The Prohibition of the Use of Duress in Treaty Negotiations: Study of the Iranian Hostage Crisis

Thomas Zaccaro
The Prohibition of the Use of Duress in Treaty Negotiations: A Study of the Iranian Hostage Crisis

I. INTRODUCTION

On November 4, 1979, a group of militant Iranian students, calling themselves "Muslim Student Followers of the Imam's Policy," took over the U.S. Embassy in Tehran. The seizure climaxed the intense anti-American agitation in Iran following the former Shah of Iran's admission into the United States for cancer treatment. The militants acted in a purportedly private capacity. The Iranian Government, however, endorsed the seizure within several days, translating the "continuing occupation of the Embassy and detention of the hostages into acts of that State."

After realizing that the hostage crisis would not be quickly resolved, the Carter Administration took a number of legal measures designed to impose economic and political pressure on Iran. On November 14, 1979, President Carter, invoking his authority under the International Emergency Economic Powers Act (IEEPA), ordered the Secretary of the Treasury to block the removal of all


2. The International Court of Justice (I.C.J) noted in its majority opinion the increasing tension in Iran regarding the United States:

   In October 1979, the Government of the United States was contemplating permitting the former Shah of Iran, who was then in Mexico, to enter the United States for medical treatment. Officials of the United States Government feared that, in the political climate prevailing in Iran, the admission of the former Shah might increase the tension already existing between the two states, and inter alia result in renewed violence against the United States Embassy in Tehran, and it was decided for this reason to request assurances from the Government of Iran that adequate protection would be provided.


5. Id. at 35. The ICJ found inter alia that the announced policy of the Ayatollah Khomeini and other Iranian authorities to maintain the occupation of the embassy and the detention of the American hostages transformed those acts into acts of the Iranian State. Id.


Iranian assets subject to U.S. jurisdiction. Approximately 400 American corporations immediately commenced litigation in U.S. courts against the Government of Iran and various of its agencies. The corporate litigants sought prejudgment attachments of the frozen Iranian assets in order to satisfy potential judgments in the event the presidential freeze was revoked and attempts were made to return the assets to Iran.

On December 22, 1979, the Carter Administration requested the Security

prohibit inter alia any "transfer . . . of . . . any right, power, or privilege with respect to, or transaction involving, any property in which any foreign country or a national thereof has any interest . . . with respect to any property subject to the jurisdiction of the United States." 50 U.S.C. §1702(a)(1)(b) (1976 & Supp. V 1981).


The Executive Order was issued immediately after Bani Sadr, then the finance minister of Iran, announced that Iran intended to withdraw all its deposits out of U.S. banks in order to damage the dollar. Cutler Address, supra note 6, at xvi-xvii.

9. The litigation against Iran was authorized by a general license issued by President Carter. Under this license, an American litigant could initiate certain judicial proceedings, including prejudgment attachments, against Iran but would be unable to obtain any judgment or decree. See 31 C.F.R. § 555.504 (1980) (Certain Judicial Proceedings with Respect to Property of Iran or Iranian Entities); 31 C.F.R. § 555.418 (1980) (Authorization of Judicial Proceedings under § 555.504). See also Note, Dames & Moore v. Regan: Was It Fair?, 34 BAYLOR L. REV. 283 (1982).


10. The purpose of the judicial process of attachment is to seize or block persons or property by judicial order to bring them or it under the control of the court. See FED. R. CIV. P. 64. A prejudgment attachment is one which is issued before judgment for the purpose of securing assets of the defendant that would be necessary to satisfy the potential judgment. Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724, 726 (S.D.N.Y. 1979). See also Comment, The Iran Case — Executive Intervention in Private Litigation, 30 DEPAUL L. REV. 623, 631 n.52 (1981) [hereinafter cited as Comment, The Iran Case].


13. U.N. Doc. S/13705 (1979), letter addressed to the President of the Security Council. There has been considerable controversy concerning the wisdom of the United States in bringing the hostage crisis to international fora, such as the U.N. Security Council and the International Court of Justice. Professor Alfred Rubin has argued that any judgment by the ICJ or the United Nations would endorse the legal correctness of the U.S. position and add weight to the American demand that Iran release the hostages immediately. Rubin, The Hostage Incident: The United States and Iran, 1982 Y.B. WORLD AFFAIRS 213, 220. Accordingly, such international organizations could influence Iran without appearing to favor the United States in a political confrontation with Iran. Id. Moreover, any judgment by an international organization against Iran would enable the United States to refuse to discuss the return of the Shah or any other concession as a quid pro quo for the release of the hostages. Id.
Council of the United Nations to take certain measures to induce Iran to comply with its international obligations. That same month, the Security Council unanimously passed two resolutions, which called on the Government of Iran "to release immediately the personnel of the embassy of the United States of America being held in Tehran and to provide them protection and to allow them to leave the country." In addition to bringing its request to the Security Council, the United States instituted proceedings against Iran before the International Court of Justice (ICJ) on November 29, 1979. The Court issued provisional measures against the Government of Iran, effective until final judgment. The ICJ adopted the following measures: (1) that Iran take imme-

Another international commentor, however, has questioned whether it was actually worthwhile for the United States to secure the endorsement of the United Nations. In the eyes of the Iranians, this endorsement represented an invalidation of the United Nations as a framework for conflict resolution. They perceived the United Nations response as one-sided: the U.N. addressed the seizure of the hostages but did not look at either the questions of the Shah's crimes against the Iranian people or the complicity of the United States in subverting the constitutional order of Iran back in 1953 [by restoring the Shah to power].


14. The Iranian hostage crisis was originally brought to the attention of the Security Council on November 25, 1979, after the Secretary-General of the United Nations, Kurt Waldheim, declared that the hostage crisis "posed a serious threat to international peace and security." U.N. Doc. 13,646 (1979). The Secretary-General has the authority under Article 99 of the U.N. Charter to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security." U.N. Charter art. 99.

15. The United States submitted a draft resolution to the Security Council that called upon all members of the United Nations to impose a sweeping embargo on Iran. This resolution was vetoed by the Soviet Union. Cutler, supra note 12, at 996. The United States interpreted this veto to signal the end of any help from the Security Council for the duration of the crisis. Rubin, supra note 13, at 217.


18. The International Court of Justice, the primary judicial organ of the United Nations, was created by the U.N. Charter in 1945. U.S. Charter arts. 7, 92-96. It is the successor of the Permanent Court of International Justice and is comprised of 15 judges. At the time the Hostage Case was decided, the membership of the Court was as follows: President, Sir Humphry Waldock (United Kingdom); Vice-President, Taslim Olauale Elais (Nigeria); and Judges Manfred Lachs (Poland), Isaac Forster (Senegal), Andre Gros (France), Richard R. Baxter (United States of America), P.D. Morozov (U.S.S.R.), Jose Sette-Camara (Brazil), Jose Maria Ruda (Argentina), Nagendra Singh (India), Abdullah Ali EI-Erian (Egypt), Hermann Mosler (Federal Republic of Germany), Shigeru Oda Oapan), Salah EI Dine Tarazi (Syrian Arab Republic), and Robert Ago (Italy). ICJ Judgment, 1980 I.C.J. at 3; see also Note, The Case Concerning United States Diplomatic and Consular Staff in Tehran, 11 Cal. W. Int'l L. J. 543, n.2 (1981) [hereinafter cited as Note, United States v. Iran].

19. A "provisional measure" is an interim measure of protection which the ICJ is authorized to issue under Article 41 of the Court's Statute: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." Stat. I.C.J. art. 41(1). The Statute of the ICJ is annexed to the U.N. Charter.

mediate steps to redress the hostage crisis by releasing all U.S. nationals held hostage and facilitating their departure from Iran; (2) that no member of the diplomatic or consular staffs be kept in Iran for purpose of judicial proceedings; and (3) that Iran return the Embassy and Consulate premises to the United States and make reparation to the United States for damage to those premises.21 The Court subsequently incorporated these measures into its final judgment.22

Neither the ICJ decision nor the Security Council's action expedited the end of the hostage crisis or the return of the hostages.23 After extensive negotiations, however, the Government of Algeria announced on January 19, 1981 that the United States and Iran had signed the Declaration of the Government of the Democratic and Popular Republic of Algeria (Agreement),24 thereby clearing the way for the release of the hostages after 444 days of captivity.25 The Agreement between the United States and Iran consisted of two separate accords. The first, the Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States (Declaration),26 required the release of the hostages in return for the release and transfer of all frozen Iranian assets.27 The express purpose of the Declaration

21. ICJ Judgment, 1980 I.C.J. at 44-45. The Court held that since Iran continued to hold the U.S. Embassy at the time of the judgment, the form and amount of reparations could not be determined. Id. at 42. The form and amount of such reparation would be established by agreement between the parties, or, failing such agreement, by the Court. Id. at 45.

22. ICJ Judgment, 1980 I.C.J. at 44-45. The decision was announced on May 24, 1980. The Court concluded that the conduct of the Government of Iran in the hostage crisis violated and continued to violate obligations owed by it to the United States under international conventions in force between the two countries as well as under rules of general international law. Id. at 44. For further discussion of the ICJ Judgment, see infra text accompanying notes 144-171.

23. For a possible explanation of the failure of the United Nations and the ICJ to settle the Iran hostage crisis, see supra note 13.


25. As an apparent final insult to President Carter, the Iranian Government postponed the actual departure of the hostages until 12:25 p.m. EST of January 20, 1981, several minutes after Ronald Reagan was inaugurated as Carter's successor. N.Y. Times, Jan. 21, 1981, at I, col. 1.

Lloyd Cutler, an aide to President Carter during the negotiation, noted that the delay was due to ineptitude and internal conflict within the Iranian Government:

But then came the cruellest delay of all — the four and a half hours it took the Iranians to round up the hostages, deliver them to the airport, pass them through hostile crowds, and — in my judgment, more because of ineptitude and continuing internal conflict than by plan — permit President Carter's term to expire before the demon of his hostage crisis had been fully exorcised.

Cutler, supra note 12, at 1000.


27. Id. See also, Note, The Effect of Duress, supra note 3, at 848. Among the provisions, the Declaration provided that the United States would not intervene politically or militarily in the affairs of Iran, Declaration, supra note 26, at para. 1; the Bank of England would serve as an escrow agent, id. at para. 2; the United States would transfer to the Bank of England all assets owned by Iran which were in the Federal Reserve Bank of New York, id. at para. 4; after certification that all the hostages had safely left Iran, Algeria would direct the Algerian Central Bank to direct the Bank of England to forward
was “to restore Iran to the financial position it enjoyed prior to the freezing of the assets, and to terminate all suits between the two parties and their nationals.”

The second accord, the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by Iran and the United States (Claims Settlement Agreement), provided for the establishment of an international Arbitral Tribunal to resolve commercial claims raised by the nationals and governments of Iran and the United States against each other. 31

Shortly after the settlement was announced, questions arose concerning both the wisdom and constitutionality of the Agreement. Several commentators urged the newly inaugurated Reagan Administration to renounce the Agreement on the basis that it violated international law. 32 More specifically, these commen-

immediately all funds held in escrow, id. at para. 3; the United States would then have six months to transfer all assets which were held in domestic branches of U.S. banks to the Bank of England. From these assets, an escrow account would be established to satisfy claims of American nationals against the Government of Iran, id. at para. 6; if the balance of the escrow account drops below $500 million, Iran must replenish the account to maintain the $500 million level, id. at para. 7; the United States must revoke trade sanctions against Iran and terminate all pending and future litigation against Iran, including the suit before the ICJ and potential claims arising out of the embassy seizure and detention of the hostages, id. at paras. 10-11; and the United States would freeze any property of the late Shah of Iran and facilitate its recovery by Iran. Id. at paras. 12-16.


30. Article II of the Claims Settlement Agreement excluded from the jurisdiction of the Arbitral Tribunal all claims arising out of the embassy seizure and the detention of the hostages that were waived in paragraph 11 of the Declaration. Further, claims arising out of contracts providing for exclusive dispute resolution by Iranian courts (Iran forum clauses) were also excluded. Claims Settlement Agreement, supra note 29, at art. 11, para. 1.


tators argued that the acts of the Iranian militants, endorsed by the Iranian Government, came within the provisions of Article 52 of the Vienna Convention on the Law of Treaties. The Law of Treaties, elaborated by the International Legal Commission (ILC), attempts to define the international obligations of sovereign states engaged in making treaties with other nations. One underlying theme of the Vienna Convention is that a treaty is void if a signatory has been coerced into giving its consent. Article 52 specifically renders void any treaty which has been procured by the threat or use of force in violation of the principles of international law embodied in the U.N. Charter.

On February 24, 1981, President Reagan, finding that it was within the overall interest of the United States to uphold the Agreement, issued an executive order to implement the Agreement. The order suspended all claims which would be ineffective. Stuart Malawer argued that by renouncing the Agreement, the Reagan Administration would signal to the international community "its abhorrence of the taking of diplomatic hostages and the violation of the primary rules of diplomatic and international relations...." Id. at 15. Moreover, by applying international law to the hostage crisis, the Reagan Administration would be affirming its belief of the legal correctness of its position. Id. Another international legal commentator, Andreas F. Lowenfield, argued that the Agreement should be upheld because international law does not condemn a "hostage-taking supported by a Government." Lowenfield, International Law and the Hostage Agreement, Wall St. J., Jan. 27, 1981, at 30, col. 3.


36. Article 52 of the Law of Treaties is fully discussed in § II infra.

37. 2048 U.S. DEPT. STATE BULL. 17 (1981), reprinted in Symposium — The Settlement with Iran, 13 LAW. AM. 1, A-80 (1980) (Appendix) [hereinafter cited as The Settlement with Iran]. The Reagan Administration stated:

The decision represents a practical judgment that implementation provides the surest resolution of the issue consistent with the best interest of the United States in the Gulf region and throughout the world. Iran has not profited from these agreements. It was ultimately forced to settle on terms that simply restored the status quo ante because the advent of the new administration finally confronted it with a serious deadline. Id.


39. See supra notes 30-31 and accompanying text.

40. The Arbitral Tribunal was created in Article II of the Claims Settlement Agreement. See supra text accompanying notes 29-30. Article III of the Claims Settlement Agreement establishes the size of the Tribunal at nine members: three members each from Iran and the United States and three members chosen subsequently by the six U.S. and Iranian members. One of the three neutral members
during the suspension. Upon a determination of the tribunal that it is without jurisdiction over the claim, however, the suspension would be terminated. In ratifying the Agreement, President Reagan noted the controversy concerning the validity of the Agreement under international law, but declined to evaluate the Agreement according to the international obligations embodied in the U.N. Charter and the Vienna Convention.

The Iranian hostage settlement has raised many difficult questions of international law. The United States entered the Agreement with Iran in order to free fifty-two citizens who were held hostage by Iranian militants for fourteen months. If an international judicial body, such as the International Court of Justice, had considered the acts of the Iranian militants in holding these hostages during treaty negotiations and adjudged them to have been sufficiently coercive to invoke Article 52 of the Law of Treaties, then the Agreement would have been rendered void. The effect of invalidating the settlement under Article 52 would be to terminate all obligations between the United States and Iran that arise from the Agreement. Specifically, American nationals would no longer be precluded from bringing suits against the Government of Iran for injuries arising out of the hostage-taking.

This Comment analyzes the legal validity of the Agreement under the Vienna Convention on the Law of Treaties. Section II discusses whether the taking of the American Embassy in Tehran and the holding hostage of American citizens for 444 days constituted sufficient "force" to invalidate the Agreement under Article 52 of the Law of Treaties. Sections III and IV examine the procedures will be chosen as the president of the Tribunal. Claims may be settled by the full tribunal or by a panel of three members under the arbitration rules established by the U.N. Commission on International Trade Law (UNCITRAL). Claims Settlement Agreement, supra note 29, at art. III. paras. 1-2.

41. The suspension was effective only against claims raised in any form other than the Arbitral Tribunal. Article II of the Claims Settlement Agreement provides that all claims must be filed with the Tribunal no more than one year after the entry in force of the Agreement or six months after the date of the selection of the president. Id. at art. III, para. 4.


43. See supra note 32. The international validity of the Agreement is discussed in § II infra.

44. 2048 DEP’T STATE BULL. 17 (1981). "We do not find it necessary to reach a conclusion as to the legally binding character of these agreements under international law. We are proceeding because we believe it is in the overall interest of the United States to carry out the agreement." Id.

45. This Comment does not address the various constitutional issues that have been raised. In 1981, the U.S. Supreme Court in Dames & Moore v. Regan, 453 U.S. 654 (1981), held that the President had the authority to nullify prejudgment attachments of Iranian assets and to suspend any claims arising out of the hostage crisis against the Government of Iran. Dames & Moore, 453 U.S. at 669-73, 678-88. The Court, however, refused to consider whether the suspension of claims constituted a taking of property without just compensation in violation of the fifth amendment. Id. at 688-90.

46. The Declaration precludes any potential claim brought by an American national against the Iranian Government arising out of the embassy seizure and detention of the hostages. See supra note 26.

47. The Law of Treaties is discussed in detail in § II infra.
for invalidating a treaty under Article 52 and the legal effects of such an invalidation. Section V discusses the effects that the Agreement has had on the different categories of litigants that have attempted to bring claims against the Government of Iran. Finally, section VI demonstrates that any claimant who does not receive full compensation from the Government of Iran may seek compensation from the United States under the fifth amendment's Just Compensation Clause.

II. The Validity of the Agreement under the Law of Treaties

A. The Vienna Convention on the Law of Treaties

1. Background and Purpose

In 1949, the International Law Commission (ILC) began to codify the Law of Treaties. After almost two decades of discussions and preliminary drafts, the ILC presented its final draft to the U.N. General Assembly in 1966. After approving the Commission's work, the General Assembly voted to hold the Vienna Convention on the Law of Treaties in 1968-69. The Law of Treaties was adopted on May 22, 1969 and opened for signature the following day.

One of the central purposes of Article 52 of the Law of Treaties is to recognize the changing role of war as a foreign policy tool in settling international disputes. The traditional doctrine which existed prior to the Covenant of the

---

48. Paragraphs 11 to 17 of the Agreement dispose of all claims that American nationals have against the Government of Iran. See supra note 27. These provisions treat the three different categories of claimants — former hostages, banks, and contract claimants — differently. Contract claimants, whose contracts do not contain choice-of-forum clauses, may bring commercial claims before the Arbitral Tribunal established by the Claims Settlement Agreement. Claims Settlement Agreement, supra note 29, at art. II, para. i. The claims of former hostages are completely abrogated. The banks with loans outstanding to Iranian borrowers may offset these debts against the Iranian assets that were on deposit with those banks at the time of the Agreement. See Note, The Iranian Hostage Agreement, supra note 35, at 859.

49. The "just compensation" clause of the fifth amendment provides: "... nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.


55. (1953) 2 Y.B. Int'l L. Comm'n 90, 147, U.N. Doc. A/CN.4/63/1953. Lauterpacht, Special Rapporteur to the ILC on the Law of Treaties, states: "The object of this article [Article 52] is to declare the validity in the sphere of international law, of a general principle of law ... [which recognizes] the renunciation and prohibition of the use of force in general international agreements ..." Id.
League of Nations "permitted recourse to war not only as a means of enforcing rights recognized by international law but also for the purpose of challenging and destroying the existing legal rights of states." If international law permitted recourse to war, then international law recognized a priori the status quo post bellum resulting from the successful pursuit of war. Accordingly, the validity of a treaty was not affected by the fact that it was brought about by the threat or use of force.

With the enactment of the Covenant of the League of Nations and the General Treaty for the Renunciation of War (Pact of Paris), a strong body of opinion began to develop which held that every state has the duty to refrain from the use of war as an instrument of national policy. Insofar as war or threats of force constitute internationally illegal acts, the results of those illegalities, imposed treaties, cannot be considered valid, nor do they produce legal rights that would benefit the lawbreaker. The developments in international law refusing to recognize the validity of war were codified into the U.N. Charter. Article 2(4) of the Charter prohibits the use of force against the territorial integrity or political independence of any state. Article 2(4) represents a general rule of international law and was the precursor to Article 52 of the Law of Treaties.

Article 52 of the Law of Treaties declares void any treaty which was procured by the threat or use of force. For the purposes of Article 52, "unlawful force" is defined as that force which is in "violation of the principles of the United Nations." The rationale behind Article 52 is that any treaty under duress is void if the conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

56. Id.
57. Id.
58. See id.
59. Although the Covenant did not abolish the right of war, "it prohibited recourse to it prior to the exhaustion of means of pacific settlement." Lauterpacht, supra note 55, at 147. Accordingly, the recourse to war was unlawful to the extent that it violated the obligations established by the Covenant. Id.
60. Aug. 27, 1928, 46 Stat. 2343, T.S. 796, 94 L.N.T.S. 57. The parties to the Pact of Paris renounced recourse to war, as an instrument of national policy, in their relations to one another. The legal effect of the treaty was "that war could no longer be resorted to either as a legal remedy or as an instrument for changing the law." Lauterpacht, supra note 55, at 147.
63. Article 2(4) of the U.N. Charter reads: "All members shall refrain in their international relations from the threat of use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." U.N. CHARTER art. 2, para. 4.
64. See Houben, supra note 61, at 705.
65. See Lauterpacht, supra note 55, at 149.
66. Article 52, "Coercion of a State by the Threat or Use of Force," provides that: "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." U.N. Doc. A/Conf.39/27 (1969).
vitiated by the absence of consent; such a treaty is considered a nullity. One overriding fear of many jurists was that to recognize the prohibition against coerced treaties would encourage unfounded assertions of coercion. Although the Commission considered this objection, it felt that such an apprehension was not a valid ground for refusing to update treaty law to coincide with other branches of international law.

2. Whether the Law of Treaties is Applicable to the Iranian Hostage Settlement

Neither the United States nor Iran ratified or acceded to the Vienna Convention. Therefore, the prohibitions of Article 52 would be binding upon the United States and Iran only if the article is considered to be declaratory of international law, and thereby automatically applicable to all states. A multilateral treaty is considered declaratory of customary international law if "it incorporat[es] and giv[es] recognition to a rule of customary international law that existed prior to the conclusion of the treaty . . . ." One method to show that a treaty, or a particular article of a treaty, is declaratory of international law is to show that the travaux preparatoires of that article express the intention that it is meant to be declaratory of international law.

The ILC clearly indicated that in formulating Article 52 it was "codifying, not developing, the law of nations in one of its most essential aspects." Most of the members of the Commission noted that the prohibition against coerced treaties arose from Article 2(4) of the U.N. Charter, thereby constituting a rule that

---

68. Lauterpacht, supra note 55, at 151-52. Another commentator noted that Article 52 was meant to prevent antipacific conduct in the world community:

The rationale underlying the article is that while a nation may feel compelled to make an international agreement under duress in order to end another nation's offensive conduct, the victimized nation and the entire world community have a large stake in preventing the antipacific conduct from being rewarded. The theory is that nations will be deterred from using or threatening force to elicit concessions if they know that a concession can later be retracted.

Note, The Iranian Hostage Agreement, supra note 55, at 828.


72. See L. HENKIN, supra note 35, at 580.


74. Id.

75. Lauterpacht, supra note 55, at 151.
predated their discussion of Article 52. Moreover, in its report to the United Nations, the ILC reiterated that "[t]he invalidity of the threat or use of force is a principle which is lex lata in the international law of today." Accordingly, the ILC understood Article 52 to be a codification of a rule of international law which was established prior to the Vienna Convention. As a statement of customary international law, Article 52 is binding on all states, whether or not they ratified the Vienna Convention. Therefore, the prohibition against coerced treaties found in Article 52 is applicable to the Iranian hostage settlement.

B. The Definition of Force under Article 52

1. Introduction

This section analyzes the definition of force in Article 52 to determine whether the acts of the Iranian militants constituted sufficient force to subject the Iranian hostage settlement to the prohibitions of that Article. Article 52 holds any treaty void "if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." The failure of Article 52 to delineate clearly the parameters of the phrase "threat or use of force" has precipitated considerable controversy concerning the type of force sufficient to invalidate a treaty. There was a major division within the ILC as to whether "force" encompassed economic and political pressures, as argued by Third World and Communist bloc countries, or


78. For a history of the development of the rule prohibiting coerced treaties, see supra text accompanying notes 59-65.

79. See supra note 72.


82. Malawer, Coerced Treaties, supra note 50, at 16.

83. Id.

84. See, e.g., U.N. Doc. A/5746 (1964) at 20 (Proposal of Yugoslavia): "States shall ... desist from resorting to, or relying upon, force in any of its forms in their relations with other States, and from exerting pressure, whether by military, political, economic, or any other means, against the political independence or territorial integrity of any State." Id. (emphasis added). Although this proposal was not offered in the context of the Law of Treaties, it generally represents the proposals that Third World
merely physical force, as asserted by several Western, industrialized countries. 86

Third World countries sought to expand the definition of "force" to include economic and political coercion. 87 These states argued that the purpose of both Article 2(4) of the U.N. Charter and Article 52 of the Law of Treaties was inter alia to protect the political independence of sovereign nations. 88 Therefore, any form of pressure, including those of political or economic character which have the effect of threatening the integrity or political independence of a state, would violate the purpose of Article 52. 89 Clearly, these countries argued, the political independence of a nation could be threatened equally by economic and political pressure as by armed force. 90

Western nations favored a narrower definition of "force." These states asserted that "'political and economic pressure,' however reprehensible it might be, had not yet been sufficiently established in law to be incorporated into the convention as a ground for invalidating a treaty...." 91 The effect of incorporating such vague terms into a provision allowing for the invalidation of treaties would seriously endanger the stability of treaty relations. 92 Moreover, Western delegates argued that any breach of Article 2(4) of the U.N. Charter, as incorporated into Article 52, would give rise to the right of self-defense in accord with Article 51 of the U.N. Charter. 93 Clearly, Western nations argued, the framers of


89. Rosenstock, supra note 85, at 724.

90. U.N. Conf. on the Law of Treaties, First Session Vienna, 26 March-24 May 1968, Official Records, U.N. Doc. A/Conf.39/11 at 274 (1969) (statement by Mr. El-Dessauki, UAR). Mr. El-Dessauki argued that economic pressure, such as blockades or embargoes, could be more effective than the threat or use of military pressure in reducing the country's power of self-determination, especially if its economy depends upon one crop or export product. Id.


92. Malawer, Coerced Treaties, supra note 50, at 23. Malawer argued that "[i]f 'coercion' was [sic] to be regarded as extending to political and economic pressure, the door to evasion of treaty obligations might be opened very wide because these forms of coercion are much less capable of definition and much more liable to subjective interpretations." Id. Malawer supported this argument with an interpretation of the commentary of Special Rapporteur Sir Humphrey Waldock to the effect that the prohibition against coerced treaties would not involve undue risks to the stability of treaty negotiations unless "coercion" included acts other than the use or threat of physical force. Waldock, (Second) Report on the Law of Treaties, [1963] 2 Y.B. Int'l L. Comm'n 36, U.N. Doc. A/CN.4/156/1963.

93. Rosenstock, supra note 85, at 724. Article 51 of the U.N. Charter reads, in pertinent part: "Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." U.N. CHARTER art. 51.
the Charter had not intended to give rise to such a right in response to non-physical acts such as economic pressure. 94

2. Positions Adopted at the Vienna Convention

In its final draft of the Law of Treaties, 95 the Commission defined “coercion”

94. The ILC debated the precise scope of Article 52 throughout its discussion on the Law of Treaties. Sir Hersh Lauterpacht, the first Special Rapporteur to the ILC to discuss Article 52, addressed the question of what degree of force would be necessary to invalidate an “imposed treaty.” Lauterpacht, supra note 55, at 147. Lauterpacht interpreted the phrase “by or as the result of force or threats of force,” to express the principle “that coercion, however indirect, if resulting from unlawful recourse to force or threats of force invalidates a treaty.” Id. at 149. Lauterpacht further commented on the amount of force that would be sufficient to invalidate a treaty:

[A] treaty is invalid if a State, as the result of unlawful use of force has been reduced to such a degree of impotence to be unable to resist the pressure to become a party to a treaty although at the time of the signature no obvious attempt is made to impose upon it by force the treaty in question.

Id.

Although the commentary expressly states that the term “force” referred to physical force and threats of physical force as distinguished from other forms of coercion, Lauterpacht speculated that forms of economic and political pressure could be just as destabilizing to treaty negotiations as the use of physical force. Id. Lauterpacht concluded:

[In cases such as attempts to starve a State into submission by cutting off its imports or its access to the sea, although no physical force is used directly against persons[,] it may be difficult to deny that the treaty must be deemed to have been concluded as the result of the use of force or threats of force.

Id.


The case must evidently be confined to the use or threat of physical force, since there are all too numerous ways in which a State might allege that it had been induced to enter into a treaty by pressure of some kind (for example, economic) on this latter basis, a dangerously wide door to the invalidation of treaties, and hence a threat to the stability of the treaty-making process, would be opened.

Id. (emphasis in the original). Accordingly, Fitzmaurice differed with Lauterpacht to the extent of confining the prohibitions of Article 52 to only the treaty or use of physical force.

Sir Humphrey Waldock, the third Special Rapporteur to discuss Article 52, agreed with Fitzmaurice and argued that the prohibition against coerced treaties would not include those which have been imposed by political or economic coercion. Waldock, supra note 92, at 36. Waldock was concerned that the term “political and economic coercion” was incapable of precise definition and that to allow invalidation on the grounds would enhance illegitimate attempts to evade treaty obligations. Id. Moreover, Waldock argued that “the operation of political and economic pressures is part of the normal working of the relations between states, especially in international economic relations.” Malawer, Coerced Treaties, supra note 50, at 23. Therefore, according to Waldock, the expansion of the term “force” to include political and economic coercion would not only destabilize treaty relations by encouraging unfounded challenges to treaty obligations, but also interfere with normal working relations between states.

95. [1966] 2 Y.B. INT’L L. COMM’N 246, U.N. Doc. A/CN.4/183/1966/Add.1. The final draft of Article 49 [52] read: “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations.” Id. At the Vienna Convention, Bulgaria and thirteen other states successfully amended the ILC’s draft as follows: “A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international
in terms of "a threat or use of force in violation of the principles of the Charter of the United Nations,"96 and left the precise scope of this definition to subsequent interpretation.97 At the 1969 Vienna Convention on the Law of Treaties, Third World countries renewed their effort to expand the scope of "force" as used in Article 52.98 Nineteen states99 proposed an amendment (Nineteen State Amendment) to the ILC text to expand the definition of the phrase "threat or use of force" so as to include the prohibition against political and economic pressure.100 After substantial private negotiations,101 the Nineteen State Amendment was withdrawn. As part of the compromise, Western states agreed


96. U.N. Doc. A/Conf.39/27 (1969). One frequent criticism of Article 52 is that it would nullify peace treaties imposed upon an aggressor. See, e.g. Cutler Address, supra note 6, at xxi. This criticism, however, is not a valid interpretation of the Article, which prohibits only the use of force in violation of the principles of the United Nations. International law recognizes proper, legal exercises of force that would not violate the principles of the U.N. Charter. See, e.g., U.N. Charter art. 51; The Principle That States Shall Refrain in their International Relations From the Threat or Use of Force Against the Territorial Integrity or Political Independence of any State, or in Any Other Manner Inconsistent with the Purpose of the United Nations, U.N. Doc. A/5746 at 39-44 (1964). For thorough discussions of permissible uses of force in international relations, see 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-511 (1971); I. BROWNlie, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 214-349a (1963). These exercises of force include: (1) the use of force on the decision of a competent organ of the United Nations (e.g., pursuant to a decision of the Security Council); (2) the use of force on the decision of a regional agency when that agency acts in accord with the Charter; (3) the use of force in exercising the right of self-determination against colonial domination; and (4) the use of force in the exercise of the right to self-defense, as recognized in Article 51 of the U.N. Charter. U.N. Doc. A/5746, at 39-44 (1964). Article 51 of the U.N. Charter limits the right to self-defense to cases in which armed force has occurred, to the exclusion of every other act, including provocation. Furthermore, it prevents the exercise of the right of self-defense only until such time as the Security Council has taken all measures to maintain international peace and security. U.N. Charter art. 51.


101. One commentator noted the extent of the private negotiations:

The course of the debate had made it clear that if the amendment were put to the vote it would carry by quite a substantial majority. On the other hand, in private discussions it had been made quite clear to the proponents that adoption could wreck the conference because states concerned with the stability of treaties found the proposal intolerable.

To reduce tension, discussion of the article was adjourned and private negotiations resorted to. A compromise solution was reached after some days of cooling off. The amendment was withdrawn. In its place, a draft declaration condemning threat or use of pressure in any form by a state to coerce any other state to conclude a treaty was unanimously adopted by the committee.

to include into the Final Act of the Conference the "Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties,"[102] which provides that:

[The Conference] solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.[103]

The result of incorporating this language into the Final Act was to create "a vague loophole in the Draft Article 49 [52]."[104] The official language of Article 52 prohibits only that force in violation of the principles of the U.N. Charter. Although the commentary of Article 52 defines this phrase to prohibit only physical force, the declaration inserted into the Final Act arguably expands the "use of force" to include political and economic pressure.[105] Therefore, the precise scope of the acts prohibited by Article 52 was not clearly defined at the Vienna Convention.

3. Subsequent Interpretation of the Definition of "Force" as used in the U.N. Charter

a. Draft Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States

When determining whether to apply Article 52 to the Iranian hostage settlement, one must also consider interpretations of the definition of force subsequent to Article 52 to determine whether the acts of the Iranian Government are prohibited. The Draft Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States[106] is one important interpretation of the definition of "force" as employed in Article 52.

In 1963, the U.N. General Assembly established the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States[107] and instructed it to evaluate several basic principles of interna-

[103] Id.
tional law, including the prohibition of the use of coercion in treaty negotiations. The Special Commission, adopting the general wording of Article 2(4) of the U.N. Charter, concluded that "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any matter inconsistent with the purposes of the United Nations." The Friendly Relations Declaration is important not only for its definition of force but also for its enunciation of those contexts in which force is outlawed. The concept of force adopted by the Special Commission "goes beyond armed attack on the territory of another state;" the Principles prohibit "acts of reprisal involving the use of force," and resort to force "as a means of solving international disputes," and terrorist attacks.

Utilizing the Friendly Relations Declaration to interpret Article 52 of the Law of Treaties presents several problems. First, the Commission intended that any decisions would be made by unanimity rather than by majority vote.


108. The principles cover: "non-use of force, peaceful settlement of disputes, non-intervention of states in the domestic jurisdiction of other states, cooperation among states, equal rights and self-determination of peoples, sovereign equality, and fulfillment in good faith of obligations assumed in accordance with the Charter." Id. at 509.

109. G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970). The first principle that the United Nations General Assembly requested the Special Commission to consider read: "The Principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any matter inconsistent with the purposes of the United Nations." Id.

110. Friendly Relations Declaration, supra note 106, art. I.


112. Id.

113. G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 122, U.N. Doc. A/8028/1970. The Principles prohibit a state from "organizing, instigating, assisting or participating in ... terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when the acts referred to in the present paragraph involved a threat or use of force." Id. at 123.

114. Rosenstock, supra note 85, at 713-14.
ingly, the Commission had difficulty in finding language that would be meaningful yet acceptable to the different political and economic interests represented, including not only the United States and the Soviet Union, but also other European, African, and Latin American states as well.\(^\text{115}\) Second, the Friendly Relations Declaration is not considered treaty law\(^\text{116}\) and therefore represents more a recommendation than a statement of legally binding rules.\(^\text{117}\)

Political considerations, dictated by the various ideologies represented in the Special Commission, may have prevented the Commission from defining "force" with more precision. The generality of the Declaration's language, however, should not preclude its application to the Iranian hostage settlement. The Declaration specifically enumerates prohibited uses of force, including acts of terrorism, such as hostage-taking, and armed attacks on another country's diplomatic premises.\(^\text{118}\) These prohibitions are directly applicable to the acts of the Iranian militants. Any problems in interpreting the language of the Declaration are overcome by the specificity of these prohibitions.

Similarly, the Declaration's doubtful weight as treaty law should not prevent its application when evaluating the validity of a tainted treaty. The U.N. General Assembly established the Special Commission to evaluate several major principles of the U.N. Charter, including the prohibition of the use of force in treaty negotiations.\(^\text{119}\) With this instruction from the General Assembly, the Commission formulated authoritative interpretations of several principles, including the definition of force. Although not considered treaty law, the Declaration is considered "the most important single statement representing what members of the United Nations agree to be the law of the Charter on these . . . principles."\(^\text{120}\) Therefore, the Declaration should be considered to be an authoritative statement of the international community and binding as statements creating norms of international behavior.\(^\text{121}\)

b. The Definition of Aggression

The Definition of Aggression\(^\text{122}\) is a second interpretive document of Article

\(^{115}\) Id. "Thus, given the diverse ideological and economic philosophies represented, political exigencies often dictated textual compromises and omissions." Note, Declaration of Friendly Relations, supra note 107, at 509.

\(^{116}\) One member of the United Nations noted that the Declaration would not have the status of a treaty nor would it be considered jus cogens. Rather, the Declaration would be characterized among "general principles of international law." U.N. Doc. A/C.6/SR.1180 (statement by Mr. Csatarday, Hungary). See also Rosenstock, supra note 85, at 714, n.4.

\(^{117}\) Rosenstock, supra note 85, at 714-15.

\(^{118}\) See supra notes 112-13 and accompanying text.

\(^{119}\) See supra notes 107-09 and accompanying text.

\(^{120}\) Rosenstock, supra note 85, at 714.

\(^{121}\) See Malawer, Coerced Treaties, supra note 50, at 33, n.79. Malawer refers not to the Friendly Relations Declaration but to similar declarations which would have similar weight under international law. Id.

2(4) of the U.N. Charter. The Definition, which was adopted by the General Assembly in 1974, enumerates a non-exhaustive list of acts of aggression which violate the principles of the U.N. Charter. Article I defines "aggression" as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations...".

Although its language is similar to that of Article 52, the Definition of Aggression is more comprehensive in that it refers to specific acts of prohibited force. Among the forbidden acts listed in Article 3, paragraphs 3(d) and 3(g) are relevant to the Iranian hostage crisis. Article 3(d) included within the Definition of Aggression "[a]n attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state." Article 3(g) includes "[t]he sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state..." In addition, the Definition requires that an illegal act of force constitute an act, such as an actual invasion or annexation, which is more grievous and unambiguous than the mere threatening of a state's "territorial integrity and political independence."

The Definition of Aggression narrowly interprets the definition of "force." Although its general language is similar to that of Article 52, the Definition emphasizes only the prohibition of unambiguous acts of physical force. Articles 3(d) and 3(g), which prohibit armed attacks against other states, enumerate examples of other types of force that the Definition declares illegal. Political and
economic coercion, which certain members of the ILC argued were vague concepts incapable of precise definition, would apparently not constitute illegal uses of force. The Definition, with its emphasis on the prohibition of armed force, apparently limits the grounds by which a treaty may be invalidated under Article 52 of the Law of Treaties to the use of physical force.

C. Conclusion

Article 52 of the Law of Treaties, Article 2(4) of the U.N. Charter, the Friendly Relations Declaration, and the Definition of Aggression constitute a combination of statements by the United Nations and the international community condemning the threat or use of force to settle international disputes. These statements establish "an almost absolute obligation to avoid the use of force in settling disputes." Although the commentary of Article 52 specifically prohibits only the use of physical force, considerable controversy exists as to whether acts of political and economic coercion are included within such prohibitions.

The controversy concerning the parameters of the definition of force arose in the ILC. Third World countries sought to expand the definition of force to include political and economic coercion. For these countries, which have been characterized by struggling economies, such acts of coercion could constitute a more serious threat to their independence than acts of physical force. If the purpose of Article 52 is to protect the political independence of sovereign nations, Third World countries argued, then it would be inconsistent with that Article to prohibit acts which could constitute a threat to a nation's sovereignty, such as political or economic coercion.

The major concern of the drafters of Article 52, however, was that it might encourage the invalidation of treaties on the basis of unfounded assertions of coercion. Accordingly, Article 52 should be read to prohibit only clearly defined uses of force. Acts of political and economic coercion are too imprecise to be the basis for invalidating a treaty. The imprecision arises upon attempting to draw distinctions between legitimate and illegitimate uses of political and economic coercion. Certain political and economic pressures have a normal and legitimate role in international economic relations.

In contrast, the prohibition of the use of only physical force in treaty negotiations would not disturb the treaty-making process. The prohibition of physical

132. See supra text accompanying notes 91-94.
134. See supra note 90.
135. See supra note 88 and accompanying text.
136. See supra notes 69-70 and accompanying text.
137. See supra note 94.
138. See id.
139. See id.
force would not have the same definitional problems that the prohibition of economic and political pressure would have. 140 The definition of prohibited acts of physical force is narrowed further by the Friendly Relations Declaration and the Definition of Aggression, which require that acts of prohibited force be "grievous and unambiguous," such as an actual invasion by one state’s armed forces of another state’s territory, including diplomatic premises. 141 Moreover, unlike political and economic pressures, acts of physical force have no legitimate role in international relations. 142 Therefore, when interpreting Article 52 in light of the concern of international jurists that treaties should not be invalidated for vague or imprecise reasons, the prohibitions of Article 52 must necessarily apply only to the use of physical force. As objectionable as economic and political coercion may be in concluding treaty negotiations, a state may not seek invalidation of a treaty under Article 52 for such reasons.

The conclusion that Article 52 prohibits only the threat or use of physical force in treaty negotiations is important to the evaluation of the Iranian hostage settlement. If Article 52 is interpreted to prohibit only acts of physical force, then the only inquiry concerning the validity of the Agreement is whether the occupation of the Embassy and the detention of fifty-two American citizens constitute acts of force in violation of Article 52. The next section specifically addresses this inquiry and evaluates the hostage settlement with respect to the prohibitions of Article 52.

III. THE ACTS OF THE IRANIAN MILITANTS AS ACTS OF FORCE IN VIOLATION OF ARTICLE 52

As the foregoing discussion illustrates, the international community prohibits the threat or use of force in the conclusion of treaty negotiations. The prohibition is limited to the use of physical or armed force; economic and political coercion are not included within the prohibition. This section addresses the issue of whether the seizure of the U.S. Embassy and the detention of fifty-two American citizens by the Iranian militants constituted a use of force within the general prohibition of Article 52, thereby vitiating America’s consent to the agreement.

A. Attributing the Acts of the Iranian Militants to the Iranian Government

The central inquiry in determining the applicability of Article 52 to the U.S.-Iran Agreement is whether the acts of the Iranian militants constitute a "threat or use of force" that is attributable to the Government of Iran. 143 The ICJ

140. See id.
141. See supra note 129 and accompanying text.
142. See supra text accompanying notes 59-64.
143. See infra text accompanying notes 144-160.
squarely addressed this issue in its final decision in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*. The Court analyzed the hostage crisis by separating it into two phases. The first phase dealt specifically with the seizure of the embassy itself. The second phase concerned the continued occupation of the embassy by the Iranian militants.

With respect to the first phase, the ICJ concluded that the militants' takeover of the embassy could not be imputed to the Iranian Government. The Court stated that the militants acted independently; they were neither agents nor charged by a competent organ of the Iranian state. This conclusion, however, does not necessarily absolve the Government of Iran of responsibility for the events that occurred during the first phase. The Court determined that the failure of the Iranian Government to take appropriate steps to ensure the protection of the U.S. Embassy and Consulates as well as the diplomatic personnel or to persuade the militants to withdraw after the seizure occurred constituted a "clear and serious violation" of the Vienna Conventions of 1961 and 1963, and the 1955 Treaty of Amity, Economic Relations and Consular Rights. The Court understood these international agreements to create obligations in the Iranian state to protect the Embassy premises, archives, and personnel and to afford the diplomatic staff freedom of movement and communication.

Accordingly, although the Court would not impute the original

---

145. Id. at 29. The Court described these events as: "the armed attack on the United States Embassy by militants on 4 November 1979, the overrunning of its premises, the seizure of its inmates as hostages, the appropriation of its property and archives and the conduct of the Iranian authorities in the face of those occurrences." Id.
146. Id. at 33. According to the Court, this phase consisted of "the whole series of facts which occurred following the completion of the occupation of the United States Embassy by the militants, and the seizure of the Consulates of Tabriz and Shiraz." Id.
147. Id. at 29.
148. Id.
149. Id. at 30.
150. Id. at 32.
152. ICJ Judgment, 1980 I.C.J. at 32. The Court determined that the 1955 Treaty of Amity, Economic Relations, and Consular Staffs, Aug. 15, 1955, United States-Iran, 8(1) U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93, created further obligations in the Iranian state to afford private citizens of other states protection and security. Id. See also Note, United States v. Iran, supra note 18, at 560, n.105.
153. See supra notes 151-152.
takeover of the embassy to the Iranian Government, the Court held Iran responsible for Iran's failure to protect the embassy and diplomatic personnel.

With respect to the second phase, the ICJ determined that after the embassy and consulates had been seized and their staffs taken hostage, the Iranian Government had further obligations under the Vienna Conventions of 1961 and 1963 and the 1955 Treaty of Amity to restore the premises to the United States and to offer to pay reparations. Moreover, the ICJ concluded that the announced policy of the Iranian Government to maintain the occupation of the embassy and the detention of the diplomatic staff transformed those acts into acts directly imputable to the Iranian State. Although stating that the original takeover of the embassy was not imputable to the Iranian Government, the ICJ concluded that the subsequent acts of the Iranian militants were attributable to the Iranian leaders. This conclusion was based not only on Iran's failure to protect the embassy and diplomatic staff but also on Iran's subsequent endorsement of the occupation of the embassy and the continued detention of the hostages. The Court's statements are important, therefore, in that they not only impute the acts of the militants to the Iranian Government but also characterize these acts as violations of Iran's international obligations. These determinations are relevant to an evaluation of the international validity of the hostage agreement. The validity of the Agreement turns on whether the acts of the Iranian Government, as characterized by the ICJ, constitute sufficient acts of force to invoke the prohibitions of Article 52. The next section analyzes the occupation of the embassy and the continued detention of the hostages in light of the definition of force in Article 52 to determine whether the prohibitions of Article 52 are applicable to the hostage settlement.


1. The Decision of the ICJ

The statements of the ICJ in *United States v. Iran* are important to the determination of whether the Agreement violated Article 52 of the Law of Treaties.

155. Id. at 36-37.
156. Id. at 35. The Court stated:

The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States government was complied with by other Iranian authorities. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian state, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that state.

157. Id. at 29.
158. Id. at 35.
159. Id.
160. Id. at 36-37.
161. Lauterpacht, articulating the concern of many international jurists that the prohibition of
Although the ICJ did not have the opportunity to review the provisions of the Agreement,²⁶² the Court’s statements support the conclusion that the Agreement was procured by the “threat or use of force” in violation of Article 52.²⁶³ Two aspects of the Court’s opinion are important to the evaluation of the international validity of the Agreement under Article 52. First, the ICJ determined that the acts which gave rise to the Agreement and were imputable to the Iranian Government constitute violations of international law.²⁶⁴ According to the Court, “[t]here is no more fundamental prerequisite for the conduct of relations between States . . . than the inviolability of diplomatic envoys and embassies. . . .”²⁶⁵ Moreover, the ICJ concluded that “[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the purposes of the Charter of the United Nations. . . .”²⁶⁶ Article 52 invalidates any treaty that has been procured by the threat or use of force “in violation of international law embodied in the Charter of the United Nations.”²⁶⁷ The conclusion of the ICJ that the acts of the Iranian Government, in maintaining the occupation of the imposed treaties would allow states to denounce treaties too easily by making unfounded assertions of coercion, concluded that this difficulty would be overcome “by providing that a treaty was only to be invalid on the ground of coercion if so declared by the International Court of Justice.” [1963] 2 Y.B. INT’L L. COMM’N 51, U.N. Doc. A/CN.4/156/1963; see Lauterpacht, supra note 55, at 151. Therefore, any treaty that is held illegal as procured by “force” by the ICJ would be invalid under Article 52.

²⁶² In its original application to the ICJ in the Iranian hostage case, the United States argued that the embassy seizure violated Article 2(4) of the U.N. Charter. ICJ Judgment, 1980 I.C.J. at 6. This allegation was deleted subsequently in the Memorial submitted by the United States to the World Court. Id. at 6-7. Consequently, the ICJ did not determine whether the hostage-taking was proscribed by Article 2(4). Note, The Iranian Hostage Agreement, supra note 35, at 834-35. Moreover, because the decision was handed down in May, 1980, several months before the conclusion of the Agreement between the United States and Iran, the ICJ was unable to consider whether a Violation or Article 2(4) occurred. Id. at 835.

²⁶³ See infra text accompanying notes 164-171.


²⁶⁵ Id. at 42. There is no question that by virtue of the Vienna Convention on Diplomatic Relations, U.N. Doc. A/Conf.20/13, Apr. 16, 1961, signed April 18, 1961, 23(3) U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, reprinted in 55 Am. J. INT’L L. 1064 (Supp. 1961), diplomatic personnel and premises are “entitled to unconditional immune treatment.” Falk, supra note 13, at 404. Article 29 of the Convention provides: “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom, or dignity.” 23(3) U.S.T. at 3240. Article 22 provides for the protection of the diplomatic premises:

(1) The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

(2) The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

(3) The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

23(3) U.S.T. at 3237-38.

²⁶⁶ ICJ Judgment, 1980 I.C.J. at 42.

embassy and the detention of the diplomatic personnel, constitute violations of international law implies that those acts were in violation of Article 52.

The second element of the ICJ's decision is extremely important to the determination that the Agreement was procured in violation of Article 52. The ICJ concluded that the objective of the Iranian Government, in maintaining the occupation of the embassy and the detention of the American hostages, was to coerce the United States to make certain concessions. The purpose of Article 52 is to prevent a state from using coercive measures in treaty negotiations to elicit unfavorable concessions from another state. According to the ICJ ruling, the acts of the Iranian Government violated not only the prohibitions but also the purpose of Article 52. Therefore, it would be difficult to deny that the Agreement "had been concluded under the threat of force and that that force was violative of international law."

2. The Right of Self-Defense

Acts which give rise to the right of self-defense in accord with Article 51 of the U.N. Charter were considered by certain delegates to the Vienna Convention to be clear violations of international law and, if exercised to procure the conclusion of a treaty, sufficient grounds to invalidate that treaty under Article 52. Under customary international law, the use of force against another state's citizens or diplomatic territory constitutes sufficient provocation to justify the use of force in self-defense. The occupation of the embassy and the detention of

168. ICJ Judgment, 1980 I.C.J. at 42. The Court stated:
A marked escalation of these breaches can be seen to have occurred in the transition from the failure on the part of the Iranian authorities to oppose the armed attack by the militants on 4 November 1979 and their seizure of the Embassy premises and staff, to the almost immediate endorsement by those authorities of the situation thus created, and then to their maintaining deliberately for many months the occupation of the Embassy and detention of its staff by a group of armed militants acting on behalf of the state for the purpose of forcing the United States to bow to certain demands.
Id. (emphasis added).
169. See supra text accompanying notes 34-36.
170. ICJ Judgment, 1980 I.C.J. at 42. See also supra note 168.
171. The Settlement With Iran, supra note 37, at 47 (statement of H. Smit). Professor Hans Smit noted:
"We have an exercise of force that has been held by the highest tribunal to be a forbidden exercise of force. Thus, as international law stands today, it is impossible to contend that the use of force in this case is arguably permissible under international law." Id. at 52.
172. See supra note 93.
173. See supra text accompanying notes 93-94.
174. McLaughlin & Teclaff, supra note 42, at 228. McLaughlin and Teclaff argued that "[t]he coercion which might trigger a measure of self-defense should be powerful enough to qualify for invalidation of an international agreement under [A]rticle 52." Id.
One commentator argues that the measure of self-defense must be proportionate to the actual or imminent danger to the nationals in need of protection:
In practice it cannot be said that a threat to the safety of nationals abroad constitutes a threat to the security of the state. Obviously, to imperil the safety of a single national abroad is not to
the hostages are sufficient acts of force to justify the use of force by the United States in self-defense, and should, therefore, constitute sufficient grounds to invalidate the Agreement under Article 52.

3. Friendly Relations Declaration

The acts of the Iranian Government also violate the Friendly Relations Declaration,175 which is an authoritative interpretation of the definition of force as used in Article 52 of the Law of Treaties.176 The Declaration prohibits, inter alia, the threat or use of force to violate the existing boundaries of another state in order to settle an international dispute.177 Moreover, the Declaration specifically prohibits states from assisting or approving of civil strife or terrorism organized in its territory and directed at another state.178

For the purposes of the Friendly Relations Declaration, the U.S. Embassy in Tehran constituted state territory.179 The seizure of the embassy by the Iranian militants violated the existing boundaries of that territory. Therefore, the takeover and occupation of the embassy violate Article I of the Declaration, which prohibits the violation of the boundaries of another state.180 Moreover, the taking of diplomatic personnel as hostages constitutes a terrorist act.181 Such acts translate into "a forceful reprisal against the United States and a resort to force to solve an international dispute."182 Therefore, according to the Friendly Relations Declaration, the acts of the Iranian Government constitute acts of physical force in the conclusion of a treaty which are sufficient to invoke the prohibitions of Article 52.

imperil the security of the state; and yet there may be occasions when the threat of danger is great enough, or wide enough in its application to a sizable community abroad, for it to be legitimately construed as an attack on the state itself . . . . The measures of self-defence, of protection, must be proportionate to the danger, actual or imminent, to the nationals in need of protection.

D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 95 (1958).
175. See supra text accompanying notes 106-121.
176. See supra text accompanying notes 119-121.
177. Friendly Relations Declaration, supra note 106, at art. I.
178. Note, Declaration of Friendly Relations, supra note 107, at 511. The Principle provides:
Every State has the duty to refrain from organizing, instigating, assisting, or participating in acts of civil strife or terrorist acts in another State, or acquiescing in organizing activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

179. International commentators have suggested that embassy grounds constitute state territory. See supra note 128.
180. Friendly Relations Declaration, supra note 106, at art. I. The principle provides "that States shall refrain in their international relations from the threat or use of force against the territorial integrity . . . of any State . . . ." Id.
181. See Note, The Iranian Hostage Agreement, supra note 35, at 833.
182. Id. at 834.
4. Policy Reasons to Invalidate the Agreement under Article 52

Strong policy reasons also exist for invalidating the Agreement under Article 52.183 The purpose of Article 52 is to discourage the introduction of the threat or use of force in treaty negotiations.184 Iran's act of holding fifty-two American hostages is the type of international incident most likely to be deterred by the enforcement of Article 52,185 especially since it is unlikely that Iran would have taken serious military measures to retaliate against the United States after invalidation of the Agreement.186 Moreover, by seeking to invalidate the Agreement, the United States would be providing the example to other nations that "seizing diplomatic personnel would be unwise, not only because it would generate negative world opinion, but also because any concessions are likely to be repudiated."187

The Iranian hostage settlement presents an ideal situation in which to invoke Article 52 to invalidate a tainted treaty. First, the acts of the Iranian Government have been judged by the highest international tribunal to constitute violations of international legal principles defined in Article 2(4) of the U.N. Charter, Article 52 of the Law of Treaties, and Article 52's subsequent interpretations. Second, the ICJ further concluded that the effect of the actions by the Iranian Government was to coerce the United States into making certain unfavorable concessions, thereby violating the principles of Article 52. Third, the invalidation of the Agreement would most likely deter future international incidents of a similar nature.

C. Arguments against Applying Article 52 to the Iranian Hostage Agreement

Despite arguments in favor of invalidating the Agreement, a number of legal commentators have argued that the Iranian hostage settlement should not be invalidated under Article 52 of the Law of Treaties.188 One argument is that the framers of Article 52 did not consider "hostage-taking" to constitute an act of force prohibited by Article 52.189 Moreover, even if the acts of the Iranian

---

183. See Note, The Iranian Hostage Agreement, supra note 35, at 834.
184. See supra notes 66-68 and accompanying text.
186. Id. Members of the ILC, as well as other international commentators, were concerned that the power structure of the international community would seriously restrict the application of Article 52. See [1966] 2 Y.B. Int'l L. Comm'n 247, U.N. Doc. A/CONF.4/183 and Add.1-3/1966. It was believed that when the use of military force is invoked to procure the conclusion of a treaty, "[a]ny nation which has the power to impose such a treaty will also have the power to perpetuate its terms despite the fact that the treaty may be declared void." Malawer, Coerced Treaties, supra note 50, at 33. Accordingly, Article 52 is best applied to coercive measures in which no threat of military force exists, such as with a hostage-taking, and when there is no threat that the aggressor nation will attempt to perpetuate the treaty by a continued use of force. See Note, The Iranian Hostage Agreement, supra note 35, at 834.
187. Id.
Government constitute acts of force in violation of Article 52, the United States is estopped from challenging the validity of the Agreement because it signed the settlement despite its awareness of Iran's ongoing use of force. 190 Finally, another commentator has argued that the Agreement, which was aimed at returning the parties to their original position before the crisis, could not be characterized as "coerced." 191 This subsection evaluates these arguments in light of the foregoing discussion of the definition of "force" as used in Article 52.

1. The Argument that "Hostage-Taking" Does Not Constitute an Act of Force under Article 52

One legal commentator has asserted that the ILC did not intend Article 52 to encompass a government's taking of hostages. 192 This argument, however, is misleading. Although the ILC did not specifically refer to "hostage-taking" as a prohibited act under Article 52, neither did the ILC expressly exclude it. 193 The draftsmen of Article 2(4) of the U.N. Charter, as well as those of Article 52, the Friendly Relations Declaration, and the Definition of Aggression, expressly avoided greater specificity for the reason that it would be "impossible to delimit in advance every possible case of force." 194 Moreover, to the extent that a "hostage-taking" constitutes an act of terrorism, 195 it is characterized as an illegal use of force by the Friendly Relations Declaration, 196 and thereby violates Article 52. The decision of the ICJ supports the conclusion that the hostage-taking by the Iranian Government violated Article 52 is supported by the holding of the ICJ. The ICJ concluded that Iran's purpose in continuing to hold the hostages was to coerce the U.S. Government into making certain concessions in negotiating an agreement for the hostages' release. 197

2. The Argument that the United States' Knowledge of the Coercive Acts of the Iranian Government Precludes It from Challenging the Validity of the Agreement Under Article 52

A second argument against applying Article 52 to the Agreement is that although Iran used coercive measures to conclude the Agreement, the United States knew of the ongoing use of force but nevertheless entered negotiations and signed the treaty. 198 Accordingly, the United States should be estopped

---

190. Id.
191. Rubin, supra note 13, at 238-39 n.64.
194. Id. at 831; see also supra note 123.
195. See supra text accompanying notes 181-182.
197. ICJ Judgment, 1980 I.C.J. at 42.
from renouncing the Agreement. The argument, however, that a nation must be held to a coerced treaty merely “because it was cognizant of the coercion would render Article 52 meaningless.” The purpose of Article 52 is to invalidate treaties into which the victim state would not have entered but for the coercive measures taken by the aggressor state. If such measures are to have a coercive effect on a victim state, then that state must first be aware of the coercion. Moreover, it is questionable whether a state, subject to coercive pressures, enters freely into negotiations aimed at removing those pressures. Therefore, the knowledge that the United States had upon entering negotiations and signing the Agreement is irrelevant in determining whether to apply Article 52.

3. The Argument that the United States Was Not Prejudiced by the Agreement

Another argument presented in support of upholding the Agreement is that the Agreement cannot be characterized as “coerced” because the United States was returned to the position it enjoyed prior to the crisis. In fact, one commentator has doubted whether, in the absence of the political and economic crisis that arose from the hostage-taking, the United States could have obtained as “satisfactory an arrangement for the settlement of American claims as it was able to obtain through the hostage agreements.”

The ILC, in its commentary on Article 52, implies that the status of a treaty, which was procured by the threat or use of force, would not be affected by terms

199. Id. Under certain articles of the Vienna Convention, a country's acquiescence to certain infrm treaties does prevent it from nullifying a treaty under the terms of the Law of Treaties. For instance, under Article 45, a state is estopped from invalidating a treaty if it expressly agrees to the validity of the treaty after becoming aware of facts that taint the treaty. Note, The Iranian Hostage Agreement, supra note 35, at 836. Article 45 specifically provides that it applies only to “invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 or 62.” U.N. Doc. A/Conf.39/27, at 22-23 (1969). Its silence with regard to Article 52 is significant.


201. See supra text accompanying notes 35-36.

202. Id. A logical extension of this argument is to say that if the victim state ratifies a coerced treaty after the coercive influences are removed, a second agreement will have been concluded between the parties. This analysis is discussed infra in § 1V(B).

203. See, e.g., Rubin, supra note 13, at 238-39 n.64. Rubin argues:

[It] is hardly logical to classify an agreement aimed at returning the situation to what it was before the delict occurred as “coerced” or “procured” by the delict itself . . . . Moreover, even if the agreement is void, the legal result of such a holding would be to end the parts of it that created obligations in the Bank of England to hold some of the money pending actions of the tribunal set up by the Agreement to hear and evaluate the various claims. The money would probably have to be returned immediately to Iran, its undisputed source, and not [to] the United States banks, which had no claim at all to the money other than as places in which Iran had at one time in the distant past deposited it under normal banking arrangements. It is hard to see how such a step could help anybody in the United States.

Id.

204. Gordon, supra note 188, at 14, col. 1.
in the treaty favorable to the victim state.\textsuperscript{205} The ILC concludes that a victim state cannot be returned to its original position unless the coercive treaty is actually nullified.\textsuperscript{206} Therefore, although the hostage settlement contained terms favorable to the United States, it would still be invalid under Article 52.

Even if favorable terms in a coerced treaty are sufficient to validate it under international law, it is questionable whether the terms of the hostage agreement are in fact favorable to the United States. Although the Agreement effectuated the objective sought by the Carter Administration throughout the crisis, \textit{i.e.} the release of the hostages, the price for that release was high.\textsuperscript{207} The United States was forced to concede claims of American nationals against the Government of Iran.\textsuperscript{208} American litigants, especially those who had received prejudgment attachments in U.S. courts,\textsuperscript{209} were therefore prejudiced by the Agreement.\textsuperscript{210} The American plaintiffs, with suits already pending in U.S. courts, lost not only their lawsuits but also the opportunity to satisfy potential judgments.\textsuperscript{211} In return, the litigants were given the opportunity to bring their claims to a remote tribunal, with uncertain effectiveness and limited security.\textsuperscript{212} Furthermore, the argument that the Agreement was "aimed at returning the situation to what it was before the delict occurred"\textsuperscript{213} is also weakened by the conclusion of the ICJ that Iran acted to "forc[e] the United States to bow to certain demands."\textsuperscript{214}

\textbf{D. Conclusion}

The decision of the ICJ in \textit{United States v. Iran} supports the position that the Agreement is invalid under international law. The ICJ concluded that the acts of the Iranian militants were imputable to the Iranian Government, that the acts violated international law, and that the acts coerced the United States into making concessions in the Iranian hostage settlement.\textsuperscript{215} These findings, coupled with the principle that the act of hostage-taking constitutes an act of sufficient force to give rise to the right of self-defense,\textsuperscript{216} support the conclusion

\begin{itemize}
  \item 206. Id.
  \item 207. Howard, \textit{Implications of the Iranian Assets Case for American Business}, 16 \textit{Int'l L.} 128, 150-152 (1982). Howard analyzes the disastrous effect that the Agreement had on American business. He concludes that although the Agreement constituted a "diplomatic triumph," it "demeans that accomplishment to pretend that no price was paid to secure the return of our hostages." Id.
  \item 208. See Declaration, supra note 26, at paras. 10-17.
  \item 209. See supra text accompanying notes 9-12.
  \item 210. Howard, supra note 207, at 130-132.
  \item 211. Id. at 131.
  \item 212. Id.
  \item 213. Rubin, supra note 13, at 238-239 n.64.
  \item 215. See supra text accompanying notes 144-171.
  \item 216. See supra text accompanying notes 172-174.
\end{itemize}
that the Agreement violates Article 52 of the Law of Treaties. The acts of occupying the U.S. Embassy and holding the diplomatic personnel hostage also violate the Friendly Relations Declaration,217 which is an authoritative interpretation of the definition of force as used in Article 52.218 Moreover, there are policy reasons in support of the conclusion that the Agreement violates Article 52. Invalidating the Agreement on the basis that an attack on a nation's diplomatic premises and the detention of its personnel constitute internationally illegal acts is likely to deter similar conduct in the future.219

A number of arguments have been raised against the invalidation of the Agreement under Article 52.220 One argument is that terrorist acts, such as those of the Iranian Government, were not contemplated by the framers of Article 52 to violate the prohibitions of that article.221 The framers, however, avoided the specificity that would be necessary to detail every possible use of prohibited force. A second argument is that the United States, fully aware of the coercive measures applied by Iran, entered freely into the negotiations and should therefore be estopped from asserting the invalidity of the Agreement.222 This argument, however, is inconsistent with the purpose of Article 52, which is to relieve a victim state from its obligations under a coerced treaty. Such protection must necessarily apply to states which are subject to coercive measures and which enter negotiations with the aggressor state to remove those pressures. A final argument is that the Agreement cannot be characterized as "coerced" because it was aimed at restoring the positions of the parties prior to the crisis.223 This conclusion, however, ignores the fact that the Agreement caused various American litigants to lose not only their claims against the Government of Iran but also their ability to satisfy potential judgments. Accordingly, the Agreement did not restore the United States to the position it enjoyed prior to the crisis. Moreover, even if the Agreement served the purpose of restoring the United States to its original position, the ILC has implied that such restoration would not change the original invalidity of the Agreement under Article 52.224

Having established that the Agreement is void under Article 52, this Comment next determines the legal effect of such an invalidation. According to the provisions of the Law of Treaties, a treaty invalidated under Article 52 would be considered "void," thereby relieving parties from any obligations that arose from it.225

217. See supra text accompanying notes 175-182.
218. Rosenstock, supra note 85, at 714; see also Malawer, Coerced Treaties, supra note 50, at 33.
219. See supra text accompanying notes 183-187.
220. See supra text accompanying notes 188-214.
221. See supra text accompanying notes 192-197.
223. See supra text accompanying notes 203-214.
224. See supra text accompanying note 205.
225. See infra text accompanying notes 233-250.
IV. THE LEGAL EFFECT OF INVALIDATING A TREATY UNDER ARTICLE 52

This section discusses the procedure and legal effect of invalidating a treaty under Article 52. Generally, a state may not unilaterally renounce a treaty. Instead, an international tribunal must make this determination. If that international tribunal rules that the treaty was concluded in violation of Article 52, the treaty is void. This section also discusses whether a victim state may nevertheless voluntarily assume the obligations under the coerced treaty.

A. Procedure for Invalidating a Treaty under Article 52

In the first draft of Article 52, Sir Lauterpacht indicated that “no party to a treaty . . . [may unilaterally] declare it invalid on the ground that it has been concluded under duress.” This approach reflects the concern of ILC members that to allow the interested state to declare unilaterally a treaty invalid would seriously undermine the stability of treaty negotiations. Consequently, in order to invalidate a treaty under Article 52, a state must allege to an international tribunal that the treaty was procured by duress, and the tribunal must make a finding to that effect. Lauterpacht concluded that the ICJ would be the proper tribunal to review such allegations.

B. The Legal Effect of an Invalidated Treaty

Once a state has brought an allegedly infirm treaty to the attention of the ICJ and that body recognizes the infirmity, the treaty is void under the terms of

226. Lauterpacht, supra note 55, at 151.
227. Id.
229. Lauterpacht, supra note 55, at 152.
230. Id. at 150-51. Lauterpacht noted:
There is no warrant for assuming that by giving to the various aspects of invalidity a place in the Code of the Law of Treaties, encouragement may be given to arbitrary appeal to them. If the safeguards of a judicial nature formulated in the present article are adopted, they will rule as a matter of law, any abusive or unilateral reliance on the fact or assertion of coercion. It will not be the interested state but International Court of Justice which will declare the treaty to be invalid.

Id.
232. Lauterpacht, supra note 55, at 151. Lauterpacht noted:
If a State has been unlawfully coerced into entering a treaty, the proper course for it is — when conditions permit — to ask an international tribunal to make, in contentious proceedings, a declaration to that effect . . . . In view of the gravity of the issues involved the International Court of Justice would seem to be the proper tribunal competent to declare the invalidity of the treaty.

Id.
Article 52. Considerable controversy existed among the members of the ILC, however, concerning the legal status of a treaty which is invalid under Article 52. The controversy revolved around whether the invalidated treaty should be void or voidable at the request of the victim state.

There is a distinction between the terms void and voidable. If a treaty is declared void, as opposed to voidable, it is without legal efficacy and cannot be cured by subsequent ratification or affirmance by the victimized state. The framers of Article 52 felt that this distinction was important because if a treaty were merely voidable, a more powerful state could not only coerce a state into entering the treaty but also, by using threats of continuing force, convince the victimized state to ratify subsequently the tainted pact.

In the original draft of the Law of Treaties, Special Rapporteur Waldock argued that states which had been coerced into signing a treaty had the option of declaring "that the coercion nullified its consent to be bound by the treaty ab initio," or of affirming the treaty "provided always that no such affirmation shall be considered binding unless made after the coercion has ceased." Accordingly, the injured state, after assessing its position under the treaty, could seek to void the treaty or to ratify its terms. Waldock's approach essentially made a coerced treaty voidable at the option of the injured state.

The ILC specifically rejected Waldock's conclusion and determined that coerced treaties are void, rather than voidable at the option of the injured state. The rationale of this rule is that the parties to a coerced treaty can only

233. U.N. Doc. A/Conf.39/27 (1969). Article 52 provides: "A treaty is void if its conclusion has been procured by the threat or use of force..." Id.
234. See infra text accompanying notes 237-244.
236. See infra note 244.
239. Id. See also Turner, The U.S.-Iran Accords, supra note 71, at 349.

A much stronger reason [for declaring the treaty to be voidable]... was that it was not always possible to undo altogether situations created under a treaty. Some treaties were contractual in nature, others were legislative. Many treaties had consequences in internal law. Hence it was not easy simply to declare that a treaty was void ab initio. Moreover, even if it were possible to undo everything that had been done by virtue of the treaty, that might not be the most satisfactory solution for the injured party.

Id.
242. The ILC concluded that coerced treaties are void ab initio under Article 49[52]: "Even if it were conceivable that after being liberated from the influence of a threat of a use of force a State may wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded in law as void ab initio." [1966] 2 Y.B. Int'l. L. Comm'n 246, 247, U.N. Doc.
be returned to full legal equality by the invalidation of the treaty. 243 If the treaty were merely considered voidable, the state which had the power to impose the treaty would also have the power to perpetuate its terms. 244

Although the ILC deliberately used "void" rather than "voidable" to characterize the legal status of a coerced treaty, the procedures the Commission established to resolve such disputes do not distinguish between void and voidable treaties. 245 In order to invoke Article 52 to invalidate a treaty, an injured state must request the ICJ to pronounce the illegality of the treaty. 246 Such a request presupposes that the injured state is willing to allege the invalidity of the treaty before the ICJ. 247 Nothing in Article 52 compels a state to treat as void a treaty

A/CONF.4/183 and Add.1-3/1966. Professor Robert Ago of Italy, who served as both the President of the ILC and the President of the Vienna Convention, argued that "[i]n the case contemplated in [Article 52], the nullity was absolute, and the treaty should be incapable of being retrieved even by some action by the interested party." [1966] 1 Y.B. INT'L L. COMM'N 34, U.N. Doc. A/CONF.4/183 and Add.1-3/1966 (Statement of Mr. Ago, Italy).

One commentator noted that the ILC made coerced treaties void ab initio because of the "abhorrent" nature of such treaties: "Apparently the International Law Commission believed that coerced treaties were so abhorrent, and so threatening to all beginning nations, that States should not even have the option of abiding by them." Note, The Iranian Hostage Agreement, supra note 35, at 886. Another commentator argued that "[t]he majority [of the ILC] . . . considered that the threat or use of force to exert the consent of a state to be bound by a treaty must be considered a matter of such depravity as to fail for complete voidness and not mere voidability." T. ELIAS, THE MODERN LAW OF TREATIES 171 (1974).


244. The ILC assumed that even after a treaty was concluded, the coercive influences would continue. Draft Articles on the Law of Treaties with Commentaries, [1966] 2 Y.B. INT'L L. COMM'N, reprinted in U.N. Conference in the Law of Treaties, Official Records, A/CONF.39/11/Add.2 at 66-67. One legal commentator noted: "[A]rticle 52 was explicitly drafted to ensure that the victim state would not have the option to validate the void treaty. The assumption was that there would be a continuing effect of the threat or use of force." The Settlement with Iran, supra note 37, at 60 (Statement of O. Schacter).


246. Id. The result was fully discussed in Gordon & Malawer, The Iranian Hostage Agreements: A Debate, Nat'l L. J., Apr. 20, 1981, at 3, col. 1. Professor Gordon argued that the inevitable consequence of Article 52 as adopted by the ILC is that "no matter how beneficial an agreement may be to a state, it is unconditionally void if it has been procured under proscribed conditions of coercion." Id. at 14.

Compulsory invalidation of a "coerced" treaty would prevent a state against which proscribed force is being used to effect the removal of that force by agreement. Accordingly, Gordon argues that Article 52 should be modified because neither its purpose nor state practice indicates that the article should be applied to every international agreement that grows out of situations that would apparently fall within its ambit. Id.

Malawer answers this argument by clarifying that although a treaty may not be imposed by an aggressor on a victim of that aggression, the victim may impose that agreement on the aggressor. Id. at 15. This is true because a treaty will not be characterized as "coerced" if it is more favorable to the victim and the victim wishes to impose it upon the aggressor. Id. Therefore, a treaty does not fall within the prohibitions of Article 52 when imposed upon the aggressor. Id. at 15.

247. Lauterpacht, supra note 55, at 150. Lauterpacht noted: "[I]t must, de lege ferenda, be regarded as fundamental that any allegation of the invalidity of a treaty . . . may properly be made with legal effect only . . . if accompanied by a willingness of the State making such allegations to obtain a finding of an international tribunal in the matter . . . ." Id.
procured by the threat or use of force. Accordingly, a victim state may maintain the terms of a coerced treaty merely by refusing to challenge the validity of the treaty under Article 52.

The ILC recognized that a victim state may wish to enforce the terms of an infirm treaty. In its commentary on Article 52, the Commission concluded that although a victim state could never recognize the validity of a treaty which was procured by the threat of force, it may conclude a new treaty with the aggressor state after the coercive influences are removed. Thus, as long as the parties to the treaty are at full legal equality, the subject matter of the coerced treaty could be revived.

C. Conclusion

An injured state may challenge the validity of a coerced treaty only before the ICJ. If the ICJ holds that the conclusion of the treaty did in fact violate Article 52, the treaty would be void. If, however, the coerced state is unwilling to petition the ICJ to review the validity of the treaty, the effect of such inaction is that a new, “non-coerced” treaty would be concluded between the parties.

The inconsistency between the procedures and legal effect of invalidating a treaty under Article 52 is relevant to the Iranian hostage settlement. President Reagan, instead of petitioning the ICJ to review the Agreement, ratified it after the hostages were returned. The ILC, recognizing that a victim state may wish to assume voluntarily the obligations of the tainted treaty, provided that the treaty may be cured by subsequent ratification. Accordingly, the ratification by the United States of the Agreement may constitute the conclusion of a new treaty between the United States and Iran, free from the defects arising from the hostage-taking. If a new agreement is considered to have been entered between


The Commission considered it essential that the treaty should be regarded as void ab initio.

This would enable the State concerned to take its decision in regard to the maintenance of the treaty in a position of full legal equality with the other State. If, therefore, the treaty were maintained in force, it would in effect be by the conclusion of a new treaty and not by the recognition of the validity of a treaty procured by means contrary to the most fundamental principles of the Charter of the United Nations.

Id. at 247 (emphasis added).
251. Lauterpacht, supra note 55, at 151.
253. Id.
256. Id.
the United States and Iran, then American litigants, whose suits against the Government of Iran are barred by the Agreement, would be unable to pursue their claims against Iran by challenging the Agreement's validity. The next section discusses whether in fact President Reagan's ratification constituted the conclusion of a new agreement.

V. Ratification of the Agreement

A. President Reagan's Ratification

On February 24, 1981, President Reagan issued an executive order which ratified the Agreement negotiated and concluded by his predecessor, President Carter. In a statement issued six days before the executive order, the Reagan Administration addressed the constitutionality of the Agreement under domestic law, but declined to evaluate its international validity.

257. Declaration, supra note 26, at paras. 10-16.
258. See infra text accompanying notes 275-287.
260. The Agreement was concluded on January 19, 1981, see supra text accompanying note 24, the day before Reagan was inaugurated. President Carter summarized the actions of his Administration with respect to the conclusion of the hostage crisis in a statement to Congress on January 19, 1981. President Carter's Summary Statement to the Congress (January 19, 1981) reprinted in The Settlement with Iran, supra note 37, at A-56.
262. Id. The statement reads: "The conclusion of the agreements was a legal exercise of Presidential authority. This authority will be subject to challenge in our courts, and the executive branch will, of course, abide by the determination of our judicial system." Id. The major challenges to the constitutionality of the Agreement have been, first, that the President did not have the authority to conclude the Agreement and to suspend the claims of American nationals brought in U.S. courts against the Iranian Government; and, second, that the suspension of a claim against the Iranian Government constituted a taking of private property without just compensation as required by the fifth amendment. The constitutionality of the Agreement was upheld by the Supreme Court in Dames & Moore v. Regan, 453 U.S. 654 (1981).
263. 2048 DEPT. STATE BULL. 17 (1981). The statements reads: "We did not find it necessary to reach a conclusion as to the legally binding character of these agreements under international law." Id. Although the discussion of the constitutionality of the Agreement is beyond the scope of this Comment, it is important to note the relationship between domestic and international law on this issue. Clearly, it is possible that a treaty may be valid internationally and yet violate the domestic law of one of the parties. Under Article 27 of the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969), such a treaty would subsist as an international obligation, unless the constitutional violation is "manifest", that is, "easily and objectively evident to other states, and concerned with a rule of internal law of fundamental importance...." McLaughlin & Teclaff, supra note 42, at 226. See also A. McNair, supra note 231, at 164. In the instant case, Iran was entitled to accept the President's claim to possess sufficient power to conclude the Agreement. Id. at 229; see also Article 7, para. 2(a) of the Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf.39/27 (1969) (assumes the competence of heads of state to conclude international agreements). Therefore, unless the IJC concluded that the Agreement is void under the Law of Treaties, thereby negating the Agreement's force under international law, the obligations of the United States will remain in force even if the Agreement is held unconstitutional under domestic law.
The inequalities which existed during the negotiation process due to Iran's continued occupation of the embassy and detention of the hostages had been removed by the time President Reagan made his decision to maintain the Agreement.264 The commentary of the Law of Treaties contemplates that a coerced state may determine, after all the coercive influences are nullified, to maintain in force the original agreement, thereby concluding a new treaty.265 If this rationale is applied to the instant case, the ratification by the Reagan Administration of the Agreement must be characterized as the formation of a new agreement between the United States and Iran. Although President Reagan declined to evaluate the international validity of the Agreement, the effect of his executive order was to enforce the earlier agreement concluded between the United States and Iran. It is difficult to distinguish this ratification from the type of affirmance considered by the ILC266 to constitute the formation of a new treaty.

Recognition that the new agreement was established between the United States and Iran would validate the terms of the prior settlement, including those terms which extinguished all claims brought by American nationals against the Government of Iran.267 These claimants may argue that the Reagan Administration's failure to evaluate the international validity of the Agreement under international law constitutes a loophole which preserves their claims.268 In order to challenge successfully the original Agreement, the claimants must argue that President Reagan's denial to evaluate the Agreement should be construed to preserve any action that the United States may subsequently pursue before the ICJ.269 In this vein, the claimants could argue that to allow the establishment of a new agreement in circumstances such as the instant case "would defeat [A]rticle 52 whenever the victimized nation did not object; the country could always be said to have entered into a new agreement once hostilities were ended."270 Such arguments, however, do not take into account that the purpose of President Reagan's executive order was to enforce the Agreement.271 It would be contradictory for the claimants to argue that the Reagan Administration order both validated the Agreement and preserved the right of the United States to challenge the Agreement before the ICJ.

In conclusion, President Reagan's ratification of the Agreement constitutes the establishment of a new, internationally valid agreement between the United States and Iran. This ratification should be characterized as the formation of a new agreement, valid under international law.

266. See supra note 249.
267. See supra text accompanying notes 255-258.
269. Id.
States and Iran. Therefore, the terms of the original agreement remain in force, thereby precluding U.S. nationals from bringing suit against the Government of Iran. The Agreement will frustrate the satisfaction of claims against the Government of Iran unless the Arbitral Tribunal accepts jurisdiction over those claims.273

B. Potential Claims under the Agreement

This section discusses the current status of the litigants who may have potential claims against the Government of Iran. First, the author explains how the different categories of claimants are treated under the Agreement. Second, the author discusses whether the claimants may seek compensation from the United States Government under the fifth amendment’s Just Compensation Clause.274

1. Different Categories of Claimants

Generally, three categories of claimants exist under the Agreement: former hostages, banks with loans outstanding to Iranian borrowers, and any American national who has a commercial claim arising out of a binding contract with the Iranian Government. The Agreement treats these groups of claimants differently. The Agreement fully extinguishes any claim that a former hostage may bring arising out of the seizure of the embassy or his subsequent detention. Accordingly, if the validity of the Agreement is left unchallenged under international law, the hostages would be precluded from bringing suit against...
Iran and instead must look to the United States for compensation for their detention.280

Unlike the former hostages, litigants with commercial claims against the Government of Iran are not precluded by the Agreement from receiving compensation from Iran.281 Banks which had loaned money to Iranian borrowers were allowed to offset fully the debts with the Iranian assets that were on deposit in those banks at the time of the Agreement.282 Litigants with contract claims against Iran fall within an intermediate category whereby partial compensation is available.283 Claimants with binding contracts with Iran that do not include a choice-of-forum clause284 are required to submit their claims to an international tribunal for arbitration.285 Iran, in turn, agreed to post a portion of its freed assets as security for the satisfaction of these commercial claims in the Arbitral Tribunal.286 Such claims are ineffective in U.S. courts unless the Arbitral Tribunal refuses jurisdiction.287

280. President Carter issued an executive order, Exec. Order No. 12,285, 3 C.F.R., 1981 Comp., p. 117 (1982), 50 U.S.C. § 1701 (1976 & Supp. V 1981), which created the Commission on Hostage Compensation for the purpose of advising the President as to the United States' obligation to compensate the hostages for injuries resulting from their captivity. The Commission found: (1) each government employee held by the Iranian militants should be compensated $12.50 per day of captivity; (2) the United States is not legally obligated to compensate the hostages for the loss of their right to sue Iran; (3) the United States is not liable for physical harm or mental distress suffered by the hostages during their detention; and (4) the United States owed no compensation to the sole hostage who was not a government employee. See Note, Hostage Compensation: United States Liability for Injuries Suffered by Nationals Held in Iran, 23 HARV. INT'L L.J. 131 (1982).


282. Id. See also Note, The Iranian Hostage Agreement, supra note 35, at 859, 877.


284. According to the Agreement, a choice-of-forum clause is one which specifically provides that any disputes concerning the contract "shall be within the sole jurisdiction of the competent Iranian courts." Claims Settlement Agreement, supra note 29, at art. II, para. 1. The effect of the clause would be to limit subsequent adjudication to Iranian courts. The Supreme Court has recognized that choice-of-forum clauses, otherwise valid, will not be enforced if its enforcement would effectively deprive the plaintiff of his day in court. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9, 18-19 (1972). Certainly, the changed circumstances in Iran since the contracts were entered into could constitute grounds for invalidating the choice-of-forum clauses on the basis that "the courts of the chosen state . . . would deal unfairly with the plaintiff and deny him relief to which he is entitled." Reese, A Proposed Uniform Choice of Forum Act, 5 COLUM. J. TRANSNAT'L L. 193, 202 (1966). If the choice-of-forum clauses are invalidated, these claimants would have the same status as the other contract claimants and would presumably be allowed to assert their claim before the Tribunal. Note, The Iranian Hostage Agreement, supra note 35, at 875 n.356.


286. Declaration, supra note 26, at paras. 1, 6-7. According to the Agreement, Iran is required to establish a one-billion dollar escrow account for the satisfaction of claims settled by the Tribunal. In addition, Iran is required to replenish the fund whenever it dips below $500 million. Id. There is no guarantee, however, that Iran will replenish the fund as required. McLaughlin & Teclaff, supra note 42, at 250. Accordingly, although the contract claimants may assert their claims to the Arbitral Tribunal, their ability to satisfy any judgment is sharply reduced by the limited security available.

2. The Theory of Recovery: Just Compensation Under the Fifth Amendment

The Agreement frustrates former hostages and contract claimants from receiving full compensation for their claims against the Government of Iran. The claimants, however, may alternatively seek compensation from the U.S. Government. The fifth amendment of the Constitution provides that the government cannot take private property for a public purpose without fully compensating the owner of that property. To the extent that the Agreement constituted the taking of valid claims of American nationals for the "public purpose" of terminating the hostage crisis, the U.S. Government may be required to pay just compensation to the frustrated claimants.

The purpose of the fifth amendment's Just Compensation Clause is "to bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Accordingly, controversies concerning just compensation arise when an individual is deprived of a property interest as a result of the legitimate exercise of governmental authority. In such a controversy, the government must provide compensation which is a "full and perfect equivalent" for what is lost.

The president has well-established powers to conduct foreign affairs, which include the power to enter into international claims settlement agreements. The exercise of this power, however, is neither unlimited nor exempt from other constitutional limitations, particularly those of the fifth amendment. Therefore, when the president legitimately exercises his constitutional powers in

---

288. For the text of the Just Compensation Clause, see supra note 49.
289. An underlying assumption of this subsection is that the Agreement between the United States and Iran will remain in force and that the claimants — former hostages and contract litigants — will never have their day in court against the Government of Iran. That is, the former hostages and contract claimants will not have their claims against Iran satisfied because the Agreement extinguishes the hostages' claims and, with respect to the contract claimants, the Arbitral Tribunal can draw only from the limited security provided by Iran. See supra text accompanying notes 278-287.
291. Note, Dames & Moore, supra note 11, at 345.
293. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (broad delegation of congressional authority to the President is not unconstitutional in the area of foreign affairs).
295. See Reid v. Covert, 354 U.S. 1 (1957). In Reid, the Supreme Court held that American civilian dependents of overseas personnel were entitled to a civilian trial. The Reid Court concluded that "no agreement with a foreign nation can confer power on Congress, or any other branch of Government, which is free from the restraint of the Constitution." Id. at 16.
296. The Supreme Court concluded in Dames & Moore v. Regan, 453 U.S. 654 (1981), that the President had the constitutional authority to suspend claims of American nationals against Iran. 453 U.S. at 675-88. The government cannot defend a suit brought in the Court of Claims under the just compensation clause, however, on the basis that the exercise of presidential power in suspending the claims was constitutional. The majority opinion in Dames & Moore recognized as much: "Though we
such a way to take private property to achieve a public purpose, the fifth amendment requires that the owner of that property be justly compensated.\textsuperscript{297}

Traditionally, the settlement by the federal government of claims of its nationals against foreign states has not been considered a compensable taking within the meaning of the fifth amendment.\textsuperscript{298} The Supreme Court's treatment of the compensation issue in \textit{Dames & Moore v. Regan}, however, casts doubt as to whether the traditional rule will be applied in the present case. Although the \textit{Regan} Court felt that the compensation issue was not ripe for review,\textsuperscript{299} the Court added that there were no jurisdictional grounds to bar such action in the Court of Claims.\textsuperscript{300} Moreover, Justice Powell, concurring with the majority, argued that those nationals who had their claims against Iran suspended were entitled to compensation under the fifth amendment.\textsuperscript{301} He stated:

The Government must pay just compensation when it furthers the Nation’s foreign policy goals by using as “bargaining chips” claims lawfully held by relatively few persons and subject to the jurisdiction of our courts. The extraordinary powers of the President and Congress upon which our decision rests cannot, in the circumstances of this case, displace the Just Compensation Clause of the Constitution.\textsuperscript{302}

In order to establish a compensable taking in the present case, the petitioners must satisfy two requirements. First, the claimants must show that they had a significant property interest prior to the conclusion of the Agreement.\textsuperscript{303} The central inquiry here is whether a claim brought against the Iranian Government constitutes a “significant property interest.”\textsuperscript{304} Second, if it is established that the claimants could have successfully litigated their claims but for the Agreement, the inquiry becomes whether the deprivation of this right meets the constitutional standards established by the fifth amendment.\textsuperscript{305}

\textit{conclude} that the President has settled petitioner's claim against Iran, we do not suggest that the settlement has terminated petitioner's possible taking claim against the United States.\textsuperscript{306} \textit{Dames & Moore}, 453 U.S. at 688-89 n.14.


\textsuperscript{298} \textit{See}, e.g., \textit{Z. & F. Assets Realization Corp. v. Hull}, 311 U.S. 470 (1941). \textit{See also Note, supra note 280, at 156; L. HENKIN, \textit{Foreign Affairs and the Constitution} 262 (1972). Henkin summarized the view adopted by U.S. courts:

No one has successfully argued in the Supreme Court that in purporting to dispose of private claims . . . the United States deprived the original claimants of property without due process of law, impaired the obligations of their contracts, or appropriated their claims for a public purpose and was obligated to pay them just compensation for any loss.

\textit{Id.} at 263 (footnotes omitted).

\textsuperscript{299} \textit{Dames & Moore}, 453 U.S. at 688-89.

\textsuperscript{300} \textit{Id.} at 689-90.

\textsuperscript{301} \textit{Id.} at 691 (Powell, J., concurring in part, dissenting in part).

\textsuperscript{302} \textit{Id.} (footnote omitted).

\textsuperscript{303} \textit{Note, The Iranian Hostage Agreement, supra note 35, at 860.}

\textsuperscript{304} \textit{Id.}

\textsuperscript{305} \textit{Id.}
The contract claimants have two separate arguments for compensation. The first argument is that by nullifying the claimants' prejudgment attachments against Iran, "the President has taken a valid property interest ... for which compensation is due ...."\(^{306}\) In return for the destruction of the attachments, the President was obligated to provide a similar type of security of equal value.\(^{307}\) In the present case, however, the President nullified three to four billion dollars of prejudgment attachments of Iranian assets, leaving to the claimants recourse to the Arbitral Tribunal with uncertain effectiveness and limited security.\(^{308}\)

The Supreme Court expressly rejected this argument for compensation in *Dames & Moore v. Regan*. The Court argued that no compensable property interest existed because the judicial attachments were awarded under a revocable license.\(^{309}\) A petitioner was therefore on notice that its attachment was subordinate to the President's powers under the IEEPA.\(^{310}\) The Court concluded that because the President had the power to revoke the license under which the attachments were granted, the petitioners had not acquired a sufficient property interest to establish a compensation claim under the fifth amendment.\(^{311}\)

Second, claimants may argue that the portion of the Agreement which forced them to present their claims to a remote tribunal in which recovery is far less certain constitutes a compensable taking.\(^{312}\) By requiring the litigants to present their claims to the Arbitral Tribunal rather than allowing them to pursue their claims in domestic courts, the President did not provide a "fair trade."\(^{313}\) Accord-
ingly, these claimants may wish to seek compensation from the United States not only for diminishing their capacity to satisfy their claims against Iran, but also for abrogating their right to sue Iran in domestic courts.314 In this respect, the compensation claims of the former hostages are similar to those of the contract claimants because the hostages would be seeking compensation solely for the loss of the right to bring a lawsuit against Iran.315

The former hostages arguably have a valid tort claim against Iran for false imprisonment.316 The Agreement, however, abrogates the right of the hostages to bring any suits against the Government of Iran.317 Because the Agreement constitutes a “taking” of the hostages’ false imprisonment claim, the U.S. Government may be required to provide just compensation under the fifth amendment.318 The hostages may have a stronger argument for compensation because the hostages, unlike the contract claimants, may not assert their claims before the Arbitral Tribunal.319

The contract claimants and the former hostages can arguably establish *prima facie* cases under tort and contract law against the Government of Iran. As long as the terms of the Agreement remain in force, however, neither group of litigants will receive full satisfaction of their claims. The former hostages are totally precluded from bringing suit against Iran and the contract litigants are limited to asserting their claims before the Arbitral Tribunal, in which only partial recovery would be available.320 Accordingly, these claimants have been asked to sacrifice valid claims for the national purpose of ending the hostage crisis. If the purpose of the fifth amendment’s Just Compensation Clause is to prevent the government from forcing some people to bear public burdens,321 it would be inconsistent with that amendment to deny compensation to these claimants.

315. The President’s Commission on Hostage Compensation, *see supra* note 280, expressly addressed the question of whether the hostages were entitled to compensation. The Commission concluded that the hostages were not entitled to compensation on the basis that: (1) the hostages’ release constituted adequate compensation for the loss of the right to sue Iran; and (2) the right to bring suit is of dubious value since past attempts to sue foreign governments in U.S. courts have been unsuccessful. President’s Commission on Hostage Compensation, Final Report and Recommendations 11-12 (1981). The Commission realized, however, that it was not an adjudicatory body and that the Court of Claims may be a more appropriate forum to establish whether hostages are due compensation under the fifth amendment. *Id.* at 124.
316. *See supra* note 279.
318. Several former hostages have brought suits in the court of claims against the U.S. Government on the theory that they are entitled to just compensation for the deprivation of their right to sue Iran. *See* Paul v. United States, 687 F.2d 364 (Ct. Cl. 1982); Cooke v. United States, No. 581-82c, slip op. (Ct. Cl. Mar. 3, 1983).
319. The Arbitral Tribunal is competent to hear only commercial claims. *See* Claims Settlement Agreement, *supra* note 29, at art. II.
320. *See supra* text accompanying note 207.
321. *See supra* note 290 and accompanying text.
VII. Conclusion

Although the Iranian Government did not participate in the seizure of the U.S. Embassy in Tehran, its endorsement of the continued occupation of the embassy and the detention of the diplomatic personnel established its responsibility for these actions. The U.S. Government responded to this crisis by freezing all Iranian assets subject to U.S. jurisdiction. The crisis continued until January 19, 1981, when the United States and Iran entered the Declaration of the Democratic and Popular Government of Algeria. The major provisions of this Agreement restored Iran to the financial position it enjoyed prior to the freezing of the assets, terminated all suits between the two parties and their nationals, and established an international tribunal to resolve commercial claims that arose from the hostage crisis.

There has been considerable controversy as to the international validity of the Agreement. Article 2(4) of the U.N. Charter and Article 52 of the Law of Treaties constitute statements by the international community condemning the threat or use of force in treaty negotiations. These statements prohibit only the use of physical force. Although certain states argued that the prohibition should extend to acts of political and economic coercion, subsequent interpretations of the U.N. Charter preclude this application. To the extent that the actions of the Iranian Government constitute illegal acts of force, the Agreement must be considered invalid under international law.

An invalidated treaty under Article 52 is considered void ab initio. The ILC provided, however, that this infirmity could be cured by subsequent ratification by the victim state. On February 24, 1981, President Reagan, concluding that it was in the overall interest of the United States to uphold the Agreement, issued the necessary executive order to ratify it. Although the Reagan Administration declined to evaluate the international validity of the Agreement, the effect of its order was to enforce the terms of the Agreement. Therefore, the infirmity was cured and the Agreement remains in force.

The terms of the Agreement specifically preclude any suits by American nationals against the Government of Iran. Because the Agreement remains in force, American claimants are precluded from satisfying their claims. To the extent that the Agreement constitutes a “taking” of the claims against Iran, however, the U.S. Government is required by the fifth amendment to pay “just compensation” to the claimants.

Thomas A. Zaccaro