

NOTE

IEEPA's Override Authority: Potential for a Violation of the Geneva Conventions' Right to Access for Humanitarian Organizations?

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INTRODUCTION

Armed conflict creates the need for humanitarian aid. International law creates the mechanisms by which parties provide humanitarian aid and creates obligations in connection thereto. The 1949 Geneva Conventions¹ (the

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1. Four documents make up the 1949 Geneva Conventions, which govern the treatment of certain groups during armed conflict. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 [hereinafter Third Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Convention]; collectively, the 1949 Geneva Conventions (the "Geneva Conventions" or the "Conventions"). Although the details differ depending on the category of non-combatant, a number of articles are consistent from Convention to Convention and require the same level of care from parties to the conflict. These include the first three articles of each of the four Conventions [hereinafter Common Article 1, Common Article 2 and

“Conventions”) form the humanitarian backdrop against which war is waged. The Conventions establish an impartiality standard in that they grant to humanitarian organizations the right of access to non-combatants during armed conflict.² In the United States, the International Emergency Economic Powers Act (“IEEPA”)³ establishes a Presidential determination standard for humanitarian organizations acting in situations of armed conflict that allows the President to restrict and prohibit humanitarian organizations’ activities without considering their impartiality.⁴ Current circumstances present the need for immediate impartial humanitarian aid in armed conflicts to which the United States is a party.⁵ Contemporaneous use of IEEPA creates an imminent risk of a violation of the Conventions.⁶

The Conventions create a guarantee of protection and care to non-combatant military and civilian participants in an armed conflict⁷ and a right of access for impartial humanitarian organizations in order to facilitate that protection and care.⁸ Common Article 3 states that an obligation exists to provide care.⁹ This obligation to provide care has been acknowledged to

Common Article 3) and the ninth article of the First, Second and Third Conventions, which appears as the tenth article of the Fourth Convention [hereinafter Common Article 9/10].

2. This right is given only to humanitarian organizations that are impartial and do not discriminate among those whom they aid. *See* Common Article 3, *supra* note 1; *see also infra* Part I.A.

3. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1707 (2000).

4. *Id.* § 1702.

5. At the writing of this Note, the United States has a military presence in Afghanistan and in Iraq. *See* 50 U.S.C. § 1541 (Supp. II 2002) (authorizing the use of force in Afghanistan and Iraq). Both countries are receiving humanitarian aid from the United States government and various aid organizations and each country is a party to the Conventions. *See Convention de Genève pour l’amélioration du sort des blessés et des maladies dans les forces armées en campagne, Champ d’application des quatre conventions*, 26, 28 (June 1, 2004) available at <http://www.admin.ch/ch/f/rs/i5/0.518.12.fr.pdf> [hereinafter *Champ d’application*], listing signatories to the Conventions as of June 1, 2004 as placed on deposit at the Département Fédéral des Affaires Étrangères, Switzerland.

6. The U.S. ratified the Conventions with no relevant reservations. *See* 18 U.S.C. § 2441 (2000) (including within war crimes any violation of Common Article 3). The United States also implemented the relevant portions of the Conventions. *See Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 164–65 (D.D.C. 2004), *rev’d*, 415 F.3d 33 (D.C. Cir. 2005), *rev’d and remanded*, 2006 WL 1764793 (U.S. June 29, 2006); *United States v. Noriega*, 808 F. Supp. 791, 797 n.8 (S.D. Fla. 1992) (“Article 129 of Geneva III is clearly non-self-executing, as it calls for implementing legislation; however, the remainder of the provisions do not expressly or impliedly require any action by Congress, other than ratification by the Senate, to take effect.”).

7. *See* Common Article 3, *supra* note 1; Common Article 9/10, *supra* note 1.

8. *Id.*; *see also* FRANCOISE BOUCHET-SAULNIER, THE PRACTICAL GUIDE TO HUMANITARIAN LAW 321 (Laura Brav ed. & trans., 2002) (“International humanitarian law clearly recognises the right of the International Committee of the Red Cross (“ICRC”) and any other impartial humanitarian body to undertake relief and protection operations, in conformity with the applicable conventions.”).

9. *See* Common Article 3, *supra* note 1 (“The wounded and sick shall be collected and cared for”); COMMENTARY IV: GENEVA CONVENTIONS RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS OF WAR IN TIME OF WAR 40 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY IV] (“[Common Article 3] expresses a categorical imperative. . .”). The Commentaries, drawn up and published by the ICRC in the years immediately following 1949, as a result of its role in the Conventions’ creation, negotiation and drafting, are the definitive interpretation of the Conventions. *See Noriega*, 808 F. Supp. at 795 n.6.

allocate to humanitarian organizations the right to provide this care.¹⁰ Any party to a conflict that is also a signatory¹¹ to the Conventions (a “Party” under the Conventions’ terminology)¹² must ensure that it fulfills the guarantee of protection and care and that these organizations have access to non-combatants in need of aid.¹³ As a signatory, the United States bears this obligation whatever the other party’s or parties’ status is with respect to the Conventions.¹⁴

The Conventions specify that impartial humanitarian organizations have both a general right of access to aid non-combatants,¹⁵ and specific duties to ensure and implement the provision of goods such as food, medical supplies, and other articles necessary for the preservation of life.¹⁶ The duty arises in part when the Parties delegate their obligations¹⁷ either by formal agreement or by default, and in part when an organization exercises its right

10. See *supra* note 8; COMMENTARY I: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 58 (Jean S. Pictet ed., 1952) [hereinafter COMMENTARY I] (noting that, unlike the limited access available to the ICRC in earlier wars, Common Article 3 “has placed matters on a different footing, an impartial humanitarian organization now being legally entitled to offer its services.”).

11. The Conventions do not define the term “Party,” but the commentaries to each of the Conventions describe the term as including parties to a conflict, and other neutral, allied or enemy nations involved. COMMENTARY III: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 26 (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY III].

12. At the time of writing, 190 countries, including Iraq, Iran, Afghanistan and North Korea, were signatories (“High Contracting Parties”) to the Conventions. *Champ d’application, supra* note 5.

13. See *supra* notes 10 and 11.

14. Common Article 2 reads in relevant part:

[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

....

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Common Article 2, *supra* note 1. Furthermore:

[The Geneva Conventions] are coming to be regarded less and less as contracts concluded on a basis of reciprocity in the national interests of the parties and more and more as a solemn affirmation of principles respected for their own sake, a series of unconditional engagements on the part of each of the Contracting Parties *vis-à-vis* the others.

COMMENTARY III, *supra* note 11, at 20. Where a party is a non-signatory and has not accepted and applied the provisions of the Conventions pursuant to Common Article 2, *supra* note 1, customary international law will deem that the Conventions apply. See The Secretary General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), ¶ 35, U.N. Doc. S/25704 (May 3, 1993) (“The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 . . .”).

15. See Common Article 3, *supra* note 1; Common Article 9/10, *supra* note 1.

16. See, e.g., Third Convention, *supra* note 1, art. 73; Fourth Convention, *supra* note 1, arts. 23, 55, 59, 61.

17. See *supra* note 15.

to access which, once exercised, results in an obligation to comply with the Conventions' demands.¹⁸ Humanitarian organizations subject to the United States' jurisdiction¹⁹ routinely export items in connection with their operations from the United States.²⁰ These organizations also use donated funds to purchase goods within the zone of conflict.²¹

The President can use IEEPA to broadly limit these activities, restricting humanitarian organizations and inhibiting the United States' performance of its obligations under the Conventions.²² Congress passed IEEPA in 1977 to grant to the President broad authority to prohibit or otherwise restrict monetary and other property transactions involving a foreign person during times of national emergency and in similar situations.²³ Humanitarian donations of goods are exempt from this authority.²⁴ Congress delegated to the President

18. When a Party to a conflict is unable to fulfill its obligations under the Fourth Convention, these duties are delegated to a Protecting Power, often an impartial humanitarian organization. *See* Fourth Convention, *supra* note 1, art. 11; COMM. ON FOREIGN RELATIONS, GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS, S. EXEC. REP. NO. 84-9, at 6 (1955). These delegable obligations include the provision of aid. *See* Fourth Convention, *supra* note 1, art. 61. Other international treaties create similar obligations for humanitarian organizations. *See, e.g.*, Int'l Comm. of the Red Cross, *Report on the Activity of the International Committee of the Red Cross for the Indemnification of Former Allied Prisoners of War in Japanese Hands, Article 16 of the Peace Treaty of 8 September 1951 Between the Allied Powers and Japan* 5 (1971) (equating the ICRC's role thereunder to its role under the Conventions, and describing the ICRC's "responsibilities" and "mandate").

19. IEEPA applies to "donations, by persons subject to the jurisdiction of the United States." 50 U.S.C. § 1702(b)(2). For an individual's charitable donations to be deductible for purposes of federal and state taxes, the recipient organization must comply with Internal Revenue Code section 170(c)(2)(A), which requires incorporation in a U.S. state and thus creates U.S. jurisdiction over both the donor and the recipient organization. *See* BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 796 (7th ed. 1998). Donations made by U.S. persons to an organization outside of United States jurisdiction where a subsequent transfer of the articles could also fall within IEEPA, depending on how many degrees of separation the President deems applicable. *See* Peter L. Fitzgerald, *Hidden Dangers in the E-Commerce Data Mine: Governmental Customer and Trading Partner Screening Requirements*, 35 INT'L LAW 47, 52 (2001) (discussing the reach of IEEPA and similar prohibitions by stating that "those who engage in impermissible dealings with blacklisted companies may, in turn, find themselves blacklisted").

20. For example, Médecins Sans Frontières / Doctors Without Borders ("MSF") regularly ships food and medical supplies to countries within which it works, including Iraq and Afghanistan. *See Independent Aid in Iraq Virtually Impossible*, MÉDECINS SANS FRONTIÈRES/DOCTORS WITHOUT BORDERS, Apr. 23, 2004, <http://www.doctorswithoutborders.org/news/2004/04-23-2004.efm>; Press Release, Médecins Sans Frontiers/Doctors Without Borders, Alarming Food Crisis in Northern Afghanistan (Feb. 21, 2002), <http://www.msf.org>.

21. Potable water is one of the articles most likely to be sourced within a zone of conflict. *See* Oxfam, *What We Do: Water and Sanitation*, http://www.oxfam.org.uk/what_we_do/emergencies/how_we_work/water_sanitation.htm (last visited Oct. 22, 2005); CARE, *CARE International in Sudan*, http://www.careinternational.org.uk/cares_work/where/sudan/ (last visited Oct. 22, 2005).

22. *See* 50 U.S.C. § 1702(b)(2).

23. *See* H.R. Res. 7738, 95th Cong. § 202 (1977) (enacted) (authority granted to deal with "unusual and extraordinary threat, which has its source in whole or in substantial part outside the United States, to the national security, foreign policy or economy of the United States"); *see also id.* § 203(a) (authorizing the President to prescribe regulations on transactions pursuant to § 202).

24. The statute reads, in relevant part:

the ability to override the exemption under certain circumstances, such as where the President determines the donations are in conflict with national security, involve coercion, or would endanger U.S. military.²⁵ The exemption is intended to balance individual donors' interests with those of the government during a time of emergency.²⁶ The override authority grants such wide discretion to the President to place prohibitions or restrictions on humanitarian aid that the safety net created by the Conventions can be erased.²⁷ IEEPA does not require that the President satisfy any specific independent criteria in order to override²⁸ as long as he has declared a national emergency.²⁹ When the national emergency coincides with an armed conflict involving the United States, the President's use of the override

The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly . . .

(2) donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under section 1701 of this title, (B) are in response to coercion against the proposed recipient or donor, or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances; . . .

50 U.S.C. § 1702(b).

25. *Id.*

26. *See* S. REP. NO. 95-466, at 5 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4540, 4544 (“The exercise of emergency controls would be restricted in order to enable U.S. persons to make humanitarian contributions in accordance with their consciences . . .”).

27. 50 U.S.C. § 1702(b)(2). Since the terrorist attacks of September 11, 2001, courts have referred more frequently to the override section of IEEPA. For instance, *Global Relief Foundation, Inc. v. O'Neill*, 207 F. Supp. 2d 779 (N.D. Ill. 2002) states that:

Congress did not include any sort of temporal or geographic limitation on the President's ability to block humanitarian aid. There is no statement that the President can only block the distribution of international aid or that he can only block aid to specific foreign persons in specified foreign locations. Instead, Congress enacted broad, sweeping language which authorized the President to block any and all humanitarian efforts by the targeted entity so long as he declares that the provision of such relief would jeopardize his ability to deal with a national emergency.

Id. at 795. It is relevant that the *Global Relief* court was commenting in a case regarding an Islamic charity in the wake of the September 11, 2001 attacks. The court's wide reading of the President's IEEPA powers in this case is likely to be used as precedent in other situations even only tangentially related to September 11.

28. *See* S. REP. NO. 95-466, at 5 (noting the President's authority to prohibit any donations of humanitarian articles which could “subvert, contravene, or preclude effective exercise of emergency authority”). It is only the President who must determine that the conditions are satisfied. 50 U.S.C. § 1702(b)(2)(A)-(C).

29. The relevant statute states:

Any authority granted to the President by § 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

50 U.S.C. § 1701(a)(1).

authority is both politically detrimental and a potential violation of the United States' international obligations.³⁰

The United States' current military actions threaten the guarantees of the Conventions. The invasion of Afghanistan in October 2001, the war in Iraq beginning in early 2003, and the ongoing and imprecise war against terrorism each requires adherence to the humanitarian rules of the Conventions.³¹ The George W. Bush administration has stated that it considers both Iraq and Afghanistan to be supporting terrorist activities,³² creating a likelihood of broad use of the override authority in each conflict. Neither country has sufficient resources to maintain its population.³³ The Conventions' minimum requirements for humane treatment require provision of certain goods such as medical supplies that often are not available in the location of a conflict.³⁴ An impartial humanitarian organization carrying out its obligation to ensure the rights of a non-combatant needs to furnish goods from outside the zone of conflict. When the organization brings these needed articles from the United States the supplies come under the purview of IEEPA and therefore are subject to the override authority.³⁵

For example, consider a United States charity that provided food, medical care and tents for displaced persons in Iraq during the period of active military activity between the United States and Iraq. The Conventions apply to this situation of armed conflict.³⁶ The organization, therefore, has a right

30. A violation of the Conventions by the United States might be used by other countries as justification for ignoring the Conventions when the United States' interest in upholding humanitarian law is greater; for example, if armed conflict were to exist on U.S. territory. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 210–11 (1996) (“Particularly as regards multilateral treaties of general applicability . . . inconsistent legislation by Congress not only violates international obligations but ruptures international consensus which the President-and-Senate helped achieve.”).

31. The Conventions apply to all international armed conflicts. Common Article 2, *supra* note 1 (“[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . .”).

32. *See* President George W. Bush, Address to the Joint Session of Congress (Sept. 20, 2001) (transcript available at 2001 WL 1104160) (“Our war on terror begins with Al Qaeda”); President George W. Bush, Weekly Radio Address (Mar. 22, 2003) (transcript available at 2003 WL1441066) (condemning the Taliban regime in Afghanistan for its support of Al Qaeda, noting Al Qaeda’s control over the Taliban, and stating that “our mission is clear . . . to end Saddam Hussein’s support for terrorism”).

33. *See* Open Borders to Iraqis, CNN.com, Mar. 19, 2003, <http://www.cnn.com/2003/WORLD/meast/03/19/sprj.iraq.aid/index.html> (“Sixty percent of Iraqis depend entirely on food rations imported under the U.N.’s oil-for-food programs, and household supplies could run out within weeks if distributions stop.”); Press Release, Medecins Sans Frontieres/Doctors Without Borders, *Alarming food crisis in northern Afghanistan*, *supra* note 20.

34. *See supra* note 20. The Conventions include an obligation to provide food and medical supplies, *see* Fourth Convention, *supra* note 1, art. 55.

35. *See* 50 U.S.C. § 1702(b)(2) (2000); *see also* Veterans Peace Convoy, Inc. v. Schultz, 722 F. Supp. 1425, 1432 (S.D. Tex. 1988) (holding that § 1702(b)(2) covers articles “which the donor intends to be used to relieve human suffering if the articles can reasonably be expected to serve that purpose”).

36. *See supra* note 31 and accompanying text.

of access to all non-combatant Iraqis and certain obligations to provide aid³⁷ as long as its actions are impartial. The frequent acts of terrorism³⁸ combined with the significant humanitarian needs in Iraq raise the distinct possibility that members of terrorist organizations need aid. It is unlikely that the organization could both satisfy the requirement of impartiality—i.e., provide food and care without discrimination to those in need—and at the same time avoid aiding those whom the United States might deem terrorists. This situation can trigger,³⁹ and has triggered,⁴⁰ application of the override authority.

Executive Order 13,224,⁴¹ issued on September 23, 2001, is a recent use of the override authority in connection with an armed conflict to which the United States is a party, and provides an example of IEEPA's breadth. The President attached to this Order a list of entities affirmatively subject to the prohibitions and restrictions authorized by Section 1702(b)(2).⁴² The list includes any persons who provide support to or associate with the persons listed or otherwise designated in the Order.⁴³ The Order permits the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to add to the list at his discretion.⁴⁴ The Order also includes a specific reference to humanitarian donations and prohibits donations to any person designated by, or later included within, the Order.⁴⁵ The Order applies in all situations of armed conflict, including Afghanistan and Iraq at the writing of this Note, and restricts humanitarian aid with such

37. See *supra* notes 15–18 and accompanying text.

38. In October 2004, the United Nations Al Qaeda and Taliban Sanctions Committee added the al-Zarqawi network to the list of terrorist organizations subject to Security Council Resolution 1267. Press Release, Security Council, Security Council Committee Adds One Entity to Al Qaeda Section of Consolidated List, U.N. Dec. S/8219 (October 18, 2004).

39. 50 U.S.C. § 1702(b)(2) (the override authority applies to “donations . . . of articles such as food, clothing and medicine”).

40. Exec. Order No. 13,224, 3 C.F.R. § 786 (2001), *reprinted as amended* in 50 U.S.C.A. § 1701 (West 2005). The order was issued pursuant to IEEPA following Presidential findings that an increased risk of terrorism existed in the United States which merited heightened regulation of financial and other transactions, including donations of the articles listed in § 1702(b)(2). *Id.* Executive Order 13,224 was amended in 2005 to broaden the scope of the override to include donations “by,” “or for the benefit of” persons included on the list, where Executive Order 13,224 had originally included only donations “to” such persons. Exec. Order 13,372, 70 Fed. Reg. 8499 (Feb. 18, 2005). During 2003 and using similar language, President Bush invoked the override authority in connection with Iraq, Exec. Order No. 13,315, 68 Fed. Reg. 52,315 (Sept. 3, 2003), *reprinted* in 50 U.S.C.A. § 1701 (West 2005), Burma, Exec. Order No. 13,310, 68 Fed. Reg. 44,853 (July 30, 2003), *reprinted* in 50 U.S.C.A. § 1701 (West 2005), and the former Yugoslavia, Exec. Order No. 13,304, 68 Fed. Reg. 32,315 (May 29, 2003), *reprinted* in 50 U.S.C.A. § 1701 (West 2005). President Clinton invoked the override authority in 1995 in connection with negotiations regarding the peace process in the Middle East. Exec. Order No. 12,947, 60 Fed. Reg. 5,079 (Jan. 25, 1995), *reprinted* in 50 U.S.C.A. § 1701 (2000).

41. Exec. Order No. 13,224.

42. Exec. Order No. 13,224, at annex.

43. *Id.*

44. *Id.*

45. *Id.*

breadth that the United States could be in breach of its obligations under the Conventions.⁴⁶

This Note argues that, should the President exercise his override authority to prohibit or restrict the donation of humanitarian articles during an armed conflict involving the United States, the resulting prohibition or restriction would cause the United States to violate its obligations under the Conventions. This Note does not assert that the United States should not have the ability to put in place controls to prevent terrorists from benefiting from donations of funds and other humanitarian items;⁴⁷ instead, it asserts that domestic law must tread as lightly and narrowly as possible where a widely accepted multilateral treaty exists and that domestic law ought not to override humanitarian law⁴⁸ under the later-in-time rule unless absolutely necessary. IEEPA's breadth permits, and the war on terror and related conflicts are likely to encourage, restrictions and prohibitions that disrupt the balance that the Conventions demand. Part I contends that when the President exercises the full power granted to him in the override authority, such action violates international law because the restrictions permitted by IEEPA conflict with humanitarian organizations' right of access under the Conventions. Part II discusses the implications of a violation of the Conventions on both the international and domestic planes. Part II demonstrates that an analysis under the *Charming Betsy*⁴⁹ doctrine does not necessarily dispose of the question, and that Congress's established ability to override treaties under the later-in-time doctrine is inapplicable in this case, where IEEPA's lack of specificity creates legal difficulties and political dilemmas for the United States.

I. IEEPA AUTHORIZES A BREACH OF INTERNATIONAL HUMANITARIAN LAW

Given the range of authority granted to the President under IEEPA, a Presidential nullification of the humanitarian donation exemption can vio-

46. The Order was issued to help combat terrorist activities, and therefore applies to all aspects of the "war on terror," and individually to the United States' presence in Iraq and Afghanistan. Exec. Order No. 13,224 (listing in the preamble the "the continuing and immediate threat of further attacks on United States nationals or the United States" as the basis for the order).

47. See *The Role of Charities and NGO's in the Financing of Terrorist Activities: Hearing Before the Subcomm. on Int'l Trade and Fin. of the S. Comm. on Banking, Hous. and Urban Affairs*, 107th Cong. 3 (2002) [hereinafter *Role of Charities and NGO's*] (statement of Sen. Evan Bayh) ("[L]egitimate charities have been exploited when their field operations have been infiltrated by terrorist elements, particularly in areas of conflict. . . . Today's hearing will examine how terrorist groups exploit charities and NGOs and ways to curtail the flow of money to these organizations while preserving humanitarian aid.").

48. Humanitarian law is generally considered to be the set of rules that govern armed conflicts. See, e.g., M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, in 1 *International Criminal Law* 617, 617 (M. Cherif Bassiouni ed., 2d ed., 1999) (defining humanitarian law as "that body of norms that protects certain categories of persons and property and prohibits attacks against them . . . be they of an international or non-international character:").

49. *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other construction remains . . .").

late the Conventions by improperly limiting the activities of impartial humanitarian organizations during armed conflict. Section I.A argues that despite the absence of a definition of “impartial” in the text, it is possible and necessary to distinguish between organizations that have rights and obligations under the Conventions and those that can be validly restricted. It then discusses the role of impartial humanitarian organizations within the Conventions, and concludes that such organizations have a right to access, a right to deliver aid, and, when they have exercised those rights, obligations toward each non-combatant during armed conflicts. Section I.B provides examples that illustrate the potential for conflict between the right of access granted to impartial humanitarian organizations by the Conventions and the implementation of the override authority. It concludes that IEEPA’s Presidential determination standard improperly limits the activities of these organizations.

A. Impartiality and the Rights of Impartial Humanitarian Organizations under the Conventions

The Conventions’ text sets forth the minimum aid requirements with which Parties must comply.⁵⁰ Parties must provide certain levels of care and protection without discrimination to non-combatants in situations of armed conflict.⁵¹ Per the Conventions’ text and the Commentaries as their definitive interpretation,⁵² impartial humanitarian organizations play a significant role

50. COMMENTARY IV, *supra* note 9, at 37 (“[T]he applicable provisions [of Common Article 3] represent a compulsory minimum.”). The Conventions are a complement to the Hague Conventions of 1899 and 1907, which codify the laws and customs of war. *See* Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403 [hereinafter *Laws and Customs of War of 1899*]; Convention with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. The predecessor 1864 Geneva Convention stated that wounded or sick combatants, to whatever nation they belong, shall be collected and cared for. Convention internationale au sujet des militaires blessés sur les champs de bataille, art. 6, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377. The same philosophy underlies the 1949 Conventions, promulgated in reaction to the conduct of Nazi Germany and Japan and the conditions in which many of the thirty eight million combatant and non-combatant casualties of World War II lost their lives. *See* David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE W. RES. J. INT’L. L. 37 (1979).

51. *See, e.g.*, Third Convention, *supra* note 1, art. 16 (“[A]ll prisoners of war shall be treated alike . . . without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria”); Fourth Convention, *supra* note 1, art. 13 (“The provisions . . . cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion.”). Non-discrimination can be taken as a proxy for impartiality, given the text of the non-discrimination clauses and the interpretation of impartiality as discussed herein. The Conventions do not define impartiality explicitly, but do provide direction for the international community to define humanitarian organizations to which the Conventions apply. Although the International Court of Justice (“ICJ”) has not yet addressed the definition of impartiality, other courts have cited the United Nations (“UN”) as an example. *See* *Cyprus v. Turkey*, App. No. 6780/74 and 6950/75, 2 Eur. Comm’n H.R. Dec. & Rep. 125 (“a neutral and impartial organization such as the UN”). The Commentaries to the Conventions address impartiality more specifically, stating that humanitarian organizations “must not be affected by any political or military consideration,” and yet “it should be noted that impartiality does not necessarily mean mathematical equality.” COMMENTARY I, *supra* note 10.

52. *See supra* note 11.

in the implementation of and adherence to these requirements.⁵³ There is an omnipresent danger that Parties will tend toward their inherent biases, and therefore the Conventions give impartial participants a role. Once involved, these impartial participants have an obligation to act in order to ensure compliance with the Conventions.⁵⁴ It is important to ascertain a clear definition of “impartial” because terrorists have the ability to obtain funding through organizations that, while superficially charitable, do not act in an impartial manner and should not benefit from the Conventions’ rights of access.⁵⁵

Both the Conventions and IEEPA protect against the risk of terrorist funding, but IEEPA goes beyond what is necessary and limits legitimate and necessary aid. Only when an organization meets the impartiality standard do the Convention rights and consequent obligations attach.⁵⁶ Humanitarian organizations are conscious of the need to adhere to the impartiality standard in order to ensure their ability to insist on a right of access.⁵⁷ Thus,

53. The general right of access to aid the four categories of non-combatants and the obligations attached thereto extend not just to ICRC but also to other “impartial humanitarian bod[ies].” See Common Article 3, *supra* note 1; Common Article 9/10, *supra* note 1. The official commentaries of the Conventions repeatedly refer to other impartial organizations, compelling the conclusion that the ICRC is not the only entity that can fill this role. See COMMENTARY III, *supra* note 11, at 35 (“[T]he wording finally adopted . . . provides a legal basis for interventions by the International Committee of the Red Cross or any other impartial humanitarian organization” (emphasis added)). One example of an impartial humanitarian organization is OXFAM, which is “dedicated to fighting poverty and related injustice around the world.” Oxfam International, Who We Are, http://www.oxfam.org/eng/about_who.htm (last viewed Oct. 22, 2005). Other examples are CARE and MSF, the latter of which was established with the objective of “providing medical aid wherever needed, regardless of race, religion, politics or sex.” MSF, <http://www.msf.org> (last viewed Oct. 22, 2005).

54. See COMMENTARY I, *supra* note 10; see also Mary Ellen O’Connell, *Humanitarian Assistance in Non-International Armed Conflict: The Fourth Wave of Rights, Duties and Remedies*, 31 ISR. YEARBOOK ON HUM. RTS., 183, 183 (2002) (“[A]id, when offered by the State, seldom comes without strings. . . . Usually governments’ concerns are the same as those of the NGOs. There are many cases, though, when the State’s agenda is at odds with basic humanitarian beliefs.”).

55. See *supra* note 47.

56. All of these rights are enforceable against the High Contracting Parties. See Common Article 1, *supra* note 1; see also COMMENTARY I, *supra* note 10, at 26 (“[I]n the event of a Power failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should endeavor to bring it back to an attitude of respect for the Convention.”). Although the obligation to comply with a treaty is implicit for the nations that have ratified it, see Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 1155 U.N.T.S. 331 (“*Pacta sunt servanda*: Every treaty in force is binding upon the Parties to it and must be performed by them in good faith”), the reiteration of this principle in the opening article of the Conventions underscores the weight of the obligations. See BOUCHET-SAULNIER, *supra* note 8, at 344. The question of standing is beyond the scope of this Note. While some might argue that the humanitarian organizations’ right is worthless without a remedy, such an argument fails because the Conventions allow a remedy, see Fourth Convention, *supra* note 1, art. 146 (obligating the Parties to enact legislation and to otherwise suppress violations of the Conventions), and U.S. courts have intimated that they would recognize such a remedy. See *United States v. Noriega*, 808 F. Supp. at 799 (“[I]t is inconsistent with both the language and the spirit of the [Third Convention] and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual . . .”).

57. See *Humanitarian Crisis in Afghanistan: Is Enough Aid Reaching Afghanistan?: Hearing Before the S. Foreign Relations Comm., Subcomm. on East Asian and South Asian Affairs*, 107th Cong. 23 (2001) (statement of Nicolas de Torrenté, Exec. Director, MSF) (stating that impartiality “means that humanitarian actors should not take sides and should be free from political influence, so

organizations that are “charitable” in name only, established to channel money to terrorists, do not have these rights.⁵⁸ The Conventions, therefore, incorporate protections against the same risks that Congress tried to address in drafting IEEPA.⁵⁹ Unlike prohibitions created by use of the override authority,⁶⁰ however, the Conventions do not inhibit activities of impartial organizations providing valid aid in satisfaction of the protective obligations that arise during an armed conflict.

By virtue of the role of the International Committee of the Red Cross (“ICRC”) in connection with the Conventions and the Commentaries and in the development of humanitarian law, it is reasonable to incorporate its interpretation of the articles and its definition of impartiality into the Conventions.⁶¹ The ICRC’s constitutional documents parallel the language of the Commentaries. In describing the way in which humanitarian organizations determine priorities of care in delivering aid during armed conflict, the ICRC defines impartiality as making “no discrimination as to nationality, race, religious beliefs, class or political opinions.”⁶²

Other humanitarian organizations that model themselves on the ICRC and the ICRC’s interpretation of impartiality are allocated the rights and obligations by the Conventions. The Conventions set out these rights and obligations through general principles and more detailed articles based on

that they can go after their objective single-mindedly to impartially help people solely based on the criteria of need.”).

58. See COMMENTARY IV, *supra* note 9, at 98 (“A belligerent Power can obviously not be obliged to tolerate in its territory activities of *any* kind by *any* organization.” (emphasis added)). Certain organizations identified in recent U.S. cases appear to fall outside the Conventions. See, e.g., *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003) (holding that the evidence showing that foreign terrorists held an interest in the organization’s assets in the United States was sufficient for the organization to fall within Executive Order 13,224).

59. See S. REP. NO. 95-466, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4540, 4544 (stating a goal of avoiding donations that “subvert, contravene, or preclude effective exercise of emergency authority.”).

60. Exec. Order No. 13,224, 3 C.F.R. § 786 (2001), *reprinted as amended in* 50 U.S.C.A. § 1701 (West 2005).

61. See Elder, *supra* note 50, at 38 (“The International Committee of the Red Cross, in light of the widespread revulsion emanating from the contemporaneous major international and national war crimes trials, endeavored to solicit support for rectification of some of the deficiencies of humanitarian legal protection evidenced by the Second World War.”). The ICRC drew up and published the Commentaries to the Conventions. See *supra* note 12; see also O’Connell, *supra* note 54, at 183.

62. *Proclamation of the Fundamental Principles of the Red Cross* (1965), *reprinted in* INTERNATIONAL RED CROSS HANDBOOK 17 (12th ed. 1983). The impartiality standard does not require an organization to fulfill every need of everyone but does subject choices about whom to aid to an objective assessment. The editor of the Commentaries states that impartial aid “excludes *subjective* differentiation.” Jean Pictet, *The Fundamental Principles of the Red Cross and Peace*, 239 INT’L REV. RED CROSS 79 (1984) (emphasis added). None of the Conventions, the Commentaries, or the ICRC Statute suggests that impartial organizations must deliver aid uniformly but rather that they must allocate resources according to need. For example, rather than utilizing a first-come, first-served basis, medicine in short supply might be allocated first to children and pregnant women, who have weaker immune systems. See BOUCHET-SAULNIER, *supra* note 8, at 141 (“Impartiality must not be confused with a mathematical neutrality that would consist of providing equal aid to each party present, under the pretext of not favoring anyone. Impartiality actually requires that relief be given in priority to those who need it, regardless of their affiliation.”).

these principles. The general principles are common to all four Conventions. The Conventions⁶³ delineate the broad obligation to aid non-combatants and the mechanism by which this aid should be provided. These articles do not set forth the maximum set of rights that a Party could, at its discretion, allocate to organizations, but rather the baseline on which other articles build and provide specificity.

One reading of the phrase “may offer”⁶⁴ in Common Article 3 denotes optionality on both sides: the organization is not obliged to put forth its services, nor is the Party in control of the relevant territory compelled to accept such an offer.⁶⁵ The ICRC agreed to this language on the principle that states would uphold their moral obligation to involve the organizations in order to facilitate aid.⁶⁶ Numerous scholars have commented on the extreme improbability that the parties would exercise the apparent optionality in the text of Common Article 3. These authors assert that it is reasonable to conclude that the organizations have a right to be present and to fulfill the obligations con-

63. Common Article 3, *supra* note 1; Common Article 9/10, *supra* note 1. Common Article 3 binds Parties to treat non-combatants humanely, without discrimination, and to care for the wounded and sick, and states that “[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.” Common Article 3, *supra* note 1. Although Common Article 3 by its text applies to “armed conflict not of an international character,” the article was characterized from the outset as the “Convention in miniature,” COMMENTARY I, *supra* note 10, at 48 (citing an unnamed delegate), and so establishes a minimum level of protections due to non-combatants in all armed conflicts, including civil wars. The Commentary states:

Article 3 refers only to cases of conflict not of an international character. But, if these provisions represent (as they do) the minimum applicable in a non-international conflict, that minimum must a fortiori be applicable in an international conflict. That is the guiding principle common to all the Geneva Conventions. That is their justification.

Id. at 23. The ICJ has concluded that “[t]here is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which also apply to international conflicts.” *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 218 (June 27); *see also* *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) (asserting subject matter jurisdiction in part on the basis that violations of Common Article 3 are violations of the law of nations). Common Article 9/10 (as included in the Fourth Convention covering civilians) reads in full as follows: “The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.” Common Article 9/10, *supra* note 1. As with Common Article 3, Common Article 9/10 was incorporated to facilitate protection of non-combatants. COMMENTARY IV, *supra* note 9, at 98–99 (stating that the Article was included in order to “leave the door open for any initiative or activity, however unforeseeable today, which may be of real assistance in protection of civilians”); *see also* Major Maxwell et al., *Non-Governmental Organizations and the Military*, 1999-NOV ARMY LAW. 17, 21.

64. *See* Common Article 3, *supra* note 1 (“[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.”).

65. *See* Elder, *supra* note 50, at 49.

66. *See* COMMENTARY I, *supra* note 10, at 58 (noting that, unlike the limited access available to the ICRC in earlier wars, Common Article 3 “has placed matters on a different footing, an impartial humanitarian organization now being legally entitled to offer its services”). The ICRC rejected other language, which would have “superficially” strengthened the role of humanitarian organizations, in order to preserve independence of action. Elder, *supra* note 50.

sequent to that presence.⁶⁷ The right of access granted by Common Articles 3 and 9/10 is subject to few practical constraints,⁶⁸ and humanitarian organizations are justified in acting in the capacities delineated in the Conventions, and in receiving from the Parties the autonomy to do so, as long as they meet the impartiality standard.⁶⁹

B. Conflict of IEEPA Restrictions with Convention Rights

Convention articles that cover specific types of impartial aid establish obligations owed to non-combatants that, while conditional under certain circumstances, cannot be abrogated by the blanket restrictions on or prohibitions of donations of goods that IEEPA permits.⁷⁰ Together with the general obligations imposed by Common Articles 3 and 9/10, these articles create a system of aid which the Parties must adhere to and provide for in conjunction with the ICRC or other impartial humanitarian organizations.⁷¹ By enabling action such as Executive Order 13,224,⁷² IEEPA creates an environment in which the President can eviscerate these protections for non-combatants, placing the United States in violation of international law.⁷³

Although not every invocation of the override authority necessarily violates the United States' obligations under the Conventions,⁷⁴ IEEPA's

67. See COMMENTARY I, *supra* note 10, at 58 (stating that a Party incapable of fulfilling its obligations under the Conventions which "refuses offers of charitable service from outside its frontiers will incur a heavy moral responsibility"); Elder, *supra* note 50, at 67; Denise Plattner, *Assistance to the Civilian Population: the Development and Present State of International Humanitarian Law*, 288 INT'L REV. RED CROSS 249, 261 (1992) ("Although the relevant text entitles it only to offer its services, the principle that the ICRC may operate in a country ravaged by internal armed conflict is now generally accepted"). But see Peter Macalister-Smith, *Rights and duties of the agencies involved in providing humanitarian assistance and their personnel in armed conflict*, in ASSISTING THE VICTIMS OF ARMED CONFLICT AND OTHER DISASTERS 108 (Frits Kalshoven ed., 1988) (emphasizing that for states wishing to limit humanitarian organizations' access, certain parts of the Conventions "make this type of reaction possible").

68. Common Article 9/10's text, similar to Common Article 3's, might be read to allow states to refuse aid by humanitarian organizations but the similarity of the two articles compels the same argument as stated above for Common Article 3. See *supra* text accompanying notes 66 and 67.

69. See, e.g., COMMENTARY IV, *supra* note 9, at 110–11 ("But being bound to apply the Convention, [Parties] alone must bear the responsibility if they refuse to help in carrying out their engagements"); Michael Bothe, *Relief Actions: The Position of the Recipient State*, in ASSISTING THE VICTIMS OF ARMED CONFLICT AND OTHER DISASTERS 92 (Frits Kalshoven ed., 1988) (stating that the Conventions create "an obligation [on the part of the Parties] to accept relief."). Bothe notes further that the negotiating record and later statements by the signing governments support both this interpretation and the assumption "that the requirement of a consent implies an obligation to give this consent" except in limited situations of valid necessity. *Id.* at 94.

70. 50 U.S.C. § 1702(b)(2) (listing "articles such as food, clothing and medicine" within the override authority).

71. See Common Articles 3 and 9/10; see also *supra* text accompanying notes 57 and 58.

72. Exec. Order No. 13,224, 3 C.F.R. § 786 (2001), *reprinted as amended in* 50 U.S.C.A. § 1701 (West 2005).

73. 50 U.S.C. § 1702(b)(2) (2000); see *supra* text accompanying notes 36 through 40.

74. See Exec. Order No. 13,224; Exec. Order No. 13,284, 68 Fed. Reg. 4075 (Jan. 23, 2003) (specifying a number of organizations that are not, in fact, impartial humanitarian organizations under the definition applicable to the Conventions; however, the Executive Order directs that

language allows Executive Orders to contain sweeping prohibitions and creates no system of checks and balances to avoid such a violation.⁷⁵ Prohibiting donations of goods necessary for providing aid to non-combatants under either the general right to care of Common Articles 3 and 9/10, or specific rights allocated in other articles, would incapacitate humanitarian organizations in their efforts to provide aid.⁷⁶ Such incapacitation would result in a breach of the responsibilities the United States undertook upon ratification and implementation of the Conventions. Comparing the language of a number of these articles with the broad-based approach permitted under IEEPA demonstrates these potential conflicts.

Article 23 of the Fourth Convention requires free passage for various basic items.⁷⁷ Parties may require evidence that the items will not be diverted, that control will not be ineffective, and that no “definite” military or economic advantage will accrue to the other party by the latter’s use of the goods as a replacement for its own supplies.⁷⁸ Article 23’s conditions appear on their face to match a stated rationale for the IEEPA override authority: to avoid donations that “subvert, contravene, or preclude effective exercise of emergency authority.”⁷⁹

There are differences that may lead to violations of international law. IEEPA contains no requirement to identify the specific potential harm; a prohibition imposed relying on the statute could therefore violate the free passage obligations under Article 23. Article 23 goes on to say that supervision by an impartial humanitarian organization can cure the risks of diversion and advantage.⁸⁰ The President’s authority to prohibit under IEEPA should be more narrowly conditional in order to not conflict with the legal obligation to ensure free passage of goods. The override authority

additional organizations and persons may fall within its jurisdiction without conditioning such inclusion on partiality).

75. 50 U.S.C. § 1703 (2000) (requiring the President to report to Congress at any instance of exercise of Presidential authority under § 1702(b)(2), but requiring consultation with Congress only “in every possible instance”).

76. See, e.g., <http://www.oxfamamerica.org/publications/art3659.html> (last visited Sept. 24, 2005) (describing conditions in Afghanistan in [December 2001]: “Thousands of Afghans fled their homes for refugee camps, both inside Afghanistan and in neighboring countries. Oxfam brought emergency water systems to several of these camps, sharing with refugees the importance of sanitation in such close quarters. Without this intervention, thousands might have died from malaria, diarrhea, and other preventable diseases.”). Mass movement of civilians only creates additional problems. See Macalister-Smith, *supra* note 67, at 109 (noting that lack of consent from Parties will force humanitarian organizations to provide aid in camps in adjacent countries, resulting in migration of those in need of aid).

77. Fourth Convention, *supra* note 1, art. 23.

78. *Id.* An example of diversion and ineffective control is supply lines controlled by terrorist organizations, either with or without the support of the local government. An example of advantage is provision of wheat to a party without either its own source of wheat or a substitute; the donated wheat would free funds for other uses because of the reduced need to use the funds for food.

79. See S. REP. NO. 95-466, at 5 (1977), as reprinted in 1977 U.S.C.C.A.N. 4540, 4544.

80. See Fourth Convention, *supra* note 1, art. 23. The Protecting Power obligations are often delegated to the ICRC or another impartial humanitarian organization. See Fourth Convention, *supra* note 1, art. 11.

should be limited to situations where the President both (i) ascertained that the delivery of articles would result in a “definite” advantage to a hostile Party⁸¹ and (ii) required specific information showing “a serious reason for fearing”⁸² that the articles would be diverted to terrorists⁸³ in order to fit within the Conventions.⁸⁴

Individually and collectively, Articles 55, 59, 63 and 142 of the Fourth Convention permit only narrow regulation and restriction of humanitarian organizations’ role in delivering articles to protected civilians in occupied territory⁸⁵ and not a blanket prohibition as is possible under IEEPA.⁸⁶ An Occupying Power⁸⁷ has a duty under Article 55 to ensure provision of [sufficient] food and medical supplies for the population, subject only to the phrase “to the fullest extent of the means available to it.”⁸⁸ When, as in Iraq, the United States is an Occupying Power,⁸⁹ an invocation of the override authority improperly limits the means available to fulfill the nation’s obligations under Article 55.⁹⁰

Article 63 provides limited ability to restrict impartial humanitarian organizations, stating that an Occupying Power may restrict the activities only by way of “temporary and exceptional measures . . . for urgent reasons of

81. Fourth Convention, *supra* note 1, art. 23.

82. Fourth Convention, *supra* note 1, art. 23.

83. In some cases, the hostile party will be a country considered to be harboring or otherwise supporting terrorists. *See, e.g., supra* note 32.

84. Instead, the override authority requires only a national emergency, *see* 50 U.S.C. 1701(a)(1), and satisfaction of Presidential discretion conditions. *See* 50 U.S.C. 1702(b)(2).

85. Fourth Convention, *supra* note 1, sec. III and IV.

86. 50 U.S.C. § 1702(b)(2).

87. A territory is occupied when it is “actually placed under the authority of the hostile army.” *See* Convention with Respect to the Laws and Customs of War on Land, *supra* note 50, art. 42. Occupation continues until a local government establishes “full and free exercise of sovereignty;” ICRC, *Occupation and international humanitarian law: questions and answers*, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/634KFC> (last visited April 8, 2004), but a situation may revert to occupation if the hostile army retakes control in the absence of local government consent. *Id.*

88. Article 55 obliges an Occupying Power to “bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.” COMMENTARY IV, *supra* note 9, at 309. Article 59 requires “free passage of these consignments” subject only to the opposing power’s ability to search and regulate the consignments to ensure that the articles are destined for “the needy population” and not the Occupying Power itself. *Id.* at 320 (“The obligation on the Occupying Power to accept such relief is unconditional.”).

89. *See* S.C. Res. 1483, U.N. Doc. S/RES/1483 (2003) (“recognizing the specific authorities, responsibilities, and obligations of [the United States] as [an] occupying power [in Iraq]”); *see also* Asli Ü. Bâli, *Justice under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT’L L. 431, 470–71 n.124 (noting that the United States’ ongoing military presence and activities make it the “de facto ruler of Iraq”); Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War*, ASIL INSIGHTS, 1 (April 2003).

90. The conditions in Iraq require articles to be imported because, prior to the invasion, food and medical goods were available mainly under the UN’s oil-for-food program, *see Waiting, with Bravado and Anxiety*, ECONOMIST, Oct. 17, 2002, at 41, which was halted when the invasion began. Press Release, United Nations, United Nations Oil-For-Food Programme to end on 21 November; Coalition Provisional Authority to Take Responsibility, U.N. Doc. IK 404 (Nov. 19, 2003).

security.”⁹¹ Article 142 allows Parties to limit activities of relief societies⁹² “essential to their security”⁹³ only if the restriction does not “hinder the supply of effective and adequate relief to all protected persons.”⁹⁴ These specific and narrow restrictions are not equivalent to the intent or the apparent effect of IEEPA, which allows restrictions and prohibitions for additional reasons and for unlimited periods of time.⁹⁵

IEEPA’s text, unlike the articles of the Conventions, does not provide a sufficiently specific description of the situations in which the President can bar donations.⁹⁶ Although the United States relies heavily on humanitarian organizations during both war and peacetime, when the United States is a party to a conflict, the President is increasingly likely to find that conditions exist that justify exercise of the override authority.⁹⁷ While it is undisputed that the President should have the power to prevent funds from being sent or diverted to terrorists, IEEPA casts its net too broadly.⁹⁸

91. Fourth Convention, *supra* note 1, art. 63.

92. Relief societies, like impartial humanitarian organizations, are not defined in the Conventions; regardless of whether the two are deemed to be equivalent, Article 142 refers to “relief societies, or any other organizations assisting the protected persons.” Fourth Convention, *supra* note 1, art. 142.

93. *Id.*

94. *Id.*

95. 50 U.S.C. § 1702(b)(2) does not place any temporal boundaries on the President’s invocation of the override authority, except to the extent Congress may terminate the national emergency under 50 U.S.C. § 1622 and subject to specification in such termination that the Presidential authorities in 50 U.S.C. § 1702 are to be discontinued. *See* 50 U.S.C. § 1706(b); *see also* Exec. Order No. 13,224, 3 C.F.R. § 786 (2001), *reprinted as amended in* 50 U.S.C.A. § 1701 (West 2005) (including an effective date and no termination date).

96. *See* 50 U.S.C. § 1702(b)(2)(A) (“would seriously impair his ability to *deal with* any national emergency” (emphasis added)); 50 U.S.C. § 1702(b)(2)(C) (“in a situation where imminent involvement is *clearly indicated*” (emphasis added)).

97. 50 U.S.C. § 1702(b)(2)(A)-(C) (the override authority can be invoked when the President determines donations would impair his ability to deal with a national emergency, are in response to coercion, or would endanger Armed Forces of the United States). Terrorism and United States involvement in armed conflict are increasingly intertwined, resulting in declarations of national emergency under 50 U.S.C. § 1701 that in turn create a greater likelihood of exercise of the override authority. President G.W. Bush has invoked the override authority numerous times during his presidency. *See supra* note 40; *see also* Islamic American Relief Agency v. Unidentified FBI Agents et al., 394 F. Supp. 2d 34, 40, 46–47 (D.C. Cir. 2005) (mem.) (stating that the President can use the override authority to prohibit donations where the evidence shows that an organization has provided support of acts of terrorism); Press Release, U.S. Dep’t of Justice, Indictments Allege Illegal Financial Transfers to Iraq: Visa Fraud Involving Assistance to Groups that Advocate Violence (Feb. 26, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/February/03_crm_119.htm (quoting John Ashcroft, Att’y Gen. of the United States) (“As President Bush leads an international coalition to end Saddam Hussein’s tyranny and support for terror, the Justice Department will see that individuals within our borders cannot undermine these efforts. Those who covertly seek to channel money into Iraq under the guise of charitable work will be caught and prosecuted.”).

98. Three other legal mechanisms create a viable bulwark against terrorist financing: the International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. NO. 106-49 (2000), 39 I.L.M. 270, Resolution 1373 of the United Nations Security Council, S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001), and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), codified at 18 U.S.C. § 2339A (2000); 18 U.S.C. § 2339B (2000) and 8 U.S.C. § 1189 (2000). Each of these makes it an offense to transfer property with either the intent or the knowledge that the property is directed

Executive Order 13,224, for example, allows the prohibition of humanitarian relief by and to many persons who are unconnected to terrorist activities.⁹⁹ A significant percentage of impartial humanitarian organizations operating in, or likely to operate in, theaters of war are subject to United States jurisdiction.¹⁰⁰ Limiting or prohibiting access of impartial humanitarian organizations subject to U.S. jurisdiction by use of the override authority would leave only those organizations without U.S. connections free to provide aid.¹⁰¹ In large conflicts and in locations where local and smaller humanitarian organizations are unequipped or otherwise insufficient, this would result in insufficient aid and a consequent breach of the United States' Convention obligations.¹⁰² IEEPA appears to allow the President to operate in a realm outside of both the United States' stated commitment to adhere to the obligations imposed by the Conventions¹⁰³ and the flexibility

toward actual or intended terrorist activity. None of these has the breadth to encompass impartial humanitarian organizations:

AEDPA does not grant the Secretary unfettered discretion in designating the groups to which giving material support is prohibited. The statute authorizes the Secretary to designate only those groups that engage in terrorist activities. This standard is not so vague or indeterminate as to give the Secretary unfettered discretion. For example, the Secretary could not, under this standard, designate the International Red Cross or the International Olympic Committee as terrorist organizations. Rather, the Secretary must have reasonable grounds to believe that an organization *has engaged* in terrorist acts—assassinations, bombings, hostage-taking and the like—before she can place it on the list. (emphasis added).

Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137 (9th Cir. 2000).

99. See Himamauli Das, *United States Sanctions Response to the Attacks of September 11, 2001: A Synopsis of Remarks at the NESL Rogue Regimes Conference*, 36 NEW ENG. L. REV. 943 (2002):

[Executive Order 13,224] may further be used to target other entities or individuals that are acting for or on behalf of, or are owned or controlled by, persons designated in or pursuant to the Order; that assist in or provide support or financial or other services to those entities and individuals designated in or under the Order; or are associated with certain categories of entities and individuals designated in or under the Order, as determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General. This may include non-governmental or charitable organizations, as well as financial institutions in third countries that provide financial or other services to or for persons designated in or pursuant to the Order.

100. For example, CARE, OXFAM and Médecins Sans Frontières are all incorporated in the United States and each is subject to U.S. jurisdiction. See *supra* note 21.

101. 50 U.S.C. § 1702(b)(2) (the override authority applies to “persons subject to the jurisdiction of the United States”).

102. Most large humanitarian organizations fall under U.S. jurisdiction, *supra* note 100, and without their involvement, aid to Iraq would be severely lacking. See David Finkel, *Aid Efforts for Iraqis Stalled at Border: Bush Promises Assistance Soon*, WASH. POST, March 23, 2003, at A15 (noting that many humanitarian organizations were waiting in Kuwait during the United States' attacks because the situation in Iraq was too dangerous). The United States, as an Occupying Power, *supra* note 89, would therefore not be satisfying the requirements of the Conventions. See *supra* note 14.

103. Letter of Submittal from the Department of State, incorporated in the Message from the President of the United States Transmitting The Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, 26 I.L.M. 561, 567 (1987) [hereinafter Department of State Protocol II Letter] (stating that “for its part, the United States would expect that the requirement of consent by the party concerned would not be implemented in an arbitrary manner, and that essential

demanded by the international community's interpretation of the Conventions' text. Limiting impartial humanitarian organizations in such a manner is not permitted under international law.

II. IMPLICATIONS OF IEEPA'S OVERRIDE AUTHORITY

An exercise of the IEEPA override authority could result in serious domestic and international legal repercussions because of the Conventions' unique status as non-derogable, multilateral law created to protect individuals. Section II.A argues that an analysis under *Charming Betsy* does not conclude that IEEPA can coexist with the Conventions, and that additional analysis applying the later-in-time rule is necessary. Section II.B argues that once the Executive demonstrates a conflict between the Conventions and IEEPA, the nature of the Conventions demands particular adherence, and therefore, that the customary view that the later-in-time rule allows domestic derogation of international law does not apply. Section II.C argues that the international legal obligations established by the Conventions exist regardless of the treaty's status under domestic law. Section II.C also argues that because the United States' duties under the Conventions cannot be fulfilled solely on the international plane, domestic prohibitions under IEEPA result in a violation of the Conventions. Section II.D provides a summary of policy issues that arise when a party to an armed conflict limits the role of impartial humanitarian organizations and argues that these policy considerations also compel observance of the Conventions.

A. Application of the Charming Betsy Canon

For over 200 years, as dictated by the *Charming Betsy* canon,¹⁰⁴ U.S. courts have construed acts of Congress as consistent with international law unless such a construction is impossible.¹⁰⁵ The Supreme Court has ruled that even if Congress provides no direction in the text of a statute with respect to the dictates of a treaty, the presumption is that the two should be read to coexist.¹⁰⁶ The purpose of the canon is to respect principles of com-

relief shipments would only be restricted or denied for the most compelling and legitimate reasons." The letter also discusses Protocol II, which the State Department described in the same document as "designed to expand and refine the basic humanitarian provisions contained in [Common] Article 3 . . ." *Id.* at 563. The rights allocated to impartial humanitarian organizations under Article 18 of Protocol II do not deviate from Common Article 3 and Common Article 9/10. Protocol Additional (II) to the Geneva Conventions of 12 Aug., 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (June 8, 1977), 26 I.L.M. 561, 1125 U.N.T.S. 609. Department of State Protocol II Letter, *supra*, at 567.

104. *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .").

105. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *The Charming Betsy*, 6 U.S. at 118.

106. *See Haig v. Agee*, 453 U.S. 280, 291 (1981) ("[C]ongressional silence is not to be equated with congressional disapproval.").

ity¹⁰⁷ and to allow a balancing of interests.¹⁰⁸ Where Congress specifically identifies a need to position United States' interests above those of a treaty partner or the international community as a whole, a clear statement eliminates the need to read consistency into the two laws.¹⁰⁹

Although IEEPA's text does not indicate an explicit intent to overrule the Conventions and the override authority is facially ambiguous with regard to the role of impartial humanitarian organizations, *Charming Betsy* analysis could conclude that the two laws can coexist.¹¹⁰ Despite IEEPA's apparent breadth, applying *Charming Betsy* in this situation of facial ambiguity limits IEEPA's restrictions and prohibitions to the narrower restrictions permitted by the Conventions.¹¹¹ Applying *Charming Betsy*, IEEPA must be read to prohibit and restrict transactions, including donations of humanitarian goods, only to the extent such limitations have no impact on the ongoing obligations the United States undertook upon ratification and implementation of the Conventions.¹¹² Humanitarian organizations therefore must have the level of access and the ability to provide aid dictated by the Conventions, without any additional constraints. Prohibitions on aid directed toward Iraq or Afghanistan, for example, would be limited to prohibitions equivalent to the limitations permitted under the relevant articles of the Conventions.

On the assumption that Congress intended the override authority and the Conventions to coexist, a Presidential determination that contradicted the Conventions would violate international law and would conflict with the implementation of the Conventions on the domestic plane.¹¹³ In line with *Charming Betsy*, the Executive could not impose blanket prohibitions on delivery of aid without first ascertaining whether, for example, each affected organization was outside of the definition of impartial, and was acting in such a way that the prohibition did not "hinder the supply of effective and adequate relief to all protected persons."¹¹⁴ *Charming Betsy* therefore

107. See *Hartford Fire Ins. Co.*, 509 U.S. at 817 (Scalia, J., dissenting) (noting that comity in this context relates to the "respect sovereign nations afford each other by limiting the reach of their laws"); see also *Beharry v. Reno*, 183 F. Supp. 2d 584, 599 (E.D.N.Y. 2002).

108. See *Hartford Fire Ins. Co.*, 509 U.S. at 815 (Scalia, J., dissenting) (noting that "interacting interests" of the U.S. and other nations are controlling in attempts to reconcile domestic and international law).

109. See *Beharry*, 183 F. Supp. 2d at 599.

110. See *Agee*, 453 U.S. at 291.

111. See Fourth Convention, *supra* note 1, arts. 23, 55, 59, 63 and 142.

112. See *Geneva Conventions for the Protection of War Victims, Report of the Comm. on For. Rel. on Executives D, E, F and G*, 82d Cong., Executive Report No. 9, 32 (June 27, 1955) (urging the Senate to give its advice and consent to ratification of the Conventions, noting that the Conventions were "a landmark in the struggle to obtain . . . a humane treatment in accordance with the most approved international usage").

113. An example of such a Presidential determination would be an inclusion of an impartial humanitarian organization within the sweeping language of Executive Order 13,224.

114. Fourth Convention, *supra* note 1, art. 142.

demands narrow interpretation of a statute's text, in order to allow it to co-exist with international law.¹¹⁵

If IEEPA cannot be construed so as to avoid conflict with the Conventions, *Charming Betsy* cannot resolve the question of whether the statute violates the treaty.¹¹⁶ The courts must look to other facts in order to determine which of the two constitutes the applicable law. When a statute is facially ambiguous and a conflict is not immediately apparent, courts will look at legislative history, the degree of discretion given to the Executive and the circumstances of Congressional silence in order to determine whether a conflict exists.¹¹⁷ In particular, IEEPA's delegation of discretion to the President may result in a different analysis than would be applied to a statute that relates to other aspects of domestic law because of its connection with situations of armed conflict and national security.¹¹⁸

In order to invoke the override authority and unconditionally restrict or prohibit humanitarian action, the President must argue that IEEPA and the Conventions do conflict and that *Charming Betsy* does not require adherence to the Conventions. There is a basis for this argument, particularly where discretion has been afforded to the Executive.¹¹⁹ The legislative history of IEEPA indicates a strong intent to create significant authority in the President to regulate movement of money and goods during situations of national emergency.¹²⁰ The statute does not specify narrow situations in which the restrictions and prohibitions apply, allowing all other transactions to occur unimpeded, but instead permits the reverse.¹²¹ Despite a lack of specific reference to the provisions of the Conventions, IEEPA appears to have

115. *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1152 (7th Cir. 2001) (noting that *Charming Betsy* "has traditionally justified a narrow interpretation of ambiguous legislation to avoid violations of international law").

116. *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804).

117. *See Haig v. Agee*, 453 U.S. 280, 291 (1981); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453–55 (11th Cir. 1986), *cert. denied*, 469 U.S. 889 (1986).

118. *See Agee*, 453 U.S. at 291 ("[I]n the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval"). This is not to say that the judicial analysis stops; these situations of Presidential discretion resemble political questions, but remain in the realm of the courts. *Agee* was not decided as a political question case; the Court analyzed the authority of the President, acting through the Secretary of State, on the basis of the statute and its legislative history. *See id.* at 289 ("The principal question before us is whether the statute authorizes the action of the Secretary . . ."); *see also Garcia-Mir*, 788 F.2d at 1455 (noting the relevance of executive acts and judicial decision where legislation does not clearly create a conflict between domestic and international law).

119. *See Garcia-Mir*, 788 F.2d at 1455 (in which the court determined that an Executive act was "sufficient basis for . . . finding that international law does not control").

120. *See S. Rep. No. 95-466*, at 5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4540, 4544. The President may exercise the general authority of IEEPA, without a specific determination, in connection with all transfers except for those that "subvert, contravene, or preclude effective exercise of emergency authority." *Id.*

121. The breadth of the statute reflects the committee hearings on the bill. *See id.* (including discussion of narrow exceptions to the transactions that can be restricted or prohibited, and noting that the exception for donations of humanitarian goods was narrowed to cover only those from U.S. persons and to omit donations from foreign individuals "because the free exercise of conscience cannot usually be presumed" for the latter).

been drafted with the intent of breadth. This level of Congressional intent alone might not be found to be a sufficiently “clear statement from Congress” to override,¹²² but when combined with other arguments,¹²³ may provide the President with the ability to circumvent *Charming Betsy*.

The Fifth and Seventh Circuits of the U.S. Courts of Appeals have recently construed the *Charming Betsy* canon narrowly.¹²⁴ The Seventh Circuit determined in *Sampson v. Federal Republic of Germany*¹²⁵ that it did not need to read the Foreign Sovereign Immunities Act consistently with customary international law and *jus cogens* norms. In *United States v. Suerte*¹²⁶ the Fifth Circuit stated that Congress is not obliged to legislate in conformity with international law, from which it could be argued that Congressional intent need not always be emphatic in order to establish a conflict, and therefore a need for analysis beyond *Charming Betsy*. In order to maintain the flexibility that IEEPA's language, standing on its own, conveys, the President can argue that there exists a trend, as shown by the Circuit Court decisions as well as by reference to *Haig v. Agee*¹²⁷ and other Supreme Court discussion of the canon,¹²⁸ toward a narrow reading of *Charming Betsy*.

Finally, the George W. Bush administration has shown an inclination to implicitly read *Charming Betsy* narrowly, and to justify broad Executive powers as dictated by the necessities of the “war on terror.” This can be viewed as a broad interpretation of the balancing of interests analysis set forth in *Hartford Fire Insurance Co.*¹²⁹ and *Beharry*.¹³⁰ This inclination is evidenced in the Office of Legal Counsel's interpretations of the Geneva Conventions' application to current conflicts and participants thereto.¹³¹

122. *Beharry v. Reno*, 183 F. Supp. 2d 584, 599 (E.D.N.Y. 2002).

123. *See supra* text accompanying notes 117 through 119.

124. *See* *United States v. Suerte*, 291 F.3d 366 (5th Cir. 2002); *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001).

125. *Sampson*, 250 F.3d at 1151–53 (discussing the inapplicability of *Charming Betsy* to questions of sovereign immunity with respect to reparations in connection with the Nazi concentration camps, where only customary international law covered the issue).

126. *Suerte*, 291 F.3d at 374 (stating that *Charming Betsy* “is not, as is sometimes implied, any impairment of our own sovereignty, or limitation of the power of Congress”) (quoting *Lauritzen v. Larsen*, 345 U.S. 571 (1953)).

127. *Haig v. Agee*, 453 U.S. 280, 291 (1981) (holding that the President has authority to revoke U.S. passports for reasons of foreign affairs and national security, despite Congressional silence with respect to the President's discretion).

128. *See* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (arguing that principles of comity do not preclude U.S. courts from exercising jurisdiction over foreign insurers in claims made under the Sherman Act).

129. 509 U.S. 764 (1993).

130. *Beharry*, 183 F. Supp. 2d at 599 (holding that the Immigration and Naturalization Act must be read in compliance with international law).

131. *See Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Consideration* (2003), <http://www.ccr.ny.org/v2/reports/docs/PentagonReportMarch.pdf>. Although, in 2004, the Office of Legal Counsel withdrew a related 2002 memorandum from former Assistant Attorney General Jay

The combination of the discretion afforded the Executive in IEEPA generally, and specifically within the override authority section, as well as the weight given to issues of national security creates an argument for the President to show the existence of a conflict between the Conventions and IEEPA. If a conflict exists, *Charming Betsy* does not apply¹³² and it is necessary to determine which of the conflicting laws applies. Since *Charming Betsy* is not going to end the discussion, it is necessary to further analyze the legality of acts permitted under the override authority.

B. Domestic Legal Implications of a Violation of the Geneva Conventions

The later-in-time doctrine is the customary method of analyzing conflicting laws, but is not clearly applicable to conflicts involving humanitarian law. The later-in-time doctrine provides that, in domestic law, a later statute takes precedence over an earlier conflicting international agreement.¹³³ The doctrine does not affect obligations on the international

Bybee as having an excessively narrow interpretation of international and domestic prohibitions on torture, Department of Justice, Office of Legal Counsel, *Memorandum for James B. Comey Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A* (December 30, 2004), the media have reported that the Justice Department concurrently advised that torture could be used to obtain statements. See Carol D. Leonnig & Julie Tate, *Detainee Hearings Bring New Details and Disputes*, WASH. POST, Dec. 11, 2004, at A1. The George W. Bush administration also denied application of the Conventions in connection with prisoners' rights. See *U.S. Action Bars Right of Some Captured in Iraq*, N.Y. TIMES at A1, A12 (Oct. 26, 2004) (reporting that a March 2004 memorandum from the Office of Legal Counsel concluded that some non-Iraqi persons captured by the U.S. military in Iraq, like members of Al Qaeda, were not entitled to the protections of the Conventions). This stance was rejected by the District Court for the District of Columbia in November, 2004. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd and remanded*, 2006 WL 1764793 (U.S. June 29, 2006).

132. See *Hartford Fire Ins. Co.*, 509 U.S. at 815; *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir. 1986), *cert. denied*, 469 U.S. 889 (1986).

133. See *Whitney v. Robertson*, 124 U.S. 190 (1888) (holding that a general application import statute passed after an import treaty was signed between the United States and the Dominican Republic, controls); see also *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 214 (S.D.N.Y. 2000) ("It is well-established that Congress has the power to override international law."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) (1987) ("An Act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled"). A strong view of the doctrine is that the original intent of the Framers and current law unequivocally support not only the doctrine but consequently-diminished obligations on all planes. Senator Jesse Helms, in comments made regarding the United States' payment obligations to the United Nations, expressed this view: "Treaty obligations can be superseded by a simple act of Congress. This was the intentional design of our founding fathers, who cautioned against entering into entangling alliances. Now then, when the United States joins a treaty organization, the organization holds no legal authority over us." See *U.S. Senator Jesse Helms (R-NC) Delivers Remarks to the UN Security Council*, 2000 WL 42212 (Jan. 20, 2000). Senator Helms's view caused considerable international consternation. See, e.g., *U.S. Senator Berates UN* (January 21, 2000), <http://news.bbc.co.uk/1/hi/world/americas/612594.stm> (noting negative reaction of members of the Security Council, including [the Russian representative] Sergey Lavrov: "All the other members of the United Nations expected the United States to keep its word").

plane.¹³⁴ In other words, if Congress enacts legislation that is inconsistent with a treaty obligation, the domestic effect of the treaty is eliminated but the United States' obligations under international law, and the implications of such obligations, continue. The later-in-time doctrine is established under U.S. law with respect to bilateral treaties and to multilateral agreements that cover contractual obligations.¹³⁵

No case has yet raised the specific question of whether later domestic law categorically overrides a multilateral humanitarian or human rights treaty.¹³⁶ Congress enacted IEEPA after ratifying the Conventions, and, applying the established rule of later-in-time, the former overrides the latter to the extent domestic law relates to the United States' treaty obligations.¹³⁷ Growing debate over the universality of the later-in-time doctrine,¹³⁸ combined with the special nature of certain multilateral treaties, demands more thorough consideration of the override authority's effect on international obligations before applying the doctrine to the IEEPA-Conventions conflict.

The later-in-time doctrine originated in a dispute over bilateral agreements related to import duties,¹³⁹ unconnected to humanitarian or human rights issues. The Supreme Court held in *Whitney v. Robertson*:¹⁴⁰

134. There is a plethora of support for continuing at least those obligations that exist on the international plane. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(b) (1987). Furthermore:

Just as a statute can be superseded by a later inconsistent statute, so can a treaty be superseded, although maxims of interpretation [e.g. *Charming Betsy*] encourage a judicial effort to construe the later-in-time statute so as not to violate the treaty. If that effort fails, the legislative rule prevails internally, although as a matter of international law the United States has broken its obligations to the other treaty party.

HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1022 (2d ed. 2000).

135. See *S. African Airways v. Dole*, 817 F.2d 119 (D.C. Cir. 1987) (holding that the Anti-Apartheid Act unambiguously has precedence over a bilateral agreement between the United States and South Africa with regard to air services).

136. The author's exhaustive search finds no case where this argument is considered directly. One recent case concerned the head of a U.S. charity indicted for diverting donated goods to terrorist organizations in Bosnia and Chechnya in violation of 18 U.S.C. § 2339A, but not under IEEPA. See *United States v. Arnaout*, 282 F. Supp. 2d 838 (N.D. Ill. 2003). The government dismissed these charges and prosecuted only a charge of racketeering fraud. *Id.* at 840. Other recent cases have considered the inclusion of charitable organizations on the government's lists of terrorist organizations subject to IEEPA. See *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003).

137. See *Taylor v. Morton*, 23 F.Cas. 784, 786 (No. 13,799) (C.C. Mass. 1855), *aff'd*, 67 U.S. (2 Black) 481 (1862) (distinguishing between those aspects of a treaty that relate to the people, which can be abrogated by Congress under a later act, and those aspects that relate to the government, which create an ongoing obligation to treaty partners irrespective of Congressional acts).

138. See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1152 (1985) ("The doctrine making all international law rules, irrespective of their content or importance, inferior to later-in-time statutes no longer accords with contemporary international theory or practice."); see also HENKIN, *supra* note 30, at 485 n.130 ("In other contexts [citing Reservations to the Genocide Convention and The Palestine Liberation Organization Mission Controversy] it has been suggested that multilateral treaties are different because they are not primarily contracts among the parties.")

139. *Whitney v. Robertson*, 124 U.S. 190, 191 (1888).

140. *Id.*

By the constitution [sic], a treaty is placed on the same footing, and made of like obligation, with an act of legislation. . . . when the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both . . . but, if the two are inconsistent, the one last in date will control the other.¹⁴¹

Following *Whitney*, the government could justify derogation from domestic obligations established by a treaty upon passage of a conflicting statute. Courts have accepted Congressional derogation of treaties related to such issues as import duty¹⁴² and tax.¹⁴³ As cases relating to multilateral treaties covering individual and human rights arose, no court ruled conclusively that the *Whitney* framework for the later-in-time doctrine applied.¹⁴⁴ Even where the courts supported the later-in-time rule, they gave some deference to the international obligations remaining after the enactment of a conflicting statute, and to the weight of the United States' overall treaty obligation.¹⁴⁵ Doubt now exists over whether the later-in-time doctrine applies to all cases where treaties and statutes diverge; it is therefore imperative to question the doctrine's applicability to a conflict between the Conventions and IEEPA.¹⁴⁶

A leading case addressing application of the later-in-time rule to multilateral treaty obligations, *Diggs v. Schultz*,¹⁴⁷ reveals issues that the courts would balance against a propensity for rigid application of the doctrine. Although the court upheld a domestic statute under the later-in-time doctrine,¹⁴⁸ in its analysis of the importance of the UN Charter, *Diggs* offers a basis for identifying conditions under which treaty obligations continue on the domestic plane in the face of conflicting, later, domestic law.

The *Diggs* court addressed a conflict between a UN Security Council resolution that established a trade embargo with Rhodesia ("Resolution 232"),¹⁴⁹

141. *Id.*

142. *See* *Akins v. United States*, 407 F. Supp. 748, 170 (Cust. Ct 1976) (holding that customs duty payable where existing law conflicts with earlier treaty).

143. *See* *Kappus v. Comm'r*, 337 F.3d 1053, 1060 (D.C. Cir. 2003) (holding that 26 U.S.C. § 59(a)(2) governs despite an earlier conflicting treaty between United States and Canada).

144. *See* *Diggs v. Schultz*, 470 F.2d 461, 466 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

145. *Id.* at 461.

146. *See* HENKIN, *supra* note 30, at 210–11 ("Particularly as regards multilateral treaties of general applicability which establish universal standards—on human rights . . . —inconsistent legislation by Congress not only violates international obligations but ruptures international consensus which the President-and-Senate helped achieve."); *see also* Lobel, *supra* note 138; *infra* notes 209–210.

147. *Diggs*, 470 F.2d 461 (holding that plaintiffs' argument that licenses permitting trade with Southern Rhodesia, issued pursuant to the Byrd Amendment to the Strategic and Critical Materials Stock Piling Act, violated Resolution 232 of the Security Council of the United Nations (which resolution was passed with an affirmative vote from the United States and subsequently implemented on the domestic level) was a political question).

148. *Id.* at 466.

149. S.C. Res. 232, U.N. Doc. S/RES/232 (1966).

and the Byrd Amendment¹⁵⁰ to the Strategic and Critical Materials Stock Piling Act,¹⁵¹ that denied the President the right to restrict such trade. The *Diggs* court concluded that the earlier UN resolution protected against the appellant's alleged injury, stating that for people harmed by policies that the embargo was established to curtail, "United Nations action constitute[d] the only hope."¹⁵² The court noted that the dispute arose from actions "in derogation of the solemn treaty obligation of the United States to adhere to the embargo for so long as it is in being."¹⁵³ The court considered United Nations obligations, which the United States affirmatively pledged to observe, to be of particular significance.¹⁵⁴

The court then addressed the contention that the United States' commitment to the United Nations "has more force than an ordinary treaty"¹⁵⁵ in its discussion of the later-in-time rule. The court replied in the negative to the "all or nothing" argument that it would be necessary to fully withdraw from the United Nations in order to override Resolution 232 but did not deny the assertion that treaties may be differently weighted.¹⁵⁶ As a result of *Diggs*, the United States Ambassador to the United Nations testified to Congress on the difficulty of persuading others to live up to their legal obligations after the United States' violation of the Rhodesian boycott.¹⁵⁷ While these results are not complete confirmation that the doctrine is incompatible with multilateral treaties on individual and human rights, the court did suggest some of

150. 31 C.F.R. § 530 (1972) (removed, 57 Fed. Reg. 1386 (Jan. 14, 1992)).

151. 50 U.S.C. § 98 (2000).

152. *Diggs*, 470 F.2d at 465. The court went on to say that the appellants "are personally aggrieved and injured by the dereliction of any member state which weakens the capacity of the world organization to make its policies meaningful." *Id.* *Diggs* was cited negatively in *Dellums v. U.S. Nuclear Regulatory Comm'n*, 863 F.2d 968 (D.C. Cir. 1988). The complaint with *Diggs* does not, however, reject the court's acceptance of the treaty's import, *see id.* at 983 n.4 (Ginsburg, J. dissenting) ("Because *Diggs* retains vitality as a binding decision, it should guide this panel until overturned by the court en banc."), but rather the question of causal nexus. *Id.* at 976.

153. *Diggs*, 470 F.2d at 465 (noting that the appellants' primary complaint was against the government of Rhodesia).

154. *Id.* at 465 ("Appellees suggest that the prospects of significant relief by means of the embargo are so slight that this relationship of intended benefit is too tenuous to support standing. But this strikes us as tantamount to saying that because the performance of the United Nations is not always equal to its promise, the commitments of a member may be disregarded without having to respond in a court to a charge of treaty violation."). The court held for the plaintiffs on the issue of standing, and it is therefore appropriate to rely on the court's reasoning regarding the United Nations. *Id.*

155. *Id.*

156. *Id.* (noting that, despite the fact that the sanctions imposed by the U.N. would not necessarily provide a benefit to the appellants, "dereliction of any member state which weakens the capacity of the world organization to make its policies meaningful" created the injury).

157. *To Amend the United Nations Participation Act of 1945 to Halt the Importation of Rhodesian Chrome and to Restore the U.S. to its Position as a Law Abiding Member of the International Community: Hearing on S. 1868 Before the S. Subcomm. on African Affairs, Comm. on Foreign Relations*, 93d Cong. ¶ 15 (1973) (statement of John Scali, United States Ambassador to the United Nations) (noting that Congressional derogation of international obligations would make it both more difficult for the United States to convince other nations to comply with international law, and more likely that other nations would question the dependability of the United States and the strength of the Security Council in general).

the anomalies between the doctrine and international law obligations. The opinion reflects an apparent bias toward the United Nations as a unique mechanism supporting individual rights.¹⁵⁸

The District Court for the Eastern District of New York in *Beharry v. Reno*¹⁵⁹ commented on a practical problem with applying the later-in-time doctrine in this context by noting judicial unease with perfunctory override of human rights treaties:

Once this country says there is a U.N. Charter, there are U.N. covenants, there are treaties, and we subscribe to them . . . there are going to be civil and perhaps criminal consequences that we might not all think are so wonderful. But you can't simply say that we're going to have treaties for the rest of them but, of course, they won't apply to us.¹⁶⁰

There is a basis for limiting the later-in-time rule and its effect on a multilateral human rights treaty.¹⁶¹ The nature of the multilateral contract and the objectives set forth therein are relevant to determining the stringency with which the doctrine applies, particularly where the subject is human rights.¹⁶² Categorical acceptance of the later-in-time doctrine is thus eroded in certain circumstances. The Conventions, like the UN Charter, are of a different nature from a standard bilateral treaty and fall into a category of international agreements that compels special adherence.¹⁶³

United States courts have consistently emphasized the critical nature of the Conventions.¹⁶⁴ The United States District Court for the Southern District of Florida discussed the obligations of the Third Convention in some

158. *Diggs*, 470 F.2d at 465 (“the United Nations constitutes the [appellants’] only hope”); *id.* at 466 (“the purpose and effect of the Byrd Amendment. . . . was to detach this country from the U.N. boycott of Southern Rhodesia in blatant disregard of our treaty undertakings”).

159. 183 F. Supp. 2d 584, 584 (E.D.N.Y. 2002).

160. *Id.* at 601 (citing Statement of Jon O. Newman, 170 F.R.D. 201, 317–18 (1996) (Judicial Conference of the Second Circuit)).

161. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 cmt. 2 (1987) (“[I]t has been urged that the doctrine should not apply to inconsistency between a statute and general international law established by multilateral treaty.”).

162. See Lobel, *supra* note 138, at 1074 (“A complete deference by United States courts to executive orders or congressional acts irrespective of international law implications would be simply inconsistent with the spirit and rationale of Nuremberg.”).

163. There is an argument that international humanitarian law is close to *jus cogens*, and therefore not only different in character from bilateral and non-human rights related multilateral treaties but in fact nonderogable. Nonderogable rights are those that cannot be infringed on even during a state of emergency, war or other crisis. BOUCHET-SAULNIER, *supra* note 8, at 108.

164. See, e.g., *Johnson v. Eisenstrager*, 339 U.S. 763, 789 n. 14 (1950) (noting the United States’ obligations under the Conventions); *United States v. Yunis*, 924 F.2d 1086, 1097–98 (D.C. Cir. 1991) (noting the United States’ status as a signatory to the Conventions and agreeing with the District Court’s use of the Convention’s language in its analysis); *Coal. of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1050 (C.D. Cal. 2002) (referring to the United States’ agreement to be bound to certain treatment of prisoners under the Convention and noting its application to some of the detainees held at Guantanamo Bay following the United States’ military action in Afghanistan); *United States v. Noriega*, 808 F. Supp. 791, 795 (S.D. Fla. 1992) (analyzing prisoner of war status under the Third Convention). The George W. Bush administration has shown an inclination toward increasingly selective application of the Conventions. See *supra* note 131. As of the date of this writing, courts have not addressed the statements and opinions of the Office of Legal Counsel.

detail in *United States v. Noriega*.¹⁶⁵ The *Noriega* court emphasized “the United States’ asserted commitment to . . . promoting respect for the laws of armed conflict through liberal interpretation of the Geneva Conventions.”¹⁶⁶ The court strongly endorsed the United States’ compliance with the Conventions, noting both their wide scope¹⁶⁷ and importance.¹⁶⁸

Consistent with the courts’ indications that multilateral human rights treaties merit different analysis, the common scholarly view acknowledges the later-in-time doctrine as good law but emphasizes the continuing nature of international obligations.¹⁶⁹ The resulting separation of a single treaty into its domestic and international components establishes that although treaties and statutes are constitutional equals,¹⁷⁰ they are not identical.¹⁷¹ This distinction stems from what is often considered to be the original intention of the Framers, to uphold treaty obligations or to rectify a breach.¹⁷² The evolution of the later-in-time rule is a partial repudiation of this intention¹⁷³ but some of the Framers’ aims survive. That application of the rule does not diminish obligations toward treaty partners is not just a consequence of limited Congressional powers;¹⁷⁴ it is also a result of the contractual relationship among

165. *Noriega*, 808 F. Supp. at 803 (holding that incarceration in federal penitentiary was not a violation of the Conventions as long as treatment provided the rights allocated by the Third Convention).

166. *Id.* at 801.

167. *See id.* at 803 (“Considerable space has been taken to set forth conclusions which could have been stated in one or two pages. That is because of the potential importance of the question to so many. . . .”); *id.* at 795 (“The United States is a firm supporter of the four Geneva Conventions of 1949 As a nation, we have a strong desire to promote respect for the laws of armed conflict. . . .” (citing Letter from the State Dept. to the Attorney General of the United States (Jan. 31, 1990))).

168. *See id.* at 803.

169. *See* HENKIN, *supra* note 30, at 209 (“Acts of Congress inconsistent with earlier treaty obligations have been given effect by the courts. . . . Such legislation does not affect the validity of the treaty and its continuing international obligations for the United States, but it compels the United States to be in default.”); Detlev Vagts, *Taking Treaties Less Seriously*, Editorial Comment, 92 AM. J. INT’L L. 458, 460 (1998) (“the later-in-time rule is not the end of the matter, since an obligation to other countries continues to exist independently of the treaty’s status in American law”).

170. *See Head Money Cases*, 112 U.S. 580, 598 (1884).

171. *See id.* at 599 (“[A]n act of Congress . . . which may be repealed or modified by an act of a later date”).

172. Numerous authorities support the contention that equality of treaties and statutes was not clearly specified in the drafting of the Constitution. *See, e.g.*, HENKIN, *supra* note 30, at 210 (“As an original matter, the equality in U.S. law of treaties and federal statutes seems hardly inevitable; surely, the Supremacy Clause which the Supreme Court invoked does not establish it.”); Detlev F. Vagts, *The United States and its Treaties: Observance and Breach*, 95 AM. J. INT’L L. 313, 313–14 (2001) [hereinafter Vagts, *Observance and Breach*] (“In the past, the courts and the political branches consistently acknowledged . . . if the United States breaches [a treaty], it has an obligation to set the matter straight. . . . There is good reason to believe that the [later-in-time] rule would not have commended itself to the founders’ generation”).

173. Vagts, *Observance and Breach*, *supra* note 172, at 313 (noting that the three branches of the federal government have “conspicuously verbalized the idea that . . . the binding effect of international law carries little weight,” thus supporting the later-in-time rule as absolute).

174. *Goldwater v. Carter*, 444 U.S. 996 (1979) (dismissing the question of whether the President can unilaterally rescind a treaty as nonjusticiable, with the effect that it is the President who has

the treaty parties¹⁷⁵ and, in certain situations, of the significance and importance of the issue addressed.¹⁷⁶

Current judicial and scholarly views on the strength and scope of the later-in-time doctrine are not uniform, and it may be assailable in the context of the Conventions.¹⁷⁷ Although IEEPA will control under a strict reading of the doctrine,¹⁷⁸ the United States' domestic obligations under the Conventions, including the duty to permit access by impartial humanitarian organizations, will survive because of the nature of multilateral treaties embodying humanitarian obligations.

C. *International Legal Implications of a Violation of the Geneva Conventions*

Convention obligations that do not impinge on activities subject to domestic adjudication are unaffected by application of the later-in-time rule because they are distinct from domestic implementation of the treaty.¹⁷⁹ The United States must be able to perform these obligations in full in order to avoid sanctions or legal action.¹⁸⁰ Conflicting domestic law does not dimin-

the ability to do so); *see also* HENKIN, *supra* note 30, at 209 (noting that passing a conflicting statute is not a repeal of the treaty because "Congress is not acting upon the treaty but, in exercising one of its powers, it legislates without regard to the international obligations of the United States").

175. *See* THE FEDERALIST NO. 64, at 332 (John Jay) (Max Beloff ed., 1948) ("[A] treaty is only another name for a bargain; and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.").

176. For example:

It very well may be that a statute can override a treaty, but when dealing with a fundamental institution like the United Nations, can the United States argue that the provision of the Headquarters Agreement relating to the arbitration requirement does not apply, while the United States continues to operate under the other provisions of the agreement? When this matter is ultimately decided by the courts, they will have to address the issue as to whether the Charter of the United Nations and the Headquarters Agreement are just ordinary treaties.

Leonard B. Boundin, Remarks, *The Palestine Liberation Organization Mission Controversy*, 82 AM. SOC'Y INT'L L. PROC. 534, 541 (1988); *see also* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1569 n.44 (1984) ("The [later-in-time] rule may be different in respect of . . . provisions of multilateral treaties that recognize rights for private persons, notably human rights.").

177. Paul C. Szasz, Director of the General Legal Division of the United Nations, Remarks, *The Palestine Liberation Organization Mission Controversy*, 82 AM. SOC'Y INT'L L. PROC. 534, 538 (1988) ("The later-in-time rule depends on a series of court decisions which . . . are decisions that bear reexamination, particularly as to their applicability to multilateral treaties such as the U.N. Charter and to agreements made pursuant to the Charter.')

178. *See* *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

179. *Id.* at 210; *see also* Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 937 (D.C. Cir. 1988) ("Our conclusion, of course, speaks not at all to whether the United States has upheld its treaty obligations under international law.'). The question here is how treaty obligations differ pre- and post-domestic implementation, rather than whether the treaty is self-executing—i.e., whether domestic application of treaty obligations requires Congressional action. *See* *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (distinguishing non-self-executing treaties from self-executing treaties).

180. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(b) (1987).

ish the validity of international treaty obligations and, therefore, IEEPA does not change the United States' obligation to comply with the Conventions on the international plane.¹⁸¹ The Conventions require affirmative actions by the signatories.¹⁸² These actions cannot be segregated so that they occur only on the international plane and they are therefore subject to domestic law.¹⁸³ A prohibition under IEEPA on these affirmative duties to act on both the domestic and international planes makes performance under the Conventions an impossibility.¹⁸⁴

It could be argued that the Conventions create only an end—that the specified goods must reach persons in need—and do not specify the means by which that end must be achieved, thus allowing the type of discretion delegated to the President in the override authority.¹⁸⁵ For all their specificity in identifying items to be provided to non-combatants, the Conventions leave the scope of some obligations open to interpretation: for example, the Occupying Power's obligation to provide these items when the local supply is "inadequate."¹⁸⁶ The absence of an absolute definition of impartiality in the Conventions¹⁸⁷ shows further lack of clarity. These apparent holes could support a contention that any individual Party to a conflict is justified in its own assessment of adequate performance under the Conventions and that, as a consequence, performance on the international plane can be satisfied without any domestic action.

This argument fails for two reasons: first, the parties to a conflict might not effectively achieve even adequate performance of the required end.¹⁸⁸ Second, as discussed above, the Conventions allocate certain rights to impartial humanitarian organizations themselves.¹⁸⁹ It is not, therefore, simply

181. Although the Constitutional text lacks clarity regarding authority to terminate treaties, it is well-established that conflicting legislation alters only the domestic effect of a treaty. *See id.* ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."); HENKIN, *supra* note 30, at 173.

182. The Parties are obligated to comply with the Conventions. *See* Common Article 2, *supra* note 1; Common Article 3, *supra* note 1 (obligating the Parties to comply with the Conventions to ensure access by impartial humanitarian organizations); *supra* note 10; Fourth Convention, *supra* note 1, arts. 23, 55 (obligating Parties to provide, and to provide passage of, certain goods).

183. *See supra* notes 15 to 19 and accompanying text.

184. When the override authority is invoked, the general prohibitions and restrictions of the statute apply, permitting, *inter alia*, a prohibition on donations of humanitarian articles. 50 U.S.C. §§ 1702(a)(1)(A), 1702(b)(2) (2000 & Supp. II 2002).

185. *See* COMMENTARY I, *supra* note 10, at 12–13 ("A choice had to be made between elaborating very full and detailed rules covering all possible eventualities, or formulating general principles sufficiently flexible to be adapted to existing circumstances"). The Commentary further notes that the inclusion of "general and infeasible principles" helped to achieve this flexibility. *Id.*

186. Fourth Convention, *supra* note 1, art. 55 (requiring an Occupying Power to provide specified articles "[t]o the fullest extent of the means available to it").

187. *See supra* note 51.

188. *See supra* note 54.

189. *See supra* note 53.

Presidential discretion that determines what constitutes compliance with the international obligations arising under the Conventions.

The aid obligations and impartial humanitarian organizations' right to access contained in the Conventions argue against designating the conflict with IEEPA a political question. Application of the political question doctrine results in nonjusticiability for certain situations of foreign affairs.¹⁹⁰ The Supreme Court has clarified the circumstances in which the doctrine applies, stating that it excludes from review "those controversies which revolve around policy choices and value determinations"¹⁹¹ Adherence to the Geneva Conventions, a multilateral treaty with 190 signatories that is so widely accepted that it is considered customary international law,¹⁹² should not depend on a policy choice or a value judgment of an Executive immune from review. More recently, the District Court for the Eastern District of Virginia in *United States v. Lindh*¹⁹³ discussed Presidential determinations under the Conventions and stated that "[c]onclusive deference [to the President], which amounts to judicial abstention, is plainly inappropriate."¹⁹⁴

The United States has an obligation to provide care to non-combatants and to allow an identified group of organizations access to ensure that the aid arrives.¹⁹⁵ The President does not have a right under the Conventions to determine whether the United States has such an obligation. The situations in which both the Conventions and IEEPA apply often, if not always, coincide with situations in which the foreign affairs power permits the Executive to make policy choices and value judgments.¹⁹⁶ The conflict between the two laws merits judicial review, which is not excused by the political question doctrine.¹⁹⁷

On the international plane, the United States has an unambiguous obligation to comply with the Conventions.¹⁹⁸ The International Court of Justice

190. See *Baker v. Carr*, 369 U.S. 186, 211–12 (1962) (listing factors to be taken into account in determining whether an issue is a nonjusticiable political question).

191. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (holding that the "political overtones" of a controversy surrounding whaling quotas did not bar judicial inquiry).

192. See *supra* note 12; see also BOUCHET-SAULNIER, *supra* note 8, at 65 (noting that all four Conventions have the status of customary international law).

193. 212 F. Supp. 2d 541 (E.D. Va. 2002).

194. *Id.* at 556–57.

195. Common Article 1, *supra* note 1; Common Article 3, *supra* note 1; Common Article 9/10, *supra* note 1.

196. *Lindh*, 212 F. Supp. 2d at 555–56 (discussing situations in which the President, as Commander in Chief, should be given deference by the judicial branch, but concluding that the determination, in this case, relating to the applicability of the Conventions during a national emergency did not demand judicial abstention).

197. *Id.* at 556 ("At the highest level of abstraction, it may be argued that the Constitution commits the conduct of foreign affairs to the President. This is hardly a clear, demonstrable constitutional commitment to the President to construe and apply treaties free from judicial review. Indeed, as *Baker* warns, 'it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'") (citing *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

198. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 156 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd and remanded*, 2006 WL 1764793 (U.S. June 29, 2006) ("It is universally

stated this very clearly in *Military and Paramilitary Activities*:¹⁹⁹ “[T]here is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to ‘respect’ the Conventions and even to ‘ensure respect’ for them ‘in all circumstances.’”²⁰⁰ Subsequent cases decided by the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda reiterated the enforceability of the Conventions.²⁰¹

As the United States Supreme Court has often reiterated, “[i]nternational law is part of our law.”²⁰² In some circumstances, a conflicting domestic statute will not inhibit the United States from performing its international obligations under an earlier treaty and will change only the conditions under which a claim can be made following a violation.²⁰³ In this case, international law remains “our law”²⁰⁴ without controversy. In other circumstances, a bar on the domestic plane will inhibit performance on the international plane.

An example of the latter situation arose when the 1987 Anti-Terrorism Act²⁰⁵ mandated the closure of the Palestine Liberation Organization (“PLO”) UN Observer Mission.²⁰⁶ The convergence of the domestic statute and international obligations under the UN Headquarters Agreement, under which the United States gave the UN the right to invite non-members to be present at its headquarters as observers,²⁰⁷ made compliance with both

agreed, and is demonstrable in the Convention language itself . . . that Common Article 3 embodies ‘international human norms’); see also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 218 (June 27).

199. 1986 I.C.J. 14.

200. *Id.* at ¶ 220.

201. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, ¶ 4 (Sept. 2, 1998) (“According to Articles 2 to 4 of the Statute relating to its *ratione materiae* jurisdiction, the Tribunal has the power to prosecute persons . . . responsible for serious violations of Article 3 Common to the Geneva Conventions of 12 August 1949 on the protection of victims of war”); *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 143 (Oct. 2, 1995) (concluding that the ICTY had the authority to apply the Conventions). Although these cases do not specifically address the obligations of the United States, they provide the basis for enforceability of signatories to the Conventions. See *id.* at ¶ 270 (July 17, 1999); see also Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority To Court-Martial Non-U.S. Military Personnel For Serious Violations Of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74, 127 (2001) (“The cases decided after Nicaragua establish, beyond any doubt, that violations of Common Article 3(1) . . . are serious violations of international humanitarian law resulting in universal jurisdiction and giving rise to individual criminal responsibility”).

202. *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004) (citing *The Paquete Habana*, 175 U.S. 700 (1900)).

203. See Lobel, *supra* note 138, at 1073 (“The conventional justification for according the political branches the constitutional power to violate international law posits a dichotomy between the national order and the international order. . . . The government is legally answerable only in the international sphere, with enforcement left to appropriate sanctions imposed by other nations.”) (internal citations omitted).

204. *The Paquete Habana*, 175 U.S. at 700.

205. Anti-Terrorism Act of 1987, 22 U.S.C.A. §§ 5201–03 (2000).

206. *Id.* § 5202(3).

207. 22 U.S.C. § 287.

impossible.²⁰⁸ The UN Headquarters Agreement required the United States to extend certain privileges to observer missions.²⁰⁹ The later Anti-Terrorism Act prohibited, *inter alia*, the establishment of any office with the purpose of furthering the interests of the PLO.²¹⁰ The court stated, “[w]e believe the [Anti-Terrorism Act] and the Headquarters Agreement cannot be reconciled except by finding the [Anti-Terrorism Act] inapplicable to the PLO Observer Mission.”²¹¹ Although the court relied on the *Charming Betsy*²¹² canon that statutes should be construed to comply with the law of nations if possible,²¹³ it was a stretch to assert that the language of the ATA showed no congressional intent to override the treaty.²¹⁴ As the PLO case shows, even if courts accept the later-in-time doctrine unconditionally, at times implementation of the domestic law will necessarily violate the international obligations which the law,²¹⁵ the courts,²¹⁶ and commentators²¹⁷ consistently support.

208. For example:

Everyone agrees that the Anti-Terrorism Act, at least insofar as it applies to the PLO Mission at the United Nations, is a violation of the Headquarters Agreement and, presumably, the Charter of the United Nations that the Agreement implements. The question that is posed in the litigation, . . . is whether the statute has priority over the Charter? I must say that I am puzzled by a statement . . . that the international obligations of the United States remain in effect. If they remain in effect, it is very difficult to see how the statute can be carried out.

Boundin, *supra* note 176, at 541.

209. The Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, 26 June 1944, *reprinted in* 22 U.S.C. § 287 [hereinafter Headquarters Agreement].

210. 22 U.S.C.A. § 5202(3) (“It shall be unlawful, if the purpose be to further the interests of the Palestine Liberation Organization . . . to establish or maintain an office, headquarters, premises or other facilities or establishments within the jurisdiction of the United States at the behest or direction of, or with funds provided by the Palestine Liberation Organization or any of its constituent groups, any successor to any of those, or any agents thereof.”).

211. *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1465 (S.D.N.Y. 1988).

212. *See Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804); *PLO*, 695 F. Supp. at 1465.

213. The *Palestine Liberation* court reasoned that “neither the Mission nor the Headquarters Agreement is mentioned in the [Anti-Terrorism Act] itself,” *PLO*, 695 F. Supp. at 1468. However, the language of the Anti-Terrorism Act specifically prohibits PLO offices, *supra* note 210. The court next reasoned that “while the section of the [Anti-Terrorism Act] prohibiting the maintenance of an office applies ‘notwithstanding any provision of law to the contrary’ it does not purport to apply notwithstanding any treaty.” *PLO*, 695 F. Supp. at 1468 (internal citations omitted). The Headquarters Agreement, however, has been implemented into domestic law. 22 U.S.C. § 287. The *PLO* court’s determination that a treaty is not the law is inconsistent with Supreme Court decisions. *See, e.g., Head Money Cases*, 112 U.S. 580, 598 (1884) (“A treaty, then, is a law of the land as an act of Congress is. . .”).

214. *See Vagts, supra* note 169, at 159 (noting, apparently with some sarcasm, that “[o]nly heroic efforts to interpret the Anti-Terrorism Act of 1987 so as not to evince an intent to overrule a prior international agreement . . . prevented a statute from putting [the United States] in violation of [its] treaty commitments”).

215. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(b) (1987).

216. *See Diggs v. Schultz*, 470 F.2d 461, 465 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *Beharry v. Reno*, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002).

217. *See supra* note 181.

IEEPA and the Conventions create a problem similar to that of the PLO mission, in that exercise of the override authority would prohibit activities that the Conventions mandate.²¹⁸ Under IEEPA the President can choose to bar the export of items such as food and medicine by an impartial humanitarian organization subject to United States jurisdiction.²¹⁹ The Conventions obligate Parties to permit these same organizations access to deliver these same goods.²²⁰ The United States cannot, therefore, comply on the international plane while prohibiting on the domestic plane the activities necessary for compliance.

Where the domestic and international planes coincide, co-existence of the later-in-time rule and treaty obligations creates a paradox that current doctrine cannot always resolve. In this case, it is not possible to read consistency into the statute in adherence to the *Charming Betsy* canon.²²¹ Although impartial humanitarian organizations, and more generally, supporters of the Conventions, would argue that *Charming Betsy* dictates that courts must carve the Conventions' aid obligations and rights of access out of Executive Orders pursuant to the override authority, there is no statutory text in IEEPA to interpret in connection with the Conventions' specific references to impartial humanitarian organizations.²²² In order to accede to this request, courts must read limitations into the text of IEEPA,²²³ which requires a level of judicial activism beyond that which the courts have considered *Charming Betsy* to permit.²²⁴ Once the existence of a conflict has been established, courts will apply the later-in-time doctrine,²²⁵ but where, as here, the prohibited and required acts are one and the same, the later-in-time analysis does not provide resolution. For IEEPA and the Conventions to coexist with respect to impartial humanitarian organizations and their activities during armed conflict, courts must relax the later-in-time doctrine.

218. See 50 U.S.C. § 1702(b)(2); Common Article 3, *supra* note 1; Common Article 9/10, *supra* note 1.

219. 50 U.S.C. § 1702(b)(2).

220. See, e.g., Third Convention, *supra* note 1, art. 73; Fourth Convention, *supra* note 1, art. 23, 55, 59.

221. See *Murray v. The Charming Betsy*, 6 U.S. 64, 117–18 (1804); see also Richard A. Falk, Remarks, *Palestine Liberation Organization Controversy*, 82 AM. SOC'Y INT'L L. PROC. 534, 546 (1988) ("This set of controversies that has exposed our country externally to such an awkward set of contradictory commitments provides us with the challenge and opportunity to rethink the place of international law in our constitutional process and, in the broader sense, of relating it in a more systematic and effective way to the conduct of foreign relations.").

222. See Joan Fitzpatrick & William Bennett, *A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589, 593–94 (1995) (noting that when U.S. political branches violate treaties "they must act unambiguously . . . Breach of treaty or customary law should not be permitted to occur by implication"); see also text accompanying notes 112 to 117.

223. See 50 U.S.C. § 1702(b)(2) (creating the override authority).

224. See Ralph Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1167 (1990).

225. See *supra* note 128.

D. Policy Implications of a Violation of the Conventions

International agreements, especially those related to humanitarian law and human rights, by their nature raise issues of foreign policy.²²⁶ While courts at times dismiss claims as political questions addressable only by the legislature and the executive,²²⁷ such dismissal is not a foregone conclusion.²²⁸ Whether or not the Conventions are of such a nature as to preclude automatic application of the later-in-time rule,²²⁹ and whether or not adherence on the international plane is made impossible by the domestic legislation,²³⁰ policy grounds tip the balance and require that courts find that the later-in-time doctrine does not apply to multilateral humanitarian treaties.

International law depends a great deal on nations' assessments of their own needs for reciprocity and credibility on the international plane.²³¹ Domestic self-interest is also a significant consideration, but it is often bounded by the more complex considerations of reciprocity and credibility to balance short-term and long-term costs and benefits of compliance.²³²

226. The policy considerations relate to the United States' interests in the international and domestic arenas and to the practical implications of limiting and politicizing humanitarian aid. *See Chew Hong v. United States*, 112 U.S. 536, 539–40 (1884) (“There would no longer be any security,” says Vattel, “no longer any commerce between mankind, if [nations] did not think themselves obliged to keep faith with each other, and to perform their promises.” “[T]he 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 [treaty] stipulations shall be recognized and protected.”).

227. *See Diggs v. Schultz*, 470 F.2d 461, 465 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) (“The considerations underlying [the passage of the Byrd Amendment] by Congress present issues of political policy which courts do not inquire into. Thus, appellants’ quarrel is with Congress, and it is a cause which can be pursued only at the polls and not in the courts.”).

228. *See Baker v. Carr*, 369 U.S. 186, 211 (1962); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

229. *See supra* text accompanying note 177 *et seq.*

230. *See supra* text accompanying note 218 *et seq.*

231. *See* Oscar Schacter, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 7 (1991) (“[G]overnments will weigh a possible breach by them against their interest in reciprocal observance by the other party. They will also consider the likelihood of retaliation and other self-help measures by that party. Nor would they ignore the negative consequences of a reputation for repudiating their obligations.”).

232. For instance:

In part, the United States adheres to human rights conventions because it is concerned to maintain leadership in international affairs by proving that it deserves it, by its behavior at home and by its willingness to join in cooperative international efforts In larger part, the United States is concerned to see minimum standards observed in other countries in order to promote conditions that are conducive to U.S. prosperity and to U.S. interests in peace and security.

HENKIN, *supra* note 30, at 475. In some cases, the United States has renegotiated treaties in order to correct the conflict created by a later-in-time statute. President Chester A. Arthur vetoed the original version of the Chinese Exclusion Act because it did not conform with an existing treaty. 13 CONG. REC. 2551–52 (1882). The question has been posed whether the Conventions themselves need revision to conform to the world of the 21st century. *See* E-mail from A.W.B. Simpson, Professor of Law, University of Michigan Law School, to author (Nov. 5, 2002, 10:28:00 E.S.T.) (on file with the author).

Reciprocity demands a longer-term view of both the objectives of the Conventions and the possibility that the beneficiaries of the treaty obligations might be United States citizens.²³³ The *Noriega* court's argument in favor of enforcing the Convention obligations toward prisoners of war heavily emphasized the need to ensure similar treatment of United States troops in the future.²³⁴ The court also justified its holding by noting that adherence is necessary "[i]n order to set the proper example and avoid diminishing trust and respect of other nations."²³⁵ The Conventions have wide scope²³⁶ and broad support,²³⁷ and there is thus a strong policy argument against derogation and for reciprocity because future armed conflict is unpredictable.²³⁸

Credibility plays a similar role in compelling adherence to treaties, in particular treaties related to human rights and humanitarian action, due to the fact that the United States publicly asserts that it is a strong advocate for and supporter of higher global standards for individual rights throughout the world.²³⁹ Derogation from treaty obligations that enforce such goals undermines efforts at achieving them.²⁴⁰ The need for credibility is bound with the

233. See *supra* note 175.

234. See *United States v. Noriega*, 808 F. Supp. 791, 803 (S.D. Fla. 1992) (ordering the Attorney General and the Bureau of Prisons to set sentencing keeping in mind "the importance to our own troops of faithful and, indeed, liberal adherence to the mandates of Geneva III"); see also News Release, Headquarters United States Central Command, Coverage of POW's and Deceased (Mar. 23, 2003), available at http://www.centcom.mil/CENTCOMNews/News_Release.asp?NewsRelease=20030352.txt (requesting that the media not publish images or other identifying information on United States military held as prisoners of war in Iraq "[o]ut of respect for the families and consistent with the principles of Geneva Conventions").

235. *Noriega*, 808 F. Supp. at 802–03.

236. The Conventions apply to "armed conflict," internal and international. See Common Article 2, *supra* note 1 ("[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise . . .").

237. 190 nations are signatories to the Conventions. See *Champ d'application*, *supra* note 5.

238. See *To Amend the United Nations Participation Act of 1945 to Halt the Importation of Rhodesian Chrome and to Restore the U.S. to its Position as a Law Abiding Member of the International Community: Hearing on S. 1868 Before the S. Subcomm. on African Affairs, Comm. on Foreign Relations*, 93d Cong. (1973) (statement of John Scali, United States Ambassador to the United Nations); Vagts, *Observance and Breach*, *supra* note 172, at 331 (overriding treaties by internal action "is the most provocative of all tactics").

239. See Department of State Protocol II Letter, *supra* note 103, at 567 ("The United States has traditionally been in the forefront of efforts to codify and improve the international rules of humanitarian law"); Interview by Wolf Blitzer with Donald Rumsfeld, United States Secretary of Defense, in Washington D.C. (March 23, 2003), available at <http://www.cnn.usnews.clickability.com/pt/cpt?action=cpt&expire=-1&urlID=5786054> (stating that Iraq must treat POWs "according to the Geneva Convention, just as we treat Iraqi prisoners according to the Geneva Convention").

240. For instance:

The United States cannot expect to reap the benefits of internationally recognized human rights—in the form of greater worldwide stability and respect for people—without being willing to adhere to them itself. As a moral leader of the world, the United States had obligated itself not to disregard rights uniformly recognized by other nations.

Beharry v. Reno, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002).

need for reciprocity; enforcement of and adherence to international law norms are not separable.

On the domestic plane, public perception and reaction play a role in dictating international policy. The media have disseminated information about potential terrorist funding,²⁴¹ and Congress has addressed the issue in hearings with charitable organizations and other experts.²⁴² The Attorney General has investigated, and continues to investigate, alleged schemes to portray funds sent to support Al Qaeda and other terrorist organizations as humanitarian aid.²⁴³ The acts of the United States toward non-combatants during situations of armed conflict are visible and generate either support or lack of support for the nation's military engagements. Policy decisions about provision and prohibition of aid, therefore, must take into account public reaction to humanitarian crises in Afghanistan, Iraq, and other nations in which the United States military acts.²⁴⁴ Exercise of the IEEPA override authority and the consequent lack of sufficient humanitarian aid will increase the severity of such crises and will diminish the credibility of the United States on the domestic as well as the international plane.

Given the aforementioned objectives of reciprocity, credibility, self-interest, and domestic approval, the United States benefits by adhering to the Conventions.²⁴⁵ Humanitarian organizations provide support to the United States in performance of its obligations because the nature of armed conflict makes it impossible for Parties themselves to fulfill the requirements of the Conventions.²⁴⁶ Former Secretary of State Colin Powell's

241. See, e.g., *All Things Considered: Timing of Charity Shutdown Troubles Muslims* (NPR radio broadcast Oct. 26, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=4127521>; Four People, Charity Charged with Sending Millions to Iraq, CNN.com, Feb. 26, 2003, available at <http://www.cnn.com/2003/LAW/02/26/charity.arrests.ap/index.html>.

242. *Role of Charities and NGO's*, *supra* note 47, at 2 (statement of Sen. Evan Bayh) ("This hearing has been called to send a very clear signal that those who use the cover of humanitarian and charitable efforts to hide their support for the murderous acts of terrorism should have no safe harbor in our country").

243. See U.S. Dep't of Justice, *Prepared Remarks of Attorney General John Ashcroft, Criminal Indictment Announcement*, <http://usinfo.state.gov/is/Archive/2004/Sep/20-829053.html> (Sept. 17, 2004) (listing examples of indictments against those accused of providing support to alleged terrorists via charitable organizations established in the United States).

244. The decision as to whether to engage in humanitarian intervention often turns on the public's reaction to, and perception of, humanitarian crises. For example, concerns over the fate of Iraqi citizens were relevant to certain decisions related to the U.S. military's activities following the March 2003 invasion. See *Humanitarian Intervention: A Forum*, NATION, July 14, 2003, available at <http://www.thenation.com/doc/20030714/forum> (discussing the relevance of human rights and related concerns in the context of military interventions).

245. See Vagts, *Observance and Breach*, *supra* note 172, at 329 ("[T]he weighing of longer-run interests in reputation and a stable international legal system against the immediate gains from treaty defection is still a matter of instinct and judgment rather than calculation."); see also *supra* note 131 and accompanying text regarding the G.W. Bush administration's increasing inclination toward selective application of the Conventions.

246. See Rafa Vila San Juan, Sec'y Gen. & Chair, Steering Comm. for Humanitarian Response, *Humanitarian Action Must Not be a Tool of Political Interests* (July 18, 2002), available at <http://www.msf.org/msfinternational/invoke.cfm?objectid=065898A6-5322-4EE6-88C8BF97B39CB5AC> ("Impartial humanitarian assistance is a response to an urgent and inalien-

remark that non-governmental organizations are “a force multiplier for us . . . an important part of our combat team”²⁴⁷ belies the Conventions’ requirement of impartiality.²⁴⁸ Impartiality is a prerequisite for achieving the goals of the Conventions. Humanitarian organizations that operate impartially and that join the ICRC as valid providers of humanitarian aid during situations of armed conflict by law cannot be removed from that role, nor is it in the U.S.’s interests to do so.

CONCLUSION

The President’s ability to place unilateral restrictions on humanitarian donations under IEEPA is overreaching and implementation of the override authority creates an imminent risk of violations of international law in situations of armed conflict. In addition, humanitarian organizations can be reluctant to provide impartial aid in precisely the situations where it is needed most because of the very existence of potential controls and their sanctions. Courts have read the *Charming Betsy* doctrine narrowly in certain contexts, such that IEEPA and the Conventions will not be read as consistent in the circumstances relevant to the use of the override authority. The existence of this conflict requires analysis under the later-in-time doctrine. The later-in-time doctrine does not necessarily apply to the Conventions; moreover, use of the doctrine could result in legal and political repercussions because of the particular nature of multilateral humanitarian treaties. Although courts and commentators conclude that the later-in-time doctrine is viable with respect to domestic obligations, the doctrine should not apply where domestic law bars not only domestic performance but also impedes obligations on the international plane. In addition, policy considerations preclude automatic use of the later-in-time rule. The “penumbral obligation of treaties,”²⁴⁹ particularly where the object is humanitarian aid, requires narrow tailoring of measures to avoid support of terrorism.²⁵⁰

able right in itself, whereas peace-making or peace-keeping operations inevitably have a partial and political mandate. Which means . . . that civilian, humanitarian organisations cannot operate under the command of the military.”)

247. Colin Powell, U.S. Sec’y of State, Remarks to the National Foreign Policy Conference, (Oct. 26, 2001) (comments in relation to, *inter alia*, activities in Afghanistan in October 2001).

248. See Common Articles 3 and 9/10; see also *Iraq: Independent Humanitarian Aid under Attack*, http://www.doctorswithoutborders.org/publications/ideas/iraq_11-10-2003.cfm (last visited July 5, 2006) (“[T]he US’s attempt to partially justify its military goals as ‘humanitarian’ has seriously undermined the very principle of true humanitarian action: unconditional provision of assistance to those in need without taking sides in a conflict.”).

249. Vagts, *Observance and Breach*, *supra* note 172, at 323.

250. Other laws, both domestic and international, exist to effectively control funding of terrorists, a valid international concern. See *supra* note 98; see also Press Release, International Committee of the Red Cross, Geneva Convention on Prisoners of War (Feb. 9, 2002), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/26D99836026EA80DC1256B660610C90> (“The ICRC remains firmly convinced that compliance with international humanitarian law in no manner constitutes an obstacle to the struggle against terror and crime.”).

