REPORT OF THE WORKING GROUP ON LESSONS OF INTERNATIONAL LAW, NORMS, AND PRACTICE

I. PREAMBLE

"Your group almost got cut," one of the planners told us a day into our work. "I argued for it to be cut," said a second planner. Both of them were participants in our group! "So we better make the case for its significance," urged the first planner. And so our group resolved to convince the conference participants that child advocates could no longer see themselves or their clients in purely domestic terms. We first focused our attention on how international laws and norms had already shaped the ways in which we represented our clients. This approach also helped us to address the four questions that the planners provided us to consider:

1. What are the frameworks of international human rights regarding children?
2. How do we utilize international children's rights and emerging case law?
3. What are the benefits and detriments of adopting those norms?
4. What do models of representation in other countries have to teach us?

We quickly agreed to think as broadly as possible about our mission. We would generate further questions and ideas by creating the broadest list of international issues before organizing them into thematic categories. Over the course of the first morning, we generated pages of ideas, sharing a range of experiences about international and comparative laws and norms and their potential impact on the way in which we see ourselves as child advocates. When we returned from lunch, we prioritized our interests and began to make a laundry list of categories that captured our greatest concerns and kept the discussion as far reaching as possible.

In working with these categories, we remained aware that we would need to convince our colleagues that child advocates have an obligation to look beyond our borders on two accounts: to understand the international context of our work, and to explore models of child advocacy that move outside the courthouse. On the other hand, we were also aware that we wanted child advocates to understand that despite thinking broadly about child advocacy, in certain contexts like legal proceedings, the role is limited by law and professional responsibility guidelines.

By the end of the afternoon, our ideas began to be organized into three areas: the centrality of the U.N. Convention on the Rights of the Child, the recognition that our clients and their families are global and transnational (though we didn't identify this term until the next day), and the need to understand the consequences of international law and norms on our advocacy. We also knew we wanted a preamble to our recommendations to highlight our

agreement that advocates who care about children must look everywhere for laws, values and norms that benefit children.

The next morning, we began to organize our ideas so that we could divide into writing groups. They tended to fall within the following categories:

1. Domestic laws that have international implications, such as immigration laws;
2. International laws and norms that are binding on the practice of child advocates, such as the United Nations Convention on the Rights of the Child ("CRC");
3. International laws and norms that are instructive for child advocates;
4. Comparative laws and norms that are instructive for child advocates;
5. Identifying the ways in which our clients are global citizens who require child advocates able to transcend domestic and cultural limitations;
6. Identifying ways in which our domestic experience has had positive and negative impacts on international norms and practices.

Our group function became increasingly educational. We wanted to clarify the role of international laws and norms in child advocacy without scaring our colleagues with another set of obligations in a harried and overwhelming practice. Our final recommendations, therefore, contain descriptive passages to explain and enhance the reasons for their inclusion. We broke into groups to write our recommendations, dividing our work into these five categories:

1. Preamble
2. U.N. Convention on the Rights of the Child
3. Gross Departures from International Laws and Norms
4. Utilizing International and Comparative Law and Norms
5. Our clients and their families as global and transnational

Ultimately, we subdivided the international and comparative discussion into two sets of recommendations. We wrote well into the early evening and edited each other's sections, reaching consensus on both our mission (highlighted by our preamble) and our recommendations.

Because our recommendations are so detailed, we will let them speak for themselves. We hope they capture, for the reader, the thrill of working through this very difficult topic and organizing our thoughts into effective recommendations. We certainly were humbled by the knowledge, gained after this effort, of how much we have become global child advocates as our clients have become global citizens. And we were so grateful not to be cut!

II. INTRODUCTION

In the twenty-first century, children and their families are global citizens, that is, holders of international human rights and beneficiaries of international law and norms. Even in cases that appear purely domestic, international law and norms may influence outcomes. For example, in dependency hearings, international norms dictate that children have a right to express themselves freely in all matters affecting them, calling into question the widespread American practice in which representatives have no obligation to represent the child's wishes. Children increasingly live in transnational families by virtue of their parents' citizenship, residence, and other ties. The fate of a juvenile delinquency client may depend on her immigrant status. A child custody matter that crosses beyond our borders may be governed by international conventions to

which the United States is not a party. A termination of parental rights' proceeding may require interpreters and special cross-cultural sensitivity when it involves a multilingual and multicultural family. Thus, international law, international norms and international concerns pervade the legal world and law practice must immediately incorporate a sophisticated understanding of these concerns.

Concerned that the plight of children has deteriorated despite the concerted efforts of child advocates to represent them better and pursue their welfare, and acknowledging the increasingly global nature of family law, child advocates must be aware of and pursue all international and comparative "avenues" that may benefit our clients. In a spirit of humility, child advocates must acknowledge that current efforts have failed to keep children out of poverty[1] or provide them with the opportunity to reach their full human potential. In a spirit of openness, child advocates must look to *any* system or ideas that have yielded constructive outcomes for children around the world, and ask how they might be adapted to meet the needs of children in this country. In a spirit of generosity, child advocates must share any successes and failures, so that all communities can learn about methods and programs that might benefit children around the globe.

In the twenty-first century, it is also critical to think broadly and innovatively about tools to amplify our clients' voices, to represent them meaningfully in the context of their families, and to achieve social justice for children. The demands on children grow more complex daily. Child advocates must recognize the global nature of their work and become open to learning new ways of pursuing client goals as international norms are quickly emerging as binding customary law.

In order to achieve these goals, we have divided our recommendations into five separate, but related, areas. First, we call for the United States to ratify the United Nations Convention on the Rights of the Child. Second, we call for the United States to remove gross departures from international norms. Third, we propose ways in which lawyers can utilize international law and norms in their advocacy for children and their families. Fourth, we provide examples for how to learn from the comparative practices of our international colleagues. Finally, we offer recommendations for issues that affect global citizen children who live in transnational families, especially in the area of immigration law.

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[1] More than twelve million children in the United States live below the poverty line, nearly seventeen percent of all children. Since 1969, even as the GNP has risen fifty percent, child poverty has increased by fifty percent. Among the twelve industrialized OECD countries, the U.S. ranks in the bottom third for child poverty. *See* Innocenti Research Centre, UNICEF, *Child Poverty in Rich Countries 2005*, *available at*, http://www.unicef-icdc.org/publications/pdf/repcard6e.pdf.

III. U.N. CONVENTION ON THE RIGHTS OF THE CHILD: THE UNITED STATES SHOULD RATIFY AND IMPLEMENT THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD

The U.N. Convention on the Rights of the Child[2] ("CRC") addresses a wide range of issues affecting the lives of children and offers a comprehensive framework for children's rights. The CRC protects children, empowers children, and reinforces the primary role of families in the lives of children.

The CRC requires states to provide essential services such as a name, nationality, healthcare and educations. The CRC protects children from exploitation, arbitrary detention and unwarranted removal from parental care. Finally, the CRC requires states provide children the right to participation in all decision-making processes and all community systems that affect the child's life.

Every U.N. member state has signed the CRC; 192 countries have ratified the CRC. Only Somalia and the United States have not.[3] Ratification and implementation will enhance and improve the laws that protect, provide services, and secure rights for children in the United States. The United States should no longer stand virtually alone in refusing to ratify the U.N. Convention and should support and lead these efforts to improve the lives of children.

IV. GROSS DEPARTURES FROM INTERNATIONAL LAWS AND NORMS: THE UNITED STATES SHOULD IMMEDIATELY ADDRESS GROSS DEPARTURES FROM INTERNATIONAL LAW AND NORMS

The United States violates international law in three specific ways that have an immediate impact on children and families in the U.S. The first violation is a gross departure from an international treaty ratified by the U.S. The second and third are violations of customary international law.

A. Children Should Not Be Incarcerated with Adults

Approximately 14,500 youth are incarcerated in adult correctional facilities.[4] The incarceration of juvenile offenders in adult prisons is a gross violation of the US commitment to the International Covenant on Civil and Political Rights ("ICCPR"). ICCPR, to which the United States became a party in 1992, specifically acknowledges the need for special treatment of children in the criminal justice system and emphasizes the importance of their rehabilitation. Specifically, article 10(3) requires the separation of child offenders from adults and the provision of treatment appropriate to their age and legal status.

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[2] The United States is a signatory to the Convention and is thus bound "not to contravene" the convention. Furthermore, with the overwhelming international unanimity of this convention, it can be argued that the Convention is binding on the United States. However, it is still important for the United States to join the rest of the world in officially recognizing the Rights of the Child.

[3] In ratifying the CRC, the United States can address any specific concerns through carefully focused understandings or declarations.

[4] BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT. OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT, x (2000), *available at* http://www.ncjrs.gov/pdffiles1/bja/182503.pdf.

When the United States ratified the ICCPR in 1992, it attached a limiting reservation that stipulates:

> That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves 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.[5]

Through this reservation, the United States sought to reserve the ability in "exceptional circumstances" to try children in adult courts and to require some of them to serve their sentences in adult prison. However, no mechanism for determining "exceptional circumstances" has been instituted in the United States and juveniles continue to be indiscriminately sentenced to adult prisons in significant numbers in the U.S. The impact of this practice is considerable: youth incarcerated in adult institutions are five times as likely to be sexually assaulted, twice as likely to be beaten by staff, fifty percent more likely to be attacked with a weapon, and eight times as likely to commit suicide as children confined in juvenile facilities.

B. Child Offenders Should Not Be Sentenced to Life without Possibility of Parole

The CRC prohibits life imprisonment without possibility of parole for juvenile offenders ("LWOP"). Article 37(a) provides: "neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age . . . ."

In a study released by Human Rights Watch and Amnesty International, researchers concluded that at least 2225 juvenile offenders were imprisoned in the U.S. without possibility of parole. Forty-two states permit LWOP for juvenile offenders, some for juvenile offenders as young as ten years of age. An estimated twenty-six percent were convicted of felony murder in which the teen committed a felony during which a co-participant committed murder without the knowledge or intent of the youth. African American children are ten times more likely to receive LWOP than the rate for white youth. Only four other countries in the world have LWOP for juvenile offenders.

Child advocates should work to have state legislatures bring their laws into compliance with the CRC as well as constitutional and international standards and laws of incarceration. Lawyers who represent young people facing adult imprisonment should begin incorporating international law and norms into sentencing and parole board proceedings as well as clemency petitions.

C. The U.S. Should Amend CAPTA to Conform to the CRC

The Child Abuse Prevention and Treatment Act ("CAPTA") of 1974, as amended, establishes federal funding mechanism for child protection in the states. This landmark legislation created the National Center on Child Abuse and Neglect and authorized federal funds for states to establish specific programs for child victims of abuse and neglect. The law requires that states

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[5] International Justice Project, *United States of America's Reservations to the ICCPR*, http://www.internationaljusticeproject.org/juvICCPR.cfm (last visited May 25, 2006).

enforce child abuse reporting laws; investigate reports of abuse and neglect; educate the public about abuse and neglect; provide a guardian *ad litem* ("GAL") to every abused or neglected child whose case is subject to a court proceeding.

The U.S. should amend CAPTA to conform to the language of Article 12, Section 1 of the CRC that states that:

> State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 12 section 2 provides:

> [F]or this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12 on its face grants children the right to be heard, and potentially to be represented, in a vast number of proceedings beyond child protective proceedings. Importantly, Article 12 focuses on the child or her representative's ability to express the child's subjective viewpoint and wishes and not on the child's best interests. CAPTA should be amended to ensure that child advocates express the child's subjective opinion to any decision-maker.

V. Utilizing International Law and Norms

1. Child lawyers, advocates, and judges need to be knowledgeable of and utilize international law and norms in representing children and families.
2. Education in international law, norms, and practices that affect children and families should take place in law schools and through continuing legal and judicial education.

Child advocates have an obligation to know international laws and treaties that affect their practice, especially where they may be binding, customary or instructive law. Critically relevant children's law can be found in U.S. constitutional, statutory, and case law as well as in both conventional and customary international law.

The United States has ratified a wide range of treaties that impose legal duties on states that become parties. Each and all of these may be essential to a competent and zealous representation of children and families. These include:

- The International Covenant on Civil and Political Rights (1992);
- The Convention against Torture, Inhuman and Degrading Treatment and Punishment (1994);
- The U. S. ratified the two optional protocols to the U.N. Convention on the Rights of the Child in 2002: the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the Optional Protocol on Child Soldiers;
- Convention on the Elimination of all forms of Racial Discrimination (1994);
- The Geneva Conventions;
- The Vienna Convention on the Law of Treaties (1987);
- Hague Convention on the Civil Aspects of International Child Abduction ratified or acceded to by 75 nations including the U.S. (1988);
- ILO 182 on the Worst Forms of Child Labor, ratified by the U.S.

A. *Child Advocates Have an Obligation to Know and Use Customary Law*

Customary law is derived from a widespread practice of states and is legally binding on all states that have not objected to the rule during the period of its evolution. Because of the CRC's widespread adoption among the nations of the world and because the U.S. incurs specific obligations by signing the CRC, child advocates should treat the CRC as customary international law. For example, the execution of juvenile offenders in the U.S. was found to be a violation of customary international law *(jus cogens)* by the Inter-American Commission on Human Rights. This finding was based on the fact that the Convention on the Rights of the Child had been ratified by 192 nations, that none had taken a reservation to the provision prohibiting the execution of juvenile offenders, and that all other nations had ceased the practice. This ruling was cited by the U.S. Supreme Court in *Roper v. Simmons* when the Court held that executing individuals who were under the age of eighteen at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments.

B. *Child Advocates Must Be Knowledgeable about a Growing Body of Case Law Involving Children, Youth, and Families by Regional Human Rights Courts, such as the European Court of Human Rights and the Inter American Court of Human Rights*

In *V. v. U.K.* (the *Bulger* case), two young boys, ages nine and ten, were tried as adults in the English criminal court. On appeal to The European Court on Human Rights, the court held that necessary accommodations had not been made in the courtroom environment to match the developmental stage of the defendants, and that the child defendants were unable to assist counsel due to the publicity, frenzied crowds, and their extreme youth, thereby denying them procedural and human rights. Courts in the United Kingdom were required to change their practices concerning youthful defendants.

VI. Comparative Law: Learning from International Experience

1. Child advocates should educate themselves on the legal systems and practices from other legal traditions in order to use the entire world as an instructive laboratory.

Comparative law is instructive for U. S. child advocates. In areas of innovative practice, law and system reform and case law, child advocates continue to learn from, absorb, and adapt the experiences of other nations and cultures; the entire world is a laboratory of useful experience and history. We should recapture a sense of openness, experimentation, and humility by seeking tools from many sources to evaluate comprehensively our current laws and practices. Similarly, the global community can learn from the successes and failures of the U.S. experience. The legal community should encourage and facilitate exchanges of legal practitioners and scholars from various countries and legal traditions.

Many of the challenges facing families are universal. There are common beliefs and human values across nations and cultures, including the central importance of the family and the primacy for child safety and well-being. Sim-

ilar principles are in effect in other countries and have driven the development of their social and legal systems. Many values and principles are *common* among the world's cultures regarding children in families.

Advocates for children and families have been enriched by practices and law reform in other countries of the world. For example, the Maori practice of group conferencing from New Zealand has grown into a rich array of restorative justice practices and techniques around the world and in the U.S. Some legal systems think more broadly about child advocacy than the more traditional case-by-case court model. For example, the Ombudsman concept, originating in the Scandinavian countries, creates an independent agency to monitor the delivery of services for certain populations, such as children. In the United States, twenty-seven Child Ombudsman's offices have been established.

Child advocates should continue exploring alternative approaches and models of child advocacy beyond traditional litigation to maximize children's abilities to lead safe, healthy, productive and happy lives.

VII. GLOBAL CITIZENS IN TRANSNATIONAL FAMILIES

> Every lawyer who represents children must determine whether there are transnational issues directly or collaterally affecting their representation and must integrate all transnational dimensions into the representation of children and families.

Domestic and international laws that set parameters on transnational migration have great impact on children and families. Families exist across borders and heightened restrictions on immigration affect their unity. Other families that are together within the United States face challenges related to the immigration status of family members. Families are also affected by laws, such as the Indian Child Welfare Act, that establish special procedures for members of Native American families and tribes. Still other children arrive in the United States unaccompanied by any family. In all of these contexts, child advocates must be aware of the transnational dimensions of their clients' lives to be effective.

Immigration status issues, whether involving the child or family members, have direct and profound influences on multiple decisions that are routinely made in the course of representation. At a minimum, lawyers representing children must know the immigration status of their clients and other family members. The following list is illustrative of the types of proceedings in which transnational issues are critical:

> *Immigration*: Immigration law sanctions and proscribes the decisions of individuals and families to live within national borders. The operation of immigration law, therefore, can have a tremendous impact on family integrity and stability. For example, when children or family members are unable to achieve legal immigration status or face removal from the United States, immigration law can directly prevent a family from living together or restrict a family's eligibility for needed benefits.
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> *Custody and Support*: Immigration status can influence custody and support determinations. Immigration status may be raised in a discriminatory manner in proceedings regarding children. Attorneys for children must be vigilant to ensure that when immigration status does influence outcomes it is the result of rigorous factual and legal analysis and not a byproduct of stereotypes and prejudices.

Child Protection: Children in transnational families require protection without regard to their own or their parents' citizenship. In some instances, children who are removed from parents in family court proceedings may have immigration options, such as special immigrant juvenile status (SIJS) that are not otherwise available. In other cases, parents' immigration status can create barriers to acquiring much needed services or be the source of discrimination.

Adoption: Adoption can have immigration consequences for children and parents. Perhaps most apparently, overseas adoptions require consideration about the immigration steps necessary for adopted children to enter the United States. Yet even for domestic adoptions, immigration law requirements are frequently not aligned with state law requirements. For example, a valid state adoption finalized after a child reaches age 16 does not create a parent-child relationship for immigration purposes.

Abduction: The transnational aspects of lawyering for children are readily apparent when a parent abducts children and takes them across national borders. In such instances, attorneys must have knowledge of federal statutes and treaties, such as the Hague Convention on the Civil Aspects of International Child Abduction.

Delinquency: Delinquency proceedings may not result in criminal convictions, but findings and admissions inherent in the process may have serious immigration consequences. Immigration status can also present barriers to young people taking the steps they need to resolve delinquency cases, such as seeking employment or school opportunities or accessing public services. Moreover, in some instances, state dependency determinations in delinquency proceedings, such as placement in foster care, may even result in creating immigration status options (SIJS) that would otherwise not be available.

Human Trafficking: Human trafficking involving children often occur across borders and plainly implicates transnational legal considerations.

Lawyers and other professionals working with transnational children and families must incorporate the following criteria into their practices to be professionally and ethically competent.

1. Learn and integrate transnational dimensions of laws, policies and practices.
2. Access networks of resources and expertise and develop cultural competence to interact effectively with transnational families.
3. Insist on appropriate interpretation and translation services in all interactions with transnational clients, including all service provider and court contexts.

Professional Education in all fields working with transnational children and families must incorporate the following criteria into their curricula and policies:

1. Developing effective approaches to teaching cultural competence.
2. Examining the transnational dimensions of laws, policies and practices affecting children and families.
3. Developing language study options for students who will be working with transnational families.
4. Recognizing the impact on transnational learning of the increased diversity of faculty and students.