

**FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20579**

In the Matter of the Claim of	}	
	}	
	}	
5 U.S.C. §552(b)(6)	}	Claim No. IRQ-I-023
	}	
	}	Decision No. IRQ-I-021
Against the Republic of Iraq	}	

Counsel for Claimant:

Daniel Wolf, Esq.
Law Offices of Daniel Wolf

FINAL DECISION

Claimant objects to the Commission’s Proposed Decision denying his claim against the Republic of Iraq (“Iraq”). In that decision, the Commission concluded that Claimant had failed to meet his burden to prove that Iraqi officials had sexually assaulted him. He was thus unable to show that Iraq had knowingly inflicted upon him a “serious personal injury,” as required by the State Department’s referral letter authorizing the Commission to hear claims in this program.¹ On objection, Claimant has submitted additional evidence and argument in support of his claim. With this newly submitted evidence, Claimant has now met his burden to show that Iraqi officials sexually assaulted him. Because Claimant has thus shown that Iraq knowingly inflicted upon him a “serious personal injury,” and because Claimant meets all other requirements of eligibility, we

¹ See Letter dated November 14, 2012, from the Honorable Harold Hongju Koh, Legal Adviser, Department of State, to the Honorable Timothy J. Feighery, Chairman, Foreign Claims Settlement Commission (“2012 Referral” or “Referral”).

reverse the denial of the claim and conclude that he is entitled to an award of \$1,000,000.00 in compensation.

BACKGROUND

Claimant brought a claim against Iraq based on injuries he suffered as a result of being held hostage in Iraq in August and September 1990. He sought compensation, in addition to that paid to him by the United States Department of State for his experience as a hostage, based primarily on a claim that Iraqi security guards sexually assaulted him in a Baghdad hospital where he was being treated for dysentery. In support of his claim, Claimant submitted, *inter alia*, two of his own sworn statements describing his ordeal (one dated August 2004 from his federal court litigation and the other prepared specifically for this Commission in June 2013); a sworn statement from his brother describing Claimant's recounting to him of the alleged sexual assault after Claimant's return home from Iraq; a letter from Claimant's treating physician, dated April 2007, detailing Claimant's medical condition after his ordeal; a sworn statement from Claimant's wife describing Claimant's condition after his release from the hospital; and a 2013 sworn statement from Syed Ali Haider Abidi, an imam at a mosque Claimant attended in the U.S. In a Proposed Decision entered on July 24, 2014, the Commission denied the claim on the record then before it, finding that Claimant had failed to meet his burden to prove that he was sexually assaulted. *See* Claim No. IRQ-I-023, Decision No. IRQ-I-021 (2014) ("Proposed Decision").

On August 8, 2014, Claimant filed a notice of objection and requested an oral hearing. On December 1, 2014, Claimant submitted a brief containing further evidence and argument in support of his objection. The Commission held a hearing on the

objection on December 16, 2014. At the hearing, Claimant and his brother provided sworn testimony, and Claimant's counsel provided further legal argument in support of his claim.

DISCUSSION

To decide this claim, the Commission must determine whether Claimant's evidence, which now includes the newly submitted evidence, satisfies his burden to prove the factual allegations of his claim—namely, whether Claimant was subjected to a sexual assault. Stated differently, the question on objection is whether the additional evidence—consisting primarily of the live testimony from Claimant and his brother—sufficiently adds to the record such that Claimant has carried his burden of proving his claim. We conclude that it does.

I. Evidence

The essence of Claimant's argument focuses on the type and quantity of evidence typically available in sexual assault claims. He asserts that, in cases of sexual assault, documentary evidence and witness testimony is often lacking, and the Commission should consider this in deciding his claim. Further, Claimant submits that the live testimony that he and his brother provided at the oral hearing overcomes the earlier evidentiary shortcomings and provides sufficient explanation as to why he is unable to provide any more relevant evidence.

In its Proposed Decision, the Commission concluded, based on the evidence put forward at that time, that Claimant had not met his burden to show that he was sexually assaulted. In particular, the Commission noted that only two of the documents submitted—Claimant's 2013 statement and the statement from his brother—made any

reference to a sexual assault, and that both of these were sworn 23 years after the alleged incident. Moreover, the Commission had not had the opportunity to question the declarants to determine whether they were telling the truth. The Proposed Decision further noted that Claimant had presented no medical evidence documenting injuries resulting from the assault, and the letter from his treating physician contained no evidence to suggest that Claimant suffered any injuries beyond the mental and emotional harm of having been held hostage.

On the record then before it, the Commission thus concluded that Claimant had not satisfied his burden of proving that he was sexually assaulted during his captivity in Iraq. The Proposed Decision did not dispute that the alleged sexual assault would, if proven, have caused a “serious personal injury” sufficient in severity to constitute a “special circumstance warranting additional compensation,” but simply explained that, even under the “quite low” evidentiary burden for a sexual assault claim, “the evidence Claimant submitted is insufficient to show that Iraqi officials did in fact sexually assault him.” *See Proposed Decision at 13.*

After the Commission issued its Proposed Decision, Claimant provided live, compelling testimony on objection regarding his experience in Iraq and responded forthrightly to the Commission’s questions. As explained below, with this new evidence, the Commission finds that Claimant has met his burden to prove the factual allegations of his claim. Because the live testimony presented at the hearing is essential to our decision to reverse the denial in the Proposed Decision, we first detail that testimony. We then apply the standard for sexual abuse claims in this program to the facts derived from the testimony and other evidence.

Live Testimony: At the hearing, Claimant testified that he, along with his wife and son, were traveling in Iraq on a tour visiting Shiite holy sites when Iraq invaded Kuwait on August 2, 1990. Claimant stated that, on the day of the invasion, their tour leader informed them that U.S. citizens were not being allowed to leave the country, and he attempted to take them by bus across the border into Jordan. However, they were turned around by border guards who saw their U.S. passports. Claimant testified that two military guards boarded the bus and forced them to drive to Baghdad, where they were taken to a hotel and placed under armed guard. The guards forced them to stay in their rooms except when they were escorted to the cafeteria for meals.

Claimant testified that he did not leave the hotel for the first two weeks of his captivity. At that point, however, he became very ill after running out of medication for blood pressure and diabetes. He also claimed to have contracted food poisoning. Claimant testified that his wife told the Iraqi guards that he was in danger of dying and that they must take him to the hospital. He stated that he was then taken to the hospital, where he received treatment. His wife accompanied him. According to Claimant, he was so sick that he was unable to speak. He testified that his wife remained with him until the evening but was required to leave at that time.

After Claimant's wife left the hospital, a nurse entered his room to change his bedsheets. Claimant testified that, at that point, the nurse noticed distinctive religious markings on Claimant's back; she then yelled out that Claimant was a Shiite Muslim and cursed at him. Claimant stated that the nurse then walked outside the room to two Iraqi guards who were standing at the door, and that the two guards then entered the room.

The guards saw the markings and, according to Claimant, began to slap him and spit on his face as Claimant pleaded with them to stop.

Claimant testified that one of the guards took a stick and “put it between [Claimant’s] legs and . . . took the stick upwards.” He stated that this was very painful, and he again pleaded with the guards to stop. Instead, they turned him over, while one of the guards sat on his back and the other sodomized him with a stick. Claimant testified that this assault lasted three to four minutes, during which time he was yelling and screaming at the guards to stop. Eventually, a hospital worker who had heard the screams entered the room, said something in Arabic to the guards, patted them on the arm, and then left. Afterward, the worker told Claimant that he was also a Shiite Muslim; Claimant stated that he believed the worker had intervened on his behalf. Claimant testified that the worker remained in the room for about five to ten minutes and that he brought him water to drink. After the worker left, Claimant feared that the guards would return and “do something more[,]” and that throughout the evening he was crying and was “very sad, very depressed,” and “very scared.”

The following afternoon, Claimant was told he could leave, and the security guards came and took him back to the hotel. Claimant testified that, when he returned to the hotel, he was very sick and unable to walk such that his wife and son had to assist him. He remained in the hotel for another two weeks, during which time he continued to feel a great deal of pain. He testified that he did not tell his wife what had happened at the hospital because he thought it was not a “good thing” to do so when she was already crying and emotionally fragile, and he did not want to upset her further. He was

eventually released—along with women and children under 12—on September 2, 1990, after a visit to Iraq by the Reverend Jesse Jackson.

Claimant testified that even after returning home he did not tell his wife about the sexual assault; indeed, to this day, he has not discussed it with her out of fear that she would tell other people.² He claimed not to have told anyone except his brother because, according to Claimant, this type of experience is a very “shameful thing in [his] religion” and retelling the story is distressing to him. Counsel asked why Claimant decided to discuss the sexual assault in these proceedings; he responded that, although he originally wanted to withdraw the claim, his brother had encouraged him to proceed with it. With regard to the original 2002 lawsuit that Claimant had brought against Iraq in federal court, Claimant recalled that that was only about hostage-taking; thus, in the declaration that he prepared for that lawsuit, he did not discuss the sexual assault, again because he felt it to be a very “shameful thing.” Indeed, he testified that he did not even mention it to his counsel at that time.

During the hearing, one of the Commissioners asked Claimant what made him change his mind and share the incident with the Commission; he responded that he changed his mind after speaking with his brother, and in any event, he was not confident that he could prove what had happened to him.

The Commission also heard the testimony of ^{5 U.S.C. §552(b)(6)}, Claimant’s younger brother and allegedly the only person with whom Claimant had shared the story of his sexual assault prior to these proceedings. ^{5 U.S.C. §552(b)(6)} testified that, prior to the incident, Claimant was always a happy person, was always talking, and was very

² Claimant’s wife was not present at the oral hearing. He claimed to have told her that he was appearing before the Commission to testify in support of a claim for additional compensation based on lack of medicine and pain and suffering in Iraq, not on a sexual assault.

religious, and that the two of them would go to the religious center together (both are Shiite Muslims). He recalled that Claimant had gone with his wife and son to Iraq in 1990 with a group as part of a religious pilgrimage to visit the holy cities of Karbala and Najaf in Iraq, and that Claimant returned on September 3 or 4, 1990 after being trapped in Iraq for several weeks.

^{5 U.S.C.}
^{§552(b)(6)} testified that he met with Claimant the same day he returned to the United States from Iraq. At that time, Claimant “was very weak, tired, shocked, and [Mr.

^{5 U.S.C.}
^{§552(b)(6)} observ[ed] all signs of depression on his face. He was not talking to anybody”

^{5 U.S.C.}
^{§552(b)(6)} stayed with the Claimant for a couple of hours and then had occasion to visit with him every other day for the next two weeks. He testified that, during these visits, Claimant “look[ed] like [an] entirely different person[.]” from the one he knew before the Iraq ordeal. He felt that Claimant exhibited signs of depression and that he appeared “humiliated” and “shocked.” He added that Claimant “didn’t want[.] to say anything” He explained that visiting the holy sites in Iraq is “the greatest blessing for a person and a person usually will be very happy after performing the visit to the holy shrine” His brother, however, did not appear to be happy.

During those first two weeks, ^{5 U.S.C.}
^{§552(b)(6)} asked Claimant nearly every day what had happened to him in Iraq and why he was so depressed. Claimant repeatedly refused to say. ^{5 U.S.C.}
^{§552(b)(6)} testified that after about two weeks, however, Claimant finally told him

what had happened—that “he was raped by Saddam guards.” The details of this recounting are consistent with Claimant’s own testimony. According to ^{5 U.S.C.}
^{§552(b)(6)} Claimant told him that he had been very sick and was moved to the hospital. While he was there, the nurse was changing his dressing and noticed the religious markings on his

chest and back; when she saw this, she called to the guards and said ““Look at this guy, he’s a Shiite!”” The nurse also hurled an Arabic curse at him. ^{5 U.S.C. §552(b)(6)} testified that Claimant then stated that the two guards entered the room and “start[ed] hitting [Claimant] with their stick.” He said that the guards were “spitting on his face, hitting him, and there was a time they put the stick in between his leg[s], pulling it . . . upwards, and it hurt his testicles very bad.” Claimant told ^{5 U.S.C. §552(b)(6)} that this continued for two to three minutes until one of the guards turned Claimant on his back and sodomized him with a stick. ^{5 U.S.C. §552(b)(6)} testified that Claimant told him this was very painful, that he was crying, and that he pleaded with the guards to stop, telling them he was a Muslim and that he had only come to Iraq to visit the shrine. Claimant told ^{5 U.S.C. §552(b)(6)} that the guards continued to curse him and call him a Shiite. The assault continued for about three to four minutes until a hospital worker entered the room and said something to the guards in Arabic, at which point they left the room.

^{5 U.S.C. §552(b)(6)} testified that when Claimant told him this story, he appeared at times “very angry,” other times “silent,” and that he seemed “humiliated” and “degraded” and was crying throughout. ^{5 U.S.C. §552(b)(6)} told his brother that he would not discuss the matter with anybody, not even their siblings. He testified that Claimant appeared to be blaming himself for what had happened and that he felt as if he were a “guilty person.” On this point, ^{5 U.S.C. §552(b)(6)} explained that when a Shiite Muslim visits the holy shrines in Karbala and Najaf, this is considered a great blessing, and that if somebody goes there and experiences what Claimant experienced, the person will usually believe that they have done something wrong and are being punished by God. ^{5 U.S.C. §552(b)(6)} assured Claimant, however, that he had not committed any sin and should not feel guilty. He encouraged

Claimant to continue with his life as normal, and until 1995 they did not discuss the matter further.

According to ^{5 U.S.C.} §552(b)(6), Claimant's emotional state for the next five or six years after the incident was "very bad[,] and he was quiet and did not talk much with other people. In 1995, their elder brother died, and while they were at the funeral, ^{5 U.S.C.} §552(b)(6) recommended that they go and speak with Syed Ali Haider Abidi, an imam with whom he was close friends, in the hopes that perhaps he could recommend to Claimant some "religious prayers" to "improve his life condition" ^{5 U.S.C.} §552(b)(6) told him about his brother's hostage-taking in Iraq, but did not tell him about the alleged sexual assault. Mr. Abidi agreed to speak with Claimant. ^{5 U.S.C.} §552(b)(6) testified that he took Claimant to the mosque to speak with Mr. Abidi many times and that the imam spent a great deal of time talking with Claimant. ^{5 U.S.C.} §552(b)(6) further testified that he eventually noticed "a little bit [of] improvement in [Claimant's] life[,] although he was still not the same person he had been before 1990, and was not even as close to his own wife and children as he had been.

^{5 U.S.C.} §552(b)(6) testified that between 1995 and 2002 he never spoke with Claimant about the alleged sexual assault and never mentioned it to anyone else. Although his testimony was not explicit about the period after 2002, the clear implication was that it was not until 2013 that ^{5 U.S.C.} §552(b)(6) first mentioned the sexual assault to anyone else.³ In March or April of that year, Claimant called him and mentioned that he was going to file a claim, but that he would not talk about that "shameful event." After Claimant subsequently decided to withdraw the claim out of fear that the entire community would

³ On direct examination, counsel asked ^{5 U.S.C.} §552(b)(6) : "[B]etween 1995 and . . . 2002, did you ever talk to your brother again about the sexual assault that occurred?" ^{5 U.S.C.} §552(b)(6) responded "No, no." A few moments later, counsel asked, "Did there come a time when you did in fact have a discussion, a second discussion, with your brother about the sexual assault?" ^{5 U.S.C.} §552(b)(6) responded, "Yes, this was in March or April of 2013."

find out, ^{5 U.S.C.} §552(b)(6) offered him encouragement. He told Claimant that discussing the incident with his attorney or with a court is not prohibited under their religion and that he must “fight back for [his] justice” ^{5 U.S.C.} §552(b)(6) offered to speak with Claimant’s attorney about the matter, and, with Claimant’s permission, he relayed the story of Claimant’s alleged sexual assault in two different conversations in 2013.

During the oral hearing, the Commission asked ^{5 U.S.C.} §552(b)(6) whether Claimant had ever raised the issue of the sexual assault in his federal court action (which was filed in 2002). He responded that it was his understanding that Claimant had not, and that in fact they did not even discuss the matter between themselves. The Commission asked what was different about this claim under the 2012 Referral; ^{5 U.S.C.} §552(b)(6) testified that the Claimant simply did not want to discuss it, and indeed had resisted ever mentioning it at all until March 2013 when he told his brother that he “didn’t need to keep silent.” Mr. ^{5 U.S.C.} §552(b)(6) also noted that, prior to 2013, he had not discussed with Claimant his belief that sharing the story of his alleged sexual assault, under these circumstances, was not wrong.

Sexual Assault Analysis: With this new evidence, Claimant has met his burden of proving the factual allegations of his claim. As the Commission has previously noted, claims of sexual assault present unique evidentiary problems. *See* Claim No. IRQ-I-009, Decision No. IRQ-I-004, at 10-11 (Proposed Decision) (2014). For one, the victim will often be the only witness to the incident other than the perpetrator(s). *Y. v. Slovenia*, App. No. 41107/10 (Eur. Ct. H.R. May 28, 2015) (Yudkivska, J., partly dissenting), *available at* <http://hudoc.echr.coe.int/eng?i=001-154728>. In many cases, there may be no contemporaneous medical evidence, either because the victim was too ashamed to seek medical treatment or, as was the case during the Iraqi occupation of Kuwait, because

medical treatment was not available in the immediate aftermath of the assault. See U.N. Comp. Comm'n Governing Council, *Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims)* (UNCC Serious Personal Injury or Death Report), at 35, 37, U.N. Doc. S/AC.26/1994/1 (May 26, 1994). Not surprisingly, victims of sexual assault are often very reluctant to share the details of their experience. *Report of the Panel of Experts Appointed to Assist the United Nations Compensation Commission in Matters Concerning Compensation for Mental Pain and Anguish*, attached as Annex VI to the UNCC's *Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individual Claims for Damages up to US\$100,000 (Category "C" Claims)* ("UNCC Mental Pain and Anguish Report"), S/AC.26/1994/3 at 262 (Dec. 21, 1994); Special Rapporteur of the Commission on Human Rights, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation* ("Kälin Report"), ¶ 111, U.N. Doc. E/CN.4/1992/26 (Jan. 16, 1992) (by Walter Kälin); U.N. High Commissioner for Human Rights, *Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), at 21, U.N. Doc. HR/P/PT/8/Rev.1 (Aug. 9, 1999).⁴ Indeed, some victims of sexual assault may not have shared their experience with their own spouse, let alone other family members. Office of the Prosecutor, Int'l Criminal Tribunal for Rwanda, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions* 22, 38, 44 (2014) ("ICTR Best Practices Manual"); UNCC Mental Pain and Anguish Report, *supra*, at 262.

⁴ Even where an individual does share what happened, "[i]t is often only on the second or even third visit, if the contact made has been empathic and sensitive to the person's culture and personality, that more of the story will come out" Istanbul Protocol, *supra*, at 21.

Social and cultural factors must also be considered when assessing claims of sexual assault. For instance, in some cultures or societies, discussion of sexual matters is considered taboo. *See* Istanbul Protocol, *supra*, para. 149; ICTR Best Practices Manual, *supra*, para. 115. In some cases, especially for males, being the victim of a sexual assault may engender severe social stigma. *See* ICTR Best Practices Manual, *supra*, para. 39, 114. Such individuals “may feel irredeemably stigmatized and tainted in [their] moral, religious, social or psychological integrity.” Istanbul Protocol, *supra*, para. 149.

In light of these considerations, the Commission reiterates that the “evidentiary burden for a sexual assault claim has generally been quite low.” Claim No. IRQ-I-009, *supra*, at 10. The use of a standard of evidence that relies primarily on the victim’s testimony is further justified in this program by the fact that, as the Commission has previously noted, Iraqi forces are known to have engaged in widespread rape during the occupation of Kuwait, the very period during which all of the claimants in this program were held hostage. *See* Claim No. IRQ-I-009, *supra*, at 11 (citing Kälin Report, *supra*, at 28-31; UNCC Serious Personal Injury or Death Report, *supra*, at 36-37); *Interim Report to the Secretary-General by the United Nations Mission Led by Mr. Abdulrahim A. Farah, Former Under-Secretary-General, Assessing the Losses of Life Incurred During the Iraqi Occupation of Kuwait, as Well as Iraqi Practices Against the Civilian Population in Kuwait*, at 8 (1991), transmitted by Letter from the Secretary-General, U.N. Doc. S/22536 (Apr. 29, 1991). Although Claimant was not in occupied Kuwait and we do not know whether the Iraqi guards in the hospital were connected in any way with the Iraqi occupying forces, the facts Claimant and his brother recount here are consistent with the well-documented history of Saddam Hussein’s regime persecuting Shiite

Muslims, a group to which Claimant belonged. See U.S. Dep't of State, *Iraq – Country Report on Human Rights Practices* (Feb. 23, 2000), <http://www.state.gov/j/drl/rls/hrrpt/1999/410.htm>.

Nevertheless, in its Proposed Decision, the Commission found insufficient evidentiary support for Claimants' allegations, noting that only two of the declarations submitted in support of the claim made reference to any sexual assault—Claimant's Supplemental Declaration and his brother's Declaration—and that both of these were sworn only in 2013. In this respect, the Commission noted that where a claim relies heavily on written statements, certain factors must be considered in determining how much weight to place on such statements. See Proposed Decision, *supra*, at 13-14. These include the length of time between the incident and the statement, whether the declarant is a party interested in the outcome of the proceedings or has a special relationship with the Claimant, and whether there has been an opportunity for cross-examination. *Id.* (internal citations omitted). At the time of the Proposed Decision, all of these factors weighed against the Commission relying heavily on those two declarations. For one, they were sworn 23 years after the alleged incident. *Id.* at 14. Moreover, the one declaration not from Claimant himself was from his brother, clearly a person with a special relationship to the Claimant. *Id.* Finally, at that point in the proceedings, the Commission had not subjected either declarant to any questioning. *Id.* Under these circumstances, the Commission concluded that these two declarations were insufficient to meet Claimant's evidentiary burden.

During the oral hearing, the Commission had the opportunity to hear live testimony from both Claimant and his brother, and to subject them to direct questioning.

Both witnesses provided sincere, credible testimony, and offered a detailed account of what happened to Claimant while in Iraq (⁵ U.S.C. §552(b)(6) presenting the story as told to him by his brother). The details in these accounts were consistent with each other and were not contradicted by any of the other declarations, such as Claimant's 2004 declaration, the 2013 declaration from Claimant's wife, and the 2013 declaration from the imam. Both witnesses answered the Commission's questions during the hearing in a forthright manner. This oral testimony thus helps buttress the declarations of Claimant and his brother. *See id.* (noting that where there has been an opportunity for cross-examination, "live, compelling testimony by the claimant can do much to support a claim." (citing Claim No. LIB-I-007, Decision No. LIB-I-024 (2011) (Final Decision))).

There is also other circumstantial evidence in support of the claim that can now be viewed in light of the oral testimony.⁵ For instance, Claimant's wife stated in her declaration that Claimant returned from the hospital "in something of a state of shock" and that he "threw his clothes into the garbage and told [her] not to touch them." She stated that he "did not want to talk about anything . . . [,] had great difficulty sleeping[,] and . . . would frequently wake up to horrifying nightmares that would cause him to scream out loud." This behavior allegedly continued after they returned home, and Claimant was prescribed Xanax to calm his anxiety. ⁵ U.S.C. §552(b)(6) also indicates that Claimant refused to speak about his hostage experience or seek counseling and that he became socially withdrawn. For his part, Mr. Abidi, the imam, echoed the assertion that Claimant had become withdrawn after his experience in Iraq, and that when he counseled him in 1995, the trauma was apparent. Mr. Abidi added that when Claimant spoke about

⁵ As the Commission noted in the Proposed Decision, in sexual assault claims, "circumstantial evidence may be used to prove the allegations." Proposed Decision, *supra*, at 15.

his experience in Iraq, “he did so in very general terms – stating only that he had been abused and insulted by the Iraqi authorities on account of his Shiite faith.”

While none of these observations are conclusive proof that Claimant was raped in Iraq, they are consistent with his claim, as they provide some evidence that he suffered the shame and psychological trauma that is commonly associated with sexual assault. Such trauma may include post-traumatic stress disorder (PTSD), ICTR Best Practices Manual, *supra*, para. 69; Istanbul Protocol, *supra*, paras. 231, 277, and indeed, Claimant’s physician diagnosed him with PTSD in 2007—apparently attributed to his experience in Iraq—long before the commencement of this claims program.⁶

In adjudicating claims of sexual assault such as this, the Commission must balance the need for substantiating evidence with the understandable reluctance of victims to discuss incidents of rape or even to seek medical assistance. *Cf. Partial Award: Western Front, Aerial Bombardment and Related Claims - Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26*, 126 R.I.A.A. 291, 323 (Eritrea-Ethiopia Claims Commission 2005) (“It is the task of the Commission . . . to balance the obvious difficulties posed by third-party and interview testimony against the natural inclination of victims (and even witnesses) not to speak publicly about rape.”). Nothing, of course, diminishes the requirement that Claimant “have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity . . . of [his] claim.” 45 C.F.R. § 509.5(b) (2014). Nevertheless, the Commission concludes that, in light of the lower evidentiary hurdle for sexual assault claims, and

⁶ The Commission is not alone in allowing claims of sexual assault where a claimant was initially reluctant to admit to a doctor that he or she had been raped. *See, e.g., Rosendo Cantú v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter.-Am. Ct. H.R. (ser. C) No. 216, ¶ 95 (Aug. 31, 2010).

considering the fact that Claimant has presented compelling and credible testimonial evidence—evidence that the Commission was able to test through direct questioning—Claimant has proven to the Commission’s satisfaction that he was the victim of a sexual assault.

Claimant has therefore demonstrated that he suffered a “serious personal injury” that was “knowingly inflicted” by Iraq. The Commission further finds that given the nature of the specific acts committed by Iraq giving rise to Claimant’s injury, the severity of his serious personal injury constitutes a “special circumstance warranting additional compensation.” *See* Claim No. IRQ-I-003, Decision No. IRQ-I-006 (Proposed Decision), at 11.

II. Compensation

The Commission has previously held in this program that in determining the appropriate level of compensation under the 2012 Referral, the Commission will consider, in addition to the State Department’s recommendation, such factors as the severity of the initial injury or injuries; the number and type of injuries suffered; whether the claimant was hospitalized as a result of his or her injuries, and if so, how long (including all relevant periods of hospitalization in the years since the incident); the number and type of any subsequent surgical procedures; the degree of permanent impairment, taking into account any disability ratings, if available; the impact of the injury or injuries on claimant’s daily activities; the nature and extent of any disfigurement to the claimant’s outward appearance; whether the claimant witnessed the intentional infliction of serious harm on his or her spouse, child or parent, or close friends or

colleagues; and the seriousness of the degree of misconduct on the part of Iraq. *See* Claim No. IRQ-I-001, Decision No. IRQ-I-005, at 22 (2014) (Proposed Decision).

Claimant argues that, if the Commission finds his claim to be compensable, it should award him \$1.5 million, the maximum amount recommended by the State Department in this program, or, “in the alternative, an amount not less than \$1.25 million.” He makes two arguments as to why the Commission should award him the State Department’s recommended maximum: (1) if the State Department had not recommended any maximum, he would be entitled to an award of more than \$1.5 million, and the Commission should interpret the State Department’s recommended maximum as simply establishing a \$1.5 million cap for those claimants (like him) who would be entitled to more than that amount, and (2) even if, as the Commission has done in numerous other claims, the Commission interprets the recommended maximum as establishing a continuum from zero to \$1.5 million based on the relative severity of a claimant’s injuries compared with the other claimants in this program, the Commission should still award him \$1.5 million because the injury he suffered is “uniquely damaging” and merits a higher award than “other forms of physical or mental abuse.”

As to the first argument, Claimant maintained in his objection brief that the Commission has erred in numerous other claims by interpreting the State Department’s recommended maximum as establishing a continuum from zero to \$1.5 million based on the relative severity of a claimant’s injuries, rather than a cut-off maximum for all claimants who would, in the absence of the cap, otherwise be entitled to more than \$1.5 million. Instead, he argued, the Commission should first determine the amount to which he (and, by extension, each of the other claimants in this program) would be

entitled in the absence of the cap and then, if that amount is above \$1.5 million, reduce it to \$1.5 million. During the oral hearing, Claimant's counsel acknowledged that the Commission had recently rejected this argument in other claims, *see, e.g., CLAIM OF ESTATE OF* 5 U.S.C. §552(b)(6) , Claim No. IRQ-I-003, Decision No. IRQ-I-006 (2014) (Final Decision), and agreed not to pursue it any longer. As it has done in other claims, the Commission reaffirms its holding on this issue. *See, e.g.,* Claim No. IRQ-I-026, Decision No. IRQ-I-025 (2015) (Final Decision).

Claimant's second argument focuses on the nature and severity of his injuries. He argues that, even under the Commission's comparative-continuum methodology, the evidence establishes that his injuries were severe enough to warrant an award of \$1.5 million or, alternatively, no less than \$1.25 million. In particular, Claimant says that he is entitled to more than the claimants in Claim Nos. IRQ-I-006 and IRQ-I-014, claims in which the Commission awarded \$1 million to claimants who were subjected to mock executions, "because the psychological injury that is wrought as a result of sexual assault is uniquely harmful and, hence, presumptively meriting of higher awards than other forms of physical or mental abuse." As evidence of this, he cites the declaration of Robert A. Blum, M.D., a psychiatric expert on hostages,⁷ who states that "[s]exual assault is often more psychologically damaging than other forms of assault" and that "rape involving sodomy would amplify this trauma." Claimant also cites the practice of the United Nations Compensation Commission, which he notes has been relied upon by this Commission, and which places sexual assault among the highest award ceilings available relative to other types of injuries. *See* Claim No. IRQ-I-009, *supra*, at 13.

⁷ Dr. Blum's declaration was originally submitted in support of Claim No. IRQ-I-009, *supra*. It was not part of the file in this claim, and there is no indication that Dr. Blum ever treated Claimant or offered an opinion on his condition.

We are not persuaded by Claimant's arguments. In determining compensation, our task is to determine where on the continuum from zero to \$1.5 million Claimant's injuries fall, based on the severity of those injuries relative to all other successful claimants in this program, using the factors we have previously articulated, and taking into account the fact that we are making awards in this program in broad categories. In two other cases of sexual assault in this program, the Commission presumed a certain degree of long-term emotional injury and awarded the claimants \$1 million. *See* Claim No. IRQ-I-026, Decision No. IRQ-I-025 (2015) (Final Decision); Claim No. IRQ-I-009, Decision No. IRQ-I-004 (2015) (Final Decision). The only claimants in this program to have been awarded \$1.5 million—indeed, the only claimants to have been awarded more than Claimant—all suffered weeks of subhuman conditions, repeated merciless beatings, and brutal interrogations. *See* Claim No. IRQ-I-001, Decision No. IRQ-I-005 (2014); Claim No. IRQ-I-002, Decision No. IRQ-I-007 (2014); Claim No. IRQ-I-022, Decision No. IRQ-I-008 (2015); Claim No. IRQ-I-018, Decision No. IRQ-I-009 (2015). Thus, to show that he is entitled to \$1.5 million, Claimant would have to show that Iraq inflicted injuries on him that are comparable to the injuries inflicted on those other claimants.

Claimant has failed to do this. One key problem with his argument is that it is premised on the notion that we should determine compensation based on a fine-grained comparative assessment of the precise severity of each individual claimant's particular psychological injuries. As we have noted, such an analysis would be entirely unworkable, and it is this concern that led us to decide to make awards in this program in broad categories. Claim No. IRQ-I-009, *supra*, at 7-8. Moreover, Claimant's arguments also raise difficult questions of comparative justice in awarding compensation. In this

program, for instance, we have awarded several other claimants, including other sexual assault victims, \$1 million. Each of them also experienced a single extremely traumatic incident and alleged severe long-term psychological harm. As the Commission explained at length in Claim No. IRQ-I-009 (Final Decision), *supra*, adopting Claimant’s analysis would force us to assess “the specific vulnerabilities” (in Dr. Blum’s words) of the various victims who come before us; and to award higher compensation to those who can establish that they have greater “vulnerabilities.” Nothing in the State Department’s Referral requires us to undertake such a subjective—and extraordinarily fact-intensive—assessment and one that could unfairly lead to disparities in awards within a single program. In this program, we view such an inquiry as unnecessary and more likely to undermine, rather than promote, the “justice[] and equity” that our enabling statute instructs us to consider. *See* 22 U.S.C. § 1623(a)(2)(B) (2012).

Finally, the physical pain and suffering endured by Claimant does not entitle him to greater compensation than the mock-execution victims. Again, Claimant’s argument is premised on an attempt to create fine-grained distinctions in this program. In essence, Claimant argues that he suffered all the psychological harm that the mock-execution victims suffered *plus more* (i.e., the physical harm caused by the rape). But in this program, the Commission is making awards in broad categories. We will thus not parse the details of the physical and emotional injuries that any given individual claimant suffered in order to determine compensation. By saying this, we are not saying that the sum total of Claimant’s injuries is *identical* to those of the mock-execution victims, only that the act Iraq committed and the scope of the injuries Claimant suffered place his

injuries in the same broad category as those of the mock-execution victims in this program.

Claimant has established that he was brutally raped, and, as in other claims of sexual assault, we presume that he suffered long-term emotional harm, a presumption supported by the live testimony and the various declarations submitted in support of the claim. With the exception of awards made to four claimants who were subjected to weeks of brutal interrogations, beatings, threats, and the like, the highest awards made in this program were \$1 million awards. We find that this amount is the appropriate award in this claim. Claimant is thus entitled to an award of \$1,000,000.00, and this amount (which is in addition to the amount he has already received from the Department of State for having been held hostage) constitutes the entirety of the compensation that the Claimant is entitled to in the present claim.

The Commission enters the following award, which will be certified to the Secretary of the Treasury for payment under sections 7 and 8 of Title I of the International Claims Settlement Act (22 U.S.C. §§ 1626-27).

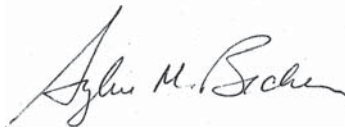
AWARD

Claimant is entitled to an award in the amount of One Million Dollars (\$1,000,000.00).

Dated at Washington, DC, October 15, 2015
and entered as the Final Decision
of the Commission.

A handwritten signature in black ink, appearing to read "Anuj C. Desai". The signature is written in a cursive style with a large initial "A" and "D".

Anuj C. Desai, Commissioner

A handwritten signature in black ink, appearing to read "Sylvia M. Becker". The signature is written in a cursive style with a large initial "S" and "B".

Sylvia M. Becker, Commissioner

**FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20579**

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Republic of Iraq

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Claim No. IRQ-I-023

Decision No. IRQ-I-021

Counsel for Claimant:

Daniel Wolf, Esq.
Law Offices of Daniel Wolf

PROPOSED DECISION

Claimant brings this claim against the Republic of Iraq (“Iraq”) based on injuries he says he suffered while being held hostage in Iraq between August and September 1990. The United States Department of State has already provided him compensation for his experience as a hostage. He now seeks additional compensation based on a claim that Iraqi officials sexually assaulted him and that the assault led to severe physical and emotional injuries. Although we are sympathetic to all that Claimant endured as a result of his hostage experience, he has failed to provide sufficient evidence to carry his burden of proof to establish that he was in fact sexually assaulted. On the present record, he is thus not entitled to additional compensation beyond that which the State Department as already provided him. Therefore, the claim is denied.

BACKGROUND AND BASIS OF CLAIM

Claimant alleges that he was traveling in Iraq with his wife and son as part of a tour group when Iraq attacked Kuwait in August 1990. He claims that, following the invasion, he was detained in a hotel in Iraq for one month, and that during this time, Iraqi guards sexually assaulted him in a hospital where he was being treated for dysentery. Claimant's experiences and injuries are detailed in the Merits section below.

Claimant sued Iraq in federal court in 2001 for, among other things, hostage-taking and intentional infliction of emotional distress. The Complaint did not include any allegation of sexual assault. That case was pending when, in September 2010, the United States and Iraq concluded an *en bloc* (lump-sum) settlement agreement. *See Claims Settlement Agreement Between the Government of the United States of America and the Government of the Republic of Iraq*, Sept. 2, 2010, T.I.A.S. No. 11-522 ("Claims Settlement Agreement" or "Agreement"). The Agreement, which came into force in May 2011, covered a number of personal injury claims of U.S. nationals arising from acts of the former Iraqi regime occurring prior to October 7, 2004. Exercising its authority to distribute money from the settlement funds, the State Department provided compensation to numerous individuals whose claims were covered by the Agreement, including some, like Claimant, whom Iraq had taken hostage or unlawfully detained following Iraq's 1990 invasion of Kuwait. According to the State Department, this compensation "encompassed physical, mental, and emotional injuries generally associated with" being held hostage or subject to unlawful detention.¹ Claimant states that the amount of the

¹ A group of hostages, not including Claimant, received compensation for economic loss. The hostages that received compensation for economic loss are not before the Commission in this program.

payment he received was based on a formula, consistently applied to all of the hostages, of \$150,000 plus \$5,000 per day of detention (\$305,000 total).

The State Department's Legal Adviser subsequently requested that the Commission commence a claims program for some of the hostages that it had already compensated. More specifically, the State Department authorized the Commission to award additional compensation to hostages who suffered a "serious personal injury," when that injury was "knowingly inflicted ... by Iraq" and the severity of that injury is a "special circumstance warranting additional compensation." The State Department made its request in a letter dated November 14, 2012 pursuant to its discretionary statutory authority. *See* 22 U.S.C. § 1623(a)(1)(C) (2012) (granting the Commission jurisdiction to "receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or 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"). The letter sets forth the category of claims as follows:

claims of U.S. nationals for compensation for serious personal injuries knowingly inflicted upon them by Iraq¹ in addition to amounts already recovered under the Claims Settlement Agreement for claims of hostage-taking² provided that (1) the claimant has already received compensation under the Claims Settlement Agreement from the Department of State³ for his or her claim of hostage-taking, and such compensation did not include economic loss based on a judgment against Iraq, and (2) the Commission determines that the severity of the serious personal injury suffered is a special circumstance warranting additional compensation. For the purposes of this referral, "serious personal injury" may include instances of serious physical, mental, or emotional injury arising from sexual assault, coercive interrogation, mock execution, or aggravated physical assault.

¹ For purposes of this referral, "Iraq" shall mean the Republic of Iraq, the Government of the Republic of Iraq, any agency or instrumentality of the Republic of Iraq, and any

official, employee or agent of the Republic of Iraq acting within the scope of his or her office, employment or agency.

² Hostage-taking, in this instance, would include unlawful detention by Iraq that resulted in an inability to leave Iraq or Kuwait after Iraq invaded Kuwait on August 2, 1990.

³ The payment already received by the claimant under the Claims Settlement Agreement compensated the claimant for his or her experience for the entire duration of the period in which the claimant was held hostage or was subject to unlawful detention and encompassed physical, mental, and emotional injuries generally associated with such captivity or detention.

See Letter dated November 14, 2012, from the Honorable Harold Hongju Koh, Legal Adviser, Department of State, to the Honorable Timothy J. Feighery, Chairman, Foreign Claims Settlement Commission (“2012 Referral” or “Referral”) at ¶ 3 & nn.1-3 (footnotes in original). The Commission then commenced the Iraq Claims Program to decide claims under the 2012 Referral. Commencement of Iraq Claims Adjudication Program, 78 Fed. Reg. 18,365 (Mar. 26, 2013).

Claimant submitted a timely Statement of Claim under the 2012 Referral, along with exhibits supporting the elements of his claim, including evidence of his U.S. nationality, his receipt of compensation from the Department of State for his claim of hostage-taking, and his alleged personal injuries.

DISCUSSION

Jurisdiction

The 2012 Referral’s statement of the category of claims defines the Commission’s jurisdiction. *See* 22 U.S.C. § 1623(a)(1)(C). Thus, the Commission has jurisdiction to entertain only claims of individuals who (1) are U.S. nationals and (2) “already received compensation under the Claims Settlement Agreement from the Department of State¹ for [their] claim of hostage-taking,” where “such compensation did not include economic

loss based on a judgment against Iraq[.]” 2012 Referral, *supra*, ¶ 3. Claimant satisfies both requirements, and the Commission thus has jurisdiction over this claim.

Nationality

This claims program is limited to “claims of U.S. nationals.” Here, that means that a claimant must have been a national of the United States at the time the claim arose and continuously thereafter until May 22, 2011, the date the Agreement entered into force. Claim No. IRQ-I-005, Decision No. IRQ-I-001, at 5-6 (2014) (Proposed Decision). Claimant satisfies the nationality requirement. He has provided a copy of two U.S. passports: one from the time of the hostage-taking (valid from April 1990 to April 2000) and his current one (valid from February 2013 to February 2023).

Compensation from the Department of State

The Claimant also satisfies the second jurisdictional requirement. He has submitted a copy of a Release he signed on August 16, 2011, indicating his agreement to accept a given amount from the Department of State in settlement of his claim against Iraq. He has also submitted a copy of an email from the Department of State indicating that this sum was sent for payment on October 8, 2011. Claimant further stated under oath in his Statement of Claim, and the Commission has confirmed to its satisfaction, that this compensation did not include economic loss based on a judgment against Iraq.

In summary therefore, the Commission has jurisdiction over this claim under the 2012 Referral.

Merits

The 2012 Referral requires a claimant to satisfy three conditions to succeed on the merits of his or her claim. Claim No. IRQ-I-005, Decision No. IRQ-I-001 (2014) at 7-8

(Proposed Decision). First, the claimant must have suffered a “serious personal injury,” which may be “physical, mental, or emotional.” In order to satisfy this standard, the injury must have arisen from one of the four acts specifically mentioned in the Referral—*i.e.*, sexual assault, coercive interrogation, mock execution, or aggravated physical assault—or from some other discrete act, separate from the hostage experience itself, that is comparable in seriousness to one of those four acts—that is, an act of a similar type or that rises to a similar level of brutality or cruelty as the four enumerated acts. *Id.* at 7.

The second requirement is that Iraq must have “knowingly inflicted” the injury. Thus, even where a claimant suffered a serious personal injury that satisfies the other requirements in the 2012 Referral, the claimant must prove that Iraq knowingly inflicted the injury.²

The third requirement is that the Commission determine that the severity of the serious personal injury suffered constitutes a “special circumstance warranting additional compensation.” In making this determination, the Commission will consider the nature and extent of the injury itself (including the specific acts committed by Iraq giving rise to the injury), the extent to which the injury substantially limits one or more of the claimant’s major life activities (both in the immediate aftermath of the injury and on a long-term basis), and/or the extent to which there is permanent scarring or disfigurement that resulted from the injury. *Id.* at 8.

Here, Claimant has alleged that Iraqi officials brutally raped him during a hospital stay in Baghdad, and that the rape resulted in physical, mental, and emotional injuries, including some that persist to the present day. To prove these allegations, Claimant has submitted, *inter alia*, two sworn statements from Claimant himself describing his ordeal

² “Iraq” is defined in footnote 1 of the Referral.

and his alleged personal injuries (one dated August 2004 from his federal court litigation and the other prepared specifically for this Commission in June 2013); a sworn statement from his younger brother describing Claimant's condition upon returning from Iraq and Claimant's recounting of his alleged sexual assault; a letter from Claimant's treating physician, dated April 2007, detailing Claimant's medical condition upon his return from Iraq; a sworn statement from Claimant's wife describing their captivity in Iraq and Claimant's condition upon his return from the hospital; a sworn statement from an imam at a mosque in the U.S. that Claimant attended; and a copy of the visa pages from Claimant's expired U.S. passport showing his entry into Iraq in July 1990 and his exit from Iraq on September 1, 1990. For the reasons discussed below, the Commission concludes that Claimant has failed to carry his burden to prove that he was in fact raped and thus suffered a "serious personal injury" within the meaning of the 2012 Referral.

Captivity in Baghdad Hotel: Claimant states that, at the time of Iraq's invasion of Kuwait, he was in Karbala, Iraq, traveling with his wife and son as part of a tour group visiting Muslim holy sites. Early in the morning on August 2, 1990, they heard gunfire outside their hotel, and their tour leader informed them that Iraqis were celebrating the invasion of Kuwait. The next day, the group drove in their tour bus to the Jordanian border in an effort to leave Iraq; however, the border guards refused to let them through. The tour leader then drove them back to Baghdad and took them to the Mansour Melia Hotel, as he had been instructed to do. Claimant states that "[s]ecurity guards were already posted around the hotel grounds and [the hostages] were warned in strong terms against trying to leave them."

Claimant and his family—along with the other hostages—were held captive in the hotel for the next month. He describes how, during this time, they were “not allowed to take walks or even visit other rooms[,]” and their own room “was stifflingly hot and infested with fleas.” Claimant states that he “slept on the floor so that [his] wife and son could share a bed.” He further states that, although their captors provided them with food, it “was inadequate in both quantity and quality[,]” occasionally consisting of nothing more than bread and butter. Fruit was not provided, and the food occasionally had insects in it. Moreover, Claimant, who is diabetic, states that his medication for diabetes and high blood pressure ran out after about a week; as a result, his blood pressure increased and he suffered frequent dizzy spells.

Hospitalization and Sexual Assault: During the second week of his captivity, Claimant states that he contracted “severe food poisoning” and dysentery; according to his wife, he “suffered from severe abdominal pain and started throwing up violently.” Claimant’s wife states that she “started screaming at the guards to take him to the hospital, which they finally did.” Claimant alleges that, after he was admitted, a nurse came into his room and noticed “cuts and scars” on his back, which Claimant says are religious markings. He further alleges that, “[u]pon witnessing those markings, [the] nurse immediately exclaimed that [he] was a Shia, cursed at [him] and walked out [of] the room.” “Moments later, two Iraqi guards came into [his] room and started swearing at and insulting [him] – calling [him] a dirty Shia and saying that God curses [him].” He states that the guards also slapped him and spat on him.

Claimant alleges that, at this point, one of the guards “took out his night stick, placed it between [Claimant’s] legs and shoved it upwards, causing intense pain to [his]

testicles.” The guard then tossed Claimant onto the bed and flipped him onto his stomach while the other guard pinned him down. According to Claimant, he then felt “a surge of excruciating pain, as the other guard took his night stick and inserted it forcefully into [his] anus.” Claimant states that he begged them to stop, but that the guards’ response “was just to laugh at and ridicule [him],” while they continued sodomizing him for another two or three minutes.

Return to the Hotel and Departure from Iraq: Claimant states that, at that point, a hospital worker entered the room and, after talking with the Iraqi guards, managed to convince them to leave. The next day, Claimant was released from the hospital and returned to the hotel. He states that he “wanted to tell [his] wife what had happened, but couldn’t bear to do so, both because [of his] shame and because [he] knew how distraught and panic-ridden she would become if she knew.” He further states that he “stayed very silent and did not let anyone know about the physical torture [he] had experienced”

For her part, Claimant’s wife notes that, upon her husband’s return to the hotel, Claimant’s “face was very pale and seemed to be in something of a state of shock He threw his clothes into the garbage and told [her] not to touch them.” She states that he “was in so much pain he could hardly speak. He said he did not want to talk about anything.” Moreover, he “avoided eating, explaining that he was avoiding food because he was scared of getting sick again without his medication.”

Claimant describes further indignities and threats once he returned to the hotel. He alleges that the “same guards that raped [him] in the hospital escorted [him] back to the hotel and remained posted there for the next week or so.” Claimant believes that those guards told the other guards that he was Shiite, “as they soon started insulting [him]

and abusing [him] as well.” He alleges that, on several occasions after his return to the hotel, Iraqi guards “pushed [him], spit on [his] face,” and hurled religious insults at him. According to Claimant, they also threatened his life, saying that he “was soon to be tortured, that [his] fingers would be cut off ‘one-by-one’ and that in the end [he] would be hung by [his] neck until [he] was dead.”

Claimant states that he was finally released on September 2, 1990, when he boarded an evacuation flight for women, children, and the seriously ill, and returned home to the United States.

Injuries Alleged: Claimant alleges both physical and mental injuries stemming from his alleged sexual assault and his captivity in Iraq. He states that, following the alleged assault, “[f]or the next two or three days, [he] was unable to walk without support[]” and “had great difficulty sitting” Claimant’s wife confirms this, stating that Claimant “was so weak that he could barely walk and [she] had to help support him when he did to prevent him from falling.” Claimant further alleges that, “[d]uring the first day, [he] bled from [his] anus and for the next several days thereafter, [he] had blood in [his] stool.” Although this condition eventually subsided, he asserts that “the pain in [his] backside persisted for about a week after the event.”

Claimant asserts that, “[a]s awful as the physical pain was, the emotional damage that [his] sodomization ordeal caused [him] was infinitely worse.” He states that, “[f]ollowing the event, he was completely traumatized and overwhelmed by feelings of sadness, hopelessness and helplessness.” Moreover, he “felt completely degraded by what had happened and fell into a state of deep depression and despair.” He also alleges that he “felt like [he] wanted to die” Claimant’s wife asserts that he “had great

difficulty sleeping and, when he did manage to fall asleep, he would frequently wake up to horrifying nightmares that would cause him to scream out loud.”

Claimant’s alleged mental and emotional struggles continued long after he returned to the United States. He claims that, for five years following the incident, he “was profoundly depressed and continued to suffer from an overwhelming sense of humiliation, anxiety attacks, intrusive recollections, irrational fears, insomnia, nightmares, an exaggerated startle response, concentration difficulties, detachment and reclusiveness[,]” and sexual dysfunction. His wife confirms his sleeping problems and nightmares, and adds that Claimant “had severe stomach problems and had to see several doctors.” She also states that he “became incredibly isolated, . . . was afraid to travel and . . . was very lethargic . . .” She also notes that Claimant “refused to speak with anyone about his experience as a hostage[,]” and that he was “unwilling to seek counseling . . .”

Claimant maintains that, with one exception, he did not discuss the alleged sexual assault with anybody, either in Iraq or after his return to the United States. The one exception was his brother, who “approached [him] about two or three weeks after [his] return and urged [him] to tell him what was the problem. . . . [A]fter securing his [brother’s] promise that he would never repeat to anyone what he was about to hear,” Claimant told his brother about the sexual assault he had suffered in Baghdad. Claimant’s brother confirms this in his own declaration, providing details of the incident that are consistent with the narrative Claimant provides in his supplemental (i.e., 2013) declaration. Claimant’s brother insists that “[t]hough [they] are nine brothers and sisters, [he was] the only [one] that [Claimant] told of his sexual assault.” He adds that neither of

them raised the issue again “until 23 years later when [Claimant] decided to bring this claim.” Indeed, it is not even clear that Claimant ever told his wife, the imam, his physician, or any other person apart from his brother about the alleged sexual assault.

In 1992, Claimant sought medical treatment; he was then diagnosed with post-traumatic stress disorder (“PTSD”) and was prescribed Xanax to deal with his anxiety. A 2007 letter from the physician who treated him in 1992 confirms the diagnosis of PTSD, although the letter mentions only Claimant’s hostage experience and says nothing about any assault, sexual or otherwise. Despite his treatment, Claimant alleges that his concentration problems led to his being laid off from his job in 1993.

When one of Claimant’s brothers died in 1995, his younger brother urged him to seek spiritual counseling. Claimant agreed, and he states that for two years, he received counseling from an imam at his local mosque. The imam has provided a declaration confirming this, noting that when Claimant discussed his experience in Iraq, he “did so in very general terms – stating only that he had been abused and insulted by the Iraqi authorities on account of his Shiite faith.” The imam added that it “was obvious to [him] that [Claimant] was holding something inside and that there were aspects of his experience he did not want to talk about” Nonetheless, he states that Claimant’s “improvement has been dramatic.” Claimant acknowledges his improvement; however, he asserts that he “remain[s] haunted by painful recollections of his sodomization ordeal and continue[s] to have problems sleeping and a startle response to loud noises.”

Analysis: Claimant bears the burden to prove his allegations. *See* 45 C.F.R. § 509.5(b) (2013) (“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.”); *see also* Claim No. LIB-II-150, Decision No. LIB-II-115 (2012) (denying claim because claimant failed to establish either the extent of the injury actually suffered as a result of the attack or that the severity of the injury was more than superficial). The evidence Claimant submitted fails to meet that burden.

Although there is no doubt that the incident alleged by Claimant, if proven, would constitute a “serious personal injury” as contemplated in the Referral, *id.* at 6, the evidence Claimant submitted is insufficient to show that Iraqi officials did in fact sexually assault him. It is true that “[t]he evidentiary burden for a sexual assault claim has generally been quite low.” Claim No. IRQ-I-009, Decision No. IRQ-I-004, at 10 (Proposed Decision) (2014). Nonetheless, after carefully examining all the evidence submitted with this claim, we conclude that Claimant has not satisfied the burden of proving that he was sexually assaulted.

First, the only evidence specifically referencing sexual assault (indeed, any assault)—the Claimant’s 2013 Supplemental Declaration and the 2013 declaration of Claimant’s brother—is insufficient to meet Claimant’s burden of proof. In circumstances where, as here, a claim relies heavily on written declarations, certain factors must be considered in determining how much weight to place on such statements. *See generally* Claim No. IRQ-I-010, Decision No. IRQ-I-022 (Proposed Decision) (2014). These may include, for example, the length of time between the incident and the statement, *see Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 137 (Sept. 2, 1998), and whether the declarant is a party interested in the outcome of the proceedings or has a special relationship with the Claimant, *see Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals* 312, 317 (Cambridge University Press

2006) (1953). Sworn statements will carry much greater weight when there has been an opportunity for cross-examination. *See Akayesu*, Case No. ICTR-96-4-T, ¶ 137; Cheng, *supra*, at 314. In such cases, live, compelling testimony by the claimant can do much to support a claim. *See, e.g.*, Claim No. LIB-I-007, Decision No. LIB-I-024 (2011) (Final Decision).

Here, Claimant's Supplemental Declaration and his brother's Declaration were sworn only last year—23 years after the alleged sexual assault and after the State Department's Referral defining the eligible claims in this program. One is from the Claimant himself, and the other is from a family member, a person who clearly has a special relationship with the Claimant. And obviously, neither of them, at this stage in the proceedings, has appeared before the Commission for direct questioning. Moreover, the declaration Claimant submitted in his federal court litigation in 2004 makes no mention of any assault, sexual or otherwise.³ As he explains in the June 2013 Supplemental Declaration he prepared for this Commission, the experience had caused him "so much pain, humiliation and embarrassment that until [two weeks before signing the June 2013 Declaration] when [he] revealed it to [his] attorney, the only person [he] had ever talked about it with was [his] younger brother."

These evidentiary shortcomings are exacerbated by the lack of any medical records, which can be particularly important in proving claims of sexual assault. For example, in Claim No. IRQ-I-009, Decision No. IRQ-I-004 (2014), the only other claim involving sexual assault decided so far in this program, the claim was supported by

³ In its entirety, the discussion of the food poisoning, dysentery, and hospitalization consists of two sentences: "I came down with severe food poisoning in roughly the second week and was hospitalized for two nights as a result. I also was stricken by dysentery, for which I required treatment after I returned to the United States,"

medical records that were consistent with the Claimant's allegations of sodomy. While UN reports of Iraq's widespread rape of civilians, and the reluctance of victims to discuss such assaults, lent considerable credibility to the claimant's declaration in that claim, *id.* at 10-11, the medical records, as circumstantial evidence, formed an integral part of the Commission's conclusion that the claimant had met his burden of showing that he had been sexually assaulted. Claimant here has not provided any medical evidence of his physical injuries, and the only medical record provided—the letter from Claimant's treating physician—contains no evidence to suggest that Claimant suffered any injuries beyond the mental and emotional harm of having been held hostage.

The remainder of Claimant's evidence is circumstantial and, more importantly, does not directly address the alleged assault. The fact that the evidence is circumstantial is not dispositive. To the contrary, in a claim such as this, particularly given the difficulty of producing direct evidence, circumstantial evidence may be used to prove the allegations. *See* UNCC Category B Report, at 38; *Rosendo Cantú v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 102 (Aug. 31, 2010). The use of such evidence is recognized as a general principle of international law, *see* Cheng, *supra*, at 322, and has been recognized as an acceptable method of proof before this Commission, *see Claim of IRENE TODRYS*, Claim No. HUNG-2-1212, Decision No. HUNG-2-0602, at 4 (1976); *cf. Claim of THE INDEPENDENT BAPTIST DIRECT MISSION, INC.*, Claim No. CN-0470, Decision No. CN-417, at 2-3 (1970) (accepting the use of secondary evidence “when claimants have established a sufficient basis for the unavailability of primary evidence . . .”). In the case of sexual assault, such evidence might include things such as a contemporaneous

medical report noting physical injuries consistent with a sexual assault, a psychiatric report indicating signs of a traumatic event, or witness statements from individuals who saw the victim exhibiting signs of a sexual assault shortly after the attack. *See, e.g., Rosendo Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶¶ 99-101. It may also include the testimony of doctors who have treated the victim. *Cf. Ethiopia-Eritrea Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims* ¶ 81.

Here, however, Claimant's circumstantial evidence does not provide much in the way of support for his allegations of assault. The declaration of Claimant's wife suggests that he was physically very weak and threw away his clothes when he left the hospital; however, she makes no mention of the alleged threats and insults directed at him when he returned to the hotel, let alone that he had experienced any form of assault. And given Claimant's untreated diabetes at the time and his suffering from dysentery or a similar condition, the fact that he was weak and in ill health when he returned from the hospital sheds no light on the cause of his condition. In addition, Claimant indicates that he received treatment for his alleged dysentery when he returned to the United States; however, he has not submitted any medical records of this treatment, or indeed of any other medical treatment since then that might contain evidence of—if not necessarily a direct establishment of—having been sexually assaulted, such as signs of physical injury from the incident.

Similarly deficient is the 2007 letter from Claimant's physician who treated him after his hostage ordeal: the letter states simply that Claimant suffers from PTSD, that he was held hostage in Iraq, and that he suffered "damages" from having had no access to

his blood pressure and diabetes medication. No detailed records have been submitted that might suggest a traumatic physical assault of the sort Claimant alleges. As for evidence of the emotional injuries, there is no evidence that the Claimant's physician is trained in a specialty that would make him professionally capable of reliably detecting the mental and emotional signs of a patient having suffered sexual assault. As for the declaration of the imam, this supports Claimant's allegation that he was in a fragile emotional state after his hostage experience, but little more.

In sum, Claimant has not satisfied his burden of proving that he was sexually assaulted during his captivity in Iraq.

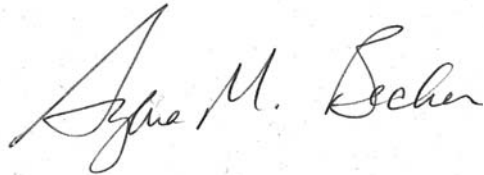
Finally, none of the other injuries he alleges arose from any discrete act other than his hostage experience. Claimant does claim to have suffered stomach problems due to food poisoning. To the extent that Claimant might argue that these problems arose from a discrete act distinct from the hostage experience—a point on which we make no determination—Claimant would still not be entitled to additional compensation under this program, since he would fail to satisfy the second requirement of the Referral, that the injury have been “knowingly inflicted” by Iraq. Indeed, if, as alleged, the Iraqi hotel guards eventually did take Claimant to the hospital for treatment for his stomach problems, this would suggest, at the very least, that they did not intend to cause or aggravate this condition further.

Accordingly, Claimant has not satisfied his burden of proving that he suffered a “serious personal injury” within the meaning of the 2012 Referral. While we sympathize with all that Claimant has experienced both during and since his captivity in Iraq, in the absence of further evidence substantiating his claim, the claim must be and is hereby denied.

Dated at Washington, DC, July 24, 2014
and entered as the Proposed Decision
of the Commission.



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days of delivery 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 delivery, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2013).