16-1436 and 16-1540

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, et al.,
Petitioners,

v.

HAWAII, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth and Fourth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL LAWYERS FOR INTERNATIONAL LAW IN SUPPORT OF RESPONDENTS

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ACRONYMS AND ABBREVIATIONS

ADRDM	American Declaration on the Rights and Duties of Man
Am.J.Int'l L.	American Journal of International Law
Co.	Company
Comm.	Communication
Dall.	Dallas
Doc.	Document
ed.	Edition
Fed. Reg.	Federal Regulation
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
Mfg.	Manufacturing
No.	number
O.A.S.	Organization of American States
page	Page
para.	Paragraph
Pet.	Peters
Pub. L.	Public Law
Res.	Resolution
S. Ct.	Supreme Court Reporter
Ser.	Series
U.S.	United States
U.N.	United Nations

U.N.G.A.	United Nations General Assembly
U.N.T.S.	United Nations Treaty Series
Vol.	Volume
Wall.	Wallace

INTEREST OF *AMICUS CURIAE*

The *amicus*, International Lawyers for International Law, are lawyers and law professors from the United States of America and from outside the United States of America who are experts in international law. They are Mr. Inder Comar, Member of the bars of California and New York; Dr. Margreet Wewerinke-Singh, Professor of Law, University of the South Pacific; Mr. Arno Develay, Member of the bars of Paris (France) and the State of Washington; and Professor Curtis F.J. Doebbler, Member of the bars of the Supreme Court of the United States and the District of Columbia; Research Professor of Law, University of Makeni.

This brief is submitted by *amicus* in the public interest of ensuring the proper understanding and application of the international law relevant to this case.[1]

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[1] Petitioner granted blanket consent for the filing of amicus curiae in this matter. *Amicus curiae* sought consent from Respondents, and received consent from the Respondents' counsel of record. Pursuant to Rule 37(a), *amicus* provided 10-days' notice of its intent to file this *amicus curiae* brief to all counsel. *Amici* further state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the International Lawyers for International Law, made a monetary contribution to the preparation or submission of this *amici curiae* brief.

SUMMARY OF ARGUMENT

This *Amicus Curiae* brief argues that this Court should apply applicable international law to determine whether Executive Order No. 13,780, 82 Fed. Reg. 13209 of 6 March 2017 (hereinafter Executive Order) is consistent with the United States' legal obligations.

This Court and all United States courts should apply international law, including treaties ratified by the United States and customary international law.

Treaties are legally binding on the United States as part of U.S. law.

Customary international law, although different in character from treaties, is also legally binding on the United States as part of U.S. law. Both sources of international law are relevant to the matter before the Court and should be applied by the Court.

The President of the United States is bound by international law in accordance with the intention of the Framers of the Constitution and its interpretation by this Court.

International law prohibits insidious discrimination. This prohibition is found in treaties and customary international law that is legally binding on the U.S. President and the Executive.

Discrimination based on national origin is prohibited by treaties and customary international law that are legally binding on the U.S. President and the Executive.

Discrimination based on religion is prohibited by treaties and customary international law that are legally binding on the U.S. President and the Executive.

Differentiations based on religion require rational justifications that must be closely scrutinized to ensure that they are based on reliable evidence.

The Court should apply the prohibition of discrimination that is found in international law applicable to the United States in evaluating the legality of the Executive Order.

ARGUMENTS

I. THE COURT SHOULD APPLY INTERNATIONAL LAW

This Court should apply international law as part of its obligation to uphold the rule of law and to preserve the system of constitutional democracy of the United States.

First, the Constitution of the United States and the precedents of this Court interpreting the U.S. Constitution indicate that international law—both treaties and customary international law—are part of United States law. The U.S. Constitution expressly declares treaties to be part of U.S. law and this Court has repeatedly recognized that customary international law is part of the laws of the United States that must be applied by the courts. When international law is overlooked, relevant law is not applied to decide a case at law. In this case, international law is relevant law that should be applied.

Second, the United States has represented to its own people that it will respect international law by ratifying treaties in which it undertakes to guarantee certain rights to all individuals under its jurisdiction, such as the rights to be free from discrimination based on nationality and religion. This is an essential ingredient of the trust of the American people in their government. It is incumbent that the United States President uphold such representations to the American people for the

proper functioning of the government as envisioned by the U.S. Constitution. The Court should ensure this crucial trust is maintained.

Third, the United States has represented to its own people that it will respect international law by enacting laws expressly recognized the prohibitions under international law against discrimination based on religion and national origin. The prohibition of discrimination based on religion found in the U.S. Constitution's First Amendment is the basis of The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), which prohibits discrimination based on religion except where the government is acting to secure a compelling interest in the least restrictive manner possible. *Id*. § 3, (a) and (b). The Religious Freedom Restoration Act, id., is based on the Congressional finding that "the framers of the Constitution, recognizing free exercise of religion as an inalienable right, secured its protection in the First Amendment to the Constitution." Id. at § 2(a)(1). This Court's protection of religious freedom has an extensive history and has been established in light of the understanding that the United States' very existence owes much to people fleeing religious persecution. Discrimination based on national origin is prohibited by Title VII of the Civil Rights Act of 1964 (Pub. L. 88–352, 78 Stat. 241, enacted July 2, 1964). The Guidelines on Discrimination Because of National Origin, Pt. 1606, 45 FR 85635, Dec. 29, 1980, implementing Title VII, provide that this provision of law "protects individuals against employment discrimination … on the basis of … national origin …

[including that the] . . . principles of disparate treatment and adverse impact equally apply to national origin discrimination." *Id*. at § 1606.2. Thus, consistent with international law as described below, this Court has recognized that U.S. law "proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U. S. 424, 431 (1971). This Court has also held in Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86 (1973), that discrimination on national origin may be found even where a different ground it expressed in the law. In these holdings, the Court has applied the prohibition of discrimination on the basis of national origin in a manner that is consistent with international law.

Fourth, respect for international law is essential to the United States good reputation in the international community. By ratifying treaties and participating in international affairs the United States represents to the international community that it will respect international law. As Professor Louis Henkin wrote almost forty years ago, and is still true today, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." Henkin, L., How Nations Behave: Law and Foreign Policy 47 (2d ed., 1979). Nations that do not respect international law open themselves to ridicule, or expose themselves to the charge that they are rogue States. The failure of the United States to respect international law harms the United States and is inconsistent with the consensus of States expressed in the text of the Vienna Convention on the Law of

Treaties, 1155 U.N.T.S. 331 (1980), which although only signed and not ratified by the United States, expresses a widely accepted rule of customary international law in its article 27 that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Id. Article 26 of the Vienna Convention, id., furthermore declares that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Id. Finally, the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States (1987), notes that "[a] state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . a consistent pattern of gross violations of internationally recognized human rights." Id. at § 702. A note to this provision of the Restatement notes that "the obligations of the customary law of human rights are erga omnes," thus obligation owed to all states and in which all States have an interest of enforcement. When the United States ignores international law its reputation in the international community can potentially suffer in the eyes of all States; embarrass American citizens; and fuels the arguments of those States and non-State actors who seek to use extra-legal means to influence the actions of the United States. It also subjects the U.S. to the possibility of being found responsible for an internationally wrongful act by international bodies such as United Nations special mandate holders or the Inter-American Commission on Human Rights. This is the case because as the Restatement, id., notes, failure to apply a rule of international law in a

domestic context "does not relieve the United States of its international obligation or of the consequences of a violation of that obligation." Id. at § 115. As the final arbiter of the extent to which international law should apply in the U.S. courts, this Court should safeguard the reputation of the United States by ensuring the application of international law, including the prohibitions of discrimination based on religion and national origin.

Fifth, disrespect for international law imposes significant restrictions on the ability of future administrations to be able to conduct international affairs in the best interest of the American people. Regardless of domestic law, the United States may face the consequences of having committed an internationally wrongful act. These consequences or reparations for injuries are summarized in the International Law Commission's Draft Articles on State Responsibility, annexed to U.N.G.A. Res. 56/83 of December 12, 2001, and corrected by U.N. Doc. A/56/49(Vol. I)/Corr. 4., as including restitution, compensation, satisfaction, and interest on any principal sum due. Id. at arts. 35-38. Moreover, if the internationally wrongful acts are serious, as systematic acts of discrimination based on religion or national origin and targeting many people are likely to be, all States in the international community "shall cooperate to bring to an end through lawful means any serious breach." Id. at art. 41. These negative consequences are likely to affect the foreign relations of the U.S. government for many years. They are also reasons why this Court should,

whenever possible, as in this case, ensure respect for international law.

A. THE COURT SHOULD APPLY TREATIES APPLICABLE TO THE UNITED STATES

Treaties are expressly made part of U.S. law by Article IV, Clause 2, of the U.S. Constitution that states "all Treaties" made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

During the founding of the United States, two of the most prominent founders, Alexander Hamilton and John Jay expressed the opinion that treaties were binding and should be applied by U.S. courts. The Federalist No. 22 at 197 (Hamilton); No. 80 at 501-503 (Hamilton); and No. 64 423-424 (Jay). This Court has recognized that treaties are part of U.S. law that must be applied by the Court in numerous cases. See, e.g., Missouri v. Holland, 252 U.S. 416 (1920); Cook v. United States, 288 U.S. 102 (1933); Kolovrat v. Oregon, 366 U.S. 187 (1961); and Water Splash, Inc. v. Menon, 581 U.S. ___ (2017), 137 S. Ct. 1504 (2017). This is especially the case where application of the treaty carries significance for the United States in international affairs. As Justice James Iredell stated long ago, and is equally valid today,

> a treaty, when executed pursuant to full power, is valid and obligatory, in point of moral obligation, on all, as well on the legislative, executive, and judicial departments . . . as on every individual of the nation, unconnected officially with either,

> because it is a promise in effect by the whole nation to another nation, and if not in fact complied with, unless there be valid reasons for noncompliance, the public faith is violated. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 272 (1796).

Treaties which the United States have ratified must be applied by the U.S. courts because Article II of the U.S. Constitution makes them applicable both in and of themselves and as part of U.S. law and because the Court itself has affirmed the application of treaties to relevant disputes. The foregoing reasons the Court should take cognizance of the treaties that the United States has ratified as part of U.S. law in reviewing the actions of the Executive.

B. THE COURT SHOULD APPLY CUSTOMARY INTERNATIONAL LAW APPLICABLE TO THE UNITED STATES

The international law applicable to the United States includes customary international law, which according to Article III of the U.S. Constitution must be applied as "Laws of the United States." Id. at § 2, cl. 1. The Court has repeatedly and consistently over time recognized that customary international law is part of U.S. law that it will apply. This Court has stated that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations [i.e. customary international law]." Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004). Indeed, the first Chief Justice of this Court, Chief Justice John Jay, expressly charged Grand Juries "that the laws of nations make part of the laws of this and of every other civilized nation. They consist

of those rules for regulating the conduct of nations towards each other; which, resulting from right reason, receive their obligations from that principle and from general assent and practice." John Jay, C.J., Charge to Grand Juries: The Charges of Chief Justice Jay to the Grand Junes on the Eastern circuit at the circuit Courts held in the Districts of New York on the 4th, of Connecticut on the 22d days of April, of Massachusetts on the 4th, and of New Hampshire on the 20th days of May, 1790 in The Correspondence and Public Papers of John Jay, Vol. III, 387, 393 (Henry P. Johnston, ed., 1891). Justice Gray, writing the opinion for the Court expressly agreed stated that "[t]he most certain guide . . . [to the applicable international law] is a treaty or a statute . . . when . . . there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is . . . ." Hilton v. Guyot, 159 U.S. 113, 163 (1895). The opinion of this Court in Hilton v. Guyot, id, states that "[i]nternational law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination." Id. In The Paquete Habana, 175 U.S. 677 (1900), Justice Gray again writing the opinion for the Court where states that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." Id. at 700. Justice Gray further

clarified that "[t]his rule of international law is one which . . . [this Court] . . . administering the law of nations are bound to take judicial notice of, and to give effect to . . . ." Id. at 708. This Court has again recently recognized that customary international law is part of U.S. law that must be applied by the U.S. courts. Bolivarian Republic of Venezuela, et al., v. Helmerich & Payne International Drilling Co., et al., 581 U. S. ____ (2017), 137 S. Ct. 348 (2017). This view is shared by the Restatement (Third) of the Foreign Relations Law of the United States (1987), that reads "[i]nternational law and international agreements of the United States are law of the United States . . . [c]ases arising under international law or international agreements of the United States are within the Judicial Power of the United States . . . ." Id. at § 111.

Moreover, customary international law cannot be derogated from by later legislation. Unlike treaty law that is created at a fixed time—i.e. when the United States becomes a party to a treaty that it has ratified—and which this Court has determined can be superseded by later in time legislation, customary international law remains in force at all times. As this Court stated, in its Opinion written by Justice William Strong, customary international law

> is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force not because it was prescribed by any superior power, but because it has been generally

> accepted as a rule of conduct. The Scotia, 81 U.S. (14 Wall.) 170, 187 (1871), quoted with approval by the Court in The Paquete Habana, op cite at 711.

It is law that once created, functions as ongoing process whereby its validity is renewed according the continuing opinio juris and practice of States. It would be inconsistent with this understanding to allow the rules of customary international law prohibiting discrimination to be derogated from by later-in-time legislation. As rule of customary international law exists with the full force of its creation at all times that it remains a rule of customary international law. Even good faith efforts by States to change a rule, are violations of the rule of customary international law until that rule has been changed the consensus of States expressed through their opinio juris and practice.

In accordance with its longstanding precedents the Court take cognizance of the United States' legal obligations under customary international law in reviewing Executive Order for consistency with the laws of the United States.

II. INTERNATIONAL LAW PROVIDES FOR LIMITS ON THE AUTHORITY OF THE PRESIDENT

International law does not distinguish among actors who lawfully represent a State. All actors are effectively bound by international law and may incur the responsibility of a State for an internationally wrongful act. This is certainly true for the U.S.

President, who is the most senior official representing the United States in the international community. As such the President is subject to international law.

This basic understanding of international law—that all state actors are bound to obey it—has been reiterated time and time again throughout the history of international law. Hugo Grotius, the famed Dutch legal scholar who is often referred to as a founder of modern international law, opined in Book III, Chapter XVIII, Part VI, of De Jure Belli ac Pacis (1625) that international law governs the relation between State and individuals and even those between citizens of different States. The Restatement (Third) of the Foreign Relations Law of the United States (1986), op cite, in its Introduction states unambiguously that "[i]n conducting the foreign relations of the United States, [officials of the United States] are not at large in a political process; they are under law." Id. at 5.

The President is bound by treaties that have received the advice and consent of the United States Senate as the U.S. Constitution expressly states that the President of the United States "shall take Care that the Laws be faithfully executed," including as indicated above international law. U.S. Const. art. II, § 3. These treaties should be applied by the Court whenever an exercise of Executive authority raises an issue of consistency with the United States' treaty obligations. Indeed, this Court has frequently reviewed executive power based on treaties. Justice John McLean in Worcester v. Georgia, 31 U.S. (6

Pet.) 515 (1932), found that treaties with native American Nations are treaties that "must be respected and enforced by the appropriate organs of the Federal Government." Id. at 594. In Dooley v. United States, 182 U.S. 222 (1901), Justice Henry Billings Brown cited with approval the seminal work of American General Henry Wager Halleck, a jurist and expert in international law, that states that the "[t]he stipulations of treaties … are obligatory upon the nations that have entered into to them… and therefore the Executive is bound by the laws of war that are international law. Id. at 231-232 (citing Bart, S.H., Halleck's International Law, Vol. II, 433 (1878). Recently in Hamdan v. Rumsfeld, 548 U. S. 557 (2006), this Court applied international law to an armed conflict involving the United States and held that ". . . the Executive is bound to comply with the rule of law . . . " including international law. Id. at 635.

Similarly, customary international law should be applied by the Court because it is part of U.S. law according to the Constitution and the holdings of this Court. In reviewing the constitutional history of Presidential authority in light of international law, Professor Jordan Paust, a foremost authority on international law in the U.S. courts, concludes that the U.S. Constitution

> documents an early expectation that international law is part of the supreme federal law to be applied at least by the Executive and the judiciary. It also documents broader legal policies at stake, all of which make it quite evident that if the President violates

> constitutionally based international law, he violates not only his constitutional oath and duty, but also the expectations of the Framers -- still generally shared -- about authority, delegated powers and democratic government. Paust, J., May the President Violate Customary International Law? (Cont'd): The President is Bound by International Law, 81 Am. J. Int'l L. 377, 378 (April 1987).

This expectation has been reiterated by this Court in The Paquete Habana, op cite, where the Court found that while Congress may authorize action contrary to the mere "usage" of the international community of States "by direction of the Executive, without express authority from Congress," Id. at 711, therefore by rational implication, no such authority could be granted to violate a rule of international law.

The matter before the Court implicates the discretion of the President to act in a manner that is contrary to rules of international law. Such authority generally does not exist under U.S. law. This Court should ensure the President's adherence to international law in the matter before the Court.

III. INTERNATIONAL LAW APPLICABLE TO THE UNITED STATES PROHIBITS DISCRIMINATION

The prohibition of insidious forms of discrimination is one of the most widely held principles of international law. It is expressly stated in treaties that the United States has ratified as well as customary international law.

Article 1, paragraph 2 of the Charter of the United Nations, 1 U.N.T.S. XVI (1945) states that a purpose of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Id. Furthermore, almost every major human rights treaty prohibits insidious forms of discrimination, including those that have been ratified by the United States. For example, article 26 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR"), 993 U.N.T.S. 3 (1976), that repeats the obligation in the Universal Declaration of Human Rights, U.N.G.A. Res. 217A (III), U.N. Doc A/810 at 71 (10 December 1948), this time as a legal obligation, obliging the United States and other State Parties to ensure that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination . . . ." Id. The United Nations Human Rights Committee, which is created in the ICCPR as the authoritative body for the interpretation of the ICCPR, has expressed in its General Comment No. 18 on Non-Discrimination, reprinted in U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008), that "[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights." Id. at 212. The Committee continued, explaining that "Article 26 not only entitles all persons to equality

before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground." Id. By ratifying the ICCPR the United States expressly "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind . . . ." ICCPR, op cite, art. 2(1). The Human Rights Committee, which is created by this treaty, in Broeks v. the Netherlands, Comm. 172/1984, U.N. Doc. A/42/40, at 139 (1987), has held that article 2, paragraph 1, of the ICCPR prohibits insidious discrimination in the enjoyment of any individual rights. Id. paras. 12.3 to 12.5. It is noteworthy that the U.N. Human Rights Committee in Broeks v. the Netherlands, id., also recognized that "[t]he right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26." Id. at para. 13. Thus the prohibition of discrimination does not proport to make illegal all distinctions made by the government, but merely those which are not reasonable. Despite the fact that the United States has not agreed to allow aggrieved persons to bring communications to the Human Rights Committee concerning violations of their right not to be discriminated against, the United States is nevertheless fully bound by the international legal

obligation to ensure that no person under its jurisdiction suffers insidious discrimination, including discrimination based on their national origin or religion.

Several non-legally-binding, but authoritative, international instruments also reiterate the international consensus against insidious forms of discrimination. For example, Article 1 of the Universal Declaration of Human Rights, op cite, states that "[a]ll human beings are born free and equal in dignity and rights" and article 2 states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind . . . ." Similarly, the American Declaration of the Rights and Duties of Man (hereinafter "ADRDM"), O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948) and reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, O.A.S. Doc. OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), states that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration." Id. Although the United States is not legally bound by these two instruments, both have been widely recognized as reflecting customary international law in their statement of the principle of non-discrimination, respectively in the international community as a whole and in the Americas.

The Inter-American Commission on Human Rights (IACHR) has the "principal function shall be to promote the observance and protection of human

rights." Art. 112 of the Protocol of Amendment to the Charter of the Organization of American States (hereinafter "Buenos Aires Protocol"), O.A.S. Treaty Series No. 1-A, ratified by the United States on April 23, 1968 and entered into force on March 12, 1970. The United States is party to the Charter of the Organization of American States, 119 U.N.T.S. 3 (1951) that created the IACHR. The IACHR has held that the provisions of the ADRDM are incorporated into the text of the Charter because they reflect customary international law. The IACHR reaffirmed the customary international nature of the ADRDM, in its opinions in The Baby Boy Case, Res. No. 23/81, Case No. 2141 (March 6, 1981) concerning abortion in the United States and in the case of Roach and Pinkerton v. United States, Resolution No. 3/87, Case No. 9647, O.A.S. Doc. OEA/ser.IJVII.71, doc. 9 rev. 1 (1987), in which it found the provisions of the ADRDM are part of international law applicable to the United States. Id. at paras. 45-48. And in Gonzales v. Cuba, Report No. 67/06; Case No. 12,476 decided during its 126th Regular Session (16 – 27 October 2006), the IACHR, relying on the ADRDM as concerns Cuba, who like the United States has not ratified the American Convention on Human Rights, determined that there is an "international consensus regarding the States' prohibition of any discriminatory treatment." Id. at para. 228. Similarly, the Inter-American Court of Human Rights in its Advisory Opinion on the Juridical Condition and Rights of the Undocumented Migrants, No. OC-18/03, Ser. A, No. 18 (September

17, 2003), stated that the prohibition of discrimination

> it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person … is unacceptable. This principle (equality and nondiscrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and nondiscrimination has entered the realm of jus cogens." Id. at para. 101.

The prohibition discrimination, as one of the foundational principles of human rights contained in the ADRDM, is therefore part of the law that is legally binding on the United States. The customary international law nature of the general prohibition of insidious discrimination is confirmed by the International Court of Justice in the Barcelona Traction (Belgium v. Spain), 1970 I.C.J. 3 (Judgment of Feb. 5), where it found the principle of equality and the prohibition of discrimination to be "imperative rules of [international] law." Id. at p. 304.

This Court should recognize the prohibition of insidious forms of discrimination as a rule of customary international law, both in its general form, and as argued below, in respect to discrimination based on national origin and religion.

A. DISCRIMINATION BASED ON NATIONAL ORIGIN IS PROHIBITED BY APPLICABLE INTERNATIONAL LAW

Discrimination based on national origin is prohibited by international law in the ICCPR, op cite, which the United States has ratified. Article 26 unequivocally declares "[a]ll persons are equal before the law and . . . entitled without any discrimination to the equal protection of the law . . . [including the obligation that] . . . the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . national . . . origin." Id. Article 2, paragraph 1, of the ICCPR, id., repeats the prohibition of discrimination in respect of the rights in the treaty stating "[t]hat Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . national . . . origin . . . ." Id. The ICCPR, id., includes the right to be free from arbitrary detention (art. 9), the right to liberty of movement (art. 12), the right of aliens lawfully within the territory of a States to a fair trial in expulsion proceedings (art. 13), the general right to fair trial (art. 14), the right to recognition before the law (art. 16), the right to privacy and family life (art. 17), the right to freedom of religion (art. 18), the right to freedom of expression (art. 19), as well as the general prohibition of discrimination in article 26. Discriminatory treatment in the enjoyment of any of these rights or any other right provided by U.S. law

is prohibited. Broeks v. the Netherlands, op cite, at paras. 12.3-12.5.

The Committee has interpreted "other status" in the second sentence of article 26 of the ICCPR, op cite, as prohibiting discrimination based on national origin. Ibrahima Gueye, et al. v. France, Comm. No. 196/1985, U.N. Doc. CCPR/C/35/D/196/1985 (1989) at para. 9.4. The Committee takes into account, as it did in F. H. Zwaan-de Vries v. The Netherlands, Comm. No. 182/1984, U.N. Doc. CCPR/C/OP/2 at 209 (1990), that "the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26." Id. at para. 13.

Customary international law also prohibits discrimination based on national origin. This is the opinion of the prominent legal scholars David Weissbrodt, Joan Fitzpatrick, Fionnuala Ní Aoláin, and Frank C. Newman, International Human Rights: Law, Policy, and Process (4th ed. 2007), who after evaluating a significant number of United Nations and other international instruments conclude that there is "an international legal consensus against discrimination based that national origin." Id. 878.

While this Court has held that distinctions based on national origin are inherently suspect and therefore subject to struct scrutiny. McLaughlin v. Florida, 379 U.S. 184, 192 (1964), applying this test

may not be sufficient to meet the United States international obligations unless the above noted provisions of international law are taken into account. The Court should apply the standards of international law that prohibit discrimination based on national origin in considering the legality of the Executive Order.

B. DISCRIMINATION BASED ON RELIGION IS PROHIBITED BY APPLICABLE INTERNATIONAL LAW

Discrimination based on religion is prohibited by international law applicable to the United States under both treaties and customary international law.

The ICCPR, op cite, article 26, already noted above, declares "[a]ll persons are equal before the law and . . . entitled without any discrimination to the equal protection of the law . . . [including the obligation that] . . . the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as religion." Article 2, paragraph 1 of the ICCPR, also noted above, obliges States not to discriminate based on an individual's right to religion, which is secured in article 18 of the ICCPR. The combined effect of the prohibition of discrimination in article 2, paragraph 1, and the right to religion in article 18 is that States cannot make distinctions based on the religion of a person when the distinction reasonably may or does disadvantage the person. In Joseph v. Sri Lanka, Comm. 1249/2004, U.N. Doc. A/61/40, Vol. II, at 347 (HRC 2005), the U.N. Human Rights Committee

found the failure to treat different religious groups similarly constituted prohibited discrimination.

The customary international law character of the prohibition of religious discrimination is reflected not only in the consensus of the 169 States who have ratified the in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N.G.A. Res. 36/55 (25 November 1981), adopted by the U.N. General Assembly by consensus, that declares that "[d]iscrimination between human beings on grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations." Id. at art. 3. This Declaration reiterates that "[n]o one shall be subject to discrimination by any State, institution, group of persons or person on grounds of religion or belief." Id. art. 2(1). Furthermore, article 2, paragraph 2, of the Declaration provides guidance as to what type of discrimination is prohibited stating that "the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis." Id. This broad definition prohibits

Executive action, even if the distinctions are ostensibly for reasons other than religion, if there is evidence to the contrary.

C. DIFFERENTIATIONS BASED ON NATIONAL ORIGIN OR RELIGION REQUIRE JUSTIFICATIONS

Article 26 of the ICCPR does not include any express justification of discrimination. According to the clear words of the article no discrimination is possible in any circumstance. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted by a meeting of experts on September 28, 1984, U.N. Doc. E/CN.4/1984/4, also takes the view that "[n]o limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself." Id. at para. I(a)(1).

Nevertheless, with due respect for the sovereign authority of States, the U.N. Human Rights Committee has interpreted the article to allow for very limited exceptions. International law prescribes these exceptions narrowly to ensure that they are not merely used to interfere with the legitimate enjoyment of individuals' rights. The Committee requires States seeking to justify any form of differentiation based on grounds such as national origin and religion.

Applying article 26 of the ICCPR to review different treatment based on religion, the U.N. Human Rights Committee stated that there must be a "reasonable and objective distinction to avoid a

finding of discrimination." Joseph v. Sri Lanka, op cite, at para. 7.4. Moreover, the Committee determined that the interference was discriminatory because the State entity had "failed to provide any evidentiary or factual foundation" for its action that differentiated between groups based on religion. Id. at para. 7.3. To justify actions that differentiate based on religion, a State must demonstrate that its restrictions are necessary for a legitimate purpose, supporting its claims with adequate evidence. For example, a detention of a migrant that continues beyond a period that is necessary and is supported by sufficient evidence will be arbitrary. A v. Australia, Comm. No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997) at para. 9.4. Similarly, in a matter involving a French law that required Sikh's to remove their turbans for identification card photographs the U.N. Human Rights Committee noted that the State had a legitimate interest in ensuring "for the purposes of public safety and order, that the person appearing in the photograph on a residence permit is in fact the rightful holder of that document," but that the State had "not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead but leaving the rest of the face clearly visible would make it more difficult to identify the author than if he were to appear bareheaded." Id. at para. 8.4. The Committee consequently found a violation of the right to religion in article 18 of the ICCPR based on the unjustified treatment the claimant received. Id. In Mohammed Alzery v. Sweden, U.N. Doc. CCPR/C/88/D/1416/2005 (10 November 2006), the U.N. Human Rights Committee

found that Sweden's reliance on representations by the Egyptian government was not sufficient to justify its returning an asylum-seeker to Egypt where he was subsequently subjected to torture. Id. para. 11.5. The Committee opined that the Sweden should have verified the information it had been given to ensure that it was reliable. Id.

While limited justifications for discrimination may be relied upon it is incumbent upon States to justify their interests and to provide reliable evidence that their acts of discrimination are necessary. Where a State and its officials fail to meet this significant burden of proof, the result must be that the State or its officials are acting in violation of the law. In such a situation, this Court should act to ensure respect for the law, including international law prohibiting discrimination in the exercise of any individual right that is recognized by U.S. law.

CONCLUSION

For the foregoing reasons, this Court should apply international law when determining whether the Executive Order is inconsistent with United States law, including the prohibitions of discrimination based on national origin and religion that are part of under international law.

Respectfully submitted,

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