1979 onward."²²⁷ However, it is likely that many refugees will not be able to establish an "effective link" to Cambodia because they have resided in the United States since they were young, as did Kim Ho Ma.

VIII. RECOMMENDATION

The Supreme Court should affirm the Ninth Circuit in *Ma v. Reno* and order the INS to release indefinite detainees who have completed their sentences and cannot be repatriated. The INS justifies the indefinite detention of "undeportable" criminal aliens on the assumption that the alien will someday become "deportable." The INS points to the international duty to readmit citizens and argues that the United States will negotiate repatriation agreements with every country. However, an examination of Cambodian nationality policies demonstrates otherwise.

Cambodia's exclusive nationality policies, political instability, and xenophobia make a repatriation agreement with the United States unlikely. While Cambodia's Constitution and its Nationality Law grant the right to travel and reenter the country to "Khmer citizens," decades of war, changing laws, and corruption have left many Cambodians without documentation of their citizenship. Further, it is extremely difficult, if not impossible, for refugees who have remained in the United States most of their lives to establish an "effective link" with Cambodia. Moreover, the broad discretion granted to Cambodian nationality officials can lead to arbitrary citizenship determinations. Thus, the INS has based its justification for indefinite detention on a faulty assumption. Detainees should not be punished for the United States' inability to negotiate a repatriation agreement or because their native country is unwilling to accommodate their return.

²²⁷ Questionnaire on file with the author.

