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BELK v. UNITED STATES: OBTAINING MONETARY RELIEF FOR AMERICANS HELD HOSTAGE IN IRAN

David L. Schwartz*

INTRODUCTION

Iran seized and detained fifty-one American hostages from November 4, 1979 to January 20, 1981, a period of over thirteen months.¹ Although the Iranian hostage crisis occurred over seven years ago, hostage taking is still a popular means through which terrorists attempt to obtain money, weapons, and international recognition.² On various occasions, negotiations have secured the release of hostages.³ Occasionally, a state prosecutes a terrorist.⁴ Rarely, however, do the hostages or their families receive a remedy for their sufferings.⁵ This Case-Comment focuses on the frustrations that hostages experience in obtaining monetary compensation when the captors are agents of a foreign sovereign state.

When President Jimmy Carter signed the Algerian Accords,⁶ he dismissed the liability of the Islamic Republic of Iran for the seizure of the American hostages.⁷ On February 24, 1981, President Ronald Rea-

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1. *Belk v. United States*, 12 Cl. Ct. 732, 732 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96753) (to be reported at 858 F.2d 706).

2. *See Iran Plays the Hostage Game*, NEWSWEEK, Feb. 9, 1987, at 34 (noting the continuing problem of hostage taking in Beirut by supporters of the Iranian Islamic movement). The above article stated that eight Americans and sixteen other foreigners were captured and held hostage in Beirut. *Id.*

3. *But see id.* at 36 (suggesting that making concessions to Iran for hostages has not solved the problems of hostage taking, and may have even sparked more kidnappings).

4. *See West Germany to Prosecute Terrorist*, 87 DEP'T ST. BULL. 85 (Aug. 1987) (noting White House approval for West Germany's decision to prosecute Mohammed Hamadei to the full extent of the law for hijacking and taking hostages on TWA flight 847).

5. *See infra* notes 212-21 and accompanying text (discussing the infrequent and inadequate *ex gratia* settlements that are sometimes given to terrorist victims for their suffering).

6. Declaration of the Government and of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, § 11, *reprinted in* 20 I.L.M. 224, 227 (1981) [hereinafter *General Declaration*].

7. *Id.* The General Declaration explicitly precludes any claims against Iran arising out of the seizure and detention of the American hostages, under United States law, Iranian law, or international law. *Id.*

Under the terms of the Algerian Accords, the Iran-United States Claims Tribunal

gan ratified the Algerian Accords, making the Accords binding on the United States.⁸ With the signing of the Accords the hostages gained their freedom, but lost their ability to bring private actions against Iran.⁹

In response to the prohibition on private actions, some of the former hostages brought suit against the United States under the takings clause of the fifth amendment of the United States Constitution.¹⁰ The hostages argued that President Carter, acting in his executive capacity, destroyed their viable tort claims against Iran without giving the hostages just compensation.¹¹ The United States Claims Court dismissed *Belk v. United States*,¹² and subsequently, the United States Court of Appeals for the Federal Circuit affirmed the decision of the Claim's Court.¹³

Part I of this Case-Comment offers a background on the takings

has the power to arbitrate American and Iranian unresolved commercial claims against one another relating to contracts or debts. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, art. II, *reprinted in* 20 I.L.M. 230, 320-31 (1981) [hereinafter Settlement of Claims]. Decisions of the tribunal are final and binding on the parties. *Id.* art. IV. See Note, *The United States-Iran Accords and the Takings Clause of the Fifth Amendment*, 68 VA. L. REV. 1537, 1539-40 (1982) [hereinafter Note, *The U.S.-Iran Accords*] (discussing various aspects of the claims settlement).

Many commentators have questioned the validity of the Algerian Accords. See *The U.S./Iranian Hostage Settlement*, 1981 AM. SOC'Y INT'L L. 236, 237 [hereinafter *The U.S.-Iran Hostage Settlement*] (questioning the enforceability of the Accords under coercion and duress, but noting that the President's ratification of the Accords makes the issue of validity merely academic); Note, *The Iranian Hostage Agreement Under International and United States Law*, 81 COLUM. L. REV. 822, 837 (1981) (commenting that settlement of a treaty through coercion may violate international law, and may make the treaty void).

8. Exec. Order No. 12,294, 31 C.F.R. § 535.216 (1981), *reprinted in* 15 U.S.C. § 1707 (1982).

9. General Declaration, *supra* note 6, art. 11.

10. *Belk v. United States*, 12 Cl. Ct. 732 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706); U.S. CONST. amend. V.

11. *Belk v. United States*, 12 Cl. Ct. 732, 732-33 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706). The fifth amendment states that the government shall not take property for a public purpose without giving just compensation for the property. U.S. CONST. amend. V.

12. *Belk v. United States*, 12 Cl. Ct. 732, 736 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

13. *Belk v. United States*, 12 Cl. Ct. 732 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706). The Federal Circuit Court wholeheartedly adopted the decision of the Claims Court, affirming the summary judgment in favor of the United States, as well as agreeing with the takings clause and political question analyses. *Id.*

clause and the political question doctrine, and reviews relevant prior case law. Part II examines the summary judgment proceedings in *Belk v. United States*.¹⁴ Part III scrutinizes the takings clause and political question analyses of the United States Claims Court. Part IV analyzes the decision of the Claims Court and suggests that the Federal Circuit Court should have reversed and remanded the case back to the United States Claims Court.

Part V of this Case-Comment analyzes a central issue which would have arisen had the Federal Circuit Court remanded the case. The issue on remand would be whether the hostages' claims against Iran did, in fact, constitute property. To prove that their claims constituted property, the hostages will have to demonstrate that they would have been able to acquire jurisdiction over the Islamic Republic of Iran in a federal district court. Part V, therefore, addresses the difficulties of obtaining jurisdiction over a foreign sovereign state. Additionally, Part V serves as a practical jurisdictional guide for international human rights attorneys for future hostage or terrorist victim cases. Part VI discusses the various remedies available to the hostages, and Part VII sets forth recommendations to allow the hostages to recover monetary compensation.

I. BACKGROUND

A. TAKINGS CLAUSE

The fifth amendment takings clause precludes the federal government from taking private property for public use without adequate compensation.¹⁵ In a just compensation analysis, plaintiffs must first prove that their claims constitute property.¹⁶ Second, plaintiffs must prove that the United States took the property for a public use without

14. Defendant's Motion for Summary Judgment, at 7 n.3, *Belk v. United States*, 12 Cl. Ct. 732 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706) [hereinafter Government's Brief].

15. U.S. CONST. amend. V. *See, e.g.,* *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1386 (Ct. Cl. 1970) (holding that no taking occurred while the United States was in a state of war); *Seery v. United States*, 127 F. Supp. 601, 602 (Ct. Cl. 1955) (noting that damage to an American citizen's estate in Austria is a taking). *Cf. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 213 (1965) (stating that the American Law Institute has not decided whether the executive's settlement of a citizen's claim against a foreign state for less than the value of the claim is a compensable taking).

16. *Pub. Water Supply Dist. No. 3 v. United States*, 135 F. Supp. 887, 890 (Ct. Cl. 1955).

giving the property owners just compensation.¹⁷

In a recent takings clause case, *Shanghai Power Co. v. United States*,¹⁸ the President settled the plaintiff's claim against the People's Republic of China [PRC], and thereby extinguished the plaintiff's claim against the PRC for the excess amount due.¹⁹ The parties cross-moved for summary judgment.²⁰ The United States Claims Court held that the plaintiff's lost claim constituted property, and the value of that property was greater than the amount that the plaintiff received in the executive settlement.²¹

In deciding whether justice and fairness require that plaintiffs receive compensation for the taking of their property, the court in *Shanghai Power Co. v. United States* offered five factors to examine.²² The five factors are: (1) the degree to which the government impaired the property owner's rights; (2) the extent to which the property owner is an incidental beneficiary of the governmental action; (3) the importance of the public interest that the governmental action would serve; (4) whether the governmental action is novel or unexpected, or falls within traditional boundaries; and (5) whether the governmental action

17. *Id.*; *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 242 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985). A taking is more likely to exist if the government physically takes or invades someone's property, and is less likely to exist when the governmental action is in accordance with public policy to benefit the public. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). *Accord* *Pacific R.R. v. United States*, 120 U.S. 227, 235 (1887) (denying compensation for a takings claim because of military necessity, and a strong government interest).

See also *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) (holding that the return of Iranian assets did not constitute a taking because the assets were frozen under an executive order); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978) (refusing to grant compensation when plaintiffs have an alternative recourse such as the right to build elsewhere); *E-Systems, Inc. v. United States*, 2 Cl. Ct. 271, 278 (1983) (holding that the plaintiff, not having exhausted all remedies, namely the Iran-United States Claims Tribunal, is not entitled to compensation because the plaintiff has not yet suffered an injury).

Most takings clause cases relating to the Iranian crisis concern commercial claims regarding Iranian assets in the United States, and various contractual obligations that the United States companies sought to enforce in United States federal courts. *See* *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) (stating plaintiff's argument that regulation nullifying attachments constitutes a taking of property interests in assets, but holding that there was no compensable taking); Note, *The U.S.-Iran Accords*, *supra* note 7, at 1540 (commenting that a taking may exist if the result of arbitration in the Iran-United States Claims Tribunal is unsatisfactory).

18. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985).

19. *Id.* at 239.

20. *Id.* at 239.

21. *Id.* at 241-42.

22. *Id.* at 242-43.

substituted any rights or remedies for those that it destroyed.²³ In a motion for summary judgment, if any of the five factors presents a triable issue of fact, a court may not grant the motion for summary judgment.²⁴ If no triable issue of fact exists, the court must weigh the five factors to determine if, as a matter of law, compensation is in the interest of justice and fairness.²⁵

B. POLITICAL QUESTION DOCTRINE

A judicial decision on the takings issue is not limited to the five-factor test, but may also depend upon the particular facts of each case.²⁶ A determination on the particular facts of each case provides the court with flexibility to decide the takings issue for other reasons, such as whether the court is interfering with the President's role in foreign policy.²⁷ Judicial deference to the executive involves the invocation of the political question doctrine.²⁸ The political question doctrine limits the ability of a federal court to review the acts of other branches of government.²⁹ Many courts have granted the executive exclusive power to execute settlements in the area of foreign relations, thereby

23. *Id.*

24. See *Belk v. United States*, 12 Cl. Ct. 732, 733 (1987) (reiterating that summary judgment is only appropriate when there are no triable issues of fact), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

25. See *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (stating that the government is subject to "justice and fairness"); *Belk v. United States*, 12 Cl. Ct. 732, 733 (1987) (citing with affirmation the language in *Andrus v. Allard*), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

26. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (noting that courts will inquire about the government's failure to adequately compensate on a case-by-case basis).

27. *Belk v. United States*, 12 Cl. Ct. 732, 735-36 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

28. *Id.*

29. See *Baker v. Carr*, 369 U.S. 186, 210-11 (1961) (stating that it is the responsibility of the court to determine whether a political question exists). The political question doctrine operates principally as a function of the separation of powers. *Id.* *Baker v. Carr* held that to determine if the issue is a nonjusticiable political question, the issue clearly must show a constitutional commitment of a coordinate political department to handle the issue; or have no judicially discoverable and manageable standards for resolving it; or that the issue is impossible to decide without a policy determination of nonjudicial discretion; or that the issue is impossible to resolve without ignoring the duties of the other branches of government; or need an unquestioning adherence to an already made political decision; or have the potential of embarrassing other branches of government because various departments made multifarious pronouncements on one question. *Id.* at 217.

limiting judicial review of foreign policy matters.³⁰ For example, in *Shanghai Power Co. v. United States*, although the claims court offered five factors to analyze the takings clause issue, the court's primary rationale for holding for the government was based upon the political question doctrine.³¹ The court was wary of interfering in the secret diplomatic functions of the executive.³²

Not all courts perceive that takings claims that are based upon an inadequate executive settlement interfere with sensitive diplomatic negotiations.³³ In *E-Systems, Inc. v. United States*,³⁴ a takings clause case in which E-Systems sought damages for Iran's default on contractual obligations,³⁵ the United States Claims Court did not find a political question and denied the government's summary judgment motion.³⁶ The court, not focusing on the executive's diplomatic function, saw little difference between a presidential taking in the area of foreign policy, and a legislative taking involving only national interests.³⁷ The court held that a governmental taking does not require a physical act.³⁸ The court, however, could not rule on the takings issue because E-Systems had not exhausted all available fora.³⁹ The court suspended the proceedings until the Iran-United States Claims Tribunal heard E-Sys-

30. See generally *Dames & Moore v. Regan*, 453 U.S. 654, 669-74 (1981) (holding that the President was authorized to nullify attachments and transfer Iranian assets); *United States v. Pink*, 315 U.S. 203, 230 (1942) (claiming that the executive's decision regarding the Litvinov Assignment is conclusive on the courts); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 326-27 (1936) (holding that legislative action delegating to the President the power to use an embargo on the sale of arms is valid). Both the *Curtiss-Wright* and *Pink* decisions stated that the President was the sole organ of the federal government in the area of foreign relations. *United States v. Pink*, 315 U.S. 203, 229 (1942); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319-20 (1936). See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 721, Reporter's note 8 (1986) (stating that courts are reluctant to question the political judgment of the executive that the settlement is in the best interests of both the claimants and the United States).

31. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 243-49 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985).

32. *Id.* at 247-49.

33. See *E-Systems, Inc. v. United States*, 2 Cl. Ct. 271, 274 (1983) (holding that the government failed to establish as a matter of law that no taking resulted under the fifth amendment from its blocking of assets in the United States in which the Iranian government had an interest); *Langenegger v. United States*, 756 F.2d 1565, 1568 (Fed. Cir. 1985) (holding that the political question doctrine is ultimately rooted in concern for separation of powers and controls political questions, and not political cases).

34. *E-Systems, Inc. v. United States*, 2 Cl. Ct. 271 (1983).

35. *Id.* at 272.

36. *Id.* at 275.

37. *Id.* at 275.

38. *Id.* at 276.

39. *Id.* at 278.

tems' claim for damages against Iran.⁴⁰

In another case, *Langenegger v. United States*,⁴¹ the Federal Circuit Court held that the issue of whether the government extinguished the plaintiffs' claim against El Salvador was justiciable.⁴² The court did not invoke the political question doctrine.⁴³ The court clarified its affirmation of *Shanghai Power Co. v. United States*, stating that *Shanghai Power* did not hold that the executive's extinguishment of a claim against a foreign state always raises a nonjusticiable takings issue.⁴⁴ Instead, the court must look to the specific facts of each case.⁴⁵ The specific facts of *Langenegger* did not give rise to a political question.⁴⁶ Incidentally, the court in *Langenegger v. United States* did not hold in favor of the plaintiffs on their takings claim.⁴⁷ Because the plaintiffs failed to exhaust all possible fora in which they could bring a claim, the court held that the government could not have extinguished the plaintiffs' claim.⁴⁸

In the above takings clause cases, courts have used a five-part takings clause analysis, and do not always invoke the political question doctrine. Courts employ the five-part analysis as a guide to determine whether a taking of property occurred without just compensation. Moreover, when the governmental act is an inadequate settlement of a plaintiff's claim against a foreign state, courts do not always invoke the political question doctrine.

II. FACTS OF *BELK V. UNITED STATES*

On November 4, 1979, Iran seized and detained fifty-one American hostages for 444 days.⁴⁹ The tort claims of the hostages against the Islamic Republic of Iran included false imprisonment, assault and battery, intentional infliction of emotional distress, and loss of consortium.⁵⁰ The Algerian Accords, however, explicitly barred all claims against Iran relating to the seizure of the hostages,⁵¹ and the hostages

40. *Id.* at 284.

41. *Langenegger v. United States*, 756 F.2d 1565 (Fed. Cir. 1985).

42. *Id.* at 1570.

43. *Id.*

44. *Id.* at 1573.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. See *Belk v. United States*, 12 Cl. Ct. 732, 732 (1987) (detailing background of hostages' claims), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database. 1099 WL 96763) (to be reported at 858 F.2d 706).

50. *Id.*

51. *Id.* at 732-33. When President Reagan signed the Algerian Accords, he, in ef-

appeared to have no remedy available to them.

In *Belk v. United States*, eleven hostages and two spouses filed a complaint against the United States in the United States Claims Court,⁵² asserting that the presidential settlement of the Algerian Accords constituted a governmental taking of property for public use without adequate compensation.⁵³ The United States moved for summary judgment,⁵⁴ arguing that no triable issues of fact existed,⁵⁵ and that, as a matter of law, the settlement between the United States and Iran did not constitute a taking of the hostages' claims without just compensation.⁵⁶ Alternatively, the government argued that the executive's settlement of the Algerian Accords was not subject to judicial review.⁵⁷

fect, dismissed all hostage claims against Iran. General Declaration, *supra* note 6, art. 11.

52. *Belk v. United States*, 12 Cl. Ct. 732, 732 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database. 1099 WL 96763) (to be reported at 858 F.2d 706). The Tucker Act grants the Claims Court jurisdiction in cases based upon the Constitution, including cases regarding damages for takings clause violations. 28 U.S.C. § 1491 (1982). See *Dames & Moore v. Regan*, 453 U.S. 654, 689-90 (1981) (holding that the Tucker Act does not preclude jurisdiction over takings claims relating to the Algerian Accords); *In Re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1310-11 (9th Cir. 1982) (stating that the treaty exception provision in section 1502 must be construed narrowly, so as not to allow a takings claim based on the Warsaw Convention). But see 28 U.S.C. § 1502 (1982) (denying jurisdiction in the United States Claims Court when a claim against the United States grows out of or is dependent upon any treaty with a foreign nation). The treaty exception, however, does not seem to bar the hostages' suit against the United States because courts have construed the treaty exception very narrowly. *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 902-06 (Ct. Cl. 1976).

53. *Belk v. United States*, 12 Cl. Ct. 732, 732-33 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

54. *Belk v. United States*, 12 Cl. Ct. 732, 732-33 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706). Under rule 56 of the Rules of the Claims Court, a party moving for summary judgment must prove that there is no genuine issue as to any material fact, and that they are entitled to judgment as a matter of law. R. CL. CT. 56, 28 U.S.C. § 774 (1982). A court may grant summary judgment only if there are no disputes as to material fact, and judgment is appropriate as a matter of law. *Weide v. United States*, 4 Cl. Ct. 432, 435 (1984), *aff'd*, 765 F.2d 157 (Fed. Cir.), *cert. denied*, 474 U.S. 822 (1985).

55. Defendant's Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment at 1, *Belk v. United States*, 12 Cl. Ct. 732 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706) [hereinafter Government's Reply Brief].

56. *Belk v. United States*, 12 Cl. Ct. 732, 733 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

57. *Id.*

III. COURT'S ANALYSIS

In *Belk v. United States*, the United States government moved for summary judgment.⁵⁸ The United States Claims Court held for the government, effectively dismissing the hostages' complaint.⁵⁹ In its decision, the United States Claims Court addressed two issues.⁶⁰ The first issue was whether the government's signing of the Algerian Accords, which extinguished the hostages' tort claims against Iran, constituted a taking of the hostages' property without just compensation.⁶¹ The second issue was whether the court had the power of judicial review in a case involving the executive's role in foreign policy.⁶²

The court first addressed the takings clause issue. Prior to conducting a thorough takings clause analysis, the court focused on the intangible nature of the property, a tort claim, and questioned whether there was a physical invasion of the alleged property.⁶³ Thus, the court began its takings clause examination with a presumption that the non-physical governmental act of destroying the intangible property, a tort claim, was not a taking.⁶⁴

The United States Claims Court then turned to the five-part takings clause test.⁶⁵ Regarding the first factor, the degree of impairment of the property rights, the court noted the government's admission that the hostages' claims were completely destroyed.⁶⁶ As to the second factor, whether the property owners were an incidental beneficiary of the governmental action, the court found that the freed hostages unquestionably benefited from the Accords.⁶⁷ Regarding the third factor, the court determined that a strong public and governmental interest in signing the Algerian Accords existed.⁶⁸ As to the fourth factor, the court rejected the plaintiff's claim that the exercise of governmental power was novel and unexpected.⁶⁹ In this regard, the court held that the hostages had no expectations of compensation.⁷⁰ Regarding the fifth factor, whether the governmental action substituted any rights or reme-

58. *Id.* at 736.

59. *Id.*

60. *Id.* at 733.

61. *Id.*

62. *Id.*

63. *Id.* at 733-34.

64. *Id.*

65. *Id.* at 733.

66. *Id.* at 734.

67. *Id.*

68. *Id.* at 734.

69. *Id.*

70. *Id.*

dies for those that it destroyed, the court pointed out that the Algerian Accords secured the release of the hostages.⁷¹ That is, the substituted remedy for the hostages was their freedom.⁷² The court determined that there were no triable issues of fact regarding any of the five factors,⁷³ and therefore concluded that, as a matter of law, the Accords did not constitute a taking of property without just compensation.⁷⁴

The United States Claims Court next addressed the question of judicial review. The court held that the political question doctrine barred it from reviewing the executive's decisions in sensitive foreign policy matters.⁷⁵ The court did not seek to question the ability of the President to conduct foreign relations for fear that such second guessing would hinder the executive's diplomatic function.⁷⁶ Therefore, the court held that the takings clause action against the dismissal of the hostages' tort claims against Iran was a non-justiciable political question.⁷⁷

IV. WRITER'S ANALYSIS

A. TAKINGS CLAUSE

Because the government conceded, for the purposes of the motion for summary judgment, that the claim constituted property, the Claims Court did not question whether the tort claim was a property interest.⁷⁸ Rather than proceeding directly to a takings clause analysis, the United States Claims Court, choosing to interpret a taking narrowly, focused on the intangible nature of the governmental act.⁷⁹ Because the dismissal of the hostages' claims did not constitute an actual physical invasion of property, the court found that the nature of the governmental act did not "readily suggest that a taking ha[d] occurred."⁸⁰ *E-*

71. *Id.*

72. *Id.*

73. *Id.* at 734-35.

74. *Id.* The court stated that the United States "should not be held as a surrogate for Iran's unjustifiable actions." *Id.* The court declared that Iran, and not the United States, took the hostages' freedom by holding them captive. *Id.* at 735.

75. *Id.* at 735-36.

76. *Id.* at 736.

77. *Id.* at 735-36.

78. *See id.* at 733 (noting that the United States conceded that the plaintiffs' claim constituted property for the purposes of the summary judgment motion).

79. *Id.*

80. *Id.* The government made a similar argument focusing on the non-physical attributes of ceding the hostages potential tort claims against Iran, as opposed to the physical nature of most eminent domain cases. Government's Brief, *supra* note 14, at 8. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (noting that when the governmental act involves a physical invasion of property, the court has an easier time, conceptually, in finding that a taking has occurred).

Systems, Inc. v. United States and other prior case law demonstrate, however, that a taking may occur when the government does not take physical possession of property.⁸¹ Accordingly, the United States Claims Court should not have concentrated on the physical nature of the governmental act as a justification for denying the hostages their takings clause claim.

The United States Claims Court then examined the five-part takings clause test, which the United States Claims Court enumerated in *Shanghai Power Co. v. United States*.⁸² The first factor of the five-part takings clause analysis examines the degree to which the government impaired the property owner's rights.⁸³ If the property maintained a substantial amount of its value after the governmental act occurred, then the act would not constitute a taking.⁸⁴ Even if the court required that the claimants prove that the United States, in signing the Algerian Accords, took one hundred percent of their property without compensation, the plaintiffs could meet this standard.⁸⁵ The Algerian Accords precluded the hostages from suing Iran, thereby destroying one hundred percent of their property interests.⁸⁶ This factor presents no triable issue of fact because the government agreed that the hostages com-

81. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 n.25 (1978) (rejecting the notion that a taking only occurs with physical possession of a piece of tangible property); *In re Air Crash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1312 (9th Cir. 1982) (holding that property interests include compensation claims); *Randall v. H. Nakashima & Co., Ltd.*, 542 F.2d 270, 275 (5th Cir. 1976) (finding that a tort claim may constitute property even when there is debate as to liability); *United States v. Hubbell*, 323 F.2d 197, 200 (5th Cir. 1963) (holding that a tort claim can constitute property); *E-Systems, Inc. v. United States*, 2 Cl. Ct. 271, 276 (1983) (noting that the government need not take physical possession of property for a taking to occur); *The U.S./Iranian Hostage Settlement*, *supra* note 7, at 239 (commenting that the tort claims of the hostages may be defined as property).

But see *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 240 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985) (stating that the claimant only possesses a property interest as long as the interest is a legally enforceable right, and does not contradict United States foreign policy).

82. *Belk v. United States*, 12 Cl. Ct. 732, 733 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706) (citing *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 240 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985)).

83. *Belk v. United States*, 12 Cl. Ct. 732, 733 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

84. See *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding that the Court views a property owner's rights in its entirety, and if the government destroys only one strand of a property owner's bundle of rights, then a taking does not exist).

85. *Belk v. United States*, 12 Cl. Ct. 732, 734 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

86. Treas. Reg. 31 C.F.R. § 535.216 (1981); General Declaration, *supra* note 6.

pletely lost their ability to sue Iran in tort.⁸⁷ Therefore, as a matter of law, the first factor supports a judgment in favor of the hostages.⁸⁸

The second factor of the five-part takings clause test analyzes the extent to which the property owner is an incidental beneficiary of the governmental action.⁸⁹ In deciding the extent of benefit, the court must determine who the principal beneficiaries are.⁹⁰ Accordingly, the United States Claims Court examined the amount of benefit that the hostages received as a result of the Algerian Accords.⁹¹ The court determined that the hostages had benefited from the President's settlement of their claims by receiving their freedom.⁹²

The United States Claims Court, however, failed to account for the degree of benefit that other parties received. For example, the commercial claimants who had contractual obligations with Iran received a forum for arbitration—the United States-Iran Claims Tribunal.⁹³ Also, the American public gained an advantage through the achievement of important foreign policy objectives,⁹⁴ which included the settlement of a source of friction between the United States and Iran.⁹⁵

In *Belk v. United States*, however, the government contended that the Algerian Accords primarily benefited the hostages⁹⁶ because the Accords directly gave the hostages their freedom, and indirectly gave them the benefit of an improved foreign policy.⁹⁷ The United States Claims Court agreed and held that the hostages were the principal beneficiaries, and the public was only an incidental beneficiary of the Alge-

87. *Belk v. United States*, 12 Cl. Ct. 732, 734 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

88. *Id.*

89. *Id.* at 733.

90. *Id.* at 734.

91. *Id.*

92. *Id.*

93. Settlement of Claims, *supra* note 7, arts I, II.

94. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that when the government action benefits the public, the loss should be placed on the public).

95. *Belk v. United States*, 12 Cl. Ct. 732, 734 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

96. Government's Brief, *supra* note 14, at 13-14. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978) (stating that a balancing test, weighing all the relevant factors, determines whether the government's action is for public or private benefit); see also *YMCA v. United States*, 395 U.S. 85, 92 (1969) (holding that in a takings clause analysis, to ascertain whether compensation is required, the court must determine if the governmental action was sufficiently directed to the property damage).

97. Government's Brief, *supra* note 14, at 13-14.

rian Accords.⁹⁸ A triable issue of fact remained as to who was the primary beneficiary of the governmental action.

The third factor of the five-part takings clause analysis determines the importance of the public interest that the governmental action would serve.⁹⁹ The government argued that the Algerian Accords served an important public purpose, and therefore, could not constitute a taking.¹⁰⁰ The court, however, did not specifically state whether the settlement of the plaintiffs' claims constituted a substantial public purpose. Assuming that the court did view the Accords as constituting a substantial public purpose, the court would logically have to determine that the government benefited greatly from the Accords. This finding should help raise a triable issue of fact as to the second factor, which was whether the public or the hostages were the principal beneficiaries of the Accords.

The fourth factor is whether the exercise of governmental power is novel and unexpected, or whether it falls within traditional boundaries.¹⁰¹ The United States Claims Court examined whether the executive traditionally has had the authority to settle claims of United States nationals.¹⁰² The government argued that the embassy workers who remained in Iran assumed an apparent risk that they might be subject to terrorist activities.¹⁰³ In this unfortunate event, the employees also assumed that the President would intervene and act on their behalf.¹⁰⁴ The court, focusing on the power of the executive to intervene in emergency situations where American interests are at stake, held that the

98. *Belk v. United States*, 12 Cl. Ct. 732, 734 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706). *See YMCA v. United States*, 395 U.S. 85, 92 (1969) (holding that if the plaintiffs in a takings claim are the principal beneficiaries of the governmental action, then a taking cannot exist, even if the public also benefited).

99. *Belk v. United States*, 12 Cl. Ct. 732, 733 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

100. Government's Brief, *supra* note 14, at 14. *See, e.g., United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168-69 (1958) (closing mines did not constitute a taking because the reallocation of resources during wartime constituted an essential governmental and public purpose).

101. *Belk v. United States*, 12 Cl. Ct. 732, 733 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706) (quoting *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 242-43 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985)).

102. *Id.* at 734.

103. Government's Brief, *supra* note 14, at 11.

104. *Id.* The government argues that it is not bound to compensate the hostages because it was trying to protect them. *See YMCA v. United States*, 395 U.S. 85, 92 (1969) (holding that no taking exists when damage occurred to building while federal officers were trying to protect it).

government's activity was neither novel nor unexpected.¹⁰⁵ The United States Claims Court deferred to the executive, acknowledging his power to make decisions in foreign policy matters.¹⁰⁶ Although the executive has often exercised his power to settle the claims of nationals, the settlement is, oftentimes, in exchange for a lesser legal remedy.¹⁰⁷ The novelty issue may therefore be a triable issue of fact because the hostages could not have expected a complete forfeiture of their tort claims against Iran.¹⁰⁸

The final inquiry of the five-part takings clause analysis is whether the governmental action substituted any rights for those rights that it destroyed.¹⁰⁹ Although the government secured the release of the hostages, it failed to give any significant tort remedies to the claimants.¹¹⁰ Accordingly, the claimants argued that if the court viewed their freedom as a sufficient *quid pro quo* for the nullification of their tort claims, then the court would, in effect, legitimize Iran's tortious act of seizing and detaining the hostages.¹¹¹

The hostages in *Belk v. United States*, asserting that they received no substitute legal right or remedy, distinguished *Shanghai Power v.*

105. *Belk v. United States*, 12 Cl. Ct. 732, 734 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706). *Accord* *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 245 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985) (stating that the possibility always exists that the executive will interfere in the settlement of a claim that affects foreign relations, and this possibility is a shared benefit and shared risk of traveling abroad for business or pleasure).

106. *Belk v. United States*, 12 Cl. Ct. 732, 736 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706). *See infra* notes 115-31 and accompanying text (discussing the application of the political question doctrine).

107. *See infra* notes 109-12 and accompanying text (explaining that, unlike the facts in *Shanghai Power Co. v. United States*, the Algerian Accords offered no legal remedy for the hostages in exchange for the extinguishment of their claims).

108. *See* General Declaration, *supra* note 6 art. 11 (noting the elimination of all hostage claims arising under United States law, Iranian law, or international law, as opposed to a Claims Tribunal that is available for commercial claims).

109. *Belk v. United States*, 12 Cl. Ct. 732, 733 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

110. *See* Victims of Terrorism Compensation Act, Pub. L. No. 99-399, § 802, 100 Stat. 879, codified at 5 U.S.C. § 5569 (Supp. IV 1986) (providing fifty dollars to each hostage for each day of captivity); Hostage Relief Act of 1980, Pub. L. No. 96-449, 94 Stat. 1967, codified as amended at 5 U.S.C. §§ 5561-62 (1982) (providing other miscellaneous benefits such as lost salaries, and medical and educational expenses, rather than just compensation for the pain and suffering of the hostages and their families).

111. Respondents' Opposition to Motion for Summary Judgment at 14, *Belk v. United States*, 12 Cl. Ct. 732 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706) [hereinafter Hostages' Brief].

United States.¹¹² In *Shanghai Power*, the executive settled plaintiff's breach of contract claim for a reduced amount of twenty million dollars.¹¹³ The hostages distinguished the *Shanghai Power* case by arguing that the executive completely extinguished their legal right to sue in tort, without providing an alternative legal remedy.¹¹⁴ A triable issue of fact therefore exists regarding whether the hostages' freedom is a right that adequately substitutes the dismissal of the hostages' tort claims against Iran.

In the five-part takings clause analysis, the government conceded that the Algerian Accords completely impaired the hostages' right to sue Iran in tort.¹¹⁵ The hostages may have difficulty arguing that the Accords did not serve an important governmental purpose, and the hostages may even lose on the novelty factor due to the court's characterization of presidential power. Nevertheless, the court's analysis of the five-part takings test still raises two triable issues of fact. A triable issue of fact exists as to the extent to which the claimants are incidental beneficiaries; and the extent to which the government substituted rights for those that it destroyed. Arguably, even if no triable issues of fact existed, the United States Claims Court should have decided, as a matter of law, that the government's act constituted a taking of property without just compensation.

While the five factors provide the United States Claims Court with a useful takings clause analysis, those factors alone are not controlling. The United States Supreme Court in *Penn Central Transp. Co. v. New York City* held that there is no established formula for determining when a taking without just compensation exists.¹¹⁶ Acknowledging this principle, the United States Claims Court emphasized the importance of the traditional nature of executive decision-making.¹¹⁷ An overriding concern of the United States Claims Court was not whether a taking existed, but whether the court should probe into politically sensitive issues.

112. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 239 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985).

113. *Id.*; Hostages' Brief, *supra* note 111, at 15.

114. Hostages' Brief, *supra* note 111, at 14.

115. *Belk v. United States*, 12 Cl. Ct. 732, 734 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

116. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). *See United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (holding that the particular facts of each case determine a taking).

117. *Belk v. United States*, 12 Cl. Ct. 732, 735-36 (1987), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

B. POLITICAL QUESTION DOCTRINE

In *Belk v. United States*, the United States Claims Court relied on the political question doctrine to dismiss the claims of the hostages.¹¹⁸ The court, examining the nature of the governmental action, determined that it involved the executive's ability to conduct foreign affairs, and to eliminate sources of international friction between the United States and the Islamic Republic of Iran.¹¹⁹ Many courts have emphasized the importance of limiting the judicial review of foreign policy matters.¹²⁰

Judge Robb, for example, noted the importance of foreign policy considerations in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*.¹²¹ Judge Robb concurred with the dismissal of the case simply because the case involved a politically sensitive area.¹²² Not all judges agree with Judge Robb's opinion, however. For instance, in *Von Dardel v. Union of Soviet Socialist Republics*,¹²³ Judge Barrington D. Parker held that the Constitution does not give the executive exclusive control over foreign affairs.¹²⁴ Judge Parker insisted that when adjudicating an act involving the treatment of diplomats, the political question doctrine should not apply.¹²⁵

In defending against political question assertions, the plaintiffs in *Belk v. United States* relied on *E-Systems, Inc. v. United States*. The court in *E-Systems* did not invoke the political question doctrine, but, instead, analogized the presidential taking in the area of foreign policy to a legislative taking involving only national interests.¹²⁶ The court in *Belk v. United States*, however, rejected the logic of *E-Systems*.¹²⁷ The

118. *Id.*

119. *Id.*; See *Dames & Moore v. Regan*, 453 U.S. 654, 679 n.8 (1981) (stating that the executive holds the power to settle international claims of American citizens); *Accord* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1965) (suggesting that the President may waive or settle claims of a United States national against a foreign state).

120. See *supra* notes 27-28 and accompanying text (discussing a background on how courts use the political question doctrine).

121. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 827 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

122. *Id.*

123. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985).

124. *Id.* at 259; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 461-62 (1964).

125. See *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 258-59 (D.D.C. 1985) (stating that when treating diplomats, no fear exists that other political branches will be embarrassed).

126. *E-Systems, Inc. v. United States*, 2 Cl. Ct. 271, 275 (1983).

127. *Belk v. United States*, 12 Cl. Ct. 732, 735-36 (1987), *aff'd*, No. 87-1631 (Fed.

court noted the delicate nature of foreign policy negotiations¹²⁸ and viewed the Algerian Accords as beyond the purview of judicial scrutiny.¹²⁹

The plaintiffs further argued that the political question doctrine was not an issue because judicial inquiry into the sensitive diplomatic negotiations was not necessary,¹³⁰ and that the Claims Court need not second guess the decisions of the executive.¹³¹ As the Federal Circuit Court held in *Langenegger v. United States*, when the sole issue is the lawfulness of the government's deprivation of the property owners' interests without just compensation, it is unnecessary to probe into the sensitive negotiations of the executive.¹³² In such a case, the claim is therefore justiciable and subject to judicial review.¹³³ The *Langenegger* court also clarified that if the court determined the government's act was a taking, then such a holding is not equivalent to a judgment that the government's act was reprehensible.¹³⁴ The court need only determine whether a taking existed, and whether compensation is appropriate. No judicial inquiry into the sensitive negotiations of the executive is necessary.

Unfortunately, the Federal Circuit Court did not adopt this analysis of the Claim's Court's takings clause and political question decisions. The Federal Circuit Court affirmed the decisions of the Claims Court, and upheld the summary judgment decision in favor of the United States.¹³⁵ For the purpose of this Case-Comment, however, it is a worthwhile exercise to hypothesize what would happen if the Federal Circuit Court overruled the United States Claims Court's decision on summary judgment, and held that: (1) triable issues of fact remain as to whether a taking of the hostages' property existed; and (2) a determination of a taking would not require judicial review of delicate foreign negotiations. Under this holding, the Federal Circuit Court should have remanded *Belk v. United States* back to the United States Claims

Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

128. See *id.* (noting that secrecy in foreign policy negotiations is important, and that judicial review of executive decision making is dangerous and potentially damaging to future foreign policy negotiations).

129. *Id.*

130. Hostages' Brief, *supra* note 111, at 26.

131. *Id.*

132. *Langenegger v. United States*, 756 F.2d 1565, 1570 (Fed. Cir.), *cert. denied*, 474 U.S. 824 (1985).

133. *Id.*

134. *Id.*

135. *Belk v. United States*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

Court.

V. THE POTENTIAL REMAND OF *BELK V. UNITED STATES*: THE ISSUE OF PROPERTY

If the Federal Circuit Court decided to remand *Belk v. United States* to the United States Claims Court, the government would have argued that the hostages never had any property, and, therefore, no taking occurred.¹³⁶ The Court would then have to determine whether a potential tort claim is a property interest.¹³⁷ Two standards exist to determine if the tort claims of the hostages are property. The first standard requires that the hostages prove that they could have obtained jurisdiction over the Islamic Republic of Iran in United States district court under the Foreign Sovereign Immunities Act¹³⁸ (FSIA), absent the Algerian Accords.¹³⁹ The United States government, defendant in both *Belk v. United States* and *Shanghai Power Co. v. United States*, formulated its argument according to this standard.¹⁴⁰

The United States Claims Court, in *Shanghai Power Co. v. United States*, offered a second standard for determining whether a tort claim constitutes property.¹⁴¹ The second standard has two steps. First, the court need not determine whether the plaintiffs could have obtained jurisdiction over the foreign state,¹⁴² but only whether the claim has the

136. See Government's Brief, *supra* note 14, at 7 (stating that the government will assume that the claims of the plaintiffs constituted property solely for the purposes of the summary judgment motion); *Belk v. United States*, 12 Cl. Ct. 732, 733 (1987) (noting that for the purposes of the summary judgment motion, the government conceded that the hostages' tort claims against the Islamic Republic of Iran constituted property), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

137. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 238 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985). See *supra* note 79 (citing past case law to support the proposition that property interests need not have physical attributes to give rise to fifth amendment protection). The United States government may argue that the hostages do not have a compensable property interest in an international claim against Iran. Note, *The U.S.-Iran Accords*, *supra* note 7, at 1561. The government would make three arguments. *Id.* First, it is too difficult to compute how much the plaintiff should receive; second, the plaintiff should not expect compensation on an international claim; and third, the circumstances of the hostage crisis gave rise to an emergency situation where executive discretion was imperative. *Id.*

138. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1603-1611 (1982).

139. *Shanghai Power v. United States*, 4 Cl. Ct. 237, 240-41 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985); Government's Brief, *supra* note 14, at 7 n.3.

140. *Id.*

141. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 240-41 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985).

142. *Id.* at 241.

law in "back of it."¹⁴³ The *Shanghai* court determined that this phrase meant that, regardless of whether the plaintiffs could find a forum in which to sue Iran, international and domestic law must support their claim.¹⁴⁴ Second, to determine whether the property had any value, the *Shanghai* court held that the plaintiffs would not only have to prove they could have overcome jurisdictional obstacles, but also that they could have succeeded against all possible defenses that the foreign state would have put forward, and could have obtained satisfaction on a judgment against the foreign state.¹⁴⁵

Because it is uncertain which standard the court in *Belk v. United States* would have adopted to determine whether the hostages' claims against Iran constituted property, this Case-Comment will only respond to the first standard. In *Belk v. United States*, the government's only argument concerning whether the tort claims constituted property was that the hostages did not possess any property because a forum did not exist in which the hostages could have obtained jurisdiction over Iran.¹⁴⁶ It is beyond the scope of this Case-Comment to address every possible defense that Iran would raise. In addition, this Case-Comment will not deal with the problems of obtaining satisfaction on a judgment against Iran.

A. FINDING A FORUM

To prove that their lost tort claims constituted property, the hostages would first have to find a forum where they could have sued Iran. The International Court of Justice would not hear the case because it only hears cases to which states are parties.¹⁴⁷ The United States-Iran

143. *Id.*; *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979).

144. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 241 (1983), *aff'd mem.*, 765 F.2d 159 (Fed. Cir.), *cert. denied*, 474 U.S. 909 (1985).

145. *Id.* at 241-42. Compare *The U.S./Iranian Hostage Settlement*, *supra* note 7, at 245 (arguing that in the absence of the Algerian Accords, the hostages must show that they could have recovered damages from Iran) with *Seery v. United States*, 127 F. Supp. 601, 606-07 (Ct. Cl. 1955) (holding that plaintiffs deserved the amount the United States took without requiring a showing that plaintiffs would have succeeded in their claim against the foreign country). See *The U.S./Iranian Hostage Settlement*, *supra* note 7, at 245 (commenting that perhaps the hostages would not have to prove that they could have received compensation from Iran on a tort claim).

One commentator analogized the hostage situation to that of prisoners of war in a foreign country, noting that our domestic tort law does not cover such suits. *Id.*

146. Government's Brief, *supra* note 14, at 7 n.3.

147. Statute of the International Court of Justice, art. 34 (1945), reprinted in DOCUMENTS OF THE INTERNATIONAL COURT OF JUSTICE 61 (S. Rosenne ed. 1979). The International Court of Justice does not hear private claims. *Id.*

The United States brought a claim against Iran in the International Court of Justice prior to the Algerian Accords. Case Concerning United States Diplomatic and Consu-

Claims Tribunal, expressly created for arbitrating all claims against Iran and Iranian nationals, is also not available to the hostages because the Algerian Accords explicitly barred all hostage claims.¹⁴⁸

Plaintiffs claim that they could have sued Iran in Iranian courts under Iranian law.¹⁴⁹ The government argued that the plaintiffs could not have sued Iran in Iranian courts because Iran did not waive its sovereign immunity in its own courts.¹⁵⁰ If, however, the hostages sue the individual captors, the 1955 Treaty of Amity between the United States and Iran may give the hostages access to Iranian courts.¹⁵¹ Article 3 of the Treaty of Amity states that foreign nationals have access to the courts of Iran in pursuit of their rights.¹⁵² This article may grant foreign nationals access to Iranian courts, but still may not waive the Iranian government's immunity to be sued. In any event, the hostages realistically would have elected to forgo filing suit in Iranian courts because the Iranian justice system potentially would have been unfair to the hostages,¹⁵³ and, in addition, reappearing to bring a lawsuit in a hostile country could have presented dangers to the plaintiffs. A more plausible forum for the hostages is a United States district court.

B. ESTABLISHING JURISDICTION OVER IRAN IN UNITED STATES DISTRICT COURT UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

The plaintiffs must initially decide who the plausible defendants are.¹⁵⁴ Because it is difficult to locate the actual captors, the analysis of

lar Staff in Teheran (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24). In the Hostages' Case, the court emphasized the importance of diplomatic immunity, and held that Iran breached its obligations under international treaty law and custom. *Id.* at 37-42. See Janis, *The Role of the International Court in the Hostages Crisis*, 13 CONN. L. REV. 263, 276 (1981) (discussing the judicial opinions of the Hostages' Case).

148. General Declaration, *supra* note 6 and accompanying text.

149. See Hostages' Brief, *supra* note 111, Exhibit #1, Affidavit of Robert Eisenman Re: Iranian Law (stating that hostages could have sued Iran in Iranian courts for seizure and detention under Iranian law).

150. Government's Brief, *supra* note 14, at 7 n.3.

151. Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 1955, 8 U.S.T. 899, 902, T.I.A.S. No. 3853, [hereinafter Treaty of Amity].

152. *Id.* at 902-03.

153. See Belk v. United States, 12 Cl. Ct. 732, 734-35 (1987) (commenting that Iran has no civilized doctrine of just compensation), *aff'd*, No. 87-1631 (Fed. Cir. Sept. 22, 1988) (WESTLAW, CTA database, 1988 WL 96763) (to be reported at 858 F.2d 706).

154. See Cooper, *Hostage Rights: Law and Practice in Throes of Evolution*, 15 CASE W. RES. J. INT'L L. 61, 111 (1983) (commenting that hostages seeking compensation can sue anyone who is not immune, including the home government, the interveners, and even non-officials with a duty to protect the interests of the hostages). The hostages could potentially sue the United States or Iran on a negligence theory. See *id.*

this Case-Comment will only address the claims that the hostages could have raised against the Islamic Republic of Iran. In fact, the only plausible claims that would give weight to the hostages' argument that their tort claims constituted property would be in a suit against Iran.

Before a United States district court can hear the merits of the claims of the hostages against Iran, the claimants must establish personal and subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA).¹⁵⁵ To establish personal jurisdiction over Iran,¹⁵⁶ the plaintiffs must properly serve the agents or instrumentalities of the foreign state located in the United States,¹⁵⁷ and must discern an exception to Iran's sovereign immunity for the seizure of the hostages.¹⁵⁸ The FSIA confers subject matter jurisdiction if the foreign state is not entitled to sovereign immunity under the Act.¹⁵⁹ Quasi-in-rem jurisdiction¹⁶⁰ is unavailable when suing a foreign state.¹⁶¹ The FSIA effectively precludes attachments of a foreign state's property in the United States in order to obtain jurisdiction, and allows attachments only to satisfy a judgment.¹⁶²

at 116-117 (discussing negligence suits against home states regarding inadequate police protection). A plaintiff, who was kidnapped in a foreign country while working for an American corporation, could sue his employer for inadequately securing his or her release. *Curtis v. Beatrice Foods Co.*, 481 F. Supp. 1275, 1293 (S.D.N.Y. 1980), *aff'd*, 633 F.2d 203 (2d Cir. 1981).

If the hostages can locate the captors, they can theoretically sue them for an intentional tort. Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFFALO L. REV. 339, 341 (1971). Compare *id.* (arguing that victims can and should sue their captors). But see Comment, *Deterring Airport Terrorist Attacks and Compensating the Victims*, 125 U. PA. L. REV. 1134, 1159 (1977) (arguing that intentional tort suits against captors are not worthwhile because of the difficulty of locating the captors, obtaining jurisdiction over them, and collecting on a judgment against them).

155. 28 U.S.C. § 1330 (a), (b) (1982).

156. *Id.* § 1330(b).

157. *Id.* § 1608 (a)(4).

158. *Id.* § 1605. The plaintiff's claim must fit into one of the exceptions to sovereign immunity enumerated in this section. *Id.*

159. *Id.* § 1330(a). If the foreign state has sovereign immunity under sections 1605-07, then the court has neither subject matter, nor personal jurisdiction. *Id.*

160. *Shaffer v. Heitner*, 433 U.S. 186, 189 (1977). Quasi-in-rem jurisdiction is based on the attachment of property within the jurisdiction of the forum, as well as the due process requirements of minimum contacts. *Id.*

161. 28 U.S.C. § 1330(b) (1982). The statute only provides for personal jurisdiction, not quasi-in-rem jurisdiction. *Id.*

162. *Id.* § 1330(b), (c). Section 1609 declares that all attachments are immune except those in sections 1610 to 1611. *Id.* § 1609. Section 1610 states that the only types of attachments prior to judgment that the FSIA allows are those attachments that the foreign state explicitly waives, or those attachments that are to secure the satisfaction of a judgment that has been or may be entered against the foreign state. *Id.* § 1610.

One legal scholar, Robert von Mehren, reviewing the commercial cases against Iran, noted that the courts allowed attachments solely to obtain security, and not jurisdic-

Iran would likely assert the sovereign immunity defense in response to claims by the former hostages.¹⁶³ The doctrine of sovereign immunity limits the power of a United States court to secure jurisdiction over Iran.¹⁶⁴ The FSIA, modeled after a state long-arm statute, codifies pre-existing customary international law on sovereign immunity into United States law. According to the FSIA, a foreign state is generally immune from the jurisdiction of United States federal courts, unless the foreign state expressly or impliedly waives its immunity,¹⁶⁵ or the United States is a signatory to an international agreement which provides for jurisdiction over the foreign state,¹⁶⁶ or the foreign act fits into any one of the five exceptions enumerated in section 1605 of the FSIA.¹⁶⁷

tion. *The U.S.-Iran Hostage Settlement*, *supra* note 7, at 243. A Presidential proclamation authorized the Iranian asset freeze. Exec. Order 12,170, 3 C.F.R. § 457 (1979). Upon seizure of the embassy, and the threatened withdrawal of assets from the United States banks, 200 claimants attached Iranian assets. Note, *The U.S.-Iran Accords*, *supra* note 7, at 1538-39 (1982).

163. See *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 837 (D.C. Cir. 1984) (asserting the sovereign immunity defense in response to a suit brought by a former hostage seeking damages for injuries inflicted during seizure of the United States embassy in Teheran); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 585 (9th Cir. 1983) (same).

164. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (stating the basic theory of sovereign immunity, by granting friendly foreign warships immunity from jurisdiction in United States courts). Traditionally, foreign states have been immune from the jurisdiction of the courts of another state. *Id.* See also *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 574 (1926) (holding that even commercial ships used for public purpose are not subject to jurisdiction in American courts).

In 1952, the United States began to employ a restrictive theory of sovereign immunity, granting immunity only when the foreign sovereign acted in a public capacity. *The Tate Letter*, 26 DEP'T ST. BULL. 984 (1952).

Professor Andreas Lowenfeld argued that the doctrine of foreign sovereign immunity precluded any claims that the hostages would have had against Iran. *The U.S./Iranian Hostage Settlement*, *supra* note 7, at 244. Traditionally, an individual had no private right of action against a foreign sovereign under international law; the private right merged into the right of the individual's state. OPPENHEIM, *INTERNATIONAL LAW* § 155b (8th ed. 1955).

165. 28 U.S.C. § 1605 (1982). A foreign state may implicitly waive its immunity under the Foreign Sovereign Immunities Act if it agrees to subject itself to the law of another state court. *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1102 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983).

Sovereign immunity is an affirmative defense; parties must plead it specifically and timely, or else the court will deem that the state waived its immunity. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 8 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6616 [hereinafter USCCAN]. If the state fails to appear at trial, the court must make an independent determination of the state's immunity. *Letelier v. Republic of Chile*, 488 F. Supp. 665, 667 (D.D.C. 1980).

See *infra* notes 204-209 and accompanying text (discussing possibilities of an implicit waiver of sovereign immunity).

166. 28 U.S.C. § 1604 (1982).

167. *Id.* § 1605(a)(1)-(5).

The only exception of the five that is applicable to the hostage situation is the noncommercial tort claim.¹⁶⁸ The exception permits noncommercial tort claims against a foreign state only when the tort occurs in United States territory.¹⁶⁹ A number of courts have defined the United States Embassy as the territory of the receiving state, Iran, and not the sending state, the United States.¹⁷⁰ Under this interpretation, the American embassy in Teheran is located in Iranian territory, and the alleged torts against the hostages, having occurred in the embassy, may not fit within the exception to sovereign immunity for noncommercial tort claims.¹⁷¹

As an alternative, Judge Harry T. Edwards, dissenting in *Persinger v. Islamic Republic of Iran*,¹⁷² suggested that, although the court has no jurisdiction over a hostage's claim for damages occurring in an embassy,¹⁷³ the court would have jurisdiction if the parents or spouse of the hostage brought the claim.¹⁷⁴ Judge Edwards's rationale is that the tortious injury, loss of consortium, or emotional distress occurred in the United States.¹⁷⁵ Nevertheless, the majority opinion in *Persinger v. Is-*

168. *Id.* § 1605(a)(5).

169. *Id.* If a foreign state commits a tortious act in the territory of the United States, the state will not receive immunity. *Id.* If the tortious act is also illegal, the foreign state cannot argue that the act was a discretionary function of the foreign state. *Id.* § 1605(a)(5)(A). See *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (holding that a foreign sovereign does not have "discretion" under the terms of the FSIA, to commit an assassination).

170. See *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 839 (D.C. Cir. 1984) (contending that United States embassies abroad are not territories of the United States); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983) (contending that a United States embassy remains the territory of the receiving state).

171. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 839 (D.C. Cir. 1984); 28 U.S.C. § 1605(a)(5) (1982). See also *Harris v. VAO Intourist Moscow*, 481 F. Supp. 1056, 1057, 1065-66 (E.D.N.Y. 1979) (granting the Soviet Union sovereign immunity for a wrongful death action in the Soviet Union); *Upton v. Empire of Iran*, 459 F. Supp. 264, 265-66 (D.D.C. 1978) (granting immunity in a wrongful death action because the tort occurred in Iran, not in the United States).

172. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843-44 (D.C. Cir. 1984) (Edwards, J., dissenting).

173. See 28 U.S.C. § 1605(a)(5) (1982) (stating that suits in tort are an exception to the Foreign Sovereign Immunities Act when the tort occurs in the United States). The American embassy in Iran is not the property of the United States for jurisdictional purposes. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 839 (D.C. Cir. 1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983).

174. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843-44 (D.C. Cir. 1984) (Edwards, J., dissenting).

175. See *id.* (arguing that the FSIA states that the plaintiff must prove only that the tortious injury occurred in the United States, and stating nothing concerning tortious acts). But see *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842-43 (D.C. Cir. 1984) (stating that it would be unfair to prohibit relief for a hostage, but would grant the parents relief on the grounds that their injury occurred in the United States); USCCAN, *supra* note 165, at 6619 (specifying that both the tortious injury, and the

Islamic Republic of Iran held that the tortious act must accompany the tortious injury under section 1605 of the Foreign Sovereign Immunities Act.¹⁷⁶ Therefore, because the tortious act of seizing and detaining the hostages occurred in Iran, the court could not obtain jurisdiction over Iran under section 1605(a)(5) of the FSIA.

Even without an explicit exception under the FSIA, some cases and commentators have suggested that gross violations of human rights provide an exception to sovereign immunity,¹⁷⁷ while others have asserted that any violation of international law is enough to constitute an exception to sovereign immunity.¹⁷⁸ A third theory is that the international agreements exception to the FSIA, outlined in sections 1330 and 1604 of the Foreign Sovereign Immunities Act,¹⁷⁹ exempts all treaties, conventions, and even customary international law from sovereign immunity.¹⁸⁰ In *Von Dardel v. Union of Soviet Socialist Republics*,¹⁸¹ the District Court for the District of Columbia applied some of these theories to deny the Soviet Union sovereign immunity in an action involving

tortious act must occur in the territory of the United States).

176. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984).

177. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 888-89 (2d Cir. 1980) (imposing jurisdiction over an agent of the state for violations of human rights); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) (imposing jurisdiction over a Chilean state agent for the alleged murder of Chilean diplomat Orlando Letelier in the United States); Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 223 (advocating non-immunity when a state violates human rights).

178. See Paust, *supra* note 177, at 241 (arguing against foreign sovereign immunity for violations of international law). The author argues that by granting jurisdictional immunity, the United States violates international law. *Id.* at 227. See also *Ex Parte Quirin*, 317 U.S. 1, 35-36 (1942) (granting federal courts jurisdiction over Nazi war criminals that violated the law of nations); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 153 (1820) (permitting subject matter jurisdiction over piracy in violation of the law of nations); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 426 (2d Cir. 1987), *cert. granted*, 108 S. Ct. 1466 (1988) (holding that sinking a neutral ship on the high seas constitutes a violation of international law, and, therefore, Argentina may not receive the protection of sovereign immunity); *International Military Tribunal (Nuremberg), Judgment and Sentences* (1946), *reprinted in* 41 AM. J. INT'L L. 172, 221 (1947) (rejecting Nazi war criminals' use of the foreign sovereign immunity defense).

179. 28 U.S.C. §§ 1330, 1604 (1982). Section 1330 excludes from immunity applicable agreements to which the foreign state is a party. *Id.* § 1330. Section 1604 excludes from immunity any prior agreements to which the United States is a signatory. *Id.* § 1604. Subsequent international agreements are also exceptions to sovereign immunity under the FSIA. USCCAN, *supra* note 165, at 6608.

180. See Paust, *supra* note 177, at 235 (suggesting that the international agreement exception includes customary international law).

181. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985).

the wrongful death of a diplomat.¹⁸²

The district court's first reason for denying immunity was that a foreign state may not receive sovereign immunity for clear violations of universally accepted international law.¹⁸³ The *Von Dardel* court stated that it had jurisdiction over certain violations of international law under the universality principle of international jurisdiction.¹⁸⁴ Similarly, in *Amerada Hess Shipping Corp. v. Argentine Republic*, the Second Circuit utilized the universality principle to obtain jurisdiction over Argentina when Argentina sank a neutral vessel on the high seas in violation of international law.¹⁸⁵ The universality principle permits international jurisdiction over claims against heinous international crimes such as piracy, slave trade, genocide, war crimes, hijacking, and possibly crimes against diplomats.¹⁸⁶ One of the oldest rules of customary international law that has been codified in Congressional statutes and international conventions, involves diplomatic immunity and consular protection.¹⁸⁷ Ideally, these rules of custom enable diplomats to negotiate in a potentially hostile state without fear of death or capture.

182. *Id.* at 251-52.

183. *Id.*

184. *Id.* at 254.

185. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425-26 (2d Cir. 1987), *cert. granted*, 108 S. Ct. 1466 (1988).

186. Paust, *supra* note 177, at 201; RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1988). Paust suggests that universal jurisdiction applies to all crimes affecting the international community and violating international law. Paust, *supra* note 177, at 211-15. See also Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109, 1140 (1982) (arguing that the universality principle may also encompass acts of terrorism).

United States case law has granted jurisdiction over selective violations of international law. See *Ex Parte Quirin*, 317 U.S. 1, 36 (permitting jurisdiction over Nazi war crimes violating the laws of war and international law); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 153 (1820) (permitting subject matter jurisdiction over piracy in violation of the law of nations); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 426 (2d Cir. 1987), *cert. granted*, 108 S. Ct. 1466 (1987) (allowing jurisdiction over a foreign state for sinking a neutral vessel on the high seas, which the court analogized to piracy).

187. Vienna Convention on Diplomatic Relations, Apr. 18, 1960, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (1960) [hereinafter Vienna Convention]; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167, G.A. Res. 3166, 28 U.N.G.A.O.R. Supp. (No. 30) at 146, U.N. Doc. A/9030, arts. 3, 6, 7, *reprinted in* 13 I.L.M. 43 (1974) [hereinafter Convention on Internationally Protected Persons] (codifying customary international law of diplomatic protection into multilateral treaties). See 18 U.S.C. §§ 1116, 1201 (1982) (codifying parts of the Convention on the Protection of Internationally Protected Persons into United States domestic statutory law); 22 U.S.C. § 254 (1982 & Supp. IV 1986) (codifying the Diplomatic Convention into United States statutory law); see also Treaty of Amity, *supra* note 151 (codifying certain consular protection into a bilateral treaty between Iran and United States).

The Islamic Republic of Iran violated domestic and international law when Iran seized persons under diplomatic protection.¹⁸⁸ Two federal court cases have held that the FSIA should not protect foreign states when they violate international law.¹⁸⁹ In one case, *Von Dardel v. Union of Soviet Socialist Republics*, the district court emphasized the legislative intent of the FSIA to preserve all existing remedies for violations of international law.¹⁹⁰ To the extent possible, courts are to interpret all federal statutes consistently with the law of nations.¹⁹¹ Therefore, courts should construe the FSIA in a manner consistent with international law.¹⁹²

In *Amerada Hess Shipping Co. v. Argentine Republic*, the court of appeals held that because international law would deny immunity to the foreign state, the FSIA must also deny immunity to the foreign

188. Case Concerning United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran) 1980 I.C.J. 3 30-42 (Judgment of May 24) 30-42 (holding that Iran violated custom and treaty law regarding the treatment of diplomats and the inviolability of the embassy).

Iran violated a number of articles of the Vienna Convention. Vienna Convention, *supra* note 187. Iran violated article 22 of the Diplomatic Convention by entering the American embassy in Teheran, and alternatively, not protecting the embassy from intrusion. *Id.* art. 22. Iran, denying all members of the embassy the right to move about freely in the Iranian territory, violated article 26 of the Diplomatic Convention. *Id.* art. 26. Iran violated article 29 by detaining the diplomats and their staff, and alternatively, by failing to protect them from any attack or affront on their dignity or freedom. *Id.* art. 29.

Iran also violated the Treaty of Amity between the United States and Iran. Treaty of Amity, *supra* note 151. Iran violated article 2 of the Treaty of Amity by disallowing the American hostages to travel freely, and alternatively, by failing to provide the foreign nationals with protection and security. *Id.* art. 2. Iran also acted in violation of article 2 when it detained the hostages without promptly informing them of the charges against them. *Id.* Iran violated article 13 of the Treaty of Amity by failing to ensure privileges and immunities to consular officials, and by failing to prevent local authorities from entering the consulate. *Id.* art. 13. Finally, Iran violated article 18 of the Treaty by failing to preclude local jurisdiction over consular officials. *Id.* art. 18. See Convention on Internationally Protected Persons, *supra* note 187, arts. 3, 6, 7 (protecting internationally protected persons from kidnapping, killing, and affronts on the their liberties).

189. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 426 (2d Cir. 1987), *cert. granted*, 108 S. Ct. 1466 (1988); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 n.9 (D.D.C. 1985).

190. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 n.9 (D.D.C. 1985).

191. See *MacLeod v. United States*, 229 U.S. 416, 434 (1913) (holding that courts should engage in statutory construction of statutes in light of the purpose of the government to act within the principles of international law, the observance of which is essential to the peace and harmony of nations); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 253 (D.D.C. 1985) (stating that courts should interpret federal statutes in a manner consistent with the law of nations).

192. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 426 (2d Cir. 1987), *cert. granted*, 108 S. Ct. 1466 (1988). See USCCAN, *supra* note 165, at 6613 (noting that the FSIA incorporates established international law standards).

state.¹⁹³ The court also stated that Congress did not specifically intend to contradict the standards of immunity in international law.¹⁹⁴ To interpret the FSIA consistently with international law, a United States federal court should therefore not grant Iran sovereign immunity under the FSIA because Iran violated international law regarding the treatment of diplomats.

The district court in *Von Dardel v. Union of Soviet Socialist Republics* also denied the Soviet Union sovereign immunity based on the fact that the FSIA is subject to international agreements to which the United States is a party.¹⁹⁵ The United States is a party to the Vienna Convention on Diplomatic Relations,¹⁹⁶ the 1973 Convention on Internationally Protected Persons,¹⁹⁷ the International Convention Against the Taking of Hostages,¹⁹⁸ and the 1955 Treaty of Amity between the United States and Iran.¹⁹⁹ Consequently, these conventions and treaties may fit into the international agreements exception of the FSIA.²⁰⁰

193. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 426 (2d Cir. 1987), cert. granted, 108 S. Ct. 1466 (1988).

194. *Id.* at 16. Unfortunately, many sources view the FSIA as the sole and exclusive standard that the court must use in adjudicating the issue of sovereign immunity. USCCAN, *supra* note 165, at 6610; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496-97 (1983); *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115, 116 (2d Cir.), cert. denied, 469 U.S. 1084 (1984).

195. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254-55 (D.D.C. 1985).

196. Vienna Convention, *supra* note 187. See 22 U.S.C. § 254 (1982 & Supp. IV 1986) (codifying the Diplomatic Convention into United States statutory law).

197. Convention on Internationally Protected Persons, *supra* note 184. See 18 U.S.C. §§ 1116, 1201 (1982) (codifying parts of the Convention on Internationally Protected Persons into United States domestic statutory law).

198. International Convention Against the Taking of Hostages, Dec. 17, 1979, arts. 5, 6, 8, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1980), reprinted in 18 I.L.M. 1456 (1979) [hereinafter Hostage Convention].

199. Treaty of Amity, *supra* note 151.

200. 28 U.S.C. §§ 1330, 1604 (1982). One commentator suggests the possibility that the Universal Declaration of Human Rights fits into the international agreements exception of the FSIA, by raising the Newman-Berkely argument. Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, 1980 AM. SOC'Y INT'L L. 20, 22 (1980); Universal Declaration of Human Rights, G.A. Res. 217A (III), 3 U.N. GAOR (183d mtg.) at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]. Because the United States is a member of the United Nations, and voted for the passage of the Universal Declaration of Human Rights, the United States is bound by the obligations within the Universal Declaration. See United Nations Commission on Human Rights, *Report on the Human Rights Situation in the Islamic Republic of Iran by the Special Representative of the Commission, Mr. Reynaldo Galindo Pohl, appointed pursuant to resolution 1986/41*, 43 U.N. ESCOR (Agenda Item 12) at 4, U.N. Doc. E/CN.4/1987/23 [hereinafter Human Rights Report] (noting the binding authority of the Universal Declaration of Human Rights on all members of the United Nations including Iran). The Newman-Berkely argument advocates that the Universal Declaration of Human Rights when read together with the United Nations Charter becomes a self-executing treaty. Comment, *The Foreign Sovereign*

That is, if any of these international agreements constitutes an exception to the FSIA, Iran would not receive sovereign immunity, and the federal court could decide to grant jurisdiction over Iran.

The final factor that the *Von Dardel* court considered in denying immunity was that the Soviet Union had waived its sovereign immunity.²⁰¹ An explicit waiver exists when a foreign state has signed a Treaty of Friendship, Commerce, and Navigation, which denies jurisdictional immunity under certain circumstances.²⁰² Although the Treaty of Amity may waive Iranian immunity for some commercial claims,²⁰³ Iran has not given an explicit waiver regarding hostage claims.

In *Von Dardel v. Union of Soviet Socialist Republics*, the court noted the ambiguity surrounding one party's implicit waiver.²⁰⁴ Legal scholars, according to the court, have suggested that in ratifying international human rights agreements, a state agrees to a binding effect, and implicitly waives immunity.²⁰⁵ Iran, as a party to the Diplomatic Convention²⁰⁶ and the International Covenant on Civil and Political Rights,²⁰⁷ may have implicitly waived its immunity against being sued.

Immunities Act and International Human Rights Agreements: How They Coexist, 17 U.S.F. L. REV. 71, 85-86, 89 (1982) [hereinafter Comment: *FSIA and Human Rights Agreements*].

201. See *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 255-56 (D.D.C. 1985) (explaining the theories of explicit and implicit waivers of immunity, and holding that the Soviet Union implicitly waived its immunity); 28 U.S.C. § 1605(a)(1) (1982) (codifying foreign state waiver provision).

202. 28 U.S.C. § 1605(a)(1) (1982).

203. See Treaty of Amity, *supra* note 151, art. XI, § 4 (waiving Iranian immunity for commercial activity in the United States).

204. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 255-256 (D.D.C. 1985).

205. *Id.* See R. LILlich AND F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 76 (1979) (noting the ambiguity of when an implicit waiver will apply); Comment, *FSIA and Human Rights Agreements*, *supra* note 200, at 82 (suggesting that article 56 of the United Nations Charter, read with the Universal Declaration of Human Rights, may amount to an implied waiver of immunity in human rights claims). But see *The U.S./Iranian Hostage Settlement*, *supra* note 7, at 247 (1981) (asserting that if a foreign state does not expressly waive its immunity in a United States court, then the foreign state has absolute immunity under the terms of the Foreign Sovereign Immunities Act).

206. Vienna Convention, *supra* note 187.

207. International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), 999 U.N.T.S. 171 [hereinafter International Covenant]. Iran and the United States are both signatories to the International Covenant, but the United States did not ratify it. *Id.* Iran violated article 9 of the International Covenant because Iran arbitrarily detained the hostages without a trial. *Id.* art. 9. Iran violated article 12 because Iran denied the hostages freedom of movement in, out of, or around their country. *Id.* art. 12.

Unfortunately, courts have interpreted waivers narrowly, and are disinclined to find that a foreign sovereign has waived its immunity.²⁰⁸

If the hostages could have proven that a district court would have obtained jurisdiction over Iran under the FSIA using any of the theories enunciated in *Von Dardel v. Union of Soviet Socialist Republics*, then the United States Claims Court, upon remand, may have found that the hostages' claims against Iran constituted property. The court would then apply the takings clause analysis, and would decide whether the government's nullification of the hostages' claims against Iran constituted a taking of property without adequate compensation.²⁰⁹ If, however, the United States Claims Court, upon remand, would have adopted the standard set forth in *Shanghai Power Co. v. United States*, then the hostages would not only have had to prove that a United States district court would have obtained jurisdiction over Iran under the FSIA, but also that the hostages could have overcome all of Iran's possible defenses,²¹⁰ and recovered actual damages on a judgment against Iran.²¹¹

208. See *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 376-78 (7th Cir. 1985) (holding that failure of a nation to defend itself against a suit brought against it did not constitute waiver of its sovereign immunity); see also *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 333 (9th Cir.), cert. denied, 469 U.S. 1035 (1984) (holding that sovereign immunity is not merely a defense, but its absence is jurisdictional requirement).

209. See U.S. CONST. amend. V (requiring that no person be deprived of property without due process); see also *supra* notes 82-115 and accompanying text (discussing the applicability of the five-part takings clause analysis).

210. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (affirming the use of the act of state doctrine). The act of state doctrine prevents United States courts from adjudicating foreign state acts that occur in the territory of a foreign state, even if the act of the foreign state conflicts with United States policy. *Id.* at 398.

The act of state doctrine poses a severe threat to human rights litigation; if the court recognizes this defense, the claims of the hostages would have no effect. Comment, *Torture as a Tort in Violation of the Law of Nations: Filartiga v. Pena-Irala*, 33 STAN. L. REV. 353, 363-64 (1981). The doctrine hinders efforts to enforce anti-terrorist measures through traditional United Nations human rights channels. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 457 (1964) (White, J., dissenting) (arguing that the act of state doctrine should not be used as a shield for violations of international law).

Many human rights commentators have supported efforts to discard the act of state doctrine if a state raises the defense to shield the state's acts that violate international law. See Paust, *supra* note 177, at 221, 243 (advocating that a court should not grant the act of state defense when the foreign state violated international law); see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 n.21 (1964) (noting that, historically, the act of state doctrine did not necessarily apply to violations of international law). Another approach limits the doctrine in refusing to recognize the defense when an act in a foreign state has effects outside the state. Paust, *supra* note 177, at 246.

211. See 28 U.S.C. §§ 1609-10 (1982) (codifying provision for post judgment at-

VI. REMEDIES FOR THE HOSTAGES

If the Federal Circuit Court had remanded the decision of the United States Claims Court in *Belk v. United States* for a reassessment of the takings clause analysis, and if the plaintiffs could have overcome the obstacles of the political question doctrine and the Foreign Sovereign Immunities Act, then the hostages may have had an opportunity to obtain a judicial remedy. Because, however, the Federal Circuit Court upheld the decision of the Claims Court, the hostages must look toward other avenues to receive a remedy. As one commentator has indicated, many hostages or victims of terrorism are bitter about their sufferings, and desire compensation.²¹²

In the past, the only remedies that victims of state-sponsored terrorism could realistically receive were inadequate *ex gratia* settlements. In one example, the Federal Republic of Germany paid over three million marks to the families of the Israelis killed at the Olympics, without claiming responsibility for their deaths.²¹³ In another example, the United States House of Representatives in 1987 passed a bill granting reparations to those Americans of Japanese descent whom the United States detained during World War Two.²¹⁴ This bill would distribute \$1.2 billion to the survivors, or \$20,000 to each victim of the Japanese internment.²¹⁵ Although these two *ex gratia* settlements provide partial compensation to the victims, they are meager in comparison with tort damages awarded in United States courts.

Similarly, the United States offered limited *ex gratia* compensation for the American hostages in Iran, amounting to only fifty dollars for each day of captivity.²¹⁶ The Hostage Relief Act²¹⁷ offered the hostages other miscellaneous benefits, such as guaranteeing the hostages their

tachment of assets located within the United States); *supra* notes 158-59 and accompanying text (explaining that attachments to satisfy a judgment with respect to property taken in violation of international law are legitimate under the Foreign Sovereign Immunities Act). It is beyond the scope of this Case-Comment to deal with these issues in depth.

212. Mathewson, *The Terrorists: Bitterness Surrounding Dutch Train Hijacking Lingers A Year Later*, Wall St. J., Jan. 6, 1977, at 1.

213. See Cooper, *supra* note 154, at 113 n.156 (discussing West German payment to the families of Israeli athletes killed at the 1972 Munich Olympic Games).

214. See H.R. 442, 100th Cong., 1st Sess. (1987) (implementing payment of prescribed sum to Japanese-Americans as damages resulting from internment during World War II).

215. *Id.*; W. McAllister, *Amends Sought For 1940s Internment*, Washington Post, Sept. 12, 1987, at 1.

216. Victims of Terrorism Compensation Act, Pub. L. No. 99-399, § 802, 100 Stat. 879 (1986).

217. Hostage Relief Act of 1980, 5 U.S.C. §§ 5561, 5562 (1980).

salaries, and extending certain medical benefits, as well as some educational expenses to the families of the hostages.²¹⁸ If the goal of United States was to offer the hostages monetary compensation for their pain and suffering, in light of the fact that the Algerian Accords nullified the hostages tort claims against the Islamic Republic of Iran, then the compensation should have been more substantial. In its present form, the settlements do not constitute just compensation for the lost tort claims of the hostages.

With the Algerian Accords, the United States achieved important foreign policy objectives, as well as a Claims Tribunal for American commercial claimants. The hostages received their freedom, and meager *ex gratia* settlements, but not a legal remedy in return for the dismissal of their tort claims against Iran. The United States made an important decision in signing the Algerian Accords. The United States should take responsibility for that decision, and should grant the hostages just compensation for their lost claims for pain and suffering.

Without adequate *ex gratia* settlements, the hostages' only alternative means of receiving monetary compensation for their pain and suffering was to sue the United States. The hostages could have sued the United States under a takings clause theory or a negligence theory. They chose the takings theory, but the United States Claims Court dismissed their complaint. Because *Belk v. United States* was affirmed, the hostages will never receive adequate compensation for their sufferings.

VII. RECOMMENDATIONS

On the appeal of *Belk v. United States*, the Federal Circuit Court should have closely examined the takings clause analysis of the United States Claims Court. The court of appeals should have found that triable issues of fact exist in at least two of the five parts of the takings clause test. Triable issues of fact exist as to the extent to which the claimants are incidental beneficiaries, and the extent to which the government substituted rights for those that it destroyed. In addition, the court should have found that, because it need not probe into the sensitive nature of executive decision-making, the takings clause issue is not a political question. Thus, the circuit court should have reversed and remanded the decision of the United States Claims Court.

If the Federal Circuit Court had remanded *Belk v. United States* back to the United States Claims Court, the government may have ar-

218. *Id.*

gued that the hostages never possessed property. The hostages would then have had to prove that they could have established jurisdiction over the Islamic Republic of Iran in a United States federal court. To allow the hostages to satisfy this jurisdictional requirement, the United States Claims Court, on remand, would have had to follow the rationale set forth in *Von Dardel v. Union of Soviet Socialist Republics*, and hold that a federal district court could have obtained jurisdiction over Iran because: (1) seizing and detaining internationally protected persons is a universal violation of international law;²¹⁹ (2) the various international agreements, to which Iran is a signatory, fit into the international agreements exception of the FSIA;²²⁰ or (3) Iran implicitly waived its immunity by signing various international human rights agreements.²²¹ Therefore, the United States Claims Court should have found that a United States district court would not grant Iran sovereign immunity under the Foreign Sovereign Immunities Act. Because the hostages could have obtained jurisdiction over Iran in a United States court, their claim constituted property that the government completely destroyed when it signed the Algerian Accords. The hostages should have had an opportunity to collect compensation for their tortious injuries through judicial channels.

A number of possibilities exist to ensure that future hostage victims receive adequate compensation. The legislature could amend the FSIA to include human rights violations as an exception to sovereign immunity.²²² Because it is difficult to pass legislation that may directly affect the executive's foreign policy power, judges could rely more on customary international law or international agreements as exceptions to the FSIA. Human rights advocates should focus their energy on encouraging the courts to grant greater legal effect to customary international law.²²³ Civil sanctions and remedies can and should exist even without

219. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 (D.D.C. 1985).

220. *Id.* at 254-55.

221. *Id.* at 255-56.

222. See *Conference Report: Human Rights in American Courts*, 1 AM. U.J. INT'L L. & POL'Y 137, 161 n.74 (1986) (suggesting the codification for an exception for violations of human rights as an amendment to the Foreign Sovereign Immunities Act).

223. See *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 427 (2d Cir. 1987), *cert. granted*, 108 S. Ct. 1466 (1988) (noting that one must look to modern international law to decide whether the statute provides jurisdiction over a foreign sovereign); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (holding that the law of nations is an evolving set of principles that must be examined as they exist today, not as they existed in 1789); see also Schneebaum, *International Law as Guarantor of Judicially-Enforceable Rights: A Reply to Professor Oliver*, 4 HOUS. J. INT'L L. 65, 79 (1981) (advocating the extended reliance on customary human rights law in United States courts).

a statute.²²⁴

CONCLUSION

Through the seizure of the American hostages in Teheran, Iran violated both domestic United States law and international human rights law. The hostages' tort claims against Iran could have resulted in monetary compensation, and therefore constitute property. The signing of the Algerian Accords by the United States constituted a taking of the hostages' property without providing just compensation. The United States Claims Court in *Belk v. United States* should not have granted summary judgment for the government because there were triable issues of fact concerning whether a fifth amendment taking occurred. The court was primarily wary of interfering in a political question, although no investigation into sensitive political negotiations was necessary to determine whether there was a taking.

Courts must not be fearful of dealing with foreign policy matters, or relying upon international law. Based upon international custom and treaty law, hostage victims should be allowed to overcome domestic jurisdictional obstacles such as the doctrine of foreign sovereign immunity. The hostage victims would then be able to receive the compensation that the trier of facts deems appropriate. Without judicially mandated compensation, or more substantial voluntary *ex gratia* settlements, the hostages will receive little for their pain and suffering.

224. See *The Three Friends*, 166 U.S. 1, 53 (1897) (noting that courts can enforce the law of nations both civilly and criminally without the passage of any jurisdictional statute).