Validity of the Settlement Under International Law

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have them. It is going to have to be somebody who has sufficient credibility with the Third World to be acceptable. But it should be somebody who is fundamentally schooled in the Western system of law and rooted in the concepts of property rights and human rights.

Charles Brower: I gather that consideration is being given to London as an alternative seat for the arbitration. Why is it being considered, are there any others, and why?

Mark Feldman: There are a great many anglophiles among the claimants' bar in Washington who feel that they want the amenities of London. Some of them even told me that we could not run something like this out of The Hague. I said I didn't believe that.

Charles Brower: They've probably been to The Hague.

Mark Feldman: There is enough work to spread all around Europe as far as I can see.

**Validity of the Settlement Under International Law**

Alan Swan: I think we should begin this afternoon to work a little bit on the question of the validity of the agreements under international law. Later, we will pick up questions regarding the statutory authorities that underlie the executive actions in this case. So, to get us started on the issue of the international legal validity of the agreement—the effect of that question on the jurisdiction of the arbitrators and on court actions—I'm going to ask Hans Smit if he would open up with some remarks.

Hans Smit: When I saw the terms of the settlement with Iran for the first time, I followed what I have already told you is my natural inclination, and that is to test its validity under the Hans Smit conception of justice. I came to the conclusion that an agreement of that nature had to be void or voidable under international law. Having reached that conclusion, I went to the authorities to see whether I could find someone to back up the accuracy of that statement. I looked at the Vienna Convention on the Law of Treaties and found some articles that bore upon it. One of them, article 52, said that a

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55. Id. This article states:

*Coercion of a state by the threat or use of force*

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.
treaty concluded under the threat of force or under the compulsion of force incompatible with the Charter of the U.N. was void. There is also article 53 which says that a treaty that violates a norm of *jus cogens*—a peremptory norm of international law—is void. It seemed to me at first glance that especially article 52 constituted solid support for the proposition that the Agreements were void. No one could deny that they had been concluded under the threat of force and that that force was violative of international law. In fact, the highest court in the world had held that the use of force which gave rise to these Agreements—the seizure of the American Embassy and the taking of hostages—constituted a violation of international law. That left the question of whether the peculiar formulation used in article 52, namely the use or threat of force incompatible with the principles of the Charter, included all uses or threats of force incompatible with international law. I was very happy to find in the travaux preparatoirs—the deliberations of the International Law Commission and the proceedings of the conference that led to the adoption of the Vienna Convention—that it was the clear, explicit, and unambiguous intention of all involved in the drafting of article 52 to bring within its ambit all threats of physical force incompatible with international law. It was very interesting to read those travaux preparatoirs. The question was not whether you should somehow limit the kinds of force that might render an agreement void. The question was whether you should expand it and bring other forms of coercion or duress, including economic boycotts and economic compulsion, within this provision. The Third World, of course, argued for the expansion. It was quite clear that the drafters did not, in the end, want to go that far, but that any threat of force incompatible with international law was a reason for regarding an agreement void.

56. Id. This article provides:

*Treaties conflicting with a peremptory norm of general international law (jus cogens)*

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.


then looked a little further into whether these agreements would violate a peremptory norm of international law. I found that one of the examples they gave of such an agreement would be an agreement to take hostages. It seemed to me that it was not too much to say that if such an agreement violated a peremptory norm of international law, then an agreement to pay for the release of hostages also violated a peremptory norm of international law. Then it also occurred to me that, after all, one of the sources of international law is the general principles of law recognized by civilized nations, and that I really don't know of any civilized nation that honors an agreement to pay a hostage-taker or kidnapper for release of hostages. Thus, it seemed to me that there was really very strong support for the proposition that the agreements concluded with Iran were agreements that, under international law, were void.

Now, what I have said does not at all prejudge the question of whether the United States should abide by the Agreements. In fact, it does not even prejudge the question of whether, as a matter of internal law, the Agreements are binding in the United States. But I do think it is important for the United States, in some form, to make clear that agreements of this nature are, in its estimation, void, and that if it chooses to abide by such agreements it does so in full realization that it is giving up the opportunity afforded by international law to refuse to honor the agreements. I am concerned about the possible precedential effects of the United States, without any condition or qualification, honoring these Agreements.

Now, I was very surprised to see the Reagan Administration, in declaring that it was going to abide by the Agreements, also say that it had not considered the question of whether they were void under international law. This, of course, raises a very interesting problem, that is, to what extent the arbitral tribunal and whatever national courts may be called upon to make a decision in that regard are

60. U.S. Dep't of State, Department Statement, Feb. 18, 1981, 81 DEP'T STATE BULL., No. 2048 at 17 (1981) (Reagan Administration Statement Announcing Compliance with the Hostage Agreements) [hereinafter Reagan Administration Statement] [for text, see infra Appendix at 80].

61. The pertinent portion of the Reagan Administration Statement provides:

The conclusion of the agreements was a legal exercise of Presidential authority. This authority will be subject to challenge in our courts, and the executive branch will, of course, abide by the determination of our judicial system. We did not find it necessary to reach a conclusion as to the legally binding character of these agreements under international law. We are proceeding because we believe it is in the overall interests of the United States to carry out the agreement.

Id. (Emphasis added).
free to determine the question. In fact, the arbitral tribunal could presumably do so on its own motion because it would seem to go to its competence. I had thought the question would probably not arise in the arbitral tribunal because as a matter of international law, if the Reagan Administration indicated that it wanted to abide by the agreement, the tribunal could say that the question was foreclosed since President Reagan certainly had apparent authority under international law to do that. Now that the Reagan Administration has said that it has not considered the question, I think it is rather difficult for the arbitral tribunal to say that the Reagan Administration has taken a position on the point and, therefore, is bound under an argument of estoppel or ratification.

As to the internal situation in the United States, I think it is very interesting. If the power of the President to conclude these agreements rests not only upon his foreign relations power but also upon a power derived from IEEPA and if the Agreements were void and not binding on the United States until ratified by President Reagan, it must be noted that under the IEEPA the President could only issue that ratification if there was a crisis situation. But, of course, the crisis had by then passed, so I think there are really two basic questions before us. One, are the Agreements void? Two, if they are void, has President Reagan ratified or reaffirmed them by his declarations and statements? That question is to be subdivided into subquestions, namely, to what extent are they binding upon the United States in the international arbitral tribunal and, secondly, to what extent are they binding in courts in the United States before whom the question may be raised?

Covey Oliver: All of us who are committed to effectiveness and fairness in the international legal order have had, after reading this agreement, the concerns which have just been voiced. But, I have

62. 50 U.S.C. § 1701 provides:
(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.
(b) The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

[for full text, see infra Appendix at 206].
difficulty in seeing how the concept just expressed—of a pact void for duress and violation of *jus cogens*—is relevant to the present circumstance. Subject to what Soia Mentschikoff tells us, even a void compact requires a moving party of some sort to make the complaint that it is void. To paraphrase what we learned in first-year torts—negligence in the air is not enough—voidness in the air is not enough either; a party must move, take a negative position. So far that has not happened. Quite to the contrary, a position reaffirming the agreement has been taken by the United States. But, to continue, just a word more with respect to the somewhat sorrowful thoughts expressed by expectant people such as Hans Smit and myself. It comes to me that we who work in the vineyards of hope for an improved international legal order, have to keep in mind also that those who work on international problems in an official capacity may not always be able to look at national goals and values in the same way we do. I am one of those split personalities who has lived in both these worlds. I too have had to use the international legal order and international legal principles in an instrumental way rather than as ends in themselves.

I think it is very sad that the situation presents itself. Yet it is a reality in our world. To the extent that we can salvage something from such an instrumental use, it is in our general interest to try and engage in that type of salvage operation. And toward this end, I can see many elements of value in these agreements. The only one that I cannot see any element of value in—leaving it for Mark Feldman and others to explain if they wish—is the beady-eyed precision with which the decision in our favor in the International Court of Justice was kicked in the teeth. It seems to me there might have been ways to draft certain portions of the Agreements differently on this matter. I say this with apologies because I was not involved in the drafting, obviously, nor am I above papering over some of the weaknesses in our system to the end that the system itself may become, in time, more credible. Nevertheless, the specific reference to a renunciation of the award of the judgment of the Court in our favor rather sticks-in-the-craw. I am sure there must have been reasons. Iran must have insisted very specifically on this and there must not have been any way around it. It may be that that was the situation.

63. Algerian Declaration, supra note 1, at par. 11, provides in part: “Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice....”
Returning again, however, to the basic point; over all it seems to me that the discussion of duress and of *jus cogens* under the circumstances of U.S. acceptance of the Agreements has ended the issue, unless farther down the road the United States may want, after having acted pursuant to the Agreements, to reverse its field and claim that the Agreements are void, always were void, and therefore never were Agreements. It is an interesting question to speculate whether a state may estop itself from asserting, after initial acceptance, somewhat later in time that an agreement was void all the way along. Certainly from the political point of view, the position taken by the United States in regard to these Agreements was that they were crucially in the national interest, even after the hostages were freed. This was based on a concern for turbulence in, and our general stance as to, the Middle East. The major political trouble with anyone calling these Agreements void for duress or *jus cogens* is that these were not Agreements between the United States and Iran, but with a willing, helpful third party, Algeria. Thus, another key state in the Middle East was involved in the process. My general feeling is that voicing for the record the doubts just expressed is useful, but that’s about as far as we can usefully go.

*Harold Maier:* I have some general concern with the mixing up of what seem to me separable issues. One of the questions is whether the United States ought to comply with the terms of the Agreements as a political matter. The other is the question whether the United States ought to take the position, or ought to refrain from taking the position, that it is complying with the Agreements because it elects to do so rather than because it is legally required to do so. My understanding of what Hans Smit was suggesting was that the issue here goes not to the question of whether we should, in fact, carry out the Agreements; the question is whether we ought to carry it out because we recognize its legal validity or whether we ought to deny its legal validity while at the same time saying we will carry it out. I worry about the longer-term precedential impact of the various kinds of things that both Covey Oliver and Hans Smit noted. The fact is that the Agreements were formed, in truth, out of a coercive situation and that it was, in fact, a situation that violates an element in the Charter that has not been mentioned yet; namely article 2(3) of the U.N. Charter, 64 which requires that disputes be settled by peaceful means.

64. “All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”
They are Agreements which quite clearly, in the eyes of the world, would not have been arrived at but for the taking of American diplomats as hostages in Iran. That is not to suggest that the United States ought to refuse to carry out its part of the Agreements. I do have, however, some real concern with the long term impact on the development of international law if the United States implicitly or explicitly recognizes the legal validity of an agreement brought about by acts of this kind. This is particularly significant with regard to those portions of the Agreements dealing with the return of the Shah's wealth.65

_Robert Mundheim:_ I don't know if I fully understand the duress argument. For example, why does the duress argument not apply to every peace treaty?

_Hans Smit:_ Well, you have to understand the evolution of international law. In the old days war was an acceptable instrument for settling disputes. So, if you resorted to war and obtained a peace treaty you had a binding and enforceable instrument. Today it is thought that, with the advent of the U.N. Charter, that rule has lost a lot of its validity. Now it is only a use of force compatible with the U.N. Charter that may lead to an enforceable peace treaty. For instance, the peace treaty that the United States arrived at with Germany at the end of World War II was an appropriate peace treaty because it was concluded after a war waged in the exercise of a right recognized by the U.N. Charter; namely, the right of self-defense. Likewise, agreements pertaining to the independence achieved through the use of force and guerrilla warfare by some of the countries that were under colonial regimes are argued to be compatible with international law because that use of force was in the exercise of the right of self-determination. In this particular case we have a very unusual situation. We have an exercise of force that has been held by the highest international tribunal to be a forbidden exercise of force. Thus, as international law stands today, it is impossible to contend that the use of force in this case is arguably permissible under international law.

_Edward Gordon:_ Is it then your position that the Camp David Accords66 are void because they were entered into at a time when Israeli military forces controlled the territory of Egypt?

Hans Smit: No, because a significant argument could be made that the use of force, certainly on the part of Israel, was a permissible use of force in the exercise of the right to self-defense.

Edward Gordon: But the argument can always be made, should Egypt want to decline to carry out not just the Camp David Accords but all the other accords with Israel, that any agreement entered into when Israel occupied Egyptian territory was per se void. For that matter, could the United States ever enter into an unchallengeable treaty with a country if it had imposed economic sanctions against that country?

Hans Smit: Well, as I told you, the use of force is not regarded as including economic boycotts and coercions. That was a question that was explicitly considered at the time of the adoption of article 52 of the Vienna Convention and it was concluded that such coercion was not within that article. One cannot deny, however, that there is, given the present status of international law, a significant question whether a use of force that is incompatible with the dictates of international law can lead to an enforceable treaty. Now you must not forget that, as in this situation, it is quite possible to come to a resolution of a dispute after the use of force has ceased, or if the parties through their actions abide by a previous agreement under circumstances in which the use of force or the threat of force no longer endures. But then that treaty is binding, not because it was achieved under the use of force, but because after the use of force had ceased the parties chose to abide by it.

Edward Gordon: That's right. In fact the draftsmen of article 52, or what was then article 49, specifically provided that the parties could thereafter, if they wanted, maintain such a treaty.

Hans Smit: They didn't provide it but remarked on it in the travaux preparatoire.

Edward Gordon: Let me read it. This is the commentary to what became article 52 by the International Law Commission, which drafted the Vienna Convention in the first instance. It says: “Even if it were conceivable that after being liberated from the influence of a threat or the use of force a State might wish to allow a treaty procured from it by such means, the Commission considers it essential that the treaty should be regarded in law as void ab initio.”67 The United States had wanted it to be voidable. I point that out because of

something I will say later. The Commission then went on and stated: "This would enable the State concerned to take a position in regard to the maintenance of a treaty that was a position of full legal equality with the other State. If, therefore, the treaty were maintained in force it would in effect be by the conclusion of a new treaty and not by the recognition of the validity of a treaty procured by means contrary to the most fundamental principles of the Charter of the United Nations." 68

Hans Smit: Exactly.

Edward Gordon: So I am having trouble understanding why this is a terribly significant issue if, in fact, the United States wants to enter into these Agreements, assuming it has the authority to enter these Agreements in any form. After all, a new administration of a different political party, has reconsidered it, made a point of saying publicly that it would reconsider it, did reconsider it, and then decided to maintain it. What is all the fuss and bother about?

Alan Swan: You are concluding then that it is now a ratified agreement?

Edward Gordon: I'm trying to beg that question for the time being and asking Hans Smit what difference it makes.

Hans Smit: I see two immediate points of relevance. First, we have to think about the future. We must make sure that the United States does not take a position on the validity of the Agreements which may, to an extent that we cannot now determine, encourage others to think that if they engage in this kind of exercise they will be able to conclude an agreement that the United States will stand by, or have to stand by, under international law. Second, if the Agreements are now void agreements which have been ratified by the Reagan Administration, then we have a different legal situation. The Reagan Administration, when stating it would abide by the Agreements, also said that it was taking no position on the voidness of the Agreements under international law. It could, therefore, be argued that, to the extent that the question of voidness is something which it might invoke later, it has retained the power to do so. Also, of course, the question of the constitutional and statutory authority of the President to enter into the Agreements is not to be determined by reference to the situation at the time President Carter concluded the Agreements, but by reference to the situation at the time President Reagan confirmed them. That may occasion a very different legal conclusion.

68. Id.
Mark Feldman: Hans Smit has told us what the statement of the Reagan Administration was. I can tell you that the specific reason for the disclaimer of any determination concerning the binding effect of the Agreements under international law was a political concern. The Administration did not want it thought that it was observing these Agreements because it was bound by international law to do so. It wanted to set that issue aside. The Agreements were implemented because they served the national interest. I want to emphasize in this connection that the Administration, as recently as Wednesday, March 4, in testimony before the Senate Foreign Relations Committee has said that the “terms” of the Agreements serve the national interest quite apart from our strategic interests in the Middle East.

I would question seriously the proposition that has been assumed by everyone here, that the United States would not have made these Agreements but for the hostage taking. The point might be made that we would not have been able to take as much advantage of the presence of Iran's assets in the United States as we have, but for the hostage taking. Iran got only a fraction of its own assets back. In effect, we took the rest through a process of agreement which provided for the up-front payment of the syndicated loans, the escrow of another $1.4 billion of assets, plus a commitment to an arbitral process. The United States did not negotiate from weakness in the

69. Undertakings, supra note 1, at para. 2, provides:

2. Iran having affirmed its intention to pay all its debts and those of its controlled institutions, the Algerian Central Bank acting pursuant to Paragraph 1 above will issue the following instructions to the Central Bank:

(A) To transfer $3.667 billion to the Federal Reserve Bank of New York to pay the unpaid principal of and interest through December 31, 1980 on (1) all loans and credits made by a syndicate of banking institutions, of which a U.S. banking institution is a member, to the Government of Iran, its agencies, instrumentalities or controlled entities, and (2) all loans and credits made by such a syndicate which are guaranteed by the Government of Iran or any of its agencies, instrumentalities or controlled entities.

70. Id. cl. (B), provides:

(B) To retain $1.418 billion in the escrow account for the purpose of paying the unpaid principal of the interest owing, if any, on the loans and credits referred to in Paragraph (A) after application of the $3.667 billion and on all other indebtedness held by United States banking institutions of, or guaranteed by, the Government of Iran, its agencies, instrumentalities or controlled entities not previously paid and for the purpose of paying disputed amounts of deposits, assets, and interests, if any, owing on Iranian deposits in U.S. banking institutions. Bank Markazi and the appropriate United States banking institutions shall promptly meet in an effort to agree upon the amounts owing.

71. Algerian Declaration, supra note 1, at General Principles, para. B.
situation. It did not pay to get the hostages back. It took the assets under control in order to get the hostages back. It paid back Iran’s own assets. We exercised counterforce which the United States uniquely in the world is in a position to do. No one in the present Administration whom I know of has any concern about future hostage-takers thinking that they are going to get benefits from taking hostages because of this set of arrangements.

Now, just to make one other point: the Office of Legal Adviser, in discussions that were internal to our own shop and had no real relationship to the policy review going on, looked at these provisions of the Vienna Convention. We raised some of the same questions that are being raised here today. We became convinced that the Convention is not good law. Despite the consensus apparent in the drafting of that Convention, there is no example of state practice to support it; it is unlikely that there will be. It would be a terrible result if parties were inhibited from negotiating their way out of serious confrontations by such a rule. That is not to say that there is no law on the subject of duress, but it simply is not as clear-cut as article 52 would have it. In our view, and it is a personal view shared by some of the staff, the results of a negotiation determine the legality of the agreement. The fairness of the deal is in some way relevant to whether the terms were extracted by duress. We think these were very balanced agreements in many ways.

*Michael Reisman:* I agree with Mark. One has to look not only at the instrument used at a particular moment in time, but at the entire process and particularly at the outcome before one concludes that there has been unlawful coercion. It is the totality that is a critical thing, and not the coercion *per se.* Coercion is an ubiquitous factor in all human interaction as well as in interaction between states. The mere presence of coercion should not invalidate an agreement.

As a separate matter, I think the use of economic coercion is probably included in article 52. On the day the Vienna Convention was signed a declaration was passed by the plenary conference. It suggests that to some extent economic coercion was in the minds of the drafters of the Vienna Convention. But, on the facts of this case, if one looks not only at the presence of coercion during the course of the negotiations, but the final outcome, it would be pretty hard to sustain the case that this is an agreement reached under duress and, therefore, void.

Covey Oliver: That exigency, especially economic exigency (in which we are specialists) is not duress, is one point I wanted to make. Duress cuts both ways and jus cogens is a doctrine of very, very, primitive content at the present time. The only thing remaining to say is that, while the Vienna Convention is the best evidence we have of the customary law governing international agreements, it is not itself positive law yet. So, when a convention still not in force at all is taken as merely evidence of customary law, it seems to me that only a restrained construction of its terms is permissible and prudent.

Lawrence Newman: I want to raise the question whether, contrary to what the Administration has been saying, ransom was paid here? We among the claimants are saying that there will be some indirect ransom paid by losses to the Treasury if we do not, in fact, get our claims fully satisfied before the tribunal. But more than that, the Government seems to have given up its right to reparations before the International Court of Justice and there has been a waiver of the right to damages for injury to the U.S. property within the U.S. Embassy compound. The State Department representatives, in testimony before the Senate Foreign Relations Committee on Wednesday, March 4, brought home a point that I had not focused on before, that is, the United States still does not have its embassy back. I do not know whether it may have given up its right to get the embassy back or at least to get paid for the damage done to it. It seems, in other words, that there has been and will likely continue to be some kind of tribute or ransom paid here of some nature. I would like to hear Mark's response. I was rather distressed to hear that we are still talking about the possibility of getting our embassy back.

Mark Feldman: It seems to me pretty far out if the claimants have to rely on damages to the embassy.

Lawrence Newman: I am speaking as an observer on that point.

Mark Feldman: We did not give up the embassy. As a matter of fact we have not given up the judgment either. We have just agreed not to press for enforcement of it. We still have a judgment, including a judgment for the embassy. The letter of withdrawal of the case, which is still sitting on the Secretary's desk, specifically reserves our right to get the embassy back and our right to reopen the ICJ case if Iran does not implement the Agreements. But we have expectations of getting the embassy back in the near future. We have asked the Iranians to return the embassy to Swiss custody, and they seem disposed to do it as soon as they can resolve their internal problems.

Robert Mundheim: As I listened to Hans Smit, I wondered if whether, at the negotiating tables, we had believed that what he said was true, we could ever have negotiated any kind of an agreement.
Hans Smit: Cash on the barrelhead. That’s what the Iranians thought.

Robert Mundheim: That’s precisely it. They would then have said: “No delayed transfer. You will only get your hostages back when you resolve all the problems.” Now, are you telling us that the law drives us only into that mode of negotiating? That would be an awful situation.

Hans Smit: It depends upon which way you look at it.

Robert Mundheim: It would be tough to sell that one to the American public. They were interested in the hostages.

Hans Smit: Not to the claimants.

Robert Mundheim: I think even to the claimants.

Ved Nanda: I think that Hans Smit’s position is not the position that serves the best interests of the United States. Nor would it serve the interests at this time of the international legal order. I think he is right in bringing to our attention that the era of the U.N. Charter has made a difference in the way we view the settlement of international disputes. But as he very well knows, soon after the U.N. Charter came into being the situation which gave birth to the Charter disappeared very, very swiftly with the advent of the cold war. Since the concept of collective security never became a reality, the utter prohibition on the use of force in article 2(4) of the Charter had to be reinterpreted. Thus, reprisals have been permitted. We have accepted anticipatory self-defense. We have stretched the Charter to permit the use of force under many circumstances. At this stage, the outcome of an agreement is much more important than the technical niceties about its theoretical legality. I would suggest that despite a reasonable case that can be made either for a narrow or broad construction of article 52 of the Vienna Convention on the Law of Treaties, a strong case can be made for the conclusion that these Agreements do not violate international law, that article 52 does permit an out.

I would also like the record to reflect my view that when we speak of the national interest, we should be aware that the appearance of “malaise” which, under the Carter Administration, was the hallmark of American foreign policy, hurts the national interest. Since

73. This paragraph 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 manner inconsistent with the Purpose of the United Nations.” Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (1945).
appearances and others' perception of such issues are of utmost importance, sometimes perhaps even more important than the reality, we should recognize that the U.S. interest lies in the carrying through of these agreements, for it will go far in restoring a sense that the United States is capable of a clear direction, of fulfilling its commitments, and of bringing continuity and certainty to its foreign policy.

On legal grounds, the circumstances demand that we look at articles 52 and 53 of the Vienna Convention, not in a narrow literal sense, but in a broader context. Such a position would not permit someone else to use the agreements with Iran as a precedent for the taking of hostages. To the contrary, if because of a strict reading of articles 52 and 53 we push countries into corners, not permitting any kind of international negotiating process to come to a conclusion, I think that we would be undermining the kind of international order we wish to establish. I am pleased to hear Mark's statement that we have not renounced the judgment of the International Court of Justice. I think it is important that every effort be made to internationalize such problems.

Oscar Schachter: I share the general, if not unanimous, view around the table that there are good and sufficient reasons to carry out the agreements. In my view this does not require that the United States deny the force and effect of article 52 of the Vienna Convention. A few points need to be clarified in respect of that article.

First, the article does not invalidate agreements on grounds of "duress" or "coercion" in general. It is limited to a specific kind of coercion, namely, to the situation where the conclusion of the treaty "has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter." The preparatory work shows that the words beginning with "threat or use of force" were intended to refer to article 2, paragraph 4, of the Charter. Although the meaning of that paragraph has given rise to much debate, it is clear that it does not extend to every kind of duress or coercion. Article 52 of the Vienna Convention should not therefore be construed (as some comments here implied) as if it invalidated all treaties concluded under duress.

Secondly, article 52 should not be interpreted as if the term "force" included economic or political pressure. It is true that some

governments have contended that "force" as used in article 2(4) extends to economic coercion, at least when such coercion is severe and compelling. The history of the Vienna Convention, however,—especially the circumstances surrounding the adoption of the declaration condemning the threat or use of pressure in any form to coerce a state to conclude a treaty—supports the view that article 52 should not be given so wide a meaning as to include economic pressure.

My third point is that article 52 was explicitly drafted to ensure that the victim state would not have the option to validate the void treaty. The assumption was that there would be a continuing effect of the threat or use of force. There might be circumstances, however, in which that assumption would not hold. Some delegates at the drafting conference suggested that the solution in those circumstances would be a "new" treaty (some used the term "novation" for that new treaty, a dubious usage). The question of the validity of that new treaty (which might be very much the same as the old "void" treaty) would then be judged in the light of the contemporaneous conditions. I do not believe that a development of this kind is at all likely in the present case, although it is worth mentioning as a theoretical possibility.

Fourth, the suggestion has been made that article 52 can be ignored on the ground the United States is not a party to the Convention as well as on the ground that the rule in article 52 has never been applied and is therefore not customary law. The latter point raises substantial issues of theoretical and practical interest. Without going into these issues, it is difficult to express a judgment on the merits. It is my recollection, however, that the rule in article 52 was unanimously declared to be lex lata by the International Law Commission and that this position was affirmed without significant dissent by the plenipotentiary conference in Vienna. The United States supported that view of article 52 as declaratory (as did the U.S. member of the I.L.C.). Perhaps that interpretation can be challenged as contrary to state practice, though this is by no means certain. But I would question whether it should be challenged in connection with the present Iranian Agreements. The issue is complicated and has important implications. To reject article 52 as existing law in order to sustain the Iranian Agreements would not only amount to a reversal of the U.S. position but would be a unilateral act that attempts to override a generally accepted and considered decision of an international conference and a

75. Id., at paras. (4), (6).
76. See id., at para. (1).
preeminent expert body of jurists. If article 52 is accepted as declaratory, then of course it is not decisive that the United States has not become a party to the Vienna Convention. As in the case of many other articles of that Convention, article 52 would be binding not as a treaty rule but as a formulation of existing customary law.

This brings me to my fifth and final point. It is the one most relevant to the Iranian Agreements. What is meant by the suggestion that the conclusion of the present agreement was "procured by the threat or use of force?" When we consider the particular facts as they evolved over time, we may question whether the violence and threats of violence used against U.S. diplomats and property "procured the conclusion of the agreement." If the United States had simply paid "ransom" to Iran as a *quid pro quo* for release of the hostages, that could reasonably have been seen as falling within the terms of article 52. What actually occurred, as we know, was significantly different. The United States, having legally exercised the right of self-help by seizing Iranian assets and cutting off trade with Iran, made it necessary for Iran to seek a settlement. At that point, the United States was not being forced to pay ransom; it was essentially a matter of returning Iranian property on conditions which met U.S. interests in respect of the hostages and U.S. claimants. The conclusion of the agreement was "procured" because each party had what the other wanted. This is a more realistic way of looking at the issue than saying that the illegal act of violence by Iran procured the conclusion of the Agreements. Moreover, to assert that article 52 applies in these circumstances leads to an extension of article 52 that is far removed from the understanding and conception of the drafters of that article.

In sum, we can reasonably take the position that article 52 does not apply to the conclusion of these Agreements. In taking that position, we do not challenge the legal force of article 52. Nor do we place in question the illegality of the threat and use of force by Iran against U.S. diplomats and property. That illegal act may reasonably be regarded as contrary to article 2(4) since it indubitably was a threat and use of force in a "manner inconsistent with the Purposes of the United Nations," if not also (because of its coercive intent) "against the . . . political independence" of the United States. But though contrary to article 2(4), those Iranian actions cannot be regarded as having procured the conclusion of the agreement; they were an element in the evolving situation that included pressures and exigencies faced by Iran. These pressures and exigencies were crucial to obtaining an agreement. We can therefore consider the rule of article 52 as not applicable without impugning its validity and without cutting down the ambit of article 2(4).
Soia Mentschikoff: Hans Smit, could I ask you one question at this point? The discussion here, when Oscar was doing it, presupposes that your position is that the Agreements as made were void, which means that they were not binding on either party. That is very different from saying that only the side against which force was taken can say “Off with his head, I'm not going to have anything to do with the Agreements.” This is a very important difference because it means that if Iran does not observe the Agreements then Iran is not in violation of the Agreements, because they were void ab initio.

Hans Smit: Absolutely! My first inclination was to say no, it should be voidable. But I was persuaded on reading the underlying history that a very deliberate judgment was made to say that it was not a question of voidability but a question of voidness.

Soia Mentschikoff: Then no novation or anything else is possible?

Oscar Schachter: No. No, they were very vehement. This point about voidability and void was one of the most explicit points made by everybody. But they quite clearly accepted the notion of a novation when the coercive situation had ceased to exist. It is, of course, very difficult to say that the United States was in a weak position—subject to continuing duress—after release of the hostages.

Soia Mentschikoff: But then it is not a novation. It's a new agreement.

Edward Gordon: Under international law or national law?

Soia Mentschikoff: Either one.

Edward Gordon: Why under international law?

Soia Mentschikoff: Because if you have nothing to start with, you are dealing with “zilch.” Void means it does not exist.

Edward Gordon: Yes, but a word can be used by parties to have a meaning somewhat different from its ordinary meaning.

Stefan Riesenfeld: I have two technical doubts. First, Hans Smit invoked the law of what is the general custom among civilized nations. That is very difficult to apply to international treaties and that is, in my mind, a considerable technical obstacle. For example, take mistake. The law of mistake in international treaties is quite different from the law of mistake as applied to private contracts, so you can not really analogize from what in private contracts is duress to what is duress under international law. The same is true with respect to the concept of “voidness.” Certainly, the Vienna Convention on Treaties distinguishes sharply between voidability and voidness. But the reason why it emphasizes the difference is because there are certain proce-
dures—notification and others—which apply to voidability. The drafters of the Convention wanted to dispense with these procedures when they mandated "voidness." But to say that it is, therefore, "zilch," I think goes too far. I do not think that that result is really correct under international law. In my mind you have to analyze further to see what the concept of voidness means. In that respect, if a party chooses not to assert voidness, it means that while they do not have to go through the notification procedures they still do not have a new treaty. You may call it a kind of voidness which is subject to ratification when the pressure is off; that is precisely what happened here. It is not helpful to say it would be a new treaty and, thereby, saddle a new administration with an agreement which was made by an old administration. I think it neater, fairer, and more in consonance with international law to say that "voidness," within the meaning of the Convention on Treaties, is not exactly like "voidness" in private law. It does not mean that you cannot ratify it. I think all of those concepts have to be thought through very, very carefully.

I also agree with Oscar Schachter that the matters which were so carefully negotiated in the Convention on Treaties should not be scuttled at once. Yet, I also agree with Mark Feldman, that if you think it through you have to see what it really means to international law. And I agree with Ved Nanda saying, "This is what we are here for." International legal order is our hope, and we should access its prescriptions carefully. We should not be swayed by private law concepts. It is too rash to go from one legal order into the other.

Michael Reisman: Let us go back for a moment to something that Mark Feldman said in response to Covey Oliver's remark\(^7\) that we should not abjure the judgment of the International Court and Larry Newman's remark\(^1\) that by doing so and surrendering a lot of claims, we are in effect paying ransom. I understood Mark to say that there is a letter on the Secretary's desk which indicates that we have not yet done all these things. Yet, paragraph 11 of the Algerian Declaration\(^9\) says that we will promptly withdraw all claims pending against Iran before the I.C.J. and will thereafter bar and preclude the prosecution against Iran of any pending or future claims of the United States—the sorts of things Larry was talking about. Mark, could you restate your interpretation of this? Do you say that we have not abjured it, that we still have it, and we can press it at some future date?

\(^{77.}\) Supra at 93.
\(^{78.}\) Supra at 97.
\(^{79.}\) Algerian Declaration, supra note 1. For text of para. 11, see supra note 51.
Mark Feldman: No, I did not say that. I think I said that we have not sent the letter yet. The undertaking in paragraph 11 is to withdraw the case from the I.C.J. But you cannot write off a judgment, and it does not say anything about writing off a judgment. It says we are not going to press any claims any further. So we are giving up our right to present the damage claims which have not yet been calculated by the court.

Michael Riesman: The agreement will hereafter "bar and preclude" the prosecution against Iran of any pending or future claims of the United States—"bar and preclude." We have a judgment, but in effect it's empty.

Mark Feldman: That's right. Nothing can flow from that in terms of the U.S. collecting anything.

Alan Swan: We are not foreclosed, however, from demanding from Iran that they comply with the judgment.

Mark Feldman: That is correct.

Hans Smit/Soia Mentschikoff: Yes we are.

Covey Oliver: But I suppose we can still put the case of the United States v. Iran before the I.C.J. in "The Case Book." [Laughter] A judgment cannot simply be annulled by the moving party to it!

Mark Feldman: There is a question of what would happen if Iran does not give us back the embassy. I do not think it is in writing.

Michael Riesman: Would we have to keep bringing new proceedings?

Mark Feldman: I suppose we would, presumably relying on the earlier judgment. There could be an issue about that. But what we have given up is the damages.

I would like to return to what Oscar Schachter had to say. We are in disagreement on the merits of article 52, but we do not disagree on article 2(4). This was clearly an armed attack on our people and the Court said so. I did not mean to imply anything to the contrary. But I do agree with Oscar's analysis that the agreement was not procured by that use of force.

Tone Grant: I believe that when representatives of the United States opted to negotiate for release of the hostages those representatives made that decision on behalf of the United States voluntarily. Therefore, there does not appear to have been "duress" in reaching the negotiated agreement. When parties to a dispute determine to negotiate a resolution or settlement of the dispute, then both parties have, essentially, repudiated the concept of a forceful resolution of the
dispute. In connection with both domestic and international settlements, I believe both sides are committed to carrying out the agreements if they have negotiated in good faith and have agreed upon a settlement.

With regard to the United States-Iran Agreements, the Government in its Statement of Interest filed in the pending U.S. litigation asserts that all of the American claimants whether they be banks or other corporations, have, in essence, been placed in the position that they were in prior to the freezing of the assets. There was no vesting of those assets by the U.S. Government. The arbitral tribunal has been added as a mechanism through which U.S. claimants may assert their claims and, if justified, receive payment on their claims. Moreover, the negotiated settlement was the means by which the hostages were released.

The Reagan Administration has, I believe, stated that it would not have chosen to negotiate with the Iranians for the release of the hostages but, since negotiations were undertaken by the Carter Administration, it would abide by the results of those negotiations. The issue, of course, is whether the private corporate claimants (both banks and non-banks) are in the same position as they were in prior to the negotiation. There are a number of related constitutional questions concerning the agreements, including whether there has been an unlawful taking from the U.S. claimants as a result of the provisions of the Agreements. I do not believe, however, that there is a substantial argument concerning the validity and enforceability of the Agreements which may be made on the basis of force or duress. The United States voluntarily chose to negotiate with the Iranians rather than take other action.

Harold Maier: I think it might be helpful to ask which of the several disputes involved we are looking at. So far we have been talking as though the problem being resolved by these agreements was solely the taking of hostages. That is, of course, the principal thrust of the Agreements. But the Iranians, if I remember correctly, took the position, at least after the seizure of the embassy, that one of the disputes they wished to resolve was their claim to the Shah's assets. One of the questions I think we might address is whether certain elements of the Agreements might be void, while others are not. The result would depend upon whether the force that was exerted—the
holding of the hostages—was used to coerce the United States to agree to return the Shah’s wealth. Alternatively, is the issue one of eliminating force from the equation entirely? In other words, was the heart of the Agreements to get the hostages back and were the frozen Iranian funds returned for that purpose? Certainly some parts of the Agreements are addressed to disputes which, in fact, existed before the embassy was taken. What I am suggesting is that this issue of coercion ought to be considered separately with regard to the several parts of the agreement.

Hans Smit: I must say that while you need not necessarily share my concededly somewhat idealistic view that we should not use improper force to get any international agreement, and to that extent, international law should become as civilized as national law, in this particular case we have a rather unusual situation. Here, the use of force was not arguably a permissible use of force but was a use of force that has been held illegal by the International Court of Justice. I really wonder whether you are prepared to endorse the view that an international agreement arrived at through the continued use of a force, determined by the International Court of Justice to be illegal and a violation of international law, is nevertheless not a use of force that invalidates the Agreements.

I think also that the attempt to rationalize the maintenance of the Agreements by stressing that the results achieved were not so bad should be rejected for two reasons. First, as to whether the results are good or bad, reasonable people can differ. I am assuming that we are all reasonable around this table. Second, in international law more than elsewhere, we need certain definite guidelines, especially since we have no compulsory jurisdiction on most issues. If you create a rule of law under which an assessment of the deal at the end determines the appropriateness of the conduct engaged in to achieve the deal, you will be giving carte blanche to people who are inclined to use this kind of force. They will first use the force and then, when they make a deal, argue that the deal is a pretty good one. Or, to refer to the thought advanced by Harold Maier, if results constitute the rationalization for sticking with a deal, then we can say, “Those results that we like—that we think are pretty fair—are O.K., but the results that we don’t like are not O.K. and, therefore, we can get rid of the Agreements pro tanto.” The argument here is in fact an argument between the realists and the idealists.

Robert Mundheim: I am interested in Larry Newman’s question concerning whether ransom was paid. When people ask that question they always point to a specific event and ask, “Didn’t we give up
something there?” I wonder whether “ransom” is to be defined as how you do on a particular part of a deal, or is it a net concept? In most deals that you work on in economic transactions, the solution that is ultimately arrived at through negotiation is a solution involving the giving of a little here and the taking of a little there. What you have got to do is find out what happens at the end. Are you prepared to say that, taking the full calculus, you come out with a net negative rather than a net plus?

Lawrence Newman: I was speaking to the suggestion made here that some claimants may be better off under this new tribunal than they would have been had they been left to the courts. That, I think, is probably true. But the ransom I was referring to was what the Government was paying. I do not see that what the Government got—the Government as opposed to its citizens—can be netted out against the loss of the claim for damages done to the embassy, loss of the potential tax revenues, loss of the embassy itself, and possibly other things of that nature. What did the Government get on the plus side of the ledger in terms of dollars, if you look at this as an economic transaction?

Robert Mundheim: Well, of course, the Government in substantial part here acts for other people. It works for all of us.

Lawrence Newman: On another point, I wanted to ask Hans Smit: If it is not appropriate to negotiate under these circumstances or to enter into any kind of a deal that does not involve cash on the barrelhead, might it not have been permissible for us to counter force with force and take the Iranians in this country—diplomats—lock them up, fifty-three or fifty-four in number, until our people were let go? Under international law, is that not permissible?

Hans Smit: Well, we had a lot of options that we did not explore. I would hope that that would be one of the last ones that we explored. I, in fact, was very distressed at President Carter’s measures against the Iranian students.82 I thought that was not in keeping with our institutions and I wrote a letter to the White House to which I received a response three months later. But I think it is not very useful at this stage to explore what another team of negotiators might have done in similar circumstances. I, of course, am convinced that I could have done much better, but that does not make any difference at this point.

Covey Oliver: I put two questions to Hans Smit in the interest of achieving a clear understanding of his viewpoint. First, do you really characterize the I.C.J. decision as one concerned fundamentally with the use of force in the international community? Is it truly an article 2(4) case, or is it more essentially a case concerned with diplomatic premises and personnel? There has been a good deal of discussion here about the use of force because Iran was holding hostages. Yet that, certainly, is a fundamentally different use of force than that of an army poised on a frontier combined with an ultimatum to a neighbor, which is the basic type of situation to which article 2(4) of the U.N. Charter was addressed in 1945. So, we ought to ask whether we are not engaging in a little bit too much semantic expansionism with respect to the concept! But I really leave it where I put the question: How do you characterize this decision? Second, Hans, what is your view as to the legitimacy, under international law, of proportional retortion? Is it legal or illegal? You evaded the question when Larry Newman mentioned it a moment ago.

Hans Smit: Well, I always thought that it was the privilege of professors to evade questions. [Laughter]

Covey Oliver: Not with other professors, only with students. [Laughter]

Hans Smit: Let me answer your first question. I do not really relegate the I.C.J. decision to any one category. I think that what is significant about that decision is that the Court held that the measures taken in that particular case, which undoubtedly involved the use of force, were violative of international law and the treaty obligations that Iran had assumed. We have a determination by the International Court of Justice that this particular exercise in the use of force was in violation of international law. And article 52, construed in the light of the discussions that led to its enactment, makes clear that the use of force in violation of international law was what it had within its contemplation.

The answer to whether the retortional use of force is permissible under international law depends upon the circumstances of the particular case. I am very reluctant to endorse it. I think it is likely to lead to a justification for the use of force after the fact. Think of the Cuban quarantine. After the fact, we figured out all kinds of theories.

under which we could justify the measures we took. I continue to think that those measures, in the end, were not compatible with international law, and that we tried to find rationalizations for it. When we do that, in my view, we reinforce the general perception of international law as an infinitely malleable body that can be adjusted by the politicians to their own ends, rather than a set of guides that rule nations in their international conduct.

Stefan Riesenfeld: Since the proceedings will be published, I would like to make two remarks that I otherwise would not have made. I feel very uneasy when Hans Smit claims that he is the idealist and we are all realists. Far from being the truth I think the top priority in international law must be to enhance the possibilities for the peaceful settlement of disputes. That, I think, is the chief purpose of the international legal system. It is, therefore, self-defeating to say that once a court has declared something an international wrong, that makes it duress, and, therefore, makes it impossible to have a peaceful settlement. That was certainly not the International Court's judgment, as I read it. It says that peaceful settlement procedures should go on. In sum, I just want to voice the opposite view from Hans Smit and in so doing claim to be just as idealistic as he.

Hans Smit: No, I do not claim that a settlement was not possible. On the contrary, as the Court itself says, it exhorted the parties to conclude a reasonable settlement. I think that the only settlement that we should have agreed to was a settlement that was compatible with the decision of the Court of Justice; namely, that Iran give up the hostages and that we try to straighten out the rest of the claims later on. In fact, I thought that was the position of the Carter Administration all along, that the hostages should be released first.

Tone Grant: I question whether the act of force in the taking of the hostages is even relevant to the agreements negotiated by representatives of the United States and Iran. That act of force did not cause the terms of the agreement to be negotiated. In fact, the United States had other alternative means of responding to the taking of the hostages. The United States made the fundamental decision to negotiate with the Iranians for the release of the hostages and in reaching the final agreement, the issue of duress may have become moot.

Hans Smit: That goes to Oscar Schachter's point that the agreement was not procured by the use of force. I happen to think that position is at odds with reality, but it is arguable.

Mark Feldman: One comment: I have read the material in which Hans Smit demonstrated that he would have done much better than the negotiators, but I always thought he was using force to achieve that. Now that I have learned that he is not using force, I am wondering how he would ever achieve that.

Hans Smit: Absolutely not! And on the next occasion that arises, give me an opportunity! [Laughter]

Edward Gordon: I want to return to the question that I asked earlier. I thought I would be able to get back to it in time to tie several aspects of it together. Two points deserve to be raised now. One point that Oscar Schachter raised was whether we really oppose article 52. Is it such a bad article that the United States should just ignore it? Or, would that be throwing the baby out with the bath water? There is a lot of good to article 52, and there are a lot of good reasons for having some definite rules with regard to treaties. But that is only one set of policy objectives: they have to be weighed against others. Second, there is the point touched upon by Covey Oliver; namely, what is the legal impact of the Vienna Convention on the United States, which is not a party to it? Indeed, what is the legal effect of the Vienna Convention on anybody? It was intended to be a codification of customary international law—admittedly, as a treaty, not just a code. But customary international law, by its nature, is always in a state of evolution. So, especially as to most of the world, which has not yet acceded to the Vienna Convention, is it not just a neat summary—to be sure a definitive summary—of customary international law as it existed in 1969? Moreover, to the extent that article 52 represents customary international law, and is not binding on the United States as a treaty commitment, would it not be significant if the United States opposed article 52 from the outset? I have not yet pinned it down in the records, but if the United States opposed article 52 from the outset, and if it can be shown that the United States has consistently opposed it and by its current actions now opposes a strict interpretation of it, doesn’t that put the United States in the position, alluded to by the International Court of Justice in the Anglo-Norwegian Fisheries Case, of being a state against which the rule of customary law is not applicable?

The business of vindicating the Vienna Convention or any other convention, or the International Court of Justice, or a particular judgment of the International Court of Justice, has to be seen in

85. Supra at 100-01.
context. None of these things are ends in themselves. They involve objectives that have to be weighed against others. This leads to the very final point, which Bob Mundheim and Charlie Brower have both raised. Given the ambiguity of article 52, in other respects, what is the advantage to the world community of interpreting that article in a way which would deny to a party against which force has been used or threatened the strategy of making a treaty to remove the force? Is it not self-defeating? If you think of that in terms of the debate whether the threat or use of force includes economic force, you might very well conclude that article 52 has the potential of being the bane of the treaty system.

Ved Nanda: I share Hans Smit's concerns. Michael Reisman and others have written about forceful intervention, its problems and likely abuse. But at this stage, to demand that there be a unqualified prohibition, to hold to the kind of narrow interpretation of the Charter that the purists hold, would be a great disservice to the international legal order.

Frank Mayer: The Reagan Administration apparently decided not to press the duress argument. As Covey Oliver observed, duress cuts both ways. The Iranians might well consider the use of economic force in seizing twelve billion dollars worth of their assets as against fifty-two hostages the kind of coercive force which, from their point of view, aborts the settlement treaty. If you believe, as I do, that international arbitration of this nature will advance international order and the peaceful resolution of disputes, then we should leave well enough alone.

The Nullification of Attachments; Sovereign Immunity and the International Emergency Economic Powers Act (IEEPA)

Alan Swan: We should now turn to what is perhaps one of the more difficult, complex, and central areas of our overall problem, one that obviously leads to the constitutional discussion; namely, the statutory predicates for the Government's action in the private litigation. The Government has, by Executive order, undertaken to suspend the law suits, to nullify the prejudgment attachments, and to nullify

87. E.g., Reisman, Termination of the USSR's Treaty Right of Intervention in Iran, 74 AM.J.Int'l L. 144 (1980).
88. Supra at 96.