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Chapter 8

International Claims and State Responsibility

A. INTERNATIONAL LAW COMMISSION

See Chapter 7.C.

B. IRAN-U.S. CLAIMS TRIBUNAL

1. *Case B/1*

On June 1, 2012, the United States filed its Brief and Evidence on the 130 Foreign Military Sales (“FMS”) cases in Case B/1 (Claims 2 and 3). This submission comprised a general issues brief, evidentiary annex, exhibits, and 130 individual case briefs and evidence, in 442 volumes totaling over 57,000 pages per copy.

2. *Case A/15(IV)*

In Case A/15(IV) before the Iran-U.S. Claims Tribunal, Iran alleges that the United States failed to terminate litigation in U.S. courts in violation of General Principle B of the Algiers Accords. On December 28, 1998, the Tribunal issued a partial award in the case finding that the United States had breached obligations under the Algiers Accords regarding certain litigation in U.S. courts (but did not assess U.S. liability in those cases), and ordered further proceedings to address breach and liability regarding other U.S. litigation and to address all remaining issues in the case. A hearing in the case was held September 24 – 27, 2012, and post-hearing submissions were filed in October 2012.

C. LIBYA CLAIMS PROGRAM

In 2012, the Foreign Claims Settlement Commission (“Commission”) worked actively to conclude its adjudication of claims of U.S. nationals against Libya that were referred to it by the Secretary of State in December 2008 and January 2009. For background on the claims settlement agreement concluded with Libya in 2008, see *Digest 2008* at 399-410. For information on the referral of certain of these claims to the Commission, see *Digest 2009* at 273-74. A summary of the decisions issued by the Commission, the value of the awards, and decisions of the Commission in individual cases are available on the Commission’s website, www.justice.gov/fcsc. A few noteworthy decisions of the Commission rendered in 2012 are discussed below.

1. *Nationality*

In many of the claims brought before it, the Commission had to determine whether claimants held continuous U.S. nationality. The excerpt below, from the Commission's decision in *Claim of INTERLEASE, Inc.*, Claim No. LIB-II-023, Decision No. LIB-II-163 (2012) (footnotes omitted), is one example of the Commission's analysis of the nationality of corporations. Interlease's claim was for losses arising from the destruction of a 1973 McDonnell Douglas DC-10-30 aircraft by the mid-air bombing of Union de Transports Ariens ("UTA") Flight 772 over the Sahara Desert in Niger on September 19, 1989.

* * * *

In *Claim of* [redacted] 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 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. In the case of a claim filed by a corporation or other legal entity, the claimant qualifies as a U.S. national if it is incorporated in a state or territory of the United States or the District of Columbia and at least 50% of its stock is owned at all pertinent times by natural persons who are citizens of the United States.

The Commission finds that the claimant has submitted evidence sufficient to establish that: (1) on the date this claim arose, September 19, 1989, the claim was owned by Interlease, Inc.—a U.S. corporation incorporated in the State of Georgia in 1988—(hereinafter ILG); (2) on October 4, 1989, LRA—a French corporation and insurer of the aircraft—paid \$34 million to ILG pursuant to its hull insurance contract, for which it received a subrogated interest in this claim; (3) on May 14, 1990, ILG assigned to its sole shareholder, Douglas G. Matthews, a U.S. national since birth, individually, “all of [its] right, title and interest in and to any claim to or action against any parties that may ultimately be determined as responsible for the suspected act of terrorism that resulted in the loss of the Aircraft;” (4) on May 16, 1990, ILG merged into Intercredit Corporation (a Florida corporation, hereinafter ICC), with ICC as the surviving corporation, which was then administratively dissolved in 1997; (5) on March 27, 2002, Interlease, Inc. (hereinafter ILG II) was “re-incorporated” under the laws of the State of Georgia, effective April 1, 2002, which, at all times relevant hereto, had as its sole shareholder Douglas G. Matthews; (6) on April 5, 2002, Mr. Matthews assigned to ILG II all rights assigned to him pursuant to the May 14, 1990 assignment referenced above; (7) on November 2, 2007, INTERLEASE, INC., the claimant herein, was incorporated under the laws of the State of Florida, which, at all times relevant hereto, had as its sole shareholder Mr. Matthews; and (8) on November 29, 2007, ILG II merged into claimant.

Based on this and other evidence in the record, the Commission finds that LRA became subrogated to ILG's interest in this claim to the extent of the \$34 million payment it made under its contract of insurance. Accordingly, the Commission determines that because, as noted above, LRA is not a national of the United States, the portion of this claim corresponding to its interest must be and is hereby denied. The Commission also finds that, to the extent that any portion of

the present claim was not previously compensated by LRA, such portion has been held by U.S. nationals continuously since the date of loss.

* * * *

In another claim, brought by New York Marine and General Insurance Company (“NYMG”) based upon its reinsurance of an EgyptAir airplane that was hijacked by Libyan-sponsored terrorists on November 23, 1985, the Commission determined that continuous nationality was lacking. Claim No. LIB-II-170, Decision No. LIB-II-165 (2012) (Proposed Decision). As explained in the following excerpt from the Commission’s Proposed Decision, in cases involving insurers, the Commission has consistently required U.S. nationality on the part of every party in the chain of insurance.

* * * *

... In *Claim of* [redacted] Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held that in order for a claim to be compensable, the claim must have been held by a “national of the United States” from the date it arose until the date of the Claims Settlement Agreement. In this program, the Commission noted in a later case that the continuous nationality requirement is a “long-standing principle of international law consistently applied and advocated by the United States to the present day. Consequently, any departure from these principles would have been clearly articulated [in the Libya Claims Program authorizing documents] and not merely implied.” *Claim of* [redacted] Claim No. LIB-I-049, Decision No. LIB-I-019 (2011), FD at 6. In [redacted] the Commission discussed in detail the basis of its determination that the continuous nationality requirement applies to the Libya Claims Program and its conclusions apply equally here:

As a general matter, the United States continues to recognize the continuous nationality rule as customary international law. For example, the United States’ 2006 comments on the International Law Commission’s Draft Articles on Diplomatic Protection clearly convey the United States’ position that the continuous nationality requirement—that nationality “be maintained continuously from the date of injury through the date of Resolution”—reflects customary international law.⁴

* * * *

Given the fact that the continuous nationality rule is recognized by the United States as customary international law, and that this rule has been applied by both this Commission and its predecessors, a derogation from this rule will not be assumed by the Commission from the absence of language in any of the operative documents that inform and define this program. Any derogation must be clearly expressed, and there has been no such express derogation in this program. Consequently, the Commission adheres

⁴ See *International Law Commission, Comments and observations received from Governments, Diplomatic protection*, at page 19, U.N. Doc. A/CN.4/561 (2006).

to its earlier finding that in order for a claim to be compensable in this program, it must have been owned by a U.S. national continuously from the date of injury to the date of the Claims Settlement Agreement.

[redacted] FD at 6-8.

Especially relevant here is the Commission's decision in *Claim of OCEAN-AIR CARGO*, Claim Nos. IR-1102, IR-1429, Decision No. IR-0961 (1994). There, the claimant insurer (Ocean-Air) provided evidence that both it and the original purchaser of the goods were at all relevant times U.S. nationals. Nonetheless, the Commission denied its claim for lack of continuous U.S. nationality because Ocean-Air was not the direct insurer, but was instead acting as an agent for French companies that initially paid the purchaser:

The evidence establishes that upon payment of the claims by the French insurance companies, those companies became subrogated to the claims of the original cargo owners and not the claimant. As such, they became the owners of the claims. . . . In light of the foregoing, the Commission determines that these claims were not continuously owned by United States nationals and are, therefore, not claims of United States nationals as defined by the Settlement Agreement and Algiers Accords, and thus are outside the jurisdiction of the Commission as established by those agreements.

Id. at 4-5.

Indeed, the Commission has consistently required U.S. nationality for all of the relevant parties in the chain of insurance: the party that suffered the loss, the insurance company that directly insured the loss, and the reinsurer that paid the insurer. See, e.g., *Claim of FORTRESS RE, INC.*, Claim No. IR-0893. Decision No. IR-2210 (1994): see also *Claim of TALBOT, BIRD & COMPANY, INC.*, Claim No. IR-0342. Decision No. IR-1722 (1993) (denying claim of the agent of an insurance company for, among other reasons, failing to meet its burden of demonstrating that it, its principal, and its principal's subrogor were U.S. nationals); *Claim of COMMERCIAL UNION INSURANCE COMPAN*, Claim No. IR-0759. Decision No. IR-2280 (1994) (denying claim for lack of jurisdiction where claimant did not meet burden of proof of continuous U.S. nationality for itself and its subrogor); *Claim of ROYAL GLOBE INSURANCE COMPANY*, Claim No. IR-2730, Decision No. IR-0519 (1992) (denying claim for lack of jurisdiction where claimant insurance company failed to meet its burden of proof of demonstrating continuous U.S. nationality through the "chain of ownership" of the claim, including the "various subrogors"); and *Claim of NEW HAMPSHIRE INSURANCE COMPANY*, Claim No. IR-2731, Decision No. IR-0518 (1992) (same)...

This precedent applies equally here. As discussed above, the present claim arises from a commercial loss that was first suffered by an Egyptian entity, EgyptAir. Through its insurance contract, this loss was then passed on to MISR, another Egyptian company. MISR, in turn, passed part of the loss, through an English broker, Leslie & Godwin, to a syndicate of underwriters at an English entity, Lloyd's, which included the claimant. The loss began with an Egyptian company, was passed to another Egyptian company, and only then was a portion of the loss passed along to the claimant.

Given these facts, the Commission concludes that the claim was not held by a U.S. national continuously from the date the claim arose through the date of the Claims Settlement

Agreement, and thus is not within the jurisdiction conferred upon it by the ICSA and the January Referral Letter.

* * * *

2. *Hostage taking and unlawful detention*

In several other cases, the Commission had to determine the proper standard for hostage taking and unlawful detention and apply that standard to the facts before it. For instance, in the excerpt below from Claim No. LIB-II-011, Decision No. LIB-II-105 (2012) (footnotes omitted), the Commission considered whether a member of an airplane flight crew, who was able to exit the aircraft approximately 20 minutes after it was boarded by hijackers, met the international law definition of a hostage. The Commission’s decision in Claim No. LIB-II-006, Decision No. LIB-II-104 (2012), brought by another member of the same flight crew, is virtually identical in concluding that those members of the flight crew who remained on the aircraft long enough to execute their duty to disable it from flight were unlawfully detained.

* * * *

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.”). 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 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. 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.

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.

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. 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. Karadzic*, Case No. IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, ¶ 65 (Apr. 28, 2009).

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 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-a-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.

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 “L-1” 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, 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, 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 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.

* * * *

In Claim No. LIB-II-007, Decision No. LIB-II-047 (2012), brought by another Pan Am 73 flight crew member, the Commission found that the international law standard for hostage-taking or unlawful detention was not satisfied. Excerpts from the Commission's decision in that case follow (with footnotes omitted).

* * * *

There is no question that, based on the evidence presented, claimant was forced to take evasive action in order to avoid being captured or killed by the hijackers. But it is this very fact—the very fact that he was able to move unnoticed to freedom within the minutes while the hostage situation was yet unfolding—that precludes a finding of the requisite control or compulsion. However, in light of the Commission's standard for Category A claims, the relevant question in this case, given its particular facts, is whether claimant was *prevented* from taking evasive action by virtue of his being under the control or compulsion of the hijackers. In this regard, claimant's experience differs in a very fundamental way from that of his fellow crew members. Unlike the Captain or First Officer, claimant remained in constant motion from the time the hijackers boarded the aircraft until he exited the cockpit via the escape hatch. Although there may have been a few moments, after returning to the cockpit, during which claimant discussed the situation unfolding onboard the aircraft with the Captain and First Officer, he appears to have remained in the cockpit just long enough to decide on a course of action, which he then pursued. Whereas the actions of the Captain and First Officer evidenced the control of the hijackers over them, that is, they were compelled under the circumstances to remain inside the cockpit—a “particular area” in which they most certainly did not wish to remain—claimant executed his plan to exit the aircraft without delay. These facts, viewed under a broad interpretation of the Commission's standard, do not implicate the level of control or compulsion—actual or constructive—over the person required for Category A claims.

As noted above, claimant argues that his “complete freedom of action” was limited in that “he could not exit through the door or enter other parts of the aircraft.” According to claimant, this inability to move about the cabin freely or exit via the main cabin door satisfies the requirement under the Commission's standard that he be “held” against his will. In support of

this argument, claimant cites *SAVARY, supra*, where the WCC found that the claimant qualified for detention benefits even though she was not physically detained by her captors during the time period in question.

Claimant's reliance on *SAVARY* for this argument is misplaced, both as to law and to fact. With regard to the law, claimant's characterization of the WCC's regulation omits an important modifier: that a person be "restricted in his movements ... *so as not to be a free person. ...*" WCC Internal Regulation No. 13 (A)(1) (emphasis added). The test applied by the WCC, therefore, was not whether complete freedom of action was precluded, or whether the claimant was restricted in his movements to any degree whatsoever; rather, the question, more accurately described, was whether the claimant's freedom of action was sufficiently restricted such that he or she was not a "free person." Thus, while this standard does not require direct physical control, it still entails a level of "control or compulsion of the person," and is therefore consistent with the Commission's interpretation of its standard for hostage-taking and unlawful detention in this claim.

Even comparing the facts of this claim and *SAVARY*, the two cases differ significantly. In *SAVARY*, the claimant's movements were controlled almost entirely by her captors. Although she was permitted for some time to operate her restaurant, this was only with the permission of the Japanese occupation forces. *Id.* Moreover, "she was under constant surveillance by the Japanese, who maintained a guard at both doors to the restaurant." *Id.* In addition, "she was required to report daily to certain guards" and, at some point, was sent by the occupation forces to another location and "instructed to care for certain civilian American internees...." *Id.* Thus, it is clear that, in that claim, the claimant was entirely under the control of her alleged captors, despite the fact that she enjoyed some degree of movement and activity within a carefully defined physical area.

By contrast, the claimant here did not answer to the hijackers during the brief time he spent on the plane. They had no control over him as he entered the main cabin to investigate, or apparently when he rushed back upstairs and used the escape reel to exit the cockpit. Under these circumstances, it cannot be said that claimant was "held" by the hijackers against his will.

Further, freedom of action is not precluded because one is unable to use a particular method of egress. If it were otherwise, any person fleeing the scene of a terrorist attack would be considered a hostage or detainee. Such an interpretation of the Commission's standard would render Category A largely meaningless, as it would, in effect, require only that a particular claimant be present at the scene of a given attack. This could not have been the intent of the January Referral, and in any event, the evidence before the Commission does not indicate that claimant was under the hijackers' control at any point during the ordeal.

Claimant also argues that his use of the escape hatch by itself provides evidence of his having been held hostage or unlawfully detained. According to claimant, the use of this term "demonstrates [claimant's] entrapment: 'Escape' suggests the need to use extraordinary procedures in order to remove oneself from danger." The Commission recognizes that use of the escape hatch may be an "extraordinary" method of egress; however, the use of an "escape hatch" does not necessarily mean that claimant was detained prior to his escape because it presupposes that claimant was under the hijacker's control prior to using it. As noted above, one who is fleeing danger is not necessarily held hostage or unlawfully detained. Therefore, the Commission must consider all the circumstances surrounding the incident, and particularly how and why claimant availed himself of the escape hatch, to determine whether its use is evidence of a hostage-taking or unlawful detention.

Finally, the Commission addresses claimant's argument that he was "held illegally against his or her will" between the time when he escaped the cockpit via the escape hatch through the time he spent hiding inside the Pan Am Operations office. As the Commission has previously held, a claimant under Category A must prove, among other things, that the party accused of either hostage-taking or unlawful detention intended to seize or detain the claimant. ... While the evidence clearly establishes that the hijackers intended to seize the airplane, its passengers, and the flight crew, there is no indication by that they intended to detain any person outside the confines of the aircraft. Because this is a necessary requirement for a successful claim of hostage-taking or unlawful detention, and because the second element of the Commission's standard requires that the claimant be held "in a particular area," this argument must fail.

* * * *

D. IRAQ CLAIMS PROGRAM

As discussed in *Digest 2011* at 269-70, the Claims Settlement Agreement between the United States and Iraq ("CSA"), which was signed in 2010, entered into force in 2011. On November 14, 2012, U.S. Department of State Legal Adviser Harold H. Koh referred to the Foreign Claims Settlement Commission ("Commission") for adjudication a category of claims within the scope of the CSA. The Commission will commence adjudication of these claims in 2013. The website of the Commission provides the following description of the Iraq claims program, available at www.justice.gov/fcsc/current-prog.html:

The category of claims referred to the Commission consists of claims of U.S. nationals for compensation for serious personal injuries knowingly inflicted upon them by Iraq in addition to amounts already recovered under the CSA for claims of hostage-taking, provided that

1. The claimant has already received compensation under the CSA from the Department of State for his or her claim of hostage-taking, and such compensation did not include economic loss based on a judgment against Iraq, and
2. The Commission determines that the severity of the serious personal injury suffered is a special circumstance warranting additional compensation.

Under the referral, "serious personal injury" may include instances of serious physical, mental, or emotional injury arising from sexual assault, coercive interrogation, mock execution, or aggravated physical assault.

Cross References

Alien Tort Claims Act litigation, **Chapter 5.B.**

McKesson v. Iran, **Chapter 5.C.1. and Chapter 10.1.a.(2)**

International Law Commission, **Chapter 7.D.**

Foreign Sovereign Immunities Act, **Chapter 10.A.**

NAFTA dispute settlement, **Chapter 11.B.1.**

Dispute settlement under CAFTA-DR Agreement, **Chapter 11.B.2.**

Arbitration under Ecuador BIT, **Chapter 11.B.3.**

WTO dispute settlement, **Chapter 11.C.**

Arbitration under the Softwood Lumber Agreement, **Chapter 11.E.2.**