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# Book Review: Lillich & Magraw eds., *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*

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## Book Reviews

### THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY

Richard B. Lillich and Daniel B. Magraw, eds.  
New York: Transnational Publishers, 400 pp. (1998).

Charles H. Brower, II\*

In this book, seven leading commentators set out to make the Iran-United States Claims Tribunal's contributions to the Law of State Responsibility "more transparent and useful."<sup>1</sup> Their concise and thought-provoking endeavor succeeds on at least three levels. First, it provides an accessible, but comprehensive, survey of the Tribunal's jurisprudence on the Law of State Responsibility. Second, it effectively rebuts the argument that the Tribunal's decisions are *lex specialis* and, therefore, irrelevant beyond the Tribunal itself. Third, it emphasizes the importance of procedure by exploring the Tribunal's use of evidentiary standards that limited (and sometimes eliminated) the practical effect of substantive rules. True to its objectives, this book delivers a cogent and insightful account of the content, importance, and operative effect of the Tribunal's jurisprudence.

Substantively, each author examines a different element of the Tribunal's case law as it pertains to the Law of State Responsibility. Following Daniel Magraw's introduction,

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<sup>1</sup> THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY at xiii (Richard B. Lillich & Daniel B. Magraw eds., 1998) [hereinafter IRAN-UNITED STATES CLAIMS TRIBUNAL].

one encounters chapters on eligible claimants,<sup>2</sup> “trans-substantive” rules,<sup>3</sup> expropriation claims,<sup>4</sup> debt and contract claims,<sup>5</sup> claims for “other measures affecting property,”<sup>6</sup> standards of compensation, and methods of valuation.<sup>7</sup> Proceeding in this manner, the book covers the doctrinal waterfront while drawing on the authors’ individual expertise. The book becomes most illuminating, however, when one examines the authors’ collective judgments about the precedential value and practical effect of the Tribunal’s jurisprudence.

All supporters of the Tribunal, the authors unanimously describe its work as an important source of precedent for the Law of State Responsibility. They adopt more critical perspectives, however, when discussing the Tribunal’s use of evidentiary standards that noticeably restricted the application of substantive rules. This mixed assessment calls to mind a recent comparison of the Tribunal’s work to a dog walking on its hind legs: “It is not done well; but you are surprised to find it done at all.”<sup>8</sup> In examining the authors’ collective judgments, this review expands on the analogy

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<sup>2</sup> David J. Bederman, *Eligible Claimants Before the Iran-United States Claims Tribunal*, in IRAN-UNITED STATES CLAIMS TRIBUNAL, *supra* note 1, at 47-108.

<sup>3</sup> David D. Caron, *The Basis of Responsibility: Attribution and Other Trans-Substantive Rules*, in IRAN-UNITED STATES CLAIMS TRIBUNAL, *supra* note 1, at 109-84. Professor Caron defines “trans-substantive rules” as secondary rules of State Responsibility that apply regardless of the particular substantive norm that the State is alleged to have breached. *Id.* at 110. Trans-substantive rules, therefore, include provisions on attribution and causation because they must be proven in every case.

<sup>4</sup> Matti Pellonpää, *Compensable Claims Before the Tribunal: Expropriation Claims*, in IRAN-UNITED STATES CLAIMS TRIBUNAL, *supra* note 1, at 185-266.

<sup>5</sup> John R. Crook, *Debt and Contract Claims Before the Tribunal*, in IRAN-UNITED STATES CLAIMS TRIBUNAL, *supra* note 1, at 267-302.

<sup>6</sup> Jamison Selby Borek, *Other State Responsibility Issues*, in IRAN-UNITED STATES CLAIMS TRIBUNAL, *supra* note 1, at 303-23.

<sup>7</sup> David P. Stewart, *Compensation and Valuation Issues*, in IRAN-UNITED STATES CLAIMS TRIBUNAL, *supra* note 1, at 325-85.

<sup>8</sup> See CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 657 (1998). To avoid confusion, I wish to emphasize that Judge Brower is *not* the author of this book review and bears no responsibility for the views expressed herein.

and expresses the opinion that, like a bipedal dog, the Tribunal's capacities are unusual and significant, but not suited to all tasks. While two of this book's authors describe the Tribunal's occasional missteps in a group of "wrongful expulsion" cases, this review suggests that more fundamental questions are posed by the Tribunal's overarching reluctance to proceed with those cases at all.

### THE TRIBUNAL'S UNUSUAL CAPACITIES

The customary Law of State Responsibility does not generally apply to violations of municipal law.<sup>9</sup> To the contrary, it regulates liability for acts of State that violate international obligations.<sup>10</sup> Thus, when a State merely breaches contractual duties, the ensuing claim typically arises under municipal law, and injured aliens cannot seek diplomatic protection from their home State.<sup>11</sup> Upon the breach of an international duty, however, the customary Law of State Responsibility permits aliens to seek diplomatic protection from their home State (subject to exhaustion of local remedies).<sup>12</sup> The aliens' home State then espouses their claims.<sup>13</sup>

In settling their impasse over hostages and frozen assets, however, Iran and the United States agreed to submit both public international and municipal law claims of their respective nationals to binding arbitration. To this end, a Claims Settlement Declaration (CSD) created the Iran-United States Claims Tribunal and vested it with jurisdiction over certain public international law claims against

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<sup>9</sup> See J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 286-87 (9th ed. 1984) (describing the limits between public international law and municipal law).

<sup>10</sup> *Id.*

<sup>11</sup> See *id.* at 288-90 (contrasting the legal implications of contract and expropriation claims). See also Crook, *supra* note 5, at 271-74 (describing the U.S. government's traditional refusal to serve as a collection agency for its nationals).

<sup>12</sup> See STARKE, *supra* note 9, at 298-301, 303-07 (describing the general principles of protection for aliens abroad and the assertion of claims on their behalf).

<sup>13</sup> See *id.* at 303-07 (discussing the espousal of claims on behalf of nationals).

the Government of Iran, as well as certain municipal law claims against the Government of Iran and its agencies, instrumentalities, and other controlled entities.<sup>14</sup> Thus, the CSD embraced a universe of claims far broader than contemplated by the customary Law of State Responsibility.

In his chapter on trans-substantive rules, Professor Caron explains the significance of the Tribunal's broad jurisdiction: "It is not that either the public international law claims or the private municipal law claims before the Tribunal were unique, but rather that the capacity of the Tribunal to hear both types of claims was very unusual."<sup>15</sup> So unusual, in fact, that a group of commentators has characterized the Tribunal's jurisprudence as a "*lex specialis*" that bears no relevance to the customary Law of State Responsibility.<sup>16</sup> Reinforcing this assessment, another commentator observed that the Tribunal's decisions principally involve the resolution of commercial disputes, and not the application of public international law.<sup>17</sup>

To these critics, Daniel Magraw's introductory chapter responds that "[t]he Tribunal has issued *several hundred* decisions in contested cases that are relevant to the Law of State Responsibility."<sup>18</sup> Magraw continues by arguing that one may readily identify those cases by "analyz[ing] carefully the particular decision . . . and ask[ing] what source of

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<sup>14</sup> See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, arts. II(1), V, *reprinted in* 1 Iran-U.S. Cl. Trib. Rep. 9, 11 (1981) (granting jurisdiction over public international law claims sounding in deprivation of property interests and municipal law claims sounding in contract and debt). The CSD has not, unfortunately, been reproduced as an appendix to this book.

<sup>15</sup> Caron, *supra* note 3, at 113.

<sup>16</sup> See Daniel B. Magraw, *The Tribunal in Jurisprudential Perspective*, in IRAN-UNITED STATES CLAIMS TRIBUNAL, *supra* note 1, at 25-29 (discussing this criticism). See also Caron, *supra* note 3, at 111-26 (addressing this problem and describing how one federal court erroneously concluded that the Tribunal's decisions are, in fact, *lex specialis*).

<sup>17</sup> CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 181 (1987).

<sup>18</sup> Magraw, *supra* note 16, at 23 (emphasis added).

law is being applied . . . .”<sup>19</sup> Yet, Magraw provides little guidance to those who would repeat his analysis and insists that the contours of the process “defy precise description.”<sup>20</sup> Thus, one leaves the book’s introductory chapter feeling well acquainted with the debate over the Tribunal’s importance, but suspecting that transparency has not yet been achieved.

Happily, Professor Caron’s chapter on trans-substantive rules offers a more precise and, therefore, more compelling methodology for identifying decisions that bear upon the customary Law of State Responsibility. Caron explains that an injured U.S. national could file municipal law claims against the whole range of potential Iranian respondents under the CSD,<sup>21</sup> but could bring public international law claims only against the Government of Iran.<sup>22</sup> This insight provides an important tool for distinguishing between awards that apply the customary Law of State Responsibility and those that reflect the Tribunal’s peculiar jurisdiction over municipal law claims. Thus, to identify the relevant cases, one must (1) examine the universe of claims in which the Government of Iran appeared as the respondent, (2) determine which of those claims alleged violations of international obligations, and (3) identify the awards in which the Tribunal applied public international law as the rule of decision.<sup>23</sup>

Sorting through the Tribunal’s docket in this way, Caron determines that only a “modest number” of the Tribunal’s 580 awards “involved claims based on public international law and thus potentially bear on [various questions of State Responsibility].”<sup>24</sup> While Caron expresses disappointment

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<sup>19</sup> *Id.* at 28.

<sup>20</sup> *Id.* at 37.

<sup>21</sup> Caron, *supra* note 3, at 112 (defining potential respondents as the Government of Iran and its agencies, instrumentalities, and other controlled entities).

<sup>22</sup> *Id.* at 113-14.

<sup>23</sup> *See id.* at 113-15 (describing this methodology in both textual and tabular form).

<sup>24</sup> *Id.* at 119.

at this limited inventory of decisions,<sup>25</sup> his methodology for identifying them credibly refutes the view that the Tribunal's jurisprudence has no relevance to the customary Law of State Responsibility.

Upon examination of Caron's small inventory, critics might be tempted to reply that the Tribunal's jurisprudence overwhelmingly constitutes *lex specialis* and therefore overwhelmingly lacks precedential value. The authors of this book, however, will not give them satisfaction. Magraw, for example, observes that the CSD's departure from custom "will have a broader significance because the [CSD] will almost certainly be looked to for guidance—positive or negative—in future claims-settlement contexts."<sup>26</sup> Professor Bederman concurs that "the overall effect will be to give additional guidance to future drafters and interpreters of international claims settlement instruments . . . ."<sup>27</sup>

John Crook elaborates on this theme in his chapter on debt and contract claims. To his credit, Crook begins by acknowledging that "the majority of the Tribunal's awards on the merits have involved conventional contract disputes," as opposed to public international law.<sup>28</sup> But he correctly observes that any criticism misses the point, because

[t]he greatest significance of the Tribunal's work relating to contract claims lies in the fact that it is being done at all. . . . By broadening the limits of international protection to embrace a wide range of additional contract and debt claims, the Tribunal has set an important precedent for much broader coverage in future claims settlement mechanisms.<sup>29</sup>

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<sup>25</sup> *Id.* at 118-19.

<sup>26</sup> Magraw, *supra* note 16, at 26.

<sup>27</sup> Bederman, *supra* note 2, at 108.

<sup>28</sup> Crook, *supra* note 5, at 267.

<sup>29</sup> *Id.* at 300.

Notwithstanding the intuitive force of Crook's argument, one detects a potential flaw. The Tribunal bears the reputation of an unusual animal—the proverbial bipedal dog. If the Tribunal's jurisdiction is so uncommon, does it depend on unique circumstances? If so, does that cast doubt on the broader application of this "important precedent" to other factual circumstances? One can hardly fault Crook for not addressing this point in a chapter that so comprehensively examines the Tribunal's resolution of contract and debt claims. But the question still nags, and some discussion might have added weight to his prediction that the Tribunal's broad jurisdiction will become an "important precedent" for future claims settlement mechanisms.

While I ultimately share Crook's assessment, the matter is not so obvious. In fact, one might initially be disposed to conclude that the Tribunal's unusual jurisdiction arose out of circumstances that do not lend themselves to general replication. With some \$12 billion in frozen Iranian assets,<sup>30</sup> the United States possessed exceptional bargaining power and, therefore, could insist that the CSD provide for the adjudication of commercial disputes.<sup>31</sup> Bargaining power may also explain the creation of a United Nations Compensation Commission (UNCC) with similarly broad jurisdiction following Iraq's crushing military defeat.<sup>32</sup> But if exceptional leverage constitutes the main explanation, one might legitimately suggest that the Tribunal's broad jurisdiction depends on unusual circumstances and, therefore, constitutes a doubtful precedent of general application.

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<sup>30</sup> Magraw, *supra* note 16, at 8.

<sup>31</sup> Cf. BROWER & BRUESCHKE, *supra* note 8, at 6 (explaining that "a mechanism for the adequate compensation of American claimants" became an essential condition to the release of frozen assets).

<sup>32</sup> See Crook, *supra* note 5, at 302 (describing the UNCC's broad jurisdiction over contract and debt claims). See also Charles N. Brower, Comment, *The Lessons of the Iran-United States Claims Tribunal: How May They Be Applied in the Case of Iraq?*, 32 VA. J. INT'L L. 421, 423 (1992) (stating that the UNCC's ability to process claims "is increased greatly by the fact that Iraq has been politically and legally flattened and is at the mercy of the UN, which has a perpetual right to a stranglehold on the Iraqi economy").



More promising, however, is the theory that *Iran* also wanted to vest the Tribunal with jurisdiction over commercial disputes as a condition to the hostages' release. According to this view, Iran needed to terminate the "trench warfare litigation" that was proceeding apace in United States courts.<sup>33</sup> The significance of this hypothesis is twofold. To begin with, it fundamentally challenges the Supreme Court's "strong sense" that judicial "engagement in the task of passing on the validity of foreign acts of [S]tate may hinder rather than further" the evolution of the Law of State Responsibility.<sup>34</sup> More importantly for this review, it also suggests that States may be willing to confer broad jurisdiction on international claims settlement bodies when there is a credible threat of litigation in domestic courts. For trading nations having substantial overseas assets, this supports the authors' belief that the Tribunal's jurisdiction over commercial disputes is not merely *lex specialis*, but perhaps the wave of the future.

### THE TRIBUNAL'S UNSTEADY GAIT

If one accepts that Iran favored the Tribunal as an alternative to litigation in United States courts, one must likewise be prepared to accept that Iran intended to—and did in fact—obtain certain benefits from the change in venue.<sup>35</sup> Most obvious is the interest of special-purpose tribunals in rendering decisions that are minimally acceptable to all

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<sup>33</sup> John E. Hoffman, Jr., *The Iranian Asset Negotiations*, 17 VAND. J. TRANSNAT'L L. 47, 48-50 (1984). See also Borek, *supra* note 6, at 322 (stating that the Tribunal "was created primarily as an alternative to U.S. courts for U.S. claimants").

<sup>34</sup> See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (expressing this sentiment).

<sup>35</sup> Cf. James Graham, *Re-Evaluation of the Dispute Resolution Mechanism in the Canada-U.S. Free Trade Agreement: The Softwood Lumber Dispute*, 28 CASE W. RES. J. INT'L L. 473, 486 (1996) (recognizing, in another context, that "a binational panel cannot be expected to act exactly in the same manner as a domestic court" and arguing that "[i]f there is to be no difference in the outcome . . . the complex procedure of forming a binational panel is unnecessary").

parties.<sup>36</sup> Another benefit turned out to be the Tribunal's reluctance to adopt pro-claimant presumptions that arguably would have been justified by facts generally known about revolutionary Iran.<sup>37</sup> Throughout this book, the authors illustrate how these two phenomena caused the Tribunal to adopt desirable rules of State Responsibility, but to pair those rules with evidentiary standards that restricted (and sometimes eliminated) their practical effect. This serves as an important reminder that the Tribunal's work does not become fully "transparent and useful" until one understands both the substantive rules the Tribunal adopted and the procedural mechanisms that control their application.<sup>38</sup>

In his chapter on eligible claimants, for example, Professor Bederman explains that "[i]n each instance where it was free to choose, the Tribunal selected the proper international law standard" for determining whether it had jurisdiction.<sup>39</sup> Thus, the Tribunal ruled that dual nationals could assert claims against Iran if their "dominant and effective" nationality was American.<sup>40</sup> As a practical matter, however, this required claimants to maintain very strong ties to the United States.<sup>41</sup> Moreover, the Tribunal often

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<sup>36</sup> See Magraw, *supra* note 16, at 30 (listing the factors necessary to ensure Iran's and the United States' continued participation in the Tribunal). See also Borek, *supra* note 6, at 322 (stating that "[i]nternational arbitral tribunals are commonly regarded as tending to compromise").

<sup>37</sup> When required by the absence of individuated proof, United States courts apply various doctrines (such as *res ipsa loquitur*) that use generalized facts to set up rebuttable presumptions. See, e.g., Robert B. von Mehren, *Burden of Proof in International Arbitration*, in PLANNING EFFICIENT ARBITRATION PROCEEDINGS 123, 128-29 (Albert J. van den Berg ed., 1996) (describing the use of presumptions in U.S. judicial proceedings). In effect, these presumptions relieve the claimant from having to submit categories of individuated proof. *Id.* at 128. Von Mehren implies, however, that the use of presumptions may be more limited in the context of international arbitration. *Id.* at 129.

<sup>38</sup> Borek, *supra* note 6, at 316-17. See also Caron, *supra* note 3, at 150 (cautioning the reader to "pay attention not only to what the Tribunal endorsed in terms of rules but also what it granted in terms of judgments").

<sup>39</sup> Bederman, *supra* note 2, at 108.

<sup>40</sup> *Id.* at 65-67.

<sup>41</sup> For example, the Tribunal used objective standards (e.g., "habitual residence"

examined the strength of those ties over the course of a claimant's entire life.<sup>42</sup> This rigorous approach proved fatal to many "globetrotting" Iranian-Americans who spent considerable periods of time outside the United States.<sup>43</sup> It also proved too demanding for at least one American woman, who *involuntarily* obtained Iranian citizenship by marriage, resided in Iran for only *four* years, and terminated her Iranian residence *before* the revolution, but still failed to establish the dominance and effectiveness of her native citizenship.<sup>44</sup> Against this background, it is not surprising that dual nationals have survived the Tribunal's jurisdictional inquiry only sixty percent of the time.<sup>45</sup>

In evaluating the dual nationality claims, Professor Bederman acknowledges that the Tribunal selected a burden of proof that "may ask too much" in some cases.<sup>46</sup> Yet, he is unwilling to condemn the Tribunal as being "too stingy in withholding jurisdiction for some individual claimants."<sup>47</sup> In Bederman's view, the problem is not systematic bias, but the need for cautious scrutiny of ambiguous facts in sensitive cases.<sup>48</sup> Because this approach does not raise a uniformly insurmountable barrier for dual nationals, it seems to fall within a range of discretion that is

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and "center of interests"), as opposed to subjective standards (e.g., "domicile"), to evaluate the dominance and effectiveness of American nationality. *Id.* at 72-73. The result was a fairly mechanical test, in which it became important for claimants to demonstrate the existence of palpable—as opposed to psychological—ties to the United States. *See id.* at 73 (describing the Tribunal's approach as a "fairly mechanical" test).

<sup>42</sup> *Id.* at 70-71.

<sup>43</sup> *Id.* at 73-75.

<sup>44</sup> *Id.* at 71, 77 n.151.

<sup>45</sup> *See id.* at 68 (noting that the Tribunal rendered positive eligibility determinations in roughly 30 of 50 dual-nationality cases).

<sup>46</sup> *Id.* at 75. *See also id.* at 80 (recognizing that the burden of proof is "heavily placed on claimants" and that "some roadblocks have been unnecessarily erected by the Tribunal in some individual claims").

<sup>47</sup> *Id.* at 81.

<sup>48</sup> *See id.* (stating that a "careful approach to the dominant and effective nationality determination [was] essential to the institutional success" of the Tribunal, given Iran's virulent reaction to suits by its own nationals).

acceptable for special-purpose tribunals.<sup>49</sup> Perhaps for this reason, Bederman appears relatively more inclined than some of his colleagues to tolerate questionable outcomes in individual cases:

Although the Tribunal may be sometimes faulted for its *application* of the standard to specified claimants and situations, one cannot impugn the general rules being utilized. The Tribunal's jurisprudence thus will reinforce and strengthen already existing precepts for determining the eligibility of claimants.<sup>50</sup>

Even if one were to disagree with Bederman's optimism, he clearly identifies areas of concern and, in the process, makes the Tribunal's work more transparent to the reader.

While it shares Bederman's comprehensive doctrinal analysis, David Stewart's chapter on compensation and valuation proves less adept at fleshing out the Tribunal's use of evidentiary standards as a limitation on substantive rules. For example, Stewart opens with a lengthy description of how the Tribunal came to adopt the "full compensation" standard.<sup>51</sup> When he subsequently observes that "[i]t achieves little to say . . . that claimants are entitled to 'full compensation' unless that standard can be effectively applied to produce an award which in fact represents the full value of the property or interests in question,"<sup>52</sup> one anticipates the insertion of an important caveat. But Stewart quickly reassures that

[t]he answer is abundantly clear. The Tribunal has consistently held that "full compensation" requires

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<sup>49</sup> See Magraw, *supra* note 16, at 33 (suggesting that the Tribunal's search for compromise did not rise above a level that is typical of international settlement tribunals).

<sup>50</sup> Bederman, *supra* note 2, at 108.

<sup>51</sup> Stewart, *supra* note 7, at 334-56.

<sup>52</sup> *Id.* at 356-57.

payment of the genuine economic worth assessed at fair market value. . . . Where an active market for the enterprise exists, then the fair market value must be ascertained and awarded. . . .

In the absence of such a market, an approximation of fair market value must be made. . . . In several significant awards, the "discounted cash flow" . . . method has been adopted . . . *although subject to some adjustments* by the Tribunal.<sup>53</sup>

Doctrinally, the analysis is correct. It does not, however, adequately explain the nature of the Tribunal's adjustments, or the perception that the adjustments reflect an unprincipled use of evidentiary standards to mitigate the imposition of liability. To be fair, Stewart mentions that the Tribunal's discounted-cash-flow rulings have been controversial, involved the rejection of experts' calculations, and resulted in substantial downward adjustments of damage awards.<sup>54</sup> Stewart even mentions, in one case, that the Tribunal made adjustments to the bottom line of a claimant's discounted-cash-flow analysis without performing any of its own calculations.<sup>55</sup> Yet, Stewart never explicitly discusses the extent of this phenomenon, its devastating effects, or the intense reactions that it has sometimes provoked among U.S. claimants and judges.<sup>56</sup>

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<sup>53</sup> *Id.* at 357 (emphasis added).

<sup>54</sup> *Id.* at 364-65.

<sup>55</sup> *Id.* at 369.

<sup>56</sup> The phenomenon was not isolated but fairly routine. See BROWER & BRUESCHKE, *supra* note 8, at 668 ("It has been a characteristic of some Tribunal decisions on damages that they have contented themselves with an approximation where, it is felt, they could well have completed detailed calculations.").

Moreover, the adjustments have had an enormous effect on individual cases. For example, while Stewart describes one such adjustment as resulting in an award of "less than one-third of the amount claimed," that case actually involved a 93% reduction to the claimed amount. Compare Stewart, *supra* note 7, at 365, with *Starrett Housing Corp. v. Iran*, 16 Iran-U.S. Cl. Trib. Rep. 112, 223 (1987) (reducing a gross profit calculation from 377,000,000 rials to 27,000,000 rials).

These sorts of adjustments have led some U.S. claimants to believe that the

Arguably, the Tribunal's unscientific adjustments raise no special concerns because, as Stewart observes, methods of valuation lie within the arbitrators' sound discretion.<sup>57</sup> To this, one might add that the Tribunal's adjustments are no more remarkable or sinister than the sort of rough estimates that we expect from juries. Yet, if the goal is transparency, Stewart's chapter might have benefited from a more thorough examination of the adjustments. Simply put, the adjustments have created suspicions that the Tribunal theoretically endorses "full compensation," but arbitrarily rejects the claimants' proof in favor of damage awards that reflect a lower standard.<sup>58</sup> Even if one disagrees with this viewpoint, recognition of its existence would have added context to Stewart's doctrinal analysis.

If Bederman and Stewart seem relatively unconcerned by the interplay between evidentiary standards and substantive rules, the problem dominates Jamison Selby Borek's lively discussion of State Responsibility for wrongful expulsions. "Time and again," observes Borek, "the [Tribunal's]

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Tribunal arbitrarily compromises on valuation issues. See Magraw, *supra* note 16, at 33 (describing the reactions of U.S. claimants). Judge Brower has similarly described the Tribunal's approach as "an inadequate substitute for a real valuation." Charles N. Brower, *The Iran-United States Claims Tribunal*, 224 RECUEIL DES COURS (Hague Academy of International Law) 123, 386 (1990-V). Although not made in the context of a discounted-cash-flow analysis, the following statement of Judge Holtzmann is also quite telling:

[T]he Majority has pulled—literally out of the air—the figure of \$750,000. This figure is not supported by arguments or evidence from either Claimant or Respondents. It is impossible to discover any reasoning in the Majority's Award that leads to its selection. In a well-documented claim for some \$40 million, the figure of \$750,000 seems to have recommended itself to the Majority on the sole ground that it was low enough.

Sea-Land Serv., Inc. v. Iran, 6 Iran-U.S. Cl. Trib. Rep. 149, 216 (1984) (Holtzmann, J., dissenting and concurring).

<sup>57</sup> See Stewart, *supra* note 7, at 382 (describing the selection of valuation methods as a discretionary exercise).

<sup>58</sup> See BROWER & BRUESCHKE, *supra* note 8, at 668 (recognizing that this practice "raises suspicions of undue arbitrariness"); Brower, *supra* note 56, at 386 (noting that the "result in some cases has been a valuation that seems far less than what one might have expected given the standard of compensation applied").

opinions embrace clear legal principles of classic . . . State Responsibility, but add a burden of proof that negates their application in the particular case."<sup>59</sup> Professor Caron concurs that the wrongful expulsion cases form part of a "cautionary tale" in which the Tribunal recognized an international obligation, but clung to evidentiary standards that made proving its breach impossible during periods of revolutionary turmoil.<sup>60</sup>

To appreciate the wrongful expulsion cases, one must understand that they encompassed 1500 claims, or forty percent of the Tribunal's docket.<sup>61</sup> Typically, the claimants lost their possessions and their livelihoods when compelled to leave Iran on short notice.<sup>62</sup> Despite the compelling nature of these claims, the Tribunal decided only six wrongful expulsion cases over nine years and ruled for the claimant only once.<sup>63</sup> In 1990, Iran and the United States settled the outstanding claims by lump-sum payment.<sup>64</sup>

Professor Caron suggests that disequilibrium between generalized and individuated facts presented an evidentiary conundrum for wrongful expulsion claimants, who had to prove that their departures could be attributed to wrongful acts of the State. At a general level, this task should not have been difficult, because Iran's virulently anti-American policies incited direct confrontations and the creation of an intolerable atmosphere for U.S. nationals in Iran.<sup>65</sup> In the context of revolutionary turmoil, however, it became almost

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<sup>59</sup> Borek, *supra* note 6, at 320.

<sup>60</sup> Caron, *supra* note 3, at 111, 181-83.

<sup>61</sup> Brower, *supra* note 32, at 427.

<sup>62</sup> *Id.* at 426-27.

<sup>63</sup> Brower, *supra* note 32, at 427.

<sup>64</sup> Borek, *supra* note 6, at 309 & n.16.

<sup>65</sup> See Caron, *supra* note 3, at 159 (quoting a dissenting opinion of Judge Brower, which describes the generalized evidence of "threats, attacks, fire bombings and virtually every form of overt assault on the persons and property of Americans in Iran during that period"). See also *id.* at 162-63 (arguing that the Iranian government's "extreme official anti-American pronouncements . . . can be presumed to be the cause of the departures of the remaining U.S. citizens").

impossible for individual claimants to document the facts necessary to prevail in specific cases.<sup>66</sup> Take, for example, the dilemma of a person who claims that a group of revolutionaries instructed her to leave Iran. How could she prove that a confrontation even occurred, much less that the Iranians involved represented the new Iranian government?<sup>67</sup> Caron puts the matter bluntly: “[W]hen the security of family members is thought to be at stake, meticulous efforts to document property claims . . . are not necessarily to be expected.”<sup>68</sup>

According to Caron, however, the problem is not merely to identify the Iranians involved in those confrontations and to unmask them as agents of the State. More fundamentally, the problem is to document *what* happened and *how* it affected the decision to leave Iran.<sup>69</sup> For example, in *Rankin v. Iran*, the Tribunal agreed that the inflammatory statements of Iranian leaders were themselves wrongful and likely to “initiate or prompt the types of harassment and violence that were suffered by individual U.S. nationals.”<sup>70</sup> Nevertheless, the Tribunal still required Mr. Rankin to prove the “general and specific acts” he allegedly experienced and to demonstrate how those anti-American acts (as opposed to revolutionary circumstances) constituted a “substantial causal factor” in his departure from Iran.<sup>71</sup> Rankin’s claim failed when judged by these requirements, and “[t]he crux of the matter,” writes Borek, “is that no normal claimant under similar circumstances is ever likely to meet such a burden.”<sup>72</sup>

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<sup>66</sup> *Id.* at 150-51, 182-83.

<sup>67</sup> *See id.* at 150-51 (raising similar questions).

<sup>68</sup> *Id.* at 150 (quoting the concurring and dissenting opinion of Judge Allison to *Malek v. Iran*, 28 Iran-U.S. Cl. Trib. Rep. 246, 301 (1992)).

<sup>69</sup> *Id.* (suggesting that it may be difficult to establish the occurrence of events); *id.* at 161 (recognizing that proof of causation may be very difficult under revolutionary circumstances).

<sup>70</sup> *Id.* (quoting *Rankin v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 135, 147 (1987)).

<sup>71</sup> *Rankin*, 17 Iran-U.S. Cl. Trib. Rep. at 147-49, 151.

<sup>72</sup> Borek, *supra* note 6, at 320.



Equally critical of the Tribunal's selection of evidentiary standards in the wrongful expulsion cases, Borek and Caron apparently part ways over the existence of feasible alternatives. Borek suggests that the Tribunal lacked a meaningful choice, because a more flexible burden of proof "would have resulted in wholesale liability for U.S. property left in Iran."<sup>73</sup> In other words, the absence of individuated facts meant that the Tribunal could adjust the burden of proof to achieve only one of two uniform outcomes: non-liability or strict liability for U.S. property left in Iran.

Because Iran's policies were intended to result in the wholesale abandonment of Iran by U.S. nationals, Borek implies that the Tribunal could have justified the imposition of strict liability.<sup>74</sup> To this, one might add that the error costs of strict liability would have been lower, because the generalized facts suggested that most departures did, in fact, result from the government's anti-American policies. Borek wisely reiterates, however, that the Tribunal was intended to provide a mutually acceptable *alternative* to U.S.-style litigation.<sup>75</sup> Its decisions could not, therefore, be informed by purely legal concerns.<sup>76</sup> To return to the opening analogy, if you adopt a bipedal dog, you must expect that its actions will periodically offend your sense of natural order.

Caron agrees that the burden of proof appears to place one on "the horns of a dilemma," in which either the wrongful expulsion claimants or Iran must invariably be condemned to lose.<sup>77</sup> Unlike Borek, however, Caron suggests that the "dilemma" may stem from a faulty presumption that outcomes need to be uniformly one-sided.<sup>78</sup> For example, Caron would avoid one-sided outcomes against claim-

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<sup>73</sup> *Id.* at 321.

<sup>74</sup> *See id.* at 322 (acknowledging that Iran's specific intent to provoke the flight of Americans could justify an expanded scope of liability).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 322-23.

<sup>77</sup> Caron, *supra* note 3, at 162.

<sup>78</sup> *Id.*

ants by using generalized facts to set up a rebuttable presumption of wrongful expulsion.<sup>79</sup> To avoid one-sided outcomes against Iran, however, Caron would allow Iran to mitigate its liability by applying principles of contributory fault (i.e., multiple causation).<sup>80</sup> This approach begins to look less like a strict liability regime, because contributory fault principles theoretically would permit Iran to chip away at the presumption even in the absence of a complete rebuttal.

Professor Caron's chapter is extremely well thought out, and I agree that he has identified the problem. The Tribunal must render practical justice,<sup>81</sup> and it cannot do this through evidentiary rules that produce unduly one-sided outcomes. I am not, however, convinced that comparative fault principles will lift us off the horns of this dilemma. While the concept of "apportionment . . . is at least theoretically appropriate[,] the real (and practical) problem is one of proof."<sup>82</sup>

When the inaccessibility of proof leads us to adopt presumptions, they tend to be rebuttable only to the extent that the respondent has superior control over the evidence and can mount a persuasive case.<sup>83</sup> Moreover, a respondent can make effective use of the comparative fault defense only by establishing the existence of other proximate, that is to say, "substantial," causes of loss.<sup>84</sup> The problem, however,

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<sup>79</sup> *Id.* at 182-83.

<sup>80</sup> *Id.* at 162-63, 183.

<sup>81</sup> *See id.* at 184 (describing the search for practical—as opposed to perfect—justice as “the only efficient and fair way to address . . . claims that follow . . . major upheavals”).

<sup>82</sup> Robert M. Ackerman, *The Seatbelt Defense Reconsidered: A Return to Accountability in Tort Law?*, 16 N.M. L. REV. 221, 236 (1986).

<sup>83</sup> *See, e.g.*, Aaron D. Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 301 (1977) (making this point in the context of *res ipsa loquitur* and also recognizing that presumptions sometimes will not yield even to strong contrary showings).

<sup>84</sup> *See* UNIF. COMP. FAULT ACT § 1 cmt. (“causation”), 12 U.L.A. 127, 128 (1996) (“For the conduct stigmatized to have *any* effect under . . . this Act it must have had an adequate causal relation to the claimant's damage. This includes the rules of . . .

is that *Rankin* suggests that the dearth of individuated proof makes it almost impossible for claimants to establish (1) "the general and specific" events they experienced, and (2) the significance of those events as causal factors in their *own* decisions to leave Iran.<sup>85</sup> But if this task proves too difficult for claimants, one must have doubts as to whether Iran would have a comparative advantage in establishing those facts as part of a comparative fault defense. The point is that comparative fault principles offer little relief from difficult issues of proof.<sup>86</sup> To the contrary, comparative fault principles can aggravate those difficulties by demanding a more nuanced examination of specific events, even though the evidence is not capable of producing individually accurate results.<sup>87</sup> Thus, if the problem really is a lack of individuated proof, comparative fault principles seem an unlikely solution to the problem of one-sided outcomes.

In a strange way, this brings me to a subtle point lurking below the surface of John Crook's chapter on debt and contract claims: some cases should not be adjudicated. Iran seems to have understood this when, as part of the CSD, it

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proximate cause.") (emphasis added). See also BLACK'S LAW DICTIONARY 1225 (6th ed. 1990) (defining proximate cause as an "act or omission [that] played a substantial part in bringing about or actually causing the injury or damage").

<sup>85</sup> Compare *Rankin v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 135, 147-49, 151 (1987) (setting forth the burden of proof), with Caron, *supra* note 3, at 162 (acknowledging that this burden of proof may be "unworkable" for claimants under revolutionary circumstances).

<sup>86</sup> See Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 1021-22 (1983) (recognizing that the use of comparative fault principles to resolve multiple causation problems encounters "substantial difficulties of proof" even in the context of well-documented construction projects). Cf. Caron, *supra* note 3, at 161 ("[C]ausation also requires proof and such proof amidst revolution may be very difficult indeed.").

<sup>87</sup> Cf. Elizabeth F. Mason, Comment, *Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin's Lead*, 19 B.C. ENVTL. AFF. L. REV. 73, 94 n.167 (1991) (suggesting that a comparative-fault approach to environmental liability may pose difficulties for courts, whose task would then become to maximize the accuracy of fault determinations using factual information that has limited utility).

agreed to repay \$3.667 billion in syndicated bank loans without submitting the matter to arbitration.<sup>88</sup> Crook observes that “[b]anks feel that if someone owes money, he ought to pay it and therefore nothing is left to arbitrate.”<sup>89</sup> Although this attitude may spring from the international banking community’s financial leverage, it also reflects the fact that bank debt claims tend to be well documented, involve clear legal standards, and entail few disputed facts.<sup>90</sup> Put another way, Iran may have chosen not to arbitrate those claims because their outcomes were self-evident.

If that is true, it similarly makes no sense to adjudicate wrongful expulsion claims in which the results are foregone conclusions. Professor Caron, therefore, explains that

during circumstances of upheaval . . . individuated proof . . . is neither feasible nor efficient. The claimants generally will lose, and the tribunal will waste resources repeatedly examining similar circumstances and repeatedly concluding that the claim should fail for lack of proof.<sup>91</sup>

As noted above, Caron would resolve the claimants’ dilemma though “rebuttable presumptions” that the Government of Iran wrongfully caused their departures. From the *Tribunal’s* perspective, however, this offers little relief from the problems of feasibility and efficiency. In fact, one anticipates a rejoinder that

during circumstances of upheaval . . . [rebuttable presumptions] . . . [are] neither feasible nor efficient. The

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<sup>88</sup> Crook, *supra* note 5, at 296-97.

<sup>89</sup> *Id.* (quoting Hoffman, *supra* note 33, at 51).

<sup>90</sup> See Shlomo Cohen et al., Note, *The Iranian Hostage Agreement Under International Law and United States Law*, 81 COLUM. L. REV. 822, 878 (1981) (“[T]he bank loans were perhaps more susceptible to immediate settlement since they involved fixed amounts and did not require judicial determination of their legitimacy and extent.”).

<sup>91</sup> Caron, *supra* note 3, at 182-83.

[respondents] generally will lose, and the tribunal will waste resources repeatedly examining similar circumstances and concluding that the [rebuttal] should fail for lack of proof.

In other words, the Tribunal had little incentive to hear the wrongful expulsion cases, regardless of how it allocated the burden of proof. If the Tribunal adhered to the requirement of individuated proof, American claimants would almost always lose, and the Tribunal might be accused of using evidentiary rules to limit the scope of State Responsibility.<sup>92</sup> On the other hand, if the Tribunal chose to adopt presumptions, the Government of Iran would almost always lose, and the Tribunal might be accused of transforming the Law of State Responsibility into a strict liability regime.<sup>93</sup> Either way, forty percent of the Tribunal's cases must have seemed unlikely to produce individual justice, but almost certain to establish sub-optimal rules of State Responsibility and to require wasteful adjudication of foregone conclusions. Confronted with these unappetizing prospects, it is no wonder that the Tribunal decided only six of the 1500 wrongful expulsion cases and forced a negotiated settlement by ignoring the rest.<sup>94</sup>

The phenomenon is not uncommon. In fact, one detects a similarity to the act of state doctrine, which United States courts use to avoid review of foreign governmental acts un-

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<sup>92</sup> See Borek, *supra* note 6, at 320-23 (describing the Tribunal's wrongful expulsion jurisprudence largely in these terms).

<sup>93</sup> See Caron, *supra* note 3, at 127 (noting the general perception that it is impractical and undesirable to force States to assume the role of insurers, in part because this provides States with an excuse to increase their control over private behavior).

<sup>94</sup> See *supra* notes 61-64 and accompanying text. Compare Charles N. Brower, *International Law: On the Edge of Credibility in the Wake of Iraq's Invasion and Occupation of Kuwait*, in AMERICAN SOCIETY OF INTERNATIONAL LAW: PROCEEDINGS OF THE 86TH ANNUAL MEETING 478, 479-80 (1992) (indicating that the Tribunal "virtually ignored" such cases), with BROWER & BRUESCHKE, *supra* note 8, at 343 (suggesting that observers expected the Tribunal to devote considerable attention to the wrongful expulsion cases).

der circumstances where (1) judicial involvement seems likely to hinder the development of appropriate international norms, and (2) diplomatic negotiations hold out a more promising avenue for achieving "some degree of general redress."<sup>95</sup> While the Tribunal did not enjoy the same freedom to dismiss those sorts of cases, it achieved a similar result by neglecting the wrongful expulsion claims until Iran and the United States voluntarily removed them from the Tribunal's docket.

This raises a fundamental point. The Tribunal may occasionally have stumbled in the wrongful expulsion cases, but most of the time it refused to proceed at all. The Tribunal's reluctance to do so challenges us, at least, to consider whether those cases were suited to adjudication. As suggested above, revolutionary circumstances made it almost impossible to document the individuated, or "adjudicative," facts surrounding attribution and causation in wrongful expulsion cases.<sup>96</sup> For these dispositive issues, the Tribunal had access only to generalized, that is to say, "legislative," facts. The problem, however, is that the Tribunal's adjudicative model provided an inappropriate vehicle for resolving disputes based on legislative facts.<sup>97</sup> In fact, trial-type evi-

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<sup>95</sup> See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 431-37 (1964) (declining to review a foreign act of state under these circumstances).

<sup>96</sup> See Caron, *supra* note 3, at 150-51, 182-83 (describing the proof problems encountered by wrongful-expulsion claimants). See also *Calvin v. Heckler*, 782 F.2d 802, 806 n.4 (9th Cir. 1986) ("Generally speaking, adjudicative facts are facts developed in individual cases regarding particularized facts, while legislative facts involve broader issues, which are more universally applicable.").

<sup>97</sup> See *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990) (Posner, J.) ("[T]rials are to determine adjudicative facts rather than legislative facts."); *Drummond v. Fulton County Dep't of Fam. & Children's Servs.*, 563 F.2d 1200, 1210 (5th Cir. 1977) (quoting KENNETH C. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 7.00-11, at 276 (1976), for the proposition that "trials are at their best when specific adjudicative facts are in dispute," but "are seldom desirable either on legislative facts or on broad factual issues"); Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 370 (1986) (describing the view that "trial-type hearings are a cost-effective means of . . . evaluating one type of information (person-specific) but not another (general)"). See also J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 379 (1974) (explaining that "adjudication is fair to the indi-

dentiary standards lead to particular confusion when applied to such disputes.<sup>98</sup> It may not, therefore, be surprising that Borek and Caron single out evidentiary standards as the cause of the Tribunal's disappointing record in the wrongful expulsion cases.

If traditional adjudication of such claims is not feasible, must we condemn wrongful expulsion claimants to years of diplomatic negotiations, where justice delayed really may be justice denied?<sup>99</sup> Perhaps not. Many authorities have observed that administrative rulemaking procedures constitute a superior model for resolving disputes based on generalized facts.<sup>100</sup> Although the analogy may not be perfect, the UNCC has been identified as an "administered program," rather than an "adjudicated program."<sup>101</sup> Created in the wake of Iraq's military defeat, the UNCC purports not to be a court or an arbitral tribunal, but a political organ that processes blocks of claims, instead of deciding them individually and in accordance with trial-type procedures.<sup>102</sup>

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vidual only if the facts are accurately found").

<sup>98</sup> See Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942) ("[T]he traditional rules of evidence are designed for adjudicative facts, and unnecessary confusion results from attempting to apply the traditional rules to legislative facts.").

<sup>99</sup> See Brower, *supra* note 32, at 427 (observing that wrongful expulsion claimants were "forced to wait beyond the period in which actual recovery would be of any immediate help").

<sup>100</sup> See, e.g., *Wisconsin Gas Co. v. Federal Energy Reg. Comm'n*, 770 F.2d 1144, 1166 (D.C. Cir. 1985) (describing administrative rulemaking procedures as "particularly appropriate for determination of legislative facts"); *National Small Shipments Traffic Conf., Inc. v. Interstate Commerce Comm'n*, 725 F.2d 1442, 1447-48 (D.C. Cir. 1984) (observing that administrative rulemaking procedures are "especially suited to determining legislative facts").

<sup>101</sup> Brower, *supra* note 32, at 424, 428. See also Gregory Townsend, Comment, *The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & U.S. Remedies*, 17 LOY. L.A. INT'L & COMP. L.J. 973, 978 (1995) (explaining that the UNCC's "mission is political or administrative, rather than judicial or adjudicatory").

<sup>102</sup> See REPORT ON THE ACTIVITIES OF THE UNITED STATES COMPENSATION COMMISSION (Sept. 1, 1992), reprinted in *United Nations Compensation Commission: Report with Decisions of the Governing Council*, 31 I.L.M. 1009, 1023 (1992) [hereinafter UNCC REPORT] ("[T]he Commission is not a court or an arbitral tribunal before which . . . parties . . . appear but a political organ . . ."). See also Brower,

Thus, for claims alleging involuntary departure from Iraq and Kuwait, the UNCC has adopted an irrebuttable presumption of attribution to Iraq and requires claimants to produce only a minimum of evidence (e.g., proof of departure dates from Iraq or Kuwait), but limits recovery in those cases to modest fixed amounts.<sup>103</sup> As it turns out, this approach has enjoyed a higher degree of success in achieving rough justice based on “group decisions” about legislative facts.<sup>104</sup> In short, the UNCC has overcome difficult proof problems by adopting administrative procedures that liberate decisionmakers from the adjudicative goal of complete factual accuracy.<sup>105</sup>

This is not to suggest that we should adopt the UNCC as a universal model for claims settlement mechanisms. There are, for example, indications that the UNCC might be less adept at handling claims in which the individuated facts could be proven through adjudication.<sup>106</sup> Moreover, the UNCC is an avowedly political institution whose existence depends on unusual circumstances that may never again

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*supra* note 32, at 424 (describing the UNCC’s administrative decisionmaking process as a departure from the traditional adjudicatory model). *But see* David D. Caron, *Introductory Note to UNCC REPORT*, *supra*, at 1009 (predicting that the UNCC will decide certain large claims in accordance with the adjudicative model).

<sup>103</sup> *See* Brower, *supra* note 32, at 428 (describing the UNCC’s adoption of an irrebuttable presumption and explaining how claimants may receive an award of \$2500 merely by demonstrating the fact and date of departure, \$2500 upon proof of serious personal injury, up to \$100,000 based upon a “reasonable minimum” of evidence, and up to \$20,000 based upon “an even lesser degree of documentary evidence”).

<sup>104</sup> Caron, *supra* note 3, at 184. *See also* Brower, *supra* note 32, at 428 (suggesting that the UNCC’s “administered program . . . may achieve better justice than an adjudicated program”). Unfortunately, however, the funding of UNCC awards has run into a number of impediments. *See* Townsend, *supra* note 101, at 1011-19. It is, therefore, important to bear in mind that superior decisions do not necessarily translate into better results for claimants.

<sup>105</sup> *Cf.* Wright, *supra* note 97, at 379 (observing that, in the administrative rule-making context, “fairness is not identified with accuracy, and the procedures designed to maximize accuracy at the cost of all other values are simply inappropriate”).

<sup>106</sup> *See* Townsend, *supra* note 101, at 986 (noting that some have criticized the UNCC process as lacking individual scrutiny and, therefore, providing an open invitation to overstated claims). *But see* Caron, *supra* note 102, at 1009 (predicting that the UNCC will adopt an adjudicative model for certain large claims).



coalesce.<sup>107</sup> The point, however, is not so much to identify a universal model, but to recognize that alternatives to traditional adjudication may be better suited to the resolution of claims in which only generalized facts have been preserved. The UNCC's administrative structure provides one alternative, but such cases might also be submitted to a tribunal for decision *ex aequo et bono*.<sup>108</sup> Here, it is important to recognize that this phrase does not merely imply a discretionary power to apply equity as a salve against the harsh effects of legal rules—for adjudicators tend to exercise *that* authority with great reserve.<sup>109</sup> Rather, it calls upon the decisionmaker to legislate a fair solution under circumstances where a negotiated settlement seems appropriate, but difficult to achieve.<sup>110</sup>

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<sup>107</sup> In fact, observers have suggested that the UNCC process might itself not survive a change of political circumstances in Iraq. See Brower, *supra* note 32, at 430 (speculating that the political demise of Saddam Hussein might terminate, or fundamentally alter, the UNCC claims process).

<sup>108</sup> The Tribunal's Final Rules of Procedure contemplated this possibility but required the consent of both parties, which was never forthcoming. See Final Tribunal Rules of Procedure, art. 33(2), 2 Iran-U.S. Cl. Trib. Rep. 405, 435 (1983) (permitting decisions *ex aequo et bono* only when expressly authorized by the parties in writing); BROWER & BRUESCHKE, *supra* note 8, at 632 (observing that the parties never availed themselves of this option). By contrast, the Foreign Claims Settlement Commission (FCSC) received statutory authority to decide certain claims of U.S. nationals against Iran in accordance with "principles of international law, justice and equity." Richard B. Lillich & David J. Bederman, *Jurisprudence of the Foreign Claims Settlement Commission: Iran Claims*, 91 AM. J. INT'L L. 436, 436, 439 (1997). In adjudicating the rights of small claimants to the 1990 lump-sum settlement, however, the FCSC never explicitly adopted equitable principles as a rule of decision. *Id.* at 440. Yet, the FCSC occasionally applied them *sub rosa* to achieve more favorable results than would have been possible under a strict application of Tribunal precedent. *Id.*

<sup>109</sup> See, e.g., Lillich & Bederman, *supra* note 108, at 440 (expressing regret that the FCSC "was unwilling to use its power to apply principles of justice and equity on a regular basis").

<sup>110</sup> See SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 213 (1958) (explaining that decisions *ex aequo et bono* involve a "species of legislative activity," which differs from the application of equitable principles to legal rules). This approach to dispute resolution is well-suited to situations in which traditional adjudication seems to be counterproductive, but a negotiated settlement appears unattainable. See W. MICHAEL REISMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION 196-97* (1997) (citing the example of a

This brings me, in the end, to the most important observation of this book. In confronting the problems of State Responsibility, we should avoid the temptation to search for theoretically universal models.<sup>111</sup> We should, instead, concentrate on devising rules and procedures that are appropriate to the circumstances.<sup>112</sup>

## CONCLUSION

The authors of this book are to be commended for producing a thoughtful and well-written volume that achieves a number of goals in just under 400 pages. It provides a comprehensive survey of the Tribunal's doctrine on the Law of State Responsibility, and it gives context to the Tribunal's work by exploring its precedential value. The book is worth reading for those two reasons alone. Yet, the book renders its greatest service by emphasizing the significance of procedural rules and by demonstrating how they control the outcome of individual cases. In so doing, it challenges us to evaluate more carefully the practical framework in which the Law of State Responsibility must ultimately be applied.

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dispute between IBM and Fujitsu, in which the parties submitted to arbitration *ex aequo et bono* after a negotiated agreement fell apart, and trial-type proceedings proved unproductive).

<sup>111</sup> See Caron, *supra* note 3, at 181-83 (criticizing the International Law Commission's search for theoretically universal rules and the Tribunal's application of those rules to factual situations that did not "seem to fit").

<sup>112</sup> *Id.*



## ETHICS AND AUTHORITY IN INTERNATIONAL LAW

Alfred P. Rubin. Cambridge: Cambridge University Press, 228 pp. (1997).

Mortimer Sellers\*

When Alfred P. Rubin was a United States Department of Defense employee in the 1960s, and for several years afterwards during the Vietnam War, some lawyers blamed the United States for the excesses of America's allies in South Vietnam (in addition to whatever United States forces may have done themselves). Rubin responded that no state has jurisdiction over another state's misdeeds—but the question has troubled him ever since. Thirty years later, Rubin is still struggling to perfect his old arguments, reformulated in this book as the assertion that no state has the “authority” to try or punish crimes committed somewhere else.

*Ethics and Authority in International Law* rests on the simple premise that “authority” should determine everything in law, and that “ethics” determine nothing. From this it follows that there are no “universal crimes” (because there is no universal authority) and no “universal jurisdiction” to adjudicate or enforce international law. Rubin hopes to establish a sharp dichotomy between a small group of realist, positivist “statesmen,” who believe in authority as the only source of law, and “naturalist” judges and professors of law who confuse law with morality, to the detri-

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ment of both. Rubin's extended efforts to separate law from morality and "statesmen" from "jurists" are heartfelt, but ultimately "demeaning to the law, subversive of its vital influence on civilized behavior, and generally polemical."<sup>1</sup>

This quote, from Rubin's own description of what he calls the "jurists'" legal views, gives a good sense of the tone of his argument, which sets out to correct "a major part of the scholarly literature of law since the days of Cicero,"<sup>2</sup> by showing how Cicero, Hugo Grotius, Samuel von Pufendorf, Christian Wolff, Emmerich de Vattel, Alexander Hamilton, John Jay, James Madison, and others were in various ways "confused" about the meaning of law and "so-called" human rights. Rubin condemns "theorists of the law, priests, and lawyers" for seeking to restrain "the holders of territorially-based authority" through law. Princes should determine the law as well as enforce it, he suggests, free of the moral, religious, or political dictates of those whom they regard as competitors for their authority.<sup>3</sup>

Rubin's argument against what he calls "morality" or "ethics" in international law rests on his own moral commitment to the sovereign equality of states. Slavery, apartheid, and other human rights violations within another state's borders should be viewed, Rubin suggests, as comparable to child abuse within a family—in both cases, "objective" or "outside" intervention leads to worse abuses than what was meant to be cured. We should protect children and battered wives, Rubin believes, only within our own "jurisdiction" or homes and leave others to do the same in theirs, according to their own lights. Rubin fears a world in which anyone "outside the circle of those immediately involved" makes decisions "for me or my family or my country."<sup>4</sup>

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<sup>1</sup> ALFRED P. RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* at xii (1997).

<sup>2</sup> *Id.* at xv.

<sup>3</sup> *Id.* at 3-4.

<sup>4</sup> *Id.* at 184.

This analogy fails on a number of levels. States are not families, and governments do not necessarily feel parental concern for their subjects. Even if they did, states should respect legal prohibitions on slavery, genocide, and other violations of international law, just as parents should respect municipal laws against child abuse and infanticide. The most extreme exponents of absolute sovereignty, such as Jean Bodin and Sir Robert Filmer, whose views Rubin echoes throughout his book, conceded the justice of intervention when sovereigns abuse their power. Such interventions frequently occur, whether they are justified or not, as when William of Orange invaded Britain or when Ronald Reagan invaded Grenada. Rubin cloaks his Hobbesian prescription for sovereign "authority" in the language of "realism," but his theories rest on the profoundly unrealistic hope that states will take no interest in each other's affairs, or that one can significantly inhibit such interventions by placing them beyond the law.

Rubin's own strong language justifies a frank description of his tendency "to construct a model of reality that leads to the desired results." (His own words, again, as addressed to "normative" jurists.). All law *is* normative and cannot be interpreted without the application of norms. Rubin's review of the development of international law from the seventeenth through the nineteenth century seeks to establish that international prohibitions never existed against piracy or the slave trade, notwithstanding the numerous cases, declarations, and treatises which said that they did.

Rubin calls himself a "positivist," by which he means to identify "human discretion" as the source of all law. But lawgivers always claim to serve justice and necessarily incorporate normative standards into their positive laws. International law develops through appeals to such standards, as statesmen make normative legal arguments to justify their public acts. Rubin would deny constraints on terrorism, war crimes, and human rights violations, be-

cause they violate the "authority"<sup>5</sup> or sovereign equality of existing heads of state. "Rights" do not exist, on this theory, even under the United States Constitution, which simply distributes "authority" among various centers of power.<sup>6</sup>

Such unrealistic hard-line Austinian positivism reflects Rubin's heartfelt fear of those "polemical exercises in group-think"<sup>7</sup> that pass for scholarly debate. This aversion to the "priestly" or "judgely" caste leads Rubin to repudiate the Anglo-American common law tradition and those aspects of international legal practice that resemble common law procedures. Rubin praises the jurisprudence of Stuart courtiers, such as Sir Leoline Jenkins, and disparages Sir Edward Coke and Sir William Blackstone for applying the *jus gentium* in English common law courts.<sup>8</sup> Rubin would situate all authority in the separate national sovereigns and only in the sovereigns, unconstrained by the domestic judiciary, or international legal order, until a world-sovereign emerges to govern them all, which he hopes will never occur. For Rubin, the law of nations does not exist until it is expressly adopted in detail by municipal "sovereign" authorities and may only be applied against a state (or its citizens) in the courts of that state itself.

Rubin excoriates the tendency of "scholars and judges seizing on incidental or irrelevant or unconsidered language of earlier decisions or diplomatic correspondence to argue for the 'obligation' of statesmen to obey the insights of irresponsible scholars and moralists,"<sup>9</sup> but this is precisely his own technique in the historical portions of his study. To elevate Sir Leoline Jenkins over Sir Edward Coke, Sir William Blackstone, James Madison, John Marshall, Henry Wheaton, and Philip Jessup reveals the very weak brief of a desperate advocate. Rubin quotes authors selectively and

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<sup>5</sup> *Id.* at 20.

<sup>6</sup> *Id.* at 32.

<sup>7</sup> *Id.* at 28.

<sup>8</sup> *Id.* at 64.

<sup>9</sup> *Id.* at 136.

misunderstands Latin whenever he encounters it. His index is frustratingly incomplete.

Rubin's desire to limit and control the scope of international law reflects his sensible opposition to non- or anti-democratic international organizations or tribunals.<sup>10</sup> Many states are not democratic, and multilateral organizations such as the United Nations necessarily reflect the self-interested views of nondemocratic governments. But it is "naive and self-defeating"<sup>11</sup> to suppose that, by disparaging the legality of the Nuremberg Tribunal or the international criminal tribunals in Yugoslavia and Rwanda,<sup>12</sup> democrats will be able to significantly constrain the international adventures of nondemocratic states.

The war in Vietnam locked a generation of American scholars into ill-considered positions on one side or the other of their youthful cultural divide. This book is a relic of that quarrel. While Rubin recognizes the distinction between law and the power to apply it,<sup>13</sup> he mistakenly supposes right and obligation to derive from authority, and not vice versa.<sup>14</sup> This confuses authority with power and privileges the transient victories of self-interested individuals over considered and long-standing provisions of international law. Rubin's claim that the law of nations should be founded on what states do, rather than what they say, vitiates his argument to restrict the jurisdiction to adjudicate violations of international law. Too much would be lost by abolishing the international law of piracy, just to vindicate American complicity in Vietnam.

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<sup>10</sup> See *id.* at 153-54.

<sup>11</sup> *Id.* at 155.

<sup>12</sup> *Id.* at 166.

<sup>13</sup> *Id.* at 112.

<sup>14</sup> *Id.* at 133-34.