No. 08-539

IN THE
Supreme Court of the United States

REPUBLIC OF IRAQ, ET AL.,

Petitioner,

v.

ROBERT SIMON, ET AL.,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Brief of *Amicus Curiae*
Center for Justice & Accountability
In Support of Respondents

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INTEREST OF *AMICUS CURIAE*

This *amicus* brief is respectfully submitted in support of Respondents by the Center for Justice & Accountability.[1]

The Center for Justice & Accountability (CJA) is a non-profit legal advocacy center that works to prevent torture and other severe human-rights abuses around the world by helping survivors hold their perpetrators accountable. CJA represents survivors and their families in actions for redress that call for the application of human-rights standards under U.S. and international law. Thus, its participation will assist this Court in understanding the profound implications of this case.

As recognized by the D.C. Circuit in *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), the Republic of Iraq does not possess

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[1]No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties in No. 08-539 have consented to the filing of this brief and such consents are being lodged herewith.

sovereign immunity in this case. The Respondents, who were subjected to torture by the Republic of Iraq, therefore, have the right to bring their lawsuit pursuant to the state-sponsor-of-terrorism provision of the Foreign Sovereign Immunities Act.

SUMMARY OF ARGUMENT

In 1996, Congress adopted legislation amending the Foreign Sovereign Immunities Act (FSIA) to allow claims against countries that are designated state sponsors of terrorism. 28 U.S.C. § 1605(a)(7). The FSIA eliminated state immunity for several acts—torture, extrajudicial killing, hostage taking, and aircraft sabotage—that are specifically prohibited under international law. In 2003, when this lawsuit was filed, the Republic of Iraq was a designated state sponsor of terrorism. As such, it was subject to the Section 1605(a)(7) waiver of immunity.

In 2008, Congress amended the FSIA through the adoption of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3. Section 1083 of the NDAA replaced 28 U.S.C. § 1605(a)(7) with more detailed provisions but reiterated the key provision that a foreign state "designated as a state sponsor of terrorism at the time" an act of torture, extrajudicial killing,

hostage taking, or aircraft sabotage occurred "shall not be immune" from a suit for damages in the federal courts. *See* 28 U.S.C. § 1605A.

The NDAA also included a provision authorizing the President to waive any provision of Section 1083 of the NDAA with respect to Iraq if he made certain determinations. President Bush subsequently invoked this power by waiving "all provisions of section 1083 with respect to Iraq, and all agencies and instrumentalities thereof." Presidential Determination No. 2008-9, 73 Fed. Reg. 6,571, 6,571 (Jan. 28, 2008).

The Republic of Iraq has asserted that the NDAA and the President's invocation of Section 1083 authority require the dismissal of this case. The decision of the Court of Appeals below, however, that neither the NDAA nor the President's invocation of Section 1083 authority with respect to Iraq deprives the courts of jurisdiction was a straightforward application of statutory-construction principles that should be affirmed.

Principles of statutory construction compel a similar finding with respect to the Emergency Wartime Supplemental Appropriations Act (EWSAA), Pub. L. No. 108-11, 117 Stat. 559, 579 (2003). The Republic of Iraq has also argued that the EWSAA made the state-sponsor-of-terrorism exception to the FSIA inapplicable to Iraq. In *Acree v. Republic of*

Iraq, 370 F.3d 41 (D.C. Cir. 2004), the D.C. Circuit disagreed, holding that Section 1503 of the EWSAA did not apply to the FSIA terrorism exception. As that court held, the EWSAA was designed to provide economic assistance to Iraq and was not meant to address the jurisdiction of the federal courts.

Although these decisions of the Court of Appeals were correctly decided on their own terms, there is an additional reason why they should be affirmed: 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. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

Under international law, victims of torture have a right to seek redress for their injuries. The D.C. Circuit's decisions, which construe the NDAA and EWSAA as continuing to allow victims of torture to seek such redress in the federal courts, are consistent with these principles of international law.

A contrary interpretation of these statutes would bring the United States into conflict with international law. Like the Court of Appeals, this Court should construe the NDAA and EWSAA in a manner that renders them consistent with international law and, accordingly, affirm the decisions below.

ARGUMENT

I. UNDER INTERNATIONAL LAW, VICTIMS OF TORTURE HAVE A RIGHT TO SEEK REDRESS FOR THEIR INJURIES

Few international norms are more firmly established than the prohibition against torture. 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, art. 7, 999 U.N.T.S. 171 (entered into force March 23, 1976); [2] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), art. 2, 1465 U.N.T.S. 85 (entered into force June 26, 1987).[3]

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[2]As of March 18, 2009, there are 164 States Parties to the International Covenant on Civil and Political Rights. The United States has ratified the International Covenant.

[3]As of March 18, 2009, there are 146 States Parties to the Convention against Torture. The United States has ratified the Convention against Torture.

The prohibition against torture is set forth in the 1949 Geneva Conventions, which the United States has ratified.[4] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3, 13, 130, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 3, 32, 147, 75 U.N.T.S. 287 (entered into force Oct. 31, 1950). 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, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953);[5] American Convention on Human Rights, art. 5(2), 1144 U.N.T.S. 123 (entered into force July 18, 1978);[6] African Charter on Human and Peoples' Rights, art. 5, OAU Doc. CAB/LEG/67/3/rev.5 (entered into force Oct. 21,

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[4]As of March 18, 2009, there are 194 States Parties to the 1949 Geneva Conventions. The United States has ratified the Geneva Conventions.

[5]As of March 1, 2009, there are 47 States Parties to the European Convention.

[6]As of March 1, 2009, there are 25 States Parties to the American Convention. The United States has signed (but not ratified) the American Convention.

1986).[7]

Each of these international instruments makes clear that the prohibition against torture is absolute. It allows for no derogation.[8] "No 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." Convention against Torture, art. 2(2).

Attached to the prohibition against torture is a concomitant obligation to ensure that victims obtain redress for their injuries and have an enforceable right to fair and adequate compensation. The Convention against Torture, which has been ratified by the United States, requires states to provide redress for victims of

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[7]As of March 1, 2009, there are 53 States Parties to the African Charter.

[8] 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 (*Case of Lori Berenson Mejia v. Peru*, 2004 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)).

torture. Article 14 provides that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."

The Committee against Torture, which is authorized to monitor and review state compliance with the Convention against Torture, has stated that states have an obligation to provide civil compensation to victims of torture in all cases. In its 2005 report on Canada, for example, the Committee stated that Canada "should review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture." Committee against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusion and Recommendations of the Committee against Torture: Canada*, ¶ 5(f), U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005).

The right of victims to seek redress for their injuries is also recognized in the International Covenant on Civil and Political Rights, which the United States has also ratified. Article 2(3) provides that each State Party to the Covenant undertakes: "(a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,

notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted." *See also* Universal Declaration of Human Rights, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

The right of victims to seek redress for their injuries was set forth in the United Nations 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, which were adopted by the United Nations General Assembly in 2005. G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005). The Basic Principles provide that victims of gross violations of international human-rights law are entitled to "(a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; [and] (c) access to relevant

information concerning violations and reparation mechanisms." *Id*. at ¶ 11.

Pursuant to the Basic Principles, States are obligated to "[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice . . . irrespective of who may ultimately be the bearer of responsibility for the violation." *Id*. at ¶ 3(c). Compensation for victims "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case." *Id*. at ¶ 20. Such damages may include physical or mental harm, lost employment, material damages and loss of earnings, moral damage, and costs required for legal or expert assistance. Other forms of reparation include restitution, rehabilitation, satisfaction, and guarantees of non-repetition. Because the Basic Principles were adopted by the United Nations General Assembly, they offer another indication of the status of international law.

U.S. law recognizes the right of torture victims to seek redress for their injuries. In 1991, Congress adopted the Torture Victim Protection Act to comply with the Convention against Torture, which was signed by the United States in 1988 and ratified in 1994. *See* 28 U.S.C. § 1350 (note). The Torture Victim Protection Act 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) (emphasis added). The Torture Victim Protection Act's definition of torture is based on the Convention against Torture.

Both the House and Senate reports on the statute 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, states that the Convention against Torture obligates states "to provide means of civil redress to victims of torture." H.R. Rep. No. 102-367, at 3. Access in our courts to judicial redress is important because

> [j]udicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact. The Torture Victim Protection Act would respond to this situation.

Id. (citation omitted).

The state-sponsor-of-terrorism exception to

foreign sovereign immunity in the FSIA was also adopted to provide victims with a right of redress. The FSIA removes state immunity from civil liability for torture, extrajudicial killing, hostage taking, and aircraft sabotage. Each of these acts is specifically prohibited by international law. Torture is defined in the FSIA by reference to the TVPA, which based its definition of torture on the Convention against Torture. 28 U.S.C. § 1605A(h)(7).[9] Thus, the decision to waive state immunity for acts of torture was based on the prohibited nature of torture under international law and the right of victims to seek redress for such acts.

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.

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[9]Hostage taking and aircraft sabotage are defined in the FSIA by reference to treaties that the United States has ratified, further attesting to the international law foundations of the FSIA exceptions. *See* 28 U.S.C. § 1605A(h)(1) and (2).

II. U.S. LAW SHOULD BE INTERPRETED IN A MANNER CONSISTENT WITH INTERNATIONAL LAW WHENEVER POSSIBLE

This Court has 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.[10] This doctrine applies to both customary international law and treaties. Indeed, U.S. courts have demanded an expression of clear intent before they will conclude that Congress intended to supersede international law in any of its statutes. *Restatement (Third) of Foreign Relations Law of the United States* § 115(1)(a) (1987); *see also* Louis Henkin, *Foreign Affairs and the U.S. Constitution* 486 (2d ed. 1996). International law is not to be used as a means for overriding domestic law; rather, courts are urged to harmonize domestic and international law whenever possible.

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[10]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. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936); *Restatement (Third) of Foreign Relations Law of the United States* § 114 rpt. n.2.

This Court's decision in *Talbot v. Seeman*, 5 U.S. 1 (1801), represents, perhaps, 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 which this 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. In February 1800, Congress adopted the Non-Intercourse Act to suspend all commerce between the United States and France. In July 1800, Captain Alexander Murray of the U.S. frigate Constellation captured the schooner Charming Betsy while it was bound for the island of Guadalupe, a French dependency. At the time of its capture, the Charming Betsy was owned by a Danish burgher who had been born in the United States. Alleging a violation of the Non-Intercourse Act, Captain Murray confiscated the cargo and the vessel. The district court declared the seizure illegal and the court of appeals affirmed. Before this Court,

the principal issue was whether "the Charming Betsy was subject to seizure and condemnation for having violated a law of the United States?" *Id.* at 118.

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 in view in construing the act now under consideration.

Id. In light of these principles, Chief Justice Marshall considered whether the Non-Intercourse Act applied to neutral vessels.

> If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been

> plainly expressed; and if it was designed to prohibit the sale of American vessels to neutrals, the words placing the forfeiture on the intent with which the sale was made ought not to have been inserted.

Id. at 119. Finding no clear indication that Congress intended the Non-Intercourse Act to abrogate norms of international law, the Court concluded that the Charming Betsy, as the property of a foreign citizen, was not forfeitable even though it was employed in carrying on trade and commerce with a French island.

In *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), this Court considered the extraterritorial reach of the Sherman Act and whether it violated customary international law. While the majority opinion did not explicitly address the *Charming Betsy* doctrine, Justice Scalia acknowledged and affirmed its relevance in his dissenting opinion, which was joined by Justices O'Connor, Kennedy, and Thomas:

> [The *Charming Betsy* doctrine] is relevant to determining the substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have

> exceeded those customary international law limits on jurisdiction to prescribe.

Id. at 815 (citation omitted). Accordingly, Justice Scalia reasoned that "even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Id.*

Although this doctrine of statutory construction goes back virtually to the founding of our nation, it is neither an historical anomaly nor an isolated extrapolation. To the contrary, it is a long-standing doctrine of statutory construction that has been affirmed by this Court in numerous decisions. *See, e.g.*, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993); *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968); *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).

Significantly, the *Charming Betsy* doctrine also forms the basis of the constitutional-avoidance doctrine of statutory construction, which holds that

> where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, and has for so long been applied by this Court that it is beyond debate.

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council, 485 U.S. 568, 575 (1988) (citations omitted); *see also* Justice Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol. 35, 38 (1997) (describing Chief Justice Marshall's opinion in *The Charming Betsy* as an "early exposition of interpretive principles that would define our jurisprudence").

The *Charming Betsy* doctrine of statutory construction applies to both customary international law and treaties. In *Chew Heong v. United States*, 112 U.S. 536 (1884), the Court considered whether immigration restrictions adopted by Congress in the Chinese Restriction

Act were inconsistent with a treaty between the United States and China. In 1880, the United States and China entered into the treaty, which regulated the rights of Chinese nationals to enter and remain in the United States. In 1882, Congress adopted the Chinese Restriction Act, which placed certain restrictions on the entry of "Chinese laborers." An action for deportation of one such laborer required the Court to determine whether Congress had intended to violate the "stipulations of a treaty, so recently made with the government of another country." *Id*. at 539.

Writing for the Court, Justice Harlan emphasized the importance of treaties and the profound implications that arise when a country violates an international obligation:

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question

was enacted.

Id. at 540. Reviewing the treaty language and subsequent federal legislation, the Court refused to override the treaty absent explicit congressional authorization.

> When the act of 1882 was passed, Congress was aware of the obligation this government had recently assumed, by solemn treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the treaty, and without so declaring in unmistakable terms, to withdraw that privilege by the general words of the first and second sections of that act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer.

Id. at 550.

In *Weinberger v. Rossi*, 456 U.S. 25 (1982), this Court considered whether a 1971 federal statute superseded an executive agreement entered into between the United States and the Philippines, the 1968 Base Labor Agreement (BLA). The statute prohibited employment

discrimination at military installations except where a "treaty" provided otherwise. The Court confronted the question of whether Congress had intended the statute's exception for treaties to encompass executive agreements such as the BLA.

Writing for a unanimous Court, then-Justice Rehnquist concluded that the treaty exception extended to executive agreements and, therefore, the discrimination exemption applied to the BLA. Because the statute implicated this international agreement, Justice Rehnquist recognized the role of the *Charming Betsy* doctrine. Accordingly, "some affirmative expression of congressional intent to abrogate the United States' international obligations is required." *Id.* at 32.

Reviewing the legislative history of the affected statute, the Court found no "support whatsoever for the conclusion that Congress intended in some way to limit the President's use of international agreements that may discriminate against American citizens who seek employment at United States military bases overseas." *Id.* at 33. Accordingly, the Court held that the international agreements were not superseded by the subsequent federal legislation.

In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1983), this 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 (PVMA) in 1978. Adopted in 1929, the Warsaw Convention established a limit on air-carrier liability for lost cargo, which was a gold-based liability regime. The United States ratified the Warsaw Convention in 1934, thereby accepting that regime for calculating air-carrier liability. In 1978, however, Congress repealed the PVMA, which had set an official price for gold in the United States. The Court was thus asked to "determine whether the 1978 repeal of legislation setting an 'official' price of gold in the United States renders the Convention's gold-based liability limit unenforceable in this country." *Id*. at 245.

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." *Id*. at 252. Justice O'Connor found it significant that Congress had not specifically referenced the Warsaw Convention in its deliberations concerning the Par Value Modification Act.[11]

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[11] While Justice Stevens dissented from the Court's ruling, he did not disagree with Justice O'Connor's analysis of the *Charming Betsy* doctrine. Indeed, Justice

"Legislative silence is not sufficient to abrogate a treaty. Neither the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the Convention." *Id*. (citation omitted). Accordingly, the Court concluded that the treaty provisions remained enforceable in the United States.

This doctrine of statutory construction is based, in part, upon comity, a respect for other nations, and the law which binds the international community. It is also influenced

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Stevens reiterated the importance of ensuring that treaty interpretation in domestic courts does not violate the terms of the treaty. "Constructions of treaties yielding parochial variations in their implementation are anathema to the *raison d'etre* of treaties, and hence to the rules of construction applicable to them." *Trans World Airlines*, 466 U.S. at 263 (Stevens, J. dissenting); *see also Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended."); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902).

by considerations of foreign policy. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963), the Court concluded that the *Charming Betsy* doctrine required it to construe the National Labor Relations Act consistent with a "well-established rule of international law." *Id.* at 21; *see also Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957). To do otherwise, the Court found, would have negative foreign policy implications.

Finally, the *Charming Betsy* doctrine is guided by concern for the separation of powers and, in particular, respect for the constitutional roles of the Executive and Legislative branches of government in formulating foreign policy. 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. *Chew Heong*, 112 U.S. at 540.

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. Moreover, 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).

Under international law, victims of torture have a right to seek redress for their injuries. The United States has recognized this right through its ratification of the Convention against Torture as well as the International Covenant on Civil and Political Rights. Indeed, this right of redress for torture victims is further recognized under customary international law.

The FSIA state sponsor of terrorism exception effectuates the right of torture victims to seek redress for their horrific injuries. There is no indication that Congress specifically sought to abrogate the international norms underpinning the FSIA exception when it enacted the EWSAA or NDAA. The D.C. Circuit's interpretation of the NDAA in *Simon v. Republic of Iraq* is therefore consistent with the *Charming Betsy* doctrine. The D.C. Circuit's interpretation of the EWSAA in *Acree v. Republic of Iraq* is likewise consistent with the doctrine. These decisions should, therefore, be affirmed.

CONCLUSION

International law holds that victims of torture should have the right to seek redress for their injuries in U.S. courts. The D.C. Circuit's decisions are consistent with international law and should be affirmed

March 25, 2009 Respectfully Submitted

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