

Although Claimant was not among them, many of the U.S. nationals in Iraq and Kuwait at the time of the 1990-91 Iraqi occupation of Kuwait sued Iraq (and others) in federal court for, among other things, hostage-taking.¹ Those cases were pending when, in September 2010, the United States and Iraq concluded an *en bloc* (lump-sum) settlement agreement.² The Agreement, which entered 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, including claims of personal injury caused by hostage-taking.³ Exercising its authority to distribute money from the settlement funds, the U.S. Department of State provided compensation to numerous individuals whose claims were covered by the Agreement, including some whom Iraq had allegedly taken hostage or unlawfully detained following Iraq's 1990 invasion of Kuwait.

Under the International Claims Settlement Act of 1949 ("ICSA"), the Secretary of State has statutory authority to refer "a category of claims against a foreign government" to this Commission.⁴ The Secretary has delegated that authority to the State Department's Legal Adviser, who, by letter dated October 7, 2014, referred three categories of claims to this Commission for adjudication and certification.⁵ This was the State Department's second referral of claims to the Commission under the Claims Settlement Agreement, the

¹ See, e.g., *Hill v. Republic of Iraq*, 175 F. Supp. 2d 36 (D.D.C. 2001); *Vine v. Republic of Iraq*, 459 F. Supp. 2d 10 (D.D.C. 2006).

² 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").

³ See *id.* Art. III(1)(a)(ii).

⁴ See 22 U.S.C. § 1623(a)(1)(C) (2012).

⁵ See *Letter dated October 7, 2014, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission* ("2014 Referral" or "October 2014 Referral").

first having been by letter dated November 14, 2012 (“2012 Referral” or “November 2012 Referral”).⁶

One category of claims from the 2014 Referral is applicable here. That category, known as Category A, consists of

claims by U.S. nationals for hostage-taking¹ by Iraq² in violation of international law prior to October 7, 2004, provided that the claimant was not a plaintiff in pending litigation against Iraq for hostage taking³ at the time of the entry into force of the Claims Settlement Agreement and has not received compensation under the Claims Settlement Agreement from the U.S. Department of State. . . .

¹ For purposes of this referral, hostage-taking would include unlawful detention by Iraq that resulted in an inability to leave Iraq or Kuwait after Iraq invaded Kuwait on August 2, 1990.

² 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.

³ For purposes of this category, pending litigation against Iraq for hostage taking refers to the following matters: *Acree v. Iraq*, D.D.C. 02-cv-00632 and 06-cv-00723, *Hill v. Iraq*, D.D.C. 99-cv-03346, *Vine v. Iraq*, D.D.C. 01-cv-02674; *Seyam (Islamic Society of Wichita) v. Iraq*, D.D.C. 03-cv-00888; *Simon v. Iraq*, D.D.C. 03-cv-00691.

2014 Referral at ¶ 3.

On October 23, 2014, the Commission published notice in the *Federal Register* announcing the commencement of the second Iraq Claims Program pursuant to the ICSA and the 2014 Referral.⁷

⁶ Although the November 2012 Referral involved claims of U.S. nationals who were held hostage or unlawfully detained by Iraq, it did not involve hostage-taking claims *per se*. Rather, it consisted of certain claimants who had *already received* compensation under the Claims Settlement Agreement from the State Department for their hostage-taking claims, and it authorized the Commission to award additional compensation to those claimants, provided they could show, among other things, that they suffered a “serious personal injury” during their detention. The 2012 Referral expressly noted that 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.” 2012 Referral, *supra*, n.3.

⁷ *Program for Adjudication: Commencement of Claims Program*, 79 Fed. Reg. 63,439 (Oct. 23, 2014).

On October 13, 2015, the Commission received from Claimant a completed Statement of Claim seeking compensation under Category A of the 2014 Referral, together with exhibits supporting the elements of his claim.

DISCUSSION

Jurisdiction

This Commission's authority to hear claims is limited to the category of claims referred to it by the United States Department of State.⁸ The Commission's jurisdiction under the "Category A" paragraph of the 2014 Referral is limited to claims for hostage-taking of (1) "U.S. nationals," provided that the claimant (2) was not a plaintiff in any litigation against Iraq for hostage taking pending on May 22, 2011 (the "Pending Litigation"), and (3) has not received compensation under the Claims Settlement Agreement from the Department of State. 2014 Referral ¶ 3.

Nationality

This claims program is limited to claims of "U.S. nationals." Here, that means a claimant must have been a national of the United States when the claim arose and continuously thereafter until May 22, 2011, the date the Agreement entered into force.⁹ Claimant satisfies the nationality requirement. He has provided a copy of his current U.S. passport, indicating his birth in New Jersey, which shows that he was a U.S. national at the time of the alleged hostage-taking (March and April of 1991) and that he remained a U.S. national through the effective date of the Claims Settlement Agreement.

No Pending Litigation

Additionally, Category A states that the claimant must not have been a plaintiff in

⁸ See 22 U.S.C. § 1623(a)(1)(C).

⁹ See Claim No. IRQ-II-161, Decision No. IRQ-II-003, at 4-5 (2016).

any of the so-called Pending Litigation cases at the time of the entry into force of the Claims Settlement Agreement.¹⁰ Footnote 3 of the 2014 Referral specifically lists the Pending Litigation cases for purposes of the Referral. Claimant has averred under oath in his Statement of Claim, and the pleadings in the cases cited in footnote 3 confirm, that he was not a plaintiff in any of those Pending Litigation cases. The Commission thus finds that Claimant has also satisfied this element of his claim.

*No Compensation under the Claims Settlement Agreement
from the Department of State*

The Claimant also satisfies the final jurisdictional requirement. Claimant has stated that he has “never received compensation under the [U.S.-Iraq] Settlement Agreement from the U.S. Department of State.” Further, we have no evidence that the State Department has provided him any compensation under the Claims Settlement Agreement. Therefore, Claimant meets this element of his claim.

In summary, this claim is within the Commission’s jurisdiction pursuant to the 2014 Referral and is entitled to adjudication on the merits.

Merits

Factual Allegations

Claimant states that Iraq held him hostage from March 29, 1991, until April 15, 1991, a total of 18 days. He alleges that he was working as a journalist and was traveling in Kirkuk, Iraq, along with two colleagues, when he was captured by Iraqi soldiers. One of his colleagues was captured with him; the other was executed just before they were arrested. Claimant states that he and his colleague spent one night in Kirkuk before being taken to a “safe house” near Baghdad where they spent three nights and were, according to

¹⁰ The Agreement entered into force on May 22, 2011. See Claims Settlement Agreement, art. IX.

Claimant, “interrogated by Iraqi military intelligence officers.” He states that they were then “blindfolded and moved to a large prison complex west of Baghdad” Claimant asserts that, during his time in this complex, he and his colleague heard and witnessed prison guards torturing other prisoners, sometimes for hours.

Claimant maintains that he was “held incommunicado for the entire 18 days and roughly 14 hours that [he] was detained[.]” and that his repeated requests to meet with representatives of the International Committee of the Red Cross were denied. Finally, on April 15, 1991, Claimant and his colleague were released from prison and taken to the Al-Rashid Hotel in Baghdad. He subsequently departed Iraq to Jordan.

Supporting Evidence

Claimant has supported his claim with, among other things, a detailed narrative in his Statement of Claim; copies of correspondence from early April 1991 between former U.S. Representative Dick Swett and the White House concerning Claimant’s missing status and efforts to seek his release; a 2018 affidavit from Andrew Winner, a U.S. State Department employee at the time of Claimant’s alleged detention, who was familiar with Claimant’s case as well as those of other American detainees in 1991; various contemporaneous newspaper articles containing details of Claimant’s experience, including the asserted dates of his captivity; and a copy of a television news interview Claimant gave shortly after his release, dated April 15, 1991, in which Claimant mentions that he and his colleagues were captured on March 29.

Legal Standard

To make out a substantive claim under Category A of the 2014 Referral, a claimant must show that (1) Iraq was engaged in an armed conflict and (2) during that conflict, Iraq

took the claimant hostage.¹¹ The Commission has previously held that, to establish a hostage-taking claim, a claimant must show that Iraq (a) seized or detained the claimant and (b) threatened the claimant with death, injury or continued detention (c) in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for the claimant's release.¹² A claimant can establish the first element of this standard by showing that the Iraqi government confined the claimant to a particular location or locations within Iraq or Kuwait, or prohibited the claimant from leaving Iraq and/or Kuwait.¹³

Application of Standard to this Claim

(1) Armed Conflict: Claimant alleges that Iraq took him hostage in Kirkuk, Iraq, on March 29, 1991, and held him hostage for 18 days, until April 15, 1991. In its first decision awarding compensation for hostage-taking under the 2014 Referral, the Commission held that between August 2, 1990, and April 8, 1991, Iraq was engaged in an armed conflict with Kuwait.¹⁴ Claimant therefore satisfies this element of the standard for at least the first 11 days of his captivity, *i.e.*, from March 29, 1991, to April 8, 1991.¹⁵

(2) Hostage-taking: To satisfy the hostage-taking requirement of Category A of the 2014 Referral, Claimant must show that Iraq (a) seized or detained him and (b) threatened him with death, injury or continued detention (c) in order to compel a third party, such as the United States government, to do or abstain from doing any act as an

¹¹ See Claim No. IRQ-II-161, Decision No. IRQ-II-003, at 16. An estate claimant would of course need to make this showing as to its decedent.

¹² See *id.* at 17-20.

¹³ See *id.* at 17.

¹⁴ See *id.* at 16-17.

¹⁵ We need not decide whether Iraq remained engaged in an armed conflict through the date that Claimant alleges his hostage-taking experience ended, April 15, 1991. As explained below, even assuming that Iraq was engaged in an armed conflict during that period, Claimant has nevertheless failed to establish the third element of the Commission's hostage-taking standard—third party coercion—and his claim thus does not satisfy the elements of the Commission's standard for claims brought under Category A of the 2014 Referral.

explicit or implicit condition for his release. Claimant fails to satisfy this standard because he has failed to provide evidence sufficient for the third prong of this test, *i.e.* that Iraq's actions were done in order to compel a third party to do or abstain from doing any act as a condition for his release.

(a) Detention/deprivation of freedom: As noted above, a claimant can establish the first element of the Commission's hostage-taking standard by showing that the Iraqi government confined the claimant to a particular location or locations within Iraq or Kuwait, or prohibited the claimant from leaving Iraq and/or Kuwait. Here, there is no doubt that Claimant satisfies this element of the standard based on his sworn statement and the contemporaneous evidence provided in support of the claim. He was physically seized on March 29, 1991, by Iraqi soldiers while reporting on hostilities between the Iraqi government and Kurdish rebels in Kirkuk, Iraq. He was then forcibly taken to a safe house in Baghdad, where he was interrogated by Iraqi intelligence officers. He remained there for three days, and was then blindfolded and placed in a prison west of Baghdad where other detainees were being brutally tortured until his release on April 15, 1991.¹⁶ Given these facts, Claimant was clearly "confined . . . to a particular location or locations within Iraq or Kuwait"

In sum, Iraq thus detained Claimant from March 29, 1991, to April 15, 1991.

(b) Threat: The second element of the hostage-taking standard requires that Iraq "threatened [Claimant] with death, injury or continued detention" The evidence shows that Iraq clearly made such threats. After Claimant's arrest, according to

¹⁶ One of the newspaper articles Claimant has submitted suggests that he was released on April 16, 1991, rather than April 15, 1991; however, each of the other articles refers to April 15, 1991, and Claimant himself indicates that he was released on that date. Based on this evidence, we find that Claimant was released on April 15, 1991, rather than April 16, 1991.

one news article, the soldiers threatened to place a grenade down his jacket. He was forcibly moved from place to place before being imprisoned near Baghdad. While in prison, according to the newspaper article, an Iraqi official told Claimant and his colleague that “their chances of getting out alive would be improved if they consented to give a television interview” about the activities of Kurdish guerillas. After apparently giving such an interview, they were still not released. As the Commission has previously stated, “[t]o constitute a threat for purposes of a hostage-taking claim under international law, it suffices for a threat to have been made ‘at any time during the detention.’”¹⁷ Claimant has thus established that Iraq threatened to kill or injure and continue to detain him between March 29, 1991, and April 15, 1991.

(c) Third party coercion: As the Commission has noted previously, Iraq detained U.S. nationals within Iraq and Kuwait for varying lengths of time between August 2, 1990, and December 6, 1990, and threatened them with continued detention in order to compel the United States government to act in certain ways as an explicit and/or implicit condition for their release.¹⁸ By the second week of December 1990, however, all remaining U.S. national hostages had been formally released.¹⁹ There is no evidence in the record that Iraq continued to make demands of the United States after December 1990 as a condition for the release of any remaining U.S. nationals detained in Iraq or Kuwait. Claimant’s period of detention occurred long after the hostage crisis of 1990 was over and towards the end of military operations between coalition forces and Iraq, which ended with a formal ceasefire on April 8, 1991.²⁰

¹⁷ Claim No. IRQ-II-161, Decision No. IRQ-II-003, at 23 n.82.

¹⁸ *See id.* at 23-24.

¹⁹ *See id.* at 12.

²⁰ *See id.* at 16-17.

Here, Claimant has presented little evidence that his detention in March and April 1991 was intended to compel the U.S. government (or another third party) to do or abstain from doing any act. Indeed, he has not even asserted this in his Statement of Claim. Claimant instead relies on the affidavit of Andrew Winner, which he contends “provides evidence relating to the Claimant's detention and third party compulsion as an implicit condition for Claimant's release.”²¹ In his affidavit, Mr. Winner states that, sometime around the time of Claimant's capture, he “received a communication relating to the fact that certain persons had been taken hostage by Iraq forces[,]” and that “among those captured was Frank Smyth” He further states: “I believe that [Claimant's] case became the subject of U.S. military to Iraq military negotiations . . . and it may have also been part of discussions with the Iraqi government through diplomatic channels or through the International Committee of the Red Cross.”

Although Mr. Winner appears to suggest that these negotiations also involved the subject of certain Iraqi prisoners of war then being held by the United States, he does not state that Claimant's detention was used as leverage in negotiations with the U.S. government or was otherwise used to coerce action on the part of the U.S. government or any other third party. Such coercion is a necessary element of the Commission's hostage-taking standard.²² In any event, Mr. Winner's statements appear to be based on

²¹ According to his affidavit, Mr. Winner was employed during the 1991 Gulf War in the U.S. Department of State's Bureau of Political-Military Affairs, where he was tasked with “monitoring political-military issues related to the war and its aftermath” and “submit[ing] memoranda on a daily basis that were regularly routed to the Under Secretary of State for Political Affairs and the Secretary of State.”

²² See Claim No. IRQ-II-161, Decision No. IRQ-II-003, at 17-19 n.65. It should be noted that the Commission also accepted the requirement of third-party compulsion in hostage claims in its Second Libya Claims Program. The Commission noted that

a distinction needs to be drawn between the offenses of hostage-taking and unlawful detention under international law. The crime of hostage-taking entails the “seizure or detention” by the perpetrator of another person “*in order to compel a third party[.]*” . . . Unlawful detention, for its part, does not include the element of coercion of a third party, although it does share with hostage-taking the element of seizure or detention, i.e., the compulsion of the person.

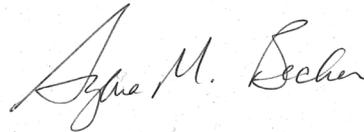
uncorroborated hearsay and were made in May 2018, more than two years after the claim was filed. Under these circumstances, the Commission finds this affidavit insufficient to prove that Claimant's detention was used to compel the United States to do or abstain from doing any act.²³

Claimant has therefore failed to establish the third element of the Commission's hostage-taking standard, and his claim thus does not satisfy the elements of the Commission's standard for claims brought under Category A of the 2014 Referral. Accordingly, this claim must be and is hereby denied.

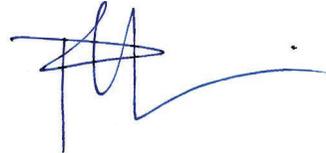
Dated at Washington, DC, April 12, 2019
and entered as the Proposed Decision
of the Commission.

**This decision was entered as the
Commission's Final Decision on**

August 20, 2019



Sylvia M. Becker, Commissioner



Patrick Hovakimian, 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) (2018).

Claim No. LIB-II-011, Decision No. LIB-II-105, at 9 (2012) (Final Decision) (italics added).

²³ Apart from the Winner affidavit, Claimant cites no evidence that he or other similarly-situated individuals—for instance, journalists working in Iraqi Kurdistan—were being detained to compel action or inaction on the part of the United States in late March or April 1991. Although a United Nations report published in March 1992 indicated that many Kuwaiti and other civilian hostages detained during the coalition military action against Iraq “were released by the Government of Iraq as part of the [ensuing] ceasefire agreement,” van der Stoep, *supra* note 20, at 39, there is no indication in this report, or in any other source of which we are aware, that large numbers of western nationals were being held hostage at that time to compel action or inaction on the part of the United States or any other third party.