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LEGALITY OF U.S. - IRAN HOSTAGE AGREEMENT

1. This memorandum considers whether the United States-Iran Hostage Agreement (the H.A.) is void because of Article 52 of the Vienna Convention on the Law of Treaties (the V.C.) which 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 the international law embodied in the charter of the United Nations." My conclusion is that the agreement is not void for that reason. This memorandum does not deal with the question as to whether the H.A. is a valid exercise of power by the president and will be regarded as binding in U.S. courts.

2. Legislative History of the Vienna Convention.

The V.C. was agreed by the negotiating states on May 23, 1969 and entered into force on January 27, 1980. The United States signed the V.C. in 1970 but has not ratified it. Since the U.S. has not ratified the V.C. it is not bound by it, although it may nevertheless wish to comply with it as a matter of policy. But much of the V.C. restates customary international law rules and to the extent that it does so the U.S. would presumably wish to comply with those rules. The V.C. was the product of many years of study and

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*/ The word "treaty" is defined to include an international written agreement between states governed by international law. This covers the H.A.

discussion primarily through the channels of the International Law Commission (the I.L.C.).

3. The problems involved in formulating a rule dealing with the effect and the use of force on treaties have been examined by governments and commentators for many years, but there is almost no judicial interpretation of the issues and little detailed analysis of the problems involved of both interpretation and policy. Even during the negotiations in Vienna in 1969 and in preparatory conferences before then there has been surprisingly little analysis of the kinds of situations which could arise under Article 52 */ although, as noted below, there were some strong differences of opinion between countries as to some of the basic issues involved.

4. The background to Article 52, including a review of the changes over time in the legal view of the effect of the use of force, is summarized in the commentary of the I.L.C. on Article 49 [which later became Article 52] (Annex A). It seems generally to have been agreed that up

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*/ Research has disclosed only one such detailed analysis by a commentator in recent years; that is in an article by Julius Stone (1968) "De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace" 8 Virginia Journal of International Law 356. Stone is very critical of the principles underlying Article 52, of the work of the I.L.C. and of its rapporteurs.

to the time of the Covenant of the League of Nations the traditional doctrine was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. This doctrine was a reflection of the general attitude of international law during that period towards the legality of the use of force for the settlement of international disputes.

5. However with the Covenant, developments after World War II and thereafter, and the clear-cut prohibition of the threat or use of force in Article 2(4) of the United Nations Charter, the I.L.C. concluded that the law had changed and that the "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."*/

6. The Commentary referred to the reluctance of some jurists to accept this conclusion because it would open the door to evasion of treaties by encouraging unfounded assertions of coercion, but concluded that this probably was not sufficient ground for rejecting the conclusion that

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*/ It should be noted in considering Article 52 that Article 51 provides that a treaty procured by coercion of a State's representatives is "without any legal effect." Discussions of the effect of coercion on treaties sometimes combines the principles underlying Articles 51 and 52, and sometimes deals with each Article separately. There has been less controversy about Article 51, since it seems to have been generally taken for granted that a treaty procured by coercion of a State's representatives should be void or at least voidable.

a treaty should be invalid if imposed by force. The Commentary also rejected the view that such a treaty should be voidable at the insistence of the injured party, not void, stating that the aggrieved State should be able to take its decision in regard to the maintenance of the treaty in a position of full legal equality with the other State.

7. As can be seen, the Commentary deals only in broad generalities with the issues raised by Article 52. For a more thorough review it is necessary to examine the reports prepared by special rapporteurs for the I.L.C. during the fifteen years prior to the Vienna Convention and the positions taken by particular countries at meetings of the I.L.C. when these reports were discussed.*/

8. The positions taken by governments during the course of the negotiations resulting in agreement on the V.C. can be summarized as follows:

(a) Broadly speaking, the developed countries were in favor of maintaining the stability of international agreements; they were concerned that Article 52 might be used as a vehicle by which the developing countries might repudiate agreements concluded with the so-called colonial powers on some theory of economic or political coercion. And yet the developed countries did not contend that treaties entered into as a result of coercion should be regarded as

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*/ The best account of these matters is in Kearney and Dalton (1970) "The Treaty on Treaties" 64 American Journal of International Law 495.

valid, some arguing (including the U.S.) more about the fringes of the issue (e.g., that they should be voidable, not void) than about the basic rule itself.

(b) The main disagreement between the developed and developing countries was with regard to the question whether Article 52 should apply to treaties procured by economic and political pressure. The developed countries (including the U.S.) wanted to exclude economic and political pressure as a ground of invalidity. Many developing countries wanted to include it. The issue was debated for many years prior to the 1969 negotiations and in Vienna in 1969. (A detailed account of positions of governments is contained in the Fifth Report on The Law of Treaties by Sir Humphrey Waldock, Special Rapporteur (Yearbook of the International Law Commission, 1966, Vol. II). The Soviet reaction coincided with that of many of the developing countries, as follows:

> "The USSR delegation considers that, to secure respect for treaties, leonine treaties such as exist, in its view, between some new States and former colonial Powers must be prohibited. It considers that to accompany a grant of independence with reservations is contrary to the principle of equality of peoples and States proclaimed in the Charter."

(Cited in the Yearbook of the I.L.C., 1966, Vol. II, p. 18)

9. In the Vienna negotiations, the conflict came to a head when a group of developing countries proposed to amend the draft of Article 52 by defining force to include any "economic or political pressure." The argument by the proponents of the amendment was based on their contention that even though the colonial era was disappearing the old colonial powers were imposing upon the newly independent states insidious methods of coercion and economic pressure designed to continue their subjection to the rich. The confrontation on this issue threatened to wreck the conference, but a compromise was finally reached under which (1) the amendment was withdrawn and (2) in its place a draft declaration condemning threat or use of pressure in any form by a state to coerce any other state to enter into a treaty was unanimously adopted. This declaration was adopted by the conference and annexed to the Final Act.

(c) In spite of the categorical nature of the language of Article 52 there was also general support for the proposition that it would be necessary for countries to be able to enter into peace treaties or armistices, for otherwise the difficulty of terminating hostilities would be increased. In a 1963 report of the I.L.C. dealing with this issue, Humphrey Waldock stated as follows:

> "It is, indeed, important to stress that only treaties resulting from an illegal use or threat of force are lacking in essential validity; for otherwise the security of armistice agreements and peace settlements, whether legitimate or illegitimate, would be endangered and the difficulty of terminating hostilities increased. Clearly, there is all the difference in the world between coercion used by an aggressor to consolidate the fruits of his aggression in a treaty and coercion used to impose a peace settlement upon an aggressor. As one writer has pointed out, the validity of the peace settlements of the First World War was never questioned in the numerous cases in which they came under discussion before the Permanent Court or in the innumerable proceedings arising out of them before arbitral tribunals. Again, while the treaty of 1939 between Nazi Germany and Czechoslovakia is generally regarded as invalid by reason of the coercion both of the delegates and the State, the validity of the Italian Peace Treaty, a treaty certainly not negotiated but imposed, has not been regarded as open to challenge." (Emphasis added)

10. It will be noted that in the paragraph quoted above, Waldock describes the kind of case which Article 52 was designed to cover, namely a case where coercion "is used by an aggressor to consolidate the fruits of his aggression." The same point was made by the Dutch representative in the Vienna negotiation when he stated:

> "[I]n itself the rule stated in Article [52] was perfectly clear and precise. He supported the principle underlying the Article, namely, the principle that an aggressor state should not, in law benefit from a treaty it had forced its victim to accept." (Quoted in Kearney and Dalton, (1970) 'The Treaty on Treaties' 64 A.J.I.L. 534)

11. Legality of Hostage Agreement. The arguments that have been made that the U.S.-Iran agreement is void under Article 52 rest on a deceptively simple proposition, namely, that since the taking of the hostages clearly was an act of force in violation of the U.N. Charter, the agreement for their release was necessarily 'void.' The basic flaw in the argument is that, by ignoring the substance of the agreement, it would compel the conclusion that any agreement following an illegal use of force is invalid -- a result which the draftsmen clearly intended to avoid. As noted above, the purpose of Article 52 seems to be to prevent an aggressor from consolidating the fruits of an illegal threat or use of force, (i.e., illegal in the sense of being in violation of the principles of the U.N. Charter). The agreement with Iran, however, does not consolidate for Iran the fruits of its illegal use of force but rather essentially restores the positions of the parties as they were prior to the hostage-taking.

12. Specifically, Iran has obtained a U.S. promise not to interfere in Iran's domestic affairs (which merely restates an obligation of all states under the U.N. Charter); a return of Iran's assets to the unblocked status they enjoyed prior to the hostage-taking (in return for Iran's

reaffirmation of its obligation to pay claims of U.S. nationals);*/ and interim U.S. assistance in identifying and preventing removal of properties of the Shah and his family pending decisions by U.S. courts whether Iran is entitled to recover the properties (similar interim relief could have been provided by the court in any event). Indeed, in certain respects Iran is worse off: it prepaid certain existing bank loans at considerable cost to it and it will lose the use of money deposited by it in the escrow account, although it will receive interest on that money at current market rates. It can also be argued that Iran is worse off because of its agreement to binding international arbitration of U.S. nationals' claims (thus foregoing the sovereign immunity defense that was arguably available in many cases in U.S. courts) and to the enforcement of the arbitration awards in the courts of any nation in accordance with its laws. It is true that the U.S. gave up certain claims (e.g., regarding the hostages and damage to the Embassy Building); but these claims arose upon the taking of the hostages and thereafter, and the U.S. waiver of these

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*/ If Iran had released the hostages without any agreement, the United States would presumably have been obligated to unblock the Iranian assets, subject again to possible safeguards designed to protect U.S. claimants and prevent disruption of capital markets.

claims for consequential damages arising out of the hostage-taking does not give Iran a benefit it was seeking to obtain by its unlawful action.

13. It is important to point out serious legal consequences of a position that the agreement is void under Article 52. If the agreement were considered void, then it might have been legally impossible for the U.S. to enter into any agreement whatever with Iran to obtain the return of the hostages. The United States would have been legally incapable of stating any binding understandings or making any undertaking to do anything in connection with the release of the hostages. Such a position would not only render the resolution of such a hostage situation much more difficult, but also would cast doubt on the validity of any armistices or peace treaties, as the Waldock report makes clear. For example, it would be legally difficult or impossible to assert the validity of the 1953 agreement between the United Nations Command and Korea, and yet it appears that no claim of illegality has been made. And it might not have been legally possible, under the principle of Article 52 thus interpreted, to sustain the legality of the Peace Treaties with Germany and Japan after World War II. This is such a rigid and dangerous position that it could not have been contemplated by the drafters of Article 52.

14. Such an extreme reading of Article 52 would tend to frustrate one of the principal goals of the U.N. Charter, which is to promote the peaceful settlement of disputes. Article 33 of the Charter expressly states that:

ARTICLE 33

> "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
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> "2. The Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means." (Emphasis added.)

In the case of the hostages, the Security Council in Resolution No. 457 (4 Dec. 1979) called on the United States and Iran "to take steps to resolve peacefully the remaining issues between them to their mutual satisfaction in accordance with the purposes and principles of the United Nations." (Emphasis added.) This overriding purpose to promote dispute settlement by peaceful means, specifically including negotiation, would be thwarted if the parties to a dispute were legally incapable of negotiating an agreed settlement in any case in which one of them had committed an unlawful use of force. The V.C. should not be interpreted in a

fashion that places it in such conflict with the U.N. Charter. */

15. Those who argue that the H.A. is void may note that the World Court found in its Final Judgment in the Hostage Case (May 24, 1980; par. 87) that Iran had resorted

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*/ Research disclosed only one reference to Article 52 of the V.C. in a World Court opinion, i.e., in the Fisheries Jurisdiction case between the United Kingdom and Iceland (2 Feb. 1973). The case concerned a dispute between the UK and Iceland occasioned by Iceland's attempt to extend its exclusive fisheries jurisdiction to 50 miles around Iceland. The UK brought the case under an agreement with Iceland under which Iceland agreed to submit certain fishery disputes to the World Court. Iceland did not appear but advised the Court it had no jurisdiction. The Court ruled only on the jurisdictional issue. In its opinion the Court referred to a statement by Iceland that the Court said could be interpreted as a "veiled charge of duress purportedly rendering the Exchange of Notes void ab initio" and stated that

> There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention of the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void.

That case, however is not in point. In the Fisheries case, if the UK had used force or threat of force to make Iceland enter into the agreement to submit disputes to the World Court there is little doubt that under Article 52 the agreement would be void precisely because in that event the unlawful aggression of the United Kingdom would have directly resulted in its obtaining the objective it sought. It is clear, therefore, that the facts in the Fisheries case are basically different than those in the hostage case and the statement in the World Court opinion quoted above, which in any event does nothing more than restate Article 52, is of no relevance whatever to the hostage case.

to "coercive action" against the hostages and the U.S. Embassy and argue that this coercion, when followed by the H.A., makes the H.A. void under Article 52. However, the discussion above makes clear that the H.A. should not be considered void under Article 52 even assuming that Iran engaged in an unlawful use of force. It should also be noted that there is nothing in the World Court judgment that indicates in any way that the U.S. and Iran could not thereafter settle their differences by agreement notwithstanding the provisions of the V.C. Indeed, in a separate opinion Judge Lachs states that the two states should now negotiate in order to seek a peaceful settlement of the dispute as they are bound to do under the U.N. Charter.

16. It is clear, therefore, that Article 52 was intended to deal with an entirely different situation than exists in this case and that the U.S. should not contend that because of Article 52 the H.A. is void.

17. Procedure Under Vienna Convention. If nevertheless the U.S. decides to regard the H.A. as void under Article 52, the V.C. contains a number of provisions regarding (a) the procedure then to be followed and (b) the legal consequences of such a decision. The provisions are

complicated and not easy to understand, largely because they were the result of protracted debate and disagreement and then compromise by the delegates to the Vienna Conference.

18. These provisions are as as follows:

SECTION 4. PROCEDURE

Article 65

Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

Article 66

Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.*/

19. An initial question presented under Articles 65 and 66 is whether the U.S., if it decides that the H.A. is void under Article 52, is bound by or should in any event comply with the procedural requirements of those Articles. The U.S. is not a party to the V.C., and Articles 65 and 66 (unlike Article 52) do not state a rule of customary law. Thus, the U.S. could, if it so decides, declare the H.A. void under customary international law and ignore the procedural requirements of Articles 65 and 66 although it would, of course, be bound to comply with the U.N. Charter. But let us assume that the U.S., though not a party, wished to follow the procedural dictates of the V.C.

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*/ As to the procedure specified in the Annex to the Convention, see pars. 21-23 below.

20. As can be seen, under Article 65(1), if the U.S. invokes coercion as a ground for impeaching the validity of the Agreement, it must so notify Iran and such notification shall include the "measures proposed to be taken" and the reason therefor.

21. Under this provision, the U.S. would have to decide what measures to take and then notify Iran of those measures. In that event Iran, under paragraph (2) and (3) of Article 65 could object to the proposed measures and the parties (U.S. and Iran) "shall seek a solution" under Article 33 of the U.N. Charter, quoted above, which provides for the pacific settlement of disputes under the machinery of the U.N. Article 66(b) of the V.C. provides that if no solution is reached under paragraph (3) of Article 65 within 12 months following an objection, any party to a dispute concerning the validity of a treaty under Article 52 (and certain other Articles) can set in motion a procedure specified in the Annex to the V.C. for the conciliation of the dispute by a Commission acting under the auspices of the Secretary General of the U.N.

22. The Conciliation Commission is empowered to draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement (Annex to V.C.; par. 4) and, after examining the claims

and objections, shall make proposals to the parties with a view to reaching an amicable settlement of the dispute. Thus, the objective of the Conciliation Commission is the same as the objective under Article 33 of the U.N. Charter, namely, that the parties reach an amicable settlement.

23. Thus, Article 65, combined with Article 66, establishes a procedure under which the U.S., if it wished to declare the invalidity of the agreement under Article 52, would be required to give notice thereof to Iran and then to submit first to the settlement procedure contemplated by Article 33 of the U.N. Charter and then to the conciliation procedure under the V.C. This procedure could easily take several years. The question arises as to the legal status of the H.A. during that period. More specifically, would the U.S. or Iran be bound during that period to continue to carry out the terms of the H.A. The V.C. is silent on this question, and there is nothing useful on the point in its legislative history. This is a difficult question but a possible answer is to regard the H.A. as suspended pending final action by the Conciliation Commission. This might be a practical solution as far as the two governments are concerned, but does not seem reasonable as far as private

claimants are concerned who would be forced to wait for a long period to have their claims adjudicated before the Arbitral Tribunal, unless of course a U.S. court, or other court, decided to disregard the H.A. and to proceed to deal judicially with the private claims.

24. Another question that arises, if the U.S. wishes to declare the H.A. void under Article 52, is whether the U.S., in selecting "measures proposed to be taken," can seek to keep in effect some of the provisions of the Agreement and regard the others as invalid. For example, the U.S. might seek to regard as invalid its waiver of the clauses regarding the hostages and its agreement to help locate the assets of the Shah, but at the same time regard as valid the provisions already executed relating to the hostage release and the arbitral provisions for the settlement of claims. This by itself would not be legally possible because Article 44(5) provides that "in cases falling under Articles 51, 52 and 53, no separation of the provisions of the treaty is permitted." Nevertheless, the U.S. could, if it so wished, declare the H.A. void under Article 52 or otherwise, and then seek to renegotiate or have Iran re-affirm those terms of the agreement the U.S. wishes to retain. Whether Iran would do so of course is doubtful.

25. There are several other provisions in the V.C. which should also be considered. If there is a material error in a treaty (Article 48) or if a State has been induced to conclude a treaty by the fraud of the other State (Article 49), the injured State can invalidate its consent to the treaty. Conceivably the U.S. could argue that it was misled by the Iranians as to the extent of the mistreatment of the hostages and that because of this deception on a basic point of fact underlying the agreement, the agreement became voidable either under Article 48 or 49, or possibly under a customary rule of contract law. This argument is weak, particularly in view of the fact that the U.S. apparently had been apprised of much of the situation by Mr. Queen, the hostage released earlier. An argument of this kind might possibly be used, as part of a general broadside attack by the U.S. on the agreement, but by itself seems unpersuasive.

CONCLUSION

26. The conclusion of this analysis, therefore, is that the H.A. is not void under Article 52 or any other provision of the V.C. and that it would be unwise for the U.S. to contend that it is. Nevertheless if for policy reasons the U.S. does not wish specifically to recognize the validity of the H.A., there is language in the V.C.

which, at least on its face would enable the U.S. to take the position that it does not wish or need to answer the question of validity under the V.C., but that it will not seek to undermine the validity of the H.A. and will nevertheless carry out its obligations under it.

ANNEX A

Article 49.[224] 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 the Charter of the United Nations.

Commentary

(1) The traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes. With the Covenant and the Pact of Paris there began to develop a strong body of opinion which held that such treaties should no longer be recognized as legally valid. The endorsement of the criminality of aggressive war in the Charters of the Allied Military Tribunals for the trial of the Axis war criminals, the clear-cut prohibition of the threat or use of force in Article 2(4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law. The Commission considers that these developments justify the conclusion that the 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 to-day.

(2) Some jurists, it is true, while not disputing the moral value of the principle, have hesitated to accept it as a legal rule. They fear that to recognize the principle as a legal rule may open the door to the evasion of treaties by encouraging unfounded assertions of coercion, and that the rule will be ineffective because the same threat or compulsion that procured the conclusion of the treaty will also procure its execution, whether the law regards it as valid or invalid. These objections do not appear to the Commission to be of such a kind as to call for the omission from the present articles of a ground of invalidity springing from the most fundamental provisions of the Charter, the relevance of which in the law of treaties as in other branches of international law cannot to-day be regarded as open to question.

(3) If the notion of coercion is confined, as the Commission thinks it must be, to a threat or use of force in violation of the principles of the Charter, this ground of invalidity would not appear to be any more open to the possibility of illegitimate attempts to evade treaty obligations than other grounds. Some members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter", and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.

(4) Again, even if sometimes a State should initially be successful in achieving its objects by a threat or use of force, it cannot be assumed in the circumstances of to-day that a rule nullifying a treaty procured by such unlawful means would not prove meaningful and effective. The existence, universal character and effective functioning of the United Nations in themselves provide for the necessary framework for the operation of the rule formulated in the present article.

(5) The Commission considered that the rule should be stated in as simple and categorical terms as possible. The article therefore 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 the Charter of the United Nations". The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are to-day of universal application. It accordingly appears to be both legitimate and appropriate to frame the article in terms of the principles of the Charter. At the same time, the phrase "violation of the principles of the Charter" has been chosen rather than "violation of the Charter", in order that the article should not appear to be confined in its application to Members of the United Nations. Clearly the same rule would apply in the event of an individual State's being coerced into expressing its consent to be bound by a multilateral treaty. The Commission discussed whether it should add a second paragraph to the article specifically applying the rule to such a case, but concluded that this was unnecessary, since the nullity of the consent so procured is beyond question implicit in the general rule stated in the article.

(6) The Commission further considered that a treaty procured by a threat or use of force in violation of the principles of the Charter must be characterized as void, rather than as voidable at the instance of the injured party. The prohibitions on the threat or use of force contained in the Charter are rules of international law the observance of which is legally a matter of concern to every State. Even if it were conceivable that after being liberated from the influence of a threat or of a use of force a State might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded in law as void *ab initio*. This would enable the State concerned to take its decision in regard to the maintenance of the treaty in a position of full legal equality with the other State. If, therefore, the treaty were maintained in force, it would in effect be by the conclusion of a new treaty and not by the recognition of the validity of a treaty

[224] 1963 draft, article 36.

procured by means contrary to the most fundamental principles of the Charter of the United Nations.

(7) The question of the time element in the application of the article was raised in the comments of Governments from two points of view: (*a*) the undesirability of allowing the rule contained in the article to operate retroactively upon treaties concluded prior to the establishment of the modern law regarding recourse to the threat or use of force; and (*b*) the date from which that law should be considered as having been in operation. The Commission considered that there is no question of the article having retroactive effects on the validity of treaties concluded prior to the establishment of the modern law.[225] "A juridical fact must be appreciated in the light of the law contemporary with it."[226] The present article concerns the conditions for the valid conclusion of a treaty—the conditions, that is, for the *creation* of a legal relation by treaty. An evolution of the law governing the conditions for the carrying out of a legal act does not operate to deprive of validity a legal act already accomplished in conformity with the law previously in force. The rule codified in the present article cannot therefore be properly understood as depriving of validity *ab initio* a peace treaty or other treaty procured by coercion prior to the establishment of the modern law regarding the threat or use of force.

(8) As to the date from which the modern law should be considered as in force for the purposes of the present article, the Commission considered that it would be illogical and unacceptable to formulate the rule as one applicable only from the date of the conclusion of a convention on the law of treaties. As pointed out in paragraph (1) above, the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata*. Moreover, whatever differences of opinion there may be about the state of the law prior to the establishment of the United Nations, the great majority of international lawyers to-day unhesitatingly hold 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. The present article, by its formulation, recognizes by implication that the rule which it lays down is applicable at any rate to all treaties concluded since the entry into force of the Charter. On the other hand, the Commission did not think that it was part of its function, in codifying the modern law of treaties, to specify on what precise date in the past an existing general rule in another branch of international law came to be established as such. Accordingly, it did not feel that it should go beyond the temporal indication given by the reference in the article to "the principles of the Charter of the United Nations".

DECLARATION OF THE GOVERNMENT OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA

The Government of the Democratic and Popular Republic of Algeria, having been requested by the Governments of the Islamic Republic of Iran and the United States of America to serve as an intermediary in seeking a mutually acceptable resolution of the crisis in their relations arising out of the detention of the 52 United States nationals in Iran, has consulted extensively with the two governments as to the commitments which each is willing to make in order to resolve the crisis within the framework of the four points stated in the resolution of November 2, 1980, of the Islamic Consultative Assembly of Iran. On the basis of formal adherences received from Iran and the United States, the Government of Algeria now declares that the following interdependent commitments have been made by the two governments:

GENERAL PRINCIPLES

The undertakings reflected in this Declaration are based on the following general principles:

A. Within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979. In this context, the United States commits itself to ensure the mobility and free transfer of all Iranian assets within its jurisdiction, as set forth in Paragraphs 4-9.

B. It is the purpose of both parties, within the framework of and pursuant to the provisions of the two Declarations of the Government of the Democratic and Popular Republic of Algeria, to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the Declaration, relating to the Claims Settlement Agreement, the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.

Point I: Non-Intervention in Iranian Affairs

1. The United States pledges that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs.

Points II and III: Return of Iranian Assets and Settlement of U.S. Claims

2. Iran and the United States (hereinafter "the parties") will immediately select a mutually agreeable central bank (hereinafter "the Central Bank") to act, under the instructions of the Government of Algeria and the Central Bank of Algeria (hereinafter "The Algerian Central Bank") as depositary of the escrow and security funds hereinafter prescribed and will promptly enter into depositary arrangements with the Central Bank in accordance with the terms of this declaration. All funds placed in escrow with the Central Bank pursuant to this declaration shall be held in an account in the name of the Algerian Central Bank. Certain procèdures for implementing the obligations set forth in this Declaration and in the Declaration of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States and the Government of the Islamic Republic of Iran (hereinafter "the Claims Settlement Agreement") are separately set forth in certain Undertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with respect to the Declaration of the Democratic and Popular Republic of Algeria.

3. The depositary arrangements shall provide that, in the event that the Government of Algeria certifies to the Algerian Central Bank that the 52 U.S. nationals have safely departed from Iran, the Algerian Central Bank will thereupon instruct the Central Bank to transfer immediately all monies or other assets in escrow with the Central Bank pursuant to this declaration, provided that at any time prior to the making of such certification by the Government of Algeria, each of the two parties, Iran and the United States, shall have the right on seventy-two hours notice to terminate its commitments under this declaration.

If such notice is given by the United States and the foregoing certification is made by the Government of Algeria within the seventy-two hour period of notice, the Algerian Central Bank will thereupon instruct the Central Bank to transfer such monies and assets. If the seventy-two hour period of notice by the United States expires without such a certification having been made, or if the notice of termination is delivered by Iran, the Algerian Central Bank will thereupon instruct the Central Bank to return all such monies and assets to the United States, and thereafter the commitments reflected in this declaration shall be of no further force and effect.

ASSETS IN THE FEDERAL RESERVE BANK

4. Commencing upon completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank of all gold bullion which is owned by Iran and which is in the custody of the Federal Reserve Bank of New York, together with all other Iranian assets (or the cash equivalent thereof) in the custody of the Federal Reserve Bank of New York, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3 above.

ASSETS IN FOREIGN BRANCHES OF U.S. BANKS

5. Commencing upon the completion of the requisite escrow arrangements with the Central Bank, the United States will bring about the transfer to the Central Bank, to the account of the Algerian Central Bank, of all Iranian deposits and securities which on or after November 14, 1979, stood upon the books of overseas banking offices of U.S. banks, together with interest thereon through December 31, 1980, to be held by the Central Bank, to the account of the Algerian Central Bank, in escrow until such time as their transfer or return is required in accordance with Paragraph 3 of this Declaration.

ASSETS IN U.S. BRANCHES OF U.S. BANKS

6. Commencing with the adherence by Iran and the United States to this declaration and the claims settlement agreement attached hereto, and following the conclusion of arrangements with the Central Bank for the establishment of the interest-bearing security account specified in that agreement and Paragraph 7 below, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank, within six months from such date, of all Iranian deposits and securities in U.S. banking institutions in the United States, together with interest thereon, to be held by the Central Bank in escrow until such time as their transfer or return is required by Paragraph 3.

7. As funds are received by the Central Bank pursuant to Paragraph 6 above, the Algerian Central Bank shall direct the Central Bank to (1) transfer one-half of each such receipt to Iran and (2) place the other half in a special interest-bearing security account in the Central Bank, until the balance in the security account has reached the level of $1 billion. After the $1 billion balance has been achieved, the Algerian Central Bank shall direct all funds received pursuant to Paragraph 6 to be transferred to Iran. All funds in the security account are to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the claims settlement agreement. Whenever the Central Bank shall thereafter notify Iran that the balance in the security account has fallen below $500 million, Iran shall

promptly make new deposits sufficient to maintain a minimum balance of $500 million in the account. The account shall be so maintained until the President of the Arbitral Tribunal established pursuant to the claims settlement agreement has certified to the Central Bank of Algeria that all arbitral awards against Iran have been satisfied in accordance with the claims settlement agreement, at which point any amount remaining in the security account shall be transferred to Iran.

OTHER ASSETS IN THE U.S. AND ABROAD

8. Commencing with the adherence of Iran and the United States to this declaration and the attached claims settlement agreement and the conclusion of arrangements for the establishment of the security account, which arrangements will be concluded within 30 days from the date of this Declaration, the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad, apart from those assets referred to in Paragraph 5 and 6 above, to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

9. Commencing with the adherence by Iran and the United States to this declaration and the attached claims settlement agreement and the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs.

NULLIFICATION OF SANCTIONS AND CLAIMS

10. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will revoke all trade sanctions which were directed against Iran in the period November 4, 1979, to date.

11. 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 and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in

the course of the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.

Point IV: Return of the Assets of the Family of the Former Shah

12. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will freeze, and prohibit any transfer of, property and assets in the United States within the control of the estate of the former Shah or of any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendant, including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

13. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days, for transmission to Iran, all information known to them, as of November 3, 1979, and as of the date of the order, with respect to the property and assets referred to in Paragraph 12. Violation of the requirement will be subject to the civil and criminal penalties prescribed by U.S. law.

14. Upon the making by the Government of Algeria of the certification described in Paragraph 3 above, the United States will make known, to all appropriate U.S. courts, that in any litigation of the kind described in Paragraph 12 above the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law.

15. As to any judgment of a U.S. court which calls for the transfer of any property or assets to Iran, the United States hereby guarantees the enforcement of the final judgment to the extent that the property or assets exist within the United States.

16. If any dispute arises between the parties as to whether the United States has fulfilled any obligation imposed upon it by Paragraphs 12-15, inclusive, Iran may submit the dispute to binding arbitration by the tribunal established by,

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