Judge Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BERTRAM SACKS, Plaintiff, v. OFFICE OF FOREIGN ASSETS CONTROL, UNITED STATES DEPARTMENT OF THE TREASURY, Defendant.	NO. C04-108C MOTION TO DISMISS Note on Motion Calendar: May 14, 2004

PETER D. KEISLER
Assistant Attorney General

JOHN McKAY
United States Attorney

BRIAN C. KIPNIS
Assistant United States Attorney
SANDRA M. SCHRAIBMAN
Assistant Branch Director
JOSHUA Z. RABINOVITZ
Trial Attorney

Counsel for the Office of Foreign Assets Control

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

Table of Contents

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

Table of Authorities

Cases **Page**

Statutes and Regulations

Judge Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BERTRAM SACKS, Plaintiff, v. OFFICE OF FOREIGN ASSETS CONTROL, UNITED STATES DEPARTMENT OF THE TREASURY, Defendant.	NO. C04-108C MOTION TO DISMISS Note on Motion Calendar: May 14, 2004

Preliminary Statement

This lawsuit presents the question whether §2(d) of Executive Order 12,724 comports with the Constitution and with Congress's delegation of power to the President. Section 2(d), which prohibits Americans from engaging in travel-related transactions regarding Iraq, was promulgated as part of the United Nations' economic sanctions program against Iraq following Iraq's invasion of Kuwait in 1990. Plaintiff, Bertram Sacks, was fined $10,000 for engaging in travel-related transactions while traveling in Iraq in November of 1997.

Plaintiff has brought this lawsuit contending that his fine is invalid because §2(d) exceeds the authority that Congress has delegated to the President and violates international law. Neither of these propositions is meritorious. First, Executive Order 12,724 is a valid exercise of the authority delegated by Congress to the President through the United Nations Participation Act.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

22 U.S.C. §287c. Moreover, the promulgation of the Executive Order was expressly approved by Congress through the Iraq Sanctions Act of 1990. Pub. L. 101-513, §586C(a). 104 Stat. 2047 (Nov. 5, 1990) *codified at* 50 U.S.C. §1701 note. Second, no rule of international law prevents a nation from prohibiting its citizens from engaging in travel-related transactions with another nation. This is especially true when the prohibition is promulgated at the specific direction of the United Nations Security Council, acting pursuant to the United Nations Charter. Accordingly, the Court should dismiss this lawsuit for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

Background

A. The Federal Government's Prohibition on Unauthorized Travel to Iraq.

On August 2, 1990, the military forces of Iraq invaded and occupied the sovereign nation of Kuwait. The United Nations, acting through the Security Council, responded swiftly, demanding that Iraq withdraw its troops to their August 1 position. See United Nations Security Council (U.N.S.C.) Res. 660 (Aug. 2, 1990) [Attached at Ex. 1]. Four days later, the United Nations, in order to secure compliance with Security Council Resolution 660, decided that its membership would impose economic sanctions on Iraq. See U.N.S.C. 661 (Aug. 6, 1990) [Attached at Ex. 1]. The sanctions initiated by the United Nations included a prohibition on remitting funds to any person in Iraq. *Id*. at §4.

The United States complied with the United Nations' sanctions effort. On August 9, 1990, in order to comply with Security Council Resolution 661, the President promulgated Executive Order 12,724, which imposed economic sanctions on Iraq.[1] See Exec. Order 12,724, 55 Fed. Reg. 33089 (Aug. 9, 1990) *reprinted at* 50 U.S.C. §1701 note. Although the Executive Order created a multi-faceted sanctions scheme, the only provision relevant to this lawsuit is

[1] Executive Order 12,724 supplemented (and replaced, to the extent they are inconsistent) Executive Order 12,722, which first introduced the economic sanctions against Iraq. See Exec. Order 12,722, 55 Fed. Reg. 31803 (Aug. 2, 1990) *reprinted at* 50 U.S.C. §1701 note.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

§2(d) of the Executive Order, which prohibits:

> Any transaction by a United States person relating to travel by any United States citizen or permanent resident alien to Iraq, or to activities by any such person within Iraq, after the date of this order, other than transactions necessary to effect (i) such person's departure from Iraq, (ii) travel and activities for the conduct of the official business of the Federal Government or the United Nations, or (iii) travel for journalistic activity by persons regularly employed in such capacity by a news-gathering organization.

Id., §2(d). Shortly after the President issued his Executive Order, the Office of Foreign Assets Control ("OFAC"), the defendant in this lawsuit, promulgated a regulation codifying §2(d):

> Except as otherwise authorized, no U.S. person may engage in any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq, or to activities by any U.S. citizen or permanent resident alien within Iraq, after the effective date, other than transactions:
>
> (a) Necessary to effect the departure of a U.S. citizen or permanent resident alien from Kuwait or Iraq;
> (b) Relating to travel and activities for the conduct of the official business of the United States Government or the United Nations; or
> (c) Relating to journalistic activity by persons regularly employed in such capacity by a newsgathering organization.
>
> This section prohibits the unauthorized payment by a U.S. person of his or her own travel or living expenses to or within Iraq.

31 C.F.R. §575.207.[2] Thus, §2(d) of Executive Order 12,724 and 31 C.F.R. §575.207, which are substantively identical, prohibit almost all travel-related economic transactions regarding Iraq, unless specifically authorized by OFAC. The prohibition includes spending money on travel to Iraq as well as spending money while in Iraq. Significantly, the OFAC regulation expressly indicates that it applies to "payment by a U.S. person of his or her own travel or living expenses to or within Iraq." 31 C.F.R. §575.207.

---

[2] All citations to the Code of Federal Regulations in this memorandum are to the regulations in effect during the time period relevant to Plaintiff's actions. In response to recent events in Iraq, OFAC has authorized many transactions that were previously prohibited under its regulations. See 68 Fed. Reg. 28753 (May 27, 2003); 68 Fed. Reg. 11741 (Mar. 12, 2003). These changes do not authorize or validate transactions that preceded their issuance. See 31 C.F.R. §575.501(a).

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

The OFAC regulations provide that civil penalties "may be imposed on any person who, after the enactment of this Act, violates or evades or attempts to violate or evade Executive Order Number 12722, 12723, 12724, or 12725, or any license, order, or regulation issued under any such Executive Order." 31 C.F.R. §575.701(a)(1). The regulations establish administrative procedures to be followed in the case of violations, including the issuance of a pre-penalty notice by OFAC and the opportunity for the charged party to make a written presentation of why a monetary penalty should not be imposed. 31 C.F.R. §§ 575.702–575.703. If, after considering any presentation, OFAC determines that a violation has occurred, it may issue a written notice of the imposition of the monetary penalty. 31 C.F.R. §575.704(b).

B. Plaintiff's Violation of the Prohibition on Travel-Related Expenditures.

With full knowledge of the United States' participation in the United Nations' effort to restore international peace and security through economic sanctions, Plaintiff has undertaken nine trips to Iraq since 1990, all of which have involved prohibited travel-related expenditures. Pl. Compl. ¶ 13. In December 1998, in response to one of these trips, OFAC sent Plaintiff a pre-penalty notice indicating that it had "reasonable cause" to believe that he had unlawfully traveled to Iraq in November 1997 and while there had engaged in unauthorized travel-related transactions. See Pl. Compl., Ex. 1 (Pre-penalty Notice). Specifically, the pre-penalty notice alleged that:

> Between on or about November 21–30, 1997, Mssrs. [redacted], [redacted], Sacks, and [redacted], engaged in currency travel-related transactions to/from/within Iraq absent prior license or other authorization from OFAC. These currency transactions included, but are not limited to, the purchase of food, lodging, ground transportation, and incidentals.

Id.[3] In response, Plaintiff sent a letter admitting that he had engaged in "civil disobedience" and

[3] The pre-penalty notice also treats the actions of other organizations and individuals, including the organization Voices in the Wilderness, which is the subject of a separate lawsuit in the United States District Court for the District of Columbia. See *Office of Foreign Assets Control v. Voices in the Wilderness*, Civ. No. 03-CV-1356 (D.D.C.). Because OFAC fined Voices in the Wilderness and Mr. Sacks under different sections of its regulations, the legal (continued...)

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

"public defiance of the laws," and that he had "publicly violate[d] [the] sanctions." Pl. Compl. ¶ 16 (quoting Plaintiff's letter to OFAC).

As a result, OFAC formally issued its finding that Plaintiff had violated the economic sanctions by engaging in "travel-related transactions" in November 1997. See Pl. Compl., Ex. 2 (Penalty notice). Although this violation of the sanctions could have incurred a penalty of up to $250,000, OFAC fined Plaintiff only $10,000.[4] See Pub. L. 101-513, §586E(1) *codified at* 50 U.S.C. §1701 note. OFAC is currently attempting to collect this penalty through Ocwen Federal Bank. See Pl. Compl. at ¶ 47.

Argument

Plaintiff contends that his fine was improper because Executive Order 12,724 is an unlawful and unconstitutional exercise of the President's authority. However, instead of discussing the prohibition on travel-related transactions found in §2(d) of Executive Order 12,724 and 31 C.F.R. §575.207, Plaintiff's complaint discusses almost exclusively an unrelated provision of the economic sanctions regulating the importation of medical supplies into Iraq. See 31 C.F.R. §575.205. But that provision has no relation to OFAC's penalty notice. It is not the provision under which Plaintiff was fined.[5]

Plaintiff's complaint also focuses heavily on the effect of the United Nations' sanctions on the people of Iraq. See Pl. Compl. ¶¶ 18–29. But the debate over the merits of the economic sanctions against Iraq is a policy question, one that Plaintiff could have brought to the political branches of the federal government. That debate is not properly brought before this Court; the

---

[3](...continued)
issues in *Voices in the Wilderness* differ from the legal issues presented by this lawsuit.

[4] Although OFAC has not yet acted in response to Plaintiff's eight other trips to Iraq, it reserves the right to do so in the future.

[5] That Plaintiff engaged in travel-related expenditures in order to bring medical supplies to Iraq would not excuse his violation of the prohibition on travel-related expenditures. See *Walsh v. Brady*, 927 F.2d 1229, 1231–1234 (D.C. Cir. 1991).

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

Supreme Court has firmly, and repeatedly, rejected all contentions that courts should review independently the political branches' determinations on the best course for foreign policy.[6] See *Regan v. Wald*, 468 U.S. 222, 242 (1984); *Zemel v. Rusk*, 381 U.S. 1, 16 (1965); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952). The United Nations, the Congress, and the President each considered and decided that the sanctions should be implemented, and Plaintiff was aware of that implementation. Plaintiff's attempt to shift the debate to the policy question whether the sanctions program has been successful should not distract attention from Plaintiff's willful, unlawful behavior. With full knowledge of the economic sanctions against Iraq, Plaintiff decided to violate the law. He should be held accountable for his conduct.

Rather than evaluating the wisdom of the economic sanctions, this Court's role is only to review §2(d) of Executive Order 12,724 and 31 C.F.R. §575.207 to ensure that they comport with the Constitution and with Congress's delegation of power to the President. As this memorandum establishes, that is undoubtedly the case. Both the Supreme Court and the Ninth Circuit have considered and upheld prohibitions on travel-related transactions with regard to Cuba. See *Regan v. Wald* 468 U.S. 222 (1984); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431 (9th Cir. 1996). The outcome here should be no different. Section 2(d) of Executive Order 12,724 was a proper exercise of Executive power under the United Nations Participation Act, 22 U.S.C. §287c(a). Congress confirmed the Executive Order's propriety by enacting the Iraq Sanctions Act of 1990, Pub. L. 101-513, §586C, 104 Stat. 2047, *codified at* 50 U.S.C. §1701 note, expressly approving of Executive Order 12,724 *after it had been promulgated*. Additionally, Plaintiff's reliance on international law is misplaced. None of the international texts that he cites relate in any way to the prohibition on travel-related transactions. And,

[6] Nor does Plaintiff, as a concerned citizen who disagrees with United States foreign policy, have standing to challenge that policy. That claim is a generalized grievance that is not subject to review. See *United States v. Richardson*, 418 U.S. 166, 173 (1974).

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

regardless, Plaintiff cites no source of international law that is binding in federal court.[7]

I. Section 2(d) of Executive Order 12,724 Is a Valid Exercise of the Authority Delegated by Congress to the President.

Plaintiff first argues that §2(d) of Executive Order 12,724 is unlawful because Congress has not delegated to the President authority to promulgate such an order. See Pl. Compl. ¶¶ 37–40, 51. This position is demonstrably incorrect. Executive Order 12,724, and the OFAC regulations that flowed from it, were authorized by the United Nations Participation Act (UNPA), 22 U.S.C. §287c. See Exec. Order No. 12,724, Preamble, 55 Fed. Reg. 33089 (Aug. 9, 1990) *reprinted in* 50 U.S.C. §1071 note. The UNPA provides that:

> *Notwithstanding the provisions of any other law*, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to Article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may … regulate, or prohibit, in whole or in part, economic relations … between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof.

22 U.S.C. §287c(a) (emphasis added). Thus, any time the United Nations Security Council requests that the United States "apply measures" intended to enforce Security Council decisions, the UNPA serves as Congress's authorization to the President to comply.

Accordingly, because Executive Order 12,724 was promulgated to comply with an international sanctions effort designed by the United Nations, the prohibition on travel-related expenditures is proper under the UNPA. On the same day that Iraq invaded Kuwait in 1990, the United Nations Security Council issued a resolution condemning the invasion and demanding that "Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990." U.N.S.C. Res. 660 (Aug. 2, 1990). Days later, in order to enforce its decision that Iraq must withdraw from Kuwait, the Security Council decided that all

---

[7] Plaintiff also claims in his complaint that "[t]o the extent OFAC seeks a civil penalty for [Plaintiff's conduct], it is untimely and is barred by the five-year statute of limitations that applies to the collection of civil fines and penalties." Pl. Compl. ¶ 54. To be clear, OFAC is not at this time seeking to enforce its penalty in this Court. Accordingly, the statute of limitations on an enforcement action is irrelevant to this lawsuit.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

States "shall prevent their nationals and any persons within their territories … from remitting any … funds to persons or bodies within Iraq or Kuwait."[8] U.N.S.C. Res. 661, §4 (Aug. 6, 1990). Thus, Resolution 661 plainly establishes that the United States was "called upon by the Security Council to apply measures" intended "to give effect to its decisions under said Charter." 22 U.S.C. §287c(a). That call by the Security Council empowered the President, under the UNPA, to regulate "economic relations" between Iraqi nationals (and others subject to Iraqi jurisdiction) and U.S. nationals (and persons subject to U.S. jurisdiction). This is the only action taken by §2(d) of Executive Order 12,724 and 31 C.F.R. §575.207. The UNPA does not except from its delegation to the President the ability to regulate travel-related expenditures. Plaintiff cannot, then, maintain his position that §2(d) of the Executive Order is unlawful.

Moreover, although the propriety of §2(d) of Executive Order 12,724 is plain from the text of the UNPA itself, after the President promulgated Executive Order 12,724, Congress enacted the Iraq Sanctions Act of 1990, which expressly approved of the President's actions. Section 586C(a) of the Act provides that:

> [T]he President shall continue to impose the trade embargo and other economic sanctions with respect to Iraq and Kuwait that the United States is imposing, in response to Iraq's invasion of Kuwait, pursuant to Executive Orders Numbered 12724 and 12725 (August 9, 1990).

Pub. L. 101-513 *codified at* 50 U.S.C. §1701 note. This Act makes Plaintiff's position untenable. After the President promulgated Executive Order 12,724, Congress passed legislation specifically endorsing that Executive Order and ordering the President to keep it in effect. Plaintiff cannot maintain an argument that §2(d) of the Executive Order exceeds the power

---

[8] Resolution 661 included the caveat that it did not apply to "payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs." U.N.S.C. Res. 661, §4. However, the Security Council subsequently reconsidered that exception and decided that foodstuffs should be provided only through "the United Nations in co-operation with the International Committee of the Red Cross or other appropriate humanitarian agencies." U.N.S.C. Res. 666, §6 [Attached at Ex. 2]. See also *id*., §8 (similar provision regarding medical supplies). Because Plaintiff was fined for monetary transactions other than purchasing medical supplies and foodstuffs, Resolution 661's exception, and its subsequent retraction, are not further addressed in this memorandum.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

Congress delegated to the President in the face of this clear enactment.

Plaintiff's only argument in opposition is that the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1707, "does not include [in its delegation of power to the President] the authority to regulate or prohibit … transactions ordinarily incident to travel to or from any country, including … maintenance within any country including payment of living expenses and acquisition of goods or services for personal use." 50 U.S.C. §1702(b)(4). See Pl. Compl. ¶ 39. On that authority, Plaintiff contends that the President lacked authority to promulgate §2(d). This argument fails.

As an initial matter, the subsection on which Plaintiff relies was only added to the IEEPA in 1994—four years after Executive Order 12,724 was promulgated. See Pub. L. 103-236, §525, 108 Stat. 474 (Apr. 30, 1994). And when the subsection was added, the legislation indicated explicitly that the addition did not apply to sanctions already in place. See *id*. at §525(c)(3), 108 Stat. at 475 ("Section 203(b)(4) of the [IEEPA] …shall not apply to restrictions on the transactions and activities described in section 203(b)(4) in force on the date of enactment of this Act."). Accordingly, 50 U.S.C. §1702(b)(4) does not apply to Executive Order 12,724, and the President's authority under the IEEPA to regulate transactions related to travel to Iraq remains unfettered.

And, even if Plaintiff had been correct in his reading of §1702(b)(4), the language that Plaintiff quotes indicates only that "this section"—that is, 50 U.S.C. §1702 itself—does not authorize a prohibition on ordinary travel expenditures. It says nothing about the propriety of such a prohibition under other statutes delegating power to the President. And as is established above, §2(d) of Executive Order 12,724 is plainly authorized by both the UNPA and the Iraq Sanctions Act of 1990.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

II. International Law Does Not Provide a Basis for Challenging the Prohibition on Travel-Related Expenditures.

Plaintiff's second challenge to §2(d) of Executive Order 12,724 and 31 C.F.R. §575.207 contends that the prohibition on travel-related expenditures runs afoul of four different international texts, as well as the norm of international law that the agreements embody. See Pl. Compl. ¶¶ 30–37. Specifically, Plaintiff suggests that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287, the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, the Universal Declaration of Human Rights, available at <http://www.unhchr.ch/udhr/lang/eng.htm>, and the Convention on the Rights of the Child, 1577 U.N.T.S. 3, necessitate a declaration that the penalty assessed against him is unlawful. This argument flies headlong into the fact that the President promulgated Executive Order 12,724 at the specific direction of the United Nations Security Council.

Additionally, by Plaintiff's own admission, these texts discuss only the denial to "civilians, particularly mothers and young children, of food, medicine, and other necessities of life." Pl. Compl. ¶ 36. Neither §2(d) of Executive Order 12,724 nor 31 C.F.R. §575.207 even arguably relates to denying Iraqi civilians food or medicine—they only prevent Americans from engaging in travel-related transactions. Thus, even if these treaties were binding law in domestic courts, they would not undermine the validity of §2(d) of Executive Order 12,724. Even so, they are not binding law.

A. The International Texts on Which Plaintiff Relies Cannot Sustain a Challenge to §2(d) of Executive Order 12,724.

1. Absent Implementing Legislation by Congress, Only Self-Executing Treaties Are Binding Sources of Law in Federal Court.

Plaintiff's reliance on the four international texts cited above is ill-founded. Only self-executing treaties—that is, treaties that need no domestic legislation to implement them—are binding in federal courts. If a treaty is not self-executing, it is binding law only if Congress

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

enacts domestic legislation to implement it:

> When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject.

Whitney v. Robinson, 124 U.S. 190, 194 (1888). See also *Cook v. United States*, 288 U.S. 102, 119 (1933); *Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39, 49 (1913); *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002); Restatement (Third) of Foreign Relations Law, §111(3) ("[A] 'non-self-executing agreement' will not be given effect as law in the absence of necessary implementation."). The question whether a treaty is self-executing is a legal issue to be resolved by the Court. In deciding whether a treaty is self-executing, courts evaluate (1) the text of the treaty, (2) the Senate's resolution ratifying the treaty, and (3) whether implementing legislation is constitutionally required. See Restatement (Third) of Foreign Relations Law, §111(4).

Two of the texts relied on by Plaintiff are not treaties at all under the meaning of the Constitution. The other two texts are not self-executing treaties, and Congress has not passed implementing legislation to make them binding domestic law under the Supremacy Clause of the Constitution.

First, Plaintiff's reliance on the Convention on the Rights of the Child is unavailing. Although the United States signed this treaty in 1995, the Senate has not ratified it. See *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 165 (2d Cir. 2003) ("The last treaty on which plaintiffs principally rely is the United Nations Convention of the Rights of the Child … which has not been ratified by the United States."). Indeed, recently, when the Senate ratified two of the Optional Protocols to the Convention on the Rights of the Child, the Senate unequivocally expressed its view that the Convention itself is *not* binding on the United States domestically: "The United States understands that the United States assumes no obligations under the Convention on the Rights of the Child by becoming a party to the Protocol." §3, 148 Cong. Rec. S5453 (June 12, 2002) (reprinting Resolution of Advice and Consent to Optional Protocol No. 2

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

to Convention on the Rights of the Child) [Attached at Ex. 3]. See also §2(1), 148 Cong. Rec. S5454 (reprinting Resolution of Advice and Consent to Optional Protocol No. 1 to Convention on the Rights of the Child). Thus, the Convention does not bind federal courts. Not only is ratification of a treaty required by the United States Constitution, see U.S. Const., Art. II, §2, cl. 2, it is required by the Convention itself. See Convention on the Rights of the Child, Art. 47 ("The present Convention is subject to ratification."). Accordingly, Plaintiff cannot rely on the Convention on the Rights of the Child.

The next international text on which Plaintiff relies, the Universal Declaration of Human Rights, is not a treaty at all, and therefore is certainly not binding in federal court. The Universal Declaration is "merely aspirational and [was] never intended to be binding on member States of the United Nations." *Flores*, 343 F.3d at 165. See also *Alvarez-Machain v. United States*, 331 F.3d 604, 618 n.12 (9th Cir. 2003) (same). The aspirational nature of the Universal Declaration is also evinced by the text of the document itself, which indicates only that all nations "shall strive by teaching and education to promote respect for these rights," as well as by the United States' position at the time of the Declaration's adoption in 1948 that the Declaration is "not a treaty" and that it does not "and does not purport to be a statement of law or of legal obligations." 19 Dep't of State Bull. 751 (1948) (remarks of Eleanor Roosevelt, Ambassador to the United Nations). Accordingly, Plaintiff cannot claim that the Universal Declaration is binding domestic law.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War is not a self-executing treaty. The text of the treaty explicitly requires its signatories to "enact any legislation necessary to provide effective penal sanction for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article." Geneva Convention, Art. 146. Accordingly, the courts of appeals have uniformly held that the Geneva Convention is not self-executing and, therefore, not a binding source of law in federal court. See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003) ("We therefore

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

agree with other courts of appeals that the language in the Geneva Convention is not 'self-executing.'") *cert. granted* 124 S.Ct. 981 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) ("Of the five treaties in force, none provides a private right of action. Three of them—the Geneva Convention for the Protection of Civilian Persons in Time of War [other treaties omitted]—expressly call for implementing legislation.… These three treaties are therefore not self-executing."); *Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) ("[T]here is no evidence that any of the general language relied upon by plaintiffs was intended to be self-executing."). Thus, the Geneva Convention is only effective if Congress implements it through domestic legislation, which it has not.

Nor is the Convention on the Prevention and Punishment of the Crime of Genocide self-executing. Article 5 of the treaty expressly calls for implementing legislation, in the same manner as the Geneva Convention: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention." Genocide Convention, Art. 5. Further, the Senate Committee Report on the Convention makes clear the Senate's understanding that the treaty is not self-executing: "[N]o part of the Convention becomes law by itself. The Convention is effective only through legislation implementing its various provisions." S. Exec. Rep. 99-2, p. 26 (1995). See also *id*. at p. 9 ("Article V also makes it clear that the Convention provides no basis itself for punishing individuals: it is not self-executing."). Thus, the each part of the Genocide Convention only binds domestic courts to the extent that Congress enacts domestic legislation to make it so.

Congress has not made it so. The Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091–1093, partially implements the Genocide Convention by criminalizing acts of genocide. However, the Act explicitly provides that nothing "in this chapter [shall] be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." 18 U.S.C. §1092. It is a criminal statute only, creating no rights for private citizens. Accordingly, Plaintiff cannot state a claim under the Genocide Convention.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

In sum, Plaintiff has no basis for claiming that any of the four international texts he cites are binding in domestic courts in the United States.

2. None of the International Texts Cited by Plaintiff Create Private Rights on Which an Individual May Rely.

Even if Plaintiff could establish that the international texts on which he relies were binding in federal court—which he cannot—Plaintiff could not avail himself of these texts because they do not create private rights on which individuals can rely. "[T]reaties do not generally create rights that are privately enforceable in the federal courts." *United States v. Li*, 206 F.3d 56, 60 (1st Cir. 2000). See also *Kwan v. United States*, 272 F.3d 1360, 1362 (Fed. Cir. 2001) ("When the foundation document is an agreement between governments, non-governmental entities cannot ordinarily challenge either their interpretation or their implementation, in the absence of express authorization for such private action."); *Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001) ("[A]s a general rule, international agreements, even those benefitting private parties, do not create private rights enforceable in domestic courts."); *More v. Intelcom Support Services, Inc.*, 960 F.2d 466, 470 (5th Cir. 1992) (similar). Accordingly, unless a treaty expressly "indicates the intention to establish direct, affirmative, and judicially enforceable rights," an individual citizen may not rely on the treaty in domestic court. *United States v. Mann*, 829 F.2d 849, 852 (9th Cir. 1987) (internal quotation marks omitted). See also *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647, 652–53 (9th Cir. 1989) (similar); Restatement (Third) of Foreign Relations Law, §703(3) ("An individual victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by other applicable international agreements.").

To be clear, the question whether a treaty creates private rights differs from the question whether domestic legislation creates private rights of action. The latter question is governed by the standard set out in *Cort v. Ash*, 422 U.S. 66 (1975). Treaties, however, are treated differently:

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Edye v. Robertson, 112 U.S. 580, 598 (1884). Thus, although a treaty may benefit individuals, unless the treaty's text expressly indicates otherwise, no private rights are created:

> [E]ven where a treaty provides certain benefits for nationals of a particular state … it is traditionally held that any rights arising from such provisions are, under international law, those of states and … [that] individual rights are only derivative though the states.

United States v. Li, 206 F.3d 56, 61 (1st Cir. 2000) (ellipses and brackets in original, internal quotation marks omitted).

None of the four texts cited in Plaintiff's complaint provides any basis for the position that it creates rights on which a private litigant can rely. As a result, the texts create no private rights. See, e.g., *Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (holding that the Geneva Convention does not create private rights on which litigants can rely); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (same). Moreover, even if the texts did create private rights, they would at most create private rights for *victims* of violations of human rights agreements. See Restatement (Third) of Foreign Relations Law, §703(3) ("An individual *victim* of a violation of a human rights agreement may pursue any remedy provided by that agreement or by other applicable international agreements.") (emphasis added). Plaintiff is not a victim of a violation of any human rights agreement. As a result, even if this Court interpreted the texts on which Plaintiff relies to create private rights for victims, Plaintiff could not assert that the international texts create rights on which he can rely.

3. Plaintiff Cannot Rely on the Four International Texts Cited in the Complaint Because the Texts Pre-Date the Iraq Sanctions Act.

Plaintiff's reliance on the four international texts also fails because these texts were adopted prior to the date that Congress enacted the Iraq Sanctions Act of 1990, which explicitly

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

approved Executive Order 12,724. See *supra*, 8–9. Under the Supremacy Clause, treaties—that is, signed, ratified, and self-executing treaties—have the same status as domestic legislation. See U.S. Const., Art. VI, cl. 2. When a treaty conflicts with a statute, the Supreme Court has long held that the later-in-time document controls. See, e.g., *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When the two [a treaty and a statute] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing."); *Edye v. Robertson*, 112 U.S. 580, 597–99 (1884) (same); *Munoz v. Ashcroft*, 339 F.3d 950, 958 (9th Cir. 2003) (same); *Committee of U.S. Citizens v. Reagan*, 859 F.2d 929, 936–37 (D.C. Cir. 1988) (same); Restatement (Third) of Foreign Relations Law, §115(1)(a) (same).

As discussed above, the Iraq Sanctions Act was enacted on November 5, 1990. See *supra*, 8–9. This enactment postdates all four international texts on which Plaintiff relies.[9] Accordingly, once this Court finds that §2(d) of Executive Order 12,724 is a proper exercise of the President's power under §586C(a) of the Iraq Sanctions Act, contrary international agreements are irrelevant. Congress has the power to alter domestic law by statute even if the alteration violates international law, as the Ninth Circuit recently confirmed. See *Munoz*, 339 F.3d at 958 ("In enacting statutes, Congress is not bound by international law; if it chooses to do so, it may legislate contrary to the limits posed by international law."). See also *Committee of U.S. Citizens*, 859 F.2d at 936. As a result, Plaintiff's claims based on the international agreements fail from the outset; to the extent that there is any conflict, which there is not, an earlier-in-time treaty can never undermine a later-in-time statute. The earlier-in-time treaty might militate in favor of a particular interpretation of the statute if the statute is ambiguous, but

---

[9] The Geneva Convention entered into force on Feb. 2, 1956. The Universal Declaration was adopted in 1948. The Convention on the Rights of the Child was signed by the United States on Feb. 16, 1995, and has not been ratified by the Senate. And the Genocide Convention was ratified by the Senate on Nov. 25, 1988.

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

here the Iraq Sanctions Act is absolutely clear. It approves specifically, by name, of Executive Order 12,724 and orders the President to continue it. No ambiguity exists. As a matter of law, therefore, none of the international agreements cited by Plaintiff can affect the propriety of §2(d) of Executive Order 12,724.

4. The Four International Texts Relied on by Plaintiff Are Unavailing Because Obligations Created by the United Nations Charter Prevail over Other International Obligations.

Finally, Plaintiff's reliance on the four international texts cited in the complaint is faulty because the United Nations Charter makes clear that obligations under the Charter prevail over other international obligations. Specifically, Article 103 of the United Nations Charter indicates that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. Charter, Art. 103 [Attached at Ex. 4]. Thus, to the extent that §2(d) of Executive Order 12,724 served to fulfill the United States' obligations under the U.N. Charter, any conflict with other international law obligations is irrelevant; obligations under the Charter always take precedence.

Accordingly, because the United States was obligated to promulgate §2(d) of Executive Order 12,724 by Articles 48 and 49 of the United Nations Charter, Article 103 of the Charter establishes that §2(d) does not violate international law. Section 2(d) of Executive Order 12,724 fulfilled the United States' obligations under Article 48 of the Charter, which requires that an "action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations." U.N. Charter, Art. 48. See also U.N. Charter, Art. 49 (similar). As discussed above, see *supra*, 2, Security Council Resolution 661, which §2(d) of Executive Order 12,724 partially implements, was the Security Council's effort to restore peace and security to Iraq and Kuwait. The Resolution was expressly promulgated under U.N. Charter chapter VII, which is the chapter that contains Articles 48 and 49. See U.N.S.C. Res. 661, Preamble. Accordingly, because §2(d) of

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

Executive Order 12,724 was required under Articles 48 and 49 of the U.N. Charter, Article 103 of the Charter makes any alleged conflict with other international obligations irrelevant.

B. Customary International Law Is Binding on Domestic Courts Only in the Absence of a Controlling Legislative or Executive Act.

Plaintiff also relies on the four international texts as evidence of "[i]nternational custom and general principles of law recognized by civilized nations." Pl. Compl. ¶ 31. Although the government disputes Plaintiff's characterization of international law—international law does not prevent a prohibition on travel-related expenditures such as §2(d) of Executive Order 12,724—the Court need not reach that issue, for international custom is inapplicable where a controlling executive or legislative act exists.

The Supreme Court articulated the principle that customary international law is subservient to legislative and executive acts in the seminal decision *The Paquete Habana*:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, *where there is no treaty and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations.

175 U.S. 677, 700 (1900) (emphasis added). This principle has been faithfully adhered to since that time by the Supreme Court and the Ninth Circuit. See, e.g., *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941); *Galo-Garcia v. INS*, 86 F.3d 916, 918 (9th Cir. 1996) ("[W]here a controlling executive or legislative act does exist, customary international law is inapplicable."); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir. 1991) ("[W]e are bound be a properly enacted statute, provided it be constitutional, even if that statute violates international law."). As established in Part I above, Executive Order 12,724 is a proper executive action under the United Nations Participation Act, and is further reinforced by the Iraq Sanctions Act. The Executive Order is, therefore, proper, regardless of the existence of the customary international norms to the contrary. This is not an admission that Executive Order 12,724 violates customary international law—it does not—rather, because Plaintiff's reliance on international custom cannot succeed as a

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

matter of law, this Court need not reach the issue at all.

Conclusion

For the foregoing reasons, this Court should dismiss this lawsuit for failure to state a claim upon which relief may be granted.

Dated: April 16, 2004

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

JOHN McKAY
United States Attorney

s/ Brian C. Kipnis
BRIAN C. KIPNIS
Assistant United States Attorney

s/ Joshua Z. Rabinovitz
SANDRA M. SCHRAIBMAN
Assistant Branch Director
JOSHUA Z. RABINOVITZ
Trial Attorney

Counsel for the Office of Foreign Assets Control

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 16, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participant(s):

Donald B. Scaramastra
Gary Dean Swearingen

DATED this 16th day of April, 2004.

s/ Joshua Z. Rabinovitz
JOSHUA Z. RABINOVITZ

UNITED STATES ATTORNEY
601 UNION STREET, SUITE 5100
SEATTLE, WA 98101-3903
(206) 553-7970