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ADDRESS

at the
University of Miami School of Law
April 14, 1981

LLOYD N. CUTLER*

I am very pleased to be here with you this evening. One of my partners, Mike Klein, was the editor-in-chief of your law review some years ago and I see a great deal of your Dean, Soia Mentschikoff. We both serve on the Council of the American Law Institute.

I have been asked to talk about the hostage agreements. In doing so, I would like to divide the topic into two major areas. The one with which I will start and to which I will return after talking about the Agreements themselves, concerns the fact that the hostage problem, like so many of the problems that we are facing in the 1980's, was just not susceptible of a military solution. It was not practicable to use America's overwhelmingly superior military power, even though we had the clearest possible provocation for doing so. It is, of course, important to have military power, and to have it properly disposed and made ready for use if necessary. Nevertheless, like the Soviet invasion of Afghanistan and perhaps, if there is one, a Soviet invasion of Poland, it was not practicable to use our military power in Iran, either to get our hostages back safely or to administer the kind of lesson that most of us, I am sure, felt ought to be administered to Iran just to establish America's own sense of dignity and pride.

Among other things, this was not a Caribbean island or a new African republic. This was a country sitting on the edge of the Soviet Union, a part of the most strategic area in the world economically, politically and militarily for the United States and its allies. Leave aside the question of whether military action would have actually rescued the hostages. One still had to reckon with the fact that if an invasion or a sustained bombing or blockading of Iran were attempted, that action would almost certainly have destabilized the existing government of Iran. As little as we may think of that government, its fall would, in all probability, have brought to power an even more radical government. It would have tempted the Soviets, as has been true before, to come into Azerbaijan and perhaps move all the

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way to the Persian Gulf. It might have tempted the Iranians, using the arms and training we have given them in the past, to destroy the port and oil gathering facilities of such neutral states as Saudi Arabia, Kuwait and Bahrain. It was simply not a problem for which military measures offered a practical solution.

On this point, a great deal of credit must be given to President Carter. The best thing the President could have done for his own political future was to go to war with Iran. A war with Iran, whatever else might have resulted from the standpoint of the ultimate good of the country and the security of the free world, would have made him a war President. Such a cause would have greatly strengthened his chances for re-election. It must, therefore, be said on the President's behalf, especially since he stands accused of having politicized the seizure of the hostages, that he consistently turned away from any of the stronger military measures that would have transformed the hostage crisis into at least a short war and perhaps a major war encompassing the entire region. To his credit, he pursued a peaceful course even though a war would have improved and perhaps guaranteed his re-election.

What the President did was to pursue a series of legal measures designed to impose economic and political pressure on Iran. The first of these measures was the freeze of Iranian assets. This occurred ten days after the hostages were seized. It was something the President was planning to do and, at least in so far as assets in the United States were concerned, had the power to do under the International Emergency Economic Powers Act (IEEPA), a descendant of the old Trading with the Enemy Act. The President took this action although many people in the Administration and some bankers were genuinely concerned that the freezing of twelve billion dollars of assets of another country for political purposes, no matter how justified, might precipitate a real-life "Crash of '79." Those of you that have read the novel by that title, may remember that the crash described in the book occurred after an imagined war between the Iranians and the Saudis. Many thoughtful people were concerned about what the Saudis would do if we froze Iran's assets, what the Kuwaitis would do, what all those faceless gnomes in Zurich, with their investments and bank accounts in the United States, would do if the security of their deposits and investments in the United States were to be threatened by a freeze imposed on Iran's assets for political reasons.

While we were debating the issue overnight on the 12th and 13th of November, Bani Sadr, then the finance minister of Iran, announced that Iran was going to take all of its deposits out of U.S.

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banks both in the United States and in Europe. This, he said, would do very serious damage to the dollar. Because of the eight hour time gap, we heard of this announcement around three or four o'clock on the morning of November 14th. That ended all debate and hesitancy within the Administration. We decided that we had to go ahead. We also decided that, without regard to what the Europeans might feel about extra-territoriality, we had to reach Iranian deposits in American banks abroad. This represented about six billion out of the total twelve billion dollars of assets subject to the freeze. By eight o'clock on the morning of November 14th, we had the freeze order signed and in effect. In those hours between four and eight we not only had the order prepared and signed—fortunately we had earlier drafts to work from—but we talked to every central bank and foreign minister among our allies and to the Saudis and Kuwaitis. As we all now know nothing happened to the dollar. The “Crash of '79” did not occur. There was simply no place to go from the dollar, particularly at the interest rates than prevailing. On the other hand, the freezing of these deposits turned out to be, I think, the measure that ultimately persuaded the Iranians to release the hostages although that, of course, took a very long time. It had to await the playout of the struggle for internal power within Iran.

The President took a number of other legal measures. Following the freeze a cap was put on various kinds of trade with Iran, although much of that had already been effectively prevented by the freeze. Our effort to have the United Nations call for sanctions ran into a Soviet veto in the Security Council. Nevertheless, we succeeded in persuading most of our European allies to impose sanctions. These were not quite as severe as our own or as proposed to the U.N. but they were effective nonetheless. Thus, when Iraq, probably emboldened by the impact of the freeze, the sanctions and the general political isolation of Iran, attacked Iran, the Iranians had literally no place in the world to turn for arms, for spare parts, for loans or for anything else that could help their economy.

We also did our best to isolate Iran politically through resolutions adopted by the United Nation's Security Council and through the first serious effort, on the part of the United States, to invoke the jurisdiction of the International Court of Justice. The latter, of course, was successful even though Iran failed to participate in the proceedings. The World Court declared that the actions of the Iranian Government, in ratifying, defending and continuing the seizure of the hostages, constituted a violation of international law and had to be stopped.

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It was against this background that we were finally able to obtain the agreements which provided for the release of the hostages and the settlement of American claims against Iran. I am not going to stop to describe any of the major points of those agreements tonight. They became possible, however, only because of the continuing economic and political pressure brought to bear on Iran and because of developments in the Iranian revolution. In time, it came to the point where a single political group within the Islamic Republican Party—the clerical faction, the most radical and rightwing of all groups—gained predominance in the legislature. This group was able to undertake the decisive act of returning the hostages, something no earlier government—certainly not those of Bani-Sadr or Ghotbzadeh—could do. They were never willing to risk the adverse internal impact that return of the hostages would likely have had on their position in Iran.

Under the resulting Agreements, the United States waived certain claims of American nationals against Iran, including the hostage claims. We undertook to bar American contract claimants from continuing with cases against Iran in the American courts and required that they resort instead to a neutral arbitral tribunal. We returned a portion, but only a portion, of the frozen Iranian assets in return for the hostages. In all of this we probably went to the outer limits of the executive power and of the national power to alter contract rights, interfere with judicial proceedings and settle the claims of our nationals against a foreign government. I say we went to the outer limits. We may find out, in the next six months to a year, that in one minor respect or another we went beyond those limits. On the whole, however, I think that most of what we did will be upheld by the courts, and that it had the approval of public opinion. No one filed suit in those tense days before January 20 when all of this was well known. Also, the agreement to arbitrate the American claims had to be approved by the Iranian Majlis, or parliament, and we had to wait some time for that to occur. Yet, no one in our Congress stood up and said, "How can the executive do this by himself; this must be approved by the Congress." It was the desire, I think, of every segment of the American public—of every political group from Ronald Reagan and the Republicans to the Carter people—to get this done and behind us. The desire to get the hostages back was so strong that no one was prepared to stand up and try to block the agreements.

Several of President Reagan's strongest supporters were claimants who tried to persuade the new Administration to repudiate the agreements. Nevertheless, the Administration concluded that, on the

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whole, it was better to go forward and perform the agreements. The reason for this decision is, I think, very clear. Consider how different the first 90 or 120 days of the Reagan Administration would have been if our negotiations had failed, if the hostages had not been returned and if the Iranians had carried through, as I believe was unavoidable, with the Majlis' resolution. That resolution you recall said that if the Majlis' terms of settlement were not accepted, the hostages would be tried for espionage. Just as Johnson's war in Vietnam became Nixon's war, Carter's hostages would have become Reagan's hostages. Every evening on the news, instead of talking about David Stockman and the importance of balancing the budget and cutting taxes, we would still have been counting the days of captivity for the hostages and would have seen films of the hostages on trial. The whole experience would, I think, have been very searing for the United States. The Reagan Administration would have had to do what we had told the Iranians we would do if they tried the hostages; interrupt all commerce with Iran by a blockade and perhaps by more. Such measures would have risked a Soviet response which could, in turn, have put all of our oil supplies on the other side of the Persian Gulf in jeopardy. All of this was avoided by the return of the hostages through the making of these agreements. The decks were now clear for the new President to go forward with his own program.

Also, I believe the agreements will turn out to be of net benefit to the American claimants. They now have a much better opportunity to obtain a favorable decision and to collect any award than they would have had through litigation in the United States. In the latter case, they would have had to overcome the major barriers of our own Foreign Sovereign Immunities Act and the "Act of State" doctrine. They would have encountered the embarrassing fact that many of the claims were against one entity or department of the Iranian government or against some private company or bank that Iran had later nationalized, while the assets that had been attached to secure payment of any judgment received belonged to an entirely different entity or department—something the FSIA forbids. And of course, we did more for the bar by this giant step in international arbitration than has ever been accomplished before in connection with this kind of international dispute. There will be hundreds of major arbitrations involving billions of dollars. All of them are going to have to be prepared for trial, and many will have to be tried. I have said a couple of times, as has Bob Carswell, that in gratitude for what we have accomplished for the legal profession, we are, at least, entitled to lifetime membership in, and an annual testimonial dinner from, the New York Bar, the Washington Bar and the London Bar.

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The second main point that I want to address concerns the suggestion, advanced after the release of the hostages, that we ought not to perform the balance of the agreements because they were obtained by coercion in violation of international law. It is contended that somehow the Iranians coerced us into this agreement, and that, therefore, having obtained the hostages' release, we should now repudiate the balance of what we promised to do. The legal underpinning to this argument is found in Article 52 of what is called the Vienna Convention on Treaties. That Article states that a treaty is void if its conclusion was procured by the threat or the use of force in violation of the principles of international law embodied in the Charter of the United Nations.

There is one minor point upon which we do not have to dwell. The United States has never ratified the Vienna Convention. Nevertheless, we can accept Article 52 as stating a principle of customary international law. The question is, does it really apply in this case?

Let us put aside for the moment the point that if anybody held the balance of coercive power in this case, the United States probably did. They had our 52 hostages, but we had \$12 billion dollars of their money. In the end, we got back all our hostages and they got only one-fourth, \$2.9 billion of their \$12 billion. Also leave aside the point that the executory portions of these agreements, those still to be performed, are very much in the interests of the United States. The balance of interests at this juncture is very much in our favor. Our bank claims have been or are being paid. Our contract claimants, the oil companies, the construction companies, etc., have been given a much better opportunity to obtain judgments and collect on those judgments than they would have had under the pending litigation. Leave aside even the fact that by repudiating these agreements we would be going back on our word not only to the Iranians but also to the Government of Algeria which acted as an intermediary and lent its good offices to bringing the agreements about. Such a repudiation of our word would make all future negotiations after a hostage taking absolutely impossible. Leaving all this aside, however, the question remains, is Article 52 applicable to this case?

Parenthetically, I might mention that I debated this issue with a distinguished professor of international law at another law school. I suggested that if his argument were accepted we could never have negotiated for the release of the hostages. He said that he did not mean that at all. It was alright to negotiate for their release and agree on these terms, he said, but once they were released we should have refused to perform what we promised. To support this he fell back on

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the international law arguments which you see repeated over and over again by critics of the agreements. And it is to these arguments that I want to turn for a moment. Leaving aside the practical aspects of the matter, considering this as a pure issue of international law and accepting the principles found in Article 52 of the Vienna Convention, I would contend that there is no legal basis whatsoever for repudiating these agreements.

Article 52 of the Vienna Convention, which was the subject of debate throughout the 1950's and 60's, grew out of a fight between the Soviet Union and the Third World, on the one hand, and the Western powers on the other hand. The Third World and the Soviet Union wanted to define coercion as including economic or political coercion. They took this position so that all independence agreements negotiated between the colonial powers and their about-to-become-independent colonies, which the Soviets referred to as "leonine" agreements, could be repudiated by the colonies once they gained independence. The argument would be that because the former colony was economically and politically subordinate to the colonial power, the agreement was clearly the product of economic or political coercion. The Soviet position was ultimately rejected. Article 52, as finally written, forbids only a threat or use of force in violation of the U.N. Charter.

Now, let us take those words. Did Iran's actions, which as a government amounted at most to ratifying and then adopting the seizure of our diplomats by private persons, violate the U.N. Charter? The U.N. Charter prohibits the use of force to attack the territory or armed forces of another state. Was the seizure of our hostages itself a violation of the U.N. Charter? One could argue that it was, because at least a dozen or so of the hostages were members of the United States Armed Forces. Let us accept that; let us say it was a violation of the U.N. Charter just as the North Korean invasion of South Korea was a violation of the U.N. Charter and branded as such by the U.N. Security Council. Does that mean that if a war or some other confrontation or the taking of counter-measures occurs in response to an act of aggression, all agreements terminating the aggression are void? How could that really be intended?

You will all remember that after we had repelled the invasion of South Korea, the Korean conflict was finally resolved by an armistice agreement between the United Nations command and the North Koreans which established the line between North and South Korea at the 38th Parallel. That agreement has been in effect for more than twenty-five years. It did resolve the problem. Are we now to say that

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the agreement is void, that it should not have been performed because somehow the North Koreans procured the agreement by their original use of force in violation of the U.N. Charter? Could that possibly make any sense? Consider another example. After the aggressions committed by Nazi Germany, Italy and Japan were repelled and the Axis powers forced to surrender unconditionally, the Allies imposed peace treaties on each of those powers. Does that mean that those peace treaties are void because they were agreements procured by the use of force, either our force in response to the Axis aggression, or the Axis initial aggression itself? That is just an absurd line of argument.

Before assuming the post of President of the International Court of Justice, Sir Humphrey Waldock drew precisely this distinction in describing what Article 52 really means. He would agree that Article 52 would apply if, let us say, the Axis powers had been successful in their aggression and had imposed a peace on the Allies, taking, for example, two-thirds of France, part of Great Britain and half of the Soviet Union. When an aggression is repelled, however, and an agreement is made which bars the aggressor from enjoying the fruits of his aggression, Article 52 does not apply to that agreement. It remains a valid treaty under international law.

Applying that test to our Iranian agreements, they are, I submit, entirely valid. The Iranians achieved nothing—I repeat nothing—as a result of their act of aggression, or use of force, if that is what we want to call it. They seized our hostages, and we seized \$12 billion dollars of their assets. The gist of the agreement is that we got back all our hostages, and we restored only part of the status quo—we gave them back one-fourth of the assets we had seized. We also agreed to return the balance provided that the Iranians agreed to establish a neutral arbitral tribunal for the adjudication of American claims against Iran and provided that the Iranians deposited in various escrow accounts funds to pay any arbitral award that might be obtained. Iran gained nothing by its aggression. One would hope that the moral of this outcome is not that future terrorists will be encouraged or see something to gain, but rather that by an act so violative of international law and general civility among nations, the Iranians accomplished nothing. They only succeeded in bringing world disapproval together with substantial economic and, after Iraq's attack, military damage down on their heads. So whatever else might be said about these agreements, I submit that it makes no sense to say that they violated international law.

Let me make just one more point. As I said at the beginning, I think the episode of the hostages, painful and humiliating as it has

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been for us, has demonstrated something very important about the modern world, something we need to learn. Ever since World War II, we have wanted to achieve world interdependence; greater economic intercourse, expanded political and cultural exchanges, improved communications, etc. We have believed wholeheartedly in the theories of comparative advantage and free trade. We thought everyone would benefit as a result. On the whole, these theories have worked. Everyone is better off as a result of this enormous explosion of interdependence that has occurred around the world.

At the same time, interdependence has another side to it. By the very definition of interdependence we ourselves have become vulnerable to events abroad in ways that we could never have imagined before. One need only think of the Arab oil embargo and the damages resulting from the activities of OPEC since 1973 and move those activities back in our minds to 1955 or to 1940 or to 1935. We were not as interdependent in those days. The Arab oil embargo would have meant little to the economy or security of the United States and the Western World. Today we are much more vulnerable to what happens abroad. At the same time, we find, as I said at the beginning, that our enormous military superiority over most countries and our military equilibrium with the Soviet Union, often makes the use of military power too risky — too counterproductive — to be used as a response to events abroad that we dislike. As a result, we are compelled to rely upon political and economic measures. We have to develop different kinds of pressures than those we have heretofore used.

We used economic measures against Iran quite successfully. We used these other types of pressures against the Soviet Union after its invasion of Afghanistan, another episode to which it was not possible for us to respond militarily. We used the grain embargo, the Olympic boycott and we won a strong vote of disapproval in the United Nations General Assembly, something like 104 to 18. The people of the Soviet Union never heard about that disapproval until we and a large part of the Western World together with Japan and China did not show up at the Olympics. That was the first message to the Soviet people that the rest of the world disapproved of the invasion of Afghanistan so strongly. Again, some of you will remember that we used economic measures of this type during World War II. We had then what was called the Board of Economic Warfare.

At the same time the use of such measures in today's interdependent world is a very risky and difficult business. For one thing, boycotts, as the Arab oil embargo certainly taught us, are two-edged

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swords. When we withhold trade or some economic benefit because someone else acts contrary to our political views or our sense of economic security, others, like the Arabs, can do the same when they think we are doing something that conflict with their political views — as with regard to Israel, or their sense of national security. To make an economic measure work in an interdependent world you have to get all of your allies to go along with you. That is very difficult. Since trade is a two-way street you may do more harm to yourself, or at least as much harm to yourself, as you do to the country whose conduct you are trying to correct. Risk-benefit analysis becomes crucial. Nevertheless, accepting all of this, I see no other alternative in today's world than to sharpen our own capacity to employ the economic weapons that interdependence has given us and to train ourselves to use them sparingly, wisely and well.

Thank you very much.

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