

**NOS. 07 – 5178, 07-5185, 07-5186, 07-5187
ORAL ARGUMENT NOT YET SCHEDULED**

**UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

Arkan Mohammed Ali, et al.,

Plaintiffs-Appellants,

v.

Donald H. Rumsfeld, Individually, et al.,

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA,
THE HONORABLE THOMAS F. HOGAN**

**BRIEF OF *AMICI CURIAE*
HUMAN RIGHTS & TORTURE TREATMENT ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL**

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28.1, *Amici* certify the following:

A. PARTIES APPEARING BEFORE THE DISTRICT COURT

All parties, intervenors and *amici* appearing before the district court and this court are listed in the Brief for Appellants.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Appellants.

C. RELATED CASES

There are no related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for human rights and torture treatment organizations makes the following disclosure:

None of the *Amici* is a publicly held entity. None of the *Amici* is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity. No parent companies or publicly held companies have a 10% or greater ownership in any of the *Amici*.

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GLOSSARY OF ABBREVIATIONS

ATS: Alien Tort Statute

CAT: Convention against Torture

IACHR: Inter-American Court of Human Rights

ICCPR: International Covenant on Civil and Political Rights

PCIJ: Permanent Court of International Justice

TVPA: Torture Victim Protection Act

INTEREST OF AMICI

This Brief of *Amici Curiae* is respectfully submitted by several human rights and torture treatment organizations pursuant to Federal Rule of Appellate Procedure 29 and District of Columbia Circuit Rule 29. The Brief is filed in support of the Plaintiffs-Appellants and seeks the reversal of the district court's decision.¹

Amici represent a diverse group of human rights and torture treatment organizations.² Each organization believes in the inherent dignity of human beings. Each organization denounces the use of torture, promotes accountability for perpetrators of torture, and seeks redress for victims of torture. *Amici* believe this case raises important issues concerning human rights law and the right to a remedy under international law. They believe the district court's ruling in *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007), is startling and deeply troubling. Essentially, the decision ensures that victims of torture and other human rights abuses are unable to seek redress for their injuries through the U.S. legal system. Such an outcome is contrary to well-established international law. Accordingly, *Amici* would like to provide this Court with their

¹ The Plaintiffs-Appellants have consented to the filing of this Brief of *Amici Curiae*. The United States and one of the Defendants-Appellees have also consented to the filing of this Brief. Two other Defendants-Appellees did not oppose the filing of the Brief.

² A complete list of *Amici* appears in the Appendix.

perspective on these issues. They believe this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

As the district court correctly noted, this is a regrettable case, *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d at 85. The Plaintiffs-Appellants allege they were tortured and abused while detained by the U.S. military at military facilities in Iraq and Afghanistan. Each Plaintiff-Appellant was subsequently released without ever being charged. Equally regrettable, however, is the district court's decision dismissing these claims, which effectively precludes the Plaintiffs-Appellants from seeking redress for their injuries.

It is well-established that torture is prohibited under international law. Moreover, victims of torture have the right to an effective remedy under international law. The United States has accepted these principles through its ratification of several international instruments. Both the Alien Tort Statute and the Torture Victim Protection Act have been used to implement the prohibition against torture and provide a remedy for victims of torture in the United States.

In this case, the district court failed to implement either the prohibition against torture or the right to a remedy for victims of torture. The court did not

incorporate any reference to these international norms in its interpretation of the Westfall Act. In so doing, the district court failed to comply with the venerable U.S. law doctrine of statutory construction providing that federal law must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

ARGUMENT

I. VICTIMS OF TORTURE HAVE A RIGHT TO A REMEDY UNDER INTERNATIONAL LAW

A. Torture is Prohibited Under Customary International Law

Few international norms are more firmly established than the prohibition against torture.³ This prohibition is recognized in every major human-rights instrument, including treaties ratified by the United States. *See, e.g.*, Universal Declaration of Human Rights, art. 5, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights (“ICCPR”), art. 7,

³ The term “customary international law” is used interchangeably with “law of nations,” particularly in the context of the Alien Tort Statute. *See, e.g., Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 n. 2 (2d Cir. 2003); (citing *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir.1995); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir.1980); *The Estrella*, 17 U.S. (4 Wheat.) 298, 307-08 (1819) (referring to non-treaty-based law of nations as the “the customary . . . law of nations”).

Dec. 16, 1966, 999 U.N.T.S. 171;⁴ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85;⁵ Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3, 13, 130, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 3, 32, 147, Aug. 12, 1949, 75 U.N.T.S. 287.⁶ It is also codified in several regional human rights agreements. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 221;⁷ American Convention on Human Rights, art. 5(2), Nov. 22, 1969, 1144 U.N.T.S. 123;⁸ African Charter on Human and Peoples’ Rights, art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3/rev.5.⁹

⁴ As of September 20, 2010, there were 166 States Parties to the International Covenant on Civil and Political Rights, including the United States, which ratified the ICCPR in 1992.

⁵ As of September 20, 2010, there were 147 States Parties to the Convention against Torture, including the United States, which ratified the CAT in 1994.

⁶ As of September 20, 2010, there were 194 States Parties to the Geneva Conventions, including the United States, which ratified them in 1955.

⁷ As of September 20, 2010, there were 47 States Parties to the European Convention out of a total 47 state members of the Council of Europe.

⁸ As of September 20, 2010, there were 25 States Parties to the American Convention out of a total 35 states members of the Organization of American States. The United States has signed, but not ratified, the American Convention.

⁹ As of September 20, 2010, there were 53 States Parties to the African Charter out of a total 53 states members of the Organization of African Unity.

Each of these international instruments makes clear that the prohibition against torture is absolute.¹⁰ For example, the Convention against Torture provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” CAT, *supra*, at art. 2(2). According to the U.S. State Department, this blanket prohibition was viewed by the drafters of the Convention against Torture as “necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.” President’s Message to Congress Transmitting the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, May 23, 1988, S. Treaty Doc. No. 100-20, *reprinted in* 13857 U.S. Cong. Serial Set at 3 (1990) [“State Dept. Summary”]. *See e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-85 (2d Cir. 1980) (listing numerous sources, including the opinion of the State Department, supporting the proposition

¹⁰ This principle has been affirmed by numerous international tribunals, including the European Court of Human Rights (*Selmouni v. France*, 29 Eur. H.R. Rep. 403 (1999); *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1997); *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25 (1978)); the Inter-American Court of Human Rights (*Lori Berenson Mejia v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004)); and the International Criminal Tribunal for the former Yugoslavia (*Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (Oct. 2, 1995)).

that torture is prohibited as a matter of customary international law, and noting that despite continued practice of torture by many countries, virtually all have renounced the practice, including through international declarations and agreements); Restatement (Third) of the Foreign Relations Law of the United States § 702, Reporters note 5(d) (1987).

Indeed, the prohibition against torture has attained the status of a *jus cogens* norm, which allows for no derogation. *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940-941 (D.C. Cir. 1988) (noting that *jus cogens* constitutes a peremptory norm that is “non-derogable and enjoy[s] the highest status within international law;” and that the Court itself has recognized torture as “prohibited by the law of nations”). Numerous federal courts have acknowledged the *jus cogens* status of the prohibition against torture. *See, e.g., Nuru v. Gonzales*, 404 F.3d 1207 (9th Cir. 2005) (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993)); *Wissam Abdullateff v. Adel Nakhla*, 2010 U.S. Dist. LEXIS 76450 (D. Md. July 29, 2010). As such, no government can justify torture or waive the prohibition against its use. *Certain Underwriters at Lloyds London v. Great Socialist People's Libyan Arab Jamahiriya*, 2007 U.S. Dist. LEXIS 49032 (D.D.C. July 9, 2007).

B. The Right to a Remedy is a Fundamental Right under International Law

The principle of *ubi ius ibi remedium*—“where there is a right, there is a remedy”—is a well-established principle of international law. The leading international formulation of the “no right without a remedy” principle comes from the 1928 holding of the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case: “[I]t is a principle of international law, and even a general conception of law, that *any breach of an engagement involves an obligation to make reparation.*” *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) (emphasis added). The remedial principles governing human rights law are heavily influenced by the *Chorzów Factory* case. See Dinah Shelton, *Remedies in International Human Rights Law* 99 (2d ed. 2005) (“[I]nstitutions applying [human rights law] return to the law of state responsibility to assess the nature and extent of the remedies.”). Significantly, remedies must be effective to be consistent with international law. *Id.* at 9. See generally Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 Am. J. Int’l L. 833, 834 (2002).

Nearly every major human rights treaty includes a provision establishing an individual right to an effective remedy. See, e.g., Universal Declaration of Human Rights, *supra*, at art. 8 (“Everyone has the right to an effective remedy . . . for acts violating the fundamental rights granted him”); International Covenant on

Civil and Political Rights, *supra*, at arts. 2(3), 9(5), 14(6) (ensuring remedies and compensation for wrongful convictions and imprisonment); Convention on Elimination of All Forms of Racial Discrimination art. 6, Mar. 7, 1966, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (“State Parties shall assure to everyone within their jurisdiction effective protection and remedies.”); Convention on the Elimination of All Forms of Discrimination Against Women, art. 2(c), Dec. 18, 1979, S. Exec. Doc. R, 96-2 (1980), 1249 U.N.T.S. 13 (establishing legal protection of women’s rights against any act of discrimination); Convention against Torture, *supra*, at art. 14 (“Each State Party shall ensure in its legal system that the victim . . . obtains redress and has an enforceable right to fair and adequate compensation”); Int’l Comm’n of Jurists, Written Statement to Ad-Hoc Committee on Disability Rights Convention, *Need for an Effective Domestic Remedy in the Disability Rights Convention*, Jan. 2005, available at <http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5icj.rtf>. (“The right to an effective remedy is so firmly enshrined . . . that any credible modern human rights treaty has to incorporate it.”).

The U.N. Human Rights Committee, established to oversee ICCPR compliance, echoed these views in General Comment 31, which addressed the nature of states’ obligations under Article 2(3) of the ICCPR.

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been

violated. Without [this], the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. ... The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. ...¹¹

The importance of the right to remedy was further acknowledged by the U.N. General Assembly in 2005 in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.¹² G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (“Basic Principles”). The Basic Principles note that states shall provide victims of gross violations of international human rights law with “(a) equal and effective access to justice; (b)

¹¹ Human Rights Committee, General Comment No. 31 [80] on Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

¹² U.N. General Assembly declarations, such as the Basic Principles, provide a key source of law for states’ obligations, as they declare existing customs, crystallize emerging customs, and generate new customs. See Lori Bruun, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 Md. J. Int’l L. & Trade 193, 216–17 (1993); Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 Ga. J. Int’l & Comp. L. 1, 8 (1995/96).

adequate, effective and prompt reparation for harm suffered; [and] (c) access to relevant information concerning violations and reparation mechanisms.” *Id.* at ¶ 11. Victims must have “equal access to an effective judicial remedy as provided for under international law.” *Id.* at ¶ 12. Full and effective reparations include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. *Id.* at ¶ 18.

Regional human rights institutions have also recognized the right to a remedy. For example, the Inter-American Court of Human Rights (“IACHR”) held in *Velásquez Rodríguez v. Honduras* (compensatory damages judgment) “that every violation of an international obligation which results in harm creates a duty to make adequate reparation.” Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989). Although the Court acknowledged that compensation was the most common means, it also held that *restitutio in integrum* was the starting point to counter the harm done. *See also Garrido & Baigorria*, Inter-Am. Ct. H.R. (ser. C) No. 39, at 10 (Aug. 27, 1998); *accord Durand & Ugarte*, Inter-Am. Ct. H.R. (ser. C) No. 89, at 6 (Aug. 16, 2000) (“[A]ny violation of an international obligation carries with it the obligation to make adequate reparation.”). In *Moiwana Village v. Suriname*, the Inter-American Court extended the right to a remedy even in those situations where a violation occurred before a state ratified the American Convention on Human Rights. Inter-Am. Ct. H.R. (ser. C) No. 124, at 1 (June 15, 2005).

The African system of human rights offers similar protections. The African Commission on Human and Peoples' Rights has accepted the principle of reparations. In spite of an absence of express authority in the African Charter on Human and Peoples' Rights or in the Commission's Rules of Procedure, it has been developing a practice of providing remedies, including declaratory relief, compensation and restitution. The Protocol to the African Charter establishing the African Court on Human and Peoples' Rights stipulates that, "[i]f the Court finds that there has been violation of a human or peoples' rights [*sic*], it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation." Protocol to the African Charter on Human and Peoples' Rights, art. 27, June 9, 1998, CAB/LEG/665, *available at* http://www.achpr.org/english/_info/court_en.html.

Finally, in the European human rights system, the Committee of Ministers of the Council of Europe ("COE") recommended that "[r]eparation should be ensured for damage caused by an act due to failure of a public authority to conduct itself in a way which can be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule." Recommendation No. R(84) 15 Relating to Public Liability, adopted by the Committee of Ministers on Sept. 18, 1984.

In sum, the right to a remedy is a fundamental principle of international law.

Victims of torture have a right to seek redress for their injuries. This obligation is all the more significant in light of the *jus cogens* nature of the prohibition against torture.

C. The United States Has Recognized a Right to a Remedy for Torture

U.S. law recognizes the right of torture victims to seek redress for their injuries. In 1991, for example, Congress adopted the Torture Victim Protection Act (“TVPA”) to comply with the Convention against Torture, which the United States signed in 1988 and ratified in 1994. *See* 28 U.S.C. § 1350 (note). The TVPA establishes civil liability for torture perpetrated by an individual “under actual or apparent authority, or color of law, of any foreign nation.” *Id.* § 2(a). The TVPA has been used by numerous victims of torture to seek accountability against the perpetrators who harmed them.¹³

Both the House and Senate reports on the TVPA acknowledged that remedies should be available in the United States for victims of torture. *See generally* H.R. Rep. No. 102-367 (1991); S. Rep. No. 102-249 (1991). The House Report, for example, notes that the Convention against Torture obligates states “to

¹³ Congress also enacted 18 U.S.C. § 2340A to criminalize acts of torture occurring outside its territorial jurisdiction. Pursuant to § 2340A, any person who commits, attempts, or conspires to commit an act of torture outside the United States is subject to a fine and/or imprisonment for up to 20 years, except where death results from the prohibited conduct, in which case the offender faces life imprisonment or the death penalty.

provide means of civil redress to victims of torture.”¹⁴ H.R. Rep. No. 102-367, at 3. More recently, one of the principal drafters of the TVPA, Senator Arlen Specter, noted the importance of providing a remedy for victims of torture in the United States. “It would be ...revolting...if a torturer was physically present in the United States but could not be sued by the victim because of inadequacies or ambiguity in our present law.” *Brief of Sen. Arlen Specter et al. as Amici Curiae Supporting Respondents, Samantar v. Yousef*, 130 S. Ct. 1499 (2010) (citing 1989 statement of Representative Leach in support of the TVPA). Another prominent drafter of the TVPA, Senator Patrick Leahy, recently offered a similar statement in support of torture victims seeking accountability in the United States. “The United States should not provide safe haven to those who use their position of authority to commit torture.” Press Release, U.S. Senator Patrick Leahy, *Comment on the Supreme Court’s Opinion in Samantar v. Yousuf*, (June 1, 2010), available at: http://leahy.senate.gov/press/press_releases/release/?id=c70c8cff-3666-47f0-8c94-61e40f099ffd.

Similarly, the Alien Tort Statute (ATS) provides that “[t]he district courts

¹⁴ During debates over the Torture Victim Protection Act, Congressman Dante Fascell, Chairman of the House Committee on Foreign Affairs, stated: “[i]f international human rights are to be given legal effect, we and other nations must provide domestic remedies to victims of torture.” 135 Cong. Rec. H6423-01 (Oct. 2, 1989) (statement of Rep. Fascell).

shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. The ATS has been used on numerous occasions to hold torturers accountable for their actions and to provide redress to victims of torture. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d at 890; *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242 (11th Cir. 2005). Congress reaffirmed its support of the ATS when it adopted the TVPA. *See* H.R. Rep. No. 102-367, at 3. In *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730-731(2004), the Supreme Court also noted that the TVPA revealed congressional support of the ATS as a mechanism for victims of human rights abuses to seek redress in U.S. courts.

It would be a mockery of justice for U.S. courts to hold accountable *foreign* torturers, while refusing to apply the same legal and moral principles to *United States citizen* torturers.

II. U.S. LAW SHOULD BE INTERPRETED CONSISTENT WITH INTERNATIONAL LAW OBLIGATIONS.

Federal courts have long recognized the doctrine of statutory construction that federal statutes must not be interpreted in a manner that conflicts with

international law if any other construction is fairly possible.¹⁵ The Supreme Court's decision in *Talbot v. Seeman*, 5 U.S. 1 (1801), perhaps represents the first elaboration of this principle of statutory construction. In *Talbot*, the Court, per Chief Justice Marshall, held that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." *Id.* at 43. The doctrine, however, is more generally attributed to a case decided three years later, *Murray v. Schooner Charming Betsy*.

In *Charming Betsy*, the Supreme Court considered whether an Act of Congress adopted to suspend trade between the United States and France authorized the seizure of neutral vessels, an action that would violate customary international law. *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (2 Cranch 64) (1804). Writing for the Court, Chief Justice Marshall enunciated a doctrine of statutory construction that affirmed the importance of international law:

It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

These principles are believed to be correct, and they ought to be kept

¹⁵ The phrase "where fairly possible" derives from one of the principles of interpretation to avoid serious doubts as to the constitutionality of a federal statute. Restatement (Third) of Foreign Relations Law of the United States § 114 rpt. n.2 (1987). See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936).

in view in construing the act now under consideration.

Id. at 118. This does not mean that international law supersedes or overrides domestic law. Rather, *Charming Betsy* stands for the proposition that “courts will not blind themselves to potential violations of international law where legislative intent is ambiguous.” *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

The *Charming Betsy* doctrine is a long-standing doctrine of statutory construction that the Supreme Court has affirmed in numerous decisions. *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Payne*, 264 U.S. 446, 448-49 (1924); *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *Brown v. United States*, 12 U.S. 110, 125 (1814). Pursuant to this history, this court reiterated: “[s]ince the days of Chief Justice Marshall, the Supreme Court has consistently held that congressional statutes must be construed whenever possible in a manner that will not require the United States to violate ‘the laws of nations.’” *George E. Warren Corp. v. Environmental Protection Agency*, 159 F.3d 616, 624 (D.C. Cir. 1998) (quoting *South African Airways v. Dole*, 817 F.2d 119, 125 (D.C. Cir. 1987)).

Under *Charming Betsy*, ambiguous statutes are to be interpreted consistent with both customary international law and treaties. See Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103, 1161 (1990). This precept is illustrated in the distinction between and inclusion of both “international law” and “international agreements” in Section 114 of the Restatement (Third), which provides “[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.” Accordingly, in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004), the Supreme Court stated “this rule of construction [that ambiguous statutes are interpreted to avoid unreasonable interference with the sovereign authority of other nations] reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow.” In *Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487, 495 (D.C. Cir. 1984), this court looked to customary international law in defining the contours of the court’s enforcement jurisdiction.¹⁶

¹⁶ In *Nahas*, the court declined to infer enforcement jurisdiction based upon an ambiguous statute where such jurisdiction would “seriously impact principles of international law.” *Commodity Futures Trading Commission v. Nahas*, 738 F.2d at 495. The “principles of international law” at issue in *Nahas* were not positive instruments but rather notions of sovereignty inherent in international law. See *F.T.C. v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1313 n.67 (D.C. Cir. 1980) (holding that the compulsory service of process on a foreign

Since the *Charming Betsy* doctrine is intimately related to the international relations of the United States, it is influenced by foreign policy considerations both at home and abroad. In particular, it is based in part upon a respect for the law that binds the international community, and a respect for the constitutional roles of the executive and legislative branches of government in formulating foreign policy. When faced with ambiguous statutes, the division of power among the federal branches is best served by interpreting such statutes so as not to violate international law. Accordingly, courts should be particularly cautious when engaging in statutory construction that may affect U.S. compliance with its international obligations. *See generally* Roger Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy*, 67 Ohio St. L.J. 1339 (2006) (asserting that the *Charming Betsy* doctrine promotes separation of powers by eschewing potential international law violations through statutory interpretation).

Because the coordinate branches can state whether they seek to abrogate international law, courts will not question the commitment of those branches to international law unless such intent is clearly manifest. *See Chew Heong v. United*

national in a foreign state violates “the first and foremost restriction imposed by international law upon a State[,] . . . that failing the existence of a permissive rule to the contrary it may not exercise its powers in any form in the territory of another State”) (quoting *Case of The S.S. “Lotus,”* (1927) P.C.I.J., Ser. A., No. 10 (Sept. 7) at 18).

States, 112 U.S. 536, 540 (1884). *See generally* Restatement (Third), *supra*, at § 115(1)(a); Louis Henkin, *Foreign Affairs and the U.S. Constitution* 486 (2d ed. 1996). In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1983), the Supreme Court considered whether Congress had sought to override the provisions of the Warsaw Convention regulating international air travel by repealing the Par Value Modification Act in 1978. Writing for the Court in an 8-1 ruling, Justice O'Connor recognized that "[t]here is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action," and that "[l]egislative silence is not sufficient to abrogate a treaty." *Id.* at 252. *See also* *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902); *Weinberger v. Rossi*, 456 U.S. 25 (1982).

The United States has an international obligation under customary international law and positive instruments, such as the Convention against Torture, to afford victims of torture the right to seek redress for their injuries. Regrettably, the district court failed to implement either the prohibition against torture or the right to a remedy for victims of torture in its opinion. Its interpretation of the Westfall Act does not incorporate any reference to these international norms. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d at 109-115. Moreover, the district court failed to comply with the venerable U.S. law doctrine of statutory

construction providing that federal law must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible.

The Westfall Act should not be interpreted in a manner that affords immunity to acts of torture if another construction is fairly possible. For example, the Westfall Act's application to a "negligent or wrongful act or omission" should not extend to conduct that violates *jus cogens* norms, such as the prohibition against torture. *Id.* at 110-111. In addition, the term "scope of employment" in the Westfall Act should not extend to conduct that violates the *jus cogens* prohibition against torture. *Id.* at 113-115. Finally, the Westfall Act's exception for an action brought for a violation of a U.S. Statute should be interpreted to include actions pursued under the Alien Tort Statute. *Id.* at 111-113. In sum, there is ample ambiguity within the Westfall Act, and the district court should have considered these ambiguities in light of the *Charming Betsy* doctrine.¹⁷

A right without a remedy is no right at all. Interpreting the Westfall Act consistent with the fundamental right to a remedy embodied in international law allows the United States to live up to its promises, ideals, and values. It ensures that the right of all people to be free from torture has practical meaning.

¹⁷ The D.C. Circuit addressed analogous facts in *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) and *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008). However, it did not consider how the Westfall Act could be interpreted in light of international norms, as the *Charming Betsy* requires.

CONCLUSION

International law prohibits torture and provides that victims of torture and other human rights abuses should have the right to seek redress for their injuries. However, the district court's interpretation of the Westfall Act does not incorporate any such reference to these international norms. Thus, the district court deviated from the venerable doctrine of statutory construction that federal law must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible. For the foregoing reasons, the district court's decision should be reversed.

Dated: September 22, 2010

Respectfully Submitted

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**APPENDIX:
LIST OF *AMICI CURIAE***

Advocates for Survivors of Torture and Trauma (ASTT) is a comprehensive torture treatment program which provides comprehensive mental health care and social services to survivors of torture and war trauma. ASTT is an independent, nonprofit organization whose mission is to alleviate the suffering of those who have experienced the trauma of torture, to educate the local, national, and world community about the needs of torture survivors, and to advocate on their behalf.

The **Bellevue/NYU Program for Survivors of Torture (PSOT)** provides comprehensive medical and mental health care, as well as social and legal services to survivors of torture and war traumas and their family members. In the past year alone, PSOT provided these multidisciplinary services to more than 600 people from 70 countries. Since its inception in 1995, PSOT has developed an international reputation for excellence in its clinical, educational, and research activities. PSOT's mission is to assist individuals and families subjected to torture and war trauma, to re-build healthy, self-sufficient lives, and to contribute knowledge and testimony to global efforts to end torture.

The **Center for Justice and Accountability (CJA)** is an international human rights organization dedicated to deterring torture and other severe human rights

abuses around the world and advancing the rights of survivors to seek truth, justice and redress. CJA uses litigation to hold perpetrators individually accountable for human rights abuses, develop human rights law, and advance the rule of law in countries transitioning from periods of abuse.

The **Center for Victims of Torture (CVT)** was founded in 1985. It was the first organized program of care and rehabilitation for torture survivors in the U.S. and one of the very first in the world. To date, CVT has healed the wounds of torture for more than 18,000 individuals from 67 countries, including persons living in this country and abroad. CVT provides direct and comprehensive treatment to victims of government sponsored torture and undertake research on effective treatment methods. Moreover, CVT provides professional training and technical assistance to over 50 centers throughout the world. Through public education campaigns, public policy initiatives, and cooperative efforts with national and international human right organizations, CVT contributes to the prevention and ultimate elimination of torture.

The **International Center for Transitional Justice (ICTJ)** works to redress and prevent the most severe violations of human rights by confronting legacies of mass abuse. ICTJ seeks holistic solutions to promote accountability and create just and

peaceful societies. To fulfill that mission, ICTJ links experience from its many field programs with its research in transitional justice. This allows ICTJ to develop, test, and refine field practices and remain a research leader. ICTJ uses this knowledge to inform and advise governments, civil society and other stakeholders working on behalf of victims. It seeks to persuade those stakeholders, the media, and the general public of the need for justice and accountability, including reparations for serious violations of human rights. ICTJ works in societies emerging from repressive rule or armed conflict, as well in other societies where legacies of abuse remain unresolved.

The **National Religious Campaign Against Torture (NRCAT)** is a growing membership organization committed to ending U.S.-sponsored torture, and cruel, inhuman and degrading treatment. Since its formation in January 2006, more than 290 religious groups have joined NRCAT, including representatives from the Roman Catholic, evangelical Christian, mainline Protestant, Unitarian Universalist, Quaker, Orthodox Christian, Jewish, Muslim, Hindu, Baha'i, Buddhist, and Sikh communities. Members include national denominations and faith groups, regional organizations, and local congregations.

The **Program for Torture Victims (PVT)** is dedicated to rebuilding the lives of

the most vulnerable members of our society. As the oldest torture treatment program in the United States, PTV aims to alleviate the suffering and health consequences of state-sponsored torture among refugees and asylum seekers in the greater Los Angeles area. Founded in 1980, PTV is the only torture rehabilitation program providing comprehensive treatment and services to torture survivors in the greater Los Angeles region. PTV has helped rebuild the lives of thousands of victims of state-sponsored torture from over 65 nations by providing free medical, psychological, legal and case management services.

Survivors of Torture International (SURVIVORS) is an independent nonprofit organization dedicated to caring for survivors of politically motivated torture and their families who live in San Diego County. Since 1997, SURVIVORS has helped survivors to recover from their traumas through a holistic program including medical, dental, psychiatric, psychological, and social services. Legal services are offered through a partnership with a nonprofit immigration law firm. SURVIVORS empowers torture survivors to reclaim the strength and vitality that were stolen from them by brutal dictators and governments. The specialized care SURVIVORS provides these vulnerable individuals helps them to become self-sufficient and healthy members of their families and of our community.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 point, and contains 5,878 words, (which does not exceed the applicable 7,000 word limit).

/s/ William J. Aceves

CERTIFICATE OF SERVICE

I, William J. Aceves, the undersigned, hereby certify that I am employed by California Western School of Law at 225 Cedar Street, San Diego, California 92101. I further declare under penalty of perjury that on September 22, 2010, I caused to be served through the CM/ECF electronic filing system a true copy of the foregoing **Brief of *Amici Curiae* in Support of Plaintiffs-Appellants Seeking Reversal** upon the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit. Furthermore, I certify that I caused to be served eight copies of the **Brief of *Amici Curiae* in Support of Plaintiffs-Appellants Seeking Reversal** through UPS, postage paid, to the Clerk of the Court.

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ADDENDUM: STATUTES AND REGULATIONS

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STATUTES AND REGULATIONS

The statutes pertinent to this appeal are set forth below.

18 U.S.C. § 2340A

(a) Offense.— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.— A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

28 U.S.C. § 1350

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350 (note)

SECTION 1. SHORT TITLE.

This Act may be cited as the ‘Torture Victim Protection Act of 1991’.

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) Extrajudicial Killing.—For the purposes of this Act, the term ‘extrajudicial killing’ means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.—For the purposes of this Act—

(1) the term ‘torture’ means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind;
and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.