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Case No. 11135

Date of filing: 14 Jul '87

\*\* AWARD - Type of Award \_\_\_\_\_  
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\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

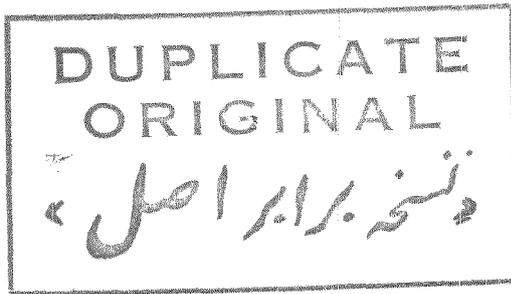
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\*\* CONCURRING OPINION of \_\_\_\_\_  
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\*\* SEPARATE OPINION of \_\_\_\_\_  
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\*\* DISSENTING OPINION of Mr. Beavel  
- Date 14 Jul '87  
23 pages in English \_\_\_\_\_ pages in Farsi

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CASE NO. 11135

CHAMBER THREE

AWARD NO. 312-11135-3

ALFRED L.W. SHORT,  
a claim of less than US\$ 250,000  
presented by the UNITED STATES OF AMERICA,  
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,  
Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری ایران - ایالات متحدہ
ثبت شد - FILED	
Date	14 JUL 1987 تاریخ
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DISSENTING OPINION OF JUDGE BROWER

1. One embarks upon consideration of this claim for wrongful expulsion much like a professional cricketer might approach an engagement to exercise his skills in a baseball stadium: The territory, while vaguely familiar, somehow does not fit the rules within whose scope one is accustomed to function. Here venerable concepts of international law regarding expulsion of aliens and State responsibility for revolutionary acts are invoked in respect of a distinctly modern phenomenon, the Islamic Revolution in Iran. The exodus of 45,000 Americans from Iran in a period of four months surrounding a Revolution that succeeded essentially without a military structure of its own and with dizzying speed has challenged conventional notions of international

law. I must conclude, sadly, that the Tribunal in this Case has met that challenge only incompletely. I therefore dissent.<sup>1</sup>

I.

2. It is logical, and I think by now established, that a State's expulsion of aliens can, like an expropriation, occur constructively as well as by express act or decree. Just as a constructive eviction of a tenant may be accomplished by a landlord turning off heat, gas and electricity, failing to have garbage collected, and creating a mighty din next door, so may an alien be expelled from a country by the host government engaging in discrete acts or omissions collectively designed to bring about his departure. As was stated in International Technical Products Corporation and Islamic Republic of Iran, Award No. 186-302-3 (19 August 1985):

[The absence of a formal expulsion order] leads to the question as to whether an ostensibly "voluntary" departure (i.e., one not based on specifically focused governmental action such as an expulsion order or the application of force specifically to the individual involved) induced by general circumstances in the country can also constitute expulsion. . . .

Although it is clear that not every inconvenience which may cause an alien to leave the country constitutes expulsion, the Tribunal accepts, in principle, the possibility that the constituent elements of expulsion ("removal, either 'voluntarily,' under threat of forcible

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<sup>1</sup>I concur in the Award's determination that the Tribunal has jurisdiction. My only difference with it in that area is that I would have been inclined to find in respect of paragraph 11(D) of the General Declaration, as applied by Article II(1) of the Claims Settlement Declaration, that in referring to "the United States nationals" it is limited to "the 52 United States nationals" mentioned in paragraph 11(A). (Emphasis added.)

removal, or forcibly") can be fulfilled in exceptional cases even where the alien leaves the country without being directly and immediately forced or officially ordered to do so. Such cases would seem to presuppose at least (1) that the circumstances in the country of residence are such that the alien cannot reasonably be regarded as having any real choice, and (2) that behind the events or acts leading to the departure there is an intention of having the alien ejected and these acts, moreover, are attributable to the State in accordance with the principle of state responsibility.

Id. at 14 (citing Goodwin-Gill, International Law and the Movement of Persons Between States 201 (1978)). In this respect the instant Award, by expressly adopting this dictum (para. 30), has met the first challenge presented by this Case.<sup>2</sup>

3. In consequence the Tribunal rightly has proceeded to consider the facts of this Case within the framework of the basic principles regarding a State's expulsion of aliens. They are provided by the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, signed 15 August 1955, entered into force 16 June 1957, 284 U.N.T.S. 93, T.I.A.S. No. 3853, 8 U.S.T. 899 ("Treaty of Amity"), Articles II(1), (2), (3) and (4), IV(3) and V(1),<sup>3</sup> supplemented as necessary by resort to

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<sup>2</sup>The concept of constructive expulsion seems no less applicable to a mass expulsion than to a distinctly individual one. In fact it is more likely to arise in the former context.

<sup>3</sup>Numerous awards of this Tribunal have established that the Treaty of Amity is applicable to cases such as the present one. See, e.g., Amoco International Finance Corporation and Islamic Republic of Iran, Award No. 310-56-3 at paras. 88-100 (14 July 1987); Sedco, Inc. and National Iranian Oil Company, Award No. ITL 59-129-3 (27 March 1986); Phelps Dodge Corp. and Islamic Republic of Iran, Award No. 217-99-2 (19 March 1986); INA Corporation and Islamic Republic of Iran, Award No. 184-161-1 (13 August 1985).

customary law. See generally M. Pellonpää, Expulsion in International Law (1984). Of particular relevance here are the customary law prohibition against "collective" or "mass" expulsions of groups of aliens, see Draft Declaration on the

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(Footnote Continued)

Article II provides, inter alia, as follows:

1. Nationals of either High Contracting Party shall be permitted, upon terms no less favorable than those accorded to nationals of any third country, to enter and remain in the territories of the other High Contracting Party for the purpose of carrying on trade . . . .

2. Nationals of either High Contracting Party within the territories of the other High Contracting Party shall, either individually or through associations, and so long as their activities are not contrary to public order, safety or morals: (a) be permitted to travel therein freely and reside at places of their choice . . . .

3. The provisions of paragraphs 1 and 2 of the present Article shall be subject to the right of either High Contracting Party to apply measures which are necessary to maintain public order, and to protect public health, morals and safety, including the right to expel, to exclude or to limit the movement of aliens on the said grounds. . . .

4. Nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. . . .

Article IV provides, inter alia, as follows:

3. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either High Contracting Party located within the territories of the other High Contracting Party shall not be subject to entry or molestation without just cause.

Article V provides, inter alia, as follows:

1. Nationals and companies of either High Contracting Party shall be permitted, within the territories of the other High Contracting Party . . . (c) to dispose of property of all kinds by sale, testament or otherwise. . . .

Human Rights of Individuals Who Are Not Citizens of the Country in Which They Live, U.N. Doc. E/CN.4/1336 (5 December 1978), reprinted in D. Elles, International Provisions Protecting the Human Rights of Non-Citizens, Annex I, U.N. Doc. E/CN.4/Sub. 2/392/Rev.1 (1980), and the provision in Article II(3) of the Treaty of Amity reserving to Iran and the United States the "right to expel, to exclude or to limit the movement of aliens," but only as "necessary to maintain public order, and to protect public health, morals and safety."

4. One proceeds to examine whether Claimant, when he departed Iran on 8 February 1979 -- three weeks after the Shah had gone into exile (on 16 January 1979), one week following Ayatollah Khomeini's return from exile, and three days prior to the final climax of the Islamic Revolution -- was, as he alleges, constructively expelled, as part of a constructive expulsion of Americans en masse, and without such expulsion being justified on grounds of public order, health, morals, or safety.<sup>4</sup>

5. Respondents argue, and the Award finds (1) that the events leading to Claimant's departure from Iran cannot be attributed in a legal sense to the movement headed by Ayatollah Khomeini, and (2) that in any event acts which might be so attributed cannot, even if they took place as late as 8 February 1979, engage the State responsibility of Iran. I disagree with both conclusions.<sup>5</sup>

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<sup>4</sup>As Iran denies any expulsion in this Case it has not invoked alternatively any of these justifications. It thus appears conceded that if any expulsion occurred as alleged it was indeed wrongful. Hence neither the Award nor this Opinion addresses the issue of wrongfulness further.

<sup>5</sup>As the Award deals with these distinct legal issues they have become somewhat intertwined. Nevertheless, I attempt to treat them separately in hopes of clarifying the analysis of both the Award and this Opinion.

II.

A.

6. The principal subject of review when exploring for a connection between Claimant's fate and the Islamic Revolution should be the declarations of Ayatollah Khomeini himself.<sup>6</sup> The Award itself affirms (para. 35) that these were "of anti-foreign and in particular anti-American sentiment." It must be understood that Ayatollah Khomeini urged the overthrow of the Shah, (1) by force if necessary, (2) because (in the Ayatollah's view) he had allowed Iran to be dominated by foreign interests, principally the United States, and that (3) the United States, and its nationals, thus necessarily were targeted equally with the Shah. In other words, to rid Iran of the Shah for certain one had also to cleanse it completely of Americans and their influence in every form. This theme rings through again and again in the Ayatollah's pronouncements from the very inception of the Islamic Revolution to the present.

7. It is common knowledge that "the beginning of the end" for the Shah was the slaying by government security forces in Qom on 9 January 1978 of theological students protesting an article appearing the previous day in the newspaper Etela'at which was felt to have slandered the Ayatollah. In commemoration of their martyrdom forty days later the Ayatollah declared:

. . . America . . . imposed this Shah upon us, a worthy successor to his father. During the period

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<sup>6</sup>I find no indication in the record of this Case that the former Shah's government failed to exert all reasonable efforts to protect Claimant from the revolutionary events he alleges caused his expulsion. Therefore, while it is clear that those efforts failed, I do not feel such failure amounts to a violation of an international duty.

he has ruled this creature has transformed Iran into an official colony of the U.S. What crimes he has committed in service to his masters!

Speech of February 19, 1978 at Najaf, Iraq, in Algar, Islam and Revolution: Writings and Declarations of Imam Khomeini 215 (1981).

8. As the Revolution gathered momentum in November and December of 1978, with strikes affecting the critical oil fields and banks in particular, Khomeini intensified the accompanying rhetoric. In his message of 15 November 1978 to the strikers he castigated the military government the Shah had installed on 6 November 1978 and directed attention at the United States (and no other foreign nation):

America is warned that if she insists on keeping the military government in power and make our people the targets of its paid agents' machine-gun fire . . . we have plans for our oil wells . . . . The Americans should reconsider their support for the Shah. The American politicians should warn their government against this oppressive and anti-human rights policy which is not in the eventual interest of the American people.

The Message of His Holiness Ayatollah Khomainsi to the Striking Workers of the National Iranian Oil Company [NIOC] and Other Striking People, 15 November 1978, Proclamations of Ayatollah Khomainsi 228 (1980). One week later, in a "Message of Ayatollah Khomeini to the Brave People of Iran on the Occasion of Moharram," "the month of courage and sacrifice," the leader of the Revolution cited "the merciless massacre of unarmed people by the Shah" and continued:

It is the Shah who, in the interest of the U.S. government, has ruined our agriculture and is giving away our natural resources to the capitalists.

Id. at 230. This was followed by a "call . . . to work side by side for the overthrow of the oppressive Pahlavi dynasty,

the abolition of the monarchy, and the establishment of an Islamic Republic based on progressive Islamic principles." Id.

9. By 1 December 1978 the Ayatollah had concluded publicly that "There is no other solution but to fight." The MacNeil/Lehrer Report, "Transcript of Ayatollah Khomeini Interview," Library No. 830, Show No. 4110, at [3] (1 Dec. 1978). He reiterated how inextricably entwined he regarded America as being with the reviled Shah:

The American government, they have committed the biggest crime by imposing on our people the Pahlavi dynasty. Through this support they have plundered our natural resources, and instead in return they have given us things that do not help our people in any way. They have dominated our army in order to support their cause, to stand against our people. They have made bases in our countries, which are contrary to our independence. With this Shah we don't have any life in our countries, and this is the American government who support the Shah. The President of the United States, time and over, has called our people names, dirty names . . . .

Id. at [4].

10. Six weeks later, just the day after the Shah had left Iran forever (16 January 1979), the Ayatollah was blunt:

The U.S. administration and the President have become enemies of the Iranian people. The presence of their military bases and advisers have impoverished our country. The United States has become an accessory and has backed the massacre of our people by the Shah's ignoble regime. It is now up to the American people to exert pressure on their government.

D'Epenoux, Ayatollah Khomeini Tells L'Express: "We Want a Neutral and Nonaligned Republic," L'Express (Paris), 10 Jan. 1979 at 63, translated and excerpted in 5 Foreign Broadcast

Information Service Daily Report, Middle East and North Africa, at R-16 (17 Jan. 1979).

11. Just two weeks after that, on 1 February 1979, the Ayatollah returned to Iran after fifteen years in exile to "a welcome to rival those of Lindbergh in New York or de Gaulle in Paris." N.Y. Times, 2 Feb. 1979, SA at 1. He immediately announced his intention to "appoint a government" and continued "unyielding in his hostility . . . to the United States," declaring that

Final victory will come when all foreigners are out of the country.

Id. The Islamic Revolution prevailed ten days later, on 11 February 1979, and the next day, following the threatening and mistreatment by Revolutionary Guards of hundreds of Americans who had taken refuge in the Hilton Hotel, Deputy Prime Minister for Revolutionary Affairs Dr. E. Yazdi advised American business interests to leave Iran. Affidavit of Robert N. MacKinnon at para. 11. See also Affidavit of Arthur B. Childers at paras. 5-16; Affidavit of Burl Strickland at 2-3; Affidavit of Jack Rankin; Affidavit of Howard Lukens at para. 6; Affidavit of B.H. DeChanso at para. 1; Affidavit of Barbara Maria Kalinowski at para. 5.

12. One commentator has summed up Ayatollah Khomeini's view of the United States and Americans thusly:

America was the richest, most oppressive, most savage, and bloodthirsty country in the world, an international plunderer and Satan.

Rubin, Paved With Good Intentions: The American Experience and Iran 277 (1980). An official Tehran radio broadcast, on 4 November 1986, marking the seventh anniversary of the seizure of the American Embassy in Tehran, has more recently confirmed the Ayatollah's position that "from its very

inception, the Islamic Revolution saw the forces of world oppression, led by the United States, as its true foe . . . [T]he Shah was not the revolution's major problem." 8 Foreign Broadcast Information Service Daily Report, South Asia, at I-3 (4 Nov. 1986). Another broadcast a few days later reviewed the Ayatollah's speeches from as far back as 1962 attacking the "world-devouring United States . . . as the cause of all the difficulties facing the country," noting that "the watchword was 'Death to America' from the very beginning." 8 Foreign Broadcast Information Service, Daily Report, South Asia, at I-3 (10 Nov. 1986).<sup>7</sup>

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<sup>7</sup>It is noteworthy, too, that the Minister of Foreign Affairs of Iran, communicating officially with the International Court of Justice on 9 December 1979 and 16 March 1980, referred to "more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms." United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 3, 9, 19 (Judgment of 24 May 1980).

The 9 December 1979 communication added:

. . . [T]he whole political dossier of the relations between Iran and the United States over the last 25 years . . . includes, inter alia, all the crimes perpetrated in Iran by the American Government, in particular the coup d'état of 1953 stirred up and carried out by the CIA, the overthrow of the lawful national government of Dr. Mossadegh, the restoration of the Shah and of his régime which was under the control of American interests, and all the social, economic, cultural and political consequences of the direct interventions in our internal affairs, as well as grave, flagrant and continuous violations of all international norms, committed by the United States in Iran.

Id. at 19.

13. It seems to me reasonable to conclude that there was a cause and effect relationship between these successive statements by the leader of the ultimately successful Islamic Revolution in Iran and the events that befell Americans almost universally in that country from the beginning of November 1978. The record here is replete with evidence of threats, attacks, firebombings and virtually every form of overt assault on the persons and property of Americans in Iran during that period. If plotted on a graph the rising curve of such anti-American violence would track precisely the growing intensity of Khomeini's verbal attacks on America and its citizens and the accompanying climax of the Revolution. Indeed, the essential facts are conceded, or at least not disputed.

14. The Award itself confirms (para. 31) that the "strong anti-American sentiment" thus documented "was the consequence of [the] belief ['that the American government was responsible for maintaining [the Shah] in power'], and gave to Americans present in Iran reason to believe that their lives were in danger." The Award nevertheless declines to attribute the fate of the Claimant (and others like him) to the revolutionary forces because Claimant is "unable . . . to identify any agent of the revolutionary movement" whose "actions . . . compelled him to leave Iran." The Award rules that acts of mere "supporters" of the Revolution acting against Claimant (and others like him) cannot be attributed to the movement they support. On this point the Award relies on the ruling by the International Court of Justice in United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 3 (Judgment of 24 May 1980), absolving the Iranian Government of responsibility for the initial attack by militants on the American Embassy in Tehran on 4 November 1979 absent any showing that they had "been charged by some competent organ

of the Iranian State to carry out a specific operation."<sup>8</sup>  
Id. at 29.

15. First of all, this view of things overlooks the fact that this Case is premised on allegations of a constructive expulsion of all Americans in Iran (including this Claimant) rather than on a specific event or act aimed at Claimant individually by direction of the revolutionary authorities. Having accepted the legal validity of the concept of constructive expulsion, the Award must treat this Case on those terms and cannot properly fault Claimant for failing to prove an allegation he never made. It is inherent in a constructive mass expulsion that the acts effectuating it will be, in a high degree, general, unspecific, unfocused and indirect.

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<sup>8</sup>I believe the Diplomatic and Consular Staff case to be in any event distinguishable on this point. As the Award notes, the Court referred to the various declarations of Ayatollah Khomeini, especially one of 1 November 1979 leaving it "up to the dear pupils, students and theological students to expand with all their might their attacks against the United States and Israel, so they may force the United States to return the deposed and criminal Shah, and to condemn this great plot ['to stir up dissension between the main streams of Islamic thought']," and concluded:

. . . [I]t would be going too far to interpret such general declarations . . . as amounting to an authorization from the State to undertake the specific operations of invading and seizing the United States Embassy.

1980 I.C.J. at 29, 30. The conclusion that such statements cannot be construed as a direction to assault the embassy and official representatives of a major foreign government, with all of the political, economic and legal consequences that might entail, is eminently reasonable. This is especially so in light of the fact, also pointed out by the Court, that a contrary conclusion would "conflict with the assertions of the militants themselves who are reported to have claimed credit for having devised and carried out the plan to occupy the Embassy." It does not, however, as I see it, compel the Award's conclusion (para. 35) that such  
(Footnote Continued)

16. The second weakness of the Award's ruling is that it overlooks the rest of the Diplomatic and Consular Staff case. In the next breath following its absolving the Revolutionary Government of responsibility for the initial attack itself on the American Embassy the Court held such Government thoroughly responsible for violating "the most categorical obligations" under international law in that it "failed altogether to take any 'appropriate steps' . . . either to prevent this attack or to stop it before it reached its completion." Id. at 30-31. The Court attributed this failure "to more than mere negligence or lack of appropriate means." Id. at 31. Similarly, even should one conclude that the accumulated acts to which Claimant (and others) fell victim cannot be traced directly to the Ayatollah's pronouncements, his total failure in that context to act in any way to quell the expulsive fervor of his adherents as it rose and peaked over a period of months should permit attribution to him of responsibility for the consequences. The fire brigade commander who studiously looks the other way while the arsonist is at work in his midst is no less guilty of the wrong.

B.

17. One may, I think, usefully look to surrounding events to confirm the existence of a studied policy, attributable to Ayatollah Khomeini and implemented by his adherents, to expel all Americans from Iran.

18. To suppose that every one of the approximately 45,000 Americans resident in Iran at the beginning of November

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(Footnote Continued)

statements also cannot be seen to have caused the more general, less cataclysmic and rather complete exodus of Americans from Iran.

1978, virtually all of whom departed in the ensuing four months, went home of their own free will, or under orders from their sovereign or their employers, is to attribute to all concerned an improbably lemming-like penchant for self-abnegation.<sup>9</sup> It does not stand to reason that there would be a spontaneous and complete American evacuation of any country where there has been such a complex of profitable business relationships, presumed mutual political interests and personal enjoyments. The Pied Piper may have emptied Hamelin of its children but the likelihood that a 20th century kindred spirit performed the same magic on Americans in Iran is more than remote.

19. It is, of course, true that living in Iran during the period starting with November of 1978 was an exercise in adversity, for Iranians doubtless far more so than for aliens. The fuel and food shortages, disruption of banking services, the general commotion, disorder, uncertainty and even fright attendant upon a wholesale revolution, all would tend in any circumstances to drive some out of the country, even in the absence of political or social hostility to the foreigners concerned. Doubtless many who departed Iran did so for these more conventional reasons, as reflected, for example, in their corporate employers' claims for "force majeure costs" related to their evacuation. See, e.g., American Bell International Inc. and Islamic Republic of

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<sup>9</sup>I find no basis to Iran's claim that Claimant and the other private American citizens who left Iran were ordered out by their own government. The record discloses two official statements by the U.S. Embassy to Americans living in Iran. The first, dated 31 December 1978, "recommended" that the dependents of Americans working in Iran "temporarily" leave Iran. The second, dated 31 January 1979, ordered the evacuation of the remaining 100 dependents of United States government employees and "urged" all other "non-essential" Americans to leave the country. Thus I would interpret these statements as reasonable responses to the events that caused the Americans to leave Iran rather than themselves a cause of that departure.

Iran, Award No. 255-48-3 at paras. 55-56 (19 September 1986). This may explain in part the fact that only about 1500 of the 45,000 individual Americans affected have brought claims against Iran before this Tribunal, i.e., just over 3%.

20. Ordinarily, however, one would just as equally expect that some hardy few would remain. The tenacity, hardihood and perseverance of those whose lives are spent, wholly or in part, in employment in initially unfamiliar lands is considerable. The fact that virtually every last American had given it all up in Iran by (or soon after) the end of February 1979 strongly suggests that something more than general revolutionary disorder was at play. The conclusion, to me, is unavoidable that the determinedly anti-American stance of the Revolution, which succeeded, with the events it incited and condoned, was the cause of some number of American departures.

21. There are also very important indicators in the actual trend of events in Iran and the pattern of the approximately 1500 wrongful expulsion cases submitted to the Tribunal.<sup>10</sup> First the fact, as previously noted, that so few such claims have been filed, relative to the 45,000 American departures

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<sup>10</sup>This Case was assigned to this Chamber on 16 December 1983, having been chosen as one of 18 claims of less than U.S. \$250,000 ("CLTDs") activated as "Representative Cases" intended to provide precedential guidance for all of the major categories of issues raised in such CLTDs. See Minutes of 89th Meeting of the Tribunal (6 December 1983). The instant Case was intended to represent similar claims presenting the issue "what is the extent of Iran's liability for the early termination of employment contracts between U.S. nationals and U.S. companies in Iran when such companies were forced to cease operations because of events in Iran?" (Category II). This Case also raises the issue stated in Category IV, Issue C: "What is the extent of Iran's liability for personal property which U.S. nationals were forced to leave behind when they left Iran?"

from Iran during the climactic period of the Revolution, is significant. Second, more than five years after those claims were filed it is perhaps appropriate to take judicial notice of the fact that well over half of them appear to arise in February 1979 or shortly thereafter. In other words, there is a trend coinciding with the climax and success of the Revolution. Third, a high percentage of those post-1 February claims, as the evidence before us confirms, involved actual mistreatment of American employees of American companies by identifiable Revolutionary Guard units on and after 12 February 1979. Fourth, at this same time Americans employed by Iranian Government controlled companies were discharged, thus effecting their removal from Iran as well. See Theodore Lauth and Islamic Republic of Iran, Award No. 233-10335-3 at para. 14 (8 May 1986).

22. What this adds up to, it seems fair to conclude, is this: The Khomeini forces, as the Ayatollah's proclamations foretold, decided as a matter of policy to rid the country of Americans. Some, of course, left early under conditions in no way to be construed as wrongful expulsion. Others persevered, eventually succumbing to the accumulation of discrete acts and omissions designed to discomfit to the point of departure. Finally, those who somehow had not understood the message were summarily fired, or, where this option was not available, literally run out of the country. Clearly the third group was just as surely expelled as the first group was not. The question presented by the instant Case is whether the second category also was expelled. I believe the answer should be "Yes." Once a policy to expel is adopted, those who go peaceably rather than kicking and screaming are no less the victims.

C.

23. In considering any wrongful expulsion case presented to us one further aspect must be analyzed which the Parties and

the Award here have wholly failed to explore for the benefit of the Tribunal: The relationship of the will of the Claimant to that of his American employer and the effects this relationship might have under varying hypotheses. The doctrine of wrongful expulsion is applied only in the case of natural persons. The answer as to why it never is discussed in relation to a juridical person is that such persons have access to other legal concepts which address their concrete problems in a less drastic way, or at least in a more familiar one. Thus American corporations who as a practical matter might feel that they, too, were "expelled" from Iran normally allege a breach of the contract that probably took them to Iran in the first place or an expropriation, or both. An individual who was present in Iran solely for the purpose of being employed there by such a company is not likely to have the same remedies.

24. The interposition of an individual's employer into the complex of legal relations between the host State and the individual raises particular questions. Such an employee may be dependent upon his employer for transportation out of the country and is not in a position to flee no matter how great and justified his terror at the thought of staying. That is to say, a constructive expulsion may require, for actual effectuation, an act of the employer in addition to the employee having drawn his justified conclusions. By the same token, an individual who himself might choose to persevere through even the worst hostility to which the succeeding revolution might subject him necessarily is prevented from doing so if his employer sees it differently and evacuates him. The question arises whether the departing employee is any less expelled in the second case than in the first. To resolve the question of expulsion in any given case ideally requires examination of the treatment to which the employer was subjected, yet the Parties here have devoted precious little time to the situation of Claimant's employer, Lockheed, even though it claims here, too, in a

separate case,<sup>11</sup> and the Tribunal is not thus very fully informed.

25. Having said this, I think that in the case of the Islamic Revolution one may fairly assume that in most cases, absent convincing evidence to the contrary, the attitudes of American companies and their American employees normally are not to be distinguished. Such an assumption is particularly justified where a mass expulsion is posited rather than a purely individual one. Nonetheless I remain troubled by the absence of specific evidence and analysis on this point.

### III.

26. What I find particularly difficult to comprehend is the Award's refusal to find the Islamic Republic of Iran, effectively proclaimed 11 February 1979, responsible for any wrongful acts, culminating as to this Claimant in his expulsion three days earlier, attributable to the then insurgent Revolution. The Award concludes that there is no liability to Claimant on the part of Iran "as the acts of supporters of a revolution cannot be attributed to the government following the success of the revolution." This seems to be saying that although, as the Award concedes, "Where a revolution leads to the establishment of a new government . . . [t]he successor government is also held responsible for the acts imputable to the revolutionary movement even if those acts occurred prior to its establishment," the principle cannot be applied except where identifiable organized units, visibly controlling specified territory, were the perpetrators. This seems to me both

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<sup>11</sup>Lockheed Corporation and Government of Iran, Case No. 829 (Chamber Two).

unrealistic and in disregard of international law as it now stands.

27. The breathtaking swiftness with which the firestorm of the Islamic Revolution swept the Shah from power in Iran reflected a broad base of support for a change of government. The fact that it was accomplished, uniquely, without the formation of a distinct and complete revolutionary military force evidences the extent of disenchantment with the Shah, and the corresponding breadth of support for a new government. It would be emphasizing form over substance, and failing to adapt the traditional concepts of international law to evolving political developments, to say that acts of unorganized or loosely organized adherents of the successful Revolution are not attributable to the ensuing government, whereas had the Revolution been less popular -- had it been able to prevail only after a long and bitter fight between more conventional contending military units -- it would have been responsible for the same acts.

28. Indeed I think that international law as it now stands more nearly comports with my view of the matter rather than that of the Award. Article 15 of the International Law Commission Draft Articles on State Responsibility, which the Award itself cites, states:

The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State.

Draft Articles on State Responsibility, [1975] 2 Y.B. Int'l L. Comm'n. 59, U.N. Doc. A/CN.4/SER. A/1975/Add.1 (emphasis added). As the "Commentary" to this Article states:

. . . [N]o distinction is made between the acts of organs of the insurrectional movement according to whether they preceded or followed the acquisition by the movement of effective power over a given region . . . . [T]he attribution or non-attribution to the State of acts of insurgents is

quite independent of their exercise of de facto power.

Id. at 100, Commentary to Article 15, para. 2. This is consistent with the reason for the principle, as stated in Bolivar Railway Company Case (U.K. v. Venezuela), 9 R. Int'l Arb. Awards 445, 453 (1903), relied on by the Award and recited in the "Commentary":

The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented ab initio a changing national will, crystallizing in the finally successful result.

The "Commentary" concludes:

What is important is to determine whether . . . attribution is or is not made in the real world of international relations.

Draft Articles on State Responsibility, supra, at 100, Commentary to Article 15, para. 3.

29. It seems to me that on that test the answer here is obvious. In keeping with the underlying principle it must be true, as O'Connell states, that "states are liable for . . . all acts [of successful revolutionaries] committed when they were merely mobs as well as when they became de facto governments." International Law 968 (2d ed. 1970) (emphasis added). See also Sohn & Baxter, Convention on the International Responsibility of States for Injuries to Aliens, Final Draft, comments to Article 18, reprinted in Garcia-Amador, Sohn & Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974) (liability "should attach as early as possible, even before a group of insurgents has achieved the status of a full-fledged revolution"); R. Ago, Third Report on State Responsibility, [1971] 2 Y.B. Int'l. Law Comm'n. 199, 266 (conduct of private persons performing public functions at

State instigation is attributable to the State); 3 League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference 108, 116, Doc. No. C.75.M.69.1929.V, quoted in Commentary to Article 15, Draft Articles on State Responsibility, supra, at 103, para. 15 (insurrectionist party, having taken power, is liable for "damage done to the person or property of foreigners by persons engaged in insurrections or riots, or through mob violence"); A.H. Feller, The Mexican Claims Commissions 156-7, 163 (1935) (even acts of revolutionaries opposed to the ultimately successful faction are attributable to the new government).

30. In short, something less than what the Award here posits as necessary is sufficient to establish the nexus between the injury to the alien and the successful revolutionary government making the latter responsible for the former. It is the Award's failure thus to adapt traditional concepts to unique events that is especially disappointing.

#### IV.

31. The question remains of how to determine in this individual Case what was, in the end, the cause of departure. I believe all of the evidence before us suggests that at least from 1 February 1979, the day the Ayatollah returned triumphantly to Iran and announced his intention to "appoint a government" and the imperative to see "all foreigners . . . out of the country," the departure of any American then still in Iran was very likely due to the applied anti-Americanism of the Ayatollah and his followers. The facts of a particular case may, to be sure, demonstrate the contrary, and they should, to the extent available, be examined.

32. Given the rather small number of departing Americans who have made any claim here, and having regard for all of

the other circumstances, cited above, I believe the appropriate way for the Tribunal to approach this Case (and others like it) would be to presume that any American claimant here alleging that he was wrongfully expelled by Iran who departed Iran after 1 February 1979 did so because of the aforementioned acts and omissions of Ayatollah Khomeini, his supporters and followers. In order to leave it open to the Tribunal to find in a given case that the departure in question was due to other factors, and thus rule in favor of the Respondent, such presumption should be rebuttable.

33. I find it certainly appropriate to apply this presumption to the instant Case and, finding nothing to rebut it, would have ruled in Claimant's favor.

V.

34. It remains, for the sake of completeness, to consider the damages that, in my opinion, should have been awarded to Claimant.

35. At the time Claimant departed Iran he had been employed there by Lockheed for something under two years. His then current contract would end 11 April 1979, subject, however, to the right of Lockheed to terminate him at any time on 90 days' notice. On 20 January 1979 he had agreed to an "indefinite" extension of his contract, which Lockheed had offered to extend for a full year, likewise subject to dismissal on 90 days' notice. His expressed hope, nonetheless, was to remain in Iran a total of five years.

36. The issue is what Claimant lost by virtue of his expulsion. Lockheed's right to terminate him, as it did following his departure from Iran, is not necessarily a limiting factor. What the Tribunal must judge is how long, absent the expulsion, Claimant in fact would have worked for

Lockheed in Iran. Claimant suggests that it would have been at least for the period he required to find substitute employment, i.e., until April 1981. Having regard to all relevant circumstances, it seems to me appropriate to grant Claimant the earnings he would have realized had he embarked upon and completed the proffered one year extension, i.e., to 11 April 1980.<sup>12</sup>

Charles N. Brower  
Charles N. Brower

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<sup>12</sup>I would also compensate Claimant for the property, valued at \$855.42, he was unable to take with him when leaving Iran.