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Words Not War: A Letter from the Netherlands

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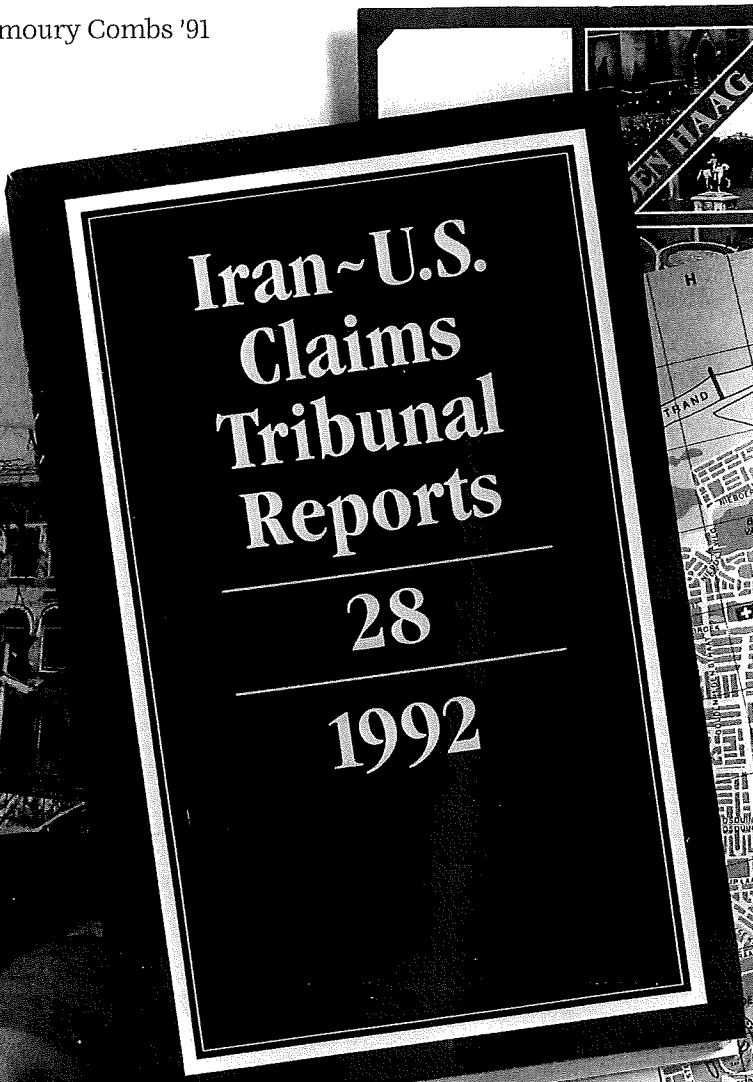
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WORDS NOT WAR: A LETTER

by Nancy Amoury Combs '91



THE IRANIAN RESCUE MISSION Why It Failed



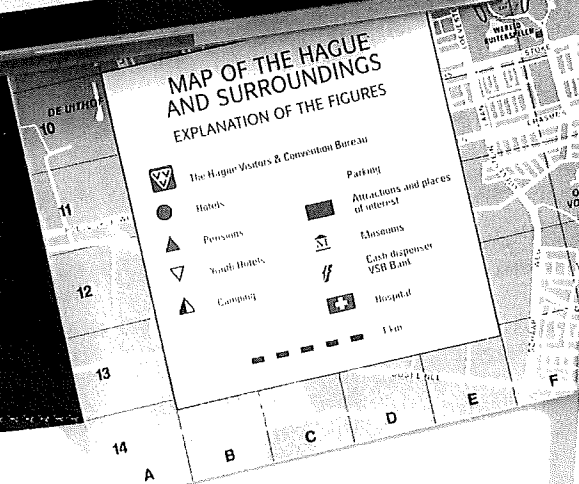
"ONE OF THE BEST BOOKS ABOUT GOVERNMENT DECISION-MAKING I'VE EVER READ"
—BOB WOODWARD

By Paul

ALLEY DOW AMERICA'S TRAGEDY ENCOUNTER WITH WITH A NEW INTRODUCTION



GAR



Green House mit Den Haag



TER FROM THE NETHERLANDS

A report from Holland, where “the most significant arbitration body in history” has devoted 16 years to mediating legal matters between two hostile nations: the United States and the Republic of Iran.

Recent diplomatic overtures made to the United States by Iran’s president Mohammed Khatami were front-page news, but when I tell people, even right here in The Hague, that I’m a legal advisor at the Iran-United States Claims Tribunal, most of them reply that they’ve heard about “the war crimes courts or the court at the Peace Palace.” I explain that, no, the Claims Tribunal isn’t the International Court of Justice, or the International Criminal Tribunal for the Former Yugoslavia. Rather, it’s an international arbitral tribunal established in 1981 as part of the settlement to free the 52 Americans taken hostage in Iran in 1979.

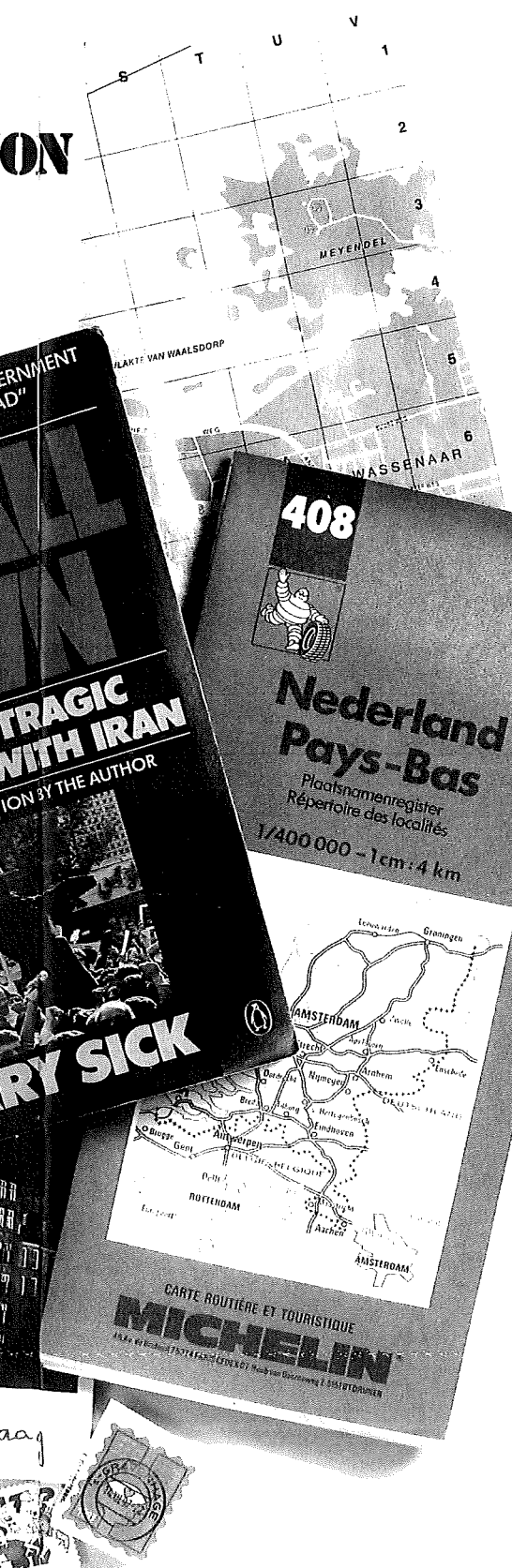
It’s not surprising that many people have never heard of the Claims Tribunal. It carries on its proceedings in relative obscurity, in an inconspicuous former hotel in this sleepy, diplomat-heavy Dutch city. But though its physical surroundings are modest, its success isn’t: the Tribunal has been described as “the most significant arbitral body in history,” and for 16 years it has brought together lawyers and judges from two decidedly hostile nations to discuss complex legal questions in an exceptionally delicate political context. The Tribunal has managed to sidestep hundreds of legal and political problems to stay on course, resolve claim after claim, and have, I believe, a significant effect on the development of public international law.

Nearly two decades after the hostage crisis, it may be hard to remember that for 30 years before the

1979 incident, Iran and America were the closest of allies. During those years, Iran experienced enormous economic and military growth, spurred by increased oil revenues, and the Shah, wishing to industrialize Iran’s growing economy, turned to Western — especially American — technology, equipment, advisors, and investment. American companies and the American military were more than happy to provide such help, and by the late 1970s, Iran was home to many American business interests, ranging from construction projects to off-shore oil drilling to product lines like Pepsi-Cola and Revlon. The American government, seeking to obtain a secure foothold in the Persian Gulf, also supplied Iran with vast quantities of military hardware. By the late 1970s, hundreds of American corporations were involved in lucrative Iranian projects, and tens of thousands of American citizens were living in Iran.

But during that same period, anti-Western sentiment began to gain force in Iran. Although the Shah had promised for many years to lift his people from poverty, his promises were largely unfulfilled, and substantial segments of the population had difficulty meeting basic needs. While poor Iranian families, three generations strong, crowded into miserable, dilapidated apartments in South Tehran, Americans and wealthy Iranians lived luxuriously in the tree-shaded foothills of North Tehran. Many Iranians not only believed the Westerners to be exploiting their country’s economic resources, but they also thought the Americans and their colleagues were, without much thought or sensitivity, imposing Western values and culture on Iran.

These were the seeds of a revolution, and it began in 1978, with violent strikes and demonstrations against the government. By late December 1978, most American businesses in Iran were so disrupted that they felt compelled to suspend activities and to bring expatriates home. The Shah fled the country in January 1979, the Ayatollah Khomeini took power in February, and soon after the new Islamic Republic of Iran began instituting its reforms. The new government wasted no time in breaching contracts with American companies and in expropriating com-



PHOTOGRAPH BY WAYNE ALDRIDGE

panies, especially those owned by American investors or Westernized Iranians perceived to be allies of the Shah. The government also formally nationalized certain industries, including banking and insurance, and *de facto* nationalized the petroleum industry.

On November 4, 1979, the United States Embassy was seized and 52 Americans held hostage. Readers old enough to remember the hostage crisis will remember the seeming hopelessness of resolution, as Iran seized its chance to defy "the Great Satan," the United States, on a world stage. Frustrated, President Jimmy Carter ordered an ill-fated military rescue attempt. On the night of April 24, 1980, eight Sea Stallion RH-53D helicopters lifted off from the aircraft carrier Nimitz. They were supposed to fly to a remote landing strip 275 miles from Tehran; rendezvous with six C-130 Hercules transport planes carrying commandos, vans, and trucks; and then storm the American Embassy and rescue the hostages. But the helicopters met with a sandstorm that disabled two of them. One then crashed into one of the C-130s. Both aircraft burst into flames, eight servicemen died, the hostages remained hostage, and American hopes plummeted.

Yet Carter had, all this time, a quieter weapon, one that would eventually prove to be the key to resolving the crisis. When the American Embassy was seized in 1979, Carter immediately froze Iranian assets in the United States and in American financial institutions abroad — assets totalling \$12 billion. That money was of great interest, of course, to the American companies that had lost property or had contracts breached by the new Iranian government, and the American companies filed suit in American courts, seeking recompense for their losses. Many of the claims proceeded to judgment, and Iranian assets to pay these judgments were judicially attached.

So, by the autumn of 1980, when Iran and the United States began to negotiate in earnest to resolve the hostage crisis, it was clear that each side had something the other wanted. The United States wanted its hostages released, and wanted them freed without having to pay ransom for them. Iran wanted its money back, and wanted to get out from under what it viewed as burdensome litigation before American judges. The United States, however, could not simply return Iran's money upon the

release of the hostages; much of the money had been judicially attached, and simply returning the money would have been perceived in America as selling out American litigants.

The solution: the establishment of the Iran-United States Claims Tribunal. Representatives of Iran and the United States never met face-to-face, but they conducted intense negotiations through Algerian intermediaries during the last months of 1980. On January 19, 1981, the countries agreed to the "Algiers Declarations," which stated that the hostages would be released, most of Iran's assets would be returned to Iran, and an international arbitral tribunal would be established in The Hague to adjudicate, among other things, the claims of American litigants against Iran. It should be noted that not all of Iran's assets were returned; the Declarations required that \$1 billion be transferred to a security account that would be used to pay the awards

Not surprisingly, some American litigants sued the United States government, alleging, among other things, that by requiring them to cease litigation in American courts and to bring their claims before the Tribunal, the government had effected an unconstitutional taking of their property. This bid was rejected by the U.S. Supreme Court, which recognized precedents upholding the President's authority to settle claims of United States nationals, and which was no doubt aware of the difficult position in which the President had been placed.

So the Tribunal began. Litigants had a year to file their claims, and 3,816 claims were filed before the deadline. However, this rush of activity from the claimants went unmatched by the Tribunal itself.

The American litigants and arbitrators early and often charged Iran with egregious stalling. Iran routinely



that the Tribunal issued against Iran. The declarations also required Iran to replenish the account when it dipped below \$500,000. The Declarations provided that the Tribunal would be composed of nine arbitrators: three appointed by the United States, three appointed by Iran, and three appointed by both countries together, or by an appointing authority if the countries could not agree. Litigation in the United States was suspended, and American litigants were told to bring their claims before the Tribunal.

The return of the American hostages led to great euphoria in the United States, but the American litigants who had brought suit against Iran in American courts were not as delighted; they would have to travel to The Hague to adjudicate their claims before an untested arbitral body applying who-knew-what law.

requested extensions of time for filing its briefs, extensions that were routinely granted. One American arbitrator, Judge Brower, acidly complained that the Tribunal had "been moving at a speed calculated to inspire professional envy in sloth and snail alike." Further, the Americans suspected from the outset that the Iranian arbitrators were appointed simply to rule for Iran, and it was commonly thought that Iranian arbitrators deliberately delayed proceedings by making themselves unavailable for deliberations (one Iranian arbitrator, for example, vanished on a sudden five-week vacation at a key moment), and refusing to sign certain awards made by the Tribunal.

The Iranians, on the other hand, were convinced that the Tribunal was too "Western" to be fair, and they suspected that the six non-Iranian arbi-

trators were biased against Iran. They were already opposed to a Swedish arbitrator, Judge Mangård, who had allegedly condemned executions (thereby "prejudging Iran's political system," according to the Iranians), and their overall frustration turned to fury in 1984 when the Tribunal ruled that Iranians who had left the country and obtained American citizenship could apply to the Tribunal for redress. In the wake of that ruling, Iran's Prime Minister at the time, Mr. Musavi, accused the Tribunal of succumbing to pressure from "the Great Satan, America," and threatened boycotts of sessions. The Iranian arbitrators categorized the Tribunal's awards as a "manifestation of the work of a degenerated system," and charged further that "the Tribunal, with its predominantly Western composition, has in every respect betrayed the trust vested in it." Finally, on September 3, 1984, as the Swedish judge, Mangård, was walking toward a meeting room, two Iranian arbitrators — Judges Kashani and Shafeiei — physically attacked him, punching him, yanking on his tie, and shoving him out the front door of the Tribunal. That disturbance was quelled, but Kashani said that if "Mangård ever dares to enter the Tribunal chamber again, either his corpse or my corpse will leave it rolling down the stairs," and Mangård, urged to stay home by his colleagues, did, and so was placed under virtual house arrest.

Not surprisingly, proceedings at the Tribunal came to a virtual standstill, and many wondered if this innovative experiment in cross-cultural justice had come to an end. Indeed, Judge Shafeiei later said that he and Judge Kashani had planned the attack on Judge Mangård in the hopes of putting pressure on the Iranian Government to withdraw from the Tribunal. But Iran apparently decided that it had too much at stake in the Tribunal to abandon it, and the Tribunal persevered. Iran decided of its own accord to replace the offending arbitrators, and the Tribunal resumed its work. Although the attack on Judge Mangård brought the Tribunal to the brink of collapse, it was also a turning point. The Tribunal that resumed work was a stronger, more confident institution, no longer afraid that Iran would withdraw from the agreement, and both nations renewed their commitment to make the institution work.

Since then the Tribunal has carried on, largely out of the public eye, slowly resolving the claims brought

before it. I do not suggest that all of the Tribunal's problems have disappeared. Proceedings sometimes move at what Americans at home would consider a sick snail's pace, briefings in cases routinely drag on for three or more years, and the preparation of a written opinion, once a hearing has finally been held, can take another two years, as the issues are hashed out by the arbitrators again and again, and opinions revised *ad infinitum*. Indeed, the Tribunal has still not held hearings in a handful of cases that were filed before the January 19, 1982 deadline. And the Tribunal shares with all judicial systems the plague of claimants who are willing to perjure themselves for gain.

The Government of Iran has often maintained that the security account beckons to thieves as if it were a pot of gold, and that characterization has at times seemed apt. In one case, for example, an American named Gordon Williams filed suit at the Tribunal, claiming that certain government-controlled Iranian banks had failed to honor two letters of credit that had been opened in favor of his company. The Tribunal concluded that Williams was entitled to \$300,000, plus interest from 1980. The Algerian Central Bank, as escrow agent, forwarded the money to the Federal Reserve Bank in New York to be paid to Mr. Williams. At that point the Fed discovered that there were competing Gordon Williamses, conspirators who turned out to be Iranian nationals using the birth certificate of a deceased American.

But despite some delay and chicanery, the Tribunal is a stunning and surprising success: It has decided more than 3,900 cases in 16 years and awarded nearly \$3 billion to U.S. claimants. And from a jurisprudential standpoint, the Tribunal is the largest and most important arbitral institution ever instituted in international relations, and its decisions "constitute perhaps the greatest single source of jurisprudential development of public international law in history," according to former American arbitrator Charles Browser.

The Tribunal is influential primarily for two reasons: first, its decisions are public, which is unprecedented in international arbitration; and second, its decisions cover an enormous range of international business transactions, and so serve as precedent on a wide variety of subjects. The Tribunal's most notable jurisprudential contribution is in the law of expropriation, but it also has rendered signifi-

cant decisions in treaty interpretation and the nationality of claims, among other areas.

Why has the Tribunal been successful?

One, it has *persisted*; clearly both countries have continued to participate in (and fund!) the Tribunal because they believe it to be in their best interest to do so. American claimants have clearly benefited, and Iran has brought suit seeking billions of dollars for alleged breaches of contract for military equipment.

Two, it has carefully combined principle and pragmatism. It has not allowed itself to be cowed by threats or obstructionist behavior; but it also has handled matters flexibly and diplomatically. The Tribunal has often gone out of its way to avoid calling attention to obvious misbehavior or to avoid deciding politically explosive issues. This can be frustrating, especially to Americans who believe in "telling it like it is," but such forbearance has paid great dividends.

Finally, the Tribunal provides direct access between two governments that have no formal diplomatic relations. This ability to communicate informally is of great value. It was especially useful recently when Washington and Tehran negotiated a \$61.8 million settlement for Iran's claim against the United States over the 1988 "Airbus incident." The U.S.S. Vincennes shot down an Iran Air A-300 Airbus over the Persian Gulf that year, and Iran's claim against the United States as a result of the incident had been before the high-visibility International Court of Justice for years. Fortunately for all, the parties were able to settle the matter quietly and relatively quickly in the Tribunal.

So, while presidents elsewhere trade statements, here in an inconspicuous former hotel, without the grandeur of the Peace Palace, without the heavy international press coverage afforded the War Crimes Tribunal, the Iran-United States Claims Tribunal proceeds with its cases. Although it is sometimes inefficient and sometimes motivated as much by politics as by law, it is notable as a place where words, not bullets and bombs, continue to be exchanged between hostile nations. Flaws and all, the Tribunal is something eminently worth talking about. □

Nancy Amoury Combs '91 has served as a law clerk for U.S. Supreme Court Justice Anthony Kennedy, and concludes her term with the Tribunal in The Hague in October of 1999.