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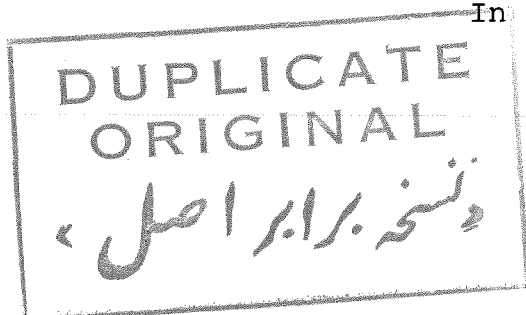
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In the Name of God



CASE NO. 12183

CHAMBER ONE

AWARD NO. 440 -12183-1

THE UNITED STATES OF AMERICA
for and on behalf of JIMMY B. LEACH,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داری دعاوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE 6 OCT '89	
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SEPARATE OPINION OF ASSADOLLAH NOORI

1. The Award in the present Case has finally fully resolved an issue passed over in silence by previous awards of this sort,¹ an issue which vexes hundreds of other cases; and it has put an end once and for all to the attempts which the United States has made in such

¹ See The United States of America for and on behalf of Jack Rankin ("Jack Rankin"), Award No. 326-10913-2, reprinted in 17 Iran-U.S. C.T.R. 135.

Cases, by portraying a scene of a particular concocted meeting between Dr. Ibrahim Yazdi and General Mackinnon, to depict the departure of the employees of Bell Helicopter International, Inc. ("BHI") as a form of expulsion by the Iranian Government and, to construe this as a "measure affecting the property rights" of those United States nationals. In this respect, the Award provides, in paragraph 20, that regardless of the nature of the alleged events on or about 12 February 1979 which may have induced BHI to reverse its decision to continue working in Iran, and caused it to evacuate its employees instead, it is clear that "once BHI had decided to withdraw from Iran, it terminated the contracts of its employees." Therefore, BHI's decision was the actual, proximate and direct cause of the termination of the contracts of its employees, and of their eventual departure.

2. In my opinion, the Tribunal should have peremptorily dismissed the claim in this Case, as well as similar claims, on the grounds that it lacked jurisdiction. Apart from the jurisdictional issue, the Tribunal could also have reached the conclusion, in view of the clear evidence available in the Case, that the evacuation of BHI's employees from Iran was a direct consequence of an order by the United States, and of that Government's decision to halt military services to Iran until the developments arising from the Islamic Revolution became clear.

3. In this Case, the majority has asserted its jurisdiction on the flimsy basis of the award by this same Chamber in The United States of America for and on behalf of Kenneth P. Yeager ("Kenneth P. Yeager").² Therefore, the instant Award has, like the award in

² Award No. 324-10199-1, reprinted in 17 Iran-U.S. C.T.R. 92.

Kenneth P. Yeager, disregarded both the legal rule of ejusdem generis, and the precedents of all three Chambers as laid down in Lillian Byrdine Grimm and The Government of the Islamic Republic of Iran ("Lillian Byrdine Grimm"),³ International Systems and Controls Corp. and Industrial Development and Renovation Organization, et al,⁴ and Manuchehr Haddadi and The United States of America;⁵ and it has also ignored

³ In that Case, Chamber One of the Tribunal, presided over by Judge Lagergren, found the claim to lie outside the Tribunal's jurisdiction, by distinguishing between measures against persons and those against property, and also by taking into account the fact that the Algiers Declarations exclude from the Tribunal's jurisdiction claims against persons, as well as all claims arising from tortious conduct, and also, finally, by taking note of the interpretive rule of ejusdem generis, which requires that the "other measures" referred to in Article II, para. 1 of the Claims Settlement Declaration be similar in both nature and kind to an act of expropriation, and that they be directed against property (Award No. 25-71-1, reprinted in 2 Iran-U.S. C.T.R. 78).

⁴ This Award (No. 256-439-2, reprinted in 12 Iran-U.S. C.T.R. 239) states, in para. 98, that:

The damage which the Claimant states it suffers approximates damages resulting from tortious conduct rather than from expropriation. Since a claim based on such conduct is not covered by Article II (1) of the Claims Settlement Declaration the Tribunal decides that it lacks jurisdiction over the direct claim brought by ISC.

⁵ In this Case, the Tribunal held that the claims for damages and costs incurred by a father and his son as a result of measures and conduct of the United States, culminating in the repatriation of the Claimant's son and the interruption of his academic program and his affliction by severe emotional disorders (measures against persons) were "not embraced by any of the cited jurisdictional rubrics [Article II, para 1 of the Claims Settlement Declaration]". (Award No. 162-763-3, reprinted in 8 Iran-U.S. C.T.R., p. 20 at 22).

the express provisions of the Algiers Declarations⁶ and the mutual understanding of the Parties thereto.⁷

⁶ See Article II, para. 1 of the Claims Settlement Declaration, which limits the Tribunal's jurisdiction to claims arising out of "debts, contracts... expropriations, or other measures affecting property rights." See also the Tribunal's interpretation of that provision, as set forth in the Awards cited in footnotes 3-5, *supra*; also see footnote 7, *infra*. In Lillian Byrdine Grimm (footnote 3, *supra*), the Tribunal concluded, in correctly distinguishing between claims against property and those against persons, that Article II, para. 1 covered only measures resulting in injury to property, because otherwise, the Tribunal would have been expressly granted jurisdiction over injuries arising from measures directed against persons as well, just as in similar treaties, *inter alia* the 1933 treaty which established the United States-Mexican General Claims Commission, and the Berlin Peace Treaty of 25 August 1921.

It is regrettable that the majority in Kenneth P. Yeager disregarded previous practice and well-established rules of law, and by a broad interpretation of its jurisdiction, extended the Tribunal's jurisdiction to include claims arising from tortious conduct as well, despite recognizing the fact that "expulsion is a measure by nature directed against the Claimant himself" (para. 30 of the Award), and that the other measures mentioned in "Article II, paragraph 1 of the Claims Settlement Declaration ...[give rise to the Tribunal's jurisdiction only where they affect] property rights in a similar way as an expropriation [*ejusdem generis*]" (para. 29 of the Award, footnote omitted).

⁷ The United States' understanding and its interpretation of Article II, para. 1 coincide with Iran's understanding and with the position that Iran has steadfastly and consistently maintained before this Tribunal from the very beginning. Therefore, the majority in Kenneth P. Yeager has not only improperly rendered an interpretation in the face of an explicit text, but also acted contrary to the express and declared intention of both Governments as stated before this Tribunal. In Haji-Bagherpour (Award No. 23-428-2, reprinted in 2 Iran-U.S. C.T.R. 38), the United States took the position, in page 5 of its Statement of Defence filed on 7 July 1982, that:
(footnote continues)

At any event, because the claim has been dismissed, I shall not elaborate on the jurisdictional issue in the present Opinion, but will defer it to another occasion, should the need arise.

4. As the numerous memorials and the evidence before the Tribunal make abundantly clear, BHI began to evacuate its employees from Iran in late 1978, especially as from December of that year, and:

BHI did terminate employment for large numbers of its employees during January 1979, and those employees and their dependents left Iran. This reduction in the workforce was apparently scheduled in groups of about 300, the third group of which was in the process⁸ of repatriation [on or about 12 February 1979...]

(footnote continued)

By the universally accepted interpretive principle of ejusdem generis... the measures here must be construed as generically similar to the antecedent measures listed: ... expropriations. Destruction of property of a tortious character does not come within this generic listing and was not intended by the parties to the Claims Settlement Declaration to come within the Tribunal's jurisdiction.

(See also the Award in Lillian Byrdine Grimm, cited in footnote 3 above).

⁸ See the Award in Jack Rankin, para. 5, cited in footnote 1 above. In para. 47 of its Award in Kenneth P. Yeager, this same majority conceded that:

Indisputably, BHI (in Iran) was in a certain state of dissolution at the time and many employees had left the country by the end of January 1979, or were about to leave....

(op cit, p. 106, cited in footnote 2 above).

5. General Mackinnon,⁹ who has asserted that "as a career Military Officer, I can recognize an order when I hear one,"¹⁰ informed Mr. Mehdi Bazargan, the then Prime Minister of Iran, in his letter dated 20 February 1979 -- i.e., a date very near that of the alleged events of 12 February 1979 -- that:

... the United States Government ordered the evacuation of American citizens in Iran, which order included employees and dependents sponsored by Bell Helicopter International, Inc...(emphasis added)¹¹

In paragraph 2 of his Affidavit dated 9 August 1984, General Mackinnon also stated that "On February 12, 1979, approximately six hundred Americans, consisting of BHI employees and their dependents, were staying at the Hilton Hotel in Tehran for purposes of staging so that they could be evacuated from Iran."¹²

⁹ The omission of the title of "General" before General Mackinnon's name in the final draft of the Award fails to detract in any way from the significance of the United States' role whereby it exercised complete control over BHI's operations in Iran through its generals. The United States has referred to General Mackinnon by that title, without any exception whatsoever, in all its memorials and also in all its affidavits prepared under his signature.

¹⁰ Annex 4 to the United States' Memorial filed on 1 July 1988 (emphasis added).

¹¹ On one other occasion, prior to this date, General Mackinnon informed the then Prime Minister of Iran about the program for evacuating American nationals, stating in his letter of 16 February 1979 that BHI had selected the Hilton Hotel as its base of operations for evacuating its employees.

¹² In the numerous memorials and affidavits filed by it in other cases, and also in its general memorials on the issue of expulsion, the United States has repeatedly admitted that because the highway leading to the airport passed directly by the Hilton Hotel in Tehran, BHI made that hotel its base for evacuating its (footnote continues)

6. The contemporaneous circumstances, the other copious, varied and independent evidence, and the policy pursued by the United States towards the Islamic Revolution in Iran in 1979 and thereafter, all confirm the authenticity of the contents of General Mackinnon's letter of 20 February 1979. Given that approximately eight years have passed since the Tribunal was established, it will by now have become clear to all its Members that after the revolutionary movement by the Muslim people of Iran reached its climax, the United States adopted a policy of preventing the sale and provision of military equipment and services to Iran, whether under direct contracts for the sale of foreign military services (F.M.S.), or under contracts with United States corporations; and in adhering to this policy up to the present time (even in violation of the obligations it undertook in the Algiers Declarations), it has barred and refused to permit the transfer and return to Iran of equipment which had already been paid for or, in certain cases, which had merely been sent to the United States for repair.¹³

(footnote continued)

employees and their dependents well before 12 February 1979. General Mackinnon and BHI's other officers also transferred their offices to this hotel, and stayed in the hotel day and night. All of the witnesses, including General Mackinnon himself, testified that besides the 600 people who had already left Iran in several groups (paragraph 4 of the present Separate Opinion), BHI had assembled approximately 600 more people in the Hilton Hotel at a time near the victorious culmination of the Revolution, so that they could be evacuated.

¹³ For further information in this connection, cf. the memorials exchanged between Iran and the United States in Case No. B/1, especially Claims 2 and 3 (The Islamic Republic of Iran and The United States of America), in which no award has yet been issued, despite the passage of all these years. See also Award No. 382-B1-FT, issued in connection with Claim 4 in Case No. B/1 (relating to the repair/return of a large quantity of military items and a number of other items of military equipment belonging to Iran, including a submarine, an F-14 fighter plane, two helicopters and a Hawk rocket defense system).

The Members of this Tribunal also know very well that the United States prevented the sale and transfer of both sensitive and nonsensitive military goods and services as from the beginning of 1979,¹⁴ and that on 3 February 1979, at the most critical phase of the Revolution and only a few days prior to the fall of the Shah's regime, it imposed on the puppet regime of the time a letter of understanding whereby it cancelled a number of purchase orders for goods worth a total of several billion dollars, some of which were already being manufactured and had already been paid for in full or in part.¹⁵ The Members of this Tribunal-- particularly my colleagues in the instant Case -- are also well aware that in 1979 and thereafter, the United States cancelled the licenses for the sale and export of services and goods of many companies engaged in work with Iran, and that it refused to extend those licenses or to issue new ones.¹⁶

7. Under such circumstances, even though Mr. Leach's claim against the Government of the Islamic Republic of Iran has been dismissed owing to the absence of any act entailing responsibility on the part of the Iranian

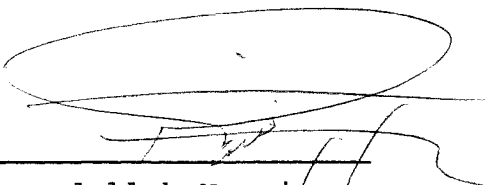
¹⁴ The Islamic Republic of Iran and The United States of America, Award No. 382-B1-FT (Claim 4), para. 13.

¹⁵ See the Memorials of Iran and the United States in Case No. B/1 (Claims 2 & 3). For an understanding of the importance of this letter of understanding to the United States, see, e.g., Gary Sick, All Fall Down, America's Fateful Encounter with Iran (1985), pp. 148-149.

¹⁶ See, e.g. Ford Aerospace & Communications Corp. and The Islamic Republic of Iran and Bank Markazi Iran, Award No. 289-93-1 (1987), para. 52, reprinted in 14 Iran-U.S. C.T.R. 23, 37; Dissenting Opinion of Judge Mostafavi in that same Case, p.5, reprinted in 14 Iran-U.S. C.T.R. 57-58; Dissenting Opinion of Judge Mostafavi in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1 (1985), reprinted in 8 Iran-U.S. C.T.R. 298, 338.

Government, and also in view of BHI's conscious decision to evacuate and withdraw its employees from Iran -- so that there might appear to be no need to examine the other evidence leading to the same conclusion -- nonetheless, in my opinion, the Tribunal should not have satisfied itself with merely finding that there was a causal link between BHI's act of repatriating its American employees and terminating their employment contracts, and their alleged injuries. Rather, before arriving at this stage, and in light of the unrebutted evidence in the Case, it could have concluded that BHI's actions in evacuating and withdrawing its personnel prior to any such decision by that company came as a result and consequence of direct orders by the United States.

Dated The Hague
6 October 1989


Assadollah Noori