

Table of Contents

CHAPTER 8	<u>1</u>
International Claims and State Responsibility	<u>1</u>
A. INTERNATIONAL LAW COMMISSION	<u>1</u>
B. IRAN CLAIMS	<u>1</u>
1. Iran-U.S. Claims Tribunal.....	<u>1</u>
2. <i>McKesson v. Iran</i>	<u>6</u>
C. HOLOCAUST ERA CLAIMS	<u>7</u>
D. IRAQ CLAIMS	<u>9</u>
1. Referral Letter of October 7, 2014.....	<u>9</u>
2. Claims Under the November 2012 Referral	<u>10</u>
a. <i>Claim IRQ-I-005</i>	<u>10</u>
b. <i>Claim IRQ-I-001</i>	<u>14</u>
c. <i>Claim IRQ-I-003</i>	<u>16</u>
d. <i>Claim IRQ-I-021</i>	<u>20</u>
3. UN Compensation Commission	<u>22</u>
E. LIBYA CLAIMS	<u>23</u>
F. CHALLENGE TO DECISION NOT TO ESPOUSE CLAIMS	<u>25</u>
Cross References.....	<u>28</u>

CHAPTER 8

International Claims and State Responsibility

A. INTERNATIONAL LAW COMMISSION

See Chapter 7.D.

B. IRAN CLAIMS

1. Iran-U.S. Claims Tribunal

On July 2, 2014, the Iran-U.S. Claims Tribunal issued a final award in *Iran v. United States (Case A/15(IV))* awarding damages to Iran of \$268,161.77, plus pre-judgment interest of \$574,306.37. On August 1, 2014, the United States requested a correction to the award because three of Iran's claims that were dismissed as settled were errantly included in the Tribunal's assessment of damages. The Tribunal issued a decision on this request on March 5, 2015, correcting the award to remove those three claims from the damages assessment, reducing the damages awarded by \$1,702.08, and reducing the pre-judgment interest by \$3,430.16.

In this case, Iran alleged that the United States violated its obligation under the Algiers Accords to terminate all litigation against Iran in U.S. courts that came within the Tribunal's jurisdiction. Iran's claim was for \$1.7 million plus pre-judgment interest. The award is available on the Tribunal's website, www.iusct.net.

The Tribunal's award of only a fraction of Iran's requested damages appears to have resulted from the Tribunal's application of the normal evidentiary standards applied in international arbitration to quantum of damages, as reflected in the Tribunal's prior award (Partial Award 590) in *Case A/15(IV)*. Iran's primary claim of damages was based on attorney's fees incurred by its U.S.-based law firm, Shack & Kimball, as a result of alleged activities undertaken by Shack & Kimball in cases that, Iran asserts, should have been terminated. Iran also claimed "unallocated litigation costs" incurred by Shack & Kimball. As evidence of such fees and costs, Iran did not submit any

of the law firm's invoices. Rather, Iran submitted only an affidavit from Thomas Shack, one of the partners of Shack & Kimball, and a settlement agreement between Iran and Mr. Shack. The Tribunal found that it could not award any of the requested damages based on such evidence.

However, when the Tribunal turned to supposed "monitoring" expenses incurred by Shack & Kimball—for which there was also no contemporaneous evidence as to quantum—the Tribunal loosened its standard, finding that it could award Iran \$70,000 as a "reasonable approximation" of Iran's damages for "monitoring" fees. This amount was far below what Iran had requested, and does not appear to have been derived from any evidence or argument presented by Iran. In dissent, Judge Charles N. Brower described the award of "monitoring" expenses as, "baseless," "a windfall," and a "giveaway," particularly as it constitutes an impermissible *ex aequo et bono* award. Dissenting Judge Thomas O. Johnson wrote,

Because there is literally no evidence upon which to base an approximation of compensable monitoring costs, this part of the Award makes no sense on its own terms. It might make sense as an award *ex aequo et bono*, but we do not have the authority to render such an award.... Iran [] chose not to provide this Tribunal with the invoices and billing records that would allow us to determine—or at least reasonably estimate—Shack & Kimball's monitoring expenses. Under these circumstances, an award of no compensation would not be 'grossly unfair,' as the Majority states, but rather the proper and logical consequence of Iran's choices, as Claimant, not to provide the Tribunal with evidence, or argument, or even a claim, that might help the Tribunal to approximate Shack & Kimball monitoring expenses.

Excerpts follow from the Tribunal's award .

* * * *

153. The Tribunal finds the absence of primary documentation, such as accounting and billing records, to support the Shack & Kimball Evidence (in particular the Settlement Agreement) problematic.

154. It is undisputed that, at a certain point, the Shack & Kimball invoices and billing documents were in the possession of, or at least available to, Iran. However, at the Hearing, Mr. Shack stated that he never turned all of the "billing statements" over to Iran because "[w]e were never requested to do [so]."

155. Mr. Shack states in the 2004 Shack Affidavit that he has relied upon accounting records in calculating legal expenses. Neither Mr. Shack nor Iran submitted these accounting records to the Tribunal.

156. Iran presented its Statement of Claim in Case No. A15 (IV) on 25 October 1982. Thus, at least as early as 1982, Iran was aware that it required evidence to substantiate its claim in these Cases. Iran therefore should have secured the relevant invoices and billing records and made them available so that the Respondent and the Tribunal might have been in a better position to verify the accuracy of Mr. Shack's statements. While the Tribunal may take into account difficulties in the production of evidence, in this instance, the destruction (or loss) of the invoices and billing records lies with Iran. In addition, Mr. Shack, Iran's witness, possesses (or recently possessed) relevant accounting and billing records. Iran has not explained why it never asked him to turn them over to it so they could be submitted to the Tribunal. In this connection, it should be noted that Section 3 of the 1992 Settlement Agreement provides that, "[u]pon dismissal of the litigation, [Shack and Kimball] and [Thomas Shack] will provide every remaining accounting document in its possession which underlies the individual statements [of Shack & Kimball charges owed for legal services rendered], including computer print outs, spread sheet compilation, and summary analysis." The Tribunal will take into account all these circumstances, where appropriate, in determining any compensation to be awarded Iran for services rendered by Shack & Kimball.

* * * *

206. [Regarding claims for specific litigation expenses,] [a]s noted above, the absence of primary documentation, such as accounting and billing records, including invoices, to support the Settlement Agreement (and other Shack & Kimball Evidence) –is problematic. This is especially so with regard to the substantiation of specific litigation expenses, in respect of which Partial Award No. 590 has established a rigorous standard of proof, requiring Iran to show "what expenses it incurred with respect to each specific case and what was the particular justification for the specific sums it spent."

207. The Tribunal is persuaded that Shack & Kimball has made appearances and filings on behalf of Iran in court proceedings that the United States should have terminated or halted pursuant to the Algiers Declarations. However, in light of the strict standard of proof set by Partial Award No. 590 mentioned above, Iran's failure to produce crucial primary evidence that was available to it and to its witness, Mr. Shack, excludes the possibility of the Tribunal making an approximation of any specific litigation expenses that Iran may have incurred as a result of those appearances and filings. That evidence, if proffered by Iran or Mr. Shack, would have assisted the Tribunal in determining the nature of the services provided by Shack & Kimball, the United States court cases to which they related, and the associated amounts the firm billed to Iran.

208. In light of the foregoing, Iran's claim for Shack & Kimball specific litigation expenses is dismissed for want of proof.

* * * *

213. Necessarily, then, Iran's claim for unallocated litigation costs, which, as Iran concedes, is for attorney expenses that "cannot be allocated to specific cases," does not meet the requirements that Iran must satisfy to prove its losses under Partial Award No. 590. Partial Award No. 590 provides that only litigation expenses that fulfill those requirements are compensable; further, Partial Award No. 590 leaves open the possibility that monitoring

expenses are compensable. What it does not do, however, is provide for the compensability of litigation expenses that fall in neither of those two categories, such as the unallocated litigation costs.

* * * *

227. [With respect to monitoring fees], [a]s an initial matter, unlike with respect to the substantiation of Iran’s specific litigation expenses, Partial Award No. 590 has established no rigorous standard of proof with respect to the substantiation of Iran’s monitoring expenses.

228. Iran has submitted contemporaneous evidence showing that, during the period here relevant, Shack & Kimball provided to Iran, among others, services relating to: (i) United States court litigation that was the subject of the United States’ termination obligation, including monitoring of suspended claims; (ii) United States court litigation that was not the subject of the United States’ termination obligation; (iii) litigation before the Tribunal; and (iv) the return to Iran of Iranian assets located in the United States. Further, it is undisputed that Iran made payments to Shack & Kimball for services rendered.

229. Iran, however, has not submitted any contemporaneous or other adequate evidence that would allow the Tribunal to determine the precise extent of Shack & Kimball’s monitoring activities or, even less, how much Iran paid Shack & Kimball specifically for monitoring activities rather than other activities performed by the firm. Indeed, Iran has not even indicated the amount it seeks for monitoring activities performed by Shack & Kimball.

230. It is well-established in international law that difficulties in calculating damages should not deprive a claimant whose interests have been injured from obtaining compensation. This principle has been endorsed in recent decisions of international arbitral tribunals. Thus, for example, in *Vivendi v. Argentina*, the tribunal said: “it is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred.” In *Tecmed v. Mexico*, the tribunal stated that “any difficulty in determining the compensation does not prevent the assessment of such compensation where the existence of damage is certain.” Further, investment jurisprudence has recognized the authority of international arbitral tribunals to determine equitably (*i.e.*, in equity *intra legem*) the amount of damages—and, in the process, to resort to approximations—where circumstances do not permit a precise calculation.

231. Likewise, it is also well-established in the jurisprudence of this Tribunal that, when circumstances make it difficult or impossible to precisely quantify compensation, the Tribunal may “exercise its discretion to ‘determine equitably’ the amount involved.” In so doing, the Tribunal has “a wide margin of appreciation to make reasonable approximations.” In addition to *Starrett Housing Corp. v. Iran*, the relevant Tribunal jurisprudence includes *Eastman Kodak Co. v. Iran*; *Seismograph Service Corp. v. National Iranian Oil Co.*; *William J. Levitt v. Iran*; *Thomas Earl Payne v. Iran*; *American International Group, Inc. v. Iran*; and *Economy Forms Corp. v. Iran*. In none of these cases did the Tribunal decide, or was deemed to have decided, *ex aequo et bono*—*i.e.*, in equity *contra legem*. The circumstances of the present Cases show similarities to those extant in *William J. Levitt v. Iran*, in which the Tribunal approximated the amount it awarded on a claim for legal fees incurred in preparation for a certain housing project in Iran. In that case, the evidence did not permit the Tribunal to attribute the entire amount claimed to the housing project. While the claimant had produced evidence of payment of the total amount of legal fees claimed, it failed “to produce evidence detailing the legal services for which these sums were paid or even specifying the matters in connection with which they were

expended”; specifically, it failed “to produce the relevant invoices or to explain why they could not have been produced.” In those circumstances, the Tribunal attributed approximately one-third of the legal fees to the housing project and awarded the related amount to the claimant.

232. As noted, in the present Cases, while Iran has proven the *fact* that Shack & Kimball provided monitoring services to it, it has not proven the precise *extent* and *value* of those services. The lack of conclusive evidence on these points therefore makes it impossible for the Tribunal to determine the precise extent of the losses that Iran has suffered. Consistent with the principles set forth above, however, given that Iran has proven the fact of its losses, its failure to prove their exact extent should not preclude it from recovering damages altogether. To exclude any recovery in these circumstances would be grossly unfair. The Tribunal has resorted to approximation to award compensation where the claimant had proven the fact that it had incurred losses but failed to produce, and to explain why it did not produce, evidence that would have allowed the Tribunal to determine the precise extent of those losses.

233. Consequently, the Tribunal will determine equitably the extent of the losses Iran has suffered as a result of the monitoring of suspended claims by Shack & Kimball. In so doing, the Tribunal will make its best approximation of those losses, taking into account all relevant evidence as well as all the circumstances, including Iran’s conduct in this arbitration.

234. With respect to the latter, the Tribunal has already noted that Shack & Kimball invoices and billing documents were available to Iran and could have been produced by it; further, Mr. Shack, Iran’s witness, admittedly possesses (or recently possessed) relevant accounting and billing records, which he could have produced in support of his affidavits. This evidence, if proffered by Iran or Mr. Shack, would have assisted the Tribunal in determining the extent of the monitoring services provided by Shack & Kimball and the related amounts the firm billed to Iran; moreover, it would likely have lessened (or perhaps even obviated) the need for the Tribunal to resort to approximations. Furthermore, production by Mr. Shack of the primary documentation in his possession might have enhanced the weight of his affidavit and Hearing testimony. In these circumstances, given Iran’s and its witness’ failure to produce primary documentation available to them, the Tribunal is justified in exercising conservative judgment in making an approximation of Iran’s losses.

235. Shack & Kimball acted as Iran’s general counsel in the United States from February 1979 through early 1983. The Tribunal is persuaded that, in this capacity, the firm, while providing Iran with assorted legal services, spent a significant amount of time on the monitoring of suspended claims before as well as after 19 July 1981. Moreover, contemporaneous evidence shows that, between July and November 1981, Shack & Kimball billed Iran a total of U.S.\$427,397.47 for services rendered as general counsel. Shack & Kimball continued to provide legal services to Iran after that date. It is further undisputed that Iran paid Shack & Kimball invoices for services rendered.

236. After taking into account all relevant considerations, the Tribunal deems it fair and reasonable in the circumstances to award Iran U.S.\$70,000 in compensation for monitoring services performed by Shack & Kimball. In determining this amount, the Tribunal, exercising conservative judgment, has, *inter alia*, considered that the amount Iran claimed in general litigation expenses covered, not only monitoring expenses, but also unallocated litigation expenses.

* * * *

2. *McKesson v. Iran*

In *McKesson Corp. v. Islamic Republic of Iran*, the United States filed its “Final Brief for the United States as Amicus Curiae” on January 6, 2014, addressing whether international law requires an award of attorneys’ fees in this case. United States briefs filed previously in this case addressed the act of state doctrine and the applicability of the commercial activity exception in the Foreign Sovereign Immunity Act and are discussed in *Digest 2011* at 139 and 292 and *Digest 2012* at 128 and 290.

The United States argued in its 2014 amicus brief that international law does not dictate whether an award of attorneys’ fees is appropriate in this case. The brief includes four main arguments. Excerpts follow (with footnotes omitted) from the section of the brief presenting the first argument, that international law should not provide the basis for determining whether to award attorneys’ fees where Iranian law provided the underlying cause of action in the case. The brief in its entirety is available at www.state.gov/s/l/c8183.htm. Using this same reasoning, the Court of Appeals for the District of Columbia Circuit decided that international law principles should not provide the basis for such a determination. *McKesson Corp. v. Iran*, 753 F.3d 239 (D.C. Cir. 2014).

* * * *

This Court should likewise recognize that international law is indifferent, and irrelevant, to an award of attorneys’ fees that is otherwise authorized and appropriate under another governing source of legal authority. That conclusion is particularly relevant here, both because (as explained below) no international law rule exists that compels the award of attorneys’ fees in these circumstances, and because this Court previously held—in two decisions—that international law does not provide a cause of action against Iran. See *McKesson VI*, 672 F.3d at 1078-1080 (Iranian law provides cause of action); *id.* at 1075-1078 (customary international law does not provide a cause of action); *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488-491 (D.C. Cir. 2008) (*McKesson V*) (Treaty of Amity, as construed under U.S. law, does not independently provide a cause of action). Where Iranian law and not international law provides a cause of action, it would be inappropriate to look to international law principles in determining whether to award attorneys’ fees.

Nor would there be a basis to conclude that international law rules concerning an award of attorneys’ fees—if there are any such rules—were applicable through the Treaty of Amity. Notably, the district court did not rely on such a theory. Instead, as discussed below, the court incorrectly assessed that general principles of law, as reflected in the domestic legal systems of other nations, support an award of attorneys’ fees to a prevailing party.

This Court previously held that Article VI, paragraph 2 of the Treaty of Amity, as incorporated in Iranian law, provides the rule of decision in this case. The treaty there provides that property of a national of the other State Party “shall not be taken * * * without the prompt payment of just compensation,” which “shall represent the full equivalent of the property taken.”

McKesson VI, 672 F.3d at 1080 (quoting treaty). That language is silent concerning attorneys' fees, including whether they can or should be included as a measure of damages or as an ancillary award.

The district court asserted, apparently in dicta, that the Treaty of Amity "authorizes awarding legal costs to a party prevailing on an expropriation claim" because it "expressly provides that a party whose property has been expropriated shall receive a remedy which is 'in no case less than that required by international law.'" JA 929 (quoting Treaty of Amity, art. IV, cl. 2). That misreads the language of the treaty, which provides that the requirements of international law govern the "protection and security" afforded to property of the other country's nationals. See *McKesson VI*, 672 F.3d at 1080 ("Property * * * shall receive the most constant protection and security * * *, in no case less than that required by international law.") (quoting treaty). The treaty does not define the standard of compensation by reference to international law.

The treaty's silence is at most ambiguous about the availability of attorneys' fees under international law, just as it was concerning the availability of interest. See *McKesson VI*, 672 F.3d at 1084 (holding that Iranian law, not international law, governs the award of interest: "the standard for 'full compensation' prescribed by the Treaty is ambiguous regarding the award of interest").

* * * *

C. HOLOCAUST ERA CLAIMS

As described in an April 9, 2014 State Department press statement, available at www.state.gov/r/pa/prs/ps/2014/04/224621.htm, the United States and France engaged in negotiations in 2014 regarding compensation for victims who were deported by rail from France to Nazi labor and death camps during the Holocaust, as well as their families. The United States federal government urged state legislatures to defer pursuing separate initiatives in deference to the American-French efforts to reach an agreement.

On December 5, 2014, the State Department issued a fact sheet describing the agreement to be signed for compensation reached by the United States and France. The fact sheet is excerpted below and available at www.state.gov/r/pa/prs/ps/2014/12/234709.htm. The text of the agreement will be made public following approval by the French parliament and entry into force.

* * * *

The United States and France have reached an agreement for substantial compensation in connection with the wrongs suffered by Holocaust victims deported from France. The United States and France plan to sign the agreement Monday, December 8th. The centerpiece of the agreement is a \$60 million lump sum payment by France to the United States, to pay out to

eligible claimants. France recognizes that Americans and other foreigners deported during the Holocaust have not been able to gain access to the French pension program, and has agreed to compensate them through this agreement. In exchange for the lump sum, the U.S. Government would undertake an international obligation to recognize and affirmatively protect the immunity of France and its instrumentalities with regard to Holocaust deportation claims in the United States, and to act as necessary to ensure an enduring legal peace.

The agreement is expected to result in payments to several thousand U.S. citizens and others around the world. The U.S. Government will be solely responsible for distributing the funds among eligible claimants. There are three categories of claimants.

First, those who survived deportation from France and are nationals of a country other than France (with the exception of those from countries covered by bilateral agreements with France: Belgium, Poland, the United Kingdom, and former Czechoslovakia) will be eligible to apply. It is estimated that each of these eligible survivors would receive a payment of over one hundred thousand dollars.

Second, spouses of those who were deported from France and are nationals of a country other than France (or one of the four countries mentioned above) will be eligible to apply. It is estimated that each spouse would receive a payment of tens of thousands of dollars.

Third, estates “standing in the shoes” of survivors or spouses who died after the end of World War II would be eligible to apply for compensation on their behalf. These estates would need to show that the deported survivor or the surviving spouse was a national of a country other than France (or one of the four countries mentioned above). The amount of payments to the estates of survivors and spouses would depend upon the year when the survivor or spouse died.

The French Parliament must approve the agreement before it enters into force, and before any payments can be made. Following entry into force, the United States will publish a notice of the program, including the information needed for the filing of claims. Claimants will then be afforded an adequate period of time to file their claims through a fair and streamlined procedure.

French citizens, who are not covered by this agreement, may continue to apply under the French pension program, even if they have never applied before, or applied and were turned down. Moreover, all individuals who were minors at the time of the deportation and lost a parent who was deported and died during the Holocaust are eligible for a pension or lump sum payment through a French program created for such orphans of any nationality. France has already paid over \$60 million to over 1,000 eligible orphans in the United States, and additional amounts to orphans from Israel and other countries. Others who lost one or both parents may apply.

* * * *

On December 8, 2014, after the United States and France signed the agreement establishing the compensation fund for holocaust victims deported from France, the two countries issued a Joint Statement, available at www.state.gov/r/pa/prs/ps/2014/12/234822.htm, in which they stated:

This fund will supplement the schemes established by France since 1946 for reparation and compensation of the victims of anti-Semitic persecutions led by the German occupation authorities and the Vichy regime. In this year marked by the commemoration of the 70th anniversary of the Allied landings in Normandy

and Provence, this agreement further strengthens the historic friendship and ties between our two countries.

D. IRAQ CLAIMS

1. Referral Letter of October 7, 2014

As discussed in *Digest 2012* at 279, and *Digest 2013* at 248-49, the State Department referred to the Foreign Claims Settlement Commission (“Commission”) for adjudication a category of claims within the scope of the Claims Settlement Agreement between the United States and Iraq, Sept. 2, 2010, T.I.A.S. No. 11-522 (“CSA”). On October 7, 2014, the State Department referred additional categories of claims within the 2010 Claims Settlement Agreement to the Commission. The October 7, 2014 referral letter from Acting Legal Adviser Mary McLeod to the Commission is excerpted below and available at

www.justice.gov/sites/default/files/pages/attachments/2014/10/21/iraq_claims_second_referral_10-7-2014.pdf. The Federal Register Notice announcing the commencement of this new Iraq claims program appeared on October 23, 2014 and identified the categories of claims as described in the October 7, 2014 referral. 79 Fed. Reg. 63,439 (Oct. 23, 2014). The Commission set a deadline of October 23, 2015 for the filing of claims. Further information about the Iraq claims programs is available at www.justice.gov/fcsc/current-programs.

* * * *

...The Commission is requested to make determinations with respect to the three categories described below, in accordance with the provisions of 22 U.S.C. § 1621 *et seq.* and the Claims Settlement Agreement.

Category A: This category shall consist 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

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-

Claims Settlement Agreement from the U.S. Department of State. ...

Category B: This category shall consist of claims of U.S. nationals for death while being held hostage by Iraq in violation of international law prior to October 7, 2004. ...

Category C: This category shall consist of claims of U.S. nationals for any personal injury resulting from physical harm to the claimant caused by Iraq in violation of international law prior to October 7, 2004, provided that the claimant: 1) had pending litigation against Iraq arising out of acts other than hostage taking; 2) has not already been compensated pursuant to the Claims Settlement Agreement; and 3) does not have a valid claim under and has not received compensation pursuant to category B of this referral....

* * * *

2. Claims Under the November 2012 Referral

The Commission issued proposed decisions in all 28 of the claims it received under the 2012 referral in 2014. Some claimants had objections to the decisions still pending as of May 2015, but in those decisions that had become final, the Commission awarded a total of \$11,000,000. Decisions are available at www.justice.gov/fcsc/final-opinions-and-orders-5#s3.

The category of claims referred to the Commission in November 2012 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 had 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 severity of the serious personal injury suffered is a special circumstance warranting additional compensation. The referral letter states that “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.

Some of the key Commission decisions on the Iraq claims under the 2012 referral are discussed below.

a. Claim IRQ-I-005

In the first claim to be decided in the Iraq Claims Program, the Commission’s decision articulates a detailed standard for determining which claims would be compensable because the severity of the serious personal injury suffered is a special circumstance warranting additional compensation. Excerpts follow (with footnotes omitted) from the final decision in Claim No. IRQ-I-005, Decision No. IRQ-I-001.

* * * *

Claimant’s attorney makes two arguments ... First, he argues that the Referral “clearly and unambiguously encompasses claims for serious personal injury without any requirement that such injury arise out of wrongful conduct separate from that of the hostage experience itself.” Under this argument, the Proposed Decision erred by requiring a discrete act as a necessary condition for a finding of “serious personal injury.” Second, he argues that the Proposed Decision erred in concluding that Claimant was fully compensated by the State Department for his injuries. He contends that this conclusion effectively ignored the word “generally” in the Referral’s indication that the State Department’s compensation “encompassed physical, mental, and emotional injuries generally associated with captivity or detention” (emphasis added).

DISCUSSION

I. Definition of “Serious Personal Injury”

To decide this claim requires that we first determine whether Claimant suffered a “serious personal injury” within the meaning of the 2012 Referral. By itself, the use of a phrase like “serious personal injury” might be thought to give us complete discretion to determine whether the Claimant’s personal injury is “serious.” Here, however, the State Department provided further elucidation of the phrase, and that is where we begin our analysis. The relevant sentence in the Referral—which we will refer to as the “explanatory sentence”—provides that “For the purposes of this 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.”

We begin by noting that the explanatory sentence must have some meaning; it must have some effect on our determinations of whether an injury is “serious” for purposes of the Referral. Therefore, to determine the meaning of “serious personal injury” requires that we understand and interpret that sentence.

The Proposed Decision understood the explanatory sentence as helping to define the contours of the meaning of the phrase “serious personal injury.” In particular, the Proposed Decision explained that the permissive nature of the phrase “may include” implied that the list in the explanatory sentence was not to be treated as exclusive. At the same time, the Proposed Decision noted that the explanatory sentence did not reference types of injuries, but instead listed types of acts that could cause injury. This approach to describing injuries suggests that determining whether an injury is “serious” for purposes of the Referral requires some consideration of the act that caused the injury. It was against this backdrop that the Proposed Decision concluded that, to be a “serious personal injury,” the injury had to have resulted from one of the four acts specifically enumerated in the Referral or some other act of a similar type or similar level of brutality or cruelty. Claimant’s arguments must thus be seen through the lens of language that on the one hand is permissive while on the other hand has the distinctive feature of connecting the “serious” nature of an injury to particular acts.

Claimant’s primary argument is textual: the Referral, he says, “clearly and unambiguously encompasses claims for serious personal injury without any requirement that such injury arise out of wrongful conduct separate from that of the hostage experience itself.” ...

The problem with this argument is twofold. First, the Proposed Decision specifically held that “serious personal injuries” would not be limited to the four acts enumerated in the explanatory sentence. We thus explicitly interpreted “include” as a word of “extension or enlargement” and not as the equivalent of “include only.” Second, it was not the words “may include” that led the Proposed Decision to require a discrete act as a condition of a finding that an injury was serious. It was the fact that the explanatory sentence tied the phrase “serious personal injury” to discrete acts. The question then is not “limitation” versus “enlargement” vis-à-vis injuries caused by the four acts listed in the explanatory sentence, since both the Proposed Decision’s reading and Claimant’s interpretation treat “include” as a term of “enlargement.” The question is simply how much “enlargement” and of what type. To answer that question, the plain meaning of the term “include” provides no help. What the Proposed Decision did find important was the Referral’s reference to specific acts that cause injuries, and we continue to see the reference to acts as the linchpin of the explanatory sentence’s meaning. The one thing that the language strongly implies is that we must “consider not just the injury itself, but how the injury arose[.]” in determining whether an injury is a “serious personal injury” within the Referral’s meaning.

... Each of the acts enumerated in the explanatory sentence evokes an extremely high level of brutality and culpability. If, as Claimant contends, we were given free rein to decide in each and every case whether there is a “serious personal injury,” it seems highly unlikely that the State Department would have listed these four acts, which seem like easy cases for showing that an injury is “serious.” Rather, it seems more likely that there was some sense in which the State Department meant to imply the broad principle of *ejusdem generis*, as if to say, “when we say ‘serious personal injury,’ look at the acts that cause injury, and these are examples of the type of acts that are bad enough to lead to a serious personal injury.”

Claimant’s second response is that the hostage-taking itself can count as the act that causes the serious personal injury. He says, “the fact that a serious personal injury ‘may include’ injury arising from certain types of acts that are separate and distinct from the act of hostage-taking does not mean that it ‘cannot include’ injury arising from the hostage-taking itself.” This argument raises precisely the question posed by the facts of this claim. Here, Claimant’s injuries arose solely from his having been a hostage. Indeed, Claimant’s injuries occurred in circumstances in which he was never even under the direct custody of Iraqi officials; he was a hostage solely due to Iraq’s restrictions on U.S. nationals leaving Kuwait and Iraq.

In the specific context of this program, this argument has to be wrong. The Referral limits this program to those who have already received compensation from the State Department “for his or her claim of hostage-taking” Clearly, then, every potential claimant was the victim of hostage-taking. Thus, under Claimant’s reading, every claimant falling within the jurisdictional terms of the Referral would have been the victim of a relevant act within the meaning of the explanatory sentence, rendering the sentence’s reference to specific acts superfluous.

* * * *

Finally, our interpretation of the phrase “serious personal injury” is supported by the way the United Nations Compensation Commission (“UNCC”) used the same phrase. As in this program, the UNCC addressed claims arising out of Iraq’s occupation of Kuwait in 1990-91, and

the State Department was likely aware of the UNCC's use of that phrase. The UNCC's Governing Council held that

1. "Serious personal injury" means:

(a) Dismemberment;

(b) Permanent or temporary significant disfigurement, such as substantial change in one's outward appearance;

(c) Permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system;

(d) Any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such recovery.

2. For purposes of recovery before the Compensation Commission, "serious personal injury" also includes instances of physical or mental injury arising from sexual assault, torture, aggravated physical assault, hostage-taking or illegal detention for more than three days or being forced to hide for more than three days on account of a manifestly wellfounded fear for one's life or of being taken hostage or illegally detained.

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, S/AC.26/1991/3, at 2 (Oct. 23, 1991).

Significantly, the 2012 Referral's explanatory sentence closely tracks the language in paragraph 2 of the UNCC's decision, and yet at the same time has differences with that language. This further buttresses our conclusion by creating negative implications about the meaning of the explanatory sentence in two distinct ways. First, the explanatory sentence, like paragraph 2 but unlike paragraph 1 of the UNCC's definition, lists acts not injuries. The absence of any language listing any specific injuries in the Referral's explanatory sentence suggests that our focus should be on acts not injuries—indeed, it suggests that injuries unconnected to specific acts may have been consciously omitted from the Referral. Moreover, the Referral's requirement that the Commission separately consider whether the "severity" of the injury "constitutes a special circumstance warranting additional compensation" also suggests that the level (i.e., severity) of the injury alone is not what the State Department wanted us to consider determinative of whether an injury satisfies the "serious personal injury" requirement. Second, paragraph 2 of the UNCC definition specifically lists hostage-taking, whereas the Referral's explanatory sentence does not. This suggests that hostage-taking may have been consciously excluded from the list of acts in the explanatory sentence and that any injuries caused solely by hostage-taking thus cannot be "serious personal injuries" within the meaning of the Referral. Of course, even if the State Department were unaware of the UNCC's definition, we could still make these negative inferences from the text; but given the remarkable similarities in the language and the fact that the UNCC adjudicated claims out of the same basic factual circumstances, the State Department was likely aware of the UNCC's definition, making the inferences even stronger here.

II. Injuries "Generally Associated" with Hostage-Taking or Unlawful Detention

Claimant's second argument is that the Proposed Decision erred by concluding that the State Department payment Claimant has already received—\$800,000—fully compensated him for his injuries. He focuses on the word "generally" in the language in footnote 3 of the Referral, which indicates that the State Department compensation "encompassed physical, mental, and emotional injuries generally associated with such captivity or detention" (emphasis added). He argues that the Proposed Decision "ignores the ordinary meaning of the word 'generally' and indeed, reads the word completely out of The Referral." ...

This argument has two types of problems: textual and practical. The textual problem is that this footnote is not the operative language of the Referral; it is merely a description of the harm for which the State Department has already compensated claimants. So, even if Claimant has not been compensated for injuries that are not “generally associated with” hostage-taking (an issue on which we make no finding), that does not mean he is entitled to compensation in this program. The legal question remains simply whether he suffered a “serious personal injury” within the meaning of the Referral. ...

Accepting Claimant’s argument would make this claims program nearly impossible to administer. Rather than focusing on how an injury was sustained, Claimant’s approach would require the Commission to undertake a case-by-case analysis to determine whether a given claimant’s injuries (including emotional injuries) were sufficiently unusual compared to those “generally associated with” the hostage experience. The task would be made even more difficult by the fact that claimants in this program experienced widely varying circumstances of captivity.

...

* * * *

b. Claim IRQ-I-001

In Claim IRQ-I-001, claimant demonstrated that Iraqi officials repeatedly and brutally beat him, subjected him to numerous instances of harsh interrogation, imprisoned him in inhumane conditions, and forced him to listen to fellow captives being beaten, leading to physical and emotional injuries such that the Commission awarded him \$1.5 million in additional compensation. In arriving at its decision, the Commission considered the appropriate level of compensation for personal injuries under international law. After reviewing a variety of sources, the Commission listed the factors that it would apply when determining appropriate compensation for all successful claimants. These factors were applied in all subsequent decisions in the Iraq program. Excerpts follow from the proposed decision in Claim No. IRQ-I-001, Decision No. IRQ-I-005.

* * * *

Assessing the value of intangible, non-economic damages is particularly difficult and cannot be done using a precise, mathematical formula. Claim No. LIB-II-002, Decision No. LIB-II-002, at 4-5 (2011) (Final Decision) (citing Claim No. LIB-II-002, Decision No. LIB-II-002, at 9-10 (2009) (Proposed Decision)); see also 2 Dan B. Dobbs, *Dobbs’ Law of Remedies* ¶ 8.3(6) (2nd ed. 1993); I Marjorie M. Whiteman, *Damages in International Law* 777-78 (1937)). Furthermore, assessing the relative value of personal injury claims is especially challenging where, as here, the claimants have alleged both physical and mental injuries, of varying number and degree, arising from highly individual circumstances.

The Claims Settlement Agreement itself says nothing about the appropriate level of compensation. The Referral sets a recommended maximum of \$1.5 million per claim, but says nothing else. 2012 Referral, *supra*, ¶ 4. The Referral also makes clear that this compensation is

not to include compensation for any injuries generally associated with the hostage experience, injuries for which the State Department has already paid the Claimant.

Under international law, compensation for personal injuries varies greatly, and there is no consistent formula applied by international courts and tribunals in determining the appropriate amount. Chester Brown, *A Common Law of International Adjudication* 206 (2007). Nonetheless, certain factors have been frequently cited in making this determination or in assessing the relative value of such claims. For instance, Whiteman cites, *inter alia*, “the nature and seriousness of the injury to the claimant, [and] the extent of impairment of the health and earning capacity of the claimant” I Marjorie M. Whiteman, *Damages in International Law* 628 (1937). Awards have generally been higher where the claimant’s suffering was permanent or persisted for many years. See *id.* at 588-92. Tribunals have also considered the seriousness and the manner of the wrong committed by the offending state, see Dinah Shelton, *Remedies in International Human Rights Law* 295 (2006); A.H. Feller, *The Mexican Claims Commissions* 296 (1935); *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, Case No. 2, Judgment of July 1, 1999, 3 ITLOS Rep. 10, ¶¶ 171-172, as well as the existence of multiple causes of action in a single claim, see, e.g., J.G. de Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico* 271 (1938).

In determining the appropriate level of compensation under the 2012 Referral, the Commission will thus consider, in addition to the State Department’s recommendation, such factors as the severity of the initial injury or injuries; the number and type of injuries suffered; whether the claimant was hospitalized as a result of his or her injuries, and if so, how long (including all relevant periods of hospitalization in the years since the incident); the number and type of any subsequent surgical procedures; the degree of permanent impairment, taking into account any disability ratings, if available; the impact of the injury or injuries on claimant’s daily activities; the nature and extent of any disfigurement to the claimant’s outward appearance; whether the claimant witnessed the intentional infliction of serious harm on his or her spouse, child or parent, or close friends or colleagues; and the seriousness of the degree of misconduct on the part of Iraq.

Claimant does not specify how much compensation he seeks, but he argues that the Commission should award him more than the State Department’s recommended maximum of \$1.5 million. Claimant contends that he is entitled to a greater amount because of the brutal and repeated nature of the acts that caused his injuries, the length of time he was subjected to attack (40 days), and the (now) more than 23 years of mental pain and anguish he has suffered. He emphasizes that, under the Referral, “damage awards are by no means limited to ‘physical injury’ and . . . mental and emotional injuries are *expressly* deemed compensable” (emphasis in original). Further, he says that he suffered treatment similar to the Gulf War POWs; and, according to Claimant, the State Department awarded those POWs amounts “well in excess of the amount now recommended by the State Department” under the 2012 Referral. Claimant notes that the State Department’s recommendation “is not binding and that the Commission will give independent consideration to the dollar amounts to be awarded” For these reasons, Claimant contends that an award in excess of \$1.5 million is warranted in this claim.

The Commission recognizes that Claimant suffered countless serious personal injuries throughout his ordeal, and the nature and seriousness of these injuries clearly entailed suffering that few can imagine. The deliberate cruelty of the Iraqi military in detaining Claimant and his colleagues, including the intentional infliction of enormous physical and mental suffering, represents some of the most egregious conduct alleged in this claims program. Moreover, the

sworn statements of Claimant's treating physicians make it clear that he has endured, and will likely continue to endure, significant emotional trauma for the rest of his life. Claimant rightly points out that the \$1.5 million mentioned in the Referral is merely a recommended maximum and that it does not bind this Commission, and he may be correct that the Gulf War POWs received more than the \$1.5 million recommended maximum.

Nevertheless, having weighed all of the relevant factors, we conclude that Claimant is entitled to \$1.5 million. The State Department set a \$1.5 million recommended maximum in this Program knowing that Claimant was among the eligible claimants. We can thus infer that the State Department did not intend the POW awards (which, according to Claimant, were made by the State Department itself) to serve as a rationale for this Commission to make awards greater than \$1.5 million in this Program. Moreover, Claimant, whose attorney represented some of the POWs both in their court case against Iraq and before the State Department, declares that those amounts are confidential and has thus not provided us with any concrete information about the awards the POWs received. Nor do we have any information about the full array of injuries that the POWs suffered at the hands of Iraq. We are therefore in no position to make the comparative assessment Claimant asks us to make. Since we have neither an explicit indication in the Referral that the POW awards were to be considered, nor any information about the specific injuries suffered and awards received by the POWs, we will not use the POW awards as a factor for assessing the appropriate level of compensation to be awarded in this Program.

Accordingly, the Claimant is entitled to an award of \$1,500,000.00 and this amount, not including the amount already received from the Department of State, constitutes the entirety of the compensation that the Claimant is entitled to in the present claim.

* * * *

c. Claim IRQ-I-003

In Claim No. IRQ-I-003, the Commission considered arguments against its use of a continuum approach in interpreting the State Department's recommended cap (*i.e.* awarding the cap amount to the most severely injured claimants, and awarding less compensation, in varying amounts, for those whose injuries were not as severe). Claimant in this case argued that the Commission should first determine appropriate compensation, regardless of the amount, and then reduce the awards to the recommended cap when they exceeded that amount. The Commission awarded claimant \$500,000 when he sought \$1 million. The Commission rejected claimant's argument, upholding the continuum approach in its final decision in Claim No. IRQ-I-003, Decision No. IRQ-I-006. Excerpts follow from the final decision (with footnotes omitted).

* * * *

*I. There Is No Uniform, Universal Test For
Measuring Compensation For Noneconomic Personal Injuries*

Claimant contends that the first step in the “proper methodology” is to “determine the award to which each claimant would be entitled in the absence of the cap” The problem with this argument is that he has offered no comprehensive and compelling way to do this. This is not surprising: as the Commission and other international-law authorities have noted numerous times, there is no consistent test for measuring compensation for the types of personal injuries at issue here. The amount of compensation awarded for noneconomic personal injuries has varied dramatically based on the institution making the awards and other contextual factors, and there is simply no true Archimedean point from which we can determine what Claimant refers to as his “actual damages.”

When Claimant argues that the Commission should “simply cap[] the amount that can be awarded in any given case,” he assumes that there is some specific amount to which a claimant would be entitled in the absence of the Referral’s recommended maximum. But this is simply not the case. In a claim for compensation for noneconomic harm, there is no uniform, universal way to determine “actual damages.” . . .

Claimant contends that the Commission should look to damage awards in U.S. courts as an external anchor against which to measure compensation in this program. We disagree. Our enabling statute, the International Claims Settlement Act of 1949 (“ICSA”), instructs us to apply, in the following order, “the provisions of the applicable claims agreement” and “the applicable principles of international law, justice and equity.” 22 U.S.C. § 1623(a)(2) (2012). One important consequence of following the strictures of our enabling statute is that we have no mandate to base compensation amounts in this program on damage awards in U.S. courts, even if the nature and severity of the injuries are similar. We thus do not seek an anchor for determining concrete damage awards or, as Claimant would have it, “actual damages,” in U.S. domestic cases.

* * * *

*II. The Proposed Decision’s “Continuum” Approach
is the Best Interpretation of the 2012 Referral*

Even if we were to assume that there is some abstract amount, presumably greater than \$1.5 million, to which most or all of the Claimants in this program would be entitled in the absence of the Referral’s recommended maximum, that does not mean that the 2012 Referral’s language mandates a cut-off approach. It merely raises the question of how to interpret the Referral’s language.

Having carefully examined the Referral’s text and context, and relevant extrinsic evidence about its meaning, we are convinced that the continuum approach we implicitly adopted in the Proposed Decision better comports with the Referral’s meaning than the cut-off approach Claimant proposes. While the text is ambiguous, both the context surrounding the State Department’s use of the recommended-maximum language and all the extrinsic evidence we have suggest that we should award compensation in this program based on the relative severity of the injuries along a continuum from zero to \$1.5 million.

Text. The Referral’s language is ambiguous as to whether to adopt the Proposed Decision’s continuum approach or Claimant’s proposed cut-off approach. The relevant sentence reads in full as follows: “If the Commission decides to award compensation for claims that meet these criteria, we recommend that the Commission award up to but no more than \$1.5 million per

claim.” 2012 Referral ¶4 (emphasis added). Claimant argues that the “up to but no more than” language favors the cut-off approach: “Nothing in the language of the Department’s recommendation,” Claimant writes, “suggests that the Department wanted the Commission to reduce the amount of compensation to which an individual might be entitled in the absence of the \$1.5 million ceiling to an amount below that ceiling.” The problem with this argument, however, is that it can work the other way around too. That is, nothing in the language of the State Department’s recommendation suggests the State Department wanted the Commission to adopt the Claimant’s recommended “cut-off” approach. Linguistically, “up to but no more than” provides no real guidance as to how to determine awards within the range from zero and \$1.5 million. To be sure, it does not preclude Claimant’s reading. It just does not decide the question.

Context. Although the text is ambiguous, the background context surrounding the State Department’s choice of the “up to but no more than” language strongly suggests that it intended that the Commission adopt a continuum approach. Before the 2012 Iraq Referral at issue here, the State Department used this exact same phrase (“up to but no more than”) in a prior referral letter, and just before the 2012 Iraq Referral, the Commission had issued several decisions interpreting the phrase in that prior referral as establishing a continuum. The State Department then used the same phrase again in the 2012 Iraq Referral, undoubtedly knowing how the Commission had interpreted it. This suggests that the State Department was aware that the language could be read to mean a continuum approach and most likely intended the Commission to take such an approach in this program.

Specifically, in January 2009, the State Department referred several sets of claims to the Commission. This was the second set of claims referred pursuant to the Libya Claims Settlement Agreement, and we call that referral the “2009 Libya II Referral.” One set of claims, Category D of that referral, was for additional compensation for physical injuries, above an initial \$3 million award that all successful physical-injury claimants had received under the first Libya program. Like this program, that category comprised claims for additional compensation for a subset of a predefined group of claimants who had already received some compensation. There, the group consisted of those who had already received \$3 million for their physical injuries and the subset consisted of those whose injuries were severe enough to warrant additional compensation; here, the group consists of those to whom the State Department provided compensation for their hostage-taking claim and the subset consists of those who suffered “serious personal injuries.” Also like here, it is safe to assume that, although the State Department may not have had detailed knowledge of all the injuries, it did know ahead of time that there would be a range of injuries.

In the 2009 Libya II Referral, the State Department used the same “up to but no more than” language as is used here. Category D provided that, “[i]f the Commission decides to award additional compensation for claims that meet these criteria, we recommend that the Commission award *up to but no more* than an additional \$7 million per claim (offering the possibility that some injury cases will be compensated at the \$10 million level of the wrongful death claims processed by the Department of State).” 2009 Libya II Referral at 2 (emphasis added). After assessing the full range of injuries, the Commission awarded compensation in Category D claims using a continuum approach, ranging from zero to the recommended maximum, based on the severity of the injuries. . . . The State Department was almost certainly aware of the Commission’s Category D decisions and, with that knowledge, used the exact same “up to but no more than” language here. Under the so-called Prior Construction Canon, we can presume both that the State Department knew about, and that it intended to adopt, the meaning we gave to the

“up to but no more than” language in the Libya II Category D cases. See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates as a general matter, the intent to incorporate the administrative and judicial interpretations as well.”). ...

Our approach in the 2009 Libya II Category D program also provides a response to Claimant’s argument that the State Department would have clearly directed the Commission to use a continuum approach. ... In view of the Libya II Category D decisions, Claimant’s negative-implication argument cuts against his position. It makes more sense to say that, if the State Department had wanted Claimant’s proposed cut-off approach, it would not have used the same “up to but no more than” phrasing that the Commission had previously interpreted as mandating a continuum approach. The State Department’s choice of the same language thus counsels the same continuum approach we used in adjudicating Category D claims from the 2009 Libya II Referral.

Extrinsic Evidence. Claimant makes several arguments that evidence extrinsic to the Referral supports his proposed cut-off approach, but none of them undercuts our view that the continuum approach better comports with the text, context and State Department’s likely intent. Claimant argues that State Department awards to POWs who were held in Iraq in early 1991 indicate that the State Department believed many of the claimants in this program suffered “actual damages” of more than \$1.5 million. The State Department allegedly provided the POWs with significantly more than the \$1.5 million recommended maximum even though the POWs allegedly suffered injuries no more severe than (and in some cases, less severe than) two of the claimants in this program, the claimants in Claim Nos. IRQ-I-001 and IRQ-I-002. Thus, Claimant argues, the State Department must have recognized that the “actual damages” of those two claimants would, in the absence of the recommended maximum, necessitate awards of greater than \$1.5 million. Measuring the “actual damages” of the rest of the claimants in this program by comparing with the amount the POWs received would then entitle numerous claimants in this program to more than \$1.5 million (again, in the absence of the recommended maximum). Thus, Claimant argues, it makes no sense to create a zero to \$1.5 million continuum for all of the claimants in this program when the State Department itself implicitly recognized that many of the claimants in this program would have deserved far more in the absence of the recommended maximum.

The fundamental problem with this argument is that we have no mandate to consider the POW award amount. This amount, to the Commission’s knowledge, has not been made public, and the State Department never instructed the Commission to take it into account in making awards in this program. When the State Department wants the Commission to know and consider amounts it has previously awarded, it knows how to inform us accordingly. ...

Given that the State Department was fully aware of how much it awarded to the POWs, its silence here speaks volumes. It strongly suggests that the State Department did not intend for the Commission to look to that amount when determining compensation in this program. ...

* * * *

Finally, Claimant argues that “case law construing statutorily imposed caps on awards in similar contexts” informs the meaning of the “up to but no more than” language in the Referral. Claimant points to a Court of Federal Claims decision interpreting the National Childhood Injury

Vaccine Act of 1986 (“Vaccine Act”) and several federal district court cases interpreting the Civil Rights Act of 1991...

Decisions interpreting these statutes do not help decide the continuum versus cutoff question here. For one, in both statutes, the language is subtly different from the Referral. The Vaccine Act uses the language “not to exceed” and the Civil Rights Act of 1991 uses “shall not exceed.” Neither uses the Referral’s phrase “up to but not more than.” In particular, the prepositional phrase “up to” admits more easily of awards being less than the recommended maximum than the phrases “not to exceed” and “does not exceed.” By itself, this by no means decides the question, but it reminds us that our goal here is to interpret the specific language in the Referral, not to think about the recommended maximum as a cap in some abstract sense.

More important than the specific differences in the language, however, is the fact that we have no evidence that the State Department was aware of these federal trial court interpretations of completely unrelated statutes. ...

Ultimately, we must interpret the Referral, a document drafted by the State Department for this program, and we think it far more likely that the “up to but no more than” language in the Referral is premised on the Commission’s earlier interpretation of that language in the Libya II program. In sum, therefore, the Referral’s recommendation to award “up to but no more than \$1.5 million per claim” is best understood to recommend the creation of a continuum from zero to \$1.5 million, with amounts to be awarded within that range based on an assessment of claimant’s injuries within this program.

* * * *

d. Claim IRQ-I-021

In Claim No. IRQ-I-021, Decision No. IRQ-I-020 (Proposed Decision), the Commission established criteria under international law that it would apply in determining the veracity of sworn statements of the claimants, their friends and family members, or other individuals. In this claim, as in many others, particularly those involving psychological injuries, there was no concrete evidence of the injuries sustained in Iraq or Kuwait. The proposed decision in Claim No. IRQ-I-021 is excerpted below (with footnotes omitted).

* * * *

Given that the only direct evidence of physical assault comes solely from Claimant’s sworn statements and those of his family members, we begin our analysis with an evaluation of those statements. In circumstances where, as here, a claim relies heavily on written declarations, certain factors must be considered in determining how much weight to place on them. See generally Claim No. IRQ-I-010, Decision No. IRQ-I-022 (Proposed Decision) (2014). These may include, for example, the length of time between the incident and the statement, see *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 137 (Sept. 2, 1998), and whether the declarant is a party interested in the outcome of the proceedings or has a special relationship with

the claimant, see Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 312, 317 (Cambridge University Press 2006) (1953). Sworn statements will carry much greater weight when there has been an opportunity for cross-examination. See *Akayesu*, Case No. ICT-96-4-T, ¶ 137; Cheng, *supra*, at 314. In such cases, live, compelling testimony by the claimant can do much to support a claim. See, e.g., Claim No. LIB-I-007, Decision No. LIB-I-024 (2011) (Final Decision). The clarity and detail of the declarations should also be considered, as should the existence of corroborating declarations and other evidence. See *Partial Award: Prisoners of War—Eritrea’s Claim* 17, 26 R.I.A.A. 23, 42 (Eri.-Eth. Cl. Comm’n 2003).

The various declarations submitted by Claimant concerning his alleged physical assault are, in most respects, consistent. One notable exception, however, is the question of where the alleged physical assault occurred. In Claimant’s wife’s declaration, she expresses surprise that Claimant’s 2004 declaration stated that the alleged assault occurred at the safe house where he was first apprehended. His wife states that Claimant had always told her that it had occurred at a local police station after his seizure. In his 2013 supplemental declaration, Claimant confirms this, noting that he had been in error in the earlier declaration. He attributes this confusion to memory problems he experienced after his release; his wife confirms these problems, noting that Claimant’s memory “has gotten progressively worse[,] and he has frequently gotten dates, names, places and events confused in his mind.”

The Commission recognizes that “[a]llowance must be made for infirmities of memory[.]” Cheng, *supra*, at 316 (quoting *Studer (U.S.) v. Gr. Brit.*, 6 R. Int’l Arb. Awards 149, 152 (Gr. Brit.-U.S. Arbitral Trib. 1925)). This inconsistency is therefore not necessarily dispositive to this claim. It does, however, heighten the importance of other corroborative evidence. This is especially true given that all of the declarations referencing the alleged assault—with the exception of Claimant’s 2004 declaration that contains the alleged error—were sworn in 2013. It is also notable that the narrative of the assault in each of these declarations comes from a single source: Claimant himself. Moreover, all of the declarants are members of Claimant’s immediate family. Under these circumstances, the Commission must look to other evidence to support a finding of serious personal injury arising from the alleged physical assault.

Evidence of physical injuries can be evidence of an assault, and Claimant has submitted medical records to show that he has suffered various physical injuries. Claimant alleges the assault led to injuries in six different parts of his body: (1) his diaphragm; (2) the location of a previous hernia; (3) his tailbone; (4) his teeth; (5) his left pinky; and (6) his head, including a spot over his eye where he received a “nasty scar” and hearing loss in his right ear. For each of these alleged injuries, however, there is either no medical evidence to establish that the injury occurred or, if there is, no medical evidence that it was caused by an assault.

* * * *

Other evidence in the record, while supporting Claimant’s assertions about his captivity generally, raises further questions about his allegations of having been seriously beaten. For example, Claimant has submitted two contemporaneous newspaper articles published shortly after his release. Both verify his hostage experience but mention no medical problems other than the ulcer condition that apparently was the basis for his release. There is no indication that Claimant was beaten. Moreover, according to one of the articles, a friend who spoke with Claimant over the phone just after his release, when he was still in Amman, Jordan, said that Claimant “sounded good; he said he felt good[.]” The friend also relayed that Claimant “was

reasonably well treated” Significantly, the friend also noted that Claimant “‘sounded very upbeat,’” and that he “‘thought about remaining in England to visit cousins. ‘That’s when [the friend] knew . . . [Claimant] hadn’t suffered any serious consequences.’”

Finally, Claimant has not submitted any declarations, recent or otherwise, from any of the non-family members who were present during his ordeal and/or could verify his assertion that he suffered a brutal beating by Iraqi soldiers. He has not submitted a declaration from either of his two companions in the safe house, nor has he submitted any declarations from any of the other hostages who were with him at the Kuwaiti hotel in the days immediately after the alleged assault, the Mansour Melia Hotel in Baghdad in the days after that, or the chemical weapons complex near Samarra, any of whom might be able to say something about the nature and seriousness of his injuries. While the absence of these documents is not dispositive, such documentation could have provided much-needed support for Claimant’s allegation that he was seriously beaten by Iraqi soldiers upon his capture in Kuwait and suffered permanent or semi-permanent injuries.

In sum, on the present record, Claimant has not provided evidence sufficient to establish that he suffered injuries from an aggravated physical assault, or any other discrete act comparable in brutality or cruelty, during his captivity in Iraq. Accordingly, the Commission concludes that Claimant has not satisfied his burden of proving that he suffered a “serious personal injury” within the meaning of the 2012 Referral. While the Commission sympathizes with all that Claimant has experienced both during and since his captivity in Iraq, in the absence of further evidence substantiating his claim, the claim must be and is hereby denied.

* * * *

3. UN Compensation Commission

On December 18, 2014, U.S. Deputy Permanent Representative to the UN in Geneva Peter Mulrean delivered remarks at the 14th special session of the UN Compensation Commission (“UNCC”) Governing Council. For background on the UNCC, see *Digest 2013* at 249-50. As stated by Mr. Mulrean, the United States supported Iraq’s request to suspend its payment obligations to the UNCC until January 2016. Mr. Mulrean’s remarks are excerpted below and available at <https://geneva.usmission.gov/2014/12/18/us-statement-at-14th-special-session-of-the-uncc-governing-council/>.

* * * *

The United States appreciates that both Iraq and Kuwait have sent eminent representatives from their capitals for this Special Session. We share the deep concern of the government of Iraq regarding its present security situation, and we are undertaking significant efforts to assist Iraq to overcome the multiple challenges it faces. We understand the requests that Iraq has made regarding its UNCC obligations, and we are in favor of helping Iraq.

We have listened very carefully to the representative of Kuwait. For us a key question about Iraq's requests is whether Kuwait and Iraq have reached accord on these proposals. It is heartening to hear that they have. Kuwait deserves much appreciation from the international community for taking a constructive and helpful approach to Iraq during its time of crisis. In fact, it is an extremely positive symbol of how far the relations of these two countries have come since the events of the early 1990s that led to the creation of the UNCC.

In the present extraordinary circumstances, and given that there appears to be agreement between Iraq and Kuwait, the United States supports adoption by the Governing Council of a decision to suspend Iraq's payment obligations for one year until January 1, 2016, when the payment obligations would resume.

It is important that Iraq's obligations under the relevant Security Council resolutions remain until all outstanding claims payments have been made. Until recently, we expected the remaining payments of approximately \$4.6 billion to be completed during 2015. Under this proposal, the conclusion of the UNCC's mandate will be deferred. That is acceptable to us, as long as there is a definite expectation and a reasonable timing for Iraq to resume and complete its payments. It remains important, as we have said at previous Governing Council meetings, to use UN resources wisely, and to accomplish the orderly wind-down of the UNCC and fulfillment of its mandate, even if that event will now be delayed by one year.

In sum, based on the accord between Iraq and Kuwait, we support Iraq's requests for both the deferral of payments and the release of funds for the months of October, November and December. We hope that other Council members will do the same.

* * * *

E. LIBYA CLAIMS

On November 21, 2014, a district court granted the U.S. motion to dismiss claims brought by the half-siblings of a victim of a 1972 terrorist attack in Israel that was carried out with material support from Libyan authorities. *Robles v. Kerry*, No. 14-79 (D.D.C. 2014). The victim's full siblings had obtained \$10 million from the State Department pursuant to the Libya claims settlement program. For background on the Libya claims program, see *Digest 2008* at 399-410 and *Digest 2009* at 273-74. The Foreign Claims Settlement Commission, to whom the State Department had referred the Libya claims, determined that because the maximum per-death payment of \$10 million had already been paid to the victim's siblings, the Commission lacked jurisdiction over the claim by the victim's half-siblings. The half-siblings then filed the suit in federal district court, seeking a declaratory judgment that the denial of their claims to compensation violates due process and an order that the State Department provide them with compensation. Excerpts follow (with footnotes omitted) from the district court's grant of the U.S. government's motion to dismiss.

* * * *

“[T]o make out a violation of [procedural] due process, the plaintiff must show the Government deprived her of a ‘liberty or property interest’ to which she had a ‘legitimate claim of entitlement,’ and that ‘the procedures attendant upon that deprivation were constitutionally [in]sufficient.’” *Roberts v. United States*, 741 F.3d 152, 161 (D.C. Cir. 2014) (citation omitted). A governmental authority “creates a [protected property] interest . . . by establishing ‘substantive predicates’ to govern official decision-making and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.” *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 462 (1989) (internal citation omitted). That is, in addition to discretion-limiting substantive predicates, the applicable statutes or regulations must contain “explicitly mandatory language, *i.e.*, specific directives to the decision-maker that if the regulations’ substantive predicates are present, a particular outcome must follow” *Id.* at 463 (internal quotation marks and citation omitted), accord *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36 (D.C. Cir. 1997).

This Court’s review of the statutes and regulations has not revealed “explicitly mandatory language” requiring the Commission (or State Department) to issue an award to any eligible claimant. *Ky. Dep’t of Corr.*, 490 U.S. at 463.15 The Executive Order directing the Secretary of State to implement the Claims Settlement Agreement provides only that the Secretary “shall provide for procedures” for processing claims. Exec. Order No. 13,477, 73 Fed. Reg. at 65,965. The notice announcing the Commission’s adjudication program outlines various eligibility criteria, but contains no requirement that “if the . . . substantive predicates are present, a particular outcome must follow” *Ky. Dep’t of Corr.*, 490 U.S. at 463 (emphasis added). Indeed, the notice provides that “the Commission will . . . certify to the Secretary of the Treasury those claims that it finds to be valid”; the notice does not require the Commission to validate any claim or class of claims. 74 Fed. Reg. at 32,194 (emphasis added). Nor is any language in the Claims Settlement Agreement or claim filing instructions availing. See generally Claims Settlement Agreement; Foreign Claims Settlement Commission Libya Claims Program (Referral Dated Jan. 15, 2009) Instructions for Completing Statement of Claim, Pls.’ Ex. 2, ECF No. 12-2. In any event, the complaint does not direct this Court to any mandatory language and therefore fails to state a plausible claim that Plaintiffs were denied procedural due process. *Iqbal*, 556 U.S. at 678.

Accordingly, Plaintiffs fail to state a claim for a declaratory judgment that the State Department’s denial of monetary relief “violates the Fifth Amendment . . . and 42 U.S.C. § 1983.” Compl. 9. . . .

Plaintiffs likewise fail to state a claim for \$10 million in monetary relief under 22 U.S.C. § 1623(a)(1)(C) because that statute does not provide any such entitlement. Rather, the statute merely sets forth the Commission’s jurisdiction:

The Commission shall have jurisdiction to receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or 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). To the extent Plaintiffs rely on an implied right of action, they must demonstrate that the statute “displays an intent to create not just a private right but also a private remedy.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). But Defendants persuasively explain that there is no evidence of such intent; to the contrary, the statute explicitly provides that Commission decisions are not subject to judicial review. See 22 U.S.C. § 1623(h). Defendants further contend that an implied right of action against the State Department would be difficult to

reconcile with the fact that this statute imposes no obligations on that agency at all; the statute provides only that the Commission can hear claims “referred . . . by the Secretary of State.” *Id.* § 1623(a)(1)(C).

* * * *

F. CHALLENGE TO DECISION NOT TO ESPOUSE CLAIMS

In 2013, the United States filed a motion to dismiss claims brought in U.S. district court challenging both the U.S. government policy of providing assistance to Vietnam despite its government’s nationalization of individuals’ property as well as the U.S. government declining to espouse claims against the government of Vietnam on behalf of Vietnamese-Americans whose property had been nationalized. *Tran et al. v. U.S. Dept. of State*, No. 13-646 (E.D. La. 2014). The district court issued its decision, excerpted below (with footnotes omitted), on May 9, 2014, granting the U.S. motion to dismiss.

* * * *

Plaintiffs are naturalized Vietnamese-Americans and a national Vietnamese-American non-profit organization who seek class action declaratory and injunctive relief against Defendants, who are agencies and officials of the United States government. Plaintiffs assert that on or before April 1975 they were citizens of the Republic of South Vietnam and owned real property before Communist forces took control of the country. They subsequently fled to the United States at various times. They left their property behind, which they claim was seized by the Vietnamese government and nationalized. Plaintiffs allege two causes of action. First, they argue that Defendants have violated federal law by providing assistance to Vietnam. Second, they argue Defendants have discriminated against them in violation of the 14th Amendment Equal Protection Clause and the 5th Amendment Due Process Clause.

Defendants seek dismissal, arguing the Court is barred from hearing the case because Plaintiffs lack standing, Plaintiffs’ claims are political questions, and the statute of limitations has expired for Plaintiffs’ Constitutional claims. Accordingly, and for the reasons articulated below IT IS ORDERED that Defendants’ Motion to Dismiss or in the Alternative for Summary Judgment (Rec. Doc. No. 55) is GRANTED and Plaintiffs’ claims are DISMISSED.

Law and Analysis

I. Statutory Claims

Plaintiffs point to 22 U.S.C. § 2370(e)(1) as prohibiting the grant of aid by the United States to certain foreign countries who have expropriated the property of United States citizens. That provision however was subsequently superseded by 22 U.S.C. § 2370a. See *Talenti v. Clinton*, 102 F.3d 573, 575 (D.C. Cir. 1996). The Court therefore analyzes Plaintiffs’ claims under § 2370a. § 2370a provides in relevant part:

(a) Prohibition

None of the funds made available to carry out this Act, the Foreign Assistance Act of 1961 [22 U.S.C.A. 2151 et seq.], or the Arms Export Control Act [22 U.S.C.A. 2751 et seq.] may be provided to a government or any agency or instrumentality thereof, if the

government of such country (other than a country described if subsection (d) of this section)—

(1) has on or after January 1, 1956—

(A) nationalized or expropriated the property of any United States person . . .

However the prohibition on aid contains a waiver provision, which reads “[t]he President may waive the prohibitions in subsections (a) and (b) of this section for a country, on an annual basis, if the President determines and so notifies Congress that it is in the national interest to do so.” 22 U.S.C. § 2370a (g).

Separate and apart from the prohibition in § 2370a, Plaintiffs also point to 22 U.S.C. § 2370(f)(1) . . .

Summarizing the two provisions restricting aid that Plaintiffs rely on, two principles are clear: (1) Both statutes require the suspension of U.S. foreign aid to countries if certain conditions are met, *i.e.* a country has expropriated Americans’ property or a country is communist; and (2) Both statutes can be unilaterally disregarded by the President upon a finding that continuing to provide the aid is in the national interest, so long as the President reports this finding to Congress.

Defendants, in their Opposition, do not appear to dispute that Plaintiffs’ land was expropriated by the government of Vietnam, or that Vietnam remains a communist country. Thus, the Court assumes for purposes of the instant motion that the statutory conditions to halt aid are present.

Turning to the waiver provisions, the President has delegated his authority to waive the aid restrictions to the Secretary of State. See Executive Order 12163, 44 Fed. Reg. 56673 (Sept. 29, 1979); Pres. Mem. of July 26, 1994, 59 Fed. Reg. 40205. The Secretary of State has waived § 2370(f) as it applies to Vietnam. Comm. Int’l Relations & H. Comm. on Foreign Relations, I-A Legislation on Foreign Relations Through 2008 § 620 n.1004 (March 2010). No similar waiver has been made under § 2370a.

In place of an argument that § 2370a has been complied with, Defendants argue that Plaintiffs lack standing to challenge noncompliance with the statute. In the alternative they argue that compliance with the statute represents a political question.

In order for a Plaintiff to establish standing, three elements must be met:

First, the plaintiff must have suffered an injury in fact— an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations and quotations omitted).

The Fifth Circuit has not had an opportunity to address the application of either provision at issue in this case. The D.C. Circuit, in *Talenti v. Clinton*, 102 F.3d 573 (D.C. Cir. 1996), considered a claim under § 2370a brought by an American citizen, Talenti, who claimed the Italian government had rezoned and expropriated millions of dollars’ worth of his property from 1974 to 1985. *Id.* at 575. He sought to cease United States foreign aid to Italy based on the statute and the lack of a Presidential waiver. The D.C. Circuit found that Talenti lacked standing. Specifically, it found Talenti could not meet third requirement of standing – redressability –

because it was speculative, if not “doubtful”, that any relief granted under that statute would redress Talenti’s injury. *Id.* at 577. The court recognized that § 2370a does not require the suspension of aid, but instead allows the President to waive the prohibition on aid by reporting the waiver to Congress. Accordingly, the only relief the court could accord Talenti was to order the President to report any waiver to Congress before resuming aid. *Id.* That relief could not redress Talenti’s injury, because forcing the President to make the report to Congress would do little if anything to assist Talenti in getting compensation for his property. *Id.* at 578. Further, even if aid was halted, that likewise would not redress Talenti’s claims – since it was merely speculative that the Italian government would respond to the denial of aid by remedying his property claims. *Id.*

The United States District Court for the District of Puerto Rico reached a similar conclusion on standing when faced with a challenge to aid to the Dominican Republic under § 2370a. *Betteroads Asphalt Corp. v. United States*, 106 F. Supp. 2d 262, 267 (D.P.R. 2000).

Further, in *Aerotrade, Inc. v. Agency for Int’l Dev., Dep’t of State*, 387 F. Supp. 974 (D.D.C. 1974) the United States District Court for the District of Columbia found a plaintiff lacked standing to challenge aid to Haiti. That case dealt with 22 U.S.C. § 2370(e)(1), the provision cited by Plaintiffs in their complaint here but which has been superseded by § 2370a. Nonetheless, the court’s reasoning is nearly identical, and recognized that because the President was free to waive the provision and because there was a lack of evidence that stopping aid would remedy plaintiff’s injury, the plaintiff lacked standing. *Id.* at 975-76.

In short, no court has permitted the type of suit advanced here to go forward. Plaintiffs’ only retort to this fact is to claim that those prior cases are distinguishable because in those cases “there were no prior Settlement Claims Act established by Congress for the specific purpose of compensating property losses of U.S. Citizens nor were they presented with such unique facts as this case.” Opposition, (Rec. Doc. No. 58 at 19). The Court is not persuaded. The fact that a settlement claims process exists does not make it more likely that Plaintiffs’ claims can be redressed by court action. Further, while the facts of this case are no doubt unique, that still does not change the inability of the Court to redress Plaintiffs’ grievances in this forum.

The Court agrees with the case law referenced above and finds that the Plaintiffs here lack standing to pursue suit against Defendants. Plaintiffs have failed to allege how a favorable ruling would redress their injury. Like the plaintiffs in the cases recited above, it is mere speculation to assume that a court order halting aid or requiring the President to meet the reporting requirements would assist in resolution of Plaintiffs’ land disputes. While the Court joins in Plaintiffs’ frustration, Plaintiffs lack the necessary legal standing to challenge the alleged failure to comply with clear statutory provisions. Accordingly, dismissal is appropriate under either the motion to dismiss or summary judgment standard.

II. Constitutional Claims

Plaintiffs next claim Defendants have violated their 5th and 14th Amendment rights by discriminating against Vietnamese-Americans. Specifically, Plaintiffs argue that Defendants have mishandled the expropriation claims brought by foreign born Vietnamese-Americans, but have honored claims brought by American born citizens – thus violating the equal protection rights of foreign born citizens.

Except in limited circumstances not relevant here, “every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” 28 U.S.C. § 2401(a). Plaintiffs’ allegations in their complaint are that: From 1975 to 1995, the U.S. Government through the Department of State, and/or the Office of the

U.S. Trade Representative, and/or the Federal Claims Settlement Commission had persistently pressed the Socialist Republic of Vietnam to pay compensation to naturally born U.S. citizens whose properties had been seized or nationalized by the Vietnamese government after the Vietnam War. (Rec. Doc. No. 45 at ¶ XLIX) During that same time period, Plaintiffs claim the U.S. government did not make similar demands or arrangements for naturalized Vietnamese-Americans to obtain compensation for their property. (*Id.* at ¶ LIII).

Accepting Plaintiffs' claims as true, the statute of limitations on their claims expired at the latest in 2001 – six years after the Defendants alleged discriminatory conduct concluded in 1995. Plaintiffs' counsel filed his clients' claims in 2013, well beyond obvious legal time limitations. The claims are therefore time barred, and must be dismissed.

* * * *

Cross References

ILC, **Chapter 7.D.**

TRIA and the FSIA, **Chapter 10.A.4.**

Investment dispute resolution, **Chapter 11.B.**

Arbitration (BG Group and Commisimpex), **Chapter 15.C.1.**