

In The
Supreme Court of the United States

—◆—
ALI HAMZA AHMAD SULIMAN AL BAHLUL,

Petitioner,

v.

UNITED STATES,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

—◆—
**BRIEF FOR JUSTICE RICHARD J. GOLDSTONE AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICUS CURIAE*¹

Richard J. Goldstone is a recognized expert in the field of international and comparative law. He served as a Justice of the Constitutional Court of South Africa from July 1994 to October 2003. In that capacity, he authored decisions addressing the right to equality and non-discrimination under the Constitution of South Africa, and informed by international and comparative law. From 1991 to 1994, he served as Chairperson of the Commission of Inquiry regarding Public Violence and Intimidation which came to be known as the Goldstone Commission. From 15 August 1994 to September 1996, he served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. During 1998, he was the chairperson of a high level group of international experts which met in Valencia, Spain, and drafted a Declaration of Human Duties and Responsibilities for the Director General of UNESCO (the Valencia Declaration). From August 1999 until December 2001, he was the chairperson of the International Independent Inquiry on Kosovo. In December 2001, he was appointed as the chairperson of the International

¹ Pursuant to Rule 37.2(a), all parties received at least 10 days' notice of the *amici curiae*'s intent to file, and letters consenting to the filing of this brief are filed with the clerk. In accordance with Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

Task Force on Terrorism that was established by the International Bar Association.

Justice Goldstone is committed to ensuring respect for international law, particularly in times of war and in response to acts of terrorism, and, more specifically, is committed to ensuring respect for the principle of equality and non-discrimination, as applied to all persons, regardless of citizenship status.



INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae herein argue the present petition for a writ of certiorari should be granted as it rightly questions the very legitimacy of the military commission used to try Petitioner based on a theory of equality. International and comparative law further bolster Petitioner's argument that the Military Commissions Act's establishment of a segregated criminal justice system in which only non-citizens are subject to military commission jurisdiction violates the equal rights of Petitioner and all non-citizens subject to its jurisdiction.

Equality is a central principle undergirding human rights law that pre-dates the founding of the United Nations and the drafting of the UN Charter, and is the only right specifically identified in the UN Charter; it serves as the foundational standard for the realization of all human rights. Jarlath Clifford, *Equality*, in *The Oxford Handbook of International*

Human Rights Law, 420, 430-431 (Dinah Shelton ed., 2013). As one leading international human rights law scholar has noted:

Equality and non-discrimination are implied in the fact that human rights instruments guarantee rights to “all persons”, “everyone”, or “every human being.” In fact, the right to be free from discrimination has been called “the most fundamental of the rights of man . . . the starting point of all other liberties.”

Dinah Shelton, *Prohibited Discrimination in International Human Rights Law*, in *The Diversity of International Law: Essays in Honour of Professor Kalliopi K. Koufa* (Aristotle Constantinides & Nikos Zaikos eds., 2009).

As set forth below, the right to equality and non-discrimination is a customary norm of international law that extends to non-citizens. The creation of a separate legal system for the detention, prosecution, and sentencing for non-citizens exclusively discriminates against non-citizens in violation of said norm of customary international law.



ARGUMENT

I. The Right to Equality and Non-Discrimination is a Customary Norm of International Law That Extends to Non-Citizens.

The Military Commissions Act of 2006 has as its stated purpose the establishment of procedures

“governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.” Pub. L. No. 109-366, § 948b, 120 Stat. 2600, 2602.² The establishment of a separate quasi-legal system for the detention, prosecution and sentencing operates in direct contravention of U.S. obligations under international law to respect and protect the right to equality and non-discrimination under the law.

A. The Right to Equality and Non-Discrimination is a Customary Norm of International Law.

The right to non-discrimination on the basis of national origin or other status is well enshrined in international treaty law and is supported by sufficient state practice and *opinio juris* that it should be recognized as part of customary international law and, hence, binding on the United States.³ The Universal

² In 2009, Congress amended the Military Commissions Act of 2006, 120 Stat. 2600, and substituted “alien unprivileged enemy belligerents” for “alien unlawful combatants” as persons subject to the jurisdiction of military commissions. National Defense Authorization Act 2010, Pub. L. No. 111-84, § 948b, 123 Stat. 2190, 2576 (2009). The relevant element defining the scope of who is subject to the jurisdiction of the military commissions, “aliens,” and the inclusion of the inchoate crime of conspiracy, which all parties recognize to not be an “offense under the law of nations,” *see* Pet. Br., pp. 3-4, remains unchanged.

³ *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction,

Declaration of Human Rights recognizes “the equal and inalienable rights of all members of the human family,” G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (Dec. 10, 1948), pmb. [hereinafter UDHR], and provides: “All human beings are born free and equal in dignity and rights.” *Id.* at art. 1. UDHR Art. 2 then elaborates further that, “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This

as often as questions of right depending upon it are duly presented for their determination.”); *United States v. Arjona*, 120 U.S. 479, 487 (1887) (“A right secured by the law of nations to a nation or its people is one the United States, as the representatives of this nation, are bound to protect.”); Restatement (Third) of the Foreign Relations Law of the United States § 111 (Am. Law Inst. 1987). International law, also referred to as “the law of nations,” has as its source international conventions, international custom or state practice as evidence of a general practice of law, general principles of law accepted by civilized nations, judicial decisions, and the opinions of eminent scholars in the field. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (“The law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’”) (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). *See also*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (international law includes “norm[s] of international character accepted by the civilized world”). *See also*, Statute of the International Court of Justice, art. 38(1)(a)-(c) (recognizing the following as sources of international law: international conventions recognized by the States subject to the dispute; “international custom, as evidence of a general practice accepted as law”; and, “the general principles of law recognized by civilized nations.”).

principle of equality and non-discrimination is reiterated in all of the significant international human rights treaties, including those ratified by the United States. *See, e.g.*, International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 (obligating States Parties “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 race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”) [hereinafter ICCPR]. *See also*, International Convention on the Elimination of All Forms of Racial Discrimination, arts. 1-2, Dec. 21, 1965, S. Treaty Doc. No. 95-18, 660 U.N.T.S. 195, 212 (prohibiting all forms of racial discrimination, and recognizing as such “any distinction, exclusion, restriction or preference based on nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms.”) [hereinafter CERD].

Equality and non-discrimination are also foundational principles in all regional human rights instruments, as well as in constitutions of nations across the globe (discussed below), further evidencing their centrality to the corpus of international human rights law. The American Convention on Human Rights explicitly obligates States Parties to guarantee the rights contained therein “without any discrimination for reasons for race, color, sex, language, religion, political or other opinion, national or social

origin, economic status, birth, or any other social condition,” and recognizes as persons covered by the Convention, “every human being.” Organization of American States, American Convention on Human Rights, art. 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The European Convention on Human Rights, which applies to all persons within a State-Party’s jurisdiction, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR], provides: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” *Id.* at art. 14.⁴ And the African Charter on Human and Peoples’ Rights, recognizing equality as a core objective for the Organization of African Unity, since replaced by the African Union, alongside freedom, justice and dignity, June 27, 1981, pmb., OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) [hereinafter African Charter], provides: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion,

⁴ Consistent with international law, the ECHR allows for States Parties to limit the political activities of non-citizens. ECHR, art. 16.

national and social origin, fortune, birth or other status.” *Id.* at art. 2.

Nations have explicitly extended right to equality and non-discrimination explicitly to rights under the law and before the courts. *See* UDHR, art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”). The ICCPR obligates States Parties to ensure equality before the courts and tribunals to all persons, and guarantees to those subject to criminal charges, the right to a “fair and public hearing by a competent, independent and impartial tribunal established by law,” without discrimination. ICCPR, art. 14. Article 26 of the ICCPR further establishes the right to equality and non-discrimination under the law as an autonomous right, providing: “All persons are equal before the law and are entitled without any discrimination the equal protection of the law.” *Id.* at art. 26.

At the regional level, the American Declaration of the Rights and Duties of Man sets forth: “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.” American Declaration of the Rights and Duties of Man, art. 2, OEA/Ser.L/V.11.23, doc. 21, rev. 6 (1948). In discussing the import of a State’s obligation to ensure equality and non-discrimination, the Inter-American Commission on Human Rights has stated: “States have the obligation to adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law; to abstain from introducing in

their legal framework regulations that are discriminatory towards certain groups either on their face or in practice; and to combat discriminatory practices.” *Undocumented Workers v. United States of America*, Case 12.834, Inter-Am. Comm’n H.R., Report No. 50/16, OEA/Ser.L/VII.159, doc. 59 ¶ 73 (2016) (citing to *Oscar Elias Bicet v. Cuba*, Case 12.476, Inter-Am. Comm’n H.R., Report No. 67/06, ¶¶ 228-231 (2006); *Maya Indigenous Community v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report No. 40/04, ¶¶ 162, 166 (2004)).

Similarly, the African Charter on Human and Peoples’ Rights, like the American Declaration and the American Convention, is explicit in its guarantee of equality before the law. *See* African Charter, art. 3 (“1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.”). Although the European Convention on Human Rights does not include a specific provision enumerating the right to equality under the law, the Convention makes clear all provisions, including those pertaining to the right to a fair trial, apply to “everyone,” without discrimination, and are subject to the prohibition of discrimination. ECHR *supra* p. 6, at art. 14.

B. Non-Citizens are Protected Under Customary International Law Norms Pertaining to the Right to Equality and Non-Discrimination.

The right to equality and non-discrimination extends to non-citizens discussed *supra*, as has been recognized by international human rights treaty-bodies, courts, and experts. The U.N. Human Rights Committee (“Human Rights Committee”) specifically addressed the application of the right to equality and non-discrimination to non-citizens through General Comment 15, wherein it held: “The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.” U.N. Human Rights Committee, CCPR General Comment No. 15: The Position of Aliens under the Covenant, ¶ 2, U.N. Doc. HRI\GEN\1\rev. 1 at 18 (April 11, 1986). The Human Rights Committee went on to state: “Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike.” *Id.* As the Human Rights Committee held, non-citizens are among those protected by the right to equality and non-discrimination under the law, as set forth in Articles 14 and 26 of the ICCPR:

Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of

rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. . . . Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.

Id. at ¶ 7.

While CERD article 1, ¶ 2 allows for distinctions to be made between citizens and non-citizens, the Committee on the Elimination of Racial Discrimination, through General Recommendation 30, “Discrimination against Non-Citizens” (Sixty-Fourth session, 2004) (2004), clarified that said article “must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.” General Recommendation 30: “Discrimination against Non-Citizens,” ¶ 2, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Feb. 23 – March 12, 2004).

In determining what constitutes unlawful discrimination versus permissible differentiation, the Committee on the Elimination of Racial Discrimination provides the following guidance: “Under the

Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” *Id.* at ¶ 4. Furthermore, States Parties must “[e]nsure that . . . the implementation of legislation does not have a discriminatory effect on non-citizens.” *Id.* at ¶ 7. Thus, while the States Parties may deny certain political rights to non-citizens, such as the right to participate in elections, to vote and to stand for election, “human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.” *Id.* at ¶ 3.

Within the Americas, the Inter-American Court on Human Rights has concluded:

[T]he principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and 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, owing to . . . national, ethnic or social origin, nationality . . . civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of

general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered into the realm of jus cogens.

Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003).

In applying the principle of equality before the law to non-citizens, the Inter-American Commission on Human Rights has recently noted:

The Commission has previously recognized that while Article II does not prohibit all distinctions in treatment in the enjoyment of protected rights and freedoms, it does require that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, “regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.” Regard should also be given to the fact that “[O]ne of the American Declaration’s objectives . . . was to assure in principle ‘the equal protection of the law to nationals and aliens alike in respect to the rights set forth.’” In this regard, the Commission takes note of similar conclusions reached by UN treaty bodies, which have interpreted the prohibition of discrimination to include non-nationals, regardless of their legal status and authorization to work.

Undocumented Workers v. United States of America, Case 12.834, Inter-Am. Comm'n H.R., Report No. 50/16, OEA/Ser.L/VII.159, doc. 59 ¶ 74 (2016) (citing to *Rafael Ferrer-Mazorra v. United States of America*, Case 9903, Report No. 51/01, ¶¶ 238, 239 (2001)).

II. The Establishment of a Segregated Legal Process for the Exclusive Prosecution of Non-Citizens Violates the United States' Obligation to Ensure Equality and Non-Discrimination of All Persons within Its Jurisdiction.

As argued above, international law obligates the United States to respect and protect the principle of equality and non-discrimination to all persons under its jurisdiction, regardless of citizenship status. This obligation extends to non-citizens subject to the jurisdiction of the military commissions under the Military Commissions Act of 2006 which has established a separate criminal justice system for non-citizens charged as enemy combatants, even – as the case is here – for crimes ordinarily subject to trial by jury before the federal judicial system. International law recognizes that States may derogate from its obligations to ensure equality under the law and before the courts in times of emergency, so long as those

derogations are specifically tailored to and proportional to the threat posed. The military commissions, as they have been constructed under the Military Commissions Act of 2006, are neither specifically tailored to, nor proportional to, the purported threat posed. When they operate – as they do here – as an alternative to the existing judicial system in ways that prejudice the non-citizens subject to their jurisdiction, they do so in violation of the United States’ obligations under international law.

A. The Establishment and Use of Military Commissions for the Prosecution of Non-Citizens for Crimes Triable by Federal Courts Violates U.S. Obligations under International Law to Uphold the Right to Equality and Non-Discrimination.

As asserted by Petitioner, the military commission system through which he has been tried was established as an alternative to the federal judicial system for non-citizens charged as enemy combatants, Pet. Br. 2, and operates in a manner that discriminates against those non-citizens. Petitioner’s brief highlights the critiques levelled against military commissions and the ways in which non-citizens are prejudiced in their enjoyment of equal rights from those tried through the federal court system, due to factors such as: “lack of judicial independence, curtailed counsel rights, and the admission of hearsay and evidence derived from torture.” Pet. Br. 3. Unlike military commissions established in earlier periods of history established for

the prosecution of “offenses against the law of war,” crimes that were “not triable by jury at common law,” *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) (cited to in Pet. Br. 3), the military commission to which Petitioner has been subjected “openly competes for the district courts’ jurisdiction over the most routinely charged federal crimes,” such as the inchoate crime of conspiracy, rather than “offenses against the law of nations,” Pet. Br. 3. As the UN Human Rights Committee has specifically stated: “Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings.” U.N. Human Rights Committee, General Comment No. 32: “Art. 14: Right to equality before courts and tribunals and to a fair trial,” ¶ 14, UN Doc. CCPR/C/GC/32 (2007).

The Inter-American Commission on Human Rights has expressed its grave concerns about the denial of the right to equality effectuated by the Military Commissions Act, illustrated by provisions that subject non-citizens alone to the exclusive jurisdiction of the military commissions. *See Inter-Amer. Comm’n H.R., Towards the Closure of Guantanamo*, ¶¶ 190-225, 211, OAS/Ser.L/VII, Doc. 20/15 (June 3, 2015).

In addressing the right to equality and non-discrimination, at issue here, the Commission has acknowledged:

Neither the American Declaration nor the American Convention prohibit all distinctions in treatment. Distinctions that are reasonable

and objective may be compatible with inter-American human rights instruments; conversely, those that are unjustified or arbitrary violate human rights. . . . When distinctions are based on categories expressly referenced in the nondiscrimination clauses of international human rights treaties, the test used must be particularly strict. Therefore, the mere existence of a legitimate goal is not enough to justify a distinction based on a suspect category. Furthermore, the measure must be strictly necessary to attain the goal sought, meaning that no other less harmful alternative exists.

Id. at ¶ 222. The Commission went on to note:

While international human rights standards recognize that there may be legitimate differences in treatment between citizens and non-citizens for such limited purposes as entry at borders and nationality, or for the purpose of residence or voting, these standards do not recognize or permit distinctions in respect for other fundamental rights, including the rights to life, personal integrity, equal protection of and before the law, and due process.

Id. at ¶ 224. Had Congress sought to distinguish unprivileged enemy belligerents charged with certain crimes that violate the law of nations from non-enemy belligerents, there would arguably be no violation of international law. But a distinction based on a protected classification under international law, such as citizenship, is inherently suspect, and where equal

protection of and before the law and due process are at issue, impermissible under international law.

The treatment of non-citizens by the legal systems of “civilized nations” across the globe provide useful guidance for understanding the scope of the right to equality and non-discrimination rights due to non-citizens under international law and customary practice.⁵ A review of comparative law illustrates that the Military Commissions Act’s designation of non-citizens is out of step not just with international human rights law, but the laws of other nations.

In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (Can.), for example, the Supreme Court of Canada held that the requirement of Canadian citizenship for admission to the British Columbia bar was an unjustifiable infringement on equality rights. In applying the right to equality and non-discrimination before and under the law, as set forth in art. 15(1) of the Canadian Charter of Rights and Freedoms (“Canadian Charter”), the Supreme Court of Canada held the requirement of Canadian citizenship for admission to the British Columbia Bar constitutes an unjustified infringement on applicants’ equality rights. In his concurring opinion, Justice La Forest noted that non-citizens comprise a discrete and vulnerable minority, “who are relatively powerless politically and whose interests are likely to be compromised by legislative decisions.” *Id.* at 146. He

⁵ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Trop v. Dulles*, 356 U.S. 86 (1958).

further wrote: “Legislating citizenship as a basis for distinguishing between persons, . . . harbours the potential for undermining the essential and underlying values of a free and democratic society embodied” in the Canadian Charter’s anti-discrimination provision. *Id.*

The analysis developed through South Africa’s jurisprudence on unlawful discrimination is particularly useful in delineating the boundaries of permissible distinctions and unlawful discrimination on the basis of citizenship. The Constitution of South Africa, 1996, employs language and standards regarding non-discrimination similar to that of the international human rights mechanisms as well as the U.S. Constitution, in that it provides: “Everyone is equal before the law and has the right to equal protection and benefit of the law.” S. Afr. Const., 1996, art. 9(1). Employing language similar to that of international human rights law, the South African Constitution further states: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth,” and further prohibits any person from engaging in direct or indirect discrimination on the basis of the above categories. *Id.* at art. 9(3)-(4).

In an opinion written by *Amicus* Justice Goldstone, the South African Constitutional Court set forth

the following factors to be assessed in determining unfair discrimination:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination is in the case under consideration is on a specified ground or not; (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. . . . (c) . . . the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

Harksen v Lane NO and Others 1997 (1) SA 300 (CC) at ¶ 50 (S. Afr.).

The Constitutional Court drew upon these factors in *Larbi-Odam v Member of the Exec. Council for Education* 1998 (1) SA 745 (CC), holding that regulations restricting permanent employment within the education sector to citizens was unlawful discrimination. The Court first found that differentiation on the

basis of citizenship has “the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.” *Id.* at para. 18 (quoting from *Harksen*, para. 54(b)(1), and referencing the Canadian Supreme Court decision in *Andrews v. Law Society of British Columbia*, discussed *supra*). The Court further noted that citizenship is a characteristic over which individuals have very little control. *Id.* at para. 19. The third and final factor considered by the court was the commission of acts evidencing the negative impact the differentiation had on the fundamental human dignity of non-citizens. *Id.* at para. 20. The question then becomes whether such discrimination is justified, and therefore should be permitted. The Court relied on its prior decision in *S v Makwanyane and Another* to conclude that citizenship discrimination was not justified. In that case, the court held:

In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

S v. Makwanyane and Another 1995 (3) SA 391 (CC) at ¶ 04.

In the subsequent case of *Khosa v. Minister of Social Development*, the Constitutional Court of South Africa ruled that the denial of social security to non-citizens violated the South African constitution, based on principles of equality and non-discrimination that mirror both the U.S. Constitution and international law. 2004 (6) SA 505 (CC). While the Court recognized it “is necessary to differentiate between people and groups of people in society by classification in order for the state to allocate rights, duties, immunities, privileges, benefits or even disadvantages,” such classifications must be reasonable. *Id.* at ¶ 53. For the differentiation between benefits afforded citizens versus non-citizens to be deemed reasonable, it must not be “arbitrary or irrational nor must it manifest a naked preference.” *Id.* The court further noted, “[t]here must be a rational connection between that differentiating law and the legitimate government purpose it is designed to achieve.” *Id.* In reaching its decision, the Court relied in part on *President of the Republic of South Africa and Another v Hugo*, wherein the Court stated that determinations of fairness required the Court to look “not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.” 1997 (4) SA 1 (CC) at pars. 41-43 (written by *Amicus* Justice Goldstone). The Court concluded, consistent with its prior analysis in

the *Hugo* decision, citizenship differentiation will rise to the level of unlawful discrimination if it has “an adverse effect on the dignity of the individual, or some other comparable effect.” *Id.* at para. 70.

As set forth in Petitioner’s brief for certiorari, it is evident that non-citizens subject to jurisdiction of military commissions are disadvantaged relative to those citizens who are subject to trial by a jury of their peers in the federal district courts. Consistent with the analysis set forth *supra* under international and comparative law, such a differentiation on citizenship grounds clearly rises to the level of unlawful discrimination.

B. The United States Has Not Met its Burden of Demonstrating that Derogation from its Obligation to Ensure the Right to Equality and Non-Discrimination Under the Law and Before the Courts Is Warranted, or that the Military Commissions Act Properly Limits and Tailors the Military Commission’s Jurisdiction in a Manner that Would Be Consistent with Any Right to Derogation it May Have.

While international law permits States to derogate from their obligations associated with the right to equality and non-discrimination under the law and before the courts in cases of national emergency, such derogation must be tailored to and proportional to the threat posed. “If, for example, exceptional criminal

procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases, objective and reasonable grounds must be provided to justify the distinction.” U.N. Human Rights Committee, General Comment No. 32: “Art. 14: Right to equality before courts and tribunals and to a fair trial,” ¶ 14, UN Doc. CCPR/C/GC/32 (2007). The question then becomes what constitutes objective and reasonable grounds warranting a separate system.

The United Kingdom sought to derogate from human rights law’s limitations on detention through a measure directed specifically at non-citizens following the 9/11 attacks. Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644 [hereinafter the Derogation Order]. Non-citizen detainees subjected to indefinite detention under the Anti-terrorism, Crime and Security Act 2001 challenged the Derogation Order. The House of Lords ruled that the creation of a separate system for non-citizens – even under the auspices of responding to a terroristic threat post-9/11 – was unlawfully discriminatory in light of the United Kingdom’s obligations under and consistent with the European Convention on Human Rights. *A and others v. Sec. of State for the Home Dept.*, [2004] UKHL 56. The House of Lords cited to UN Human Rights Committee, and other UN human rights mechanisms that had spoken specifically on the Derogation Order, as well as on the issue of derogation from human rights obligations, more generally. The House of Lords paid particular attention to the report of Commissioner for Human Rights for the Council of Europe, Mr. Alvaro

Gil-Robles, addressing the United Kingdom's Derogation Act, wherein he noted that measures which apply only to non-citizens and appear to create a "two-track justice, whereby different human rights standards apply to foreigners and nationals," cannot stand. Council of Europe, Office of the Commissioner for Human Rights, On Certain Aspects of the United Kingdom 2001 Derogation from Article 1 par. 1 of the European Convention on Human Rights, Opinion 1/2002 (28 August 2002) (cited to in *A and others v. Sec. of State for the Home Dept.*, [2004] UKHL 56, [57]).

In affirming the decision of the House of Lords, Lord Nicholls of Birkenhead noted: "The principal weakness in the government's case lies in the different treatment accorded to nationals and non-nationals. . . . It is difficult to see how the extreme circumstances, which alone would justify such detention, can exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists." *Id.* at [76]. The same rationale can and should be applied in the present case, where the federal district courts have successfully tried individuals who are accused of terrorist activity.

The Inter-American Commission on Human Rights has spoken specifically as to whether the Military Commissions Act's otherwise impermissible discrimination against non-citizens constitutes a permissible derogation from U.S. obligations under international law. The Commission concluded there has been "no clear justification" set forth by the U.S. government demonstrating the necessity "for the exclusive application of the [military commissions] regime to foreign

Muslim men, presenting the apparent targeting of individuals in relation to nationality, ethnicity and religion.” Inter-Amer. Comm’n H.R., *Towards the Closure of Guantanamo*, ¶ 224, OAS/Ser.L/VII, Doc. 20/15 (June 3, 2015). No reading of international human rights law, comparative law and its jurisprudence, and customary practice permits a different conclusion.



CONCLUSION

The petition for certiorari should be granted as this case raises important questions regarding the discriminatory and unequal treatment of non-citizens under the Military Commissions Act, in violation of customary international law.

Respectfully submitted,

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MAY 30, 2017