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The Effect of Duress on the Iranian Hostage Settlement Agreement

James M. Redwine

NOTE

THE EFFECT OF DURESS ON THE IRANIAN HOSTAGE SETTLEMENT AGREEMENT

TABLE OF CONTENTS

I. INTRODUCTION

A. *Background and Terms of the Agreement*

After weeks of intensive negotiating,[1] at 3:30 a.m. Eastern Standard Time (EST), January 19, 1981, the government of Algeria announced that the United States and Iran had signed[2] the Declaration of the Government of the Democratic and Popular Re-

1. The best account of the negotiations prior to the Majlis November 2, 1980 establishment of four conditions for the hostages' release is the ABC News Special "America Held Hostage: The Secret Negotiations" aired on January 28, 1981. A synopsis of the negotiations by Deputy Secretary of State Warren M. Christopher and others after that date is found in N.Y. Times, Jan. 21, 1981, at A2, col. 1.

2. N.Y. Times, Jan. 20, 1981, at A1, col. 6.

public of Algeria,[3] thereby paving the way for the release of the fifty-two United States diplomats and nationals held in Iran for 444 days.[4] The next day, January 20, 1981, as Ronald Reagan concluded his inaugural address[5] at 12:25 p.m. EST, the fifty-two hostages boarded an Algerian jet.

The hostage settlement agreement consists of two accords, one freeing the hostages in return for the unblocking and transfer, via an escrow agent, to Iran of Iranian assets[6] (Declaration).[7] The other accord established an International Arbitral Tribunal to settle claims of Iran, the United States and each country's nationals against the other and its nationals (Claims Settlement Declaration).[8] The avowed principles of the Declaration are 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.[9] Under the Declaration, the United States promised not to intervene "directly or indirectly, politically or militarily in Iran's internal affairs."[10] Pursuant to the agreement in the Declaration to establish an escrow account at a "mutually agreeable central bank,"[11] the Bank of England was chosen as escrow agent.[12] The United States promised to transfer to the Bank of England all gold bullion and assets owned by Iran which were

3. The full text of the Declaration [hereinafter referred to as the hostage settlement agreement] is found in N.Y. Times, Jan. 20, 1981, at A4, col. 1, and reprinted in 20 INT'L LEGAL MATERIALS 224 (1981). The executive orders implementing the agreement are found in 17 WEEKLY COMP. OF PRES. DOC. 3027 (Jan. 19, 1981).

4. N.Y. Times, Jan. 21, 1981, at 1, col. 1.

5. *Id.* at col. 6.

6. The Iranian assets had been frozen since November 14, 1979. *Declaration of the Government of the Democratic and Popular Republic of Algeria*, 20 INT'L LEGAL MATERIALS 224 (1981) [hereinafter cited as *Declaration*]; *see* notes 9-24 *infra* and accompanying text for the content of the *Declaration*.

7. *Declaration*, *supra* note 6.

8. *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*, 20 INT'L LEGAL MATERIALS 230 (1981) [hereinafter cited as the *Claims Settlement Declaration*]; *see* notes 25-31 *infra* and accompanying text for the content of the *Claims Settlement Declaration*.

9. *Declaration*, *supra* note 6, at 224.

10. *Id.*

11. *Id.* at 225.

12. N.Y. Times, Jan. 20, 1981, at A1, col. 6.

then in the Federal Reserve Bank of New York.[13] The United States is also to compel foreign branches of United States banks to transfer to the escrow account all Iranian assets that "stood on their books" on or after November 14, 1979.[14] Upon certification by the government of Algeria to the Algerian Central Bank that the fifty-two hostages had "safely departed from Iran," the Algerian Central Bank was to direct the Bank of England immediately to forward to it all funds held in escrow.[15]

Different treatment was given to Iranian assets held in domestic branches of United States banks and by private parties. The Declaration requires that within thirty days the United States and Iran establish an "interest bearing security account" at the Bank of England and gives the United States six months to transfer to the Bank of England all Iranian assets held in domestic branches of United States banks.[16] As the funds are transmitted to the Bank of England, the Algerian Central Bank is to direct that one half of such funds are to be forwarded to Iran while the other half are to be placed in the security account. Once the security account obtains a balance of one billion dollars, remaining funds from domestic branches of United States banks are to be transferred directly to Iran. Funds in the security account are to be held for satisfaction of claims against Iran,[17] as determined by the procedures established under the Claims Settlement Declaration. Should the account balance drop below $500 million, Iran is required to deposit amounts sufficient to maintain the account at the $500 million level,[18] and the United States is obligated "to act to bring about" the transfer to the escrow account of all other Iranian funds or securities "located in the United States and abroad"[19] and to "arrange, subject to the provisions of U[nited] S[tates] law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the

13. *Declaration, supra* note 6, at 225, ¶ 4; *see* Exec. Order No. 12,277, 17 WEEKLY COMP. OF PRES. DOC. 3029 (Jan. 19, 1981).

14. *Declaration, supra* note 6, at 226, ¶ 5; *see* Exec. Order No. 12,277, 17 WEEKLY COMP. OF PRES. DOC. 3030 (Jan. 19, 1981).

15. *Declaration, supra* note 6, at 225, ¶ 3.

16. *Id.* at 226, ¶ 6.

17. The validity of these claims will be determined by the *Claims Settlement Declaration. See* note 8 *supra* and accompanying text.

18. *Id.* ¶ 7; *see* Exec. Order No. 12,279, 17 WEEKLY COMP. OF PRES. DOC. 3031 (Jan. 19, 1981).

19. *Declaration, supra* note 6, at 226-27, ¶ 8.

United States and abroad and which are not within the scope of the preceding paragraphs."[20]

The United States is also required to revoke trade sanctions against Iran and to terminate all pending litigation against Iran, including the suit against Iran in the International Court of Justice,[21] and to bar pending or future litigation arising out of the embassy seizure, hostage taking and detention, and injury resulting from nonofficial acts during the "Islamic Revolution in Iran."[22] Finally,[23] the United States also promised to freeze any property of the late Shah of Iran or his close relatives and to facilitate its recovery by Iran.[24]

The Claims Settlement Declaration agreed to by the United States and Iran[25] provides for the establishment of a nine-member International Arbitral Tribunal to be operated according to the arbitration rules of the United Nations Commission International Trade Law (UNCITRAL).[26] The tribunal has jurisdiction over claims by nationals of both countries, including debts, contracts,[27] official acts of expropriation and "other measures affecting property rights," but not over claims nullified by the Declaration freeing the hostages, "and claims arising out of the actions of the United States in response to the conduct described in such paragraph and excluding claims arising under a binding contract

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20. *Id.* at 227, ¶ 9; *see* Exec. Order No. 12,280, 12,881, 17 WEEKLY COMP. OF PRES. Doc. 3033-36 (Jan. 19, 1981).

21. In the Case Concerning the United States Diplomatic and Consular Staff in Tehran (United States v. Iran), *reprinted in* 19 INT'L LEGAL MATERIALS 553 (1980), Iran was required to make reparation to the United States for damage resulting from the embassy takeover and hostage seizure. *Id.* at 574.

22. *Declaration, supra* note 6, at 227, ¶¶ 10-11; *see* Exec. Order No. 12,283, 17 WEEKLY COMP. OF PRES. Doc. 3037 (Jan. 19, 1981). Pursuant to the *Declaration,* President Carter established the President's Commission on Hostage Compensation to determine whether the hostages should be financially compensated, and if so, in what amounts. Exec. Order No. 12,285, 17 WEEKLY COMP. OF PRES. Doc. 3039 (Jan. 19, 1981).

23. The *Declaration* also establishes procedures for dispute settlement. *Declaration, supra* note 6, at 228, ¶ 17.

24. *Id.* at 227-28, ¶¶ 12-16. The United States will also survey the late Shah's property in the United States, request that Iran's recovery of such assets should not be barred by the act of state or sovereign immunity doctrines, and guarantee the enforcement of judgments against such assets. *Id.*

25. *Claims Settlement Declaration, supra* note 8, at 230.

26. *Id.* at 231, art. III, ¶¶ 1-2.

27. This includes "transactions which are the subject of letters of credit or bank guarantees." *Id.* at 230-31, art. II, ¶ 1.

between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian court in response to the Majlis position."[28] The tribunal also has jurisdiction over counterclaims arising out of the same transaction as the original claim and over official claims of the United States and Iran stemming from contracts for the purchase and sale of goods and services.[29] All claims are to be filed within the later of one year after the agreement's effective date or six months after the appointment of the president of the tribunal.[30] Finally, the tribunal has sole power to determine the applicable law, including commercial and international law, and choice of law rules.[31]

B. *Controversy Over the Validity of the Agreement*

As soon as the United States began celebrating the hostages' release, the validity of the agreement became a subject of intense controversy. Conservative commentators urged that the United States "renounce the deal."[32] To them, the Declaration was not an agreement but extortion, and had "the same moral standing as an agreement made with a kidnapper, that is to say, none at all."[33] Although praising the negotiators' hard work, these commentators questioned both the wisdom and the constitutionality of the Declaration and argued that to fulfill its terms would be to legitimize and encourage terrorism and the violation of international law.[34] These commentators[35] and others[36] held that the actions of the Iranian student militants, subsequently endorsed by the government of Iran, came within the purview of article 52 of

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28. *Id.*; *see* text accompanying note 22 *supra.*

29. *Claims Settlement Declaration, supra* note 8, at 230-31, art. II, ¶¶ 1-2.

30. *Id.* at 232, art. III, ¶ 4.

31. "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." *Id.* art. V.

32. *Renounce the Deal,* Wall St. J., Jan. 21, 1981, at 26, col. 1 (editorial).

33. *Id.*

34. "And it is important for the world to know that extortionists are not entitled to the same legal and moral consideration as governments operating in accordance with international law." *Id.*

35. *See also* Wall St. J., Jan. 27, 1981, at 30, col. 1.

36. Malawer, *A Gross Violation of Treaty Law,* NAT'L L. J., Mar. 2, 1981, at 13, col. 1.

the Vienna Convention on the Law of Treaties[37] which renders void treaties "procured by duress"[38] and constituted an attack on the United States "diplomatic territory" thereby offending the 1974 United Nations Definition of Aggression.[39] Acting upon similar beliefs, Senator De Concini submitted Senate Resolution 31 on January 22, 1981.[40] Citing the illegal detention and mistreatment of the hostages and the provisions of the agreement itself, the Resolution stated that the agreement with Iran was a pact with kidnappers and terrorists and thus had no "moral authority."[41] The Resolution called upon the Senate to support the President in any determination he might make to refuse to fulfill any as yet unkept promises to Iran, "inasmuch as such agreements were made in order to secure the release of the fifty-two Americans held in Iran in violation of international law."[42]

Other commentators questioned both the legality and wisdom of repudiating the Declaration. According to Andreas F. Lowenfeld, international and constitutional law are less relevant to evaluation of the agreement than "history, politics and psychology."[43] First, Lowenfeld upholds the choice of the self-executing executive agreement rather than the treaty form by questioning the efficacy of the drawn-out advise and consent proceedings in the Senate that are an inherent part of treaty ratification.[44] Second, addressing the problem of the timing of the agreements—their conclusion in the waning hours of the Carter Administration—Lowenfeld sees the issue as one of state succession in respect of treaties and, on the basis of an established rule of international law, he determines the agreements to be binding.[45] Third, Lowenfeld states that the agreement is not void because it

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37. Vienna Convention on the Law of Treaties, *entered into force*, Jan. 27, 1980, U.N. Doc. A/Conf. 39/11/Add. 2 [hereinafter cited as Convention on Treaties].

38. *Id.* art. 52; *see* text accompanying notes 131-219 *infra*.

39. G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31), U.N. Doc. A/0631, at 142 (1974) [hereinafter cited as Definition]; Malawer, *supra* note 36, at 13, col. 1.

40. S. RES. 31, 97th Cong., 1st Sess. (1981), *reprinted in* 127 CONG. REC. S579 (daily ed. Jan. 22, 1981)(unenacted). A copy of the *Wall Street Journal* editorial, *supra* note 32, accompanies the Resolution. *Id.*

41. *Id.*

42. *Id.*

43. Lowenfeld, *International Law and the Hostage Agreement*, Wall St. J., Jan. 27, 1981, at 30, col. 3.

44. *Id.*

45. *Id.*

was procured by duress, or the threat or use of force in violation of the United Nations Charter[46] and article 52 of the Vienna Convention on the Law of Treaties.[47] He states that article 52 does not cover the case of a "hostage-taking supported by a government."[48] Furthermore, he notes, the United States, aware of article 52, engaged in long negotiations with Iran and achieved "its primary goal" of obtaining the hostages' release while also getting Iran to pay off certain bank loans.[49] Lowenfeld concludes that "[t]he argument about duress, while not implausible, is sufficiently doubtful that repudiation of the agreement by the U[nited] S[tates] would . . . be ill-advised."[50] Finally, reviewing the wisdom and probable success of the claims settlement agreement, Lowenfeld notes that the question whether the claimants are better or worse off under the accord is very difficult, and depends on whether the Iranians will replenish the fund out of which claims are to be paid, whether the claims tribunal can function effectively, and whether a claimant's prospects for recovery were actually any better in United States courts despite the existence of sovereign immunity and act of state defenses.[51]

Although it will take years of litigation and commentary to assess the full significance and consequences of the hostage taking and the settlement agreement, some preliminary observations may be made. The Declaration poses many difficult questions of international and constitutional law. Examples of constitutional law questions raised include the power of the President to conclude self-executing agreements and to nullify claims of citizens brought in United States courts.[52] In examining the agreements, this Note will concentrate on challenges to the validity of the agreements under international law. Thus, this analysis avoids such constitutional issues as the President's agreement-making power, except insofar as they relate to the possible domestic con-

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46. *Id.* U.N. CHARTER art. 2(4) provides: "All Members 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 Purposes of the United Nations."

47. Convention on Treaties, *supra* note 37.

48. Wall St. J., Jan. 27, 1981, at 30, col. 3-4.

49. *Id.* at col. 4.

50. *Id.*

51. *Id.*

52. *See, e.g.*, Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran, 49 U.S.L.W. 2531 (N.D. Tex. Feb. 2, 1981).

sequences of an international treaty, for under international law an unconstitutional treaty usually subsists as an international obligation.[53] In examining the effect of duress on the international validity of the agreement, this Note will consider concepts of coercion[54] under article 52 of the Vienna Convention of the Law of Treaties[55] and article 2(4) of the United Nations Charter.[56] Although the agreement freeing the hostages is separated into Declarations, this Note will consider them as a unit for purposes of testing their validity, because of their interrelationships[57] and their joint origin as instruments necessary to the hostages' freedom. Finally, it will suggest the potential international and domestic[58] significance of a finding of the validity of the Treaty.

II. EFFECT OF COERCION ON THE SETTLEMENT AGREEMENT

Prior to 1915, treaties imposed by a victor upon a vanquished state were universally considered to be as valid as those freely negotiated between parties.[59] Imposed treaties were an exception to the generally recognized idea that the basis of a state's obligations under international law was consent.[60] International stability, and the necessity of ending hostilities, dictated that in such

53. *See, e.g.*, McNair, *Constitutional Limitations Upon the Treaty-making Power* in R. ARNOLD, TREATY-MAKING PROCEDURE 6 (1933): "[I]f one party produces an instrument complete and regular on the face of it . . . [t]hough in fact constitutionally defective, the other party, if it is ignorant and reasonably ignorant of the defect, is entitled to assume that the instrument is in order and to hold the former to the obligations of the treaty."

54. *See* text accompanying notes 220-60 *infra*.

55. *See* text accompanying notes 131-86 *infra*.

56. *See* text accompanying notes 187-219 *infra*.

57. *See, e.g.*, text accompanying notes 18, 28 *supra*.

58. *See* text accompanying notes 334-52 *infra*.

59. *See generally* S. MALAWER, IMPOSED TREATIES AND INTERNATIONAL LAW 26-27 (1977) [hereinafter cited as MALAWER, IMPOSED TREATIES].

60. The theory that consent was the basis of states' international obligations has been recognized as a fiction. Malawer, *A New Concept of Consent and World Public Order: "Coerced Treaties" and The Convention on The Law of Treaties*, 4 VAND. J. TRANSNAT'L L. 1 nn. 1 & 2, 2 n. 4 (1970), *reprinted in* S. MALAWER, STUDIES IN INTERNATIONAL LAW 31 (1977) [hereinafter cited as MALAWER, COERCED TREATIES] *citing* J. BRIERLY, THE BASIS OF OBLIGATION IN INTERNATIONAL LAW 12 (H. Lauterpacht & C. Waldock eds. 1958). The victorious state was viewed as "legislating" for its vanquished foe. W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 122 (3d ed. 1971).

cases the principle of *pacta sunt servanda*[61] prevailed over the rights of the vanquished state.[62] Beginning in 1915,[63] however, the validity of imposed or coerced treaties was challenged by state practice, conventional international law, and writers. By 1945, with the adoption of the United Nations Charter, customary international law "implicitly recognized the invalidity of treaties imposed by 'aggressive' military force."[64]

Article 52 of the Vienna Convention on the Law of Treaties[65] "explicitly"[66] accepts the prohibitions against coerced treaties based upon the Charter's prohibition against the threat or use of force,[67] and 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."[68] Although article 52 rendered the hostage settlement agreement void, article 52 may not represent the correct state of the law between the United States and Iran. First, since the Convention, and especially the prohibition against the use of force,[69] are a product of the International Law Commission's efforts to "codify and progressively develop" international law via multilateral treaty,[70] it may not accurately reflect the state of cus-

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61. *E.g.*, article 26 of the Convention on Treaties, *supra* note 37, provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."

62. *See* MALAWER, IMPOSED TREATIES, *supra* note 59, at 11-19.

63. The first such challenge was the United States response to Japan's 21 Demands upon China, in 1915. *Id.* at 25-26.

64. *Id.* at 155-56.

65. Convention on Treaties, *supra* note 37.

66. MALAWER, IMPOSED TREATIES, *supra* note 59, at 156.

67. *See* note 46 *supra.*

68. Convention on Treaties, *supra* note 37.

69. *See* text accompanying notes 131-34 *infra.*

70. The International Law Commission is charged by the General Assembly with the responsibility of both codifying and progressively developing international law. U.N. CHARTER, art. 13(1)(a). According to the late Professor Richard R. Baxter "[t]he multilateral [codification] treaty is, it cannot be emphasized too heavily, a reflection of the State practice of the parties to it and constitutes an expression of their attitude toward customary international law, to be weighed together with all other consistent and inconsistent evidence of customary international law." Baxter, *Treaties and Custom,* ACADEMIE DE DROIT INTERNATIONAL, 129 Recueil des Cours 52 (1970) [hereinafter cited as Baxter, *Treaties and Custom*]. To the extent that a multilateral treaty purportedly declaratory of customary international law actually progressively develops the law, it ceases to reflect state practice, for "[p]ut bluntly, progressive development means

tomary international law, especially as it regards the scope of the prohibition against the use of force.[71] Second, although the United States and Iran have signed the Convention, which has entered into force, neither state has ratified it.[72] Third, since the adoption of article 52 the United Nations has promulgated the 1970 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States[73] and the 1974 Definition of Aggression,[74] which clarify the principles upon which article 52 is based.[75] Thus, evaluation of the validity of the Declaration requires a delineation of the alleged threat or use of force itself, an inquiry into the applicable rules of international law, and an examination of the scope of the rule against coerced treaties and related doctrines.

A. *Iran's Alleged Use of Force—The Backdrop for, and the Seizure of, the Embassy in Tehran and Subsequent Events*

Although the situation surrounding the embassy was tense following an attack upon and seizure of the embassy on February 14, 1979,[76] tension increased dramatically after October 22, 1979, when the former Shah of Iran was admitted to the United States

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change." *Id.* at 39.

71. The Preamble to the Convention on Treaties, *supra* note 37, states that both "codification and progressive development of the law [was] achieved in the present Convention."

72. Multilateral Treaties in Respect of which the Secretary General Performs Depository Functions, List of Signatures, Ratifications, Accessions, etc. as of 31 Dec. 1979, U.N. Doc. ST/LEG/SER.D/13 at 597-98 (1980).

"If a State does not become a party to a codification treaty in the strict sense, its conduct means one less vote in favor of the norms of the treaty as rules of customary international law." Baxter, *Treaties and Custom, supra* note 70, at 52.

73. G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 124, U.N. Doc. A/8028 (1971).

74. Definition, *supra* note 39, at 142-43.

75. *See* text accompanying notes 221-24 *infra.*

76. N.Y. Times, Nov. 10, 1979, at F1, col. 1; Feb. 4, 1981, at A9, col. 1; Case Concerning United States Diplomatic and Consular Staff in Tehran (judgment) (United States v. Iran), [1980] I.C.J. ___, *reprinted in* 19 INT'L LEGAL MATERIALS 553, 557, ¶¶ 14-15 (1980) [hereinafter cited as I.C.J. Iran Judgment]. Two of the best synopses of events surrounding the hostage taking and their imprisonment are found in *Days of Captivity: The Hostages' Story,* N.Y. Times, Feb. 4, 1981, at A9-A15 [hereinafter cited as *Days of Captivity*], and the above cited I.C.J. Iran Judgment.

for cancer treatment at the New York Hospital-Cornell Medical Center.[77] Recognizing that the admission of the Shah might endanger the embassy, United States officials in Tehran on three separate occasions requested of and received from high Iranian government officials assurances that the embassy would be adequately protected.[78] On November 1, 1979 a large group of Iranian demonstrators gathered outside the embassy, but the Tehran chief of police personally visited the embassy and reassured L. Bruce Langen, the charge d'affaires and the highest ranking diplomat at the embassy, that the embassy's security was being taken "very seriously."[79] Both local police and Revolutionary Guards maintained their position around the compound, and Iranian citizens were discouraged from going to the embassy to protest.[80]

By November 4, 1979 the situation had changed drastically. Since the Shah's admission to the United States on October 27, the Ayatollah Khomeini had stepped up his verbal attacks on the United States[81] and on November 1, 1979 stated

> that it was "up to the dear pupils, students, and theological students to expand with all their might their attacks against the United States and Israel, so they may force the United States to return the deposed and criminal shah, and to condemn this great plot" (that is, a plot to stir up dissension between the main streams of Islamic thought).[82]

Apparently on their own initiative, though inspired by the Ayatollah's statements, a group of militants calling themselves "Muslim Student Followers of the Imam's Policy"[83] took over the embassy on November 4, 1979. The demonstrators, armed primarily with "sticks, baseball bats, lead pipe clubs and, by some accounts, a few pistols, rushed into the compound" by breaching the steel gates and pouring over the top of the secondary walls.[84]

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77. N.Y. Times, Nov. 10, 1979, at 7, col. 1.

78. *Id.* These assurances were received from Dr. Bazargan, Iran's Prime Minister, Dr. Yazdi, the Foreign Minister, and the Commander of the Iranian National Police, on October 21, 22, and 31, 1979, respectively. I.C.J. Iran Judgment, *supra* note 76, at 557, ¶ 15.

79. I.C.J. Iran Judgment, *supra* note 76, at 557-58, ¶ 16.

80. *Id.*

81. *Id.* at 566-68, ¶¶ 56-68.

82. *Id.* at 566-667, ¶ 59.

83. *Id.* at 558 ¶ 7.

84. *Days of Captivity, supra* note 76, at A9, col. 4. The I.C.J. Iran Judgment,

Iranian security guards either offered no resistance to the militants or left the scene entirely, and repeated calls to the Iranian Foreign Ministry for help during the assault were to no avail.[85]

A few embassy personnel were trapped in various buildings inside the compound, but most were able to retreat to the chancery, where Marine guards bolted shut the heavy doors.[86] Once inside, embassy personnel began to destroy documents and call Washington and Iranian government officials.[87] The siege of the embassy lasted for approximately five hours, from 10:30 a.m. to 3:30 p.m. During this period Marine guards fired tear gas grenades at the students several times, and when the Iranians finally broke into the basement of the chancery and embassy personnel were forced to retreat to higher floors, guards had to hold off the attackers at gunpoint.[88] Several times during the siege the militants held captured embassy personnel at gunpoint and knifepoint and paraded them in front of other not yet captured Americans, to force the latter to surrender.[89] After the last holdouts in the security vault had shredded most sensitive documents and surrendered, the militants beat them and threatened to mutilate them if they did not open locked safes.[90]

After the embassy's surrender and intermittently during the hostages' imprisonment, they were subjected to "acts of barbarism,"[91] including interrogations, physical abuse and beating, Russian roulette sessions, and mock firing squads.[92] Several hostages were kept in solitary confinement for most of their fourteen

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supra note 76, at 558, ¶ 17, describes the militants as "a strong *armed* group of several hundred people." (Emphasis added.) At approximately 10:30 a.m. on November 7, 1979, about 500 Iranian students broke away from a group of thousands, who were marching on the first anniversary of the shooting of Tehran University students by the Shah's police, and stormed the embassy compound. N.Y. Times, Nov. 10, 1979, at 7, col. 1.

85. I.C.J. Iran Judgment, *supra* note 76, at 558, ¶ 17.

86. *Days of Captivity, supra* note 76, at A9, cols. 4-5.

87. *Id.* at col. 5.

88. *Id.* at A10, col. 1.

89. *Id.; see* I.C.J. Iran Judgment, *supra* note 76, at 559, ¶ 23.

90. *Days of Captivity, supra* note 76, at A10, col. 1.

91. According to President Carter, speaking after his meeting with the hostages in Wiesbaden, West Germany, the hostages had been subject to "acts of barbarism that can never be condoned" and to abuse that was "much worse than had been previously revealed." N.Y. Times, Jan. 22, 1981, at 1, col. 5.

92. *Id.; Days of Captivity, supra* note 76, at A11, col. 1-5.

months in captivity.[93] Although the militants acted at first in an apparently private capacity,[94] within a few days the government of the Islamic Republic of Iran had endorsed the seizure, and "[the] approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian state, and the decision to perpetuate them, translated the continuing occupation of the Embassy and detention of the hostages into acts of that State."[95] Already well known are the Iranian threats, issued at various times during the 444-day crisis, to put the hostages on trial, or to kill them, if various Iranian demands were not met, or if the United States attempted military action against Iran.[96] These threats and the physical abuse of the hostages took place while negotiations for the hostages' release continued,[97] and were an integral part of the negotiating process itself, until the hostages were actually released.[98] For example, in the closing hours of negotiating the escrow agreement and the transfer of funds, difficulties arose over an eleven page appendix to the main agreement. Behzad Nabavi, Iran's chief negotiator on the hostage issue, stated that if the United States banks did not complete transfers to the escrow accounts in the Bank of England, "obviously we will take more severe action,"[99] indicating that the hostages would be tried as spies.[100]

B. *The Applicable Law*

As mentioned,[101] article 52 of the Vienna Convention on the Law of Treaties may not automatically represent the applicable international law between the United States and Iran since

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93. N.Y. Times, Jan. 22, 1981, at A1, col. 5.

94. I.C.J. Iran Judgment, *supra* note 76, at 566-69, ¶¶ 56-74. During the first few days after the embassy seizure, although the Iranian clergy and other leaders supported the hostage taking, N.Y. Times, Nov. 6, 1979, at A1, col. 5, the Iranian government of Dr. Mehdi Bazargan officially promised to "do its best" to free the hostages. N.Y. Times, Nov. 5, 1979, at A1, col. 5.

95. I.C.J. Iran Judgment, *supra* note 76, at 569, ¶ 74.

96. The militants began making public pronouncements to this effect on November 6, 1979. N.Y. Times, Nov. 7, 1979, at A14, col. 6.

97. *See* notes 1 & 96 *supra* and accompanying text.

98. The hostages were mistreated until they were placed on the Algerian jets in which they left Iran. *See* N.Y. Times, Jan. 21, 1981, at A1, col. 2.

99. N.Y. Times, Jan. 20, 1981, at A7, col. 5.

100. *Id.* at col. 6.

101. *See* text accompanying notes 69-75 *supra.*

neither party has ratified the Convention and since the Convention explicitly recognizes that it both codifies and changes customary public international law.[102] Thus, if the rule of article 52 is to govern the question of the hostage settlement agreement, it must do so because it is "declaratory of customary international law."[103]

According to the late Professor Richard R. Baxter, a multilateral treaty may be declaratory of customary international law[104] if it "incorporat[es] and giv[es] recognition to a rule of customary international law that existed prior to the conclusion of the treaty . . . ."[105] Such a treaty may be proven to be declaratory of international law in one of four ways:

> [(1)] The treaty may state, generally in its preamble, that it is declaratory of customary international law.
> [(2)] The final act of the conference that drew up the treaty or the *travaux preparatoire* of the treaty may indicate that the entire treaty was intended by its draftsmen to be declaratory of customary international law.
> [(3)] The *travaux preparatoires* for a particular article may show that the article was intended to be declaratory of customary international law, even though other provisions of the treaty were not.
> [(4)] A comparison of the terms of a particular article with the state of customary international law may indicate that the article is an accurate formulation of a rule of customary international law.[106]

Even if the principles enumerated in a treaty "are not consistent with what had hitherto been taken to be the state of customary law,"[107] the treaty may express agreed upon practices and is "to be weighed together with all other consistent and inconsistent evidence of the state of customary international law."[108]

Because the preamble of the Convention on the Law of Treaties states that the treaty represents both codification and pro-

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102. Convention on Treaties, *supra* note 37, art. 52.

103. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, [1965-1966] BRIT. Y.B. INT'L L. 275, 277 (1968) [hereinafter cited as Baxter, *Multilateral Treaties*].

104. For categories of multilateral treaties that are not declaratory of customary international law, see *id.* at 276-77.

105. *Id.* at 277.

106. *Id.* at 287.

107. Baxter, *Treaties and Custom*, *supra* note 70, at 55.

108. *Id.* at 52; *see* note 70 *supra*.

gressive development[109] and because of the conceptual and practical difficulties in proving the state of customary international law at the time of the treaty's conclusion,[110] the *travaux preparatoire* of article 52 must be examined to determine the drafters' intent.[111] In considering the predecessors of article 52 most members of the International Law Commission (ILC) recognized that the rule against coerced treaties predated their discussions.[112] A plurality of ILC members commenting on the existence of the rule felt that it became a principle of customary international law upon the adoption of the United Nations Charter in 1945 or that it was based upon the Charter.[113] Several held that it predated the Charter.[114] Others did not express an opinion as to the date of the rule's creation, but acknowledged its existence, or stated that it was already *lex lata.*[115] Even those who expressed dissatisfaction with the particulars of the rule did not repudiate it or deny its existence.[116] Similarly, most delegates to the Vienna Conference on the Law of Treaties stated that the rule predated the United Nations Charter[117] or was *lex lata.*[118] At the Conference,

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109. *See* note 70 *supra.*

110. For the development of the rule in customary international law, see MALAWER, IMPOSED TREATIES, *supra* note 59. Regarding the conceptual difficulties of comparing the provisions of customary law at the time of the treaty's conclusion, Professor Baxter also wrote that "[t]o determine [the treaty's] character by comparison of its provisions with customary international law is self-defeating, since the state of customary international law is itself the effect of the inquiry." Baxter, *Treaties and Custom, supra* note 70, at 56.

111. *See generally* S. ROSENNE, THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION (1970).

112. *See id.* at 286-89.

113. Summary Records of the 681st Meeting, [1963] 1 Y.B. INT'L L. COMM'N 52, U.N. Doc. A/CN.4/SER. A/1963 [hereinafter cited as 1963 ILC Records] (statement of Mr. Paredes, Ecuador); *id.*, 682d Meeting, at 54-56 (statement of Mr. Rosenne, Israel); *id.* at 58 (statement of Mr. Tabibi, Afghanistan); Summary Records of the 827th Meeting, [1966] 1 Y.B. INT'L L. COMM'N 31 (Part 1) U.N. Doc. A/CN.4/SER. A/1966 [hereinafter cited at 1966 ILC Records].

114. *E.g.,* 1963 ILC Records, *supra* note 113, at 53 (682d mtg.) (statement of Mr. Verdross, Austria).

115. *E.g., id.* at 52 (681st mtg.) (statement of Mr. Castren, Finland); *id.* at 57 (682 mtg.) (statement of Mr. Tunkin, U.S.S.R.).

116. *Id.* at 54 (682d mtg.) (statement of Mr. Briggs, United States).

117. *E.g., United Nations Conference on the Law of Treaties, First Session Vienna, 26 March-24 May 1968, Official Records,* U.N. Doc. A/Conf. 39/11, at 273 (1969) [hereinafter cited as *First Session Official Records*] (48th mtg.) (statement of Mr. Alcivar-Castillo, Eduador).

Bulgaria and thirteen other states co-sponsored a successful amendment[119] to establish that the rule against coerced treaties antedated the Charter and to bind non-member states.[120] Significantly, opposition to the Bulgarian amendment centered on its possible effect on treaties concluded before 1945, and did not go to the existence of the rule itself.[121]

Most importantly, both Lauterpacht and Waldock, Special Rapporteurs on the law of treaties, understood that in their formulations of article 52 they were "codifying, not developing the law of nations in one of its most essential aspects."[122] Only the proposed but subsequently rejected[123] provisions calling for the adjudication of claims were regarded as *de lege frenda*.[124] In its report to the General Assembly, the ILC reiterated that "[t]he invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today."[125] The ILC thus considered article 52 to be only a

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118. *E.g., id.* at 281, (50th mtg.) (statement of Mr. Osiecki, Poland); *id.* at 284 (statement of Mr. Saulescu, Romania).

119. The Bulgarian (14 state) amendment inserted the italicized words in the International Law Commissions's text: "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/C. 1/L. 289 & Add. 1, *reprinted in United Nations Conference on the Law of Treaties, First and Second Sessions, Official Records, Documents of the Conference,* U.N. Doc. A/Conf. 39/11/Add. 2, at 172-73 (1971) [hereinafter cited as *Conference Documents*].

120. *E.g., First Session Official Records, supra* note 117, at 273 (48th mtg.) (statement of Mr. Smejkal, Czechoslovakia); *id.* (statement of Mr. Alcivar-Castillo, Ecuador).

121. *E.g., id.* at 293 (51st mtg.) (statement of Mr. Kearney, United States); *see* MALAWER, COERCED TREATIES, *supra* note 60, at 10-15.

122. Lauterpacht, *(First) Report on the Law of Treaties,* U.N. Doc. A/CN.4/63, *reprinted in Documents of the Fifth Session* [1953] 2 Y.B. INT'L L. COMM'N 90, 151, U.N. Doc. A/CN.4/SER. A/1953/Add. 1 [hereinafter cited as Lauterpacht, *Report*], *quoted in* Waldock, (SECOND) *Report on the Law of Treaties,* U.N. Doc. A/CN.4/156 & Add. 1-3, *reprinted in Documents of the Fifteenth Session,* [1963] 2 Y.B. INT'L L. COMM'N 51, U.N. Doc. A/CN.4/SER. A/1963/Add. 1 [hereinafter cited as Waldock, *Report*].

123. *See, e.g.,* Waldock, *Report, supra* note 122, at 51.

124. Lauterpacht, *Report, supra* note 122, at 150.

125. Report of the International Law Commission to the General Assembly, 18 U.N. GAOR, Supp. (No. 9), U.N. Doc. A/5509 (1963), *reprinted in* [1963] 2 Y.B. INT'L L. COMM'N 197, U.N. Doc. A/CN.4/SER. A/1963/Add. 1. That article 52 codified, rather than developed, customary international law, has been recognized by most writers. *See, e.g.,* MALAWER, IMPOSED TREATIES, *supra* note 59, at

codification.

Since state practice[126] and the opinions of writers[127] support the rule of article 52, and since the United States and Iran have signed the Convention,[128] article 52 must be regarded as governing the question whether coercion vitiated United States consent to the settlement agreement.

C. *The Definition of Force*

1. "Force" as Defined by the International Law Commission and the 1969 Vienna Conference on the Law of Treaties

Article 52 voids treaties procured through "the threat or use of force in violation of the principles of international law embodied in The Charter of the United Nations";[129] therefore, the central question in analyzing the validity of the instant treaties is the meaning of "force." The major controversy in both the ILC's deliberation and the Vienna Conference over the meaning of "force" was whether it encompassed economic and political pressure as claimed by Third World and communist countries, or merely physical force as maintained by certain western industrialized countries.[130]

At the Vienna Conference the Australian delegates responded to Third World and communist arguments that the United Nations Charter prohibited all forms of force, including economic and political pressure, by arguing that article 2(4) of the Charter

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156; A. McNAIR, THE LAW OF TREATIES (1961); I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 95-100 (1975); Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L., 495, 532-33 (1970); Nablik, *The Grounds of Invalidity and Termination of Treaties*, 65 AM. J. INT'L L. 736, 743 (1971).

126. *See* MALAWER, IMPOSED TREATIES, *supra* note 59.

127. *See* note 126 *supra*. *But see* Stone, *De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace*, 8 VA. J. INT'L L. 356 (1968) (criticism of article 52).

128. *See* note 72 *supra*.

129. Convention on Treaties, *supra* note 37, art. 52.

130. *See, e.g., First Session Official Records, supra* note 117, (statement by Mr. Saulescu, Romania). The amendment to include economic and political pressure would have changed article 49 [52] to read: "A treaty is void if its conclusion has been procured by the threat or use of force, including economic or political pressure, in violation of the principles of the Charter of the United Nations." U.N. Doc. A/Conf. 39/C. 1/L. 67/Rev.1/Corr. 1, Reports of the Committee of the Whole, U.N. Doc. A/Conf. 39/14 (1969), *reprinted in Conference Documents, supra* note 119, at 172.

was intended to prohibit only aggressive war.[131] It is submitted that neither of these positions accurately reflects the current definition of "force." Although the Third World's initiative failed to expand the definition of "force,"[132] the "legislative history" of article 52 shows that it includes most if not all forms of physical violence and that a similar examination of the history of article 2(4) of the Charter[133] and related concepts[134] reinforces this conclusion.

Debate on the scope of "force" occurred not only at the 1968-1969 Conference on the Law of Treaties, but stretches back to the 1953 report on the law of treaties by Sir Hersh Lauterpacht[135] in which he proposed that "treaties imposed by or as the result of the use of force or threats of force against a State" would be invalidated by the International Court of Justice at the request of any state.[136] He noted that although the prohibition against the use of force has its origin in pre-World War II developments, it was the cumulative effect of the Covenant of the League of Nations, the Kellogg-Briand Pact, and the United Nations Charter that prohibited the threat or use of force.[137] Recognizing that his formulation of the rule against coerced treaties followed the language of article 2(4) of the Charter,[138] Lauterpacht distinguished between physical force and the threat of its use, and other types of coercion.[139] Conceding that the borderline between the two types of coercion is not rigid, Lauterpacht held that only physical force "however indirect invalidates a treaty and that war was merely a subspecies of 'force.' "[140] He would, however, also in-

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131. *See, e.g., First Session Official Records, supra* note 117, at 282. (statement of Mr. Harry, Australia).

132. *See generally, e.g.,* I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 95-100 (1973); MALAWER, COERCED TREATIES, *supra* note 60, at 16-25.

133. *See* text accompanying notes 187-219 *infra.*

134. *See* text accompanying notes 220-60 *infra.*

135. Lauterpacht, *Report, supra* note 122, at 90.

136. *Id.* at 147.

137. *Id.* at 148.

138. *Id.* at 149.

139. "The article refers to physical force or threats of physical force as distinguished from coercion not amounting to physical force." *Id.*

140. *Id.*

> The merit of the formulation adopted in the Charter is that it obviates the doubts, which gave rise to some uncertainty under the Covenant and the Pact of Paris, as to whether in a particular case the use of force amounts to war in the technical use of the term. Under the Charter and the article

clude within the rubric of invalid imposed treaties those procured by

> attempts or threats to starve a state into submission by cutting off its imports or its access to the sea, although no force is used directly against persons . . . Neither would it appear to be essential that compulsion this directly applied against a State should be the result of a war or of other use of direct physical force.[141]

Lauterpacht thus concluded that "the inevitably indefinite character of this cause of invalidity of treaties renders it particularly necessary to make its operation dependent upon impartial determination as provided in this article."[142]

Sir Gerald Fitzmaurice, the next Special Rapporteur, was less sanguine about the possible effect of the prohibition against coerced treaties, and argued against such a prohibition. Fitzmaurice urged the restriction of the types of force which might result in the invalidity of a treaty:

> The case must be explicitly confined to the threat or use of *physical* force, since there are all too numerous ways in which a State might allege that it had been induced to enter a treaty by pressure of some kind, (*e.g.*, 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.[143]

The next Special Rapporteur, Sir Humphrey Waldock, reinstated a revised version of the prohibition against coerced agreements. This version forbade treaties entered into "through an act of force or threat of force, employed . . . in violation of the principles of the Charter of the United Nations."[144]

Discussion in the ILC of Waldock's and subsequent revisions of predecessors of article 52 reveal that the prohibition against the use of force is wider than that suggested by the Australian delegate.[145] In the ILC's 1963 sessions on Waldock's draft article, discussion centered on three topics: the wording of the article,

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as here formulated that distinction is devoid of relevance.
Id.

141. Lauterpacht, *Report, supra* note 122, at 149.

142. *Id.* at 149-50.

143. Fitzmaurice, *(Third) Report on the Law of Treaties,* [1958] 2 Y.B. INT'L L. COMM'N 20, 38, U.N. Doc. A/CN 4/115 (1968).

144. Waldock, *Report, supra* note 122, at 51.

145. *See* text accompanying notes 133 *supra* through 182 *infra.*

whether a coerced treaty was void or voidable, and the scope of the term "force." Shabtai Rosenne had proposed that the wording of the draft article more closely follow that of article 2(4) of the United Nations Charter.[146] His and similar suggestions were accepted[147] with the subsequent recognition that "article 2, paragraph 4, together with other provisions of the Charter, authoritatively declares the modern customary law regarding the threat or use of force."[148] With regard to whether a coerced treaty is void or voidable, the vast majority of delegates believed that customary law rendered such treaties absolutely void or void *ab initio*.[149]

The scope of the prohibition against the use of force provoked more discussion. Those favoring expansion of the scope of the prohibition to include economic and political pressure differentiated between "force" and "war," and apparently believed that "force" was broader. For example, Mr. Yasseen of Iraq remarked that while "[t]he Covenant of the League of Nations and other international instruments had restricted the right to resort to war, [t]he Charter of the United Nations prohibited the use or threat of force. . . ."[150] Mr. Paredes of Ecuador argued that prohibition against force "had been given full expression in the Charter of the United Nations and in the regional Charter of the Organization of American States [OAS]"[151] and that the wider definition in OAS treaties[152] should be employed in this instance.

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146. 1963 ILC Records, *supra* note 113, at 58 (682d mtg.).

147. *Id.* at 61 (683d mtg.) (statements of Sir H. Waldock, Special Rapporteur).

148. Draft Articles on the Law of Treaties with Commentaries, *Conference Documents, supra* note 119, at 67. The final draft of article 52 does not conform to or expressly mention article 2(4) in order to (1) permit treaties to be imposed on aggressors, (2) make the article binding on non-member states, 1963 ILC Records, *supra* note 113, at 62 (683d mtg.) (statement of Sir H. Waldock, Special Rapporteur), and (3) avoid prejudicing later interpretation of the Charter, *id.* at 59, ¶ 71 (682 mtg.) (statement of Mr. Arechaga, Chairman).

149. *See, e.g.*, 1963 ILC Records, *supra* note 113, at 52 (681st mtg.) (statement of Mr. de Luna, Spain).

150. *Id.* at 56 (682d mtg.) (statement of Mr. Yasseen, Iraq).

151. *Id.* at 52 (681st mtg.) (statement of Mr. Paredes, Ecuador).

152. Mr. Paredes quoted article 11 of the 1933 Convention on the Rights and Duties of States to the effect that "[t]he contracting States definitively establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been gained by force, whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. . . ." *Id.*

Similarly, those who opposed expansion of "force" did not limit "force" to "war," and in fact distinguished between the two concepts, although somewhat less frequently. Mr. Vendross of Austria held that the rule against imposed treaties was first recognized in the Stimson doctrine, under which the United States declared that it would not recognize treaties wrought by war.[153] He also noted that this principle, although not explicitly stated, was implicit in article 2(4)'s prohibition against force.[154] Mr. Castren of Finland urged that political or economic pressure "should be disregarded [as ground for invalidity, for] article 12 dealt with physical force only."[155] Similarly, in the 1966 ILC session on the law of treaties, Third World and other delegates argued that article 2(4) of the Charter had developed to encompass kinds of "force" other than "armed" force.[156]

At the 1969 Vienna Conference on the Law of Treaties, Third World countries renewed the drive for including prohibitions against economic and political pressure with the prohibition against the use of force.[157] Mr. El-Dessouki of the United Arab Republic championed this position, stating that economic pressure such as blockades could be as effective as military force, especially if the target country's economy relied upon one crop or export product.[158] Numerous Third World countries argued that the Charter's definition of "force" was not restricted to "armed force."[159] They urged that either the language of article 2(4) of the Charter, which prohibits the use of force in violation of the "Purposes of the United Nations," encompassed economic and political pressure[160] because the meaning of "force" itself had expanded since the drafting of the Charter,[161] or that economic and political pressure was outside the spirit of the Charter.[162] It is also important to note the forms of "force" which those states sup-

153. *Id.* at 53 (682d mtg.) (statement of Mr. Vendross, Austria).

154. *Id.*

155. *Id.* at 52 (681st mtg.) (statement of Mr. Castren, Finland).

156. *See, e.g.*, 1966 ILC Records, *supra* note 113, at 31 (statement of Mr. de Luna, Spain).

157. *See* MALAWER, COERCED TREATIES, *supra* note 60, at 16.

158. *First Session Official Records, supra* note 117, at 274 (49th mtg.) (statement of Mr. El-Dessouki, United Arab Republic).

159. *Id.* at 270 (48th mtg.) (statement of Mr. Mercado, Bolivia).

160. *Id.* at 284 (50th mtg.) (statement of Mr. Saulescu, Romania).

161. *Id.* at 287-88 (51st mtg.) (statement of Mr. Dadzie, Ghana).

162. *See, e.g., id.* at 290-91 (51st mtg.) (statement of Mr. DeCastro, Spain).

porting the Third World position considered to be within the rubric of physical or armed "force." In arguing for the expansion of the definition of force, Mr. Mutale of the Democratic Republic of the Congo stated:

> [The] word "force" as employed in the United Nations Charter and in Article 49[52] of the draft covered *all forms of force* starting with threats and including in addition to bombardment, military occupation, invasion or *terrorism,* more subtle forms such as technical and financial assistance and economic pressure in the conclusion of treaties.[163]

Western and certain Latin American countries responded to these arguments in five ways. The first response was made by Mr. Harry of Australia who restricted the term "force" to a meaning equivalent to war by stating that the prohibition "referred to physical force, armed force of the type used by the aggressor powers in the war that was still raging when the Charter was drafted at the San Francisco Conference."[164] Notions of political and economic pressure were not yet well enough "established in law to be incorporated into the convention as a ground for invalidating a treaty."[165] Other nations, such as Uruguay advanced a second response: "the expression 'the threat or use of force' was a time-honored and broad term embodied in the United Nations Charter, which did not exclude particularly serious cases of economic or political coercion, such as economic blockade. . . ."[166] Accordingly, "force" meant "armed force," whether used "overtly or in well-known indirect" ways.[167] The Third World amendment "might give the impression . . . that these forms of pressure were not at present covered" by the Charter.[168] The third response was a policy argument that the inherent vagueness[169] of the term "force and the difficulties in ascertaining when force vitiates a

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163. *United Nations Conference on the Law of Treaties, Second Session Vienna, 9 April-22 May 1969, Official Records,* U.N. Doc. A/Conf.39/11/Add. 1, at 100 (1970) (emphasis added) [hereinafter cited as *Second Session Official Records*].

164. *First Session Official Records, supra* note 117, at 282 (50th mtg.).

165. *Second Session Official Records, supra* note 163, at 101 (20th mtg.) (statement of Mr. Tsurvoka, Japan).

166. *First Session Official Records, supra* note 117, at 276-77 (49th mtg.) (statement of Mr. Arechaga, Uruguay).

167. *Id.* at 278 (statement of Mr. Almeida, Portugal).

168. *Id.* at 277 (statement of Mr. Arechaga, Uruguay).

169. *Id.*

State's consent to a treaty make it unwise to broaden the definition.[170] Fourth, it was noted that it was inappropriate for the Conference to expand the definition because such expansion would amount to an interpretation of the Charter, a task already entrusted to the Special Committee on the Principles of International Law Concerning Friendly Relations and Cooperation between States.[171] Fifth, it was asserted that leaving "force" undefined would allow for subsequent interpretation of the Charter.[172]

The Conference compromised by removing the Third World amendment[173] and substituting in The Final Act of the Conference a "Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties"[174] which provides, in relevant part, that the Conference "[s]olemnly 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 principle of sovereign equality of States and freedom of consent. . . ."[175]

2. Meaning of "Principles of International Law" Embodied in[176] The Charter of the United Nations

In the ILC's deliberations and at the Vienna Conference[177] three interpretations for the phrase "principles of international law" were advanced. First, article 52 was designed so that it did not interfere with the inherent right of self-defense as recognized in the Charter.[178] Second, article 52 could not interfere with a state's right to impose a peace treaty upon an aggressor.[179] Third,

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170. *Id.* at 287 (50th mtg.) (statement of Mr. Devadder, Belgium).

171. *Id.* at 289 (51st mtg.) (statement of Mr. Maresca, Italy).

172. *Id.* at 276-77 (49th mtg.) (statement of Mr. Arechaga, Uruguay).

173. *Id.* at 465 (78th mtg.).

174. Final Act of the United Nations Conference on the Law of Treaties, U.N. Doc. A/Conf. 29/26 (1971), in *Conference Documents, supra* note 119, at 285.

175. *Id.*

176. For the meaning of "international law embodied in," see note 119 *supra.*

177. *See* note 163 *supra.*

178. *E.g.,* 1963 ILC Records, *supra* note 113, at 57 (682d mtg.) (statement of Mr. Tunkin, U.S.S.R.); *id.* at 62 (683d mtg.) (statement of Sir H. Waldock, Special Rapporteur).

179. *E.g., First Session Official Records, supra* note 117, at 288 (51st mtg.)

the term "principles" was used to bind states which were not United Nations members.[180] It has also been pointed out, however, that "[b]y emphasizing the *principles* of the Charter, the article implies all those rules and practices of international law which underlie the Charter provisions and which are of general application today."[181]

It is submitted that article 52's prohibition on coerced treaties has moved beyond that of treaties imposed by "aggressive use of military force."[182] The International Law Commission clearly distinguished between war and force,[183] and even those favoring expansion of the term to include economic and political pressure viewed terrorism as physical or armed force.[184] Both those opposing and those favoring the inclusion of economic and political pressure recognized that the term "force" was broad,[185] and it was finally agreed that "force" should remain undefined so that it might be subject to future interpretations.[186]

3. "Force" in Article 2(4) of the United Nations Charter

Although the Third World and the industrialized West split over the scope and effective date of the prohibition against coerced treaties, most nations agreed that the rule was established as of the date of the adoption of article 2(4)[187] of the United Nations Charter, if it did not actually flow from the article.[188] Thus, both reliance on and the ambiguity of article 2(4) of the Charter, which prohibits threats or use of force only against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations in drafting article 52, and the disputes in the ILC and in the 1969 Vienna Conference on The Law of Treaties necessitate an examination of the legislative history of the Charter provisions.

Article 2(4) of the Charter is a lineal descendant of chapter 2,

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(statement of Mr. Khlestov, U.S.S.R.).

180. *E.g., Conference Documents, supra* note 119, at 66; 1963 ILC Records, *supra* note 113, at 53 (682d mtg.) (statement of Mr. Vendross, Austria).

181. T. ELIAS, THE MODERN LAW OF TREATIES 170-71 (1974).

182. MALAWER, IMPOSED TREATIES, *supra* note 59, at 7, 9.

183. *See* text accompanying notes 150-56 *supra.*

184. *See* text accompanying notes 153-55 *supra.*

185. *See* text accompanying note 163 *supra.*

186. *See* text accompanying note 172 *supra.*

187. For the text of article 2(4), see note 46 *supra.*

188. *See* text accompanying notes 147-49.

article 4 of the Dumbarton Oaks Proposals for a General International Organization (DOP), which provided that "[a]ll members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization."[189] As part of the preparation for the United Nations Conference on International Organization in May and June 1945, governments were invited to submit comments on, and suggestions for the amendment of the DOP.[190] These comments and suggested amendments revealed that although governments generally supported chapter 2, article 4 as then formulated, they believed that the provisions should be strengthened by making it more specific.

Amendments came primarily from Latin American and smaller nations and can be placed into four categories. First, Belgium and Uruguay proposed amendments based on the Stimson non-recognition doctrine.[191] Bolivia believed that the Charter had to contain "a double and reciprocal guaranty among . . . members":

> [T]he first, concerning the territorial inviolability of the states, the legal validity of acquisitions of territory which may originate in acts of force or other means of compulsion not being recognized; and the second, concerning respect for the political independence of the states and the right which they possess to develop freely in their internal life, without the intervention of any other state.[192]

Uruguay carried this sentiment further by requesting that members of the United Nations undertake "the obligation of maintaining, even by armed force, the integrity of rights and the frontiers of the countries threatened or attacked."[193]

The second category of amendments came from countries such as Chile,[194] Mexico,[195] and Paraguay.[196] These countries commented that "nonintervention in the domestic or foreign affairs of another State" should form "one of the fundamental principles of

189. Doc. 1, 6/1, 3 U.N.C.I.O. Docs. 1, 3 (1945).
190. Doc. 3, 6/2, (1), 3 U.N.C.I.O. Docs. at 2.
191. For an explanation of the Stimson nonrecognition doctrine, see R. FARRELL, AMERICAN DIPLOMACY 537-38, 540 (3d ed. 1975).
192. Doc. 2, G/14(4), 3 U.N.C.I.O. Docs. 578 (1945).
193. Doc. 2, G/7(a), 3 U.N.C.I.O. Docs. at 30.
194. Doc. 2, G/7(i), 3 U.N.C.I.O. Docs. at 283.
195. Doc. 2, G/7(c), 3 U.N.C.I.O. Docs. at 65-66.
196. Doc. 2, G/7(1), 3 U.N.C.I.O. Docs. at 347.

international harmony."[197] Third, Chile, drawing upon the Kellogg-Briand Pact, advocated the "abandonment of war as an instrument of national policy,"[198] while Costa Rica proposed that the phrase "in any manner inconsistent with the purposes of the Organization" be dropped from the Dumbarton Oaks Proposals "in order that the principle of abstention from the use of force may be absolute."[199] Last, Norway, Panama, and Ecuador advanced amendments proposing that force be forbidden except where approved by the Organization.[200]

The principles advanced by Bolivia and others resulted in the adoption of the Australian amendment, which stated that "[a]ll members of the organization shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any member or state or in any other manner inconsistent with the purposes of the United Nations."[201] Small states[202] remained unsatisfied, however, and supported a proposal by New Zealand requiring "[a]ll members of the Organization [to] undertake collectively to resist every act of aggression against any member."[203] Delegates from the United States and the United Kingdom spoke against the amendment, which was defeated.[204] They pointed out that it would narrow the obligation of members to cover only instances of aggression, that an aggressor might escape collective action by calling its act "by some other name," and that it was similar to provisions of the Covenant of the League of Nations that the United States had earlier found unacceptable.[205]

Certain nations continued to express concern over possible loopholes in the prohibition against the threat or use of force, in-

197. Doc. 2, G/7(i), 3 U.N.C.I.O. Docs. at 283.

198. *Id.*

199. Doc. 2, G/7(h), 3 U.N.C.I.O. Docs. at 274.

200. Doc. 2 G/7(n)(1), 3 U.N.C.I.O. Docs. at 366 (Norway); Doc. 2, G/7(p), 3 U.N.C.I.O. Docs. at 399 (Ecuador); Doc. 2, G/7(8)(2), 3 U.N.C.I.O. Docs. at 270 (Panama).

201. Doc. 739, I/1/A/19(a), 6 U.N.C.I.O. Docs. 720-(1945).

202. The delegates from Belgium spoke in favor of the New Zealand proposal and the Panamanian delegate offered a proposal which would have added the phrase "and to preserve against aggression the territorial integrity and political independence of all Members." Doc. 778, I/1/26, 6 U.N.C.I.O. Docs. at 342-46.

203. *Id.* at 342.

204. *Id.* at 346.

205. *Id.* at 344-46.

cluding situations in which the use of force might be lawful, and the types of force, if any, that might be employed legally under the Charter. "Various delegates" "pointed out that the phraseology of paragraph four might leave it open to a member state to use force in some manner consistent with the purposes of the Organization but without securing the assent of the organization to such use of force."[206] The Brazilian delegate also suggested that "apart from the use of legitimate self-defense, the text as it stood might well be interpreted as authorizing the use of force unilaterally by a state, claiming that such action was in accordance with the purposes of the Organization."[207] Delegate views on the queries thus posed indicate the broad scope of chapter 2, article 4 of the DOP. For example, in response to the Brazilian delegate's interpretation, the Belgian delegates stated that the changes in the original text, especially the phrase "in any other manner," covered the problem.[208] The Norwegian delegate added that he favored clarification of the Committee report to reflect the notion that paragraph 2(4) "did not contemplate any use of force, outside of action by the Organization,[209] going beyond individual or collective self-defense." He proposed that the phrase "territorial integrity and political independence" be eliminated "as being unnecessary in light of the Charter provisions."[210] The United Kingdom delegate stated that he did not disagree with the Norwegian delegate's reasoning, but thought that the amended text avoided conflict with the Charter's enforcement provisions.[211] Significantly, he "made it clear that the intentions of the authors of the original text was to state in the broadest of terms an all inclusive prohibition"; the phrase "or in any other manner" was designed to insure that there should be no loopholes."[212]

The delegate[213] to the 1968-1969 Vienna Conference on the Law of Treaties correctly noted, with regard to the specific types of force permitted, that the 1945 San Francisco conference had rejected a Brazilian amendment that would have forbidden eco-

206. Doc. 283, I/1/19, 6 U.N.C.I.O. Docs. at 304.
207. Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. at 334.
208. *Id.*
209. *Id.*
210. *Id.* at 334-35.
211. *Id.* at 335.
212. *Id.*
213. *First Session Official Records, supra* note 117, at 282 (50th mtg.) (statement of Mr. Harry, Australia).

nomic pressure.[214] Consideration of a Norwegian amendment revealed, however, that although economic force was not banned, the prohibition against force was broader than that against the "territorial integrity and political independence" of states. Norway proposed that chapter 2, paragraph 4, be amended to enjoin "the threat *of force and from any* use of force *not approved by the Security Council as a means of implementing* the purposes of the Organization."[215] According to the Rapporteur,

> The Committee likes it to be stated in view of the Norwegian amendment to the same paragraph that the *unilateral use of force or similar coercive measures* is not authorized or admitted. The use of arms in legitimate self-defense remains admitted and unimpaired. The use of force, therefore, remains legitimate only to back up the decisions of the Organization at the start of a controversy or during its solution in the way that the Organization itself ordains. The intention of the Norwegian amendment is thus covered by the present text.[216]

Thus, to offend article 2(4) a party need not violate a state's "territorial integrity or political independence." The discussion of force was not designed to be restrictive but rather to offer certain guarantees to small nations.[217] Article 2(4) prohibits not only blatant uses of force such as Hitler's invasion of Czechoslovakia, but also any threat or use of force contrary to the "[p]urposes of the United Nations."[218] Furthermore, the prohibitions on *threats* of force widen even further the scope of forbidden actions.[219]

4. "Force" in the Declaration Concerning the Principles of International Law Concerning Friendly Relations and Cooperation

Throughout the ILC's deliberations on article 52, western states countered Third World and Soviet bloc arguments that article 52 should explicitly invalidate treaties procured through the use of

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214. Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 334-35 (1945).

215. Doc. 2, G/7(n)(1), 3 U.N.C.I.O. Docs. at 366.

216. Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. at 400 (emphasis added). Identical language is retained in a subsequent report. Doc. 944, I/1/34(1), 6 U.N.C.I.O. Docs. at 459.

217. I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 267 (1963).

218. *See* U.N. CHARTER arts. 1, 2(4).

219. *See* BROWNLIE, *supra* note 217, at 364.

economic and political pressures[220] by referring to the work of the Special Committee on the Principles of International Law Concerning Friendly Relations and Cooperation Among States (Declaration of Friendly Relations). Western states argued that it was not the province of the ILC to interpret the Charter,[221] that the Special Committee was charged with considering the seven basic principles of international law,[222] and that to pass on the question of the inclusion of economic and political force would be to usurp the Special Committee's role.[223] Thus, an analysis of the Declaration on Friendly Relations must supplement any interpretation of article 52.[224]

The relevant portions of the Declaration on Friendly Relations buttress the conclusion that the prohibition on the threat or use of force is broader than the prohibition on the use of regular military forces to change the international frontiers of a state or to extinguish a state's independence. For example, the first principle of the Declaration, that "states shall refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations,"[225] resulted in much disagreement between Eastern bloc and nonaligned states, which desired to expand the principle, and Western states, which wanted to insure that their inherent right to self-defense not be impaired and that the legitimacy of wars of national liberation not be recognized.[226] The first paragraph of the Declaration explicating this principle, and efforts to expand the definition of "force" to include economic and political pressures, were repulsed despite efforts to raise the base figure for the quantum of pressure necessary to

220. *See* text accompanying note 171 *supra.*

221. *Id.*

222. Note, *The Declaration of Friendly Relations,* 12 HARV. INT'L L.J. 509, 509 (1971); Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey,* 65 AM. J. INT'L L. 713, 713 (1971); Houben, *Principles of International Law Concerning Friendly Relations and Cooperation Among States,* 61 AM. J. INT'L L. 703, 703 (1967).

223. *See* text accompanying note 171 *supra.*

224. *See* text accompanying notes 187-88 *supra.*

225. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028(1921) [hereinafter cited as Friendly Relations Declaration].

226. Houben, *supra* note 222, at 705.

trigger the prohibition on the use of force.[227] Paragraph four establishes that states must refrain from the threat or use of force "to violate the existing international boundaries of another state or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of states."[228] Thus, this paragraph is "merely a special case of the general prohibition . . . and was inserted because of the historic importance of the use of force across boundaries."[229] This provision complements the second principle of the Declaration, that "states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered."[230] Consistent with this principle, "state parties to an international dispute . . . shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations."[231] The Declaration further provides that "the parties to a dispute have the duty, in the event of the failure to reach a solution by any one of the above peaceful means[232] to continue to seek a settlement of the dispute by other peaceful means agreed upon by them."[233] Thus, a combination of the prohibition on the threat or use of force to solve international disputes and the obligation to use only peaceful means to settle disputes, even when the enumerated methods have failed, establish an almost absolute obligation to avoid the use of force in settling disputes. Furthermore, the Declaration recognizes that the prohibition against the use of force can be offended without violating a state's boundaries or causing the victim state to cease its separate existence.

5. Force and the Definition of Aggression

Attempts to define aggression antedate the League of Na-

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227. Third World States would consider economic pressure to offend article 2(4) of the Charter only when it threatened the territorial integrity of political independence of states. *See* Houben, *supra* note 222, at 707.

228. Friendly Relations Declaration, *supra* note 225, art. 1, ¶ 4.

229. Rosenstock, *supra* note 222, at 718.

230. Friendly Relations Declaration, *supra* note 225, art. 2.

231. *Id.*

232. *See* U.N. CHARTER art. 33.

233. Friendly Relations Declaration, *supra* note 225.

tions.[234] Active development of the definition in the United Nations, however, dates from the early 1950s when the Soviet Union, angered at United Nations actions in Korea, and smaller states, fearful for their safety, pushed for a comprehensive definition.[235] The Definition of Aggression (Definition) adopted by the General Assembly in 1974[236] is primarily for the use of the Security Council in its enforcement activities.[237] It should be noted that aggression is not the most serious act threatening peace; aggression is but one type of activity along a continuum of hostile acts that may endanger peace and security.[238]

Article 1 of the Definition provides that "[a]ggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations, as set out in this definition."[239] Article 1 of the Definition is thus more restrictive than article 2(4) of the Charter. First, the Definition requires the use of "armed force," but article 2(4) refers only to "force."[240] Second, although article 2(4) states that "[m]embers shall refrain . . . from the threat or use of force," the Definition omits threats from activities constituting aggression.[241] Third, the Definition phrase "in any other manner inconsistent with the Charter of the United Nations . . ."[242] contrasts with article 2(4)'s requirement that the threat or use of force not be "incon-

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234. 1 B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE 4-6 (1975).

235. 2 *id.* at 1-3.

236. Definition, *supra* note 39, *reprinted in* 2 FERENCZ, *supra* note 234, at 15.

237. *Id.* at 2d preambular paragraph. According to the United Nations Charter, the Security Council is charged with determining "the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39.

238. *See, e.g.*, as to the difference between aggression and offensive war, 2 FERENCZ, *supra* note 234, at 64 n.132 (citing DE VISCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 303-06 (1968)).

239. Definition, *supra* note 39, art. 1.

240. This is consistent with the rejection of economic and political forces as aggression. 2 FERENCZ, *supra* note 234, at 30.

241. *See* Broms, *The Definition of Aggression*, 154 Recueil des Cours 299, 342 (1977); 2 FERENCZ, *supra* note 234, at 29.

242. Definition, *supra* note 39, at 143.

sistent with the Purposes of the United Nations."[243] At least one commentator has suggested that the primary purpose of these modifications is to insure states' inherent right to self-defense,[244] which arises when a member of the United Nations suffers an "armed attack" and exists only until the Security Council "has taken the measures necessary to maintain international peace and security."[245]

Article 2 of the Definition is a compromise between backers of the priority[246] and *animus aggressionis*[247] principles. It provides that the "first use of armed force by a State in contravention of the Charter[248] shall constitute *prima facie* evidence of an act of aggression," but the Security Council may find otherwise in light of "other relevant circumstances" or if the acts are de minimus.[249] Subject to article 4 of the Definition, which states that the Security Council may determine other acts to constitute aggression,[250] article 3 lists types of acts that "shall, subject to and in accordance with the provisions of article 2, qualify as . . . act[s] of aggression."[251] Included in this nonexhaustive list are invasion and annexation of territory,[252] bombardment or use of weapons against another state's territory,[253] blockade,[254] violation of a troop stationing agreement,[255] and allowing territory to be used for aggression against a third state.[256] More noteworthy in dealing with the Iranian situation are paragraphs 3(d) and 3(g). Article 3(d) includes in the category of aggressive acts "[a]n attack by

243. U.N. CHARTER art. 2(4).

244. Broms, *supra* note 241, at 343. There is some dispute, however, as to the meaning of these changes. *See* 2 FERENCZ, *supra* note 234, at 29, and sources collected at 63 n.123.

245. U.N. CHARTER art. 51.

246. For an explanation of the priority principle, see 2 FERENZ, *supra* note 234, at 31.

247. *See id.*

248. It is unknown whether this deviation from article 2(4) is significant.

249. Broms, *supra* note 241, at 344-47.

250. "The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter." Definition, *supra* note 39, art. 4.

251. *Id.* art. 3.

252. *Id.* art. 3(a).

253. *Id.* art. 3(b).

254. *Id.* art. 3(c).

255. *Id.* art. 3(e).

256. *Id.* art. 3(f).

the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state."[257] 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 of such gravity as to amount to the acts listed above,[258] or its substantial involvement therein."[259] Article 3, however, is qualified by article 7, which states that nothing in the Definition of article 3 may "prejudice the right of self-determination . . . of peoples forcibly deprived of that right . . . nor of the right of these people to struggle to that end."[260] Aggression, therefore, is one of the most serious acts threatening peace; and although aggression is a subspecie of "force," it requires the offending state to commit more grievous and unambiguous acts, such as actual invasion and annexation, than the mere threatening of a state's "territorial integrity and political independence."[261]

D. *The Question of Causation*

Related to the question of the kind and amount of force necessary to invalidate a treaty is the issue of when the application of threats or force concludes the allegedly void treaty. Although to be void under article 52 a treaty must be "procured"[262] through the threat or use of force, procurement is a vague concept as there are few cases discussing the matter. The issue is addressed only briefly in the *travaux preparatoires* of the article.[263] In his 1953 report on the law of treaties[264] Sir Hersh Lauterpacht proposed that "[t]reaties imposed by or as the result of the use of force or threats of force against a State in violation of the principles of the Charter of the United Nations are invalid if so declared by the International Court of Justice (ICJ) at the request of any State."[265] The consequences of a finding by the ICJ of such

257. *Id.* art. 3(d).
258. *See* text accompanying notes 252-57 *supra.*
259. Definition, *supra* note 39, art. 3(g).
260. *Id.* art. 7.
261. *Id.* art. 1.
262. Convention on Treaties, *supra* note 37, art. 52.
263. As to state practice on this point, see MALAWER, IMPOSED TREATIES, *supra* note 59, at 89-106.
264. Lauterpacht, *Report, supra* note 122.
265. *Id.* at 151 art. 12.

threats or use of force[266] were to be severe. Treaties resulting from the threat or use of force were void, not voidable.[267] The coerced state could not choose to deny part of the treaty and affirm the rest, or affirm the whole treaty.[268] According to Lauterpacht, "[t]he attitude of acquiescence or apparent acquiescence on the part of the coerced party is irrelevant."[269] Furthermore, under Lauterpacht's proposal an international tribunal would not be competent to determine if any portions of the coerced treaty were fair and reasonable.[270] It would be impossible to determine if any portion of the coerced treaty could be "intrinsically reasonable" since force was necessary to its conclusion.[271] Allowing an international tribunal to affirm the fairness of the treaty might legitimize the coercion, contrary to international public policy.[272]

Considering the type of threat or quantum of force that would cause the treaty to fall within the ambit of the prohibition, Lauterpacht indicated that "coercion, however indirect, if resulting from an unlawful use of force or threats of force invalidates a treaty."[273] Apparently, although the coercion itself may be indirect, the illegal use or threat of force must rise to a certain level to constitute "coercion":

> This means that a treaty is invalid if a state, as a result of unlawful use of force, has been reduced to such a degree of impotence as to be unable to resist the pressure to become a party to a treaty although at the time of signature no obvious attempt is made to impose upon it by force the treaty in question.[274]

Thus, although under Lauterpacht's proposal indirect force alone may trigger the sanction, his concept of coercion requires such a strong threat that many instances involving the indirect use of force would not fall within his concept of prohibited force.

Whether the threshold is as high as Lauterpacht maintains is questionable for several reasons. First, previous cases of treaty in-

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266. For Lauterpacht's views on the definition of force, see text accompanying notes 139-41 *supra*.
267. Lauterpacht, *Report*, *supra* note 122, at 151.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* at 151-52.
273. *Id.* at 149.
274. *Id.*

validation do not appear to require that the coerced state be impotent.[275] In its letters to the ICJ in the *Fisheries Jurisdiction Cases*,[276] Iceland alleged that a 1961 international fishing rights agreement between it and the United Kingdom was imposed by force.[277] The alleged illegal use of force was the presence of the Royal Navy in waters near Iceland during the negotiation of the agreement.[278] The Court rejected Iceland's contention, stating that "a court cannot consider an accusation of this serious nature on the grounds of vague general charges unfortified by the evidence . . . ."[279] Thus, the primary basis for the Court's rejection of Iceland's claim was evidentiary, and not that the claim, if supported by adequate proof, would render the treaty void.[280] The ICJ also examined the circumstances surrounding the conclusion of the agreement, however, and concluded that "[t]he history of the negotiations which led up to the 1961 Exchange of Notes reveals that these instruments were freely negotiated by the interested parties on the basis of perfect equality and freedom of decision on both sides."[281] Thus, the ICJ opinion indicated that when the circumstances of an agreement's conclusion demonstrate that it was "freely negotiated . . . on the basis of perfect equality and freedom of decision on both sides,"[282] the agreement will be valid, and, by implication, that cases not involving negotiations as "free" as those between the United Kingdom and Iceland may render a treaty void.

In his dissenting opinion,[283] Judge Padillo Nervo suggested that a lower quantum of force or proof is necessary to establish invalidity:

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275. *See* note 263 *supra*.

276. Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1973] I.C.J. 3 (jurisdiction), [1974] I.C.J. 3 (merits).

277. *See* MALAWER, IMPOSED TREATIES, *supra* note 59, at 142-46.

278. *Id.* at 144.

279. [1973] I.C.J. 58-59 (jurisdiction).

280. *See* MALAWER, IMPOSED TREATIES, *supra* note 59, at 145.

281. [1973] I.C.J. 49, 58-59.

282. *Id.*

283. *Id.* at 46-47. Policy grounds also militate against imposing too high a standard of causation for invocation of the rule. If a state must be proven "impotent to resist pressure to become a party to a treaty," Lauterpacht, *Report*, *supra* note 122, at 149, a high standard may encourage coerced states to resort to an illegal use of force themselves, or the fear that failure to do so may result in their later being obliged to honor the treaty.

> A big power can use force and pressure against a small state in many ways, even by the very fact of diplomatically insisting on having its view recognized and accepted. The Royal Navy did not need to use armed force and its mere presence on the seas inside the fishery limits of the constant state could be enough pressure.[284]

Thus, although the impotence of the coerced state will ensure the invalidity of the imposed treaty, such impotence is not required by all authorities. The standard of causation is relatively low, therefore: The coerced state need not be impotent in all respects but merely impotent to resist the pressure to join the treaty, and this coercion can be effected by the indirect threat of force.

E. *Iran's Conduct as Invalidating the Hostage Settlement Agreement*

1. Iran's Conduct as an Illegal Use of Force

The seizure of the United States embassy by Iran, the physical abuse of the hostages, and threats to kill or try the hostages made during the course of the negotiations for their release appear to constitute a violation of the concept of the threat or use of force within the meaning of article 52 of the Vienna Convention on the Law of Treaties and article 2(4) of the United Nations Charter, although it most probably does not rise to the level of aggression.

Aggression. Iran's seizure of the United States embassy most likely cannot be considered aggression because the seizure did not constitute the use of "armed force" against "the territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations."[285] Although weapons facilitated the seizure,[286] "armed force" as used in the Definition of Aggression is a narrower concept that the definition of "force" under article 2(4) of the Charter. Independently of the "territorial integrity" language, "armed force" seems to require the violation of a State's borders. Although the precise intent of the drafters is unclear,[287] the deviation from the text of article 2(4) in the Definition of Aggression was designed primarily to in-

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284. [1973] I.C.J. 4, 46-47.

285. Definition, *supra* note 39, art. 1. This is supported by the statements of various individuals throughout the crisis. *See* text accompanying notes 327 *infra*.

286. *See* text accompanying note 84 *supra*.

287. *See* 2 FERENCZ, *supra* note 234, at 29, and sources collected at 62 n.123.

sure States' rights to self-defense, in "armed attack" situations.[288] Armed attack is generally defined as an organized "offensive" "trespass" across a states' frontiers and does not include "sporadic operations by armed bands."[289] Nevertheless, Brownlie has pointed out that

> it is conceivable that a coordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state from which they operate, would constitute an 'armed attack,' more especially if the object were the forcible settlement of a dispute or the acquisition of territory.[290]

But even Brownlie's exception implies the necessity of a frontier crossing or outside sponsorship of in-state activity; armed attack does not contemplate "internal disorders."[291] Therefore, the seizure of the embassy by a small private group of Iranian students, does not qualify as aggression, even though the militant students' actions might have been accomplished with the apparent complicity of the Iranian authorities[292] and was subsequently endorsed by the Islamic Republic of Iran, because the embassy seizure appears to be the product of internal disorders and not to involve a frontier crossing or outside sponsorship.

The enumeration of acts qualifying as acts of aggression in article 3 of the Definition reinforces the notion that aggression requires a violation of a State's frontiers and that Iran's actions did not rise to that level. Article 3 lists such acts as invasion and annexation of, or the bombardment of, or the use of weapons against, another state's territory; or "an attack by the armed forces of a state on the land, sea, or air forces . . . of another state; or "the 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."[293] Although at least one commentator has suggested that embassy grounds constitute State territory for purposes of the Definition,[294] the modern law of diplomatic immunity rejects extra-territoriality as a fiction and considers

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288. U.N. CHARTER art. 51.

289. BROWNLIE, *supra* note 217, at 278.

290. *Id.* at 279.

291. *Id.* at 278 n.5.

292. *See* text accompanying notes 84-85 for the acts that may have involved the Iranian authorities' complicity in the seizure.

293. *See* text accompanying notes 252-56 *supra.*

294. MALAWER, *supra* note 36.

both embassy grounds and diplomatic personnel as "inviolable."[295] The incidental presence of Marine guards at the embassy[296] should not render Iran's actions an attack on the "land, sea, or air forces" of another State, and the requirement of a "sending"[297] of armed bands or irregulars also implies a border crossing. Furthermore, as the ICJ has noted, Iran's conduct in seizing the embassy constituted a violation of the principles of the United Nations Charters;[298] it did not violate the Definition because it did not violate the Charter itself.

2. Article 2(4) and the Declaration of Friendly Relations

Although the clearest violation of article 2(4) is crossing another country's borders to take territory or to extinguish its existence as a State, the prohibition in article 2(a) on the threat or use of force is much broader. As mentioned, a number of delegations to the 1945 San Francisco Conference supported amendments that would have forbidden all use of force, except where approved by the United Nations.[299] Others, in response to queries about the possible effect of the phrase "territorial integrity or political independence"[300] pointed out that the framers intended "to state in the broadest terms an all-inclusive prohibition."[301] Both the "unilateral use of force" and "*similar coercive measures*" were covered by article 2(4).[302] Thus, it is submitted that article 2(4)'s broad language encompasses Iran's seizure of the embassy and subsequent threats to kill or try the hostages.

This conclusion is buttressed by consideration of the relevant portions of the Declaration on Friendly Relations. The first principle of the Declaration essentially restates article 2(4) and is thereby also offended by Iran's actions.[303] Paragraph one of the Declaration on Friendly Relations which explicates the principle forbidding the threat or use of force to violate the "existing inter-

295. Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3217, T.I.A.S. 7502, 500 U.N.T.S. 95, art. 22.
296. *See* text accompanying note 88 *supra.*
297. Definition, *supra* note 39, art. 3(g).
298. I.C.J. Iran Judgment, *supra* note 76, at 573, ¶ 91.
299. *See* text accompanying note 200 *supra.*
300. *See* text accompanying note 210 *supra.*
301. *See* text accompanying note 212 *supra.*
302. *See* text accompanying note 216 *supra.*
303. Rosenstock, *supra* note 222, at 717.

national boundaries of another state or as a means of solving international disputes,"[304] is simply a special case of the general prohibition on the use of force,[305] thus confirming the broad scope of the prohibition in article 2(4). Iran's actions appear to violate paragraph one which forbids the use of force to solve any international disputes, especially since Iran failed to use all peaceful means at its disposal to settle disputes with the United States over the return of the Shah.[306]

Force under article 52. Although the definition of force under article 52 is coextensive with the definition under article 2(4), the conclusion that Iran's actions offend article 52 of the Vienna Convention on the Law of Treaties is also supported by the discussion offered by the framers of article 52. Both Lauterpacht and Fitzmaurice explained that only "physical force" could invalidate treaties, if indeed they could be voided.[307] The term "physical force," although undefined, distinguishes and excludes economic pressure,[308] and Lauterpacht noted that even indirect physical force, invalidated treaties.[309] Since "physical force" encompasses nearly all forms of physical pressures, Iran's seizure of the embassy and subsequent threats to kill or try the hostages constitute the threat or use of force within the meaning of article 52.

Iran's conduct also constitutes force according to the various explanations expounded during the 1969 Vienna Conference on the Law of Treaties. Third World delegates ruled that all forms of force, and not merely armed force, were prohibited;[310] the Iranians who captured and held the embassy were clearly armed. The Uruguayan delegates noted that "force" was a broad term including more serious forms of economic and political pressure;[311] Iran attempted to exercise this type of pressure. Furthermore, Third World delegates noted that armed force included terrorism,[312] and the Conference itself condemned all forms of force or

304. *Id.* at 717 n.8.
305. *Id.* at 717.
306. *See* text accompanying notes 232-33 *supra.*
307. *See* text accompanying notes 140-43 *supra.*
308. *Id.*
309. Lauterpacht, *Report, supra* note 122, at 149.
310. *First Session Official Records, supra* note 117, at 270 (48th mtg.) (statement of Mr. Mercado, Bolivia).
311. *Id.* at 276-77 (49th mtg.) (statement of Mr. Arechaga, Uruguay).
312. *Second Session Official Records, supra* note 163, at 100.

pressure.[313]

Iran's actions also offend the language in article 58 which prohibits treaties imposing threats of force in violation of the "principles of international law embodied in the Charter of the United Nations."[314] According to the International Court of Justice, "[t]here is no more fundamental prerequisite for the conduct of relations between states . . . than the inviolability of diplomatic envoys and embassies . . . ."[315] Even if Iran's actions do not expressly fall within the already recognized reach of "force," the International Law Commission felt "that the precise scope of the acts covered . . . should be left to be determined in practice by interpretation of the relevant provisions of the Charter."[316] This broad interpretation indicates that the prohibition can be expanded to cover Iran's conduct.

The conclusion that Iran's actions constitute an illegal use of force is buttressed by official statements made during the course of the crisis. The ICJ repeatedly[317] referred to the seizure of the embassy as an "attack,"[318] "armed attack,"[319] "assault,"[320] or "invading force"[321] by an "armed group"[322] that constituted "coercive action"[323] against the United States. The court also observed 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 principles of the Charter of the United Nations . . . ."[324] In contrast to this was the ICJ's treatment of the United States attempted military rescue of the hostages in April 1980.[325] The court described these United States actions as "operations," or "rescue operations" or an "in-

313. *See* text accompanying notes 174-75 *supra.*

314. *See* text accompanying notes 176-81 *supra.*

315. I.C.J. Iran Judgment, *supra* note 76, at 573, ¶ 91.

316. Draft Articles on the Law of Treaties with Commentaries in *Conference Documents, supra* note 119, at 66, ¶ 3.

317. I.C.J. Iran Judgments, *supra* note 76, at 574, ¶ 95. These statements were issued in conjunction with the ICJ judgment ordering Iran to release the hostages and pay reparations.

318. *Id.* at 559, ¶ 24.

319. *Id.* at 566, ¶ 57.

320. *Id.* at 558, ¶ 18.

321. *Id.* ¶ 17.

322. *Id.* at 557, ¶ 14.

323. *Id.* at 572, ¶ 87.

324. *Id.* at 573, ¶ 91.

325. *Id.* at 560, ¶ 32.

cursion" into Iranian territory.[326] Similarly, though most delegates were careful to avoid inflaming Iran in debate in the Security Council on the resolution calling on Iran to free the hostages, Mr. N'Dong of Gabon regretted that the embassy should be the "object of aggression."[327]

3. The Question of Causation

The final question in considering whether Iran's action invalidates the agreement is whether the agreement was "procured" through the illegal threat or use of force: Does the seizure of the embassy fourteen months prior to the conclusion of the agreement and Iran's continued threats throughout the course of negotiations vitiate the United States consent to the agreement despite the appearance of lengthy negotiations between the two countries and concessions by Iran to the United States?[328] Although the treaty was not militarily imposed upon the United States, Lauterpacht's analysis would suggest that the United States was "reduced to such a degree of impotence as to be unable to resist the pressure to become a party" to the treaty.[329] Iran's seizure of the embassy and threats during the negotiating process constituted sufficient pressure to cause the United States to accede to an otherwise objectionable agreement, or to include otherwise objectionable terms.[330] But, as previously discussed,[331] the ICJ has suggested a less stringent requirement of causation: that an agreement that is not freely negotiated may be invalid.[332] Use of this or similar standards suggested by Judge Nervo's dissenting opinion in the *Fisheries Jurisdiction Case*[333] suggests that the hostage settlement agreement was illegally procured by force.

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326. *Id.* at 573, ¶ 93.

327. U.N. MONTHLY CHRONICLE, Jan. 1980, at 8.

328. For example, Iran agreed to pay off all bank loans and to commit nationals' claims to international arbitration. *See Claims Settlement Declaration, supra* note 8.

329. *See* text accompanying note 274 *supra.*

330. The return of frozen Iranian assets which might have been used to pay United States claims against Iran is an example of an objectionable term.

331. *See* text accompanying notes 275-82 *supra.*

332. *Id.*

333. *See* text accompanying notes 284-85 *supra.*

III. CONCLUSION

Since the hostage settlement agreement falls within the ambit of article 52, the potential domestic and international effects of the agreement must be considered. The basic international impact is stated in article 52: a treaty is "void" if procured by duress. The International Law Commission clearly rejected characterizing such treaties as voidable,[334] and called them void *ab initio*.[335] None of the provisions in a void *ab initio* treaty may be salvaged because

> 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 act 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.[336]

Thus, although the Commission regards treaties procured by duress as void, uncertainty is created by the proviso that these treaties may be "maintained in force." Further uncertainty is created by article 65 of the Convention, which establishes procedures to be followed upon assertion of the invalidity of a treaty. According to article 65, a party must notify other parties of its claim[337] when it invokes a ground to invalidate a treaty. If after three months neither party objects to the claim of invalidity, the party claiming invalidity may declare the treaty void.[338] If a party objects, however, the parties must "seek a solution" under article 33 of the United Nations Charter.[339] Article 70 of the Convention provides that "[a] treaty the validity of which is *established* under the present Convention is void . . . [and has] no legal force."[340]

A contradiction thus exists in the legal force accorded treaties procured by duress and the procedures established by the Convention. Although a coerced treaty is void *ab initio*, its invalidity must be asserted by the coerced state and "established" by the

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334. Draft Articles on the Law of Treaties with Commentaries, in *Conference Documents, supra* note 119, at 66, ¶ 6.
335. *Id.*
336. *Id.* at 66-67.
337. Convention on Treaties, *supra* note 37, art. 65(1).
338. *Id.* art. 65(2), art. 67(2).
339. Convention on Treaties, *supra* note 37, art. 65(3).
340. *Id.* art. 70(1).

required steps.[341] If articles 65 and 70 do not represent a condition of customary law on these points[342] however, they may not be applicable to the treaty between the United States and Iran.

If articles 65 and 70 do not represent customary law, the question, aside from whether the President has the constitutional power to conclude a self-executing agreement of this type,[343] is whether the Supremacy Clause[344] presumes an internationally legal treaty. Although a treaty has never been declared unconstitutional, the courts have reserved this right[345] and there are historical[346] and case precedent[347] indications from the Founding Fathers that the requirements of international law provide standards which all treaties must meet. But the political question[348] and act of state[349] doctrines may block consideration of the legality of the agreements. The application of these doctrines of self-imposed, judicial restraint, however, would be inappropriate in cases involving the validity of a treaty. Although a President may invoke his own enumerated and implied powers[350] to conclude self-executing international agreements, the grant of the treaty-making power to the Senate in the Constitution suggests that greater scrutiny be given executive agreements:

> However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to intrust that power to an elective magistrate of four years' duration. It has been remarked, upon another occasion, and the remark is unquestionably just, that an hereditary monarch, though

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341. *See generally* Briggs, *Procedures for Establishing the Invalidity or Termination of Treaties Under the International Law Commission's 1966 Draft Articles on the Law of Treaties*, 61 AM. J. INT'L L. 976, 977-78 (1967).

342. According to Briggs, the "boldest innovations" in the convention are in those articles dealing with procedures regarding nullity, invalidity, and termination. *Id.* at 977.

343. *See, e.g.*, W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941).

344. U.S. CONST. art. VI, § 2.

345. *E.g.*, Geofroy v. Riggs, 133 U.S. 258 (1890).

346. *E.g.*, THE FEDERALIST No. 64 (J. Jay), at 422 (Mod. Lib. ed. 1941).

347. *E.g.*, United States v. Rauscher, 119 U.S. 407 (1886).

348. *See, e.g.*, Dickson, *The Law of Nations as National Law: "Political Questions,"* 104 U. PA. L. REV. 451, 484-92 (1956).

349. *See, e.g.*, Williams, *The Act of State Doctrine:* Alfred Dunhill of London, Inc. v. Republic of Cuba, 9 VAND. J. TRANSNAT'L L. 735 (1976).

350. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

> often the oppressor of his people, has personally too much stake in the government to be in any material danger of being corrupted by foreign powers. But a man raised from the station of a private citizen to the rank of chief magistrate, possessed of a moderate or slender fortune, and looking forward to a period not very remote when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice his duty to his interest, which it would require superlative virtue to withstand. An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.[351]

Equally important, the structure of international law suggests that the agreements be more closely scrutinized. Mutual respect is the cornerstone of international law. But, given the lack of sanctions in international law[352] and the difficulties of settling third party disputes through concerted action emanating from the United Nations, national courts may provide the only effective forum for enforcement of minimal standards of world public order.

James M. Redwine

351. THE FEDERALIST No. 75 (A. Hamilton), at 486-87 (Mod. Lib. ed. 1941).

352. *See* W. FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).