

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

In the Matter of the Claim of

Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-II-004

Decision No. LIB-II-005

Counsel for Claimant:

Stuart Newberger, Esq.
Crowell & Moring LLP

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based on the claimant being held hostage or unlawfully detained 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 United States nationals against Libya. *Letter dated January*

15, 2009, from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission (“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 Secretary of State certified, pursuant to the LCRA, that the United States Government had received funds sufficient to ensure “fair compensation of claims of nationals of the United States for . . . physical injury in cases pending on the date of enactment of this Act against Libya” January Referral Letter, *supra*, ¶ 1. On the same day, the President issued Executive Order No. 13,477, 73 Fed.

Reg. 65,965 (Oct. 31, 2008), espousing the claims of United States nationals coming within the terms of the Claims Settlement Agreement, barring United States nationals from asserting or maintaining such claims, terminating any pending suit within the terms of the Claims Settlement Agreement, and directing the Secretary of State to establish procedures governing claims by United States nationals falling within the terms of the Claims Settlement Agreement.

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

BASIS OF THE PRESENT CLAIM

On August 18, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits supporting the claim. In substance, the claimant, Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) states that on September 5, 1986, he was held hostage or unlawfully detained by armed hijackers on board Pan Am Flight 73 in Karachi, Pakistan, for approximately sixteen hours. The claimant has provided evidence of his United States nationality, both on the date of the incident and at the time of the Claims Settlement Agreement. Additionally, he has provided an extensive description of the hijacking; a copy of the complaint in the litigation against Libya to which he was a party; a copy of the Stipulation of Dismissal of that litigation; a copy of a list of the passengers on the flight which includes his name; an Air India press release also listing his name as a Flight 73 passenger; a newspaper photograph showing the claimant at Karachi Airport shortly following the incident; and an electronic printout of a

New York Times article, dated September 7, 1986, that identifies the claimant as one of the Americans involved in the incident. Lastly, the claimant states, and Commission records confirm, that he did not receive an award in a claim pursuant to the December Referral Letter.

DISCUSSION

Jurisdiction

As an initial matter, the Commission must consider whether this claim falls within the category of claims referred to it by the Department of State. The Commission's jurisdiction under the "Category A" paragraph of the January Referral Letter is limited to claims of individuals who are: (1) United States nationals; (2) named parties in a Pending Litigation case against Libya which has been dismissed; (3) parties who set forth a claim for injury other than emotional distress alone in the Pending Litigation; and (4) persons who did not receive an award pursuant to the December 11, 2008 referral letter. January Referral Letter, *supra*, ¶ 3.

Nationality

As noted above, the January Referral Letter tasked the Commission with adjudicating and certifying six categories of claims of United States nationals. In order to determine who qualifies as a United States national, the Commission must look to the provisions of the ICSA, the statute under which the referral is made. Under that statute, the Commission is directed to apply, in the following order, "the provisions of the applicable claims agreement" and "the applicable principles of international law, justice and equity" in its deliberative process. 22 U.S.C. § 1623(a)(2) (2006).

Although the Claims Settlement Agreement states that it settles the claims of “United States nationals,” it does not define that term. However, the Commission’s authorizing statute defines the term “nationals of the United States” as “(1) persons who are citizens of the United States, and (2) persons who, though not citizens of the United States, owe permanent allegiance to the United States. It does not include aliens.” 22 U.S.C. § 1621(c) (2006).¹

In the *Claim of* Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that in order for a claim to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission’s authorizing statute, from the date the claim arose until the date of the Claims Settlement Agreement. This principle has also been recognized by the courts of the United States. *See, e.g., Haas v. Humphrey*, 246 F.2d 682 (D.C. Cir. 1957), *cert. denied* 355 U.S. 854 (1957). Therefore, consistent with its past jurisprudence, the Commission holds that in order for a claim to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission’s authorizing statute, at the time the claim arose and continuously thereafter until the date of the Claims Settlement Agreement.

Based on the evidence submitted with this claim, reflecting that the claimant was born in the United States and currently holds a United States passport, the Commission

¹ The Commission notes that both LCRA, Pub. L. No. 110-301, 122 Stat. 2999 (2008), and Executive Order No. 13,477 define the term “national of the United States” by reference to the Immigration and Nationality Act, 8 U.S.C. § 1101(a) (22) (2006), which similarly defines the term as a citizen of the United States, or a person who, though not a citizen, owes permanent allegiance to the United States. LCRA § 2(3), 122 Stat. at 2999; Exec. Order No. 13,477, 73 Fed. Reg. at 65,965.

determines that the claimant was a United States national at the time of the incident and has been a United States national continuously thereafter until the effective date of the Claims Settlement Agreement.

Pending Litigation and its Dismissal

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

Claim for Injury Other than Emotional Distress

The January Referral Letter requires that the claimant must have set forth a claim for injury other than emotional distress alone in the Pending Litigation. January Referral Letter, *supra*, ¶ 3. Claimant alleges in the complaint in the Pending Litigation that the incident caused him “pain, suffering and economic loss.” 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.

No Prior Award

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

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

Merits

Standard for Claims under Category A

As stated in the January Referral Letter, to be eligible for compensation, a claimant asserting a claim under Category A must meet the "standard . . . adopted by the Commission." January Referral Letter, *supra*, ¶ 3. In order to develop such a threshold standard for compensability, the Commission has considered pertinent sources in international law and domestic law. On this point, the Commission notes that the United Nations Compensation Commission ("UNCC"), which compensated for losses resulting from Iraq's invasion of Kuwait in 1991, developed a threshold standard to apply in determining whether a claimant had been illegally detained and what facts would qualify such a claimant for compensation for the resulting mental pain and anguish. The UNCC determined that a valid claim was one where the individual established that he or she was "taken hostage or illegally detained for more than three days, *or* for a shorter period in

circumstances indicating an imminent threat to his or her life[.]” *Decision taken by the Governing Council of the United Nations Compensation Commission during its second session, at the 15th meeting, held on 18 October 1991: Personal Injury and Mental Pain and Anguish*, S/AC.26/1991/3, Oct. 23, 1991 (emphasis added). The UNCC defined detention as “the holding of persons by force in a particular location” *Id.*

Further, the International Convention Against the Taking of Hostages defines hostage taking as the offense committed by

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

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

In enacting the Hostage Taking Act of 1984, Congress adopted similar language when it defined hostage taking as the offense committed by any person who

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

18 U.S.C. §1203(a) (2006).

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

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

(b) in a particular area; and

(c) for an extended period of time, or for shorter periods of time in circumstances in which he or she reasonably felt an imminent threat to his or her life.

Application of Standard to this Claim

According to his Statement of Claim and accompanying documents, on September 5, 1986, claimant Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) was a passenger on Pan Am Flight 73 when the aircraft was attacked and taken over by four heavily armed hijackers while waiting to take off from Karachi, Pakistan, en route to Frankfurt, West Germany. Claimant has provided an extensive narrative, in affidavit form, recounting the experiences he endured for the sixteen hours that he and the other passengers were detained by the gunmen. He describes in detail how the hijackers forced him and the other business class passengers to move to the economy section of the plane, where he had to sit on the floor in the aisle because the flight was full. He further describes how the hijackers took up positions surrounding the passengers; forced them to hold their hands up in the air for many hours; collected the passengers' passports; and refused to allow them access to the restrooms until later in the day, and even then, they were required to signal a hijacker and receive permission. The claimant feared that the hijackers intended to specifically target Americans, and that he would be identified as such because of his physical appearance. He further recounts how, late in the day, the lights on the plane went out, at which point the hijackers attacked the passengers with machine guns and hand grenades as they attempted to escape from the airplane.

Based on the evidence and information submitted in this claim and described above, the Commission finds that the claim of Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) meets the

standard for compensability under Category A of the January Referral Letter.

COMPENSATION

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

The January Referral Letter recommended “a fixed amount of \$1 million [as] an appropriate level of compensation for all damages for a claim that meets the applicable standards under Category A.” January Referral Letter, *supra*, ¶ 3. In order to determine whether this amount is the appropriate level of compensation, the Commission takes notice of the discussion in Dan B. Dobbs’ treatise, *Dobbs’ Law of Remedies*, Volume 2 (2nd ed. 1993) at section 8.3(6), which observes the difficulty in assessing intangible, non-economic damages. *See also* Marjorie M. Whiteman, *Damages in International Law*, Volume 1 (1937) at page 777-778 (citing a decision of Umpire Parker in *Mixed Claims Commission United States and Germany, Decisions and Opinions* at 17, 21-22 (November 1, 1923), which states that “it is manifestly impossible to compute mathematically or with any degree of accuracy or by the use of any precise formula” certain forms of damages, such as those sustained as a result of mental suffering). In this context, the Commission has carefully reviewed its prior claims programs as well as those of other tribunals and commissions which have adjudicated similar claims, and notes that the amount recommended by the State Department is significantly greater than the amounts that have been awarded in similar claims brought before international tribunals.²

² For example, pursuant to the *Decision taken by the Governing Council of the United Nations Compensation Commission during its Fourth Session, at the 22nd meeting, held on 24 January 1992: Determination of Ceilings for Compensation for Mental Pain and Anguish*, S/AC.26/1992/8, 27 January 1992, the UNCC limited its awards in claims for illegal detention against Saddam Hussein’s Iraqi

The Commission recognizes that the claimant in this case—as well as other claimants similarly situated—has waited many years to have his claim resolved. However, even with this point in mind, the Commission is not persuaded that the recommended amount of \$1 million is justified. After careful consideration, the Commission, for purposes of determining the appropriate level of compensation for claimants meeting the standard for Category A claims, will take into account both the duration and severity of the incident. In the instant case, the Commission notes that although the passengers on Pan Am Flight 73, including the claimant, were detained for a relatively short time, they were forced to endure the entire ordeal under conditions entailing severe physical discomfort and the constant threat of violence. Moreover, the psychological trauma of the passengers' detention could only have been exacerbated by the hijackers' final assault on the main cabin, characterized by indiscriminate machine-gun fire, the throwing of grenades, and the resulting panic that ensued as passengers were killed, injured, and/or covered with blood and shrapnel.

government to a fixed amount of \$1,500 per incident. The United States-Mexican General Claims Commission, sitting in the 1920s and early 1930s, issued damages awards in several cases involving unlawful detention, ranging from \$500 (\$6,466.14 in 2009 as adjusted for inflation using the Department of Labor's Consumer Price Index (CPI) Inflation Calendar) for five days' detention, *see Chazen (U.S.) v. United Mexican States*, 4 R. Int'l Arb. Awards 564 (Gen. Claims Comm'n 1930), to \$8,000 (\$101,038.13 in 2009 adjusted for inflation) for eighteen months' detention, *see Dyches (U.S.) v. United Mexican States*, 4 R. Int'l Arb. Awards 458 (Gen. Claims Comm'n 1929). The European Court of Human Rights (ECHR) has also issued awards in several unlawful detention cases; as with the UNCC and the General Claims Commission, these awards have been considerably less than the amount proposed by the State Department. For example, in *Raninen v. Finland*, 1997-VIII Eur. Ct. H.R. 2804, the ECHR awarded 10,000 Finnish Marks (\$1,857 in U.S. dollars) as non-pecuniary damages to an applicant who was unlawfully detained by military police. In *K.-F. v. Germany*, 1997-VII Eur. Ct. H.R. 2657—another case involving unlawful detention by police—the ECHR awarded 10,000 German Marks (\$5,764 in U.S. dollars) as non-pecuniary damages. However, in *Assanidze v. Georgia*, 2004-II Eur. Ct. H.R. 221, the court awarded €150,000 (\$181,320 in U.S. dollars) to an applicant who had been illegally detained for over three years by local authorities, despite a presidential pardon and a court order for his release. The ECHR's award covered both pecuniary and non-pecuniary compensation. In *Özkan v. Turkey*, App. No. 21689/93 Eur. Ct. H.R. (2004), available at <http://worldlii.org/eu/cases/ECHR/2004/133.html>, a case involving over thirty applicants, the court awarded a range of awards as non-pecuniary damages for inappropriate detentions, although none exceeded €49,800 (\$60,203 in U.S. dollars).

As this Commission has previously stated, each claims settlement is based on a unique set of circumstances, which may in turn lead to breaks with past practices. With this in mind, under this Claims Settlement Agreement and noting the specific circumstances described above, the Commission holds that for all passengers on Pan Am Flight 73, taking into account the sixteen hours during which they were held hostage or unlawfully detained and the conditions of their confinement in the main cabin, the appropriate amount of compensation is \$500,000.00. Accordingly, the Commission determines that the claimant, Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) is entitled herein to an award of \$500,000.

As regards interest, in the *Claim of* Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) *supra*, after consideration of principles of international law and precedent decisions, the Commission held that compensable tort claims in this claims program are not entitled to interest as part of the awards made therein. *Id.* Therefore, the award of \$500,000.00 made herein constitutes the entirety of the compensation that the claimant is entitled to under the Claims Settlement Agreement.

CONCLUSION

Accordingly, the Commission enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICOSA. 22 U.S.C. §§ 1626 and 1627 (2006).

AWARD

Claimant Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6)

is entitled to an award in the amount of Five

Hundred Thousand Dollars (\$500,000.00).

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

DEC 18 2009


Mauricio J. Tamargo, 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) (2008).