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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA M. KIAKOMBUA, *et al.*, *Plaintiffs*, v. KEVIN K. McALEENAN, Acting Secretary of Homeland Security, *et al.*, *Defendants*.	Civil Action No. 19-cv-1872 (KBJ)

AMICUS CURIAE BRIEF OF
IMMIGRATION REFORM LAW INSTITUTE
IN SUPPORT OF DEFENDANTS AND THEIR
MOTION FOR SUMMARY JUDGMENT

CORPORATE DISCLOSURE STATEMENT

The Immigration Reform Law Institute is a 501(c)(3) nonprofit corporation. It does not have a parent corporation and does not issue stock.

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IDENTITY OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens and assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases. *See, e.g., Wash. All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013); *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015). IRLI is considered an expert in immigration law by the Board of Immigration Appeals. IRLI has prepared *amicus* briefs for the Board at the request of that body for more than twenty years. *See, e.g., Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

IRLI submits this *amicus curiae* brief to help this Court understand that, contrary to Plaintiffs' pleading, international law does not compel this Court to grant Plaintiffs relief.

All parties have consented to the filing of this *amicus curiae* brief, with Plaintiffs consenting to its filing by August 29, 2019. No party or party's counsel authored any part of this brief. No person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION

Plaintiffs are five aliens who, after being found inadmissible during their entry inspections for failure to possess valid documents, were placed in expedited removal proceedings. The original Plaintiff was Maria Kiakombua. An Amended Complaint, Doc. 5-1 ("AC"), added four new pseudonymous alien Plaintiffs. AC ¶ 8. Each alien indicated a fear of persecution or torture, but subsequently failed a credible fear interview. Ms. Kiakombua and

three pseudonymous aliens again failed credible fear interviews upon *de novo* review by an immigration judge ("IJ"). AC ¶¶ 14, 21, 25, 27. The fifth alien's IJ review is pending. AC ¶ 23.

United States Citizenship and Immigration Services ("USCIS") *sua sponte* reconsidered its prior determination and found that Kiakoumba has a credible fear. AC ¶ 19. This determination normally results in transfer of the alien from an expedited removal proceeding under § 235(a) of the Immigration and Nationality Act ("INA") to a § 240 removal proceeding, instead. 8 U.S.C. § 1225(b)(1)(B)(ii), (b)(2)(A).

Two of the pseudonymous aliens have been deported or removed. AC ¶¶ 25, 27. Only two remain in detention as beneficiaries of an emergency stay of removal. Doc. 18.

On August 19, Defendants submitted a Motion for Summary Judgement to dismiss all of Plaintiffs' claims. Doc. 31. Defendants' accompanying memorandum of law ("MSJ") supporting their motion is exceptionally complete. Defendants explain that none of the aliens has standing to challenge USCIS's April 19 revisions to an internal training manual, the Lesson Plain on Credible Fear of Persecution and Torture Determinations ("Lesson Plan"). MSJ at 12–17. Defendants also explain that this Court does not have jurisdiction to adjudicate the claims either under any immigration statute, MSJ at 18–24, or under the Administration Procedure Act, MSJ at 24–35. IRLI submits this *amicus curiae* brief to provide this Court with supplemental briefing on Plaintiffs' underlying merits theory that international law compels this Court to grant Plaintiffs relief. That theory is incorrect even if Plaintiffs' claims were otherwise justiciable.

ARGUMENT

I. Customary international law does not provide Plaintiffs with a lawful claim against Defendants.

Plaintiffs ask this court to rely in part on customary international law as the basis for their claims against Defendants. AC ¶ 94. But customary international law does not govern aliens' presence in the United States. Congress does. *See* U.S. CONST. art. I, § 8, cl. 4 ("Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization."). Accordingly, Congress enacted the INA, which is controlling over Plaintiffs' claims. Customary international law, on the other hand, "is controlling only 'where there is no . . . controlling executive or legislative act or judicial decision.'" *The Paquete Habana*, 175 U.S. 677, 700 (1900). In this case, there is no legal vacuum for customary international law to occupy. Rather, Defendants, Congress, and court precedent, through their respective constitutional roles over the INA, represent the "controlling executive or legislative act or judicial decision" that rules over this case.

In their first claim for relief, plaintiffs incorrectly subordinate the INA to customary international by pleading that "[t]he INA, the Refugee Act, and the CAT [("Convention Against Torture")] must be interpreted consistently with the American commitment to the principle of *non-refoulement* and the right to seek asylum as set forth in treaty obligations and in customary international law." AC ¶ 94. In fact, the opposite is true. The INA supersedes customary international law. "In in the context of immigration detention . . . international law is not controlling because federal executive, legislative, and judicial actions supersede [its] application . . . ." *Gisbert v. U.S. Att'y Gen.*, 988 F.2d 1437, 1448 (5th Cir. 1993), *amended on other grounds*, 997 F.2d 1122 (5th Cir. 1993) (per curiam). Indeed, the INA's supersession of customary international law is so total that there is no role left over for mere custom when

determining the outcome of cases arising under the subject matter of the INA. "Because Congress has enacted an extensive legislative scheme for the admission of refugees, customary international law is inapplicable . . . ." *Galo-Garcia v. I.N.S.*, 86 F.3d 916, 918 (9th Cir. 1996) (per curiam). Thus, Plaintiffs' appeal to customary international law accomplishes nothing.

Indeed, even if the guidance in the Lesson Plan somehow constituted a rule, that it was "inconsistent with principles of customary international law" would be to the disadvantage of those principles, not the rule. As the D.C. Circuit has held, where (as in this case) jurisdiction is claimed under domestic law, an inconsistent statute or rule "simply modifies or supersedes customary international law to the extent of the inconsistency." *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1998).

Plaintiffs' own pleading, just by acknowledging the INA, establishes that their customary international law claim is frivolous in light of the "comprehensive" role of congressional statutes over matters of immigration law in the United States. *E.g.*, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("Congress enacted IRCA, a comprehensive scheme prohibiting the employment of illegal aliens in the United States.") Even if customary international law is useful when there is no other alternative, it is useless in the context of United States immigration law because preexisting regulation over this field is so pervasive.

II. Treaty obligations do not provide Plaintiffs with a lawful claim against Defendants.

Plaintiffs complement their appeal to customary international law with an appeal to "treaty obligations." AC ¶ 94. This, too, is unavailing. Treaty obligations are not in themselves binding upon United States asylum officers, immigration judges, or federal district courts. Rather, treaties "affect United States law only if they are self-executing or otherwise given effect by congressional legislation." *United States v. Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir.

2002). Even if—hypothetically—the 2019 Lesson Plan contradicted a treaty, that tension cannot be grounds for a claim of arbitrary, capricious, or otherwise illegal agency action under 5 U.S.C. § 706 (2)(A) because these treaties, including their construction by United Nations officials, are not in themselves binding against Defendants.

Plaintiffs' claims for relief are cognizable only to the extent that these claims rely on U.S. law. *E.g.*, AC ¶¶ 92, 93 (citing 8 U.S.C. § 1158(a) and 8 U.S.C. § 1231(b)(3)). When congressional statutes execute treaty obligations, the statute controls exclusively—not the treaty obligation that inspired it. With respect to the Refugee Act, AC ¶ 94, for example, and the "treaty obligations" implied by American participation in the UN Convention and Protocol on the Status of Refugees, the only law that matters is the statutory language enacted by Congress, not the treaty obligation. *See INS v. Stevic*, 467 U.S. 407, 417-18 (1984) ("President [Johnson] and the Senate believed that the Protocol was largely consistent with existing law. There are many statements to that effect in the legislative history of the accession to the Protocol.") (citing S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968), at 6, 7 ("the United States already meets the standards of the Protocol")). Participation in a multilateral treaty can be legally meaningless *ab initio*, purposed only toward achieving a political result. In the case of the Protocol on the Status of Refugees, "the United States already meets the standards of the Protocol." *Ming v. Marks*, 367 F. Supp. 673, 678 (S.D.N.Y. 1973) (citing S. Exec. Rep. No. 14, 90th Cong., 2d Sess. at 6, 7, VII (1967)). President Johnson only signed the treaty because "formal accession would greatly facilitate our continuing diplomatic effort to promote higher standards of treatment for refugees and more generous practices on the part of countries *whose approach to refugees is less liberal than our own*." *Id.* (emphasis added). It "was 'absolutely clear' that the Protocol would not 'requir[e] the United States to admit new categories or numbers of aliens.'" *Stevic*, 678 F.2d at

417 (citing S. Exec. Rep. No. 14, at 19). Participation in non-self-executing international treaties is sometimes how America changes the law in foreign countries. Domestic legislation, or the ratification of self-executing treaties, is how America changes the law in our own.

Plaintiff's shoehorning of "the American commitment to the principle of *non-refoulement* and the right to seek asylum as set forth in treaty obligations" into domestic law has been tried before—and rejected by the U.S. Supreme Court. AC ¶ 94. In 1992, the United Nations High Commissioner for Refugees ("UNHCR") argued as an *amicus curiae* that the Attorney General's *refouler* of an illegal alien IRA terrorist without granting him an asylum hearing offended treaty obligations. *INS v. Doherty*, 502 U.S. 314 (1992). The Second Circuit agreed, stating that "Congress intended foreign policy interests to play no role in asylum determinations." *Id.* at 321. But the Supreme Court rejected the Second Circuit's view and upheld the Attorney General's action as an exercise of his "broad discretion" as "the final administrative authority in construing the regulations, and in deciding questions under them." *Id.* at 327 (citing *INS v. Jong Ha Wang*, 450 U.S. 139, 140 (1980)) (per curiam).

Doherty was not the Supreme Court's only occasion to review this issue. One year after *Doherty*, the Court again examined the scope of the United States's treaty obligations toward aliens demanding asylum hearings. In *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), UNHCR again participated as an *amicus*, arguing that treaty obligations prohibited the extra-territorial interception and repatriation of asylum seekers without a hearing. But the Court again disagreed with the treaty body, finding that *non-refoulement* was inapplicable to refugees located on the high seas. *Id.* at 187–88. And, in *Aguirre-Aguirre v. INS*, 526 U.S. 414 (1999), the Court reviewed the scope of the "serious nonpolitical crime" bar to asylum. There, the Ninth Circuit erroneously adopted UNHCR's interpretation of the "serious nonpolitical crime" rule as

"an authoritative commentary on the Convention and Protocol." *Aguirre-Aguirre*, 121 F.3d 521, 523 (9th Cir. 1997). The Supreme Court reversed, holding that "the [UNHCR] Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts." *Id.* at 427–28. By now, it is well-settled that the refugee treaty obligations do not "confer any rights beyond those granted by implementing domestic legislation." *Jaadan v. Gonzales*, 211 Fed. Appx. 422, 431–32 (6th Cir. 2006). In short, Plaintiffs' approach is a would-be Trojan Horse contradicting unambiguous Supreme Court precedent on the authority of treaty obligations under federal law.

III. The Refugee Act of 1980 does not provide Plaintiffs with a lawful claim against Defendants.

The capstone of Plaintiffs' Amended Complaint is a sweeping assertion that "*all* noncitizens at or within U.S. borders generally have a right to apply for asylum—a form of protection available to individuals who can prove that they are 'refugee[s]' within the meaning of the INA . . . ." AC ¶¶ 34, 92 (citing 8 U.S.C. § 1158(a)). Plaintiffs lump this third theory together from an "historical commitment" and "historic policy" of the "Executive" "codified" in the Refugee Act of 1980, and in the "principle of *non-refoulement*" purportedly "reflected" in that act. AC ¶¶ 2, 33–36. This Court should reject this chimera.

It is black-letter law that only *some* "noncitizens at or within U.S. borders" designated by Congress "generally have a right to apply for asylum." AC ¶ 34. Three broad statutory exceptions restrict the right to apply even if a well-founded fear of persecution or torture exists: adult foreign nationals subject to a safe third country agreement, 8 U.S.C. § 1158(a)(2)(A); aliens who cannot demonstrate "by clear and convincing evidence" that their application was filed "within one year after the date of the alien's arrival," 8 U.S.C. § 1158(a)(2)(B); and aliens who have previously been denied asylum, 8 U.S.C. § 1158(a)(2)(C). For the remaining pool of

potential applicants not excluded by these bars, additional statutory exceptions preclude eligibility, such as: (1) involvement in persecuting others; (2) commission of an aggravated felony; (3) commission of a serious nonpolitical crime outside the United States; (4) being a danger to United States security; (5) involvement in various terrorist activity; or (6) being firmly resettled in a third country prior to arrival. 8 U.S.C. § 1158(b)(2)(A). Moreover, the Secretary of Homeland Security may in his discretion impose further limitations and conditions both on eligibility consistent with the asylum statute, 8 U.S.C. § 1158(b)(2)(A), and on consideration of an asylum application not inconsistent with the INA as a whole, 8 U.S.C. § 1158(d)(5)(B). Both provisions expand DHS authority to impose additional limitations that may result in the denial of asylum in the exercise of discretion. "The delegation of authority [in 8 U.S.C. 1158(b)(2)(C)] means that Congress was prepared to accept administrative dilution of the asylum guarantee in § 1158(a)(1)." *R-S-C v. Sessions*, 869 F.3d 1176, 1187 (10th Cir. 2017). Plaintiffs' assertion that "*all* noncitizens . . . generally have a right to apply for asylum" is hyperbolic.

In the specific context of expedited removal proceedings, further limitations on application for asylum exist. Most asylum seekers arriving from Mexico are placed in an expedited removal (INA § 235) proceeding, where they must complete a credible fear screening before they may apply for asylum. Screened arriving aliens who are determined to have a "credible fear" of persecution are transferred by statute from DHS to EOIR jurisdiction for an INA § 240 removal proceeding. 8 U.S.C. § 1225(a)(1)(B)(ii). Once placed in an INA § 240 proceeding, the alien may only make a defensive application for relief from removal. INA § 208 does not require or permit either agency to accept an affirmative application for removal from an alien in section 240 proceedings.

Once the asylum officer—or under 8 U.S.C. § 1125(b)(1)(B)(iii)(III), an immigration judge—determines that the alien has credible fear, that alien thus becomes subject to a statutory bar to their "right" to file an affirmative asylum application. That alien may only file his or her asylum application defensively, with the immigration court having jurisdiction over that alien's removal proceeding. If the Secretary has exercised his discretion to direct that the alien return to Mexico until his INA § 240 proceeding commences, by operation of law the alien must wait to apply defensively for asylum until that hearing date. By contrast, the arriving alien at the southern border who, after placement in a § 235 expedited removal proceeding, receives a negative credible fear determination from an asylum officer and immigration judge, is *statutorily precluded* from filing an application for asylum. The bar arises from neither a mandatory nor a discretionary ground of ineligibility "consistent with" INA § 208, but from the independent mandate of INA § 235. 8 U.S.C. § 1225(b)((1)(B)(iii) (Removal without further review if no credible fear of persecution).

Similarly, the Refugee Act, as amended, does not provide for unconditioned eligibility for withholding of removal ("WOR") relief for "all noncitizens at or within U.S. borders generally." AC ¶ 34. While WOR is a mandatory form of relief, it is only available as a defense to removal in an INA §240 proceeding. An asylum officer has no jurisdiction over WOR claims other than to screen for a significant possibility of eligibility. 8 C.F.R. § 208.16(a). But before WOR relief may be granted, an immigration judge must first enter an order of removal in an INA § 240 proceeding. *Matter of I-S- and C-S-*, 24 I&N Dec. 432 (BIA 2008) (following IRLI amicus brief). Although an IJ has no authority to deny a valid WOR claim, the INA lists five statutory grounds for ineligibility that apply even if the alien's life or freedom would be threatened upon return. 8 U.S.C. § 1231(b)(3)(B).

Plaintiffs also complain vaguely that the "credible fear assessment was deliberately designed to be a permissive standard to safeguard against the United States returning displaced people to dangerous conditions they fled, because doing so contravenes international and domestic law obligations." SAC ¶ 3. "In doing so, Congress created what the Department of Justice has recognized as a 'low threshold of proof of potential entitlement to asylum…." AC ¶ 46. Defendants allegedly "misrepresent[] the relevant asylum standards by failing to present them according to the controlling question of whether the asylum seeker has a significant possibility of meeting those standards in the future." Id. ¶ 83.c.

In reality, Congress intentionally enacted a higher and more restrictive burden of persuasion for aliens in credible fear interviews than that promulgated by the United Nations in its interpretation of the Refugee Convention and Protocol. Whatever the legislative intent may have been upon enactment of the Refugee Act in 1980, it changed after 1996 when Congress revisited problems with the asylum system. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P. L. No. 104-208, § 604, 110 Stat. 3009 (1996) ("IIRIRA"), as codified at 8 U.S.C. §§ 1101, 1221, 1324 (1996). New IIRIRA provisions included expedited removal, in particular the credible fear screening provisions thereof. As amended, the INA adopted the more demanding "significant possibility" standard, not the UNHCR alternative of a "not manifestly unfounded" claim of credible fear. *See* 142 Cong. Rec. S11491 (Sept. 27, 1996) (statement of Sen. Hatch).

The differences between the UNHCR and U.S. standards are important. The UNHCR's credibility requirement is a "claim which is not clearly fraudulent." Mark Hatfield, U.S. Comm'n on Int'l Religious Freedom, *Study on Asylum Seekers in Expedited Removal: Report on Credible Fear Determinations*, 170 (vol. 2 2005) ("USCIRF Report Vol. 2"). To meet the UNHCR "not

manifestly unfounded" standard, an applicant in a contracting state that has adopted the UN standard would only need to prove that his or her claim is not clearly a lie. *Id.*

By contrast, the U.S. statute requires "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under [INA] Section 208." 8 U.S.C. § 1225(b)(1(B)(v).

Thus, the U.S. standard requires applicants to prove both that they were not lying and that they have a substantial and realistic possibility of prevailing on an asylum claim. USCIS - Refugee, Asylum and Int'l Operations Directorate Officer Training, Asylum Division Officer Training Course: Reasonable Fear of Persecution and Torture Determinations 17 (Feb. 13, 2017), https://www.uscis.gov/sites/default/files/files/nativedocuments/Reasonable_Fear_Asylum _Lesson_Plan.pdf. A credible fear claim under the UNHCR Handbook must merely "be related to criteria for refugee status," while, by contrast, the U.S. standard requires a "significant possibility the applicant can establish a nexus to a protected ground or . . . to torture." USCIRF Report Vol. 2 170.

In the REAL ID Act of 2005, Congress again moved beyond the 1980 Act formulations to clarify that credible fear claims must be primarily and directly related to one of the protected Convention grounds. 8 U.S.C. § 1158(b)(1)(B)(iii) (providing that such a ground must be a "central reason"). Congress intended, *inter alia*, to "tighten the asylum process," which the sponsors believed had been "abused by terrorists" like those in the 9/11 attacks. 151 Cong. Rec. H454 (Feb. 9, 2005) (statement of Rep. Sensenbrenner). These more demanding standards, absent from the UN's formulation, were overlooked by Plaintiffs.

CONCLUSION

Even if the numerous and pervasive impediments to the justicability of Plaintiffs' Amended Complaint—identified by Defendants in the Motion for Summary Judgment—were not present, none of the international, domestic, or hybrid sources of law invoked by Plaintiffs would prevent Plaintiffs' removal from the United States following the denial of their asylum claims and withholding-of-removal claims. The Amended Complaint should be dismissed.

Dated: August 29, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2019, the foregoing was served by filing a copy using the Court's ECF filing system, which will send notice of the filing to all counsel of record.

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