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Disguised Expulsion from Iran-United States Tribunal to the International Law Commission's Draft on the Expulsion of Aliens

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Abstract

Treatment of aliens has a long history under international law. In this context, the main issue is the need for compromise between the competence of sovereign states and the protection of human rights. The expulsion of aliens is one of the most important subdivisions of international laws on treatment of aliens. Since the nineteenth century, affected by humanization of international law, the laws regulating this domain have been impressively evolved. Recently International law commission has drafted a treaty text concerning the expulsion of alien which in tenth article provides for the delicate problem of disguised expulsion. In this regard, the Commission has been influenced by Iran-United States Claims Tribunal judgments. This paper is intended to analyze the judgments rendered by the tribunal on disguised expulsion in order to show how its legacy has played a role in the development of international law.

Keywords: Expulsion, Disguised Expulsion, Iran-United States Claims Tribunal, International Law Commission

Introduction

Iran-United States Claims Tribunal is among the most important international arbitration institutions in terms of the number of cases referred to it as well as procedures that are put in place. As soon as the tribunal was established hundreds of legal cases were opened by American citizens, who were forced to leave the country at the time or after the Islamic Revolution of Iran, on the expulsion. The claimants all claimed they were illegally expelled from their home and work against their will. They were contractors, employees and workers who were employed in the

country with the permission of the government. The number of expulsion lawsuits registered by American citizens amounted to 1500 which constituted 40% of all the claims referred to this tribunal. The tribunal only had the chance to adjudicate seven of these lawsuits. The remaining cases were among minor cases and in a compromise with the Iranian government in 1990 were settled by paying a lump sum (Khalilian, 2003). However, the tribunal could enrich international jurisprudence regarding the expulsion of foreigners by issuing awards on these cases and showed innovations.

United Nations International Law Commission in the draft articles on the expulsion of aliens 2014 considered the decisions made by the tribunal and referred to their content in the interpretation of some provisions.

In this article we attempt to examine disguised expulsion in the tribunal judgments and the mentioned draft. The question is whether or not disguised expulsion is considered among cases of expulsion according to international law?

Iran-United States Claims Tribunal's Approach to Categorization of the Methods Used for Expelling Aliens

In ALFRED L.W. SHORT V. I.R.I (MacGlashan, 1987) the tribunal stated that the expulsion of aliens can be affected by one of the three following forms:

- 1-A legal order issued by the state authorities obligating the alien to leave the host country or otherwise be forcibly removed;
- 2-A forcible action of the police or other state organ not authorized by a legal order issued by the competent authorities; and
- 3-In the circumstances of the case, the alien could reasonably be regarded as having no other choice than to leave and when the acts leading to his departure were attributable to the state.

Articles I and II are deemed to be official expulsion of an alien. But, the third that lacks the official order of deportation or expulsion by the government is disguised expulsion.

Official Expulsion of Aliens

Among the seven cases, only the claimant of the case of Katherine Hilt v. I.R.I (MacGlashan, 1988) alleged that she was officially expelled from Iran. She claimed as the internal unrest in Iran intensified head of the Faculty of Languages of the University of Ahvaz -where she worked as a professor- contacted her and advised her to leave the country as soon as possible.

Mrs. Hilt believed that the nature of head of the faculty's advice was an expulsion order and she had followed this order. Therefore she was formally and illegally dismissed. The tribunal did not find the claimant's argument acceptable. The tribunal believed regardless of whether or not the head of the faculty's action can be attributed to the government, his recommendation cannot be considered as a command.

Practical Expulsions of Aliens

Yeager case claimant (MacGlashan, 1987) alleged his expulsion was taken by the people whose actions could be attributed to the Revolutionary government. He believed that people who entered his home on February 13, and forced him and his wife to go to Hilton Hotel, were members of the Iranian Revolutionary Guards and as these people have served the Iranian government and their actions were attributable to the Iranian state.

In order to make a decision on the claim the tribunal first investigated the evidence brought before it in terms of their membership in the Revolutionary Guards and concluded that these people in fact had been members of this group. But it could not hold the Revolutionary government responsible for the transfer of Mr. Yeager from his house and his subsequent expulsion, unless it evident that the Revolutionary Guards action were attributable to the new government. Defendant in its defense claimed that it had no control over their actions so their actions were not attributable to the government.

The tribunal by referring to article 8(b) of the 1975 ILC draft on the international responsibility of the state, declared than an act is attributable even if a person or group of persons was in fact merely exercising elements of governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority. Then it found that the revolutionary "komitehs" or "Guards" after 11 February 11 1979 were acting in fact on behalf of the new government, or at least exercised elements of governmental authority in the absence of official authorities, In operations of which the new government must have had knowledge and to which it did not specifically object. Furthermore it stated that the evidence suggests that the new government, despite occasional complaints about the lack of discipline, stood behind them. The tribunal is persuaded, therefore, that the acts of the aforementioned persons including those who took Mr. Yeager to the Hotel Hilton and then to the airport, are attributable to Iran.

Disguised Expulsion

International Products Corporation Case: A Jump toward Development of New Rules

None of the awards given by Iran-United States Claims Tribunal had addressed the issue of disguised expulsion without formal ordering or formal action as that rendered on the International Products Corporation case (Adlam, 1985).

The claimant of the case, despite the fact that there was no official order issued by the Iranian authorities regarding the expulsion of Americans, claimed that it was the intention of the authorities to oppress the Americans in a way which them no choice but to abandon the country. In order to prove this contention the claimant referred to some historical events, including the following:

- 1- That 40000 Americans left Iran in the closing weeks of November and early December 1978;
- 2- That various U.S. companies had by that time ordered their employees out of Iran;
- 3- That violence was occurring in various Iranian cities, and;
- 4- That the U.S. government announced it would pay the travel expenses out of Iran of its employees.

It seems that the tribunal believed it could not render any judgment on the case before considering these two questions:

- 1- Whether the alleged acts amounted to expulsion, and, if so
- 2- Whether the expulsion was wrongful under international law.

In order to answer the first question, the tribunal deemed it necessary to define the concept of "expulsion" as it is understood in international law. So it stated: " According to one typical definition, [t]he word "expulsion" is commonly used to describe that exercise of state power which secures the removal, either "voluntarily" under threat of forcible removal or forcibly, of an

alien from the territory of a State". Then the tribunal explained there is no doubt that the concept of expulsion is met according to international law if based on the municipal immigration or alien laws a foreigner is expelled physically or ordered to leave the territory on a given deadline. The tribunal also contended it is immaterial whether the action is termed expulsion or deportation in domestic law and it does not matter through which modality the expulsion is exercised. For example, cancelation of residence permit of an alien or escorting an alien to a country border can constitute expulsion in international law, even when it occurs outside the framework of national laws governing the treatment of aliens.

Obviously the claimant did not claim the occurrence of official expulsion as defined above. Thus the issue the tribunal had to decide about was whether it was possible to consider an apparently voluntary departure of a foreigner as an expulsion without an expulsion order being issued or a physical action taken place?

The third chamber of the tribunal acknowledged that possibility provided three conditions are met:

- 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 principles of state responsibility.

The claimant of this case had based its claims for compensation on 8 different disputes¹. The chamber had announced in the beginning of the judgment that the expulsion claim must be addressed before other claims because in addition to its importance, the results could be used in the examination of other contractual claims and counter-claims. Given this background it was expected that the tribunal upon determining the applicable law -as it did -would immediately decide whether taking into account all the arguments and evidences represented the expulsion had taken place according to international law and if so, whether or not the expulsion was illegal? Contrary to this expectation, relying on this argument that it can deliver its award on other grounds, the tribunal evaded further proceedings and stated that it defers determination of the issue until another case or cases when the tribunal can discuss the matter more extensively.

It seems that the tribunal's approach to this case can be criticized on two grounds. First, is the possibility of dealing with the matter on the basis of other claims can be considered as a reasonable justification for not addressing the issue of expulsion? What initially comes to mind is that a tribunal normally is expected to rule on every single dispute brought before it unless it does not have jurisdiction to do so and it is clear-cut that the third chamber believed it had jurisdiction, otherwise it would had not considered the expulsion claim at all. The second criticism -which is derived exactly from the first one- is if the tribunal intended to rule on the case on other grounds than the alleged expulsion and its illegality why did it dedicated such portion of its award clarifying the law applicable to expulsion? Perhaps the tribunal thought it would be better not to avoid implementation of the applicable rules it a fore-established on the case in order to avoid the complexities that might arise in connection with considering and evaluating the delicate matter of expulsion, the complexities which when especially coupled with the novelty of the issue

¹. Including claims for breach of contract, expropriation of real property, cancellation of letters of credit and bank guarantees, expulsion, and costs.

and absence of established international jurisprudence could somehow be an obstacle to rendering an impeccable judgment.

The Approach of the Tribunal to Disguised Expulsion in Other Cases

The tribunal's award on the international products corporation case was the first of its kind issued by this arbitration authority in relation to alleged expulsion of Americans from Iran. As observed above, the third chamber in the process of determining the applicable law, came up with an innovatory idea according to which in some particular circumstances it can be held that expulsion of aliens had taken place while neither an official order had been issued nor as a result of the acts done by a government body, a foreigner had been actually thrown out of the country in which he used to reside. After the discussed award was delivered, many deemed it fairly foreseeable that tribunal would further develop and complete the task which it had already began in other subsequent cases whose subject matter wholly or partially was identical to that of international corporation case. Contrary to this expectation, none of the three chambers of the tribunal stepped in the footsteps of the third chamber and not only they did not use the aforementioned award as a guiding directive, they also ignored its findings and referred to traditional rules of expulsion according to which the responsibility of the respondent state was not engaged until it is proven that the acts done are attributable to Iran in the first stage and illegal according to international law in the second stage.

However, in *Alfred L.W. Short v. I.R.I* case, the third chamber confirmed that when the circumstances of the case suggests that aliens had no option but to leave and the actions which led to their departure are attributable to the State, it can be said that the expulsion occurred. In other words although it- as the tribunal did in international products case- points out the situations in which a foreigner feels obliged to leave the country in which they had chosen to reside, by emphasizing on the element of attribution of the acts to the government, it went back immediately to the traditional rules of responsibility. Then, given the fact that Mr. Short had left the country a few days before the revolutionary government was declared, it cited Article 15 of the 1975 draft articles of the international law commission on the responsibility of state according to which: "The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law". But the chamber stated that the actions of the supporters of revolution are not per se attributable to revolutionary government because the claimant could not identify any of the revolutionary movement members who had forced him to leave the country. As a result the government was not held to be responsible.

Circumstances were the same in other expulsion cases as *Arthur Young v. I.R.I* (MacGlashan, 1987) and *Jack Rankin v. I.R.I* (MacGlashan, 1987) because the claimants failed to win the cases due to lack of clear identifications of the perpetrators of alleged illegal acts.

Reference to Revolutionary Leaders' Speeches as a Proof of Attribution

In Short case (MacGlashan,1987) American citizens in their claims alleged that the followers of Imam Khomeini had threatened, harassed, beaten, and sometimes killed America's citizens in response to his sermons and other Islamic Revolution religious leaders. Revolutionaries attacked their homes and their belongings were stolen. Affidavit of American workers and the material published in the media and in the bulletins published by American companies were relied upon

as evidence to support these allegations. Also, the claimants used multiple quotes from Imam Khomeini and considered them as clear evidence of their intention to expel the Americans and revolutionary acts were attributable to the government. Some of these quotes are:

“Final victory will come when all foreigners are out of the country.” and “Our triumph will come when all forms of foreign control have been brought to an end and all roots of the monarchy have been plucked out of the soil of our land ...I offer again my thanks to all of you, and beseech God Almighty to foreshorten the arms of the foreigners and their agents.”

Tribunal in the case of Short stated that this type of quotes whatever anti-American and anti-alien in nature are general speeches with no indication that the Americans should leave Iran. Tribunal held that these words can be considered as permission neither for Iranian government to attack Americans nor for revolutionaries to expel aliens. The Tribunal referred to the decision of International Court of Justice in the matter of the United States Diplomatic and Consular Staff in Tehran (United States v. Iran), to justify its opinion. In that case ICJ did not find the speeches of revolutionary leaders enough to prove the attributability of the acts of the militants who attacked US embassy to the new Iranian government.

However, the second chamber of the tribunal in the case of Jack Rankin v. I.R.I (MacGlashan,1987) adopted different positions in relation to Imam Khomeini declarations and stated: “Passages quoted above from the leaders of the revolution however, could normally trigger or stimulus types of abuse and violence against American citizens in the period from September 1978 to January 1979. These statements which are clearly attributable to the revolutionary movement and in accordance with Article 15 of draft of state responsibility (Article 10 of the present draft articles) are attributable to Iran government are inconsistent with the requirements of the Treaty of Amity and customary international law regarding the protection and security of foreigners and their property.

However, the chamber, despite this finding, announced that defendant’s liability is established only if the claimant proves that the losses inflicted on him are caused by these statements and not as result of public unrest. Then by examining the facts of the case concluded that Mr. Rankin made his decision to leave Iran due to the unrest and thus his departure is not attributable to the state.

A Review on the Tribunal’s Approach

Mr. Brower, the American judge, strongly opposed the tribunal decision in his dissenting opinion which is annexed to the award in Short case (MacGlashan, 1987). In order to rationalize his position, he refers to numerous quotes from Imam Khomeini that demonstrates how he strongly protested the presence and influence of American citizens in Iran. He further contends that Imam Khomeini and other revolutionary leaders’ hatred for Americans was much more intense than their hatred for Shah (king of Iran before resolution) himself in a way that their main purpose was having Americans expelled as soon as possible. Brower asks why 45000 Americans should leave Iran at once while they had chosen this country as their residence. Although He does not deny that some Americans may have left because of the revolutionary unrest and the turmoil, he argues that many of these people were planning to stay in the country and continue their work, despite what was going on at that time. However, they were forced to abandon everything and go back to their own country. So he concludes that the reason behind their exodus must have

been something more than mere revolutionary feelings. The judge Brower, regarding the above says:

“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”.

In addition, he stated although the International Court of Justice in the United States Diplomatic and Consular Staff correctly adjudicated about the attribution of the actions of the militias to the Iranian government, one should distinguish between that case and claims for disguised expulsion. In other words, he was of the opinion that when it comes to decide about whether or not disguised expulsion had taken place, less strict criteria should be applied in terms of attribution of acts to governments. He also referred to International Production case and used the responsibility criteria set forth by tribunal in that case. From his opinion the tribunal should not have considered involvement of a particular revolutionary group a precondition for attributing the expulsion to the government. To clarify his opinion, Judge Brower added that Iranian revolution was a special one which- contrary to some other revolutions- was taken place without existence of any armed struggle fought by a specific armed group. Thus the traditional rules of responsibility were not applicable to it. Then he cited a quote from the Bolivar Railway company (Britain-Venezuela) arbitration tribunal which said: “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”.

In general, Mr. Brower’s opinion may be summarized as in this way: the tribunal must, by showing some innovation and following the findings of the third chamber of the tribunal had set aside the traditional strict liability criteria and applied a less strict one while considering the responsibility of the Iranian government.

In response to Judge Brower’s contentions we can say that the tribunal’s responsibility was applying governing international law when dealing with claims and naturally it could not diminish the threshold of responsibility of state for illegally expelling aliens from its territory by making rules.

Perhaps the tribunal having in mind a similar reasoning avoided in other cases making a judgment based on third chamber’s findings in International Corporation Case. But even if we consider those findings as pronouncement of the international customary laws of expulsion of those days, again it was unlikely that the tribunal would infer Iran’s responsibility because according to those findings a seemingly voluntary departure of an alien without an expulsion order being issued could only constitute an expulsion if on one hand it could be proven that behind all the events which led to this departure there existed a state’s intention to expel that alien and on the other hand those events were attributable to that state. In other words, the claimant of expulsion cases (except for Mr. Yeager) brought before the tribunal could not convince the tribunal that they were illegally expelled until they could identify the perpetrators of the acts which finally forced them leave Iran in the first step and prove that those acts could be attributed to the new government in the second step; something none of them except for Mr. Yeager was able to do. So it can be asserted firmly that the nature of Mr. Brower dissenting opinion was more idealistic than realistic and his arguments were based more on *lex ferenda* rather than *lex lata*. However, as will be discussed in the following section, the International law Commission may by

considering the concerns similar to those expressed by Mr. Brower in its draft articles on expulsion of aliens had provided new regulations for begin the development of international rules on expulsion.

The Effect of the Tribunal Judgments on the International Law Commission on the Expulsion of Aliens

In 2014, the UN International Law Commission adopted draft articles on the expulsion of aliens. Article 10 of the draft addresses the prohibition of disguised expulsion of aliens and regulates it in the following way:

- 1- Any form of disguised expulsion of an alien is prohibited;
- 2- For the purposes of these draft articles, disguised expulsion means the forcible departure of an alien from a state resulting indirectly from action or omissions of the state, including situations where the state supports or tolerates acts committed by its nationals or other persons with the intention of provoking the departure of aliens from its territory.

There are some eye-catching points in the commentary of commission on this article which are worth briefly mentioned. First of all, the commission asserts that this draft article is intended to indicate that a state does not have a right to utilize disguised or indirect means or techniques in order to bring about the same result that it could obtain through the adoption of a formal expulsion decision namely to compel an alien to depart from its territory (ILC, 2014). But why a government is not allowed to act in this way? the commission replies: "This is because, in essence, disguised infringes the human rights of the alien in question, including the procedural rights referred to in part four of the draft articles." According to what has been provided in this part(article 26), these rights include: the right to receive notice of the expulsion decision; the right to challenge the expulsion decision except where compelling reasons of national security otherwise require; the right to be heard by a competent authority; the right of access to effective remedies to challenge the expulsion decision; the right to be represented before the competent authority; the right to have the free assistance of an interpreter if he or she cannot understand or speak the language used by the competent authority; and the right to seek consular assistance.

Secondly, the Commission (ILC, 2014) actually confirms that the concept of disguise expulsion it presented in this article is in coherence with the award rendered by the Iran-United States Claims in the case of International Corporation case. It is self-evident that the commission has almost exactly used the same two-limb responsibility criteria declared by the tribunal in the mentioned award. Nevertheless by comparing what is required by this article with what the tribunal said in that case rich this conclusion that there is an essential tangible difference between these two definitions of disguised expulsion.

According to the award as a requirement, acts that led to the departure of foreigners should be attributable to the government. As indicated in the previous discussions, this strict requirement makes the proof of states' responsibility definitely difficult if not impossible. It appears that Article 10 by using the phrase "...departure of an alien from a state resulting indirectly from action or omissions of the state..." has presumed a less strict criteria, according to which the government's support or tolerance of acts which led to a voluntary but forced departure of an alien may engage it's international responsibility. Perhaps, if such a definition was accepted in international law at the time the Iran-United States tribunal's proceedings, the tribunal would be

able to hold the Iranian revolutionary government responsible in a number of expulsion cases brought before it, because firstly as a matter of fact, some of the American citizens had abandoned the country as a result of the violent situation existed; and secondly, the intention of the Iranian authorities to expel the Americans was inferable considering the aforementioned abundant quotations of the revolutionary leaders; and thirdly the revolutionary government supported or tolerated actions that led to the departure of American citizens.

Regardless of what we have discussed in the above paragraphs, the very fact that should never be underestimated here is that the third chamber of the tribunal² by introducing the concept of disguised expulsion into the international jurisprudence has left an admirable practice which paved the way for further development of international law toward humanization. Although it is regrettable that the tribunal did not follow the third chamber findings in subsequent proceeding.

Concluding Remarks

The Westphalian sovereign-centric international law allowed states to exercise full authority on its territory and has absolute discretion in dealing with its internal affairs. This led to the human rights of citizens as well as citizens of other countries be violated in the large dimensions. The evolving development of international human rights instruments ratified since the twentieth century, has strengthened the protection of individual rights in the international arena in a way that today international law considerably protects the rights of aliens in the territories of states. What is worth mentioning here is that without any doubt International jurisprudence is the best and most efficient mechanism for the development and recognition of customary rules of international law. International jurisprudence helps ILC to include some innovative rules in the drafts which it prepares. Exercising this function the ILC sets up the groundwork for the final formal acceptations of those rules by states.

The Iran-United States Claims Tribunal as a result rendering hundreds of remarkable judgments is considered among the most important International Arbitration Tribunals in terms of expanding international laws governing the treatment of aliens. Nothing may validate this assertion as much as the many references the ILC has made to the work of the tribunal in its commentary on article 10 of present draft articles.

This article was intended to clarify the distinct role of the Iran-United States Claims Tribunal in determining and applying the applicable law on the expulsion of aliens and showed how the legacy left by this tribunal has paved the way for the development of international law.

Reference

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². The third chamber at the time of issuing the award on International corporation case, consisted of Judges Nils Mangard from Sweden (president of the chamber), Parviz Ansari Moin from Islamic Republic of Iran and Charles N. Brower from the United States of America.

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