

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-II-007

Decision No. LIB-II-047

Counsel for Claimant:

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Oral hearing held on November 18, 2011.

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is made under Category A of the January Referral, and is based on the alleged hostage-taking or unlawful detention of 5 U.S.C. §552(b)(6) by armed terrorists during the hijacking of Pan Am Flight 73 at Karachi International Airport in Karachi, Pakistan, on September 5, 1986.

By Proposed Decision entered May 10, 2011, the Commission denied this claim on the ground that the claimant had not met his burden of proving that he satisfied the Commission's standard for claims under Category A of the January Referral. By letter dated May 20, 2011, the claimant, through counsel, objected to the Commission's Proposed Decision and requested an oral hearing. The oral hearing was initially scheduled for July 21, 2011, but was postponed at claimant's request. On June 30, 2011,

claimant filed a "Submission on Behalf of 5 U.S.C. §552(b)(6) in Support of Objection to Proposed Decisions," which included, *inter alia*, claimant's objection brief and a Supplemental Declaration of John Ridgway." The hearing on the objection was conducted on November 18, 2011.

Claimant's fundamental contention on appeal is that the Commission should apply an interpretation of the terms "held hostage" and "unlawfully detained," as used in Category A of the January Referral, that is sufficiently broad to encompass claimant's experience on board Pan Am Flight 73. In his objection brief and during the hearing, counsel for the claimant argued, *inter alia*, that: 1) the remedial nature of this and other claims programs supports such a broad interpretation; and 2) applicable law, including that cited by the Commission in its Proposed Decision, also supports the broad interpretation requested.

In addressing these arguments, the Commission is mindful also of claimant's testimony during the hearing, which elucidated the relevant facts of the claim, and which is summarized in the paragraphs that follow.

DISCUSSION

I. Claimant's Testimony Regarding the Pan Am 73 Hijacking

During the oral hearing, claimant provided live testimony concerning his experience aboard Pan Am Flight 73. His testimony provided helpful insight into the critical period between the moment the hijackers stormed the airplane and the time claimant exited the cockpit and crossed the tarmac to the airport terminal.

Claimant testified that, as he and the other members of the flight crew prepared for take-off, one of the flight attendants came up to the cockpit and whispered in his ear,

“There is a man downstairs with a gun.” He testified that at this point, he “almost melted in [his] seat when she said that[,]” but that after he “came a little bit to [his] senses[,]” he decided to “go out and investigate this.” Not wanting to investigate without a weapon, claimant grabbed the cockpit crash axe, and exited the cockpit into the upper cabin. Seeing nothing in that area, claimant “went downstairs, sort of tip-toeing down the steps, and [he got] down to the bottom of the steps, about maybe two steps above the floor.” Claimant testified that, a short distance away, a man stood holding a “rifle” with “a big banana clip on it.” He further testified that at this point he contemplated attacking the man with the crash axe, but decided against this course of action. Asked whether he thought the man had “commandeered the entire plane[,]” claimant responded that it “was just common sense that he did”

Claimant testified that he then decided to return upstairs, where he asked the flight attendant whether there were any more gunmen. According to claimant, she responded, “There’s four more of them.” He then returned to the cockpit, where he stated that he had “a little conversation real quick” with the Captain and First Officer to decide on a course of action. Claimant testified that he said, “We better look out the escape hatch to see what’s going on.” He described how, when he looked outside, he could see the hijacker’s back at the door of the airplane, and that he had his arm around one of the flight attendants. Further, he “had the muzzle of the rifle standing above the door.” At this point, claimant “heard gunfire[, a]nd everybody ran away.” Claimant testified that he ducked back into the cockpit, told the Captain and First Officer what he had seen, and, according to claimant, “we all decided that it would be best if I just used [the escape reel], got out of the airplane, made my way back to operations, and was able to alert the

police and the authorities that there was something really horrific going on in our plane.” Claimant then proceeded to exit the cockpit through the escape hatch, and, having reached the tarmac, he “crouched down and made [his] way to the front of the airplane” There, one of the mechanics below the plane “drove [claimant] back into the terminal.” Claimant testified that, once inside the terminal, he proceeded to the operations office, where “they removed one of these bigger [ceiling] tiles, and they actually hid me up there. They boosted me up there, and I was hiding up there.” He further testified that he only emerged from the space in the ceiling when the Captain and the First Officer made it to the operations office as well.

In addition to this description of the events during the early moments of the hijacking, claimant testified that, during one of his bi-annual Pan Am training sessions, he watched an instructional video concerning what action to take in the event of a hijacking. He explained that “the first thing that we’re going to do, our responsibility to do is escape, to immobilize the airplane. . . . It was Pan Am procedures . . . and these are the procedures that we were supposed to follow.” Asked whether he “knew it was [his] duty to escape the aircraft,” claimant responded “yeah.”

It is clear from the foregoing evidence and testimony that the claimant was acting under extreme circumstances during the period from the time the hijackers boarded the plane to the time when he exited the cockpit. The central question in this claim, however, is whether, for this period of time, the claimant was “held” by the hijackers for purposes of the Commission’s standard under Category A. Claimant’s arguments in favor of an affirmative answer to this question are addressed in the discussion of this issue that follows.

II. Remedial Nature of the Libya Claims Program

Claimant argues that the “WCC [War Claims Commission, one of the Commission’s predecessor agencies] and other claims commissions have emphasized that their programs are remedial in nature; thus, their standards should be generous to claimants.” In addition, claimant notes that the International Committee of the Red Cross, whose commentary on the Fourth Geneva Convention was cited by the Commission in its Proposed Decision, has stated: “In accordance with the spirit of the Convention, the word ‘hostages’ must be understood in the widest possible sense.” *See* 4 Int’l Comm. Of the Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 230 (1958). For these reasons, claimant argues, “the terms ‘hostage’ and ‘detention’ should be construed as broadly as possible[,]” and the Commission should “reconsider” its standard for Category A claims—and particularly as it applies to his claim—in light of this broader interpretation.

The claimant is correct in noting that the nature of this claims program favors a broad interpretation of the standard for Category A claims. Indeed, as the Commission recently noted in its decision in *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-II-011, Decision No. LIB-II-105, at 6 (2012) (Final Decision), “such an interpretation is particularly appropriate given the explicit humanitarian purpose of the Claims Settlement Agreement.” Thus, as claimant correctly observes, the term ‘hostage’ can apply “to an array of factual circumstances” For this reason, the Commission has not limited such claims to persons who were directly held by physical force.

A broad interpretation of the critical terms of Category A of the January Referral, consistent with the remedial nature of the program, must, however, also be consistent

with the proper interpretation of those terms pursuant to the Commission's applicable law provisions. Considering these factors, and as set forth in the Proposed Decision in this claim, the Commission has established that in order to be eligible for compensation under Category A of the January Referral, a claimant must have been:

- (a) held illegally against his or her will;
- (b) in a particular area; and
- (c) for an extended period of time, or for shorter periods of time in circumstances in which he or she reasonably felt an imminent threat to his or her life.

The Commission has also emphasized that "being 'held' as a hostage or unlawful detainee requires, at a minimum, the elements of control or compulsion of the person." *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-II-011, Decision No. LIB-II-105, at 12, 13 (2011) (Proposed Decision).

In its Proposed Decision in this claim, the Commission held that, notwithstanding its broad requirement of compulsion of the person, the claimant failed to satisfy this standard because, as noted above, he "was [never] under the control of the hijackers for even a moment in time." That is, even applying a broad standard for hostage-taking and unlawful detention, the claimant failed to provide evidence sufficient to satisfy the first element of the Commission's standard for Category A claims, which requires that a claimant have been "held illegally against his or will." As will be discussed below, the Commission is not persuaded that the argument, testimony and evidence adduced at the hearing is sufficient to warrant a different conclusion on appeal.

III. Scope of Hostage-Taking and Unlawful Detention

Claimant argues that, contrary to the Commission's conclusion, the ordinary meaning of the terms "held" or "detained" and the Commission's precedent concerning the same suggest a broader understanding that encompasses the factual circumstances of his claim. Specifically, claimant asserts that "it is enough if freedom of action is *restricted*[" and that a finding of "constructive custody" should be sufficient to satisfy the Commission's standard. Under such an interpretation, claimant argues, his claim satisfies the first element of the Commission's standard for Category A claims.

In support of his argument, the claimant cites the Commission's precedent concerning civilian American internees under the War Claims Act of 1948, 50 U.S.C. app. § 2004 (2006), discussed at length in the Proposed Decision in this claim, and the WCC's decision in *Claim of GLADYS SLAUGHTER SAVARY*, Claim No. 87087, Precedent Opinion No. 23 (War Claims Comm'n 1951). Claimant asserts that, according to the WCC, "the term 'held' can be viewed as synonymous with the broad notions of 'custody' and 'detainment.'" In this regard, he notes that in *SAVARY*, the WCC, quoting its regulations, equated being "held" with being "captured," which in turn was defined as being "taken into actual or constructive custody . . . whether by forcible seizure and detention or by his compliance with any order . . . directing [a civilian American citizen] to restrict his freedom of movement." *Id.* at 3 (citing *Interned Civilian American Citizens Detention Benefits*, 14 Fed. Reg. 7845 (Dec. 30, 1949) (to be codified at 45 C.F.R. § 507.23)).

In addition, claimant cites an internal regulation of the WCC, promulgated in 1950, which held that civilian internee claimants

shall be presumed . . . to have been held by the Imperial Japanese Government as a prisoner, internee, hostage, or in any other capacity, when it is alleged . . . that such person was restricted in his movements or otherwise limited by action of the Imperial Japanese Government so as not to be a free person and such allegation is substantiated by official records or other competent evidence.

WCC Internal Regulation No. 13 (A)(1) (amended) (Aug. 25, 1950), *reprinted in Settlement of Claims by the Foreign Claims Settlement Commission of the United States and its Predecessors from September 14, 1949 to March 31, 1955*, at 548 (1955).

Claimant emphasizes that, under this standard, to be “held” does not require physical custody. Moreover, he argues that “this definition does not even require the loss of *complete* freedom of action. It simply requires that a claimant be ‘restricted in his movements.’”

Finally, claimant argues the plain meaning of the term “detain,” for purposes of unlawful detention, is even broader than the term “held,” which he notes was the basis for awards by the WCC, because, according to claimant, the word “‘detain’ in modern dictionary usage encompasses *any* restriction of movement (as well as custody, delay, and impediment), whereas ‘held’ tends to connote the narrower notion of keeping one under restraint.”

Apply the foregoing principles to his claim, claimant argues that, under the broad definitions of “detention” outlined above, he satisfies the Commission’s standard under Category A. In particular, claimant asserts that while he may not have been under the direct physical control of the hijackers, he was in the “constructive custody” of the hijackers because his actions were “controlled by the intimidating presence of the hijackers and his fear of being killed.” Moreover, “Mr. §552(b)(6) ‘complete freedom of action’ was assuredly limited such that he could not exit through the door or enter other

parts of the aircraft.” In addition, claimant argues that he remained under the control of the hijackers even after he exited the plane because he “was not immediately free to move where he pleased[,]” insofar as “his actions and location [were] still dictated by the proximity of the hijackers and their ability to observe the areas surround the aircraft[,]” and because he “continued to hide once he reached the Pan Am Operations office” Claimant further contends that the fact that he had to use the escape hatch to exit the plane is evidence of the fact that he was held illegally against his will.

As claimant correctly points out, and as discussed in the preceding section, the nature of this claims program and the Commission’s own precedent favors a broad interpretation of the terms “detention” and “held” for purposes of eligibility under Category A. As previously explained, therefore, consistent with the meaning of “hostage-taking” and “unlawful detention” under international law, the WCC’s precedent under the War Claims Act of 1948, and the plain meaning of the relevant terms, the question is not whether claimant was in the direct physical custody of the hijackers, but whether they exercised “control or compulsion over claimant” See §552(b) (Final Decision), *supra*, at 6-7.

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There is no question that, based on the evidence presented, claimant was forced to take evasive action in order to avoid being captured or killed by the hijackers. But it is this very fact—the very fact that he was able to move unnoticed to freedom within the minutes while the hostage situation was yet unfolding—that precludes a finding of the requisite control or compulsion. However, in light of the Commission’s standard for Category A claims, the relevant question in this case, given its particular facts, is whether claimant was *prevented* from taking evasive action by virtue of his being under the

control or compulsion of the hijackers. In this regard, claimant's experience differs in a very fundamental way from that of his fellow crew members. Unlike the Captain or First Officer, claimant remained in constant motion from the time the hijackers boarded the aircraft until he exited the cockpit via the escape hatch. Although there may have been a few moments, after returning to the cockpit, during which claimant discussed the situation unfolding onboard the aircraft with the Captain and First Officer, he appears to have remained in the cockpit just long enough to decide on a course of action, which he then pursued. Whereas the actions of the Captain and First Officer evidenced the control of the hijackers over them, that is, they were compelled under the circumstances to remain inside the cockpit—a “particular area” in which they most certainly did not wish to remain—claimant executed his plan to exit the aircraft without delay. These facts, viewed under a broad interpretation of the Commission's standard, do not implicate the level of control or compulsion—actual or constructive—over the person required for Category A claims.

As noted above, claimant argues that his “complete freedom of action” was limited in that “he could not exit through the door or enter other parts of the aircraft.” According to claimant, this inability to move about the cabin freely or exit via the main cabin door satisfies the requirement under the Commission's standard that he be “held” against his will. In support of this argument, claimant cites *SAVARY, supra*, where the WCC found that the claimant qualified for detention benefits even though she was not physically detained by her captors during the time period in question.

Claimant's reliance on *SAVARY* for this argument is misplaced, both as to law and to fact. With regard to the law, claimant's characterization of the WCC's regulation

omits an important modifier: that a person be “restricted in his movements . . . *so as not to be a free person . . .*” WCC Internal Regulation No. 13 (A)(1) (emphasis added). The test applied by the WCC, therefore, was not whether complete freedom of action was precluded, or whether the claimant was restricted in his movements to any degree whatsoever; rather, the question, more accurately described, was whether the claimant’s freedom of action was sufficiently restricted such that he or she was not a “free person.” Thus, while this standard does not require direct physical control, it still entails a level of “control or compulsion of the person,” and is therefore consistent with the Commission’s interpretation of its standard for hostage-taking and unlawful detention in this claim.

Even comparing the facts of this claim and *SAVARY*, the two cases differ significantly. In *SAVARY*, the claimant’s movements were controlled almost entirely by her captors. Although she was permitted for some time to operate her restaurant, this was only with the permission of the Japanese occupation forces. *Id.* Moreover, “she was under constant surveillance by the Japanese, who maintained a guard at both doors to the restaurant.” *Id.* In addition, “she was required to report daily to certain guards” and, at some point, was sent by the occupation forces to another location and “instructed to care for certain civilian American internees . . .” *Id.* Thus, it is clear that, in that claim, the claimant was entirely under the control of her alleged captors, despite the fact that she enjoyed some degree of movement and activity within a carefully defined physical area.

By contrast, the claimant here did not answer to the hijackers during the brief time he spent on the plane. They had no control over him as he entered the main cabin to investigate, or apparently when he rushed back upstairs and used the escape reel to exit

the cockpit. Under these circumstances, it cannot be said that claimant was "held" by the hijackers against his will.

Further, freedom of action is not precluded because one is unable to use a particular method of egress. If it were otherwise, any person fleeing the scene of a terrorist attack would be considered a hostage or detainee. Such an interpretation of the Commission's standard would render Category A largely meaningless, as it would, in effect, require only that a particular claimant be present at the scene of a given attack. This could not have been the intent of the January Referral, and in any event, the evidence before the Commission does not indicate that claimant was under the hijackers' control at any point during the ordeal.

Claimant also argues that his use of the escape hatch by itself provides evidence of his having been held hostage or unlawfully detained. According to claimant, the use of this term "demonstrates [claimant's] entrapment: 'Escape' suggests the need to use extraordinary procedures in order to remove oneself from danger." The Commission recognizes that use of the escape hatch may be an "extraordinary" method of egress; however, the use of an "escape hatch" does not necessarily mean that claimant was detained prior to his escape because it presupposes that claimant was under the hijacker's control prior to using it. As noted above, one who is fleeing danger is not necessarily held hostage or unlawfully detained. Therefore, the Commission must consider all the circumstances surrounding the incident, and particularly how and why claimant availed himself of the escape hatch, to determine whether its use is evidence of a hostage-taking or unlawful detention.

Finally, the Commission addresses claimant's argument that he was "held illegally against his or her will" between the time when he escaped the cockpit via the escape hatch through the time he spent hiding inside the Pan Am Operations office. As the Commission has previously held, a claimant under Category A must prove, among other things, that the party accused of either hostage-taking or unlawful detention intended to seize or detain the claimant. *See* 5 U.S.C. § 552(b)(6)(Final Decision), *supra*, at 9-10. While the evidence clearly establishes that the hijackers intended to seize the airplane, its passengers, and the flight crew, there is no indication by that they intended to detain any person outside the confines of the aircraft. Because this is a necessary requirement for a successful claim of hostage-taking or unlawful detention, and because the second element of the Commission's standard requires that the claimant be held "in a particular area," this argument must fail.

CONCLUSION

Based on the evidence and information submitted in this claim, the Commission again concludes that the claimant has not met his burden of proving that he has satisfied the Commission's standard for hostage-taking or unlawful detention.* In reaching this conclusion, the Commission is mindful of the compelling nature of the claimant's testimony concerning his responsibility and desire to "escape, to immobilize the airplane," recognizes the fear and apprehension he must have felt throughout the ordeal, and sympathizes with the claimant for all he endured. Nonetheless, given the particular

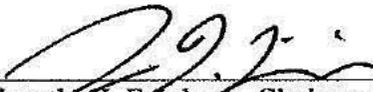
* Section 509.5(b) of the Commission's regulations provides:

The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.

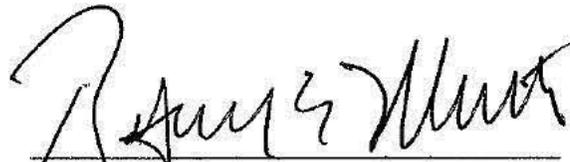
45 C.F.R. § 509.5(b) (2011).

facts of this claim, the denial set forth in the Proposed Decision must be and is hereby affirmed. This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, August 14, 2012
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Great Socialist People's
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} Decision No. LIB-II-047

Counsel for Claimant:

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} Stuart Newberger, Esq.
} Crowell & Moring LLP

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based on the hijacking of Pan Am Flight 73 at Karachi International Airport in Karachi, Pakistan, on September 5, 1986.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C) (2006).

On January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication six categories of claims of U.S. nationals against Libya. *Letter dated January 15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the*

Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission

("January Referral Letter").

The present claim is made under Category A. According to the January Referral Letter, Category A consists of

claims by U.S. nationals who were held hostage or unlawfully detained in violation of international law, provided that (1) the claimant meets the standard for such claims adopted by the Commission; (2) the claim was set forth as a claim for injury other than emotional distress alone by the claimant named in the Pending Litigation; (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission; and (4) the claimant did not receive an award pursuant to the [Secretary of State's] referral of December 11, 2008.

Id. at ¶ 3. Attachment 1 to the January Referral Letter lists the suits comprising the Pending Litigation.

The January Referral Letter, as well as a December 11, 2008 referral letter ("December Referral Letter") from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999, and on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement"), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement, barred U.S. nationals from asserting or maintaining such claims, terminated any pending suit within

the terms of the Claims Settlement Agreement, and directed the Secretary of State to establish procedures governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

On July 7, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this portion of the Libya Claims Program pursuant to the ICSA and the January Referral Letter. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

BASIS OF THE PRESENT CLAIM

On August 18, 2009, the Commission received from claimant a completed Statement of Claim and accompanying exhibits supporting the claim. Claimant states that on September 5, 1986, he was held hostage or unlawfully detained by armed hijackers on board Pan Am Flight 73 in Karachi, Pakistan. He has provided evidence of his United States nationality, both on the date of the incident and at the time of the Claims Settlement Agreement. Additionally, he has provided an extensive description of the hijacking; an excerpted copy of the complaint in the litigation against Libya to which he was a party; a copy of the Stipulation of Dismissal of that litigation; an electronic printout of a New York Times article, dated September 7, 1986, that identifies the claimant as one of the Americans involved in the incident; and a copy of an article published in the September/October 1986 issue of Pan Am Clipper, which provides details of the incident and lists the claimant as one of the members of the Pan Am Flight 73 flight crew. Lastly, the claimant states, and Commission records confirm, that he did not receive an award in a claim pursuant to the December Referral Letter.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the category of claims defined under the January Referral Letter; namely, claims of individuals who: (1) are U.S. nationals; (2) are named parties in a Pending Litigation case against Libya which has been dismissed; (3) set forth a claim for injury other than emotional distress alone in the Pending Litigation; and (4) did not receive an award pursuant to the December 11, 2008 referral letter. January Referral Letter, *supra*, ¶ 3.

Nationality

In the *Claim of* ^{5 U.S.C. §552(b)(6)}, Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that in order for the nationality requirement to have been met, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, continuously from the date the claim arose until the date of the Claims Settlement Agreement. To meet this requirement, the claimant has provided copies of his current U.S. passport and a cancelled U.S. passport issued in 1977 (expired in 1982). Based on this evidence, the Commission determines that the claim was owned by a U.S. national at the time of the incident and has been so held until the effective date of the Claims Settlement Agreement.

Pending Litigation and its Dismissal

To fall within the category of claims referred to the Commission, the claimant must also be a named party in the Pending Litigation listed in Attachment 1 to the January Referral Letter and must provide evidence that the Pending Litigation against

Libya has been dismissed. January Referral Letter, *supra*, ¶ 3. The claimant has provided an excerpted copy of the Second Amended Complaint in Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, which names him as a party. Additionally, the claimant has provided evidence that the litigation was dismissed under a Stipulation of Dismissal dated December 16, 2008. Based on this evidence, the Commission finds that the claimant was a named party in the Pending Litigation and that the Pending Litigation has been properly dismissed.

Claim for Injury Other than Emotional Distress

The January Referral Letter also requires that the claimant must have set forth a claim for injury other than emotional distress alone in the Pending Litigation. January Referral Letter, *supra*, ¶ 3. Claimant alleges in the complaint in the Pending Litigation that the incident caused him “pain, suffering and economic loss.” In addition, the claimant states causes of action for, *inter alia*, battery and assault under Counts VI and VII of the complaint. Based on this evidence, the Commission finds that the claimant has satisfied this element of his claim.

No Prior Award

Finally, the January Referral Letter requires that the claimant must not have received an award pursuant to the Department of State’s December 11, 2008 referral letter. January Referral Letter, *supra*, ¶ 3. Claimant has stated under oath in his Statement of Claim, and Commission records confirm, that he has not received an award pursuant to the December Referral Letter. Accordingly, the Commission is satisfied that the claimant has received no such award and has, therefore, met this element of his claim.

In summary, therefore, the Commission concludes that this claim is within the Commission's jurisdiction pursuant to the January Referral Letter and is entitled to adjudication on the merits.

Merits

Standard for Claims under Category A

As stated in the January Referral Letter, to be eligible for compensation, a claimant asserting a claim under Category A must meet the "standard [for claims of hostage-taking or unlawful detention in violation of international law] adopted by the Commission." January Referral Letter, *supra*, ¶ 3. In order to develop the appropriate standard for compensability, the Commission has considered—as required by its authorizing statute—the provisions of the Claims Settlement Agreement, and applicable principles of international law, justice and equity. *See* 22 U.S.C. § 1623(a)(2).

By its terms, Article I(a) of the Claims Settlement Agreement encompasses claims for personal injury, death or property loss caused by certain acts, including "hostage taking or detention" The Agreement does not provide any further definition or guidance as to what constitutes "hostage taking or detention." As noted above, the January Referral Letter uses slightly different language, namely, "held hostage or unlawfully detained." Again, there is no further definition or guidance to assist in determining what would constitute a hostage taking or unlawful detention.

The ordinary meaning of the terms is instructive. In ordinary usage, the word "hostage" means a "person held captive by another who threatens to kill or harm that person," or a "person who is given or taken into an enemy's custody." Black's Law

Dictionary (Ninth Ed.). The ordinary meaning of “detention” includes the notions of “custody,” “confinement,” and “compulsory delay.” *Id.*

Further guidance as to the meaning and usage of these terms is found in decisions of other claims programs, as well as treaties and relevant domestic legislation. For example, the War Claims Commission (WCC), one of the Commission’s predecessor agencies, addressed the meaning of what constitutes being “captured and held as an internee, hostage, or in any other capacity” in the context of civilian American internees and prisoners of war during World War II. For purposes of determining detention benefits under the War Claims Act of 1948, 50 U.S.C. app. §§ 2001-2013 (Supp. III 1950), the WCC took note of its regulations defining those eligible for compensation, under section 5(b) of the Act, for the time during which they were “*held* by the Imperial Japanese Government as a prisoner, internee, hostage, or in any other capacity” General Counsel Opinion, *Claim of GLADYS SLAUGHTER SAVARY*, Claim No. 87087, Precedent Opinion No. 23, at 3 (War Claims Comm’n 1951) (citing 50 U.S.C. app. § 2004(b)) (emphasis added). Applying this to the cases before it, the WCC limited compensation to those persons who had been “captured” by the Japanese forces, defining that term as follows:

A civilian American citizen shall be deemed to have been captured by the Imperial Japanese Government at the time when . . . he was taken into *actual or constructive custody* by such government, whether by forcible seizure and detention or by his compliance with any order . . . however published, directing him to restrict his freedom of movement.

Id. (citing *Interned Civilian American Citizens Detention Benefits*, 14 Fed. Reg. 7845 (Dec. 30, 1949) (to be codified at 45 C.F.R. § 507.23) (emphasis added).

The WCC held that “[c]ustody implies restraint and may or may not imply physical force sufficient to restrain depending on the circumstances.” *Id.* at 4. Noting that the claimant

had not been taken into actual custody, the WCC further held that “[c]onstructive custody arises only when restraint or custody of some character is exercised.” *Id.*

In another opinion, this time addressing benefits for prisoners of war under § 6 of the War Claims Act, the WCC held that the claimant could not claim compensation for being “held as a prisoner of war” during a period in which he had escaped from captivity and was “eluding recapture” because he had “placed himself beyond the immediate physical control of the detaining power.” General Counsel Opinion, *Claim of RICHARD CHESTER KLOSINKSI*, Claim No. 1414, Precedent Opinion No. 13, at 2 (War Claims Comm’n 1951).

Only three years prior to the issuance of the WCC opinions cited above, one of the Nuremberg Military Tribunals itself provided a definition of “hostages.” In *United States v. List* (“*The Hostage Case*”), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, at 757, 1249 (1950), the Tribunal stated: “For the purposes of this opinion the term “hostages” will be considered as those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population”

More recently, the United Nations Compensation Commission (“UNCC”), the body established to determine and pay compensation for losses resulting from Iraq’s 1990 invasion and occupation of Kuwait, developed a standard to apply to the claims before it. The UNCC determined that a valid claim for hostage taking or illegal detention was one where the individual established that he or she was “taken hostage or illegally detained for more than three days, *or* for a shorter period in circumstances indicating an imminent threat to his or her life[.]” *Decision taken by the Governing Council of the United*

Nations Compensation Commission during its second session, at the 15th meeting, held on 18 October 1991: Personal Injury and Mental Pain and Anguish, S/AC.26/1991/3, Oct. 23, 1991 (emphasis added). The UNCC defined detention as “the holding of persons by force in a particular location” *Id.*

Various international conventions have also addressed the issue of hostage-taking. Most notable among these is the International Convention Against the Taking of Hostages, which defines hostage-taking as the offense committed by

[a]ny person who seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party, namely, a State, an international organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of [that other person.]

International Convention Against the Taking of Hostages art. 1, Dec. 18, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205 (“Hostages Convention”).

In enacting the Hostage Taking Act of 1984, which implemented the Hostages Convention within the United States,¹ the U.S. Congress, essentially adopting the language of the Hostages Convention, defined hostage taking as the offense committed by any person who

whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so[.]

18 U.S.C. §1203(a) (2006).

The Commission also takes notice of the definition of “hostages” given in the official commentary of the Fourth Geneva Convention prepared by the International

¹ H.R. Rep. No. 98-1159, at 418 (1984) (Conf. Rep.), as reprinted in 1984 U.S.C.C.A.N. 3710, 3714; see also Act for the Prevention and Punishment of the Crime of Hostage Taking, Pub. L. No. 98-473, secs. 2001-2003, 98 Stat. 2186 (1984) (codified as amended at 18 U.S.C. § 1203 (2006)).

Committee of the Red Cross (“ICRC”), which states that “hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders . . .” 4 Int’l Comm. Of the Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 229 (1958). The ICRC has set forth a similar definition—cited by at least one international tribunal—in its official commentary on Additional Protocol II of the Geneva Conventions. *See Prosecutor v. Sesay*, Case No. SCSL-04-15-A, Judgment, ¶ 598 (Oct. 26, 2009) (citing Int’l Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 1375 (1987) (“[T]he ICRC Commentary on Additional Protocol II defines a hostage as ‘persons who are in the power of a party to the conflict or its agent, willingly or unwillingly.’”).

Apart from the definition of “hostages,” other cases have also helped elucidate the meaning of “illegal detention.” *See in re Underhill* (U.S. v. Venez.), 9 R. Int’l Arb. Awards 155, 160 (Mixed Claims Comm’n 1903) (“[D]etention takes place when a person is prevented from leaving a certain place, be it a house, town, province, country, or whatever else determined upon”); *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 234 (Mar. 3, 2000) (“The unlawful detention of civilians . . . means unlawfully depriving a group of discriminated civilians of their freedom.”).

Considering all of these sources, the Commission concludes that there are certain common elements to the crimes of hostage-taking and illegal detention. For hostage taking, these common elements include the holding or confinement of a person against his or her will, for the purpose of forcing a third party to take or abstain from an action.

Illegal detention, for its part, does not include this added element of coercing a third party, but it does include the element of compulsion – whether it be in the form of detention or delay -- of the person.

Based upon the foregoing, the Commission finds that in order for a claim to be considered compensable under the Claims Settlement Agreement and Category A of the January Referral Letter, a claimant must have been:

- (a) held illegally against his or her will;
- (b) in a particular area; and
- (c) for an extended period of time, or for shorter periods of time in circumstances in which he or she reasonably felt an imminent threat to his or her life.

Application of Standard to this Claim

According to his Statement of Claim and accompanying documents, on September 5, 1986, claimant was the flight engineer on Pan Am Flight 73 when the aircraft was attacked and taken over by four heavily armed hijackers while waiting to take off from Karachi, Pakistan, en route to Frankfurt, West Germany. Claimant has provided an extensive narrative, in affidavit form, recounting his experience after learning that Flight 73 had been hijacked. He describes how, after completing his pre-flight system checks and returning to the cockpit, a flight attendant notified him that a man with a gun was aboard the plane. Claimant further describes how he then took the “cockpit crash axe,” exited the cockpit and entered the upper lounge of the 747. Not seeing any gunmen in the upper lounge, he then descended the spiral staircase into the lower passenger cabin until he saw one of the gunmen standing approximately six or seven feet from him on the floor below brandishing a semi-automatic machine gun.

The claimant states that he believed that the gunman was ordering first-class passengers into the economy section of the plane. He recalls that he considered subduing the hijacker with the axe, but decided against this course of action given that passengers were positioned between him and the gunman, because he was not sure whether this was the only hijacker, and because he realized that he would be shot by the hijacker if he did so. The claimant states that he “stayed at the bottom of the stairs for only a few seconds” before he “slowly backed up the staircase to the upper cabin.” He also states that the hijacker did not see him.

On the way from the top of the staircase to the cockpit door, the claimant states that he passed a flight attendant who told him that there were four hijackers on the plane. Claimant states that “[a]fter speaking to the flight attendant, I returned to the cockpit, shut the door, and told [the two other flight crew members] that there was a man carrying a semi-automatic machine gun on the plane.” He then suggested opening the escape hatch to look out because the vantage point from the hatch was better than that from the cockpit windows. The claimant states that he did so, and saw a hijacker at the top of the boarding stairs holding a gun to the neck of a flight attendant. He then heard a burst of gunfire. Claimant describes how he discussed the situation with the other crew members, and that the crew started to communicate with the tower and Pan Am operations “to see what was happening.”

At this point, claimant states that he followed Pan Am’s emergency procedures and climbed through the escape hatch. After descending the side of the plane, claimant ran to the nose of the aircraft where he encountered two members of the ground crew who were hiding under the nose of the plane. Claimant states that they advised him to

remove his tie and epaulettes so that he would not be recognized as a member of the flight crew. In claimant's words, "I then made my way to the Operations Office at the airport terminal." An article in the airline's magazine, the Pan Am Clipper, submitted by the claimant, describes how the three crew members in the cockpit had executed a "daring, by-the-book escape."

Given these facts as alleged, the central question in this claim is whether the claimant has satisfied the elements of the Commission's standard of compensability for a claim of hostage-taking or illegal detention. Specifically, the precise question raised by this claim is whether the claimant was ever held against his will – as required by the Commission's standard – during this ordeal.

Considering all of the evidence here in the light most favorable to the claimant, the Commission concludes that the claimant was never under the physical control of the hijackers; indeed, from the particular facts of this claim, the Commission cannot conclude that the claimant was under the control of the hijackers for even a moment in time. He descended and ascended the plane's internal spiral stairway, had a brief conversation with a flight attendant on the upper floor, and exited and entered the cockpit without being seen by a hijacker. He was able to close the cockpit door, release the escape hatch, and escape to safety, again with the hijackers unaware of his presence or movements.

Claimant's actions, and the actions of the other two members of the flight crew, were undoubtedly crucial to foiling the hijackers' plans insofar as the plane remained grounded without a flight crew. At the same time, it is clear that because the claimant was able to execute these actions without delay (the later actions asserted to be in conformity with airline emergency procedures), it cannot be concluded that claimant was

held illegally against his will, as required by the Commission's standard for Category A claims under the January Referral Letter.

In conclusion, based on the evidence and information submitted in this claim, and in light of the authorities discussed above, the Commission finds that the claimant has not met the burden of proof in this claim in that he has not satisfied the first element of the Commission's standard for compensability by demonstrating that he was held illegally against his will. Accordingly, this claim must be, and hereby is, denied.

The Commission finds it unnecessary to make determinations with respect to other elements of this claim.

Dated at Washington, DC, May 10, 2011
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2010).