

**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-II-161
	}	
	}	Decision No. IRQ-II-003
	}	
Against the Republic of Iraq	}	
	}	

Counsel for Claimant:

Daniel Wolf, Esq.
Law Office of Daniel Wolf

PROPOSED DECISION

Claimant brings this claim against the Republic of Iraq (“Iraq”) alleging that Iraq held him hostage in violation of international law in August and September 1990. Because he has established that Iraq held him hostage for 42 days, he is entitled to an award of \$360,000.

BACKGROUND AND BASIS OF THE PRESENT CLAIM

Claimant alleges that he was a nine-year old United States citizen living in Kuwait with his family when Iraq invaded the country on August 2, 1990. He asserts that, beginning with the invasion and for six weeks thereafter, he and his family were forced to hide in his family’s residence in constant fear of being captured by Iraqi authorities. He further claims that during this entire period, the Iraqi government in effect forcibly prevented him (and other U.S. nationals) from leaving Kuwait and/or Iraq and did so with the express purpose of compelling the United States government to

acquiesce to certain Iraqi government demands. After the Iraqi government authorized women and minor U.S. nationals to leave, Claimant flew out of Kuwait (via Baghdad, Iraq) on September 12, 1990.

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

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").

State Department's second referral of claims to the Commission under the Claims Settlement Agreement, the 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.

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 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.

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

On November 2, 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 Here, therefore, we must look to the language of the "Category A" paragraph of the 2014 Referral. That language limits our jurisdiction 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

With respect to the first requirement—that the claim be brought by a "U.S. national"—the term "U.S. national" has a specific legal meaning. When the Commission interprets terms such as "U.S. national," Congress has directed us to look first to "the provisions of the applicable claims agreement."⁹ Here, that means we must turn first to the 2010 U.S.-Iraq Claims Settlement Agreement. That Agreement expressly provides a definition of "U.S. nationals." Article I of the Agreement states that "[r]eference to 'U.S.

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

⁸ See 22 U.S.C. § 1623(a)(1)(C).

⁹ *Id.* § 1623(a)(2) (2012).

nationals' shall mean natural and juridical persons who were U.S. nationals at the time their claim arose and through the date of entry into force of this agreement.”¹⁰ As the Commission has recognized in its previous decisions, the U.S. nationality requirement in these Iraqi claims programs thus means that 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.¹¹

Claimant satisfies the nationality requirement. He has provided a copy of his U.S. passport valid from October 11, 1987 to October 10, 1992, which shows that he was a U.S. national at the time of the alleged hostage-taking (August and September of 1990). He has also provided his current U.S. passport, which expires on October 12, 2019 and establishes that he has remained a U.S. national since August 1990.

No Pending Litigation

Additionally, Category A states that the claimant may not have been a plaintiff in any of the so-called Pending Litigation cases at the time of the entry into force of the Claims Settlement Agreement.¹² Footnote 2 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 2 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 in his Statement of Claim, under penalty of perjury, that “I have not received

¹⁰ Claims Settlement Agreement, art. I(2).

¹¹ See Claim No. IRQ-I-005, Decision No. IRQ-I-001 (Proposed Decision), at 5-6 (2014).

¹² The Agreement entered into force on May 22, 2011. See Claims Settlement Agreement, art. IX.

compensation under the 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 Backdrop to Claimant’s Allegations

Claimant’s hostage-taking claim is based upon events arising from what is known as the First Gulf War that ran from August 2, 1990¹³ through the first part of 1991.¹⁴ Claimant’s allegations involve the period after Iraq invaded Kuwait on August 2, 1990 but before a U.S.-led coalition force joined with Kuwaiti forces in January 1991 to expel Iraq from Kuwait.

Iraq’s treatment of foreign nationals: Shortly after Iraq invaded Kuwait on August 2, 1990, Iraqi forces began seizing and detaining U.S. nationals in Kuwait.¹⁵ Starting that very same day, the Iraqi military began searching for American citizens and other non-Iraqi nationals.¹⁶ By the next day, August 3, 1990, Iraq had taken several U.S. nationals into custody.¹⁷ Iraqi authorities then began to “relocate” many of these U.S. nationals from Kuwait to Baghdad.¹⁸

¹³ See S.C. Res. 660 (Aug. 2, 1990).

¹⁴ See George H. W. Bush, “Kuwait Is Liberated: Address by President Bush to the Nation, February 27, 1991” in U.S. Dep’t of State, *American Foreign Policy Current Documents 1991* 489 (Paul Claussen & Evan Duncan eds. 2008); S.C. Res. 687, ¶ 33 (Apr. 3, 1991).

¹⁵ See Unclassified U.S. State Department cable from U.S. Sec’y of State, dated Aug. 3, 1990.

¹⁶ See Caryle Murphy, *Iraqi Invasion Force Seizes Control of Kuwait*, WASH. POST, Aug. 3, 1990, at A1. The dateline of this article is Kuwait, Aug. 2.

¹⁷ Unclassified U.S. State Department cable from U.S. Sec’y of State, dated Aug. 3, 1990.

¹⁸ Unclassified U.S. State Department cable from U.S. Embassy in Baghdad, dated Aug. 7, 1990.

During those first few days after the invasion, some Americans and other foreign nationals were able to escape from Kuwait by driving across the border to Saudi Arabia.¹⁹ But, within days, the Iraqi military had sealed the border crossings and had set up check points on the roads leading out of Kuwait, making it nearly impossible for U.S. nationals (and those of several other countries) to leave.²⁰ One British national who tried to flee by crossing the desert was shot dead in the attempt.²¹ A week after the invasion, on August 9, 1990, Iraq made a formal announcement that it had closed all borders under its control, including those between Kuwait and Saudi Arabia, to foreign nationals.²²

During this period, U.S. nationals and foreign nationals from Japan, Germany, France, and the United Kingdom were effectively forced into “deep hiding” within Iraq and Kuwait.²³ On August 16, 1990, Iraq ordered a round-up of all U.S. citizens in Kuwait: Iraqi security forces were ordered to take all U.S. nationals into custody, while at the same time, all U.S. nationals were told to report to two Kuwait City hotels for their “safety.”²⁴ Most U.S. nationals (including, as we detail below, the Claimant before us here) viewed the latter order as a ruse and continued to try to hide from the Iraqi authorities in private residences, specially created “safe houses,” or at the U.S. Embassy compound in Kuwait. Hiding in private residences and safe houses became more difficult when, on August 24, 1990, Iraq’s Revolutionary Command Council issued Resolution 341, which made “sheltering a foreigner[] with a view to hiding him from

¹⁹ Unclassified U.S. State Department cable from U.S. Sec’y of State, dated Aug. 14, 1990.

²⁰ By August 7, 1990, the United States Embassy in Baghdad observed that “as far as the Embassy can determine, all Iraqi borders remain closed to foreigners.” Unclassified U.S. State Department cable from U.S. Embassy in Baghdad, dated Aug. 7, 1990.

²¹ See Amnesty International, *Iraq/Occupied Kuwait (Human Rights Violations Since August 2, 1990)*, at 25 (1990).

²² See *Arab Summit Postponed; Security Council Rejects Annexation*, ASSOCIATED PRESS, Aug. 9, 1990, <http://perma.cc/U9SK-MUUY>.

²³ Unclassified U.S. State Department cable from U.S. Embassy in Kuwait, dated Oct. 28, 1990.

²⁴ See *New Threat to Westerners: Americans, Britons Told to Assemble at Kuwait Hotels*, L.A. TIMES, Aug. 16, 1990, at P1; Unclassified U.S. State Department cable from the U.S. Embassy in Kuwait, dated Aug. 18, 1990.

authority” an offense punishable by death.²⁵ Throughout the crisis, Iraq continued to apprehend and detain U.S. nationals living in Kuwait and Iraq, several of whom were used as human shields.²⁶

Statements about foreign nationals by Iraqi government officials: On numerous occasions during August and September 1990, top Iraqi officials made clear not only that Iraq was preventing U.S. nationals (and those of several other countries) from leaving Kuwait and/or Iraq, but also the reasons for their detention: to compel the U.S. government (and the governments of those other nationals) to acquiesce to certain Iraqi demands. Iraq’s primary demand was that the United States (and other nations that might ally themselves with Kuwait) refrain from military action against Iraq. For example, on August 17, 1990, the Speaker of Iraq’s National Assembly at the time, Saadi Mahdi, stated that “Iraq . . . [will] play host to the citizens of these aggressive nations as long as Iraq remains threatened with an aggressive war.”²⁷

In addition, Iraq also insisted on a complete U.S. withdrawal of troops from Saudi Arabia and demanded an end to an economic embargo that had been imposed on Iraq because of its invasion of Kuwait. In an open letter dated August 19, 1990, Iraq’s president Saddam Hussein wrote to the families of foreigners in Iraq that

preventing the foreigners from departing Iraq—particularly those whose governments have a hostile position and are taking part in the preparation for aggression and the economic embargo against Iraq—will constitute a

²⁵ Resolution No. 341, al-Waqā’i’ al-‘Irāqīyah [Iraqi Official Gazette], No. 37 of Sep. 12, 1987, p. 3. The resolution is dated August 24, 1990. See also Unclassified U.S. State Department cable from U.S. Sec’y of State, dated Sep. 28, 1990.

²⁶ See Amnesty International, *Iraq/Occupied Kuwait (Human Rights Violations Since August 2, 1990)*, at 24 (1990); Walter Kälin (Special Rapporteur of the Commission on Human Rights), Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, ¶ 90, U.N. Doc. E/CN.4/1992/26 (Jan. 16, 1992); Unclassified U.S. State Department cable from U.S. Sec’y of State, dated Jan. 18, 1992.

²⁷ *Confrontation in the Gulf; Iraqi Remarks on Detention of Foreigners*, N.Y. TIMES, Aug. 18, 1990, at A11. The newspaper published the “text of the statement made . . . [on August 17, 1990] by the Speaker of the Iraqi Parliament, Saadi Mahdi Saleh, about the detention of foreign nationals in Iraq and Kuwait, as transmitted by the Iraqi press agency and translated by Reuters.”

means to open a deep dialogue with the peoples of those countries and those who represent them and with the administrations of those countries, to find a peaceful solution and avert the imminent catastrophe against the region and maybe the whole world that war would entail if it broke out. At any rate, their presence with the Iraqi families working near the vital targets may prevent military aggression.²⁸

Hussein also stated that “the foreigners [would] ... be allowed to travel immediately as they choose,” as soon as the U.S. withdrew its troops from Saudi Arabia.²⁹ In an open letter addressed to then U.S. President George H.W. Bush two days later (August 21, 1990), Hussein reiterated that “[n]ot allowing some foreigners to travel is not revenge, but deterrence of a crime of aggression President Bush intends to commit against the Iraqi people.”³⁰ Hussein also gave an address to the American people titled “Message of Peace” dated September 26, 1990, during which he repeated that he

wish[ed] to see the people of Iraq and its National Assembly given a guarantee or pronouncement from the United States of America, pledging its commitment not to launch [a] war of aggression against Iraq, a pledge that would enable [the Iraqi Government] ... immediately to allow all foreigners to leave the country if they so wished.³¹

Hussein made similar comments during personal visits with detained foreign nationals. During a visit with a group of British nationals on August 23, 1990, Hussein stated that the “presence [of foreign nationals] . . . is meant to prevent the scourge of war,

²⁸ Saddam Hussein, *Open Letter to U.S. President George Bush from President Saddam Hussein of 19 August 1990*, in *Iraq Speaks: Documents on the Gulf Crisis* 13 (Fred Moore trans. 1992).

²⁹ *Id.* at 14.

³⁰ Saddam Hussein, *Open Letter to U.S. President George Bush from President Saddam Hussein of 21 August 1990*, in *Iraq Speaks: Documents on the Gulf Crisis* 14 (Fred Moore trans. 1992); see also John Kifner, *Confrontation in the Gulf; Foreigners Trapped Till U.S. Leaves Region, Iraqi Warns; Says Kuwait Is ‘Arab Issue’*, N.Y. TIMES, Aug. 20, 1990, at A1 (quoting Hussein as stating that “averting death and starvation from American policy against Iraq, by preventing some citizens from traveling, is a gain for humanity as a whole.”)

³¹ Saddam Hussein, *Message of Peace from Saddam Hussein, President of the Republic of Iraq, to the People of the United States of America*, in *Iraq Speaks: Documents on the Gulf Crisis* 48, 53 (Fred Moore trans. 1992).

to avoid the war.”³² During a visit to another group of foreigners on August 28, 1990, Hussein stated that “[Iraq] view[s] your presence here as guests of Iraq at a certain time as something that may prevent [a war.]”³³ He also stated that “a number of foreigners have been kept to prevent the death of many more foreigners” and that “Iraq believed that among the ways to prevent war is not allowing . . . [foreigners] to travel abroad until further notice.”³⁴

International Response: The Iraqi government’s treatment of foreign nationals in Iraq and Kuwait was the subject of several resolutions of the Security Council of the United Nations during this period. In Resolution 664 of August 18, 1990, the Security Council demanded that “Iraq permit and facilitate the immediate departure from Kuwait and Iraq of third-State nationals and grant immediate and continuing access of consular officials to such nationals.”³⁵ In Resolution 667 of September 16, 1990, the Security Council reiterated its demand for “the immediate release of all nationals mentioned in Resolution 664,” and thus the release of third-State nationals—including U.S. citizens—prevented from leaving Kuwait or Iraq.³⁶ In Resolution 670 of September 25, 1990, the Security Council condemned “Iraq’s . . . holding of third-State nationals against their will, in flagrant violation of . . . international humanitarian law.”³⁷ Similarly, in Resolution 674 of October, 29, 1990, the Security Council condemned “the actions by the Iraqi authorities and occupying forces to take third-State nationals hostage.”³⁸ In that same Resolution, the Security Council also demanded that “Iraqi authorities and occupying forces immediately cease and desist from taking third-State nationals hostage”³⁹ and that

³² *Excerpts of remarks exchanged between Saddam Hussein and some British families detained by Iraq at vital Iraqi installations on 23 August 1990, in Iraq Speaks: Documents on the Gulf Crisis* 16 (Fred Moore trans. 1992).

³³ Saddam Hussein, *Remarks by Saddam Hussein during his visit with some families on 28 August 1990, in Iraq Speaks: Documents on the Gulf Crisis* 19 (Fred Moore trans. 1992).

³⁴ *Id.* at 19, 21.

Iraq “permit and facilitate the immediate departure from Kuwait and Iraq of those third-State nationals, including diplomatic and consular personnel, who wish to leave.”⁴⁰

Departure of foreign nationals from Iraq and Kuwait: Throughout the crisis, the Iraqi government granted small groups of individuals permission to leave Iraq and Kuwait. It granted blanket releases to particular groups based on a number of factors, including nationality and gender.⁴¹ The categories of U.S. nationals that were allowed to leave Kuwait included some U.S. diplomats in Kuwait; dependents of U.S. diplomats stationed in Kuwait; and women and minors.⁴² The Iraqi government also permitted some individuals to leave on an ad hoc basis after receiving visits from prominent “unofficial envoys”—including politicians, athletes, and in some cases, the family members of the U.S. nationals trapped in Iraq.⁴³ Of particular relevance to this claim was Iraqi President Saddam Hussein’s announcement on August 28, 1990 authorizing women and minors of foreign nationality to leave Iraq and Kuwait.⁴⁴ At the same time, though, Hussein made clear that no U.S. male adults would be permitted to leave “as long as this

³⁵ S.C. Res. 664 ¶ 1 (Aug. 18, 1990).

³⁶ S.C. Res. 667 ¶ 2 (Sep. 16, 1990).

³⁷ S.C. Res. 670 (Sep. 25, 1990).

³⁸ S.C. Res. 674 (Oct. 29, 1990).

³⁹ *Id.* at ¶ 1.

⁴⁰ *Id.* at ¶ 4.

⁴¹ See Mark Fineman, *Iraq Prepares to Free Hostages After Delay: Gulf crisis: Logistical Problems Are Blamed. About 250 American Women and Children Are Expected To Be Among Those Who Leave*, L.A. TIMES, Aug. 30, 1990, at A1 (reporting that women and children were given permission to depart on August 28, 1990); Unclassified U.S. State Department cable from U.S. Sec’y of State, dated Oct. 28, 1990 (noting that French nationals had received permission to depart Iraq).

⁴² See Mark Fineman, *Iraq Prepares to Free Hostages After Delay: Gulf crisis: Logistical Problems Are Blamed. About 250 American Women and Children Are Expected To Be Among Those Who Leave*, L.A. TIMES, Aug. 30, 1990, at A1; *Chronology of Persian Gulf Crisis*, UNITED PRESS INTERNATIONAL, Sep. 1, 1990.

⁴³ See Philip Shenon, *Mideast Tensions; At Baghdad’s Bazaar, Everyone Wants Hostages*, N.Y. TIMES, Nov. 27, 1990, at A17.

⁴⁴ See Mark Fineman, *Iraq Prepares to Free Hostages After Delay: Gulf crisis: Logistical Problems Are Blamed. About 250 American Women and Children Are Expected To Be Among Those Who Leave*, L.A. TIMES, Aug. 30, 1990, at A1.

crisis continues.”⁴⁵ Finally, on December 6, 1990, after intense pressure from the international community, the Iraqi government authorized the departure of all foreign nationals who wished to leave.⁴⁶

The Iraqi government’s promises to release foreign nationals were not, however, always honored immediately. In at least one instance, several foreigners were forcibly detained after the Iraqi government had given them formal permission to leave Iraq and Kuwait. These were French nationals who “were picked up by the Iraqis and jailed between the time [Iraqi President Saddam Hussein] announced the general release [of French nationals] and the actual departure of the community.”⁴⁷

Moreover, Iraq imposed a number of conditions on air travel that delayed the departure of a significant number of U.S. nationals for several days or even weeks after a release was granted.⁴⁸ First, Iraq required departing U.S. nationals to obtain exit visas before leaving its territory, a process which could take over a day to complete.⁴⁹ Second, and more importantly, Iraq required States seeking to repatriate their nationals to charter evacuation flights through its national carrier, Iraqi Airways.⁵⁰ As a result, Iraq maintained complete control over the evacuation process; at least once, an evacuation flight was cancelled by order of the Iraqi government and was restored only after significant diplomatic pressure.⁵¹ Subject to these conditions, the U.S. government organized several flights to repatriate its nationals during the weeks after the August 28,

⁴⁵ Joseph Treaster, *Confrontation in the Gulf; Hostage Evacuation Flights Resume from Iraqi Capital*, N.Y. TIMES, Sep. 5, 1990, at A15.

⁴⁶ See Dana Priest, *Saddam Orders the Release of All Hostages*, WASH. POST, Dec. 6, 1990.

⁴⁷ Unclassified U.S. State Department cable from U.S. Embassy in Kuwait, dated Oct. 28, 1990.

⁴⁸ See *Iraq Frees Hundreds Of Hostages American Men Part Of Group*, PHILA. INQUIRER, Sep. 2, 1990, at A1.

⁴⁹ Joseph Treaster, *Confrontation in the Gulf; Evacuation of Hostages Is Stalled As Iraqis Prohibit Foreign Flights*, N.Y. TIMES, Sep. 4, 1990, at A1.

⁵⁰ See *id.*

⁵¹ See *id.*

1990 release for women and minors of foreign nationality and the December 6, 1990 release for all foreign nationals.⁵²

Factual Allegations Specific to Claimant

Claimant states that Iraq held him hostage from August 2, 1990 until September 12, 1990, a total of forty-two days. Claimant alleges that he was nine years old and living in Kuwait with his family when Iraq invaded the country on August 2, 1990. He alleges that after the invasion, he and his family sequestered themselves inside their home “for fear of being . . . arrested by Iraqi soldiers who established a heavy presence in . . . [their] neighborhood within days of the invasion.” Claimant further alleges that by the end of August, Iraqi forces were “going door to door searching for American citizens and other western nationals—arresting any of them they could find and administering harsh punishment to Kuwaiti and other Arab nationals who were determined to be harboring them.”

Claimant and his family remained sequestered in their home for six weeks beginning with the invasion on August 2, 1990. Pursuant to Iraqi President Saddam Hussein’s August 28, 1990 announcement that foreign national women and minors could leave the country, Claimant was formally permitted to go. Between September 1, 1990 and September 23, 1990, the U.S. government organized several charter flights from Iraq and Kuwait to repatriate those released U.S. nationals wishing to return to the United States.⁵³ On September 12, 1990, Claimant flew to Baghdad with his mother and brother

⁵² See Stanley Meisler, *Last U.S. Refugee Plane Leaves Iraq: Persian Gulf: Hundreds of Americans Remain As Pawns in the Largest Hostage Crisis in the Nation’s History. Baghdad Publishes Interviews with ‘Human Shields’*, L.A. TIMES, Sep. 23, 1990, at A1; *Last U.S. Flight Takes Hostages from Baghdad 5 Kuwait Diplomats, 27 Other Americans Arrive in Germany*, BALTIMORE SUN, Dec. 14, 1990, <https://perma.cc/RTS9-ECFG>.

⁵³ Stanley Meisler, *Last U.S. Refugee Plane Leaves Iraq: Persian Gulf: Hundreds of Americans Remain As Pawns in the Largest Hostage Crisis in the Nation’s History. Baghdad Publishes Interviews with ‘Human Shields’*, L.A. TIMES, Sep. 23, 1990, at A1 (quoting State Department spokeswoman Margaret Tutwiler as

on one of these U.S. chartered flights. In Baghdad, Iraq provided the three of them exit visas. They then flew to London that same day, September 12, 1990, and from there to Raleigh, North Carolina the next day.

Supporting Evidence

Claimant has supported his claim with, among other things, his sworn Statement of Claim and a copy of his passport, which contains an Iraqi exit stamp dated September 12, 1990, and an entry stamp from Gatwick Airport in London with the same date. Claimant has also provided a copy of a news article dated September 13, 1990 and declarations from him and his mother describing the circumstances of his alleged detention and ultimate departure from Kuwait. Additionally, Claimant has submitted a number of documents that provide background about the broader geopolitical situation during the First Gulf War, including some that relate specifically to the circumstances faced by U.S. nationals in Iraq and Kuwait at the time. These documents include statements from U.S. and Iraqi officials, resolutions of the United Nations Security Council, newspaper articles, a report from Amnesty International on human rights violations committed by Iraq in 1990, unclassified cables and a memorandum from the U.S. Department of State, and affidavits submitted in two lawsuits brought by other U.S. nationals who were also in Kuwait or Iraq during the First Gulf War.

Legal Standard

Category A of the 2014 Referral consists of “claims by U.S. nationals for hostage-taking by Iraq in violation of international law prior to October 7, 2004” 2014

stating “[The U.S. embassy] reports from Baghdad that all the Americans in Iraq who have been able to leave and who wanted to leave have now departed. . . . We have no more charters scheduled at this time.”)

Referral at ¶ 3 (footnotes omitted).⁵⁴ Accordingly, to determine the applicable standard for compensability for hostage-taking claims under Category A, the Commission must look to pertinent sources in international law.⁵⁵

Customary international law prohibits States from taking hostages during an armed conflict. Under the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention”)⁵⁶ and its First Additional Protocol,⁵⁷ States are prohibited from taking hostages during an armed conflict.⁵⁸ This prohibition on hostage-taking during armed conflict had thus become customary international law prior to the Iraqi invasion of Kuwait in 1990.⁵⁹

⁵⁴ The 2014 Referral’s reference to the date of October 7, 2004, derives from the Claims Settlement Agreement, which by its terms limited its coverage to claims that “[a]re based on an act that occurred prior to October 7, 2004....” *Claims Settlement Agreement*, Art. III (1)(a)(iii). The significance of the October 7, 2004 date is not mentioned in the Agreement or the Referral.

⁵⁵ When the applicable claims agreement does not define a term, as is the case here, the Commission must apply “[t]he applicable principles of international law” 22 U.S.C. § 1623(a)(2)(B).

⁵⁶ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War [hereinafter Fourth Geneva Convention], arts. 3, 34, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁵⁷ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) [hereinafter Additional Protocol I], art. 75(2)(c), June 8, 1977, 1125 U.N.T.S. 3.

⁵⁸ See Fourth Geneva Convention, art. 34 (establishing that “[t]he taking of hostages is prohibited.”); *id.* at art. 3(1)(b) (establishing that the “taking of hostages” is prohibited in an armed conflict not of an international character); AP I, art.75(2)(c) (providing that hostage-taking is “and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents.”) See also Fourth Geneva Convention, art. 147 (recognizing hostage-taking as a grave breach of the Convention).

⁵⁹ See Jean-Marie Henckaerts, Louise Doswald-Beck, International Committee for the Red Cross, *Customary International Humanitarian Law* 334-37 (2005); Walter Kälin (Special Rapporteur of the Commission on Human Rights), Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, ¶¶ 42-44, U.N. Doc. E/CN.4/1992/26 (Jan. 16, 1992) (noting that “certain provisions of Protocol I, particularly those relating to the protection of civilians and persons detained by the occupying Power [and including the prohibition on hostage-taking] . . . are considered customary in nature in that they reiterate and extend provisions already set down in the Geneva Conventions which through time and usage have acquired international consensus.”); Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 427 (1987) (noting that “the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely . . . and not be subjected to . . . the taking of hostages” is viewed by the United States Department of State as reflecting customary international law); *Tadić v. Prosecutor*, Case No. IT-94-I-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Oct. 2, 1995) (recognizing Article 3 of the Fourth Geneva Convention, which prohibits hostage-taking in armed conflict not of an international character, as customary international law).

We need not decide whether, as a matter of treaty law, the Fourth Geneva Convention's prohibition on hostage-taking specifically applies to U.S. nationals in Kuwait at the time,⁶⁰ because the customary international law prohibition on hostage-taking during armed conflict protects all persons, irrespective of nationality.⁶¹

Therefore, to be entitled to compensation 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.⁶²

(1) Armed Conflict

On August 2, 1990, Iraq's armed forces invaded Kuwait. There is thus no doubt that as of that date, Iraq and Kuwait were engaged in an armed conflict. That armed conflict continued as a matter of law until April 8, 1991, the date on which Iraq accepted the United Nations Security Council's offer of a formal cease-fire between Iraq on the one hand and Kuwait and the United Nations Member States (including the United

⁶⁰ The prohibition on hostage-taking under the Fourth Geneva Convention applies only to "protected persons," as that term is defined in Article 4 of the Convention. While Article 4 provides a broad definition of "protected persons"—"those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals"—it specifically excludes those "[n]ationals of a neutral State who find themselves in the territory of a belligerent State . . . while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." Fourth Geneva Convention, art. 4. Under this exclusion, U.S. nationals in Kuwait at the time might not be deemed "protected persons." The commentary to Article 4 establishes, however, that in an occupied territory, this exception does not apply: "protection is accorded to all persons who are not of the nationality of the occupying State." 4 Int'l Comm. of the Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 46 (1958). Because the evidence does not conclusively establish that Kuwait was "an occupied territory" until August 6, 1990, *see* S.C. Res. 660 (Aug. 6, 1990) (first recognizing Kuwait as an occupied territory on August 6, 1990), it is unclear whether U.S. nationals in Kuwait at the time would have been "protected persons" entitled to the protection of the Fourth Geneva Convention's hostage-taking prohibition between August 2, 1990 and August 6, 1990.

⁶¹ Iraq became a party to the Fourth Geneva Convention prior to 1990 but did not become a party to the First Additional Protocol until 2013. *See* Swiss Federation, List of States Parties to the Fourth Geneva Convention, <https://perma.cc/87MT-27HR>; Swiss Federation, List of States Parties to Additional Protocol I, <https://perma.cc/F3MH-UYUA>. Because States were prohibited from taking hostages under customary international law by 1990, Iraq's status as a party also makes no difference to our analysis.

⁶² An estate claimant would of course need to make this showing as to its decedent.

States) who had contributed to the coalition forces defending Kuwait on the other.⁶³ Thus, any claimant who alleges that Iraq took the claimant hostage in violation of international law during any portion of the period from August 2, 1990 to April 8, 1991 satisfies the requirement that Iraq have been engaged in an armed conflict.

(2) Hostage-Taking

To show that Iraq took a claimant hostage, the 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. A claimant can establish the first element 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. We derive this standard from various sources that evidence the customary international law of hostage-taking, including in particular the definition of hostage-taking found in the International Convention against the Taking of Hostages ("Hostages Convention") and the jurisprudence of international tribunals discussing hostage-taking claims.⁶⁴

Although neither the Fourth Geneva Convention nor the First Additional Protocol contains a definition of hostage-taking,⁶⁵ what constitutes hostage-taking is well-

⁶³ See S.C. Res. 687, ¶ 33 (Apr. 3, 1991); Letter Dated 11 April 1991 from the President of the Security Council Addressed to the Permanent Representative of Iraq to the United Nations, U. N. Doc. S/22485, Apr. 11, 1991.

⁶⁴ This standard is also consistent with the legal standard for hostage-taking under U.S. law. See *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003).

⁶⁵ The official International Committee for the Red Cross commentary to the Fourth Geneva Convention gives some explanation as to what constitutes hostage-taking for the treaty's purposes, but it fails to include any reference to the third-party compulsion that the Hostages Convention definition requires: For example, the commentary to Article 34 of the Fourth Geneva Convention describes hostages as "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). Similarly, the commentary to Article 147, which recognizes

recognized in international law. In particular, article 1 of the Hostages Convention defines hostage-taking. While the Hostages Convention itself may or may not have been binding customary international law in 1990, we view it as an important and relevant source for providing a definition of hostage-taking under customary international law.⁶⁶

The Hostages Convention defines hostage-taking as the offense committed by

any person who seizes or detains and threatens to kill, to injure or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.⁶⁷

International tribunals have looked to this Hostages Convention definition to explain the elements of the offense of hostage-taking under both customary international law and the Fourth Geneva Convention. For example, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) adopted this definition in *Prosecutor v. Blaškić*, in which the Tribunal specifically analyzed hostage-taking in the context of armed conflict under both the Fourth Geneva Convention and customary international law. In *Blaškić*, the tribunal determined that

a situation of hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another person in order to compel a third party to do or to abstain from doing something as a condition for the release of that person.⁶⁸

hostage-taking as a grave breach of the Convention, defines hostages “as persons illegally deprived of their liberty, a crime which most penal codes take cognizance of and punish,” and notes that “there is an additional feature [to the offense], i.e. the threat either to prolong the hostage’s detention or to put him to death.” *Id.* at 600. Given consistent jurisprudence elsewhere requiring some form of third-party compulsion to make out a hostage-taking claim, we view this commentary as incomplete.

⁶⁶ As of June 2016, the Hostages Convention has 174 parties, including Iraq, which ratified the treaty in 2013, and 39 signatories. See United Nations, *Multilateral Treaties Deposited with the Secretary-General*, <https://perma.cc/N2HF-UFEM>.

⁶⁷ International Convention against the Taking of Hostages, art.1, Dec. 18, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205.

⁶⁸ *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, ¶¶ 158-161, 164-166 (Mar. 3, 2000). In *Blaškić*, the tribunal analyzed hostage-taking as a violation of the Fourth Geneva Convention and customary international law. *Id.* at ¶ 638.

International tribunals have broken this definition down into three specific elements. For example, the Special Court for Sierra Leone cited *Blaškić* for the proposition that there are “specific elements for the offence of hostage-taking.” Those are

- (i) The Accused seized, detained, or otherwise held hostage one or more persons; (ii) The Accused threatened to kill, injure or continue to detain such person(s); and (iii) The Accused intended to compel a State, an international organisation, a natural or legal person, or a group of persons, to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person(s).⁶⁹

The International Criminal Court’s Elements of Crimes also sets forth these same three elements in its definition of the war crime of hostage-taking:

- (1) The perpetrator seized, detained or otherwise held hostage one or more persons. (2) The perpetrator threatened to kill, injure or continue to detain such person or persons. (3) The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.⁷⁰

In *Prosecutor v. Karadžić*—the most recent decision of an international tribunal to address hostage-taking in violation of the customary international law of armed conflict—the ICTY reiterated that the definition codified in article 1 of the Hostages Convention provides a sound basis for ascertaining the elements of the offense under customary international law.⁷¹

⁶⁹ *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgment, ¶ 240 (Mar. 2, 2009). The court considered the elements of the offense under customary international law, as codified in, among other instruments, Article 3 of the Fourth Geneva Convention. *Id.* at ¶ 239.

⁷⁰ Assembly of States Parties to the Rome Statute of the International Criminal Court, Elements of Crimes, U.N. Doc. ICC-ASP/1/3(SUPP), at 129 (2002). The Assembly included other elements in its formulation of the offense with the purpose of limiting its application to acts committed during an international armed conflict and to persons protected under the 1949 Geneva Conventions.

⁷¹ *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 468 (Mar. 24, 2016). The tribunal considered hostage-taking under customary international law, as codified in Article 3 of the Fourth Geneva Convention. *Id.* at ¶ 5939.

In sum, for a claimant to satisfy the hostage-taking requirement under Category A of the 2014 Referral, 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.

Application of Standard to this Claim

In view of the standards articulated above, to make out a substantive claim under Category A of the 2014 Referral, Claimant must establish that (1) Iraq was engaged in an armed conflict and (2) during that conflict, Iraq took Claimant hostage.

(1) Armed Conflict: Claimant alleges that Iraq took him hostage in Kuwait on August 2, 1990 and held him hostage for forty-two days, until September 12, 1990, when Iraqi officials granted him and his family exit visas, allowing them to leave Iraq. During this entire period, Iraq was engaged in an armed conflict with Kuwait.⁷² The hostage-taking prohibition in the customary international law of armed conflict thus applies.

(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 explicit or implicit condition for the claimant's release. Claimant satisfies this standard for the 42-day period from August 2, 1990 to September 12, 1990.

(a) Detention/deprivation of freedom: For purposes of analyzing Claimant's allegations of having been detained, his time in Kuwait following the Iraqi invasion can be divided into three periods: (i) between the Iraqi invasion on August 2,

⁷² See *supra* at 15.

1990 and the Iraqi government's formal closing of the borders on August 9, 1990; (ii) from that August 9th formal closing of the borders until the August 28, 1990 announcement that women and minors could leave Iraq and Kuwait; and (iii) from that August 28th announcement until Claimant's departure on September 12, 1990.

From August 2, 1990 until Iraq formally closed its borders to foreign nationals on August 9, 1990,⁷³ Iraq confined Claimant to his residence by threatening all U.S. nationals with immediate seizure and forcible detention. Although some foreign nationals did manage to leave Kuwait and/or Iraq during this period,⁷⁴ Claimant could not reasonably be expected to have escaped. Iraqi authorities were forcibly detaining foreign nationals (including U.S. nationals) in Kuwait, relocating many to Baghdad against their will. Claimant and his family understandably had, as the United Nations Compensation Commission has put it, a "manifestly well-founded fear" of being killed or forcibly detained if they had left their home.⁷⁵ For purposes of the legal standard, putting Claimant and his family in this situation in effect amounts to detaining them in their residence. Iraq thus detained Claimant in his residence from August 2, 1990 to August 9, 1990.

From August 9, 1990 until he flew from Baghdad to London on September 12, 1990, the Iraqi government confined Claimant to Kuwait (and, for a short time just before his release, the Baghdad airport), preventing him from leaving the country by the threat of force. Starting on August 9, 1990, the Iraqi government formally closed Kuwait's

⁷³ See *Arab Summit Postponed; Security Council Rejects Annexation*, ASSOCIATED PRESS, Aug. 9, 1990, <https://perma.cc/U9SK-MUUY>.

⁷⁴ See *supra* at 7.

⁷⁵ Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to US \$100,000 (Category "C" Claims), UN Doc. S/AC.26/1994/3 (1994), at 93.

borders, forcibly prohibiting U.S. nationals from leaving.⁷⁶ Thus, as of that date, Iraq prohibited Claimant from leaving the country, effectively detaining him within the borders of Kuwait and Iraq. For Claimant, this formal policy of prohibiting U.S. nationals from leaving Iraq and Kuwait lasted until August 28, 1990, when the Iraqi government announced that all female and minor U.S. nationals could leave.⁷⁷

Although Claimant may have been legally permitted to leave Kuwait on August 28, 1990, his detention did not end on that date. As the Commission has previously recognized, a claimant's detention ends only on the date that he is released from the control of the person or entity that detained him.⁷⁸ Any "attempt [by the perpetrator] to restrict [the] movements" of a Claimant establishes control,⁷⁹ whereas a claimant who has a reasonable opportunity to leave the site of his or her captivity is deemed no longer to be under the perpetrator's control.⁸⁰

Under this standard, Claimant remained under Iraq's control until September 12, 1990. As noted above, Iraq imposed conditions on air travel that limited the ability of foreign nationals, including U.S. nationals, to leave Iraq and/or Kuwait immediately after the August 28, 1990 release announcement.⁸¹ Indeed, the available evidence indicates that Claimant left Iraq at the first reasonable opportunity, on the September 12, 1990 U.S. government-chartered flight that left Iraq. Because there is no evidence that Claimant remained voluntarily in Kuwait at any time during this period, we conclude that he was under Iraq's control and thus detained from August 28, 1990 to September 12, 1990.

⁷⁶ See *supra* at 7.

⁷⁷ See *supra* at 11.

⁷⁸ See Claim No. LIB-II-183, Decision No. LIB-II-178 (Proposed Decision), at 13 (2012).

⁷⁹ *Id.* at 12.

⁸⁰ See *id.* at 13.

⁸¹ See *supra* at 12.

In sum, Iraq thus detained Claimant from August 2, 1990 until September 12, 1990.

(b) Threat: The Iraqi government threatened U.S. nationals in Kuwait and Iraq with continued detention.⁸² This included Claimant.⁸³ Both Iraqi President Saddam Hussein and the Speaker of Iraq's National Assembly Saadi Mehdi made clear that American nationals (as well as those from numerous other countries) would not be permitted to leave.⁸⁴

In short, the Iraqi government made unequivocal threats to continue to detain U.S. nationals in Kuwait and Iraq. Claimant was a U.S. national in Kuwait at the time. Claimant has thus established that Iraq threatened to continue to detain him.

(c) Third party coercion: The reason Iraq detained Claimant and threatened him with continued detention was to compel the United States government to act in certain ways as an explicit and/or implicit condition for his release. Iraq itself stated that it sought three things from the United States government before it would release the detained U.S. nationals; it wanted the United States (i) not to attack Iraq, (ii) to withdraw its troops from Saudi Arabia; and/or (iii) to end the economic embargo

⁸² To 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." See *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, ¶ 468 (Mar. 24, 2016).

⁸³ While we determine that these statements apply to Claimant and other similarly situated U.S. nationals who were prevented from leaving Iraq or Kuwait after the invasion, we do not make any findings as to whether they also apply to U.S. nationals with diplomatic status: Iraqi officials made specific representations about the ability of diplomatic and consular staff members with U.S. nationality (and their relatives) to leave Iraq and Kuwait throughout the crisis. See *In Iraq: 'We Have A Problem' Iraq Holds Fleeing U.S. Diplomats Staff from Kuwait Reaches Baghdad, But Can't Leave*, PHILA. INQUIRER, Aug. 24, 1990, <https://perma.cc/B2YF-79AY>.

⁸⁴ See *supra* at 8-10.

imposed on Iraq.⁸⁵ Indeed, at the time, the U.S. government itself understood Iraq's actions to be hostage-taking.⁸⁶

In sum, this claim meets the standard for hostage-taking within the meaning of the 2014 Referral. Iraq held Claimant hostage in violation of international law for a period of forty-two days, and Claimant is thus entitled to compensation.

COMPENSATION

Having concluded that the present claim is compensable, the Commission must next determine the appropriate amount of compensation.

Without setting a precedent for other categories or other claims programs, the Commission holds that successful claimants under Category A of the 2014 Referral should be awarded compensation in the amount of \$150,000 plus an additional \$5,000 for each day the claimant was in captivity.⁸⁷

Here, three factors are particularly important: (1) the State Department's recommendation, (2) our precedent, and (3) the State Department's awards to other claimants Iraq held hostage during the same period. First, for claims found to be compensable, the 2014 Referral Letter specifically recommends "an amount of \$150,000 per claim plus \$5,000 for each day the claimant was in captivity."⁸⁸ Second, the recommended approach—which combines a lump-sum payment with a *per diem* amount that accounts for the duration of the victim's captivity—falls reasonably within the range

⁸⁵ See *supra* at 8-10.

⁸⁶ See George H. W. Bush, "These Innocent People . . . Are, In Fact, Hostages" in U.S. Dep't of State, *American Foreign Policy Current Documents 1990* 484 (Sherrill Brown Wells ed. 1991); see also 2014 Referral at ¶ 3; cf. S.C. Res. 674 (Oct. 29, 1990) ("actions by . . . Iraq authorities and occupying forces to take third-State nationals hostage" and demanded that Iraq "cease and desist" this practice).

⁸⁷ In previous programs, the Commission has noted that assessing the value of intangible, non-economic damages is difficult. See Claim No. LIB-II-012, Decision No. LIB-II-006 (Proposed Decision), at 10; Claim No. IRQ-I-022, Decision No. IRQ-I-008 (Proposed Decision), at 15; see also Dan B. Dobbs, *Dobbs' Law of Remedies* ¶ 8.3(6) (2nd ed. 1993); Marjorie M. Whiteman, *Damages in International Law* 777-78 (1937). This is no less true here.

⁸⁸ 2014 Referral at ¶ 3.

of awards that the Commission and other international tribunals have previously considered to be appropriate damages for hostage-taking or unlawful detention.⁸⁹

Finally, the State Department awarded compensation based on precisely this same formula to other U.S. nationals who were held hostage by Iraq at the same time. Following receipt of the funds transferred by Iraq to the United States in connection with the Claims Settlement Agreement, the State Department distributed payments for certain types of claims covered by the Agreement, one of which was “claims of former hostages and human shields with unpaid judgments against Iraq or those with pending litigation against Iraq at the time of the entry into force of the Claims Settlement Agreement” 2014 Referral ¶ 1. According to uncontroverted evidence presented to the Commission during the first Iraq Claims Program, these payments were based on a formula, consistently applied to all of the hostages, of \$150,000 plus \$5,000 per day of detention—*i.e.*, the same formula recommended by the State Department here.⁹⁰

The only difference between the hostages paid by the State Department and those before us now under Category A of the 2014 Referral is that those paid by the State Department had “unpaid judgments” or “pending litigation” against Iraq at the time the Claims Settlement Agreement entered into force. We see no reason to award different

⁸⁹ See Claim No. LIB-II-002, Decision No. LIB-II-002 (Final Decision), at 10 (awarding \$1,000,000 in compensation for hostage-taking); *see also, e.g.*, A.H. Feller, *The Mexican Claims Commissions* 300-01 (1935) (noting that several early claims tribunals awarded approximately \$100 a day for compensation for unlawful detention which is equivalent to \$2417 dollars per day when adjusted for inflation); *Perry (U.S.) v. Pan.*, Bert L. Hunt, *American and Panamanian General Claims Arbitration (Hunt's Report)* 33-35, 71-77, 82-84 (1934) (awarding \$57.50 in compensation for unlawful detention, which is equivalent to \$1027 when adjusted for inflation). Though not applicable here because this Commission is bound by international law, *see* 22 U.S.C. § 1623(a)(2)(B), federal courts applying U.S. law have also used a similar formulaic approach to compensation. *See Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 37 (D.D.C. 2001) (awarding \$10,000 per day of captivity for a total sum of \$5,640,000); *Price v. Socialist People's Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, 134-35 (D.D.C. 2005) (awarding \$10,000 per day of captivity for a total sum of \$1,050,000); *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 26 (D.D.C. 2001) (finding that \$10,000 per day of incarceration, is reasonable and appropriate . . . to compensate . . . for both the suffering inflicted by the captivity itself, and for the psychological injuries experienced by [the plaintiffs] following their release.).

⁹⁰ *See, e.g.*, Claim No. IRQ-I-001, Decision No. IRQ-I-005 (Proposed Decision), at 8.

levels of compensation for hostage-taking to otherwise similarly situated claimants simply because some had initiated litigation against Iraq and others had not. In the Libyan claims programs, we also had categories of claimants who differed solely on this basis, and we awarded them the same compensation despite this difference. We specifically rejected the argument that claimants with an “unpaid judgment” were entitled to greater total compensation than other claimants with the same substantive claim.⁹¹ Similarly, in wrongful-death and physical-injury claims in the Libyan claims programs, we awarded claimants who had not been plaintiffs in a “pending litigation” case the same compensation as those who had been.⁹² Claimant here should thus be awarded the same compensation as those hostages who brought lawsuits and whom the State Department has already paid.

Finally, Claimant is not entitled to interest. The Commission has previously held that, based on principles of international law, compensable tort claims are not entitled to interest as part of the awards.⁹³ Neither the Claims Settlement Agreement nor the 2014 Referral provide a basis to depart from this precedent.

Therefore, for the forty-two days Iraq held Claimant hostage, he is entitled to an award of \$360,000, which is \$150,000 plus (42 x \$5,000). This amount constitutes the entirety of the compensation to which Claimant is entitled under the Claims Settlement Agreement.

⁹¹ See Claim No. LIB-II-017, Decision No. LIB-II-164 (Proposed Decision), at 16-20 (rejecting claim that wrongful-death claimants with a non-final prior court judgment were entitled to additional compensation beyond other wrongful-death claimants).

⁹² See *Claim of ESTATE OF VIRGEN MILAGROS FLORES*, Claim No. LIB-II-065, Decision No. LIB-II-043 (2011) (awarding non-Pending Litigation claimant the same level of compensation as Pending Litigation claimants in wrongful death claim, in part because “this [was] not a difference that [held] any legal significance for the purpose of determining the amount of compensation to be awarded”); Claim No. LIB-II-039, Decision No. LIB-II-015, at 7; *see also* LIB-II-155, Decision No. LIB-II-171, at 5 (using same approach to determining additional compensation for physical injuries for those who did not have litigation pending at the time of the Libyan claims settlement agreement as those who did).

⁹³ See, e.g., Claim No. LIB-I-001, Decision No. LIB-I-001, at 11-13.

The Commission hereby enters the following award, which will be certified to the Secretary of the Treasury for payment under sections 7 and 8 of the ICSA.⁹⁴

AWARD

Claimant is entitled to an award in the amount of \$360,000.

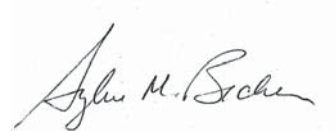
Dated at Washington, DC, July 13, 2016
and entered as the Proposed Decision
of the Commission.

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

August 23, 2016



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) (2015).

⁹⁴ 22 U.S.C. §§ 1626-1627 (2012).