

CRIMINALIZING HUMANITARIAN RELIEF: ARE U.S. MATERIAL SUPPORT FOR TERRORISM LAWS COMPATIBLE WITH INTERNATIONAL HUMANITARIAN LAW?

JUSTIN A. FRATERMAN*

In the wake of the U.S. Supreme Court's decision in Holder v. Humanitarian Law Project, there has been much discussion about the potentially chilling effect that U.S. material support laws may have on the provision of humanitarian assistance in both disaster and war zones. This Article examines these issues in depth, providing an analysis of the material support legal regime and the Humanitarian Law Project decision, the regime's potential legal impact on humanitarian organizations, and the interaction between these laws, international law, and U.S. constitutional law.

More specifically, this Article advances a number of arguments: First, it posits that the material support laws pose a serious threat to the provision of much needed humanitarian relief. Next, it argues that the United States has a clear obligation under international humanitarian law—more specifically under the Geneva Conventions—to refrain from interfering with the provision of humanitarian assistance in certain circumstances. As a result, the material support laws as applied to humanitarian relief organizations place the United States in violation of its international legal obligations. The Article then considers the impact of this conflict as a matter of U.S. domestic law, looking at the literature and jurisprudence on self-executing treaties to examine whether the Conventions are judicially enforceable in U.S. courts. In doing so, it asserts that some provisions of the Conventions could arguably provide humanitarian workers and organizations facing

* Associate, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; J.D., Georgetown University Law Center (2011); MSc International Relations, London School of Economics and Political Science (2006); B.A. History and Political Science, McGill University (2004). A draft of this Article was presented at the American Society of International Law's Annual Meeting in March 2012, and at the *Yale Journal of International Law's* Young Scholars Conference in February 2011. The author is thankful to all those at these conferences who offered their insight and criticism. The author is particularly grateful to David Luban for his guidance and mentorship and to Dustin Lewis for contributing extensive comments. Thanks are also due to Esha Bhandari, David Cole, Justin Gest, Oona Hathaway, Heike Krieger, Peter Margulies, Carlos Vázquez and the editorial staff of this publication for their helpful advice, comments and input. As always, responsibility for any errors or omissions remains solely with the author. The views expressed herein are the author's own and do not necessarily reflect those of his employer or any other party.

criminal prosecution with a defense against allegations of providing material support. Finally, the Article considers a possible enlarged humanitarian exception to the existing statutory regime, as well as the particular difficulty faced by the International Red Cross movement in adapting its activities to ensure compliance with the material support laws.

I.	INTRODUCTION	401
II.	CRIMINALIZING MATERIAL SUPPORT FOR TERRORISM	405
	A. <i>Important Elements of the Criminal Statutes</i>	405
	1. <i>Meaning of "Material Support"</i>	407
	a. <i>Humanitarian Assistance as "Material Support"?</i>	411
	2. <i>Meaning of "Designated Terrorist Organization"</i>	414
	3. <i>The Mens Rea Requirement</i>	415
	4. <i>Extraterritorial Jurisdiction</i>	418
	5. <i>The Secretary of State's Exception</i>	422
	B. <i>Important Elements of Executive Order 13,224 Under IEEPA</i>	422
	C. <i>The Supreme Court's Ruling in Holder v. Humanitarian Law Project</i>	426
	D. <i>The Chilling Effect of the Material Support Laws on Humanitarian Assistance</i>	428
	E. <i>Some Unresolved Questions</i>	430
III.	THE INTERACTION OF THE MATERIAL SUPPORT MEASURES WITH U.S. OBLIGATIONS UNDER INTERNATIONAL HUMANITARIAN LAW	432
	A. <i>Conflict Typology: Situations in Which Humanitarian Organizations and Designated Terrorist Organizations Might Interact, and the IHL that Applies</i>	433
	B. <i>The Right of Civilians to Receive or Request Relief</i>	438
	C. <i>The Duty of Parties to Provide or Facilitate—or at Least, Not to Impede—Relief</i>	439
	D. <i>The Right of Humanitarian Organizations to Provide Relief or to Offer Their Services</i>	442
	E. <i>The Obligation of Third Parties Not to Interfere with the Provision of Relief</i>	443
	F. <i>Other Protections Afforded Specifically to the ICRC</i>	448

G.	<i>Humanitarian Relief Outside of Situations of Armed Conflict</i>	449
H.	<i>Mixed Situations of Disaster and Conflict</i>	451
IV.	THE INTERACTION OF THE MATERIAL SUPPORT STATUTES WITH THE GENEVA CONVENTIONS UNDER U.S. DOMESTIC LAW	454
A.	<i>Treaties as the “Law of the Land”</i>	454
B.	<i>Use of the Charming Betsy Doctrine to Resolve Conflicts Between Domestic Statutes and Treaty Obligations</i>	455
C.	<i>Treaty Provisions as Defenses to Criminal Prosecution</i>	456
D.	<i>Are the Geneva Convention Provisions Protecting Humanitarian Assistance Judicially Enforceable?</i>	461
V.	THE WAY FORWARD	465
VI.	CONCLUSION	467
ANNEX I	469

I. INTRODUCTION

In December 2004, a massive tsunami wreaked havoc and destruction throughout the Indian Ocean region. The island of Sri Lanka was among the worst hit, with 40,000 people losing their lives and many more suffering injuries, being temporarily displaced from their homes, or being rendered permanently homeless.¹ In the aftermath of this disaster, much of the island’s public infrastructure and public health capacity was devastated: disease threatened to spread, and food and shelter were in short supply.² As with all such complex emergencies, there was an urgent need for immediate and widespread humanitarian assistance. Donations of food, blankets, clothing, and other essential relief supplies, alongside millions of dollars in cash, poured into relief organizations like the Red Cross, and volunteers geared up to travel to Sri Lanka and

1. Samanthi Dissanayake, *Divided Island Remembers Tsunami*, BBC NEWS (Dec. 26, 2005), http://news.bbc.co.uk/1/hi/world/south_asia/4560598.stm.

2. Peter Beaumont, *Tsunami: 500,000 Still Homeless*, THE OBSERVER (June 19, 2005), <http://www.theguardian.com/world/2005/jun/19/tsunami2004.internationalaidanddevelopment>; *Bad Water, Disease Threaten Tsunami Survivors*, NBC NEWS (Jan. 3, 2005), <http://www.nbcnews.com/id/6755980/#.UtNjCmRDuZU>.

other affected states throughout the region to donate time and expertise.³

Unfortunately, many of these donations, volunteers and supplies never ended up at their intended destination.⁴ This is because there were justifiable concerns that the involved aid agencies and individuals could face criminal prosecution in the United States. At the time of the tsunami, the north-eastern part of Sri Lanka was controlled by the Liberation Tigers of Tamil Eelam (LTTE), a Tamil-nationalist armed group seeking the creation of an independent Tamil state. The LTTE has engaged in terrorism throughout its history and, by all accounts, is responsible for hundreds of suicide bombings and more than a dozen assassinations since its founding.⁵ Consequently, the LTTE has been designated as a Foreign Terrorist Organization by the U.S. State Department since 1997.⁶ As a result, most forms of interaction with the LTTE and other similarly designated groups have been criminalized in the United States by a dense web of criminal statutes and administrative measures. In particular, the provision of “material support” to these groups may result in the imposition of stiff criminal sanctions such as heavy fines and lengthy prison terms.

However, the LTTE is not merely a terrorist group: For much of the civil war it acted as the de facto government of north-eastern Sri Lanka, providing health services and schooling, training police officers, and running a court system.⁷ As a result, it would have been nigh impossible in the aftermath of the tsunami to provide humanitarian assistance in the north-

3. *Red Cross Red Crescent Tsunami Operation*, INT’L FED’N OF RED CROSS & RED CRESCENT SOC’YS, <http://www.ifrc.org/what/disasters/response/tsunamis/index.asp> (last visited Nov. 20, 2013).

4. *Implementation of the USA Patriot Act: Prohibition of Material Support Under Sections 805 of the USA Patriot Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 25–28 (2005) (statement of Ahilan Arulanantham) [hereinafter Statement of Ahilan Arulanantham].

5. Preeti Bhattacharji, *Backgrounder: Liberation Tigers of Tamil Eelam (AKA Tamil Tigers) (Sri Lanka, Separatists)*, COUNCIL ON FOREIGN RELATIONS (MAY 20, 2009), http://www.cfr.org/publication/9242/liberation_tigers_of_tamil_eelam_aka_tamil_tigers_sri_lanka_separatists.html#p3.

6. *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE (Sept. 28, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

7. Statement of Ahilan Arulanantham, *supra* note 4, at 25.

eastern part of Sri Lanka without in some way coordinating, liaising, or interacting with LTTE officials.⁸ However, by consequence of the U.S. material support laws, any humanitarian organizations or their employees who did so risked criminal prosecution and asset freezes.⁹ In short, these laws likely prevented the provision of indispensable aid to millions of people in a devastated disaster zone.¹⁰

The U.S. Supreme Court's 2010 decision in *Holder v. Humanitarian Law Project* brought these issues to the forefront of the public discourse, and has led to much discussion about the potentially chilling effect that the material support laws may have on the provision of humanitarian assistance in both disaster and war zones. Indeed, in one concrete (and particularly absurd) example of this chill factor, it was reported in October 2009 that the U.S. State Department was sitting on USD \$50 million worth of much-needed aid to Somalia out of fear that U.S. government employees administering this assistance would be exposed to prosecution under Executive Order 13,224 due to the fact that large parts of the country are controlled by Shabab, an Islamist group designated as a terrorist group by the Office of Foreign Asset Control (OFAC). In fact, the State Department went so far as to send a letter to the Treasury Department seeking assurances that OFAC would not launch prosecutions or asset freezes against any government employees providing humanitarian relief.¹¹ Unreassuringly,

8. OMB WATCH & GRANTMAKERS WITHOUT BORDERS, COLLATERAL DAMAGE: HOW THE WAR ON TERROR HURTS CHARITIES, FOUNDATIONS, AND THE PEOPLE THEY SERVE 54 (2008), available at <http://www.ombwatch.org/files/npadv/PDF/collateraldamage.pdf>.

9. See *Anti-Money Laundering: Blocking Terrorist Financing and Its Impact on Lawful Charities: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm on Fin. Servs.*, 111th Cong. 70–76 (2010) (statement of Kay Guinane, Program Manager, Charity and Security Network) (discussing the difficulties the law creates for charitable organizations working in areas dominated by groups on the list).

10. Ahilan T. Arulanantham, "A Hungry Child Knows No Politics:" A Proposal for Reform of the Laws Governing Humanitarian Relief and 'Material Support' of Terrorism, AM. CONST. SOC'Y FOR LAW & POL'Y (June 25, 2008), <http://www.acslaw.org/files/Arulanantham%20Issue%20Brief.pdf>.

11. Jeffrey Gettleman, *U.S. Delays Somalia Aid, Fearing It Feeds Terrorists*, N.Y. TIMES, Oct. 2, 2009, at A13. For more on the impact of counter-terrorism laws on humanitarian assistance in Somalia see Dustin Lewis, *Counterterrorism Regulations and Humanitarian Access to the Famine in Somalia*, HARV. U. PROGRAM ON HUMANITARIAN POL'Y & CONFLICT RES. (Aug. 10, 2011), <http://>

the Treasury Department responded that any transactions with Shabab remained prohibited, but that American aid officials would not be prosecuted if they acted in "good faith."¹²

This Article aims to consider this issue in depth, providing an analysis of the material support legal regime and the *Humanitarian Law Project* decision, its potential legal impact on humanitarian organizations, and the interaction between these laws, international law and U.S. constitutional law. In so doing, this Article will advance a number of arguments. First, Part II posits that the material support laws do potentially pose a serious threat to the provision of much-needed humanitarian relief. Next, Part III argues that the United States has a clear obligation under international humanitarian law, more specifically the Geneva Conventions, to refrain from interfering with the provision of humanitarian assistance in certain circumstances. As a result, the material support laws as applied to humanitarian relief organizations place the United States in violation of its international legal obligations. Part IV considers the consequences of the incompatibility between the material support statutes and the Conventions as a matter of U.S. domestic law. It looks at the literature and jurisprudence on the self-execution of treaties to examine whether the Conventions are judicially enforceable in U.S. courts, arguing that some provisions of the Conventions could furnish humanitarian workers and organizations with a defense against criminal prosecution. Finally, Part V considers a possible enlarged humanitarian exception to the existing statutory regime, as well as the particular difficulty faced by the International Red Cross movement in adapting its activities to ensure compliance with the material support laws.

www.hpcrresearch.org/blog/dustin-lewis/2011-08-10/counterterrorism-regulations-and-humanitarian-access-famine-somalia. For more on the issue generally, see SARA PANTULIANO ET AL., COUNTER-TERRORISM AND HUMANITARIAN ACTION: TENSIONS, IMPACT AND WAYS FORWARD, HUMANITARIAN POL'Y GROUP (2011), available at <http://www.odi.org.uk/resources/docs/7347.pdf>; Kate Mackintosh, Holder v. Humanitarian Law Project: *Implications for Humanitarian Action: A View From Médecins Sans Frontières*, 34 SUFFOLK TRANS-NAT'L L. REV. 507 (2011).

12. Gettleman, *supra* note 11.

II. CRIMINALIZING MATERIAL SUPPORT FOR TERRORISM

The legal regime targeting the provision of material support or financing of terrorism consists of three federal statutes—18 U.S.C. § 2339A, § 2339B and § 2339C¹³—and an executive order—Executive Order 13,224¹⁴—promulgated pursuant to the authority granted to the President under the International Emergency Economic Powers Act (IEEPA).¹⁵ Whereas the statutes provide for criminal sanctions, including prison sentences and fines, the executive order creates an administrative basis to impose asset freezes and other economic measures. The following Parts will provide a description of the key elements of the federal statutes and the executive order, and will analyze their potential application to humanitarian actors. These Parts will also provide insight into the way in which these statutes deter or encumber humanitarian actors from delivering humanitarian assistance.

A. *Important Elements of the Criminal Statutes*

18 U.S.C. § 2339A makes it a criminal offence to provide material support to individuals committing certain predicate terrorist offences.¹⁶ Effectively, § 2339A

13. Section 2339A was first enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022, and § 2339B was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250. Together they have been amended several times, most notably through the USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 805, 115 Stat. 272, 377-78, and the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603, 118 Stat. 3638, 3762-64. Section 2339C was created by the Terrorist Bombings Convention Implementation Act of 2002, Pub. L. No. 107-197, § 202, 116 Stat. 721, 724-27, in order to fulfill U.S. obligations under the United Nations' International Convention for the Suppression of the Financing of Terrorism. It has subsequently also been amended numerous times, most recently in 2006. For more on the history and background of these statutes, see Michael W. Ryan, Comment, *Not All Practice Makes Perfect: How the Treasury's Revised Anti-Terrorist Financing Guidelines Still Fail to Adequately Address Charitable Concerns*, 43 WAKE FOREST L. REV. 739 (2008).

14. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

15. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701-07 (2011)).

16. Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in

outlaws attempting to, conspiring to, or actually providing material support or resources, or concealing or disguising the nature, location, source, or ownership of material support or resources, knowing or intending that they be used in preparation for, in carrying out, in preparation for concealment for an escape from, or in carrying out the concealment of an escape from an offense identified as a federal crime of terrorism.¹⁷

A fine and/or a prison term of up to fifteen years may be imposed by a federal court should a conviction for violation of this statute be obtained. In the case of violations leading to the death of a person, a life sentence may also be imposed.

Next, 18 U.S.C. § 2339B makes it a criminal offence to provide material support to a foreign terrorist organization.¹⁸ Effectively, § 2339B “outlaws attempting to provide, conspiring to provide, or actually providing material support or resources to a foreign terrorist organization knowing that the organization has been designated a foreign terrorist organization, or engages, or has engaged, in ‘terrorism’ or ‘terrorist activity.’”¹⁹ As with § 2339A, a fine and/or a prison term of up to fifteen years may be imposed by a federal court should a conviction for violation of this statute be obtained. In the case of viola-

preparation for, or in carrying out a violation of [certain criminal statutes, including political assassinations, bombings, and hijackings] or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be [fined, imprisoned or both]

18 U.S.C. § 2339A(a) (2012).

17. CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B, at 15 (2010) (reformatted by author to exclude subheading numbering).

18. Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism

18 U.S.C. § 2339B(a)(1) (2012).

19. DOYLE, *supra* note 17, at 2 (reformatted by author to exclude subheading numbering).

tions leading to the death of a person, a life sentence may also be imposed.

Finally, 18 U.S.C. § 2339C makes it a criminal offence to provide funds used in the commission of a terrorist offence.²⁰ Effectively, § 2339C outlaws directly, or indirectly, unlawfully and willfully providing, or collecting funds with the intention, or with the knowledge that such funds will be used to carry out an act prohibited by indicated counter-terrorism treaties or any other act of terrorism (as defined in the statute). A fine and/or prison sentence of up to twenty years may be imposed for violations of this law.

1. *Meaning of “Material Support”*

As is clear from the statutory language, understanding the meaning of the term “material support” is vital to interpreting the scope and effect of the first two criminal statutes (as well as Executive Order 13,224, as discussed *infra* in Part II.B). Sections 2339A and B share the same definition of “material support”:

(1) The term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives personnel (1 or more individuals who may be or include

20. Whoever . . . by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out —

(A) an act which constitutes an offense within the scope of a [specified counter-terrorism treaty] or

(B) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act,

shall be punished as prescribed [below].

18 U.S.C. § 2339C (2012).

oneself), and transportation, except medicine or religious materials;

(2) The term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) The term “expert advice or assistance” means advice or assistance derived from scientific, technical or otherwise specialized knowledge.²¹

Because the provided definition of “material support” is so broad and sweeping, it is difficult to know exactly what kind of conduct (with the exception of the provision of medicine and religious materials, which are clearly exempted) comes under the statute’s purview. Indeed the Congressional findings included within the original statute indicate that Congress, in enacting the law, believed that: “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”²² As a result, it is conceivable that the prohibition on material support could capture a broad range of otherwise innocent-seeming conduct. In fact, even the explicit exception for the provision of “medicines” produces some ambiguity, as it is not entirely clear if such language includes the broader provision of medical services or is strictly limited to the provision of actual medicines. In *Boim v. Holy Land Foundation*, the Seventh Circuit read the word “medicine” liberally to include the provision of medical services more broadly construed.²³ However, in a more recent case, *United States v. Sabir*, the Second Circuit saw the issue differently, holding that the medicines exception “shields only those who provide *substances* qualifying as medicine to terrorist organizations. Other medical support, such as volunteering to serve as an on-call doctor for a terrorist organization, constitutes a provision of personnel and/or scientific assistance proscribed by law.”²⁴

Individuals have been prosecuted (though not always successfully) under the material support laws for running a web-

21. 18 U.S.C. § 2339A(b).

22. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1247.

23. *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 699 (7th Cir. 2008) (en banc).

24. *United States v. Farhane*, 634 F.3d 127, 143 (2d Cir. 2011).

site providing links to jihadist websites (resulting in acquittal),²⁵ for rebroadcasting a television network run by a designated terrorist organization (resulting in a guilty plea),²⁶ and, in the case of a criminal defense lawyer, for acting as a defense attorney for a leader of a designated group (resulting in a guilty verdict, but on other grounds).²⁷ In its recent decision in *Holder v. Humanitarian Law Project*, the Supreme Court ruled that a human rights group's efforts to provide training in human rights advocacy and U.N. lobbying, as well as assistance in peacemaking, to a designated group could be considered material support. It also ruled that the material support statute as applied to such circumstances was constitutionally sound.²⁸

There is a similar prohibition on the provision of material support in the immigration context, which allows the Department of Homeland Security to bar entry to the United States to foreign individuals who have afforded material support for the commission of a terrorist activity, or to any individual or group designated as a terrorist or terrorist entity.²⁹ The statute's definition (like that of 18 U.S.C § 2339A and B) is non-exhaustive, but prohibits

an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training.³⁰

Vitaly, there is no intent element required for an individual to violate this provision.

In interpreting this provision in *Singh-Kaur v. Ashcroft*, the Third Circuit found that no *de minimis* exception applied.³¹ Interestingly, the plaintiff asked the court to consider the fact

25. Susan Schmidt, *Saudi Acquitted of Internet Terror: Defense Hails Verdict on Islamic Sites as Victory for Free Speech*, WASH. POST, June 11, 2004, at A3.

26. Benjamin Weiser, *A Guilty Plea in Providing Satellite TV for Hezbollah*, N.Y. TIMES, Dec. 24, 2008, at A21.

27. *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

28. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

29. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2012).

30. *Id.*

31. *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298–300 (3d Cir. 2004) (*De minimis* provision of support, including “minimal participation” in the form

that the statutory text in 8 U.S.C. § 1182 contains fewer examples of activity deemed to be material support than does the statutory text in 18 U.S.C. § 2339A, and thus to conclude that the former statute is less extensive in its reach. The court rejected this line of reasoning and, in so doing, opined in dicta that “it would be incongruous to conclude that a person who provides food and sets up tents for terrorists could be jailed for up to life under 18 U.S.C. section 2339A, but the same conduct could not prohibit admission to the United States under [the relevant immigration laws].”³² In another case, a Burmese pastor was denied entry to the United States on the basis of having given a hat and other small items to a cousin who was a member of a terrorist group.³³ The rulings in two further immigration cases, *Annachamy v. Holder*³⁴ and *In the Matter of R.K.*,³⁵ made clear that absent a waiver by the Secretary of State, duress is not a valid defense against a charge of material support to terrorism and that even involuntary provision of material support (e.g., the payment of a ransom by kidnapping victim) could act as a bar to entry.³⁶

of provision of food and shelter, was held by the court to constitute material support for purposes of the statute.).

32. *Id.* at 299.

33. Swetha Sridharan, *Material Support to Terrorism—Consequences for Refugees and Asylum Seekers in the United States*, MIGRATION INFORMATION SOURCE (Jan. 30, 2008), <http://www.migrationinformation.org/feature/display.cfm?ID=671>.

34. *Annachamy v. Holder*, 686 F.3d 729, 734–36 (9th Cir. 2012).

35. See SHAINA ABER ET AL., UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR 18 n.120 (Mark Fleming et al. eds., 2006) (citing *In the Matter of R.K.*, Oral Opinion, Judge Mirlande Tadal, United States Immigration Court, Elizabeth, New Jersey (May 9, 2005)), available at http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1000&context=hri_papers.

36. In 2007, the Secretary of Homeland Security exercised his authority under a waiver provision in the Immigration and Nationality Act to create an exception to the material support bar for those candidates whose material support to a terrorist organization (whether designated or undesignated) is adjudicated to have occurred under duress. However, as the court in *Annachamy* made clear, the existence and exercise of such waivers demonstrate that Congress did not intend a duress defense to be available in the absence of the exercise of such a waiver. *Annachamy*, 686 F.3d at 735–37. This has important implications for the interpretation of § 2339B since there is no provision for such a waiver.

a. *Humanitarian Assistance as “Material Support”?*

As we have seen, the full extent of the meaning of “material support” remains somewhat opaque. Nevertheless, given that both the statutory texts and the Executive Order clearly criminalize the provision of property, services, lodging, and transportation, traditional humanitarian activities such as the provision of medical care, food, shelter, and clothing could all fall under the category of material support, and therefore place humanitarian actors at serious risk of criminal prosecution. Indeed, the above-cited examples from the immigration context show that individuals have been deemed to engage in material support for having provided water or items of clothing to members of terrorist organizations. They also show that in some cases even individuals providing such support under duress have been found in violation of the law.

Also of significant concern to the humanitarian community is the prohibition on providing “training,” “expert advice or assistance,” “communications equipment,” and “facilities.” As discussed above, the only relevant explicit exception under §§ 2339A and B is for “medicines,” and even then it is unclear whether most forms of medical services—such as giving medical advice or performing surgery or other procedures—are included in the term “medicines.” As a result, the delivery of such services could place humanitarian workers and organizations at serious risk of prosecution. Importantly, it should be noted that except in certain narrow circumstances, there is no exemption for medical services or medicines in the case of those individuals subject to the administrative sanctions under IEEPA.³⁷

With regard to humanitarian assistance, Justice Roberts, writing for the majority in the *Humanitarian Law Project* opinion, pointed out that

when Congress enacted § 2339B, Congress simultaneously removed an exception that had existed in § 2339A(a) (1994 ed.) for the provision of material support in the form of ‘humanitarian assistance to persons not directly involved in’ terrorist activity. That repeal demonstrates that Congress considered

37. 31 C.F.R. § 594.409 (2013). See *infra* Part II.A.5 for a list of exceptions.

and rejected the view that ostensibly peaceful aid would have no harmful effects.³⁸

Indeed, during oral arguments before the Ninth Circuit, the Department of Justice indicated that humanitarian relief agencies operating in areas controlled by designated terrorist organizations would be at risk of prosecution and would need to seek a waiver from the Secretary of State in order avoid falling afoul of the law.³⁹

What consequence does the definition of material support have for the humanitarian community? In light of both the statutory and administrative texts and jurisprudence on the subject, it seems likely that the majority of humanitarian relief activities could be construed as material support. Food, water purification devices, hygiene kits, shelter materials (e.g. tarpaulins, ropes, and sheet metal), and blankets all constitute “property,” and thus could place humanitarian workers at risk of prosecution if they are provided to terrorist organizations or to individuals or entities who engage in terrorist activities. Similarly, providing access to shelter would constitute “lodging” under §§ 2339A and B, and access to certain sanitation and infrastructure projects could be considered “facilities.” Training programs could come under the rubric of “expert advice” or simply “training,” while many humanitarian relief activities could also constitute “expert assistance.” Family reunification programs also present a problem since providing access to telephones, emails, or other communications infrastructure would likely constitute “communications equipment.”

Cash transfer programs present an additional challenge because not only could they fall afoul of §§ 2339A and B, but they might also violate § 2339C. Given § 2339C’s knowledge requirement, humanitarian workers would need to be aware that these funds were being used to further terrorist activities in order to violate this section. This means that humanitarian organizations may need to exercise some form of due dili-

38. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (internal citations omitted).

39. Oral Argument, *Humanitarian Law Project v. Gonzales*, 393 F.3d 902 (No. 02-55082), available at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004506. See Annex I for author’s transcription of this recording.

gence with regard to their cash transfer programs in order to avoid falling afoul of § 2339C. Furthermore, cash transfers may also directly contravene Executive Order 13,224, and therefore may place both humanitarian personnel and organizations at risk of asset freezes or seizures, or of being subjected to administrative fines.

Humanitarian assistance programs would run particular risks if they were being conducted in response to a natural disaster that occurred in an area controlled by a terrorist organization or in which terrorist activity is ongoing. For example, efforts to provide relief in the aftermath of the 2010 monsoons in Pakistan may have placed relief workers in contact with members of Al Qaeda or other designated terrorist organizations. Similar relief efforts after the 2004 Indian Ocean tsunami may have placed humanitarian personnel in contact with members of the LTTE in Sri Lanka, a designated terrorist group, or with Acehnese rebel groups in Indonesia, some of which had links to Jemaah Islamiyah, a designated terrorist organization.⁴⁰ In some circumstances, the local controlling authority may be a designated terrorist organization, such as Hamas in Gaza, or may be mounting their own relief operations, such as Jamaat-ud-Dawa in Pakistan.⁴¹ In such cases, it may be impossible to avoid some form of interaction with these organizations that is prohibited by the material support statutes.⁴² Furthermore, as will be considered in greater detail in Part III, relief operations provided by the International Committee of the Red Cross (ICRC) or other humanitarian organizations in active conflict zones would almost certainly run the risk of engaging in illegal interactions with terrorist groups or individuals affiliated thereto.

In sum, it is clear that the term “material support” plausibly encompasses a wide variety of core humanitarian activities. This conclusion is supported by the Congressional record,

40. See Mark Oliver, *Leaders Promise Tsunami Warning System*, GUARDIAN (Jan. 6, 2005), <http://www.theguardian.com/world/2005/jan/06/tsunami2004.eu> (reporting that members of a radical Islamic group allegedly linked to Jemaah Islamiyah were assisting in tsunami relief efforts).

41. See Saeed Shah, *U.N.-listed “Terror Front” Group Leads Flood Relief in Pakistan*, McCLATCHY NEWSPAPERS (Aug. 3, 2010), <http://www.mcclatchydc.com/2010/08/03/98589/un-listed-terror-front-group-leads.html> (reporting aid efforts executed by Jamaat-ud-Dawa for flood victims in Pakistan).

42. *Id.*

statements made by various U.S. government officials, and the Supreme Court ruling in the *Humanitarian Law Project* case. The result is that the continued provision of humanitarian relief in certain circumstances might place relief workers and humanitarian organizations at serious risk of criminal prosecution.⁴³

2. *Meaning of “Designated Terrorist Organization”*

18 U.S.C. § 2339B prohibits the provision of material support to either a “designated terrorist organization” or to an organization that is or has been engaging in “terrorism” or “terrorist activities.” “Designated terrorist organizations” are those specified by the Secretary of State, as per authority granted in Section 219 of the Immigration and Nationality Act.⁴⁴ Such designations may be challenged administratively as well as before the D.C. Circuit, but only by the designated organizations themselves.⁴⁵ A defendant charged with the provision of material support to such an organization has no standing to collaterally attack such a designation.⁴⁶ “Terrorism” is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”⁴⁷

The definition of an organization that “engages in terrorist activity” is more complex. In addition to the actual commission of terrorist acts, it includes their preparation, gathering information on potential targets, soliciting funds for terrorist activities, recruiting, and even the provision of material support to others engaged in terrorist activity.⁴⁸ “Terrorist activity” is defined as an act that is “unlawful under the laws of the

43. Under U.S. law both individuals and organizations may be held criminally liable. In particular, organizations may be held liable for crimes committed by employees in either the actual or apparent course of their duties. DAVID LUBAN, JULIE R. O’SULLIVAN & DAVID P. STEWART, *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 131 (2010).

44. 8 U.S.C. § 1189 (2012).

45. 8 U.S.C. § 1189(a)(4)(B); 8 U.S.C. § 1189(c).

46. 8 U.S.C. § 1189(a)(8); *United States v. Afshari*, 426 F.3d 1150, 1155–59 (9th Cir. 2005).

47. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 140(d), 101 Stat. 1331, 1349 (1987) (codified as amended at 22 U.S.C. § 2656f(d)(2) (2012)).

48. 8 U.S.C. § 1182(a)(3)(B).

place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State)” and involves hijacking or sabotage of vehicles; seizure, detention or threatening to kill an individual in order to compel a third person to act or to abstain from acting; a violent attack upon an internationally protected person; an assassination; use of a biological, chemical, or nuclear weapon; use of explosives, firearms or other weapons to endanger individuals or damage property; or the “threat, attempt, or conspiracy to do any of the foregoing.”⁴⁹

3. *The Mens Rea Requirement*

18 U.S.C. § 2339A, B and C all have a mens rea element requiring some degree of knowledge of interaction with a terrorist group or terrorist activities. In the case of 18 U.S.C. § 2339A, the material support or resources in question must be provided with either knowledge or intent that they will be used in the commission of a terrorist offence.⁵⁰ As held by the Second Circuit in *United States v. Stewart*, “the mental state in § 2339A extends both to the support itself, and to the underlying purposes for which the support is given.”⁵¹ In the case of 18 U.S.C. § 2339B, the first sentence of the statutory text states that a person must have “knowingly” provided material support. While a plain reading of this sentence may produce some ambiguity as to whether the word “knowingly” is intended to modify the verb “provide” or the noun “foreign terrorist organization”—i.e., must a person know or intend that such support would further actual terrorist activities or is it sufficient that he or she know that the organization to which they are providing support is a foreign terrorist organization?²—the provision read as a whole and the case law indicate that it is the latter. The second sentence of the paragraph provides that in order to violate the provision “a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in ter-

49. *Id.*

50. See Humanitarian Law Project v. Mukasey, 552 F.3d 916, 927 (9th Cir. 2009) (noting that § 2339A requires defendant to act with specific intent), *aff'd in part & rev'd in part on other grounds sub nom.* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

51. *United States v. Stewart*, 590 F.3d 93, 113 n.18 (2d Cir. 2009).

rorist activity . . . or that the organization has engaged or engages in terrorism.” The Supreme Court provided further clarification in *Holder v. Humanitarian Law Project* when it held that “Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.”⁵²

In the case of 18 U.S.C. § 2339C, the provision or collection of funds for terrorist acts must be both “unlawful” and “willful.” There must also either be intention or knowledge that such funds will be used to carry out terrorist activities. As a result, an act may constitute an offence under the statute without a showing that the funds were actually used to carry out the predicate act of terrorism, so long as there is intent that such funds will be used to undertake such an act.⁵³ The intent requirement presents interesting evidentiary concerns, since in the absence of evidence of communications conveying intent to support an act of terror, the existence of such intent will likely prove difficult to demonstrate.

In light of these different mens rea requirements, what are the associated risks for humanitarian actors relating to each of the statutes? In the case of 18 U.S.C. § 2339A, relief workers would only be in contravention of the law if they provided material support or resources with either knowledge or intent that such support would be used in the commission of a terrorist offence. In the case of 18 U.S.C. § 2339B, humanitarian workers would need to have knowledge that the organization to which they are providing resources is either a designated terrorist organization, or that it engages in terrorism or terrorist activity.⁵⁴ As for 18 U.S.C. § 2339C, the evidentiary

52. *Humanitarian Law Project*, 130 S. Ct. at 2717.

53. 18 U.S.C. § 2339C(a)(3) (2012).

54. Although not explicitly indicated in the text of the statute, liability may also attach under 18 U.S.C. § 2339B where defendants are deemed to have had constructive knowledge that an organization has been designated as a terrorist organization. *See, e.g.,* *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702, 2006 WL 2862704, at *13–15 (E.D.N.Y. Oct. 5, 2006). However, while § 2339B is silent as to constructive knowledge, the language used in the immigration statute is clear that an actor that commits an act that he or she “knows, or reasonably should know” affords material support is in violation of the material support bar, thereby suggesting that the § 2339B restriction is limited to actual rather than constructive knowledge. 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). It is also unclear to what extent there is a duty to

difficulties in proving intent make the risk of prosecution under that provision less salient. The consequence of these mens rea requirements is that if humanitarian workers or agencies provide assistance to individuals without knowledge of their identity, knowledge of such individuals' actions previous to the moment that assistance is given, or knowledge of their future intentions, there is technically no violation of the statute. On the other hand, if relief workers provide assistance to individuals in situations where they have information linking such individuals to terrorist groups or terrorist activities, then there is a serious risk of prosecution.

Given the knowledge requirement, it could be possible to work around the law by requiring all aid beneficiaries to complete a questionnaire asking them to state their identity and asking them whether they are affiliated with any terrorist groups, have engaged in any past terrorist activity or are intending to engage in such activity. Should an individual not be recognized by name as a terrorist or as a member of a terrorist group (the lists of designated individuals and groups are published and readily available online) and should he or she answer negatively to the other questions, then humanitarian workers could, unless they had other reasons to suspect an individual, safely provide him or her with assistance.⁵⁵ However, should an individual be a known terrorist or answer in the affirmative to the questions then relief workers would be well-advised to turn the individual away. Unfortunately, such a refusal to provide assistance would likely constitute a violation of the fundamental humanitarian principle of impartiality and would, therefore, be intensely problematic for most humanita-

investigate whether particular individuals are members or are otherwise affiliated with a designated organization or if willful ignorance of such information would insulate humanitarian workers from criminal liability. For more on such an extended theory of liability, see Amicus Brief of Charities, Foundations, Conflict-Resolution Groups, & Constitutional Rights Organizations in Support of Defendants and Urging Reversal of Convictions of Counts 2–10, *United States v. El-Mezain*, 664 F.3d 467 (2011) (No. 09-10560).

55. There is, as of the time of writing, no case law as to whether there is a burden to investigate links to terror organizations before providing material support, and there is also no case law as to whether actual notice of terrorist affiliations is required or whether a conviction could be sustained on the basis of constructive knowledge.

rian organizations.⁵⁶ Notwithstanding the associated ethical or legal difficulties, it may also, as a practical matter, be difficult to administer such a questionnaire in emergency situations: Medical patients often arrive at treatment facilities in a state of shock, physically unable to communicate or, in extreme situations, in a state of unconsciousness. Furthermore, language barriers between aid workers and beneficiaries may also serve as an impediment to effective diligence efforts on the part of aid organizations.

4. *Extraterritorial Jurisdiction*

The risk of prosecution under these statutes is heightened by their broad jurisdictional reach.⁵⁷ For example, 18 U.S.C. § 2339B has an explicit extraterritorial jurisdiction provision. After making the general statement that there is extraterritorial jurisdiction, the section goes on to indicate specific instances when such jurisdiction will attach. These are: 1) when the offender is a national of the United States or is lawfully admitted for permanent residence in the United States; 2) when the offender is a stateless person habitually resident in the United States; 3) if, after the impugned conduct occurs, the offender is found in the United States, even if that conduct has occurred outside of the United States; 4) when the offence occurs either in whole or in part in the United States; 5) when the offence occurs in or affects interstate or foreign commerce of the United States; and 6) when the offender aids or abets another person over whom jurisdiction exists through the aforementioned conditions in committing or conspiring to commit a material support offence.⁵⁸ This last condition means that jurisdiction will attach to anyone, even if it otherwise would not, who assists another person over whom such

56. Int'l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 52–53, ICRC Doc. 31IC/11/5.1.2 (Oct. 2011), available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>.

57. For more on the extraterritorial reach of the material support laws, see Alexander J. Urbelis, *Rethinking Extraterritorial Prosecution in the War on Terror: Examining the Unintentional yet Foreseeable Consequences of Extraterritorially Criminalizing the Provision of Material Support to Terrorists and Foreign Terrorist Organizations*, 22 CONN. J. INT'L L. 313 (2007).

58. 18 U.S.C. § 2339B(d)(1) (2012).

jurisdiction attaches for the commission of a material support offence. Given the incredibly broad scope of this list, it is difficult to conceive of a situation in which U.S. extraterritorial jurisdiction would not attach.

In contrast to § 2339B, § 2339A does not have an explicit extraterritorial jurisdiction provision. While there is no explicit case law addressing this question, as Doyle points out, a court would most likely construe extraterritorial application of the law for a number of reasons.⁵⁹ First, extraterritorial jurisdiction typically attaches to overseas accomplices to crimes with extraterritorial application. In this case, most of the predicate offences to § 2339A are crimes for which extraterritorial jurisdiction either explicitly attaches or has traditionally been understood to attach. As a result, violations of § 2339A are now akin to “ancillary offenses,” which according to De Pue, means that their “jurisdictional scope corresponds to that of the crime that the material support or resources is intended to facilitate.”⁶⁰ Second, application of the statute to purely domestic violations would likely frustrate Congressional intent. This is because as originally enacted, § 2339A prohibited a person “within the United States” from providing material support or resources knowing that they would be used for the commission of a terrorist crime. However, with the advent of the USA PATRIOT Act in 2001, this jurisdictional limitation was deleted.⁶¹ This deletion would suggest that any previous territorial limitation on jurisdiction is no longer applicable to the statute.⁶² Finally, regardless of the explicit statutory construction, prosecutions for violation of the material support statute could almost always be covered by at least one of the generally accepted international law principles of jurisdiction such as the territorial principle, the nationality principle, the passive personality principle, the protective principle, or even the universal principle.⁶³

59. DOYLE, *supra* note 17, at 21.

60. John De Pue, *Fundamental Principles Governing Extraterritorial Prosecutions—Jurisdiction and Venue*, U.S. ATT’YS’ BULL., Mar. 2007, at 1, 5.

61. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 805(a)(1)(A), 115 Stat. 272, 377 (amending 18 U.S.C. § 2339A to permit its extraterritorial application).

62. De Pue, *supra* note 60, at 5.

63. DOYLE, *supra* note 17, at 21. The territorial principle refers to crimes that occur in or have an effect in a state’s territory, *see, e.g.*, Hartford Fire Ins.

With regard to 18 U.S.C. § 2339C, there are explicit and extensive jurisdictional provisions that are divided into two categories. The first category relates to offences that take place within the United States and come under federal jurisdiction by virtue of their connection to foreign individuals or locations, or their interaction with interstate commerce or the foreign relations of the United States.⁶⁴ The second category concerns extraterritorial jurisdiction and covers offences that have taken place outside of the United States, but have the following connections to the United States: 1) the perpetrator is a U.S. national or a habitual resident of the United States; 2) the perpetrator is found within the United States; or 3) the offence was directed towards or resulted in the carrying out of a predicate act against any U.S. government property, any person or property within the United States, any U.S. national or his or her property, or the property of any legal entity organized under U.S. law.⁶⁵ Finally, other bases for jurisdiction include commission of offences on U.S. flag vessels or aircraft, or offences directed towards the commission of a predicate act of terrorism intended to compel the United States from committing or abstaining from committing any act.⁶⁶

Given the broad extraterritorial provisions contained in § 2339B, humanitarian personnel who have otherwise contravened the prohibition on the provision of material support to a foreign terrorist organization will likely be subject to U.S. jurisdiction. According to the statute, U.S. citizens are subject to the jurisdiction of U.S. courts, as are permanent residents or simply persons found within the United States at the time they are prosecuted. Jurisdiction also attaches when the provi-

Co. v. California, 509 U.S. 764 (1993); *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013); the nationality principle deals with crimes committed by a state's nationals, *see, e.g.*, *Blackmer v. United States*, 284 U.S. 421, 437–38 (1932); the passive personality principle is based on crimes committed against a state's nationals, *see, e.g.*, *United States v. Columba-Colella*, 604 F.2d 356 (5th Cir. 1979); the protective principle is concerned with crimes that have an impact on a state's national interests, *see, e.g.*, *United States v. Romero-Galue*, 757 F.2d 1147, 1154 (11th Cir. 1985); and the universal principle refers to activity of universal concern, *see, e.g.*, *United States v. Bin Laden*, 92 F. Supp. 2d 189, 196 (S.D.N.Y. 2000). For a thorough examination of this subject, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401–04 (1986).

64. 18 U.S.C. § 2339C(b)(1) (2012).

65. 18 U.S.C. § 2339C(b)(2).

66. 18 U.S.C. § 2339C(b)(3)-(5).

sion of material support leads to an offence affecting interstate commerce, a category which is typically very broadly interpreted by U.S. courts.⁶⁷ Finally, even the act of aiding or abetting another individual over whom jurisdiction attaches in the provision of prohibited material support will subject a person to jurisdiction. In sum, there are few situations in which U.S. courts would not have jurisdiction over relief workers or organizations that had otherwise contravened § 2339B. As a result, only those organizations based entirely outside of the United States and those workers with no ties to the United States and no intention to travel there are exempt from prosecution. Even then they may still be subject to United States jurisdiction on the basis of the protective principle or one of the other jurisdictional hooks discussed above. Indeed, in December 2011, federal prosecutors indicted three men with seemingly no connection whatsoever to the United States (the suspects are foreign citizens, resident in foreign states, were arrested abroad, and are accused of conduct having taken place entirely outside of the United States) in the Federal District Court for the Eastern District of New York for, *inter alia*, alleged violations of § 2339B.⁶⁸ The court as of yet has not ruled on this case, but the result will be instructive as to the extent of § 2339B's extraterritorial scope.

As discussed previously, § 2339A does not contain an explicit grant of extraterritorial jurisdiction. However, such jurisdiction is likely to derive from the nature of the predicate offences, as well as the statutory history.⁶⁹ Furthermore, federal extraterritorial jurisdiction typically applies to accomplices to crimes that are extraterritorial in scope.⁷⁰ This means that hu-

67. *See, e.g.*, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (finding ban on racial discrimination against hotel guests in 1964 Civil Rights Act to be within Congressional authority under the Commerce Clause); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (finding ban on racial discrimination against restaurant patrons in 1964 Civil Rights Act to be within Congressional authority under the Commerce Clause). *But see* *United States v. Lopez*, 514 U.S. 549 (1995) (finding that federal statute making it unlawful to possess a firearm in a school zone exceeded Congressional authority under the Commerce Clause).

68. Mosi Secret, *Court Papers Offer Details in Terror Case*, N.Y. TIMES, May 2, 2013, at A20.

69. DOYLE, *supra* note 17, at 21.

70. *Id.* (citing *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 (9th Cir. 1991)).

manitarian personnel, even those who are not U.S. citizens or those acting outside the United States, could more than likely come within the jurisdiction of U.S. courts for violations of the statute.

5. *The Secretary of State's Exception*

Before concluding our analysis of the content of the statutory provisions, it should be noted that subsection (j) of § 2339B provides that no person is to be prosecuted for the provision of "personnel," "training," or "expert advice or assistance" if the provision of such material support was approved by the Secretary of State in consultation with the Attorney General. However, there is no exception for the provision of food, water, or other supplies, thereby making the exception of limited use and comfort to the humanitarian community. Furthermore, the Secretary of State may not grant such an exception in instances where the material support in question may be used to carry out a terrorist activity.⁷¹ Considering that many types of humanitarian assistance could in theory be used to undertake terrorist activities, this last provision effectively precludes the granting of such an exception.

B. *Important Elements of Executive Order 13,224 Under IEEPA*

In addition to the three aforementioned criminal law statutes, Executive Order⁷² 13,224 provides an administrative basis to freeze assets of designated individuals and organizations as well as those entities that "assist in, sponsor, or provide financial, material or technological support" of acts of terrorism or of designated individuals or entities.⁷³ This Executive Order was promulgated on September 25, 2001 under presidential authority granted by IEEPA.⁷⁴ Subsequent administrative regulations adopted in the Code of Federal Regulations amended and expanded the scope of the Executive Order and provided

71. 18 U.S.C. § 2339B(j) (2012).

72. Executive Orders have the force of law, and "courts are required to take judicial notice of their existence." JOHN CONTRUBIS, CONG. RESEARCH SERV., 95-772 A, EXECUTIVE ORDERS AND PROCLAMATIONS 2 (1999).

73. Exec. Order No. 13,224, 66 Fed. Reg. at 49,079, 49,080 (Sept. 25, 2001).

74. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701-07) (2011).

for its implementation.⁷⁵ Importantly, these regulations also created certain narrow humanitarian exceptions to the application of the Executive Order, including for the provision of nonscheduled emergency medical services pursuant to a specific license and, subject to certain restrictions, the provision of certain medicines and medical services to the Palestinian Authority.⁷⁶

Executive Order 13,224 relies on the President's authority under IEEPA to block all "property and interests in property" of foreign persons listed in the order (known as Specially Designated Global Terrorists [SDGT]), as well as persons whom the Secretary of the Treasury determines "assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to this order or determined to be subject to this order."⁷⁷ Thus, all natural or legal persons who proffer material support to designated individuals or organizations may be subject to asset freezes.

Asset freezes also apply to persons determined by the Secretary of the Treasury to be "otherwise associated" with designated persons or other persons determined to be subject to the order.⁷⁸ In *Humanitarian Law Project v. US Department of Treasury*, the Federal Court for the Central District of California held that the Executive Order was both unconstitutionally overbroad and vague with regard to the "otherwise associated" provision.⁷⁹ In response the Treasury Department issued a regulation that defined the term as "(a) To own or control; or (b) To attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to."⁸⁰ On appeal, the Ninth Circuit found this language adequate to cure the constitutional infirmities that had previously been found by the court below.⁸¹ Section 2 of the Executive Order further

75. 31 C.F.R. §§ 594.101, 594.102–.594.802 (2013).

76. 31 C.F.R. §§ 594.507, 594.515.

77. Exec. Order No. 13,224, 66 Fed. Reg. 49,079, 49,080 (Sept. 25, 2001).

78. *Id.*

79. *Humanitarian Law Project v. U.S. Dep't of Treasury*, 463 F. Supp. 2d 1049, 1067–71 (C.D. Cal. 2006).

80. 31 C.F.R. § 594.316.

81. *Humanitarian Law Project v. U.S. Dep't of Treasury*, 578 F.3d 1133, 1145 (9th Cir. 2009).

prohibits “any transaction or dealing by United States persons or within the United States in property or interests in property blocked pursuant to [the] order” including the “contribution of funds, goods, or services to or for the benefit of” designated persons.⁸²

These provisions are supplemented, defined, and implemented by Title 31, Part 594 of the Code of Federal Regulations, which defines “financial, material, or technological support” to mean “any property, tangible or intangible, including but not limited to currency, . . . or any other transmission of value; . . . communications equipment; . . . lodging; . . . facilities; vehicles or other means of transportation; or goods.”⁸³ “Property” is further defined to include “goods, wares, merchandise, chattels.”⁸⁴ In addition to freezing the assets of those providing material support to designated organizations or individuals, the regulations establish that violations of the Executive Order and corresponding regulations may be punished by a fine of up to the greater of USD \$250,000 or twice the amount of the offending transaction.⁸⁵ In the case of willful violations a fine of up to USD \$1,000,000 may be imposed on both natural and legal persons, and a prison sentence of up to twenty years for natural persons.⁸⁶

Under IEEPA, the President normally does not have the authority to regulate or prohibit “donations . . . of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering.”⁸⁷ However, should the President determine that such donations would impair his ability to deal with a national emergency, or that they are made in response to coercion or would endanger U.S. armed forces engaged in hostilities or in a situation of imminent hostilities, then he may invoke an override to this exemption.⁸⁸ In this case, section 4 of Executive Order 13,224 invokes this override authority, thus

82. Exec. Order No. 13,224, 66 Fed. Reg. at 49,080.

83. 31 C.F.R. § 594.317.

84. 31 C.F.R. § 594.309.

85. 31 C.F.R. § 594.701.

86. *Id.*

87. International Emergency Economic Powers Act § 203(b)(2), 50 U.S.C. § 1702(b)(2) (2011).

88. *Id.*

prohibiting the making of such donations.⁸⁹ This is an explicit indication that, at least under Executive Order 13,224, humanitarian relief is clearly one of the prohibited forms of material support and as such, is serious cause for concern for humanitarian actors.

Regarding jurisdiction to enforce these measures, the preamble to Executive Order 13,224 indicates that “financial sanctions may be appropriate for those foreign persons that support or otherwise associate with . . . foreign terrorists.”⁹⁰ The Order also indicates that all assets of persons in violation that are found within the United States, or later come within the United States or come within the possession or control of U.S. persons, including in their overseas branches, may be blocked. The term “persons” is only defined to mean “an individual or entity” with no reference to the nationality of such an individual. However, given that the Order otherwise makes reference to “foreign persons” and “United States persons” it seems apparent that “persons” implies to all persons regardless of nationality.

Section 2 prohibits transactions or dealings by “U.S. persons” or “within the United States.” Accordingly, persons not of U.S. nationality may be subject to the reach of the law if the conduct in question occurs within the United States. It is also possible that individuals or organizations not physically present within the territory of the United States could be subject to the Order if the transaction or activities in question are deemed to have taken place “within the United States.” As a result, it is possible that non-U.S. persons or individuals acting outside the United States could be subject to the prison terms or fines indicated in the administrative regulations.

The jurisdictional implications of the Executive Order for humanitarian activities are complex. Because the asset freezes envisioned by section 1(d) appear to apply to *all* persons providing prohibited forms of support to terrorist organizations, not only American organizations but also international humanitarian organizations could theoretically find themselves within the ambit of this Executive Order. As a result, any funds

89. Exec. Order No. 13,224, 66 Fed. Reg. 49,079, 49,080–81 (Sept. 25, 2001).

90. *Id.* at 49,079.

held in U.S. bank accounts, even by foreign organizations, could be blocked under this section.

With regard to the section 2 prohibition on dealing or transacting with designated organizations, the requirement that such activity be undertaken either by U.S. persons or within the United States likely limits the scope of jurisdiction under this section to U.S. organizations and to U.S. nationals engaged by the humanitarian organizations. It is also conceivable that, were a humanitarian organization or its employees to engage in such prohibited activities within the United States, it too could be targeted under the Executive Order and thus subject to fines or prison terms.

C. *The Supreme Court's Ruling in Holder v. Humanitarian Law Project*

Before June 2010, many issues relating to the material support laws had come before the lower courts and federal immigration agencies, thereby providing clarity on some of the statutory ambiguities, but some vital questions remained unresolved. In *Holder v. Humanitarian Law Project*, the Supreme Court was asked, for the first time, to rule on several issues relating to the material support laws, specifically regarding § 2339B.⁹¹ This Part will consider the pertinent parts of the Court's decision in *Humanitarian Law Project*, and consider the implications of this ruling for the provision of humanitarian assistance.

In *Humanitarian Law Project*, the Court was asked to consider: 1) whether the language in § 2339B prohibiting the knowing provision of “‘training,’ ‘expert advice or assistance,’ ‘service,’ and ‘personnel’” to a designated terrorist organization was unconstitutionally vague; and 2) whether the criminal prohibitions on the provision of “expert advice or assistance” “derived from scientific [or] technical . . . knowledge” and “personnel” were unconstitutional with respect to speech that furthers only lawful, nonviolent activities of proscribed organizations.⁹²

The constitutional challenge was brought by the Humanitarian Law Project (HLP), a U.S. NGO that, in its own words, is

91. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

92. *Id.* at 2716.

“dedicated to protecting human rights and promoting the peaceful resolution of conflict by using established international human rights laws and humanitarian law.”⁹³ In the courts below, HLP had sought pre-conviction declaratory relief to determine whether it could be prosecuted under § 2339B for training members of the PKK (Kurdistan Workers Party) and the LTTE—both designated terrorist organizations—on how to use humanitarian and international law to peacefully resolve disputes, to obtain relief from international bodies, and to engage in peaceful international advocacy.⁹⁴

In a 6–3 decision authored by Chief Justice John Roberts, the Court ruled that it is not unconstitutional for the government to block speech and other forms of advocacy in support of designated terrorist organizations, even if such speech is only intended to support such a group’s peaceful or humanitarian actions.⁹⁵ However, the Court qualified its decision in holding that such activity may only be banned if it is coordinated with or controlled by the overseas terrorist group; independent individual advocacy or speech remains protected by the First Amendment, and therefore, may not be criminalized by the government.⁹⁶ Specifically, the Court stated that:

Congress has not, therefore, sought to suppress ideas or opinions in the form of “pure political speech.” Rather, Congress has prohibited “material support,” which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.⁹⁷

The Court further limited the scope of its decision by stating that it was limited to the particular activities that HLP wished to pursue and that it does not “address the resolution of more difficult cases that may arise under the statute in the future.”⁹⁸

93. HUMANITARIAN LAW PROJECT, <http://hlp.home.igc.org/> (last visited Nov. 24, 2013).

94. *Humanitarian Law Project v. Reno*, No. CV 98-1971 ABC (BQRx), 2001 WL 36105333, at *8 (C.D. Cal. Oct. 2, 2001).

95. *Humanitarian Law Project*, 130 S. Ct. at 2712.

96. *Id.* at 2723.

97. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723 (2010).

98. *Id.* at 2712.

One of the central themes running through the Court's decision is that it is impossible to distinguish material support for a foreign terrorist group's violent and non-violent activities. Here, the Court relied heavily on the Congressional record, as well as statements from the Executive Branch, both declaring that any material support to terrorist organizations, no matter how benign on its face, would ultimately inure to the benefit of their criminal, terrorist functions.⁹⁹ The Court specifically noted the statute's explicit reference to "medicines" and "religious materials" as evidence that Congress had carefully balanced some of the relevant competing interests in order to create two very limited exceptions to an otherwise blanket ban on material support.¹⁰⁰

Importantly for present purposes, the Court also clarified the mens rea requirement of the statute. As mentioned above, the Court held that the statute does not require proof that an individual intended to further a foreign terrorist organization's illegal activities. Instead, the Court wrote that "Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities."¹⁰¹

D. *The Chilling Effect of the Material Support Laws on Humanitarian Assistance*

The presence of the above-enumerated legal risks has already had a dramatic, negative effect on the provision of humanitarian assistance in conflict-stricken regions.¹⁰² As de-

99. *Id.* at 2727.

100. *Id.* at 2728.

101. *Id.* at 2717.

102. See CHARITY & SECURITY NETWORK, SAFEGUARDING HUMANITARIANISM IN ARMED CONFLICT (2012), available at <http://www.charityandsecurity.org/SafeguardingHumanitarianism> (describing the negative effects of U.S. counterterrorism policy on U.S. charities); KAY GUINANE ET AL., OMB WATCH, COLLATERAL DAMAGE: HOW THE WAR ON TERROR HURTS CHARITIES, FOUNDATIONS, AND THE PEOPLE THEY SERVE (2008), available at <http://www.foreffectivegov.org/files/npadv/PDF/collateraldamage.pdf> (discussing weaknesses of the U.S. counterterrorism framework); KATE MACKINTOSH & PATRICK DUPLAT, STUDY OF THE IMPACT OF DONOR COUNTER-TERRORISM MEASURES ON PRINCIPLED HUMANITARIAN ACTION (Tim Morris ed., 2013), available at https://docs.unocha.org/sites/dms/Documents/CT_Study_Full_Report.pdf (investigating the consequences for humanitarian actors of counter-ter-

scribed above, in the aftermath of the 2004 tsunami, aid agencies could not effectively operate in the north of Sri Lanka for fear of engaging in illegal interactions with the LTTE. In 2003, in the wake of severe flooding in Pakistan, KARAMAH, a U.S.-based Muslim charity, was unable to provide children with backpacks out of fear of prosecution.¹⁰³ In 2009, USAID stopped processing new funding to NGOs and U.N. agencies engaged in humanitarian work in Somalia and decided not to renew existing grants. After seven months of negotiations between the NGOs and USAID, grants were restored, but only subject to heightened and often onerous due diligence requirements to satisfy OFAC rules.¹⁰⁴ In one specific example, American NGOs wishing to drill wells in conjunction with USAID in a hunger-stricken region of Somalia were not able to proceed with the project, as they would have been required to monitor the wells to ensure that no member of Shabab drank from them, and then to report such an incident to the U.S. authorities.¹⁰⁵ According to Mackintosh and Duplat, between 2008 and 2010 U.S. aid to Somalia declined by 88 percent, while aid from other donors remained largely constant.¹⁰⁶

There are also more indirect consequences of the material support regime: By forcing humanitarian actors to abandon principles of impartiality and neutrality, compliance with these laws places such organizations at greater risk of being targeted by armed groups or excluded from conflict areas. For example, shortly after Shabab was designated a terrorist organization in February 2008, it expelled two significant U.S. NGOs, and by November 2011, sixteen more organizations were expelled for “lacking complete political detachment and neutrality with regard to the conflicting parties in Somalia.”¹⁰⁷ Worldwide, attacks on aid workers have boomed since 2003: According to the Overseas Development Institute, reported politically motivated attacks on humanitarian actors rose from

rorism laws from various donor countries); Sam Adelsberg, Freya Pitts & Sirine Shebaya, *The Chilling Effect of the “Material Support” Law on Humanitarian Aid: Cause, Consequences, and Proposed Reforms*, 4 HARV. NAT’L SEC. J. 282 (2013) (describing the chilling effect of the material support statute).

103. CHARITY & SECURITY NETWORK, *supra* note 102, at 53.

104. MACKINTOSH & DUPLAT, *supra* note 102, at 82.

105. CHARITY & SECURITY NETWORK, *supra* note 102, at 56.

106. MACKINTOSH & DUPLAT, *supra* note 102, at 82.

107. *Id.* at 81.

29 in 2003 to nearly 50 in 2008, and in 2008 alone 260 aid workers were killed, seriously injured, or kidnapped as a result of violent attacks.¹⁰⁸ While not solely attributable to the existence of material support laws, it seems likely that such an increase in violence aimed at humanitarian actors is at least in part a product of the growing perception among armed groups that humanitarian actors are proxies for Western foreign policy and counterterrorism agendas.¹⁰⁹

E. *Some Unresolved Questions*

Although both the statutory text and the relevant jurisprudence provide reasonably clear guidance on the scope and application of the material support prohibitions, several important questions with vital implications for the work of humanitarian organizations remain unresolved. The first and most obvious question relates to the term “medicines” found within the listed exceptions to the definition of material support. Read literally, the statute only makes reference to medicines; there is no indication as to whether this term should be read expansively to include the administration of these medicines or the provision of medical services, such as the dispensation of advice, the performance of surgical and other medical procedures, or the administration of public health services. This is important because the definition of material support otherwise includes the provision of “expert advice or assistance,” which could arguably include the provision of medical assistance. Therefore, a narrow reading of the term “medicines” could severely limit the ability of humanitarian agencies to provide all kinds of vital medical services in certain contexts, as they would technically be in violation of the law and therefore, be at risk of prosecution. Indeed, as described above, the U.S. government has argued before the lower courts that the provision of medical assistance could, under the wrong circumstances, fall foul of the statute’s prohibitions,¹¹⁰ and the Second Circuit came to a similar conclusion in *Sabir*.¹¹¹ Approached rationally, such an interpretation is quite flawed:

108. CHARITY & SECURITY NETWORK, *supra* note 102, at 74.

109. *Id.*

110. *See, e.g.*, Oral Argument, *supra* note 39. See Annex I for author’s transcription of this recording.

111. *United States v. Farhane*, 634 F.3d 127, 143 (2d Cir. 2011).

Why would Congress go out of its way to provide a clear exception for medicines (thereby recognizing the humanitarian imperative), but then continue to prohibit the administration of those medicines by medical professionals or the performance of surgical procedures that might be just as vital, if not more so, than the simple provision of medicine? Unfortunately, in light of the *Sabir* decision, it appears that a less reasonable interpretation currently prevails and that humanitarian organizations could be subject to prosecution for the provision of anything more than medicine, strictly defined.

Even if we accept that the individual terms “material support” and “terrorist organization” are reasonably well defined individually, there remains some ambiguity as to what is meant by the phrase “providing material support or resources to a terrorist organization” as a whole. More specifically, it is unclear whether providing such support or resources to an individual who is part of that organization will be viewed as support merely to that individual or whether it constitutes support to the organization. For example, according to the district court’s dicta in *Boim*, medical treatment of individual patients affiliated with a terrorist organization could be distinguished from providing medical assistance to the group as a whole.¹¹² Acceptance of such an interpretation would go a long way towards minimizing risks for humanitarian organizations. However, failing that, the provision of food, shelter, or medical supplies or services to an individual member of a terrorist group could present significant legal risks to humanitarian agencies.

As has been illustrated above, both the criminal statutes as well as the administrative measures are sweeping in scope and potentially target a wide array of otherwise innocent-seeming activities. In light of this context, there is a clear and unignorable risk that humanitarian actors could be subject to prosecution or regulatory action, which, as we have seen, has already had serious consequences for the provision of aid in situations where it is critically needed.

112. *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 699 (7th Cir. 2008) (en banc).

III. THE INTERACTION OF THE MATERIAL SUPPORT MEASURES WITH U.S. OBLIGATIONS UNDER INTERNATIONAL HUMANITARIAN LAW

Having examined the language and architecture of the material support statutes and administrative measures, it is clear that they may have a deleterious and chilling effect on the ability of humanitarian organizations to provide relief in situations or circumstances where designated terrorist organizations are active. Such situations will be varied and unpredictable, but can typically be placed into a category of conflict covered by international humanitarian law (IHL).

As a general proposition, IHL creates a privileged and protected role for humanitarian relief activities and the organizations that provide such relief. The specific contours of these privileges and protections are defined by various legal instruments, most notably the four Geneva Conventions (GCs), the first two Additional Protocols to the Geneva Conventions (AP I and AP II) and a body of customary law that has accumulated and developed since the nineteenth century.¹¹³ Since it is a party to the GCs, the United States is bound to "respect and to ensure respect" for these treaties "in all circumstances."¹¹⁴ As will be argued below, this not only means that the United States must affirmatively comply with all of its own obligations under these instruments, but also that it has a duty to refrain from preventing or hindering other parties from fulfilling their treaty-based obligations. Furthermore, the

113. 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 GC I]; 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 GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; 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 GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter GC AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, S. TREATY DOC. NO. 100-2 (1987), 1125 U.N.T.S. 609 [hereinafter GC AP II].

114. GC I, GC II, GC III & GC IV, *supra* note 113, art. 1.

United States is bound to respect the obligations incumbent upon it by virtue of customary international law.¹¹⁵ In this light, it is imperative that we consider the interaction between the material support statutes and IHL.

More specifically, this Part will analyze whether these statutes are compatible with U.S. obligations under the GCs and other sources of IHL. Given the length and complexity of the relevant treaties and customary provisions, this will not be an exhaustive enumeration of all the relevant IHL provisions, but rather an overview highlighting some of the most salient sections of IHL pertaining to humanitarian relief operations. In order to provide greater clarity to the discussion, we will divide these provisions into four questions concerning situations of armed conflict: (1) Is there a right of civilians to receive or request relief? (2) Is there a duty of the parties to an armed conflict to provide or facilitate—or, at a minimum, not to inhibit—relief? (3) Is there a right of humanitarian organizations to offer or provide relief? and (4) Is there an obligation of non-belligerent third parties to facilitate—or, at least, to refrain from impeding—the provision of relief?¹¹⁶ In other words, does the United States have an obligation under international humanitarian law not to interfere with the offer and provision of humanitarian relief in armed conflicts to which it is not a party?

A. *Conflict Typology: Situations in Which Humanitarian Organizations and Designated Terrorist Organizations Might Interact, and the IHL that Applies*

Under IHL, the legal rights and obligations relating to the provision of humanitarian relief may differ according to the nature of the conflict in question. Therefore, before moving on to consider and analyze the nature and content of these rights and obligations, it is important to first identify the various circumstances in which relief agencies would typically interact with designated terrorist organizations. Broadly speak-

115. *The Paquete Habana*, 175 U.S. 677, 700 (1900); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1986).

116. For an in-depth analysis of these categories, see J. Benton Heath, Note, *Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission*, 43 N.Y.U. J. INT'L L. & POL. 419 (2011).

ing, these are international armed conflicts, non-international armed conflicts, and situations of occupation.¹¹⁷ Furthermore, humanitarian organizations may also encounter designated terrorist organizations in mixed situations of disaster and conflict. Discussion of this latter permutation will be reserved for Part III.H, *infra*.

The most common circumstance in which a humanitarian organization might interact with a designated terrorist organization is a non-international armed conflict (NIAC). Common Article 3 defines a NIAC in opposition to an international armed conflict (IAC), calling it a “conflict not of an international character occurring in the territory of one of the High Contracting Parties.”¹¹⁸ Similarly, AP II speaks of “armed conflicts which are not covered by” AP I; that is, armed conflicts of a non-international nature.¹¹⁹ However, because the United States is not a party to the AP II, it is arguably not bound by its strictures. Nevertheless, it has been argued convincingly that the Additional Protocols have attained the status of customary international law.¹²⁰ Consequently, they would be applicable

117. For an extensive analysis of the different types of conflict recognized by IHL see Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69 (2009).

118. GC I, GC II, GC III & GC IV, *supra* note 113, art. 3.

119. GC AP II, *supra* note 113, art. 1. The first paragraph of article 1 also states that it applies only to conflicts between the armed forces of High Contracting Parties and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” The second paragraph further clarifies that the term is not to include “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.” *Id.*

120. For detailed discussion on the customary international law status of the Additional Protocols and the Geneva Conventions more generally, see JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES (2005); *see also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW 62–78 (1989) (discussing U.S. interpretations regarding the customary law status of various aspects of GC AP I and GC AP II); Antonio Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PAC. BASIN L.J. 55 (1984) (discussing which provisions of GC AP I and GC AP II reflect customary international law and which are only applicable insofar as the two Protocols are ratified); Christopher Greenwood, *Customary Law Status of the 1977 Geneva*

to the United States.¹²¹ Furthermore, a colorable argument can be made that AP II merely gives content to Common Article 3, a provision to which the United States is bound as a product of its being a party to the four original Conventions. Yet, even if one discounts the applicability of AP II, the United States still remains bound to uphold certain minimum obligations in the context of a NIAC by virtue of the undisputed applicability of Common Article 3. In situations of non-international armed conflict, the designated terrorist organization is likely a belligerent party taking the form of an organized militia, guerilla army, or other insurrectionist group that is engaged in active hostilities against the local authorities and/or other non-state actors. Examples would include the FARC in Colombia, the LTTE in Sri Lanka, Hezbollah, the Abdallah Az-zam Brigades and the Al-Nusra Front (as an alias for Al-Qaeda in Iraq) in Syria, and Shabab in Somalia. Common Article 3 is applicable to all of these situations,¹²² and in the case of the ongoing hostilities in Colombia, AP II is also applicable to the conflict (although not necessarily to the United States) by virtue of Colombia's accession to this treaty.

The next most common circumstance in which an organization providing humanitarian relief would encounter a desig-

Protocols, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 93 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991) (tracing relevant developments in customary international law since the two Protocols were adopted and discussing continuing and ongoing challenges to voluntary application and ratification of the Protocols); Christopher Greenwood, *Terrorism and Humanitarian Law—The Debate Over Additional Protocol I*, 19 ISR. Y.B. HUM. RTS. 187 (1989) (discussing the United States' "terrorism" criticism of Protocol I); Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678 (1994) (arguing that the United States' original concerns about Protocol I have not played out and it is in the United States' best interest, and consistent with U.S. foreign policy, to ratify Protocol I).

121. Under the Vienna Convention on the Law of Treaties, rules set forth in a treaty may "becom[e] binding upon a third State as a customary rule of international law, recognized as such." Vienna Convention on the Law of Treaties art. 38, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. It has been held for over 100 years that customary international law is part of the law of the United States. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

122. For greater clarity on when Common Article 3 is applicable, see JEAN S. PICTET ET AL., COMMENTARY I: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49–50 (Jean S. Pictet ed., 1952).

nated terrorist organization would be in a situation of occupation. Such situations are controlled by the 1907 Hague Regulations¹²³ and GC IV. According to Article 42 of the Hague Regulations, “territory is considered occupied when it is actually placed under the authority of the hostile army.”¹²⁴ The narrowness of this formulation leads to many questions about when an actual situation of occupation would obtain. For example, what kind of authority or control must be exercised by the hostile army? Must the hostile army control the entirety of the occupied state? What is the relationship of the hostile army to the legitimate sovereign of the territory?¹²⁵ A recent example of occupation would be Iraq following the end of U.S. major combat operations on May 1, 2003 until June 28, 2004 when Iraq regained its sovereignty.¹²⁶ At this point the situation of occupation morphed into a NIAC, pitting armed groups against the government of Iraq and coalition forces led by the United States. Designated terrorist groups present in Iraq during the time of the occupation included Kongra-Gel,¹²⁷ Al-Qaeda in Iraq,¹²⁸ and Kata’ib Hezbollah.¹²⁹

The final category of conflict is an IAC. According to Common Article 2, the four GCs apply to “all cases of declared

123. Hague Convention No. IV of 18 October 1907, Respecting the Laws and Customs of War on Land, 36 Stat. 2227, T.S. No. 539 and the annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land, 36 Stat. 2295 [hereinafter Hague Regulations].

124. Hague Regulations, *supra* note 123, art. 42.

125. These questions are discussed in greater depth in Colloquium, *Current Challenges to the Law of Occupation*, 34 COLLEGIUM, Autumn 2006, at 9; Colloquium, *Beginning and End of Occupation*, 34 COLLEGIUM, Autumn 2006, at 26. For more on the law of occupation generally, see EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* (2d ed. 2012); YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* (2009).

126. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 154 (2010).

127. Memorandum from Robert S. Deutsch to Admiral David C. Johnson (Aug. 6, 2004), available at http://www.wikileaks.org/plusd/cables/04AN-KARA4419_a.html.

128. *Counterterrorism 2013 Calendar: Al-Qa’ida in Iraq (AQI)*, NATIONAL COUNTERTERRORISM CENTER, <http://www.nctc.gov/site/groups/aqi.html> (last visited Nov. 24, 2013).

129. James Risen, *A Region Inflamed: The Hand of Tehran; Hezbollah, in Iraq, Refrains from Attacks on Americans*, N.Y. TIMES (Nov. 24, 2003), <http://www.nytimes.com/2003/11/24/world/region-inflamed-hand-tehran-hezbollah-iraq-refrains-attacks-americans.html>.

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.”¹³⁰ Furthermore, AP I is also applicable to IACs for those states that are parties to the Protocol and for all others to the extent that it can be considered customary international law.¹³¹ Although an IAC, by definition, involves hostilities between the forces of state actors, there is the possibility of hybrid or dual status conflict situations in which an IAC and NIAC exist in parallel and in which non-state actors, such as designated terrorist organizations, are active, fighting against one or both of the states involved in the underlying IAC, often in the same territorial space as the IAC.¹³² An example of this comes from the early days of the war in Afghanistan, when the Taliban-controlled government was simultaneously prosecuting a civil war against the Northern Alliance and a more conventional inter-state conflict against the U.S.-led coalition.¹³³

It may be tempting in such hybrid situations to conduct, as Dinstein suggests,¹³⁴ a bifurcated analysis in which the IHL obligations of a state fighting under such circumstances are separated into IAC-related obligations and NIAC-related obligations. However, this is problematic because it assumes that the only IHL obligations incumbent on that state relate to how it interacts with the other belligerent parties, and ignores the fact that, as we shall see in the following Parts, significant provisions of the GCs have a broader scope, relating, *inter alia*, to the treatment afforded to the civilian population and the access granted to relief organizations. Therefore, given the fact that an IAC is in progress, the parties to that conflict cannot abandon their IAC-related IHL obligations to the civilian population or relief organizations merely by virtue of the fact that they are simultaneously prosecuting a NIAC against a non-state actor. In other words, these underlying IAC-related IHL obligations continue to exist side-by-side with any relevant NIAC-related IHL obligations. As a result, even in such situa-

130. GC I, GC II, GC III & GC IV, *supra* note 113, art. 2.

131. GC AP I, *supra* note 113, art. 1, para 3.

132. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 26 (2d ed. 2010).

133. *Id.* at 27.

134. *Id.* (using the example of different obligations for the conflicts of the Nicaraguan government with the *contras* and with the United States).

tions we still need to consider any GC obligations in effect during IACs.

B. *The Right of Civilians to Receive or Request Relief*

As discussed above, situations of non-international armed conflict are the most likely to produce interactions between humanitarian relief organizations and designated terrorist organizations. Common Article 3 is applicable in all such situations and unambiguously dictates that “the wounded and sick *shall* be collected and cared for.”¹³⁵ Furthermore, AP II makes clear that the wounded and sick (including those involved in the conflict) are to be “respected and protected” and “*shall* receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.”¹³⁶ These provisions evidence the unambiguous right of civilians to receive humanitarian relief in situations of non-international armed conflict.

The rights of civilians to relief are slightly murkier in situations of occupation and during IACs. In situations of occupation, Article 62 of GC IV mandates that “[s]ubject to imperative reasons of security, protected persons in occupied territories *shall* be permitted to receive the individual relief consignments sent to them.”¹³⁷ While this passage retains the imperative, “shall,” it also contains a security qualifier that could be invoked by the occupying power to dilute or modify this obligation. In the case of an IAC, Article 30 of GC IV dictates that all “protected persons” are entitled to apply for assistance to the ICRC and the local National Red Cross Society.¹³⁸ “Protected persons” are defined as “those who at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹³⁹ Pictet makes clear in his authoritative commentary that the phrase “in the hands of” is not to be read literally. Instead, he writes “the expression ‘in the hands of’ need not necessarily be understood in the physical sense; it simply means that the person

135. GC I, GC II, GC III & GC IV, *supra* note 113, art. 3 (emphasis added).

136. GC AP II, *supra* note 113, art. 7 (emphasis added).

137. GC IV, *supra* note 113, art. 62 (emphasis added).

138. *Id.* art. 30.

139. *Id.* art. 4.

is in territory which is under the control of the Power in question.”¹⁴⁰ As a result, not only those civilians living under formal occupation, but also those living in a territory temporarily controlled by a state party would be entitled to request humanitarian relief. Consequently, in a hybrid IAC-NIAC situation, the mere presence on the ground of a designated terrorist organization would not diminish the IAC-related obligation to allow such a request for relief if the civilians in question were in territory under the control of a High Contracting Party. Thus, we see that in all three conflict variants—as well as in a hybrid IAC-NIAC situation—there is a right (although, in some cases, a qualified right) of civilians to receive, or at least to request, humanitarian relief.

C. *The Duty of Parties to Provide or Facilitate—or at Least, Not to Impede—Relief*

If the GCs afford civilians a right to receive relief, what do they have to say about the duty of parties to the GCs to provide or facilitate provision of such relief? According to the ICRC, under customary international humanitarian law, parties to armed conflict “must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.”¹⁴¹ The obligation is highest in situations of occupation, where “[i]f the whole or part of the population . . . is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.”¹⁴² Indeed, “[s]uch schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the [ICRC], shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.”¹⁴³ Article 18 of GC I further requires the military authorities, even in invaded or occupied areas, to al-

140. OSCAR M. UHLER ET AL., COMMENTARY IV: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 47 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958).

141. *Rule 55. Access for Humanitarian Relief to Civilians in Need*, INT’L COMM. OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55 (last visited Nov. 24, 2013).

142. GC IV, *supra* note 113, art. 59.

143. *Id.*

low both the local inhabitants and relief societies to care for wounded and sick combatants.¹⁴⁴

In situations of international armed conflict other than occupation, GC IV requires states to “allow the free passage of all consignments of medical and hospital stores” intended only for civilians and the “free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases,” subject to certain verification and search conditions.¹⁴⁵ Similarly, Common Article 9/10 indicates that the ICRC and any other impartial humanitarian organization “may, subject to the consent of the Parties to the conflict concerned, undertake [humanitarian activities] for the protection of” the wounded and sick, whether they be soldiers, sailors, chaplains, medics, prisoners, or civilians.¹⁴⁶ However, it is important to note that this Article does not give these organizations the unqualified right

144. GC I, *supra* note 113, art. 18.

145. GC IV, *supra* note 113, art. 23 (“The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

(a) that the consignments may be diverted from their destination,
 (b) that the control may not be effective, or
 (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.”).

Additional Protocol I, in article 70, states that if the civilian population is not adequately provisioned with needed supplies, humanitarian and impartial relief actions are to be undertaken subject to the agreements of the concerned parties. The parties to the conflict, as well as all High Contracting Parties to the Conventions, are required to allow and facilitate “rapid and unimpeded passage” of such relief schemes and are required to “encourage and facilitate effective international co-ordination” of such relief actions. GC AP I, *supra* note 113, art. 70.

146. GC I, *supra* note 113, art. 9; GC II, *supra* note 113, art. 9; GC III, *supra* note 113, art. 9; GC IV, *supra* note 113, art. 10.

to provide relief. It does, nevertheless, give the parties to the conflict the right to authorize such relief. Article 70 of AP I also requires that, should the civilian population not be adequately provisioned with needed supplies, humanitarian and impartial relief actions are to be undertaken. The Parties to the conflict, as well as all High Contracting Parties to the Conventions, are required to allow and facilitate “rapid and unimpeded passage” of relief supplies and are required to “encourage and facilitate” effective international co-ordination of such relief actions.¹⁴⁷

In situations of non-international armed conflict, Common Article 3 allows humanitarian organizations to offer their services to all parties to the conflict.¹⁴⁸ Similar language in Article 18 of AP II indicates the lack of state obligation to accept such services—an interpretation confirmed by the authoritative ICRC commentaries on the Additional Protocols.¹⁴⁹ This interpretation is also corroborated by the *travaux préparatoires*: The Draft of the Second Additional Protocol adopted by Committee II of the Diplomatic Conference leading to the adoption of the Additional Protocols contained more imperative language requiring relief to be allowed and facilitated; however, this provision was ultimately deleted prior to the adoption of the final version.¹⁵⁰ Interestingly, this Draft also contained language indicating that under no circumstances should participation in impartial humanitarian activities be punishable.¹⁵¹ This provision was also omitted from the final version, with only a prohibition on the punishment of provision of medical services surviving the final edits (see discussion

147. GC AP I, *supra* note 113, art. 70.

148. GC I, GC II, GC III & GC IV, *supra* note 113, art. 3.

149. GC AP II, *supra* note 113, art. 18; INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1478 (Yves Sandoz et al. eds., 1987). For more on the effect of an offer of relief both in international and non-international conflicts see FRANÇOIS BUGNION, THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE PROTECTION OF WAR VICTIMS 423–65 (Patricia Colberg et al. trans., 2003).

150. Draft Additional Protocol II art. 33, in OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, VOL. I, PT. III, at 43 (1977).

151. *Id.* art. 35.

in Part III.E, *infra*).¹⁵² Regardless, Article 18(2)—when read alongside Article 14—has been interpreted by the ICRC to impose a duty on the state party not to refuse relief without “good grounds,” for doing so “would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat”¹⁵³

D. *The Right of Humanitarian Organizations to Provide Relief or to Offer Their Services*

International humanitarian law also recognizes that humanitarian organizations (particularly the ICRC and national Red Cross organizations) have, in the case of international armed conflict and occupation, the right to provide relief and, in non-international conflict, the right to offer their services to all parties to armed conflict. For instance, as noted above, Common Article 9/10, applicable to international armed conflict, states that “[t]he 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.” This right to provide relief is most forcefully expressed in Article 81, paragraph 1 of AP I which states that the Parties to a conflict “shall grant to the International Committee of the Red Cross all facilities within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts.”¹⁵⁴ Article 81 continues by allowing the ICRC to undertake other (non-enumerated) forms of humanitarian activity subject to the consent of the Parties to the conflict. Paragraph 2 of Article 81 is important because it specifically mandates that Parties to the conflict shall grant facilities to their respective national Red Cross organizations in accordance with the Conventions and the fundamental principles of the Red Cross movement and to other humanitarian organiza-

152. See GC AP II, *supra* note 113, art. 10 (“Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics.”).

153. INT’L COMM. OF THE RED CROSS, *supra* note 149, at 1479.

154. GC AP I, *supra* note 113, art. 81, para. 1.

tions which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions.¹⁵⁵ Finally, Article 63 of GC IV provides that in situations of occupation, national Red Cross organizations “shall be able to pursue their activities in accordance with Red Cross principles” (which include the principles of impartiality and non-discrimination) and that other relief societies shall also be permitted to “continue” their humanitarian activities.¹⁵⁶

As noted above, Common Article 3, applicable in non-international armed conflicts, recognizes the right of all impartial humanitarian organizations to offer their services to the parties to the conflict. However, under Common Article 3 there is no right of humanitarian organizations to provide relief.

E. *The Obligation of Third Parties Not to Interfere with the Provision of Relief*

Having established that under certain circumstances there is either a right to receive humanitarian assistance, a right of certain humanitarian organizations to provide assistance, or a right or obligation of Parties to the conflict to allow such organizations to provide assistance, it remains to be asked what duties non-Parties to the conflict have vis-à-vis these rights and obligations. This issue has important implications for determining the compatibility of the U.S. material support statutes with international law. Namely, if it can be determined that the United States has an obligation not to interfere with the provision of humanitarian relief in conflict situations, then it follows that the material support statutes (or at the least the implementation of those statutes under certain circumstances) place the United States in violation of international humanitarian law.

The obvious starting point to this discussion is Common Article 1, which states that the “High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”¹⁵⁷ As the official ICRC commentary points out, each Convention is not “an engagement con-

155. *Id.* art. 81, paras. 2–4.

156. GC IV, *supra* note 113, art. 63.

157. GC I, GC II, GC III & GC IV, *supra* note 113, art. 1.

cluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations." Instead it is a "solemn contract" before the world, creating obligations not only opposite the other Parties but also "*vis-à-vis* itself."¹⁵⁸ This means that the United States, as a High Contracting Party, not only has an obligation to respect all of the obligations directly incumbent upon it by virtue of specific reference in the Conventions (e.g., if the United States is an occupying power then it obviously must fulfill all the obligations of occupying powers), but also has an obligation to refrain from interfering with the ability of other High Contracting Parties to fulfill their Convention duties and to refrain from interfering with the discretionary exercise of non-obligatory provisions (e.g., those provisions which state that a Party "may" accept relief offered by humanitarian organizations or which allow such organizations to offer relief). For example, as per Common Article 1, the United States is bound to respect and ensure respect for Common Article 3, which, as explained above, specifically permits the ICRC to offer its services to parties in a NIAC and, by implication, allows High Contracting Parties to accept such an offer.¹⁵⁹

Based on the above analysis, were the United States to prosecute relief workers or relief organizations under the material support statutes, then it might not only be violating its direct obligations under the Conventions, but might also be preventing other Parties from fulfilling their obligations or exercising their rights. In such circumstances, the United States would be in violation of its international legal obligations.

In situations where the United States is a party to the conflict, many of the provisions discussed above would be directly applicable. For instance, although the current status of U.S. forces in both Iraq and Afghanistan may be somewhat unclear, at some point during the last decade the presence of U.S. troops in these two states made the United States an occupying power. In such a situation, under Article 59 of GC IV the United States would be obliged to agree to relief schemes undertaken by "impartial humanitarian organizations."¹⁶⁰ Similarly, under Article 63 it would have a duty to allow National

158. UHLER ET AL., *supra* note 140, at 15.

159. Int'l Comm. of the Red Cross, *supra* note 56, at 52.

160. GC IV, *supra* note 113, art. 59.

Red Cross societies to “pursue their activities in accordance with Red Cross Principles.”¹⁶¹ These principles include humanity and impartiality, according to which the Red Cross “makes no discrimination as to nationality, race, religious beliefs, class or political opinions” and is guided solely by the needs of suffering individuals.¹⁶² There is also an obligation under Article 63 to allow other relief societies to continue their humanitarian activities.¹⁶³ Thus, were the United States to prosecute relief workers for material support to terrorism because they had provided food or shelter, or performed a medical procedure on a member of a listed terrorist group, then the United States would arguably be in violation of its Article 1 obligation to respect the Conventions.

The issue of medical services is a particularly interesting one. As discussed *supra* in Part II.A, there is some ambiguity in the definition of material support, as §§ 2339A and B create an exception for the provision of medicines without specifying whether this includes the provision of medical services. If these statutes do criminalize certain types of medical service provision, then there is a severe risk of conflict between the statutes and the numerous GC provisions that articulate a right for victims of conflict to receive medical care, an obligation for Parties to facilitate or provide such care, and the right of impartial humanitarian organizations to provide medical assistance. Beyond the provisions already discussed, it is worth noting that Article 18 of GC I explicitly states “[n]o one may ever be molested or convicted for having nursed the wounded or sick.”¹⁶⁴ Similarly, Article 10 of AP II states that in non-international armed conflicts, no person shall “be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.”¹⁶⁵ As discussed previously, while the United States is not a party to AP II, the Additional Protocols are commonly considered to have

161. *Id.* art. 63.

162. INT’L COMM. OF THE RED CROSS & INT’L FED’N OF RED CROSS & RED CRESCENT SOC’YS, *Statutes of the International Red Cross and Red Crescent Movement*, pmbll., in HANDBOOK OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT 519, 519 (14th ed. 2008) [hereinafter RED CROSS HANDBOOK].

163. GC IV, *supra* note 113, art. 63.

164. GC I, *supra* note 113, art. 18.

165. GC AP II, *supra* note 113, art. 10.

attained the status of customary international law and, as a result, are applicable to the United States.¹⁶⁶ Accordingly, the United States would be expected to comply with the obligation of Article 10.

Other provisions in the GCs make specific reference to obligations of the "High Contracting Parties," meaning that the United States has certain duties irrespective of its status in any given conflict. The most pertinent of these provisions for present purposes is Article 81 of AP I which, as discussed earlier, places an obligation on Parties to the conflict and High Contracting Parties alike to facilitate the work of national Red Cross organizations and other relief organizations in the provision of relief to the victims of conflicts.¹⁶⁷ Similarly, under Article 70 of AP I, each High Contracting Party is required to "encourage and facilitate effective international co-ordination" of relief activities.¹⁶⁸ Prosecution of relief workers or relief organizations for violation of the material support statute would undoubtedly serve as a major hindrance to their operations, and would most likely deter either the scope or the type of relief offered in the future. Moreover, it would most certainly not "encourage" or "facilitate" effective international co-ordination of relief activities. As a result, implementation of the material support laws against humanitarian organizations or workers would place the United States in violation of its IHL obligation to facilitate the work of relief organizations.

Again, the United States is not a Party to AP I. However, as is the case with AP II, AP I is widely considered to be customary international law, and thus is arguably binding on the United States. In fact, in 1987, U.S. Deputy Legal Adviser Michael Matheson acknowledged that the United States considered many elements of AP I, including specifically Article 81, to constitute customary international law and thus, to be binding on the United States.¹⁶⁹

Despite the fact that the activities of relief organizations are protected and privileged through the Conventions and the

166. *See supra* Part III.A.

167. GC AP I, *supra* note 113, art. 81, paras. 2-4.

168. *Id.* art. 70.

169. *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. INT'L L. REV. 415, 428 (1987).

Additional Protocols, the timing and nature of such activities are still subject to certain limitations. For example Article 30 of GC IV, which grants humanitarian organizations access to protected persons, states that such access must be “within the bounds set by military or security considerations.”¹⁷⁰ Article 62 allows for the receipt of relief consignments to be limited subject to “imperative reasons of security” and the Article 63 right of access for relief societies may be restricted temporarily and exceptionally for “urgent reasons of security.”¹⁷¹ However, all of these provisions would appear to refer to temporary, *in situ* restrictions placed on relief activities and not to *post hoc* criminal prosecutions. On the contrary, as demonstrated above, the only provisions of the Conventions that refer explicitly to criminal prosecutions are those that explicitly proscribe pursuing prosecutions of those engaged in humanitarian relief. As a result, it would be difficult to argue that prosecution of humanitarian relief workers or agencies could be justified under these restrictions.

Thus, we see that through customary international law and a multitude of provisions in the GCs the United States is bound, either directly—as a Party to a conflict—or indirectly—as a High Contracting Party to the Conventions with an obligation to respect and ensure respect of their provisions—to allow for the delivery of various forms of relief by impartial humanitarian organizations. Furthermore, such relief may not be provided in a way that discriminates against recipients. This means that the U.S. material support laws, inasmuch as they criminalize the provision of specific forms of humanitarian assistance, are in direct conflict with the requirements of the GCs. Actual implementation of these laws through prosecutions of aid workers or humanitarian organizations would therefore place the United States in breach of its obligations under international humanitarian law. Furthermore, the mere existence of the legislation could place the United States in violation of its obligation to “encourage and facilitate” the coordination of international relief efforts as required by Article 70 of AP I. Even in circumstances where a direct conflict does not apply, there most certainly is an inescapable tension between these two bodies of law, as the mere

170. GC IV, *supra* note 113, art. 30.

171. *Id.* arts. 62–63.

existence of the material support legal regime will likely have a chilling effect on the activities of humanitarian organizations, thereby impeding some of the vital policy goals that underlie international humanitarian law.

F. *Other Protections Afforded Specifically to the ICRC*

As demonstrated above, the ICRC occupies a special place in international humanitarian law and is granted a wide array of rights and privileges within the GC legal regime. Notwithstanding its status under the GCs, the ICRC, by operation of a 1988 Executive Order in combination with the International Organizations Immunities Act (IOIA), enjoys immunity from legal process in the United States.¹⁷² Under IOIA, eligible international organizations¹⁷³ enjoy the same immunity from “suit and every form of judicial process as is enjoyed by foreign governments.”¹⁷⁴ This means that the ICRC would not be able to be prosecuted for organizational liability under any of the material support laws.

ICRC employees are also offered protection under the IOIA, but in a much more limited way. 22 U.S.C. § 288d indicates that officers and employees of international organizations are to enjoy functional immunity¹⁷⁵—that is, they enjoy immunity from suit and legal process relating to acts performed in their official capacity and falling within the functions of the organization. However, in order to benefit from such immunity, individuals must have been “duly notified to and accepted by the Secretary of State” as ICRC personnel, or be family members of such personnel.¹⁷⁶

172. Exec. Order No. 12,643, 53 C.F.R. § 24247 (1988). President Reagan was empowered to issue this order under the provisions of 22 U.S.C. § 288f-3 (2012). For more on the IOIA, see Aaron I. Young, *Deconstructing International Organization Immunity*, 44 GEO. J. INT’L L. 311 (2012).

173. An eligible international organization is defined as “a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order.” 22 U.S.C. § 288.

174. 22 U.S.C. § 288a(b).

175. 22 U.S.C. § 288d(b).

176. 22 U.S.C. § 288e(a).

The upshot of these provisions is that only previously registered and recognized ICRC personnel clearly acting within the scope of their duties for the ICRC are immune from prosecution under the material support laws. While the functional element should not present a serious problem (ICRC staff distributing food aid or providing medical services would clearly be acting in their official capacity), the registration and notification element effectively mean that only those ICRC personnel who are accredited to and recognized by the Department of State would enjoy immunity from legal process. Additionally, this immunity is specific to the ICRC and does not benefit the American Red Cross Society, other National Red Cross Societies, or other humanitarian organizations and their workers. Therefore, its ability to reduce the chilling impact of the material support laws is rather narrow and limited.

G. *Humanitarian Relief Outside of Situations of Armed Conflict*

The foregoing analysis has focused on U.S. obligations under international humanitarian law, that is, the obligations incumbent upon the United States in situations of armed conflict, both international and non-international. However, because not all humanitarian relief is offered in conflict situations, we shall now turn to consider legal obligations as they relate to the provision of relief in disaster situations, also commonly known as “complex emergencies.” The term complex emergencies encompasses both natural disasters and man-made disasters, including those engendered or exacerbated by conflict; however, since the preceding Parts have already dealt with the rules pertaining to situations of armed conflict, this Part will only focus on those disasters occurring in isolation from armed conflict.

The field of international disaster relief law (IDRL) is a relatively new one: The International Federation of Red Cross and Red Crescent Societies (IFRC) first established its IDRL program in 2001.¹⁷⁷ In its authoritative work, *Law and Legal*

177. DAVID FISHER, INT’L FED’N OF RED CROSS & RED CRESCENT SOC’YS, LAW AND LEGAL ISSUES IN INTERNATIONAL DISASTER RESPONSE: A DESK STUDY 19 (2007). For more on the evolution and current state of international disaster relief law see David P. Fidler, *Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law?*, 6 MELBOURNE J. INT’L L. 458 (2005); Rohan J. Hardcastle & Adrian T.L. Chua, *Humanitarian Assistance:*

Issues in International Disaster Response: A Desk Study, the IFRC acknowledges that there is no central treaty regime for international disaster response, but rather that IDRL has developed through a multiplicity of diverse legal and policy instruments, including various treaties and soft law instruments that are “not formally binding but nevertheless exercise varying levels of moral authority as evidence of international consensus and/or best practice.”¹⁷⁸ Despite the existence of these numerous instruments there is, as of today, no set of binding legal norms governing U.S. interaction with international disaster relief. More specifically still, there is no legal obligation (leaving aside the question of moral obligation) incumbent upon the United States to refrain from interfering with the provision of humanitarian relief in disaster situations. As a result, humanitarian organizations and their staff operating in such situations remain vulnerable to prosecution under the material support laws if they liaise or coordinate with designated foreign terrorist organizations when providing relief or if they provide such relief to members of terrorist groups.

It should be noted, however, that the International Law Commission has been working on Draft Articles on the Protection of Persons in the Event of Disasters (Draft Articles). These Draft Articles would not apply in situations where IHL applies, but, where applicable, would obligate States to cooperate, as appropriate, “among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.”¹⁷⁹ Article 6 enshrines the fundamental humanitarian principles, providing that “[r]esponse to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into ac-

Towards a Right of Access to Victims of Natural Disasters, 38 INT’L REV. RED CROSS 589 (1998).

178. FISHER, *supra* note 177, at 33.

179. U.N. Int’l L. Comm’n, *Protection of Persons in the Event of Disasters: Texts of Draft Articles 1, 2, 3, 4 and 5 as Provisionally Adopted by the Drafting Committee*, U.N. Doc. A/CN.4/L.758 (July 24, 2009).

count the needs of the particularly vulnerable.”¹⁸⁰ Article 10 imposes a duty on States to seek assistance from, *inter alia*, “competent intergovernmental organizations and relevant non-governmental organizations.”¹⁸¹ Finally, Article 12 would grant “competent intergovernmental organizations” and “relevant non-governmental organizations” the right to offer assistance to the affected State.¹⁸² As the Draft Articles remain in an embryonic stage it is currently unknown as to whether the United States would be inclined to sign on to a binding treaty incorporating such language. However, as we have seen above with similar provisions in the GCs, if transformed into a binding treaty, these provisions in the Draft Articles would be in conflict with the material support laws.

H. *Mixed Situations of Disaster and Conflict*

One final permutation worth considering is based on situations in which disaster and conflict exist concurrently. As Gavshon astutely points out, conflict and disaster often conspire together to create particularly complex humanitarian emergencies, which, as their name suggests, are not susceptible to clear legal analysis, much less an effective humanitarian response on the ground.¹⁸³ In some circumstances, complex emergencies arise as a direct result of conflict; this is particularly true of famine and disease epidemics. In other cases, independently existing disaster situations are exacerbated by conflict, such as when an armed conflict reduces or completely eliminates a government’s ability to respond to disaster conditions. Sometimes local authorities may even be unwilling to respond to the humanitarian exigencies of the disaster situation

180. U.N. Int’l L. Comm’n, *Protection of Persons in the Event of Disasters: Texts and Titles of Draft Articles 6, 7, 8 and 9 Provisionally Adopted by the Drafting Committee on 6, 7 and 8 July 2010*, U.N. Doc.A/CN.4/L.776 (July 14, 2010).

181. U.N. Int’l L. Comm’n, *Protection of Persons in the Event of Disasters: Texts and Titles of Draft Articles 10 and 11 Provisionally Adopted by the Drafting Committee on 19 July 2011*, U.N. Doc. A/CN.4/L.794 (July 20, 2011).

182. U.N. Int’l L. Comm’n, *Protection of Persons in the Event of Disasters: Texts and Titles of Draft Articles 5 bis, 12, 13, 14 and 15, Provisionally Adopted by the Drafting Committee from 5 to 11 July 2012*, U.N. Doc. A/CN.4/L.812 (July 12, 2012).

183. Daniela Gavshon, *The Applicability of IHL in Mixed Situations of Disaster and Conflict*, 14 J. CONFLICT & SECURITY L. 243 (2009).

as part of larger military or political strategy in the conflict.¹⁸⁴ A further variation is a situation where disasters occur in a conflict zone but are unrelated to the conflict.¹⁸⁵ Recent examples of the final category include the 2005 Indian Ocean tsunami (in Sri Lanka and Aceh, Indonesia) and the 2005 Kashmir earthquake.

In such situations, a multitude of actors may be on the ground providing humanitarian relief. As far as the various constituents of the Red Cross movement are concerned, the Statutes of the International Red Cross and Red Crescent Movement make clear that armed conflict and related issues are the bailiwick of the ICRC.¹⁸⁶ Operationally, the 1997 Seville Agreement between the ICRC and the IFRC makes clear that the ICRC is to be “lead agency” in situations of mixed conflict and disaster.¹⁸⁷ Despite this clarity on the operational front, it is not entirely clear which body of law applies in mixed contexts. The IFRC *Desk Study* opines that in mixed situations international humanitarian law is the *lex specialis* that prevails over other types of law.¹⁸⁸ This approach is also followed by the Draft Articles.¹⁸⁹ If this is indeed the case, then, as demonstrated *supra*, there may be certain legal rights and obligations to provide or receive humanitarian assistance. However, it should be noted that some non-international conflicts are not

184. For example, in 2008 following Cyclone Nargis, the government of Myanmar limited the access of humanitarian agencies to various conflict-stricken areas of the country. For more on the nexus between conflict and disaster, see KATIE HARRIS, DAVIS KEEN & TOM MITCHELL, OVERSEAS DEVELOPMENT INSTITUTE, WHEN DISASTERS AND CONFLICTS COLLIDE: IMPROVING LINKS BETWEEN DISASTER RESILIENCE AND CONFLICT PREVENTION (2013). See also Rebecca Barber, *The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study*, 14 J. CONFLICT & SECURITY L. 3 (2009) (examining the Cyclone Nargis case study and evaluating whether the refusal to allow humanitarian aid could in severe cases justify use of force under the responsibility to protect doctrine).

185. Gavshon, *supra* note 183, at 244–45.

186. *Statutes of the International Red Cross and Red Crescent Movement*, art. 5, in RED CROSS HANDBOOK, *supra* note 162, at 519, 523–25.

187. *Agreement on the Organisation of the International Activities on the Components of the International Red Cross and Red Crescent Movement*, art. 5.3.1, in RED CROSS HANDBOOK, *supra* note 162, at 639, 645.

188. FISHER, *supra* note 177, at 36.

189. U.N. Int'l L. Comm'n, *supra* note 179, art. 4.

subject to AP II, and therefore, only Common Article 3 and any derivative customary international law obligations apply.¹⁹⁰

Furthermore, there may be situations in which IHL technically applies to a mixed disaster-conflict situation but where actual application would be bizarre and impractical. Take, for example, parts of Indonesia during the 2005 Indian Ocean tsunami: Because there was a non-international armed conflict taking place in Aceh at the time, the provisions of Common Article 3 and AP II technically applied throughout Indonesian territory. However, to apply IHL to justify and require access for humanitarian relief operations in Indonesian territory outside of Aceh would be to distort the GCs from their originally intended purpose of providing protection to those involved in or subject to armed conflict.¹⁹¹ Indeed, the IFRC, even when justifying its relief activities inside Aceh, never made reference to any IHL obligations.¹⁹²

Nevertheless, even if relief organizations do not rely upon the GCs to justify their presence in mixed situations, they may be still be able to rely upon the protections offered by these treaties. As Gavshon suggests, in certain situations the GCs do not require a geographical or situational nexus between the armed hostilities and the civilian population receiving aid for the Conventions' protections to apply to the provision of humanitarian relief.¹⁹³ Instead, these protections may be valid throughout the territory of the parties to the conflict. In such situations, humanitarian activities outside the immediate conflict zone would be privileged and protected in entirely the same way as they would be when taking place within the immediate conflict zone.

190. See GC AP II, *supra* note 113, art. 1 (defining the conflicts to which the Additional Protocol applies). For a discussion of the obligations imposed by Common Article 3 and corresponding customary international law, see PICTET, *supra* note 122.

191. Gavshon, *supra* note 183, at 248–52.

192. See, e.g., INT'L FED'N OF RED CROSS & RED CRESCENT SOC'YS, LEGAL ISSUES FROM THE INTERNATIONAL RESPONSE TO THE TSUNAMI IN INDONESIA (2006), available at <http://www.ifrc.org/Global/Publications/IDRL/country%20studies/indonesia-cs.pdf> (containing no reference to IHL).

193. Gavshon, *supra* note 183, at 248–52.

IV. THE INTERACTION OF THE MATERIAL SUPPORT STATUTES
WITH THE GENEVA CONVENTIONS UNDER U.S.
DOMESTIC LAW

A. *Treaties as the "Law of the Land"*

Having considered the United States' international law obligations with regard to the provision of humanitarian assistance in conflict, disaster and mixed conflict-disaster contexts, it is now important to examine the domestic law implications of these obligations. The natural starting place for such an analysis is Article VI of the U.S. Constitution, which reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁹⁴

According to this language, not only are treaties considered the "supreme Law of the Land," but they are judicially enforceable in the same way as the Constitution and statutes. In *Whitney v. Robertson*, the Supreme Court held that treaties are to be placed on equal footing as legislation with "no superior efficacy . . . given to either over the other."¹⁹⁵ Accordingly, treaties that are *lex posterior*, i.e. "last in time," vis-à-vis domestic legislation may (subject to certain restrictions, especially the doctrine of "self-execution," which will be discussed in detail below) prevail over such legislation in the case of a clear conflict. However, the converse is also true: Because of its equivalent status, conflicting domestic legislation that is later in time may trump a treaty provision.¹⁹⁶ According to this principal, the GCs, subject to certain important qualifications, would be considered the domestic law of the United States—a proposition that was endorsed by the District Court for the

194. U.S. CONST. art. VI.

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

196. It should, however, be noted that this rule is far from settled and has been the subject of much academic debate. Compare Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 870–72 (1987), with Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479 (2006).

Southern District of Florida in *U.S. v. Noriega*.¹⁹⁷ This means that, in addition to the above-discussed international legal obligations of the United States, there may also be domestic legal consequences flowing from the fact that the United States is a party to these treaties. For example, as will be discussed in Part IV.C below, certain provisions of the GCs could potentially be invoked as defenses by individuals or organizations facing prosecution under the material support laws.

B. *Use of the Charming Betsy Doctrine to Resolve Conflicts Between Domestic Statutes and Treaty Obligations*

Given that the material support statutes are later in time than the GCs (they postdate the Conventions by at least a half-century), any conflict between them would normally be resolved in favor of the statutes and at the expense of the Conventions. However, under the *Charming Betsy* canon of interpretation, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”¹⁹⁸ Therefore, we must consider whether the statutes can be read in such a way to avoid producing a clash with the GCs. Such an approach would require assuming that when Congress criminalized the provision of material support it did not intend to violate the United States’ GC obligations, and that, by extension, the provision of humanitarian assistance by impartial organizations, such as the Red Cross, should not attract criminal liability even if it were to violate the *strictu sensu* text of the statutes. Importantly, there is nothing in the Congressional Record to suggest that Congress sought to undermine the rights and duties pertaining to humanitarian assistance under the GCs when it enacted the statute. The Supreme Court addressed the issue of congressional silence in *Haig v. Agee*, where it held that such silence, particularly in the areas of foreign policy and national security, “is not to be equated with congressional disapproval.”¹⁹⁹ Similarly, in *Trans*

197. *United States v. Noriega*, 808 F. Supp. 791, 796 (S.D. Fla. 1992). The Supreme Court has never ruled on this question.

198. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). For an excellent analysis of the history, scope, and meaning of the *Charming Betsy* canon, see Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784 (2011).

199. *Haig v. Agee*, 453 U.S. 280, 291 (1981).

World Airlines, Inc v. Franklin Mint Corp. the Court found that there is “a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action.”²⁰⁰ In this light, it could be argued credibly that any conflict between the statute and the GCs was inadvertent or uninformed.²⁰¹

However, even in the absence of unambiguous language or some other indication clearly evidencing Congress’ intent, is it really reasonable for the courts to read terms from the material support statutes such as “whoever” and “whosoever” to mean “those individuals whose actions are not protected by the Geneva Conventions” when the plain meaning of those terms would suggest otherwise? Steinhardt’s response is to suggest that since the very purpose of the *Charming Betsy* canon is to prevent unintentional violations of international law, a court should satisfy itself that such apparent violations reflect the deliberate intent of Congress to contradict international law before it applies any interpretation of statute that violates the United States’ international law obligations.²⁰² Under this approach, the burden of showing intent to abrogate the treaty shifts to those seeking to enforce the statutes, and a court should only recognize a statutory override of international law when there is both evidence of intent to override the norm and text that cannot be squared with the norm.

C. *Treaty Provisions as Defenses to Criminal Prosecution*

Even if a court were to find no congressional intent to derogate from the United States’ GC obligations, anyone wishing to employ these obligations as a defense against prosecution under the statutes would need to convince the court that these provisions are self-executing and therefore, susceptible to judicial enforcement. Indeed, in *Whitney v. Robertson*, the Su-

200. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (citing *Cook v. United States*, 288 U.S. 102, 120 (1933) (“A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed.”)).

201. See Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1163 (1990) (noting that in only a small subset of cases has Congress directly repudiated international law, and most decisions require an attempt to reconcile domestic legislation with international norms).

202. *Id.* at 1167.

preme Court held that conflict between a treaty and a statute only arises when the treaty is considered to be self-executing—in other words, that it takes effect without the need for legislative implementation.²⁰³

The doctrine of self-execution is complex and has been vigorously debated.²⁰⁴ In *Foster v. Neilson*, the Supreme Court held that the Constitution declares a treaty to be the law of the land and therefore, is “to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”²⁰⁵ The Court continued by holding that when “either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”²⁰⁶ Unfortunately, the Court offered little guidance on how to distinguish instances of the former from the latter. In its most recent decision on self-execution, *Medellín v. Texas*,²⁰⁷ the Supreme Court for the first time denied relief solely on grounds of non-self-execution.²⁰⁸ In so doing, it also attempted to provide some clarity on the complex and vexing question of what attributes are required by a treaty for it to be considered self-executing. While the decision fails to provide this much-desired clarity, it does suggest that a self-executing treaty is one that “contains language plainly providing for domestic enforceability.”²⁰⁹ Some scholars have interpreted this passage as indicating an implied presumption against self-exe-

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

204. For an excellent discussion of the concept of self-execution, compare Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995) [hereinafter Vázquez, *Four Doctrines*], with David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT’L L.J. 135 (2012) [hereinafter Sloss, *Executing Foster*]. See also Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 600 (2008) [hereinafter Vázquez, *Treaties as Law of the Land*] (“[T]he Supremacy Clause establishes a default rule that treaties are directly enforceable in the courts like other laws, rebuttable only by a clear statement that the obligations imposed by the treaty are subject to legislative implementation.”).

205. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

206. *Id.*

207. *Medellín v. Texas*, 552 U.S. 491 (2008).

208. Vázquez, *Treaties as Law of the Land*, *supra* note 204, at 646.

209. *Medellín*, 552 U.S. at 526.

cution.²¹⁰ Others have suggested that *Medellin* is best understood to have found the particular treaty in question (the U.N. Charter) to be non-self-executing because it “imposed an obligation that required the exercise of nonjudicial discretion.”²¹¹

Moving beyond the general issue of self-execution, the Supreme Court has never ruled on whether the GCs specifically are self-executing. The Court was faced with this question in both *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld*, but in each case the Court, without actually reaching the issue of self-execution, overturned the decisions below that had, *inter alia*, found the Conventions not to be self-executing.²¹² Meanwhile, in the lower courts there is divergent precedent. For example, in both *United States v. Lindh* and *United States v. Noriega*, District Courts took a more favorable view on the issue of Geneva enforceability. In *Lindh*, the Eastern District of Virginia reasoned that the GC provisions relating to the application of fair trial procedures were self-executing.²¹³ In *Noriega*, the Southern District of Florida did not have to rule on the issue, but did state in its dicta that “were this Court in a position to decide the matter, it would almost certainly find that Geneva III is self-executing.”²¹⁴ For its part, the U.S. Court of Military Commission Review, in *United States v. Khadr*, held that Common Article 3 was self-executing.²¹⁵ Finally, in an amicus brief submitted to the Supreme Court in *Hamdan*, Louis Henkin et al. also argued convincingly that the legislative record of Con-

210. LUBAN ET AL., *supra* note 43, at 64.

211. Vázquez, *Treaties as Law of the Land*, *supra* note 204, at 602.

212. *Hamdan v. Rumsfeld*, 548 U.S. 557, 627–28 (2005); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). The Court in *Hamdan* decided that Common Article 3 was applicable to the case at bar by virtue of its incorporation into U.S. domestic law through a reference in the Uniform Code of Military Justice. The Court therefore reached its decision without considering whether the Conventions were self-executing. *Hamdan*, 548 U.S. at 629.

213. *United States v. Lindh*, 212 F. Supp. 2d 541, 553–54 (E.D. Va. 2002).

214. *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992).

215. *United States v. Khadr*, 717 F. Supp. 2d 1215, 1220 n. 4 (Ct. Military Comm’n Review 2007) (“The Geneva Conventions are generally viewed as self-executing treaties (i.e., ones which become effective without the necessity of implementing congressional action), form a part of American law, and are binding in federal courts under the Supremacy Clause.”).

gress' ratification of the GCs evinces a clear intent on the part of lawmakers that the Conventions be self-executing.²¹⁶

By contrast, when the D.C. Circuit considered the issue in *Tel-Oren v. Libyan Arab Republic*, Judge Bork opined in a concurrence that the Conventions were not self-executing and therefore, did not create a private right of action in the U.S. courts.²¹⁷ Judge Kavanaugh, sitting on the same court, came to the same conclusion in his concurrence in *Al-Bihani v. Obama*.²¹⁸

However, even if the GCs are found to be self-executing, the discussion does not end there. According to the Restatement (Third) of Foreign Relations Law, “[w]hether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies.”²¹⁹ The fact that a treaty is self-executing merely implies that the treaty is judicially enforceable in the sense that it does not require implementing legislation to create a domestic legal obligation.²²⁰ It does not, however, automatically imply that the treaty creates a *private right* in the sense that it grants a legally-cognizable right to individuals that must be acknowledged by the courts of the United States, or that it creates a *private right of action*—a remedial right allowing individuals to affirmatively initiate causes of action to vindicate that right (e.g., causes seeking money damages or other forms of relief).²²¹ Therefore, although only treaties that are self-executing can create private rights and

216. Amicus Brief of Law Professors Louis Henkin et al. Supporting Petitioner (Geneva—Enforceability) at 22–24, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2005) (No. 08-184).

217. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 800–01 (D.C. Cir. 1984) (Bork, J., concurring).

218. *Al-Bihani v. Obama*, 619 F.3d 1, 20 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

219. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987).

220. Oona Hathaway et al., *International Law at Home: Enforcing Treaties in US Courts*, 37 YALE J. INT’L L. 51, 56 (2012).

221. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2680 (2006) (“[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.”); see also Hathaway et al., *supra* note 220, at 56. Sloss adopts a similar schema but uses different language, distinguishing instead between treaties that create a *private right of action* that allows access to the courts and those that create a *primary right* that allows an individual to invoke a treaty once already in court. David Sloss, *When Do Treaties Create Individually Enforce-*

private rights of action, not all self-executing treaties create such rights.²²²

Nevertheless, as argued by Vázquez and Hathaway et al., even in the absence of a private right or a private right of action, litigants could still rely on the treaty defensively, for example as defendants in a criminal proceeding or in a civil proceeding in which they were involuntarily haled into court.²²³ The Supreme Court's decision in *United States v. Rauscher* supports such a conclusion.²²⁴ In *Rauscher*, the Court found that a defendant could invoke the terms of a then-effective extradition treaty between the United States and Great Britain as a defense against the charges he was facing in U.S. federal court.²²⁵ In another case, *Cook v. United States*, a British shipmaster fined for failing to list a shipment of liquor in his manifest in violation of the Tariff Act of 1922 successfully raised a treaty-based defense to challenge the jurisdiction of the court.²²⁶ In both cases, as well as in *Kolovrat v. Oregon*,²²⁷ the treaty in question was found to be self-executing, but not to create either a private right or a private right of action—yet, the Court still ruled in favor of the defendants based on the content of the treaty.²²⁸ In other cases, the Court considered treaty-based defenses, but rejected them on the merits after having carefully considered the actual text of the treaty rather than its enforceability in United States courts.²²⁹ The rulings in these cases, therefore, demonstrate that individuals facing criminal prosecution in U.S. courts may, so long as they are self-executing, invoke treaties defensively in the face of government prosecution even where such treaties do not explicitly create a private right or a private right of action.²³⁰ Sloss even goes so far as to argue that the question implicates the Due Process Clause and that criminal defendants have a “constitu-

able Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas, 45 COLUM. J. TRANSNAT'L. L. 20, 30 (2006).

222. Hathaway et al., *supra* note 220, at 56.

223. *Id.*; Vázquez, *Treaties as Law of the Land*, *supra* note 204, at 629–30.

224. *United States v. Rauscher*, 119 U.S. 407 (1886).

225. *Id.* at 430–31.

226. *Cook v. United States*, 288 U.S. 102 (1933).

227. *Kolovrat v. Oregon*, 366 U.S. 187 (1961).

228. Hathaway et al., *supra* note 220, at 86.

229. *See, e.g.*, *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982) (regarding a trade treaty between the United States and Japan).

230. Hathaway et al., *supra* note 220, at 85.

tional right to demand a judicial ruling on the merits of a treaty-based defense.²³¹ Accordingly, were a court to find the pertinent provisions of the GCs to be self-executing, then humanitarian workers or agencies brought into court to face charges under the material support statutes could plausibly invoke these treaty-derived rights defensively to contest such prosecutions.

D. *Are the Geneva Convention Provisions Protecting Humanitarian Assistance Judicially Enforceable?*

Having considered the larger question of the judicial enforceability of the Conventions, it remains to be considered whether the specific provisions of the Conventions privileging or protecting the provision of humanitarian assistance are actually self-executing and create private rights or private rights of action. First, it is unlikely that the argument put forward in Part III.E (that the United States is obliged to refrain from hindering provision of humanitarian assistance by virtue of Common Article 1 that engages all states parties to the Conventions to “undertake to respect and to ensure respect for the present Convention in all circumstances”)²³² will stand up to the *Medellín* criteria for judicial enforceability. As Shah has pointed out, given that the Court found the word “undertakes” to be “too precatory to require direct enforcement” in *Medellín*, it is likely that the Court would take the same approach in this case.²³³ By contrast, as Justice Breyer pointed out in his stinging dissent in *Medellín*, in *Comegys & Petit v. Vasse* the Court found that the use of the term “undertakes” in a treaty was in fact an example of a self-executing provision.²³⁴ Application of the *Medellín* approach would, at a minimum, render only the provisions not directly addressed to the United States unenforceable. At a maximum, it could render the whole treaty non-self-executing and, therefore, judicially unenforce-

231. Sloss, *Executing Foster*, *supra* note 204, at 173.

232. GC I, GC II, GC III, & GC IV, *supra* note 113, art. 1.

233. Meera Rajnikant Shah, *Unnecessary Complications for Basic Obligations: Medellín v. Texas and Common Article 3*, 41 COLUM. HUM. RTS. L. REV. 883, 906 (2010).

234. *Medellín v. Texas*, 552 U.S. 491, 545–46 (2008) (Breyer, J., dissenting) (citing *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193, 211–12 (1828)).

able.²³⁵ Indeed, in *In re Iraq and Afghanistan Detainees Litigation*, the D.C. District Court found that none of provisions of GC IV contain any “express or implied language indicating persons have individual ‘rights’ that may be enforced under the treaty.”²³⁶

However, assuming that the entire treaty would not be un-enforceable on this basis, other provisions might fare better under a *Medellín*-type analysis. For example, Article 18 of GC I is clearly addressed to both the judicial and legislative branches when it says “[n]o one may ever be molested or convicted for having nursed the wounded or sick.”²³⁷ Similarly, Article 10 of AP II, which proclaims that in non-international armed conflicts no person shall be “punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom,”²³⁸ would, given its clear proscription against punishment, readily be susceptible to judicial analysis and could, therefore, also be interpreted and enforced by a domestic court of law.

Finally, as discussed in Part III.D–E *supra*, other provisions of the Conventions contain language evincing a clear intention to allow for some degree of latitude or discretion on the part of governments in determining the manner in which the Conventions will be respected. For example, Article 30 of GC IV, which grants humanitarian organizations access to protected persons, states that such access must be “within the bounds set by military and security considerations.”²³⁹ Article 62 allows for the receipt of relief consignments to be limited subject to “imperative reasons of security,” and Article 63’s right of access for relief societies may be restricted temporarily and exceptionally for “urgent reasons of security.”²⁴⁰ Here, it may not be so much a question of self-execution, but rather a question as to whether the material support laws in fact constitute the sort of limitations or exceptions envisaged by the Conventions. Consequently, it could be convincingly argued that

235. For a discussion on the whole treaty approach, see Shah, *supra* note 233, at 890–94.

236. *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 115–16 (D.D.C. 2007).

237. GC I, *supra* note 113, art. 18.

238. GC AP II, *supra* note 113, art. 10.

239. GC IV, *supra* note 113, art. 30.

240. *Id.* art. 62–63.

these articles, self-executing or not, permit the United States, through measures such as the material support laws, to derogate, albeit in a limited way, from otherwise enforceable obligations under the Conventions. Furthermore, the language of these articles appears to be directed towards the executive and not the judiciary. Not only do such terms resist judicial interpretation,²⁴¹ but they also concern the war-making field, which in the jurisprudence of the Supreme Court, has traditionally been considered the near-exclusive province of the executive branch.²⁴² Besides, under *Curtiss-Wright*, courts are required to be highly deferential to the executive branch when reviewing challenges to executive action in the field of foreign affairs.²⁴³ Therefore, based on both reasons relating to the separation of powers and non-justiciability²⁴⁴ it could prove difficult to get a judicial determination on whether the material support laws do contravene the United States' obligations under Articles 30, 62, and 63 of GC IV.

Although the judicial enforceability of the GCs is anything but clear, and has never been adjudicated by the Supreme Court, recent legislative action by Congress suggests, by implication, that the Conventions (or at least some provisions

241. In *Baker v. Carr*, the Court held that an issue was justiciable only if a set of "judicially manageable" standards were present. *Baker v. Carr*, 369 U.S. 186, 226 (1962).

242. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (holding that the executive branch does not have the power to seize property to end labor disputes because this is not an exercise of military power); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139–40 (1866) (Chase, C.J., concurring) ("Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences . . . unless in cases of a controlling necessity.").

243. The court will refrain from requiring "narrowly definite standards by which the President is to be governed" and will not lightly endeavor to "limit[] or embarrass[] such powers." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 321–22 (1936) (quoting *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915)).

244. Vázquez has argued that non-justiciability and limitations relating to the separation of powers are two variants or sub-doctrines of the non-execution doctrine, but unlike treaties or treaty provisions that are non-executable by virtue of the language of the treaty itself, these sub-doctrines limit a court's ability to take judicial cognizance of a treaty in the same way as they might limit a court's ability to inveigh on the legality of domestic statutes. Vázquez, *Treaties as Law of the Land*, *supra* note 204, at 629–32; see also Vázquez, *Four Doctrines*, *supra* note 204.

thereof) are in fact judicially enforceable. In the wake of the Court's decision in *Hamdan*, Congress, seeking to limit the scope of the Conventions' applicability in certain U.S. domestic proceedings, passed the 2006 Military Commissions Act (MCA).²⁴⁵ Under § 948b(g) of this act "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."²⁴⁶ More pertinently for present purposes, the MCA also provides:

No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.²⁴⁷

Both these provisions make it difficult to invoke the Conventions within the courts of the United States. However, these provisions are also evidence that portions of the Conventions are in fact understood by Congress to be self-executing and judicially enforceable, since if they were not, Congress would not have found it necessary to introduce language preventing their invocation in court. Indeed, according to Vázquez, the MCA serves to "unexecute" the Conventions in the enumerated circumstances.²⁴⁸ While the act prevents litigants from invoking the Conventions in a habeas action or any other civil action or proceeding to which the United States is a party, it is silent with regard to criminal proceedings. As a result, it appears that, notwithstanding the MCA, defendants would not be precluded from defensively invoking the Conventions if they were confronted with criminal charges under the material support statutes. On the other hand, it seems that the MCA has foreclosed the possibility of filing a *Humanitarian Law Project*-style action for declaratory relief, as such a suit would con-

245. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended at 10 U.S.C. §§ 948a–950w and in scattered sections of 10 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

246. 10 U.S.C. § 948b(g) (2012).

247. 28 U.S.C. § 2241 (2011).

248. Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 88–92 (2007).

stitute a “civil action or proceeding” to which the United States is a party.

V. THE WAY FORWARD

The foregoing Parts have demonstrated that there is a substantial risk that humanitarian workers and organizations will be prosecuted under the current material support regime. This Article has also shown that while the United States might be in breach of its international law obligations were it to prosecute certain aid workers, the story on the domestic plane is much less clear. While those being prosecuted may attempt to invoke the GCs as a defense, it is quite possible that such prosecutions could result in convictions under U.S. law. What is certainly apparent is that, as chronicled above, even if no such prosecutions ever materialize, the mere threat of prosecution is already having a chilling effect on the humanitarian aid community and will serve to deter aid workers and organizations from delivering essential humanitarian assistance in certain conflict and disaster zones. This state of affairs is far from desirable, and should be remedied as soon as possible.

As detailed in Parts II.B.5 and II.C *supra*, the material support statutes and IEEPA contain humanitarian exceptions that, in theory, will allow government officials to approve putative violations of these instruments for humanitarian ends on a one-off, ad hoc basis. During oral arguments in *Humanitarian Law Project v. Gonzales* in the Ninth Circuit in 2004, the Department of Justice made clear that humanitarian relief organizations wishing to provide assistance in disaster zones controlled by designated terrorist organizations would in fact be required to seek such a waiver in order to avoid prosecution.²⁴⁹ However, because the exception under 28 U.S.C. § 2339B is limited to the provision of “personnel,” “training,” or “expert advice or assistance,” there are entire categories of humanitarian assistance, such as the provision of food, shelter, or other supplies, that will remain prohibited under this statute. Furthermore, many complex emergencies require an extremely rapid response by the international community and having to wait to

249. Oral Argument, *supra* note 39. See Annex I for author’s transcription of this recording.

obtain the permission of the Secretary of State may unduly delay the provision of essential aid.

In response, a network of humanitarian organizations has proposed the creation of a more comprehensive and permanent humanitarian exception. Under this proposal the exception would be altered to allow humanitarian assistance when such aid:

- is conducted in accordance with long-accepted standards of charitable practice, such as the Code of Conduct for the International Red Cross Red Crescent Movement and NGOs in Disaster Relief and the *Principles of International Charity*,
- is provided only to noncombatants in need, with priority to the most vulnerable, and
- when contact, communications and logistical arrangements with a listed organization cannot reasonably be avoided.²⁵⁰

While such a proposal is eminently reasonable and would certainly be a step in the right direction, there does not seem to be much of an appetite in Congress to modify the existing regime.²⁵¹

In this light, it is apparent that humanitarian relief organizations will have to continue to carefully monitor and assess their activities in conflict and disaster zones to ensure that they and their staff are not in violation of the material support statutes. Some organizations may consider changing their patterns of activity, in particular by screening or vetting aid recipients or refusing to provide aid in certain high-risk geographic areas or in certain unstable political contexts. However, in the case of the IFRC, the ICRC, and IFRC-member National Socie-

250. *Material Support and the Need for NGO Access to Civilians in Need*, CHARITY & SECURITY NETWORK (JULY 7, 2010), http://www.charityandsecurity.org/analysis/material_support_law. For other proposals see Peter Margulies, *Accountable Altruism: The Impact of the Federal Material Support Statute on Humanitarian Aid*, 34 SUFFOLK TRANSNAT'L L. REV. 539 (2011).

251. Senator Patrick Leahy has advocated for greater clarity in the material support laws and the creation of a humanitarian exception. See *Countering Terrorist Financing: Progress and Priorities: Hearing Before the Subcomm. on Crime & Terrorism of the S. Comm. on the Judiciary*, 112th Cong. 64–65 (2011) (Statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary). He appears, however, to be a lone voice, and the Senate has not taken any further action on the subject.

ties, the principle of impartiality must be strictly respected. Under this principle, no discrimination as to nationality, race, religious beliefs, class, or political opinions is to be made in the provision of humanitarian assistance. Furthermore, the Red Cross Movement is to be guided solely by needs of suffering individuals, and to give priority to the most urgent cases of distress. Discrimination on the basis of group membership or political beliefs or affiliation might constitute a violation of this principle and therefore, provide a difficult challenge to the Red Cross Movement's continued provision of humanitarian assistance.

VI. CONCLUSION

The material support statutory regime creates serious risks for humanitarian organizations and individuals providing assistance in conflict and disaster zones where designated terrorist organizations are active. This has had a chilling effect on the provision of much-needed assistance and threatens to undermine the future provision of such assistance. The Supreme Court's decision in *Humanitarian Law Project* confirmed the dangers that now exist for humanitarian organizations and put those in the humanitarian community not already familiar with the material support laws on notice of the serious risk of criminal prosecution or crippling financial penalties.

Enforcement of the material support statutes in certain circumstances places the United States in violation of international law. This fact might be used, assuming recognition of judicial enforceability, as a defense to criminal prosecution in U.S. courts. However, given the convoluted history of the doctrine of self-execution, it is nigh impossible to predict how a court would rule should such an issue come before it. As a result, humanitarian organizations would be well served to seriously evaluate the legal risks they face and may even have to reconsider the prudence of continuing with some of their core functions and activities. For organizations that are part of the Red Cross Movement, with its uncompromising commitment to neutrality and impartiality, such consideration may place them in the difficult position of choosing between the maintenance of these cherished core values and the avoidance of significant legal hazards. In the end, the way forward is not clear, but what is unmistakable is that the emergence of global ter-

rorism in the last twenty years and the resulting measures taken in response by the U.S. government have significantly altered, as with so many other elements of our social landscape, the operational and legal environment for the provision of humanitarian assistance. As is all too often the case, it appears that it will be the most vulnerable individuals who will suffer the worst consequences of these measures.

ANNEX I

TRANSCRIPT OF ORAL ARGUMENT IN THE CASE OF
HUMANITARIAN LAW PROJECT V. GONZALES

Excerpts of oral arguments of Douglas N. Letter, U.S. Department of Justice, before the U.S. Court of Appeals for the Ninth Circuit, *en banc* hearing, December 14, 2004, Pasadena, CA.

Judge Thomas: Let's take pure humanitarian aid, let's say the Red Cross comes in and assists people that have been involved in skirmishes. Under that definition, that organization could be, or its members could conceivably come under the umbrella of material support.

Douglas Letter: If it was a foreign organization? Yes, Your Honor and I'll give you the reason why, again remember this is based on an explicit congressional finding—Senator Feinstein's statement on the floor of the Senate is very relevant here. Let's look at again, at a group like Hamas or the Tamil Tigers. These are groups—they are complicated, they clearly do things that we all might say are wonderful: they help people, they patch people up, they cure children's diseases, they run schools, etc. They do so, though—and this is what Congress found—as part of a unified program. The program includes assassinating the president of Sri Lanka, the program includes setting off truck bombs, blowing up and killing more than a 100 people at a time. Again, this isn't like Al-Qaeda, this is part of a big program and when they do provide that kind of aid in the community one of the things that it does, is that it gives the group much more credibility and popularity within the community and that's why Congress said: "We're going to draw very broad lines . . ."

Judge Graber: Mr. Letter, I'd like to follow up on Judge Thomas's question with another one. I was somewhat surprised by your answer—maybe because I have a different understanding of what the Red Cross does. If an entity like the Red Cross went in to help individuals, regardless of their affiliation with an entity—anyone who is killed in this region, you know, we'll clean up the bodies or anybody who's injured, we'll try to get them medical care, but not particularly attached to an organization—is that made unlawful by this or not?

Letter: No, Judge Graber. Thank you very much for clearing that up—I misunderstood Judge Thomas’s question. I’m sorry I thought that he meant if the Red Cross were a foreign terrorist organization. No, you’re exactly right—

Judge Thomas: No, I was not suggesting that.

Letter: I misunderstood—I apologize. I’m glad we got that straight. Your Honor, that’s correct. What we’re talking about is if the Red Cross decided to give money to Hamas that runs a hospital.

Judge Thomas: My question is this: If they came in and started treating people, under Hamas’s direction, just humanitarian aid, going in and saying: “Ok, there’s been a battle, there’s been a skirmish, we’re going in, under our Red Cross flag”, I think they fall under the definition—your definition—of providing material aid.

Judge Callahan: Can’t they under the new statute—there’s a humanitarian exception, where you can ask the Secretary of State to do something and get permission, correct?

Letter: Yes. I’d like to answer Judge Thomas and then answer you, Judge Callahan. Yes, Judge Thomas, because I think your hypothetical had what, for me, was a very critical word. You said “under Hamas’s direction” and that is—

Judge Thomas: Yes, obviously if you’re gonna go into a foreign compound, where it’s a military operation, you have to say, “May I come in? May I render aid,” and they usually say, “Well, sure.”

Letter: So, if it’s under Hamas’s direction or if it’s giving aid to Hamas, then yes. Judge Callahan, yes. The new bill provides that somebody can make a request to the Secretary of State and it can be then authorized for certain situations.

Unknown (Female) Judge: Let’s say there was a like an earthquake in one of these places, but people in a particular group who were on the list were people that were injured, the Red Cross could ask permission from the Secretary of State and the Attorney General to go in and do that, correct?

Letter: That’s exactly right, Your Honor. Yes— [*Interrupted*]