

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

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-II-011

Decision No. LIB-II-105

Counsel for Claimant:

Lee Crawford-Boyd, Esq.
Schwarcz, Rimberg, Boyd &
Rader LLP

Oral hearing held on January 25, 2012.

FINAL DECISION

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

By Proposed Decision entered October 28, 2011, the Commission denied this claim on the ground that the claimant had not met his burden of proving that he satisfied the Commission's standard for claims under Category A of the January Referral. Specifically, the Commission concluded that the claimant failed to establish that he had been held illegally against his will, as required under the first element of the Commission's standard for compensability. In so holding, the Commission determined,

in part, that “being ‘held’ as a hostage or unlawful detainee requires, at a minimum, the elements of control or compulsion of the person[,]” and that, in this claim, the claimant failed to prove that he was ever “under the physical control of the hijackers.”

On June 7, 2011, counsel submitted in this case a “Supplemental Brief Re: Standard of Compensability in Support of Category A Claims” that had previously been submitted in response to the Commission’s Proposed Decision in the *Claim of* ^{5 U.S.C. §552(b)}₍₆₎

Claim No. LIB-II-007, Decision No. LIB-II-047 (2011), a decision involving another member of the Pan Am Flight 73 flight crew (and which was denied for similar reasons as the instant claim). On June 17, 2011, counsel submitted a “Declaration of ^{5 U.S.C. §552(b)(6)} in Support of Supplemental Brief Re: Standard of Compensability.” By letter dated November 14, 2011, the claimant objected to the Commission’s Proposed Decision and requested an oral hearing. The hearing on the objection was held on January 25, 2012.

In her supplemental brief and during the hearing, counsel for the claimant argued, *inter alia*, that: 1) international and domestic law both support a broad interpretation of the term “hostages,” which would warrant the conclusion that claimant was held hostage or unlawfully detained; 2) the hijackers possessed the specific intent to hold hostage everyone on board, including the flight crew; and 3) the act of using the cockpit escape hatch placed claimant in imminent fear of death, restricting his freedom of movement and thus providing evidence of his being detained. For these reasons, counsel argued, the facts of this case satisfy the Commission’s standard for Category A claims, requiring the conclusion that the claimant was “held illegally against his will,” and should be awarded compensation.

DISCUSSION

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

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

Claimant testified that, as he and the other members of the flight crew prepared for take-off, he heard bursts of automatic fire, and that his First Officer "saw all these sparks ricocheting off the tarmac." At this point, he stated, they "knew [they] were in deep trouble." Claimant further testified that, at that time, only the L1 passenger door (the forward left door of the aircraft) was open.¹ After hearing the automatic fire, the flight crew received a call in the cockpit, from one of the flight attendants, indicating that there was a man with a gun onboard the aircraft. Claimant stated that he then called the air traffic control tower to advise them of the situation unfolding in the main cabin; however, according to claimant, the person who responded "didn't understand what [he] was telling her." Eventually, a different operator responded to claimant's communication and understood what he was saying.

Following his conversation with the control tower, claimant called "Pan American Operations" to advise them of what was transpiring aboard Pan Am 73. He testified that, at some point, his First Officer communicated with the flight crew in the rear of the

¹ Claimant's counsel presented two photographs as exhibits during the hearing depicting the forward section of the aircraft fuselage. One photograph, apparently a model of a Pan Am passenger jet, shows the L1 door as being situated below and behind the cockpit windows on the left side of the airplane. Exact measurements, however, were not presented as evidence during the oral hearing or in claimant's objection brief or accompanying documentation.

plane, and was told that there was more than one gunman on board, and specifically, that "there were at least two, if not more." He further testified that, while he was in the initial processes of shutting off the flight control systems, Flight Engineer ⁵ U.S.C. §552(b)(6) who had left the cockpit to investigate, returned and immediately exited the cockpit via the emergency escape hatch.

Claimant explained that, at the time of the hijacking, he had just recently completed "hijacking training," which he stated he was required by his employer to complete. He testified that, during this training, he had been instructed "if at all possible, exit the aircraft, but in doing so, you are putting yourself in extreme danger" He had also been told that "any movement that you make . . . they will try to shoot you." Claimant testified that "[t]he objective is to keep the airplane on the ground." On this point, claimant stated that "[w]e were rushing[,]" and that he and his First Officer were "working as fast as we possibly can." He highlighted the fact that the cockpit door was like a "curtain, very flimsy." Claimant further testified that "[w]hen we felt that we did enough that would disable the airplane," they decided to exit the aircraft. According to claimant, he and his First Officer had spent approximately "fifteen, twenty minutes" inside the cockpit shutting down the flight systems before they left via the emergency escape hatch.

Claimant testified that the emergency escape hatch utilized an inertial reel mechanism to enable the crew to escape safely from the cockpit, but that it was a "last resort" for exiting the aircraft. He explained that there were no instructions on how to use the escape hatch, and that to use it, one had to climb onto the seat "in order to pull yourself up . . . it's a struggle." Claimant testified that his First Officer exited the cockpit

via the escape hatch first, and that he followed afterwards. He explained that, to exit assisted by the inertial reel, you "slide with your back toward the fuselage." He further stated that, during this period, he believed that "[his] life was over." It was clear from claimant's testimony that, in his mind, exiting via the escape hatch using the inertial reel mechanism was the only realistic means of escaping the airplane.

The Commission also takes note of a deposition sworn by claimant during the course of litigation against Pan American in 1987, in which claimant described his experience during the incident. During the deposition, claimant stated that, under "FAA and company policy," he was instructed, during a hijacking incident, to "leave the aircraft if at all possible and to render it disabled on the ground." He further stated that, prior to leaving the aircraft, he communicated with ground personnel to ask whether "the L1 door was cleared" in order to "make sure that it was safe to exit the airplane and not take any chances." As to why he had checked to ensure the L1 door area was clear, claimant added that "[t]here was no sense in making the escape if you couldn't do it[.]" and that "[t]he question [was] not whether there was someone down there and we were going to get hurt. The question was whether it was possible to leave the aircraft."

It is clear from the foregoing evidence and testimony that the claimant was acting under extreme duress during the period from the time the hijackers boarded the plane to the time when he and his First Officer exited the cockpit. Even beyond the concern for his own safety, the pressure placed upon claimant to take appropriate action to protect the passengers under his care, as he was trained to do, undoubtedly placed upon him a mental burden difficult to imagine. The central question in this claim, however, is whether, for this period of time, the claimant was under the control of the hijackers for purposes of the

Commission's standard under Category A. Claimant's arguments in the affirmative are addressed in the discussion of this issue that follows.

II. International Law Definitions of Hostage-Taking and Unlawful Detention

Claimant argues that international law recognizes a broad understanding of the term "hostages," and that both international and domestic tribunals have found hostage-taking or unlawful detention to exist under circumstances similar to those of the Pan Am 73 flight crew. In particular, claimant cites various decisions of international criminal tribunals, the European Court of Human Rights, and the Commission's own precedent under the War Claims Act.

As claimant has observed, international law generally advocates a broad understanding of the term "hostage." *See 4 Int'l Comm. of the Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 230 (1958) [hereinafter *ICRC Commentary*] ("In accordance with the spirit of the Convention, the word 'hostages' must be understood in the widest possible sense.").² In this claims program, such an interpretation is particularly appropriate given the explicit humanitarian purpose of the Claims Settlement Agreement.

As the Commission also noted in its Proposed Decision, the authorities cited by claimant in his brief "are largely consistent with the Commission's findings [discussed in its decision]; indeed, they reinforce the principle that being 'held' as a hostage or unlawful detainee requires, at a minimum, the elements of control or compulsion of the person." The key question in this claim, therefore, is whether the gunmen who boarded

² *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 187 (Mar. 3, 2000) (citing *ICRC Commentary* at 230); *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 306 (Feb. 26, 2001) (citing *Blaškić* ¶ 187); *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, ¶ 241 (March 2, 2009) (citing *ICRC Commentary* at 230).

Pan Am Flight 73 exercised a level of control or compulsion over claimant that rises to the level of hostage-taking or unlawful detention under international law, thereby satisfying the first element of the Commission's standard for Category A claims.

During the oral hearing, claimant cited two cases in particular in support of his claim. In *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 187 (Mar. 3, 2000), the International Criminal Tribunal for the Former Yugoslavia ("ICTY") found that certain villagers were kept in a "detention camp" by virtue of the fact that—despite the defense's argument that "their freedom of movement in the village . . . was not limited"—they "were prevented from leaving the village, especially because they were being watched by snipers positioned in the hills around the village." *Id.* ¶¶ 684, 691.³ Claimant also cited a decision from one of the Commission's predecessor agencies, the War Claims Commission, in which the claimant, who was a resident of the Philippines during the Japanese occupation in the 1940s, was subjected to "constant surveillance" while operating her restaurant (where guards were stationed at both doors), was required to "report daily to certain guards and the premises searched repeatedly[,] " was twice "taken into actual custody[,] " and was ultimately forced by the Japanese to move to a location "where she was instructed to care for certain civilian American internees" *Claim of GLADYS SLAUGHTER SAVARY*, Claim No. 87087, Precedent Opinion No. 23, at 1-2 (War Claims Comm'n 1951). The Commission concluded that claimant "was by force of the Japanese Army restrained in her movements and activities," and was therefore considered to be "captured and held by the Imperial Japanese government." *Id.* at 5.

³ As claimant notes, however, the tribunal did not charge the defendant with hostage-taking *per se*, but rather with other crimes involving the destruction of property and the inhumane treatment of civilians.

As in its Proposed Decision in this claim, the Commission concludes that, contrary to the claimant's assertions, and as noted above, these cases are consistent with the Commission's findings regarding the principles applicable to hostage-taking and unlawful detention under international law, which require, in particular, elements of control or custody of the person. In this objection, therefore, there appears to be no difference of opinion on the law; rather, it is in the application of the unique facts of this case to the law where claimant's disagreement lies.

In its Proposed Decision, the Commission found, in light of the applicable legal principles derived from relevant authorities, that "from the particular facts of this claim, the Commission cannot find that the claimant was under the control of the hijackers for even a moment in time." During his objection hearing, the claimant and counsel spent a significant amount of time focusing on the claimant's actions during the 20 minutes from when word first reached the cockpit of armed men having entered the plane, to the claimant's escape via the cockpit hatch. With the aid of the additional facts adduced during the hearing, the Commission renews here its focus on the key issue of whether or not the claimant was held illegally against his will on board Pan Am flight 73 on September 6, 1986.

III. The Specific Intent of the Hijackers

Claimant argues, in part, that the act of hostage-taking connotes a specific *mens rea*, and that this subjective element of the offense is satisfied in the instant claim. Specifically, claimant asserts that the hijackers, as evidenced by their conduct, "had the specific intent to hold everyone on board the plane hostage, including perhaps most

especially the two pilots and cockpit crew, because only they could fly the plane and carry out the hijackers' ultimate goal"

With regard to the *mens rea* of the hijackers, the Commission notes 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[.]" *International Convention Against the Taking of Hostages*, art. 1, Dec. 18, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205. 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.⁴ In other words, unlawful detention is essentially a lesser included offense within hostage-taking in which the specific intent and actions of the perpetrator distinguish one offense from the other. This idea was recently articulated by the ICTY, which concluded that "unlawful detention is indeed an element of the offense of hostage-taking." *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, ¶ 65 (Apr. 28, 2009).⁵

Against this analytical backdrop, the Commission examines the issue of the hijackers' specific intent in relation to Pan Am Flight 73 on September 5, 1986. In this

⁴ See *Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 234 ("The unlawful detention of civilians . . . means unlawfully depriving a group of discriminated civilians of their freedom."); *In re Underhill (U.S. v. Venez.)*, 9 R. Int'l Arb. Awards 155, 160 (Mixed Claims Comm'n 1903) (stating that "detention takes place when a person is prevented from leaving a certain place, be it a house, town, province, country, or whatever else determined upon"); *Decision taken by the Governing Council of the United Nations Compensation Commission during its second session, at the 15th meeting, held on 18 October 1991: Personal Injury and Mental Pain and Anguish*, S/AC.26/1991/3, Oct. 23, 1991 (defining "detention" as "the holding of persons by force in a particular location").

⁵ See also *Kordić and Čerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 314 ("[A]n individual commits the offense of taking civilians as hostages when he threatens to subject civilians, *who are unlawfully detained*, to inhuman treatment or death as a means of achieving the fulfillment of a condition.") (emphasis added).

regard, the abundant evidence before the Commission of the 16-hour ordeal endured by the passengers on board that flight, which included negotiations on the part of the hijackers that were audible to those passengers, as well as the evidence adduced in the United States District Court case against the hijackers, provided ample evidence of the hijackers' specific intent, and of the passengers' recognition that they were being forcibly held against their will in order to secure the demands of the hijackers.

Nevertheless, while claimant is correct in observing that the crime of hostage-taking requires the existence of a particular *mens rea*—which, as noted above, the evidence clearly supports in this claim—in order to establish liability under international law, *see Prosecutor v. Sesay*, Case No. SCSL-04-15-A, Judgment, ¶¶ 581, 583 (Oct. 26, 2009), it is equally true that the crimes of hostage-taking and illegal detention require a particular *actus reus*, separate and apart from the hijackers' intentions. *Id.* Indeed, it is this convergence of *mens rea* and *actus reus* that results in the crimes of hostage-taking and unlawful detention. Absent either element, one cannot be “held illegally against his or her will” under the Commission’s standard for Category A claims.

Assuming, then, that the hijackers possessed the requisite *mens rea*, the question thus remains whether the *actus reus* of hostage-taking or unlawful detention has been established vis-à-vis claimant and the other members of the flight crew. This aspect of the claim underlies claimant’s other arguments and is addressed in the discussion which follows.

IV. Actus Reus of Hostage-taking or Unlawful Detention

It is clear from the evidence in the record that the objective of taking scores of passengers hostage on board a large jet airplane necessarily comprises a series of actions

that are not accomplished instantaneously. It is a process that unfolds over time. In the case of the illegal seizure of Pan Am Flight 73 in Karachi on September 5, 1986, the evidence clearly reveals that during the initial minutes of confusion and uncertainty, the hijackers revealed themselves to be hostile terrorists, rather than the security personnel they were disguised to be. The evidence further reveals the hijackers' efforts to secure the entry level of the plane, by closing the rear door, and shooting rounds of bullets out of the front loading doorway (the "L1" door). At around this time, the hijackers showed themselves to the outside world to be holding one of the members of the flight crew at gunpoint in that doorway. It is also clear from the evidence that, in these initial minutes, the passengers and crew on the upper level of the plane (which included a section of First Class seating, a galley, and the cockpit) were unaware first-hand of the violent events that were unfolding below, and only became aware of them through communications originating from the flight crew on the lower level. Indeed, the evidence demonstrates that the flight crew never actually knew precisely what was happening until after they had exited the plane.

Implicit in the elements of the crime of hostage taking or unlawful detention, and consistent with the fact that a hostage-taking does not happen instantaneously, but rather unfolds over time, is that there must be some awareness on the part of the victim that he or she is being held "against his or her will," as required by the Commission's standard. It is therefore relevant at this point in the analysis of the claim to consider claimant's apprehension of the hijackers' actions upon boarding the plane. More specifically, in light of the relatively short period of time that the claimant spent on board that flight (short certainly in comparison to that of the passengers), the issue of his awareness of

what was transpiring in those minutes is a critical element to the question of whether he may properly be considered to have been a hostage, or illegally detained, for even that period of time.

Considering all of the evidence in the claim, it is clear that the situation developed sufficiently quickly to convince the claimant that the airplane was being attacked by armed gunmen while he was still in the cockpit. This is established by: the information that was received by the claimant from his flight engineer and his First Officer, in the initial minutes of the hijacking, concerning armed gunmen on board the plane; his communications to the operations center in the airport where he was trying to convey to the authorities that the gunmen had boarded and taken over the plane; his instructions to his First Officer to begin disabling the plane; the actions he took in successfully disabling the plane; and finally by the extraordinary measures he took to escape the plane via the cockpit hatch.

Having concluded that the claimant has established to the Commission's satisfaction that he was aware that the gunmen intended to hold the persons on the plane hostage, and were in the process of doing so, the Commission now moves to consider the question of whether the claimant was, in fact, "held" during those early minutes of the hostage crisis on board Pan Am Flight 73 for purposes of satisfying the elements established by the Commission for a hostage-taking or unlawful detention.

Counsel for the claimant argued, during the oral hearing, that as a general principle, detention occurs "at the point where a reasonable person would believe that they have no freedom, full freedom of movement without threat of death." Applying this principle to the instant claim, counsel asserted that use of the cockpit escape hatch posed

an imminent threat of death to the claimant; therefore, the fact that its use was required for him to escape evidenced his detention by the hijackers.

While counsel's characterization of the terrifying situation faced by the flight crew may be accurate,⁶ under the authorities discussed by the Commission and cited by counsel in her brief, this does not fully address the requirements for being "held" as a hostage or unlawful detainee in violation of international law. The question is not the escape, or manner of escape, *per se*, but, as noted above, whether the hostage was illegally held against his will *prior* to executing his escape.

To an ordinary person examining the actions of the claimant *post facto*, it may seem as if the claimant weighed various options and exercised personal discretion in deciding whether to remain in the cockpit to disable the aircraft. However, based on claimant's testimony and that of his First Officer, it is clear that remaining on board to disable the flight systems was not an option in any reasonable sense of the word—it was a moral and professional obligation from which they felt they were not free to deviate. Indeed, it is clear that, given the uncertain situation that was unfolding in the cabin below, and the imminent threat faced by him,⁷ the claimant's natural reaction would have been to flee to safety; however, the fact that he remained in place is a direct result of the hijackers' actions: he felt no option but to discharge his duties.

Put another way, under these clearly extraordinary circumstances—in particular, the evidence of claimant's knowledge of the extreme danger posed to the plane and its passengers—and given his responsibilities, the fact that the claimant remained in the

⁶ Moreover, the Commission is not persuaded by counsel's argument that, under the circumstances, use of the escape hatch posed an imminent threat of death.

⁷ The evidence presented established that the cockpit door of commercial Boeing 747 jets in that era was not secure, and could easily have been forced open with a kick.

cockpit to disable the plane can hardly be understood as a course of action that he freely chose. He stayed because he felt compelled to stay, and he felt compelled to stay because the hijackers' actions required him to discharge his professional and moral obligations to disable the plane to increase the likelihood of a safe outcome for the passengers. This conclusion does not change because the claimant recognized, after he had discharged his obligations to the passengers according to his training, that he still had an opportunity to escape, and because he successfully made that escape. The fact of an escape does not vitiate the finding of an illegal detention in the time preceding the escape, so long as the elements of an illegal detention are present, as they are here. On the basis of the evidence presented, including claimant's oral testimony during the objection hearing, the Commission concludes that claimant has satisfied its standard for unlawful detention under Category A.

The claimant has not, however, satisfied the Commission that the elements necessary for a finding that the claimant was held hostage are present. As explained above, while it is clear that the hijackers had the goal of holding the passengers and flight crew hostage for the purpose of coercing a third party, it is also clear that, with respect to the flight crew, the claimant has failed to establish that the hijackers had perfected that criminal act before the members of the flight crew were able to exit the airplane.

Based on the totality of the testimony provided by the claimant during the oral hearing, and in consideration of relevant authority under international law, the Commission finds that claimant has satisfied its standard for a claim of unlawful detention brought under Category A of the January Referral. Accordingly, claimant

5 U.S.C. §552(b)(6) is entitled to compensation as set forth below.

COMPENSATION

In the *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-II-002, Decision No.

LIB-II-002 (2011) (Final Decision), the Commission held that \$1 million was an appropriate amount of compensation for those passengers of Pan Am Flight 73 who were held inside the main cabin, taking into account the sixteen hours during which they were held hostage or unlawfully detained and the conditions of their confinement. As noted by the Commission in its decision in 5 U.S.C. §552(b)(6) the language of the January Referral is significant insofar as it makes clear that the award recommendation under Category A was intended to encompass “all damages” suffered by the victims of hostage-taking as a result of the incident. *Id.* at 9. The recommendation of a “fixed amount of \$1 million,” moreover, for “all damages” indicates further that it was the intention not to require specific fact-finding concerning gradations of hostage-taking or detention conditions or trauma as between different persons who otherwise meet the requirements of that category.

In this claim, as noted above, the evidence submitted indicates that the time period during which the claimant was unlawfully detained was from the moment the hijackers boarded the plane until claimant exited the cockpit via the emergency escape hatch—a period of approximately twenty minutes, according to the highest estimate provided by claimant in his testimony and in his sworn declaration. While, as explained above, the evidence establishes that the claimant experienced extreme fear and apprehension, consistent with its approach in all other claims under Category A, the Commission will not attempt to differentiate for compensation purposes the fear and apprehension of the claimant as compared to that experienced by the passengers on board

flight 73. Instead, consistent with the fixed sum approach taken in this Category for other persons on board flight 73, the Commission will base its award of compensation on the duration of the unlawful detention. Accordingly, in light of the amount of compensation awarded to the Pan Am 73 passengers for their sixteen-hour ordeal, and in consideration of the estimated twenty minutes of claimant's confinement, the Commission holds that the appropriate amount of compensation in this claim is \$20,000. In addition, as also held in ^{5 U.S.C. §552(b)(6)} *supra*, compensable hostage-taking or unlawful detention claims in this claims program are not entitled to interest as part of the awards granted therein. Accordingly, the Commission determines that the claimant, ^{5 U.S.C. §552(b)(6)} is entitled herein to an award of \$20,000.00 and that this amount constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

The Commission therefore withdraws the denial in its Proposed Decision in this claim, and enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-1627 (2006).

AWARD

Claimant 5 U.S.C. §552(b)(6) is entitled to an award in the amount of Twenty
Thousand Dollars (\$20,000.00).

Dated at Washington, DC, May 17, 2012
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
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Counsel for Claimant:

Lee Crawford-Boyd, Esq.
Schwarcz, Rimberg, Boyd &
Rader LLP

PROPOSED DECISION

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

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

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

22 U.S.C. § 1623(a)(1)(C) (2006).

On January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication

six categories of claims of U.S. nationals against Libya. *Letter dated January 15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* (“January Referral Letter”).

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

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

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

The January Referral Letter, as well as a December 11, 2008 referral letter (“December Referral Letter”) from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999, and on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* (“Claims Settlement Agreement”), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008), which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement, barred U.S.

nationals from asserting or maintaining such claims, terminated any pending suit within the terms of the Claims Settlement Agreement, and directed the Secretary of State to establish procedures governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

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

By Proposed Decision entered on August 20, 2009, the Commission denied the claimant's physical injury claim submitted pursuant to the December 2008 Referral Letter. *Claim of* 5 U.S.C. §552(b)(6) , Claim No. LIB-I-012, Decision No. LIB-I-008 (2009). No objection was filed, and the Proposed Decision was entered as the Final Decision of the Commission on September 30, 2009.

BASIS OF THE PRESENT CLAIM

On September 2, 2009, the Commission received from claimant a completed Statement of Claim in which he asserts a claim under Category A of the January Referral Letter, along with exhibits supporting the elements of his claim. This submission included evidence of claimant's U.S. nationality, his presence at the scene of the terrorist incident, and his alleged hostage-taking or unlawful detention in violation of international law.

The claimant states that he was on board Pan Am Flight 73 in Karachi, Pakistan on September 5, 1986 as part of the flight crew when he was held hostage or unlawfully detained by armed hijackers. According to the Statement of Claim and accompanying

exhibits, claimant, who was the Captain of Flight 73, was in the cockpit preparing for takeoff when he “heard automatic gunfire” outside the aircraft, and was notified by a flight attendant that there was a gunman aboard the plane. Claimant describes how both the Flight Engineer and First Officer left the cockpit to investigate, and, upon returning, the First Officer confirmed that there was a gunman onboard. As discussed more fully below, claimant proceeded to shut down the plane’s flight systems, and, shortly thereafter, exited the plane via an escape hatch in the cockpit by which the Flight Engineer and the First Officer had already exited the plane.

DISCUSSION

Jurisdiction

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

Nationality

In the *Claim of* 5 U.S.C. §552(b)(6) , Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that in order to meet the nationality requirement, the claimant must have been a national of the United States, as that term is defined in the Commission’s authorizing statute, continuously from the date the claim arose until the

date of the Claims Settlement Agreement. To meet this requirement, the claimant has provided a copy of his birth certificate, showing his place of birth in Trenton, New Jersey, and a copy of his current U.S. passport. Based on this evidence, the Commission determines that the claim was owned by a U.S. national at the time of the incident continuously through the effective date of the Claims Settlement Agreement.

Pending Litigation and its Dismissal

To fall within the category of claims referred to the Commission, the claimant must be a named party in the Pending Litigation listed in Attachment 1 to the January Referral Letter and must provide evidence that the Pending Litigation against Libya has been dismissed. January Referral Letter, *supra*, ¶ 3. The claimant has provided an excerpted copy of the Second Amended Complaint in *Patel v. Socialist People's Libyan Arab Jamahiriya*, Case No. 06-cv-626, filed in the United States District Court for the District of Columbia, which names him as a party. Additionally, claimant has provided evidence that the litigation was dismissed under a Stipulation of Dismissal dated December 16, 2008. Based on this evidence, the Commission finds that the claimant was a named party in the Pending Litigation and that the Pending Litigation has been properly dismissed.

Claim for Injury Other than Emotional Distress

The January Referral Letter also requires that the claimant must have set forth a claim for injury other than emotional distress alone in the Pending Litigation. January Referral Letter, *supra*, ¶ 3. Claimant alleged in the complaint in the Pending Litigation that the incident caused him "pain, suffering and economic loss." The Commission further notes that the claimant states causes of action for, *inter alia*, battery and assault

under Counts VI and VII of the complaint. The Commission therefore finds that the claimant has satisfied this element of his claim.

Prior Award

Finally, the January Referral Letter requires that the claimant must not have received an award pursuant to the Department of State's December 11, 2008 referral letter. January Referral Letter, *supra*, ¶ 3. As noted above, while the claimant did file a claim under the December Referral Letter, the Commission denied that claim. *See Claim of 5 U.S.C. §552(b)(6)*, *supra*. Accordingly, the Commission is satisfied that the claimant has received no such award and as such has met this element of his claim.

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

Merits

Standard for Claims under Category A

As stated in the January Referral Letter, to be eligible for compensation, a claimant asserting a claim under Category A must meet "the standard for such claims adopted by the Commission" for purposes of this referral. January Referral Letter, *supra*, ¶ 3. The Commission held in *Claim of 5 U.S.C. §552(b)(6)*, Claim No. LIB-II-002, Decision No. LIB-II-002 (2009) (Proposed Decision),* that in order for a claim for hostage-taking or unlawful detention pursuant to Category A to be considered compensable, a claimant must have been:

- (a) held illegally against his or her will;

* In *Claim of 5 U.S.C. §552(b)(6)*, Claim No. LIB-II-002, Decision No. LIB-II-002 (2011) (Final Decision), the Proposed Decision was modified as to the amount of compensation only.

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

Id. at 8.

The first element of this standard, that a claimant be “held illegally against his or her will,” constitutes the essence of hostage-taking or unlawful detention. This is clear from an examination of relevant treaties and decisions of international tribunals. For instance, the United Nations Compensation Commission (“UNCC”), the body established to determine and pay compensation for losses resulting from Iraq’s 1990 invasion and occupation of Kuwait, developed a standard to apply to claims of hostage-taking or illegal detention. *See Decision taken by the Governing Council of the United Nations Compensation Commission during its second session, at the 15th meeting, held on 18 October 1991: Personal Injury and Mental Pain and Anguish*, S/AC.26/1991/3, Oct. 23, 1991. In setting forth its standard, the UNCC defined detention as “the holding of persons by force in a particular location” *Id.*

Further, the Commission takes notice of the definition of “hostages” given in the official commentary of the Fourth Geneva Convention prepared by the International Committee of the Red Cross (“ICRC”), which states that “hostages are nationals of a belligerent State who of their own free will or through compulsion are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders and the security of his armed forces.” 4 Int’l Comm. of the Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 229 (1958) [hereinafter *ICRC Commentary*]. The ICRC has set forth a similar definition—

cited by at least one international tribunal—in its official commentary on Additional Protocol II of the Geneva Conventions. *See Prosecutor v. Sesay*, Case No. SCSL-04-15-A, Judgment, ¶ 598 (Oct. 26, 2009) (citing Int’l Comm. of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 1375 (1987) (“[T]he ICRC Commentary on Additional Protocol II defines a hostage as ‘persons who are in the power of a party to the conflict or its agent, willingly or unwillingly.’”).

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

A civilian American citizen shall be deemed to have been captured by the Imperial Japanese Government at the time when . . . he was taken into

actual or constructive custody by such government, whether by forcible seizure and detention or by his compliance with any order . . . however published, directing him to restrict his freedom of movement.

Id. (citing *Interned Civilian American Citizens Detention Benefits*, 14 Fed. Reg. 7845 (Dec. 30, 1949) (to be codified at 45 C.F.R. § 507.23) (emphasis added). The WCC held that “[c]ustody implies restraint and may or may not imply physical force sufficient to restrain depending on the circumstances.” *Id.* at 4. Noting that the claimant had not been taken into actual custody, the WCC further held that “[c]onstructive custody arises only when restraint or custody of some character is exercised.” *Id.*

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

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

Considering all of these sources, the Commission concludes that the elements of physical control over the person, and compulsion of the person, as described in the foregoing discussion, form an integral part of the first element of the Commission's standard for Category A claims, namely, that the claimant be "held illegally against his or her will."

Application of Standard to this Claim

According to his Statement of Claim and accompanying documents, on September 5, 1986, claimant was the Captain on Pan Am Flight 73 when the aircraft was attacked and taken over by four heavily armed hijackers while waiting to take off from Karachi, Pakistan, en route to Frankfurt, West Germany. In support of his claim, claimant has provided, *inter alia*, an affidavit describing his experience during the incident, a supplemental declaration from the claimant recounting his experience; an extensive background paper (prepared by claimant's counsel) concerning all of the *Patel* claims and containing a detailed description of the hijacking, copies of two newspaper articles published shortly after the incident (identifying claimant as a member of Pan Am Flight 73 flight crew), and an additional sworn declaration from the claimant describing his experience during the hijacking.

In his sworn statements, claimant recounts his experience after learning that Flight 73 had been hijacked. He describes how, while preparing the aircraft for takeoff, he "heard automatic gunfire[.]" and the First Officer "yelled out that he saw bullets ricocheting off of the stairs leading to the plane and the tarmac." A flight attendant then called the cockpit to notify the flight crew that a man with a gun was aboard the plane. Claimant describes how, "[a]s we, the flight crew, had been trained to do, we began to

shut down the various flight systems on the plane so that if the hijackers were able to reach the cockpit, it would be difficult to get the plane airborne.” He further describes how the flight engineer took the cockpit “fire axe,” left the cockpit to investigate, and “returned to the cockpit and slammed the cockpit door shut. He looked terrified.” Claimant states that the First Officer then left the cockpit, “confirmed the status of the gunmen at this time, and returned to his seat in the cockpit.”

The claimant states that he and the First Officer “remained on the airplane in order to complete duties that we felt were necessary for the safety of the passengers even though we were aware of the extreme danger involved in doing so.” Accordingly, claimant and the First Officer “shut down the plane’s flight systems and continued to communicate with Pan Am Operations.”

The claimant further asserts that after he and the First Officer spent approximately 20 minutes disabling the aircraft and communicating with airport personnel and Pan Am Operations, they exited the aircraft via the emergency hatch, lowered themselves to the tarmac, and “went to the Pan Am Operations Office at the airport.”[†] According to a newspaper article published four days after the incident, the “vice chairman and chief operating officer for Pan American World Airways[] said the cockpit crew followed ‘long-established Pan Am and industry procedures under circumstances of the [sic] nature.’” Claimant himself stated in his affidavit that he “had been trained that in a hijacking situation, my first and best option was to shut down all the flight systems and escape from the cockpit.” Another newspaper article submitted with the claim indicates

[†] In his second declaration, claimant asserts that he was held hostage not only for the period of time that he was in the cockpit, but also for the 3-4 hours that he was in the Pan Am operations center in the airport terminal because “I was the Captain of the plane. I was the one person the terrorists were most interested in.” This assertion is not repeated in the later declaration that was submitted by the claimant; in any event, given the Commission’s reasoning in this claim, it does not change the Commission’s decision.

that “[t]hey were the first airline flight crew to pull the stunt on hijackers, a procedure the airline industry advocates[.]”

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

In a supplemental brief filed with this claim, claimant argues that international law recognizes an expansive definition of the term “hostage,” as evidenced by numerous decisions of international tribunals and the Commission’s own precedent, which compels a finding of compensability in this claim. Most notably, claimant cites *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 234 (Mar. 3, 2000), a decision of the International Criminal Tribunal for the former Yugoslavia (ICTY), which in turn cites the ICRC commentary on the Fourth Geneva Convention, which, as discussed above, defines hostages as those persons who “are in the hands of the enemy and are answerable with their freedom or their life for the execution of his orders” *See Blaškić*, Case No. IT-95-14, ¶ 187 (citing *ICRC Commentary*, *supra*, at 229). In addition, claimant cites several decisions of the European Court of Human Rights in support of the argument that the circumstances in which claimant found himself mirror other international cases where illegal detention has been found to exist.

The cases and other authorities cited by claimant in his brief are largely consistent with the Commission’s findings discussed above; indeed, they reinforce the principle that being “held” as a hostage or unlawful detainee requires, at a minimum, the elements of

control or compulsion of the person. It is this principle that informs the Commission's determination of whether the first element of its standard under Category A has been satisfied.

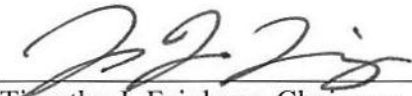
Considering all of the evidence here in the light most favorable to the claimant, the Commission determines that the claimant was never under the physical control of the hijackers. Indeed, from the particular facts of this claim, the Commission cannot find that the claimant was under the control of the hijackers for even a moment in time. He was able to communicate with airport personnel, shut down the airplane's flight systems, and escape to safety via the emergency hatch with the hijackers unaware of his presence or movements. In short, claimant's exit from the plane after shutting down the flight systems, undertaken only minutes after the gunmen boarded the plane, compels the finding that at no time during the ordeal was he under the control of the hijackers.

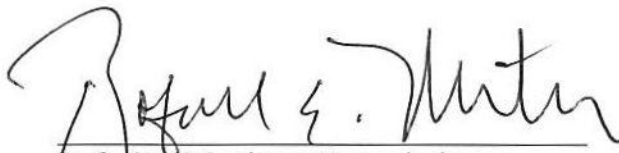
Claimant's brave and heroic actions were undoubtedly crucial to foiling the hijackers' plans insofar as the plane remained grounded without a flight crew. At the same time, and unfortunately for this claim, it is clear that it is precisely because the claimant was able to execute these actions without delay that the Commission cannot find that claimant was held illegally against his will, as required by the Commission's standard for Category A claims under the January Referral Letter.

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

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

Dated at Washington, DC, October 28, 2011
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman

Rafael E. Martinez, Commissioner

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