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## CHAPTER 8

### International Claims and State Responsibility

#### A. STATE RESPONSIBILITY

##### 1. Remarks on State Responsibility at the UN Sixth Committee

Julian Simcock, deputy legal adviser for the U.S. Mission to the UN, delivered remarks on October 14, 2019 at a UN General Assembly Sixth Committee meeting on “Agenda Item 75: Responsibility of States for Internationally Wrongful Acts.” His remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-general-assembly-meeting-of-the-sixth-committee-on-agenda-item-75-responsibility-of-states-for-internationally-wrongful-acts/>.

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The draft articles on the responsibility of States for internationally wrongful acts, with commentaries, were adopted in 2001. Since that time, they have been relied upon by States and other litigants, as well as by international courts and tribunals, as providing guidance on the customary international law of state responsibility. Indeed, the United States has itself cited to certain of the draft articles and the ILC commentaries in its pleadings before international courts and tribunals.

At the 71st session of the Sixth Committee (2016), the draft articles were discussed at length, with some countries favoring a diplomatic conference to convert the draft articles into a convention, and others preferring to leave the articles in draft form. The U.S. position in 2016 was that the articles are most valuable in their current draft form, and our position has not changed.

The United States remains particularly concerned that the negotiation of a convention poses risks to important existing rules. In opening the draft articles to the debate necessary to arrive at a convention, well-accepted rules that are documented in the draft articles and their

commentaries could be re-drafted, questioned, or undermined. On the other hand, those draft articles that represent the progressive development of international law, and which are not necessarily accepted by all States, may not be ready for negotiation. It would be better to allow the topics covered by those rules an opportunity to be subject to State practice, to ascertain whether the draft articles may gain broader acceptance and crystalize into customary international law, or may be disregarded. New rules that are utilized by States in practice are much more likely to gain widespread acceptance, as opposed to a convention negotiated under the pressure of a condensed timeframe.

We also believe that a negotiated convention ultimately would not enjoy widespread acceptance by States, in part because certain articles go beyond existing customary international law. This result would lead not to clarity regarding state responsibility, but to confusion over an area of law that includes both settled customary international law and areas of continuing progressive development. Consequently, the best option is to allow the articles to continue to guide States and other litigants as to the content of settled law, and to assist States in the progressive development of law.

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## 2. Remarks on Diplomatic Protection at the UN Sixth Committee

On October 14, 2019, Deputy Legal Adviser Simcock delivered remarks at a UN General Assembly meeting of the Sixth Committee on Agenda Item 80—Diplomatic Protection. His remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-general-assembly-meeting-of-the-sixth-committee-on-agenda-item-80-diplomatic-protection/>.

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First, let me thank the Secretary General for his helpful report compiling the written comments of States on possible future action on the draft articles on diplomatic protection.

As we indicated in 2016, the United States shares the view that where the draft articles on diplomatic protection reflect State practice, they represent a substantial contribution to the law on the topic and are thus valuable to States in their current form. The United States has concerns, however, that certain draft articles are inconsistent with well-settled customary international law. For more details, please see the statement delivered by the United States on October 19, 2007, as reported in document A/C.6/62/SR.10.

To highlight just one significant remaining concern, we would point to Article 15 on exceptions to the local remedies rule. Draft Article 15 would not require exhaustion where there is no reasonably available local remedy for effective redress or the local remedies provide no reasonable possibility of such redress. In our comments to the International Law Commission, we opposed this standard as too lenient, noting that the customary international law standard was that the exhaustion requirement was excused only where the local remedy is “obviously futile” or “manifestly ineffective.” While the ILC, in its commentary, regarded the customary international law rule as too burdensome—a conclusion with which we respectfully disagree—we maintain

that any articles considered in a convention on diplomatic protection should reflect the well-established customary international law on this subject.

We maintain similar concerns regarding, for example, Articles 10 and 11, which were also detailed in our previous written submissions and our 2007 statement. As we stated in 2007, the United States is also concerned that the negotiation of a convention risks undermining contributions already achieved by the draft articles.

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## B. HOLOCAUST-ERA CLAIMS

On February 6, 2019, the State Department issued a media note announcing that additional payments would issue to individuals based on claims in connection with the Holocaust Deportation Claims Program. The media note is excerpted below and available at <https://www.state.gov/additional-payments-under-holocaust-deportation-claims-program/>. See *Digest 2014* at 313-15 for a discussion of the U.S.-France Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs (“U.S.-France Agreement”), which was concluded in December 2014.

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The U.S. Department of State is pleased to announce that it will soon make additional payments to individuals with approved claims in connection with the Holocaust Deportation Claims Program. Within the next few days, all individuals whose claims were previously approved will receive a letter from the Department notifying them that they will receive an additional payment of 97% of their prior approved claim amount. This amount is based on the funds remaining for approved claims. The letter will provide instructions for receiving the additional payment.

While no payment can provide complete justice for all who were impacted by deportation from France, we hope those affected by one of history’s darkest eras will receive some additional relief from these further payments. The Department’s Office of the Legal Adviser, through its International Claims and Investment Disputes Office, has administered the Holocaust Deportation Claims Program since its inception.

The program was established in connection with the U.S.-France Agreement ... following negotiations led by the Office of the Legal Adviser and Office of the Special Envoy on Holocaust Issues. Under the Agreement, France provided a lump-sum of \$60 million to the United States to distribute to survivors of deportation, surviving spouses of deportees, and representatives of the estates of survivors and surviving spouses who are no longer living. The Department accepted claims in two filing periods and approved and paid claims that were eligible based on the requirements of the Agreement.

The Department is now nearing completion of the program. The following initial payments were made to those whose claims were deemed eligible under the terms of the program: \$204,000 to living survivors of deportation; \$51,000 to living surviving spouses of deportees whose deportee spouse died before 1948, and a pro rata amount if the deportee spouse

died after 1948; and a portion of those amounts to heirs of survivors and surviving spouses based on how long the relevant survivor or surviving spouse lived. Payments to date on approved claims total \$30,028,500. With the additional payment of 97% of their prior approved claim amount, living survivors would receive in total \$401,880; living surviving spouses would receive up to \$100,470; and heirs of survivors and surviving spouses would receive a portion of these amounts.

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### C. IRAN CLAIMS

As discussed in *Digest 2018* at 317-18, the Iran-U.S. Claims Tribunal (“Tribunal”) hearings on Case B/1 (regarding the former U.S. foreign military sales program with Iran) began in 2018. The series of hearings on Case B/1 concluded in June 2019. In December 2019, the United States submitted to the Tribunal its response brief in Case B/61, pertaining to the United States’ obligation to arrange for the transfer of Iranian export-controlled property held by private parties in the United States.

### D. CUBA CLAIMS

In April 17, 2019 remarks to the press, available at <https://www.state.gov/remarks-to-the-press-11/> and excerpted below, the Secretary of State announced that, effective May 2, 2019, the Secretary would no longer suspend Title III of the Cuban Liberty and Democratic Solidarity (“LIBERTAD”) Act of 1996. With certain exceptions, Title III of the LIBERTAD Act permits U.S. nationals with claims to property confiscated by the Cuban government to file suit in U.S. courts against persons or entities “trafficking” in that property. LIBERTAD gives the President the authority to suspend the right to file suit under Title III for periods of not more than six months if he or she determines and reports to Congress that suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba. That suspension authority was delegated to the Secretary of State in 2013. Title III was suspended in full from the time of enactment until May 2, 2019, with a partial suspension from March 19, 2019 to May 2, 2019.

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In 1996, Congress passed the Cuban Liberty and Democratic Solidarity Act, also known as Libertad. [Under] Title III of that act, United States citizens who had their property confiscated by the Castro regime were given the right to file suit against those who traffic in such properties.

But those citizens’ opportunities for justice have been put out of reach for more than two decades. For now more than 22 years, every president, every secretary of state has suspended Title III in the hope that doing so would put more pressure on the Cuban regime to transition to democracy.

\* \* \* \*

More broadly, the regime continues to deprive its own people of the fundamental freedoms of speech, press, assembly, and association. Indeed, according to NGO reports, Cuban thugs made more than 2,800 arbitrary arrests in 2018 alone. In the run-up to the country's recent sham constitutional referendum, one that enshrined the Communist Party as the only legal political party in Cuba, the regime harassed, beat, and detained ... opposition leaders and activists. Three hundred and ten people were arbitrarily detained according to the Cuban Commission on Human Rights and National Reconciliation.

Cuba's behavior in the Western Hemisphere undermines the security and stability of countries throughout the region, which directly threatens United States national security interests. The Cuban regime has for years exported its tactics of intimidation, repression, and violence. They've exported this to Venezuela in direct support of the former Maduro regime. Cuban military intelligence and state security services today keep Maduro in power.

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For these reasons, I'm announcing that the Trump administration will no longer suspend Title III. Effective May 2nd, the right ... to bring an action under Title III of the Libertad Act will be implemented in full. I have already informed Congress of my decision.

Implementing Title III in full means a chance at justice for Cuban Americans who have long sought relief for Fidel Castro and his lackeys seizing property without compensation. For the first time, claimants will be able to bring lawsuits against persons trafficking in property that was confiscated by the Cuban regime. Any person or company doing business in Cuba should heed this announcement.

In addition to being newly vulnerable to lawsuits, they could be abetting the Cuban regime's abuses of its own people. Those doing business in Cuba should fully investigate whether they are connected to property stolen in service of a failed communist experiment. I encourage our friends and allies alike to likewise follow our lead and stand with the Cuban people.

\* \* \* \*

Today we are holding the Cuban Government accountable for seizing American assets. We are helping those whom the regime has robbed get compensation for their rightful property. And we're advancing human rights and democracy on behalf of the Cuban people.

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## **E. IRAQ CLAIMS UNDER THE 2014 REFERRAL TO THE FCSC**

The Foreign Claims Settlement Commission ("FCSC" or "Commission") began issuing decisions in 2016 in the Second Iraq Claims Program, which was established by a referral dated October 7, 2014, from the State Department's Legal Adviser under a 2010 claims settlement agreement between the United States and Iraq. Most of the claims under

the referral were brought under “Category A,” which consists of “claims by U.S. nationals for hostage-taking by Iraq in violation of international law prior to October 7, 2004 ... .” The final value of all awards in the program is \$121,425,000. See <http://www.justice.gov/fcsc/current-programs>. For background on the 2014 referral, see *Digest 2014* at 315-16. The following discussion focuses on some of the more noteworthy decisions in 2019. The full text of the decisions is available at <https://www.justice.gov/fcsc/final-opinions-and-orders-5#s3>.

**1. Claim No. IRQ-II-383, Decision No. IRQ-II-317 (2019)**

This claim under Category A involves a U.S. national who was living with his family in Kuwait when Iraq invaded on August 2, 1990. He asserted that he remained a hostage of Iraq even after Iraq allowed U.S. nationals to leave because of the presence of Iraqi forces in the vicinity of his apartment. The Commission rejected this argument, finding that, “[u]nder the international law applicable to armed conflict ... the mere presence of an occupying or belligerent force, including the establishment of a military checkpoint, is not sufficient to establish the injury of detention.” For this reason, the Commission found that claimant was not “seized or detained” beyond the date when Iraq allowed U.S. nationals to leave, and therefore was not held hostage under international law beyond that date. He was awarded \$785,000 for the 127 days he was held hostage before Iraq allowed U.S. nationals to leave.

**2. Claim No. IRQ-II-143, Decision No. IRQ-II-314 (2019)**

This claim, also under Category A, was brought by a U.S. national who alleged that she was held hostage by Iraq from August 2, 1990 (when she was six years old) until February 26, 1991, the day of Kuwait’s liberation. Claimant argued that, although Iraq had announced on August 28, 1990, that all foreign national women and children could leave Iraq and Kuwait, she continued to be detained because, *inter alia*, travel was dangerous, there was a continuous Iraqi military presence, she was not aware of the announcement, and, in any event, she could not leave because she could not travel alone. The Commission denied claimant’s hostage claim beyond August 28 on the basis that none of claimant’s assertions related to attempts by Iraq to restrict her movements. Excerpts follow (with most footnotes omitted) from the Commission’s decision.

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Although Claimant may have been legally permitted to leave Kuwait on August 28, 1990, her detention did not necessarily end on that date. As the Commission has previously recognized, a claimant’s detention ends only on the date that she is released from the control of the person or entity that detained her. In this regard, any attempt by Iraq “to restrict [the] movements” of a

claimant establishes control, whereas a claimant who has a reasonable opportunity to leave the site of his or her captivity is deemed no longer to be under [Iraq's] control.

Here, while Claimant advances several reasons why she remained under Iraq's control after August 28, 1990, only one of these reasons concerns acts allegedly committed by the Iraqi government: Claimant argues that due to several "actions and pronouncements" of the Iraqi government during its occupation of Kuwait it was "not safe" for her to attempt to leave her grandparents' residence prior to February 26, 1991—*i.e.*, the date Kuwait was officially liberated from Iraq.<sup>47</sup> Claimant's primary contention in this regard is that Iraq continued its policy of seizing and detaining women and children of U.S. nationality even after the August 28, 1990 announcement and, thus, she reasonably feared that Iraq would have seized or detained her had she attempted to leave after that date.

Claimant, through counsel, has submitted a memorandum contending that Iraq continued its policy of seizing and detaining women and children of U.S. nationality after the August 28, 1990 announcement, that the announcement was a "hollow" and "public relations-driven" promise that Iraq did not apply in practice, and that while Iraq allowed a "few hundred Americans" to leave Iraq "in mid-September," it did so only "because it was forced to by Rev. Jesse Jackson and the publicity he brought to the dire situation." Claimant cites several sources showing that Iraq continued to detain foreign nationals after August 28, 1990. None of these sources, however, address whether Iraq had a policy of seizing and detaining *women or minors* of U.S. nationality after the August 28, 1990 announcement. They are thus not determinative here.

Claimant also cites a December 7, 1990 *Washington Post* chronology of the Gulf War that states that on or around August 30, 1990, "[d]iplomats in Baghdad [said] Iraq will allow planes to pick up Western women and children only if the aircraft fly food and medicine into Iraq." While it is clear that Iraq imposed restrictions on air travel that prevented some women and minors from leaving Kuwait and Iraq immediately after August 28, 1990, Claimant cites no evidence to suggest that Iraq, in practice, enforced the conditions noted in the August 30 account. To the contrary, Claimant's contention in this regard directly contradicts contemporaneous statements and communications from State Department officials, none of which indicate that women or minors of U.S. nationality were prevented from leaving Iraq and/or Kuwait because Iraq imposed restrictions on air travel related to the import of food and medicine. As noted above, statements made by senior State Department officials in September 1990 establish that, as a result of the August 28, 1990 announcement, the vast majority of U.S. nationals in Kuwait—including several hundred women and children—left on evacuation flights between September 1, 1990, and September 22, 1990. These statements indicate that women and children of U.S. nationality who remained in Kuwait after September 22, 1990, chose to stay in the country.

State Department communications also show that Iraq continued to allow women and children to leave on evacuation flights in October 1990, November 1990, and December 1990.

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<sup>47</sup> See Memorandum In Support of Claim IRQ-II-143 in Response to Commission Request for Information, dated September 19, 2016 ("Claimant Mem."), at 15, 18. Claimant also argues that: 1) she was not aware of the August 28, 1990 announcement; 2) the State Department did not provide her with information about the announcement or evacuation flights chartered by the U.S. government; 3) evacuation via air was impractical because no one was available to accompany her on an evacuation flight; and 4) the only escape route from Kuwait was through the desert. None of these arguments, however, involve an attempt *by Iraq* to restrict Claimant's movements after August 28, 1990. We thus make no findings on these issues.

According to ... State Department officials, the 285 women and children of U.S. nationality who, like Claimant, remained in Kuwait after the last U.S. government chartered evacuation flight departed on December 13, 1990, had decided to stay despite having had many opportunities to leave, and in most cases, were dependents of Kuwaiti, Iraqi, or Arab nationals who had also decided not to leave.

We conclude that Claimant has failed to establish that Iraq acted to restrict her movements after August 28, 1990. She has therefore failed to establish that Iraq detained her after August 28, 1990.

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### **3. Claim No. IRQ-II-138, Decision No. IRQ-II-334 (2019)**

The Category A claimant in this case was a journalist who was detained by Iraqi soldiers in northern Iraq on March 29, 1991 and held for about two weeks. He claimed that, for most of this time, he was detained in an Iraqi prison and was held incommunicado. The Commission denied the claim because Claimant failed to prove the third element of the Commission's hostage standard—that Iraq's actions were done in order to compel a third party to do or abstain from doing any act as a condition for his release. Excerpts follow (with footnotes omitted) from the Commission's decision.

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(1) Armed Conflict: Claimant alleges that Iraq took him hostage in Kirkuk, Iraq, on March 29, 1991, and held him hostage for 18 days, until April 15, 1991. In its first decision awarding compensation for hostage-taking under the 2014 Referral, the Commission held that between August 2, 1990, and April 8, 1991, Iraq was engaged in an armed conflict with Kuwait. Claimant therefore satisfies this element of the standard for at least the first 11 days of his captivity, *i.e.*, from March 29, 1991, to April 8, 1991.

(2) Hostage-taking: To satisfy the hostage-taking requirement of Category A of the 2014 Referral, Claimant must show that Iraq (a) seized or detained him and (b) threatened him with death, injury or continued detention (c) in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for his release. Claimant fails to satisfy this standard because he has failed to provide evidence sufficient for the third prong of this test, *i.e.* that Iraq's actions were done in order to compel a third party to do or abstain from doing any act as a condition for his release.

(a) Detention/deprivation of freedom: As noted above, a claimant can establish the first element of the Commission's hostage-taking standard by showing that the Iraqi government confined the claimant to a particular location or locations within Iraq or Kuwait, or prohibited the claimant from leaving Iraq and/or Kuwait. Here, there is no doubt that Claimant satisfies this element of the standard based on his sworn statement and the contemporaneous evidence provided in support of the claim. He was physically seized on March 29, 1991, by Iraqi soldiers while reporting on hostilities between the Iraqi government and Kurdish rebels in Kirkuk, Iraq. He was then forcibly taken to a safe house in Baghdad, where he was interrogated by Iraqi

intelligence officers. He remained there for three days, and was then blindfolded and placed in a prison west of Baghdad where other detainees were being brutally tortured until his release on April 15, 1991. Given these facts, Claimant was clearly “confined ... to a particular location or locations within Iraq or Kuwait ... .”

In sum, Iraq thus detained Claimant from March 29, 1991, to April 15, 1991.

(b) Threat: The second element of the hostage-taking standard requires that Iraq “threatened [Claimant] with death, injury or continued detention ....” The evidence shows that Iraq clearly made such threats. After Claimant’s arrest, according to one news article, the soldiers threatened to place a grenade down his jacket. He was forcibly moved from place to place before being imprisoned near Baghdad. While in prison, according to the newspaper article, an Iraqi official told Claimant and his colleague that “their chances of getting out alive would be improved if they consented to give a television interview” about the activities of Kurdish guerillas. After apparently giving such an interview, they were still not released. As the Commission has previously stated, “[t]o constitute a threat for purposes of a hostage-taking claim under international law, it suffices for a threat to have been made ‘at any time during the detention.’” Claimant has thus established that Iraq threatened to kill or injure and continue to detain him between March 29, 1991, and April 15, 1991.

(c) Third party coercion: As the Commission has noted previously, Iraq detained U.S. nationals within Iraq and Kuwait for varying lengths of time between August 2, 1990, and December 6, 1990, and threatened them with continued detention in order to compel the United States government to act in certain ways as an explicit and/or implicit condition for their release. By the second week of December 1990, however, all remaining U.S. national hostages had been formally released. There is no evidence in the record that Iraq continued to make demands of the United States after December 1990 as a condition for the release of any remaining U.S. nationals detained in Iraq or Kuwait. Claimant’s period of detention occurred long after the hostage crisis of 1990 was over and towards the end of military operations between coalition forces and Iraq, which ended with a formal ceasefire on April 8, 1991.

Here, Claimant has presented little evidence that his detention in March and April 1991 was intended to compel the U.S. government (or another third party) to do or abstain from doing any act. Indeed, he has not even asserted this in his Statement of Claim. Claimant instead relies on the affidavit of Andrew Winner, which he contends “provides evidence relating to the Claimant’s detention and third party compulsion as an implicit condition for Claimant’s release.” In his affidavit, Mr. Winner states that, sometime around the time of Claimant’s capture, he “received a communication relating to the fact that certain persons had been taken hostage by Iraq forces[,]” and that “among those captured was [Claimant] ... .” He further states: “I believe that [Claimant’s] case became the subject of U.S. military to Iraq military negotiations ... and it may have also been part of discussions with the Iraqi government through diplomatic channels or through the International Committee of the Red Cross.”

Although Mr. Winner appears to suggest that these negotiations also involved the subject of certain Iraqi prisoners of war then being held by the United States, he does not state that Claimant’s detention was used as leverage in negotiations with the U.S. government or was otherwise used to coerce action on the part of the U.S. government or any other third party. Such coercion is a necessary element of the Commission’s hostage-taking standard. In any event, Mr. Winner’s statements appear to be based on uncorroborated hearsay and were made in May 2018, more than two years after the claim was filed. Under these circumstances, the Commission finds this affidavit insufficient to prove that Claimant’s detention was used to compel the United States

to do or abstain from doing any act. Claimant has therefore failed to establish the third element of the Commission's hostage-taking standard, and his claim thus does not satisfy the elements of the Commission's standard for claims brought under Category A of the 2014 Referral. Accordingly, this claim must be and is hereby denied.

\* \* \* \*

**4. Claim No. IRQ-II-204, Decision No. IRQ-II-332 (2019)**

The Category A claimant in this case was living with her husband in Kuwait at the time of the August 2, 1990 invasion. Despite Iraq's announcement on August 28, 1990, that American women and children could leave, claimant remained in Iraq until November 18, 1990. She argued that she was detained during this entire time, including after the August 28 announcement, for a variety of reasons. Among these were: she was confused about the announcement; she was concerned that her husband might be detained if they made arrangements to get to the airport; she had only intermittent phone access and limited access to news reports; and she did not want to leave her husband alone in Kuwait. The Commission rejected most of these arguments on the basis that they "[did] not reflect an intentional effort by Iraq to restrict Claimant's movements after August 28, 1990." Claimant also argued that a decree mandating the death penalty for persons assisting American prevented her from being evacuated. However, the Commission found no evidence that this applied to foreign national women and children after August 28, 1990. Finally, claimant argued that, "her 'personal and moral obligations' compelled her to remain with her husband in response to Iraq's actions in Kuwait," citing decisions from the Second Libya Claims Program in which compensation was awarded to crew members of a hijacked plane who stayed on the plane prior to escaping in order to disable it and prevent further harm. The Commission found the analogy inapt because in "the Libya decisions, it was clear that the crew members would have been detained had they not escaped." By contrast, the claimant here presented no evidence that Iraq forced her to remain in Kuwait after August 28 by detaining her husband; indeed, "many female claimants ... left Iraq and Kuwait even while their husbands stayed behind." The Commission therefore denied the portion of the hostage claim for the period following the release of women and children because she was not "seized or detained" during that time as required by the Commission's standard.

**F. LIBYA CLAIMS**

**Alimanestianu v. United States**

As discussed in *Digest 2018* at 342-44, *Digest 2017* at 350-56, and *Digest 2016* at 350-56, the United States prevailed on summary judgment and on appeal in *Alimanestianu v. United States*. The Alimanestianu plaintiffs brought a federal suit against Libya, but their

lawsuit was dismissed after the United States reached a claims settlement agreement with Libya. Although the Alimanestianu estate and family received nearly \$11 million from the settlement fund, they claimed that the lost opportunity to pursue their suit in federal court constituted a taking. On January 4, 2019, the United States filed its brief in opposition to the petition for certiorari. *Alimanestianu v. United States*, No. 18-295. On February 19, 2019, the Supreme Court denied the petition. Excerpts follow (with record citations omitted) from the U.S. brief filed in the Supreme Court.

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Petitioners renew their argument that this Court’s decision in *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), requires a finding that a per se taking occurred and that the court of appeals therefore should not have applied the factors set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), for determining whether compensation is due. As an initial matter, petitioners lack a cognizable property right in their tort claims and non-final judgment against Libya, and their takings claim fails on that basis alone. Moreover, even assuming (as the court of appeals did) that petitioners had a cognizable property right, the court correctly concluded that the actions of the Executive and Legislative Branches in espousing petitioners’ claims and compensating their injuries through a settlement do not amount to a per se taking. That reasoning, based on longstanding precedent and historical practice, does not conflict with any decision of this Court or another court of appeals. And this case would be a poor vehicle for addressing the question presented because petitioners ultimately dispute the amount of compensation they received from the settlement fund—a nonjusticiable question. Further review is unwarranted.

1. The Fifth Amendment prohibits the taking of “private property \* \* \* for public use, without just compensation.” U.S. Const. Amend. V. “To state a claim for a taking,” therefore, petitioners must first establish “that they had a cognizable property interest.” [S]ee, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981). The government argued in the court of appeals that petitioners had not adequately alleged a taking because they had not asserted a cognizable property interest. The court of appeals declined to resolve that issue, instead “assum[ing], without deciding, that [petitioners] had a cognizable property interest in their district court claims and non-final judgment.” Although that decision is fully correct for the reasons explained below, petitioners’ claim fails for the independent and antecedent reason that they “did not acquire any ‘property’ interest” in their tort claims and non-final district court judgment and therefore cannot “support a constitutional claim for compensation.” *Dames & Moore*, 453 U.S. at 674 n.6.

Petitioners identify no authority suggesting that a tort claim of the sort they seek to pursue against Libya is a form of “vested” property right that gives rise to a Fifth Amendment takings claim. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). To the contrary, courts have consistently held that “a pending tort claim does not constitute a vested right.” *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) (citing cases), cert. denied, 519 U.S. 1077 (1997); see, e.g., *Salmon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991) (“[A] legal claim for tortious injury affords no definite or enforceable property right until reduced to final judgment.”) (brackets and citation omitted); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (“[R]ights in tort do not vest until there is a final, unreviewable judgment.”); *Memorial Hosp. v. Heckler*, 706 F.2d

1130, 1137-1138 (11th Cir. 1983) (no enforceable property right in non-final judgment); see also *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009), cert. denied, 560 U.S. 924 (2010). The absence of a cognizable property interest is especially clear here, where petitioners assert a taking arising from changes in the law—namely Congress’s restoration of Libya’s sovereign immunity. As this Court explained more than a century ago, “[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit.” *New York Cent. R.R. v. White*, 243 U.S. 188, 198 (1917).

The Court has stated expressly that “[l]aws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights, are not operating retroactively when applied to pending cases,” and therefore do not create a due process violation, because “[f]oreign sovereign immunity ‘reflects current political realities and relationships,’ and its availability (or lack thereof) generally is not something on which parties can rely ‘in shaping their primary conduct.’” *Republic of Iraq v. Beaty*, 556 U.S. 848, 864-865 (2009) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)). Likewise, espousal of claims in conjunction with the restoration of sovereign immunity does not affect any cognizable property interest. Indeed, in *Dames & Moore*, this Court explained that the plaintiffs “did not acquire any ‘property’ interest in” the attachments of frozen assets that were later nullified by the President as part of a claims settlement. 453 U.S. at 674 n.6; accord *United States v. Sperry Corp.*, 493 U.S. 52, 59 (1989). Petitioners accordingly fail to make the threshold showing required for a taking.

2. Even if petitioners could identify a cognizable property interest (as the court of appeals assumed *arguendo* that they could), the court correctly determined that the government actions at issue did not effect a per se taking and that, under the *Penn Central* factors, no taking occurred.

a. The Executive has espoused claims against foreign sovereigns dating back “[a]t least” to 1799. *Dames & Moore*, 453 U.S. at 679 n.8; see *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, 246 (1983) (“[T]he President’s power to espouse and settle claims of our nationals against foreign governments is of ancient origin and constitutes a well established aspect of international law.”), *aff’d*, 765 F.2d 159 (Fed. Cir.), cert. denied, 474 U.S. 909 (1985). Throughout those centuries, “the Supreme Court has never found an executive settlement of private claims to constitute a compensable taking.” *American Int’l Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 446 (D.C. Cir. 1981). The Federal Circuit, moreover, has repeatedly held that espousal of claims against foreign sovereigns does not constitute a compensable taking, and this Court has declined to review those decisions. See *Abraham-Youri v. United States*, 139 F.3d 1462, 1465 (1997), cert. denied, 524 U.S. 951 (1998); *Belk v. United States*, 858 F.2d 706, 708 (1988); see also *Aviation & Gen. Ins. Co. v. United States*, 882 F.3d 1088, 1097 (Fed. Cir.), cert. denied, 139 S. Ct. 412 (2018). That “‘established’” and “‘longstanding practice’” strongly supports the conclusion that the government’s actions here did not give rise to a taking. *Dames & Moore*, 453 U.S. at 679 (citation omitted).

... [T]he Federal Circuit recently reiterated [this view]... with respect to the restoration of Libyan sovereign immunity under the LCRA and claims settlement agreement at issue here. The court acknowledged that the plaintiffs’ ability to maintain their lawsuits was significantly impaired, but explained that “the Government’s action nonetheless was not a physical invasion of [their] property rights.” *Aviation & Gen. Ins. Co.*, 882 F.3d at 1097. This Court denied review.

The ... espousal of a plaintiff’s pending claims against a foreign sovereign as part of broader change in the legal and diplomatic landscape cannot reasonably be described as a “physical appropriation of property.” 135 S. Ct. at 2427 (emphasis omitted); cf. *Landgraf*, 511 U.S. at 274 (“Application of a new jurisdictional rule usually ‘takes away no substantive right.’”)

(citation omitted). To the extent that a claim against a foreign sovereign is a property interest at all, it is one “subject to constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights.” *Abraham-Youri*, 139 F.3d at 1468. By entering into an agreement with Libya to normalize relations and settle existing claims, “[t]he President, in the exercise of his constitutional prerogative, struck the bargain he determined would best accommodate all relevant interests. This is a classic[] adjustment of ‘the benefits and burdens of economic life to promote the common good,’” *Shanghai Power Co.*, 4 Cl. Ct. at 246 (quoting *Penn Central*, 438 U.S. at 124), not a per se taking.

The absence of a per se taking is especially clear where, as here, the government does not eliminate a plaintiff’s claim entirely, but rather provides “an alternative forum \* \* \* which is capable of providing meaningful relief.” *Dames & Moore*, 453 U.S. at 687; accord *Sperry Corp.*, 493 U.S. at 59 & n.6. Just as the agreement in *Dames & Moore* allowed nationals holding settled claims to apply to an international tribunal to receive possible compensation, the agreement at issue here expressly provided for the creation of a fund for “fair compensation” of the claims administered by the State Department and the Foreign Claims Settlement Commission. Indeed, as a result of the government’s actions here, petitioners received more than \$10 million from that fund for claims that may never have been satisfied by Libya—hardly the equivalent of having their property physically appropriated by the government. *Id.* at 6a.

Petitioners contend that the Takings Clause was originally understood to require compensation in connection with appropriations arising out of foreign affairs and, more specifically, upon the espousal of a claim. But as explained above, neither this Court nor any court of appeals has ever adopted such a holding. See *American Int’l Grp.*, 657 F.2d at 446. The historical sources petitioners cite emphasize the “equitable principles embodied by the just compensation clause,” an approach that foreshadows the *Penn Central* factors rather than per se takings analysis. And the primary opinion on which petitioners rely, *Gray v. United States*, 21 Ct. Cl. 340 (1886), is a nonbinding “advisory opinion to Congress” that does not establish any rule of constitutional law. *Abraham-Youri*, 139 F.3d at 1467; see *Aris Gloves, Inc. v. United States*, 420 F.2d 1386, 1393 (Ct. Cl. 1970) (en banc) (“All that really needs to be said about the *Gray* case is that the opinion \* \* \* was strictly an advisory opinion which was not binding upon either of the parties and cannot be binding upon subsequent courts. However, it is worth mentioning that, in referring to the ‘French Spoliation’ claims which were later granted by Congress following the *Gray* opinion, the Supreme Court remarked: ‘We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right.’”) (quoting *Blagge v. Balch*, 162 U.S. 439, 457 (1896)). Moreover, petitioners had the opportunity to “pursue [their] claim \* \* \* in another forum,” which “distinguishes this case from *Gray*,” where “the United States canceled American claims against France altogether.” *Sperry Corp.*, 493 U.S. at 59 n.6.

b. Petitioners do not contest the court of appeals’ application of the *Penn Central* factors, and that question would not justify review in any event because the court’s application of those factors was correct.

The court of appeals first properly concluded that the reinstatement of Libya’s sovereign immunity and espousal of petitioners’ claims did not interfere with their “distinct investment-backed expectations.” As explained above, there is a long history of the Executive’s espousal of U.S. nationals’ claims. Moreover, the availability or unavailability of a legal defense, much less a jurisdictional bar to suit like sovereign immunity, is not the type of interest on which a person

may reasonably rely. A legislature “remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982)... Nor could petitioners have reasonably expected that the status of Libya’s sovereign immunity would remain stable. As this Court explained in *Beatty*, “[f]oreign sovereign immunity ‘reflects current political realities and relationships,’ and its availability (or lack thereof) generally is not something on which parties can rely ‘in shaping their primary conduct.’” 556 U.S. at 864-865 (quoting *Altmann*, 541 U.S. at 696). That reasoning is particularly apt here, because petitioners’ claims accrued when “Libya enjoyed sovereign immunity from suit in the United States,” and petitioners understood that Congress could always restore the sovereign immunity that it had revoked.

The court of appeals also correctly determined that “the character of the governmental action” further demonstrates that no taking occurred. Indeed, petitioners “provided no evidence that this factor should weigh in their favor,” and it is unclear what evidence could tip this factor in favor of petitioners given both the long history of claim espousal and the Executive’s “overwhelming interest in conducting foreign affairs.” *Ibid.*

Finally, with respect to the economic impact on petitioners, the court of appeals correctly concluded that petitioners’ receipt of more than \$10 million from the claims settlement fund likely represented “more than they would have without the Government’s action.” As the CFC explained, it was at best “speculative whether [petitioners] would have secured any recovery from Libya absent the Government’s espousal and settlement of their claims,” given that the judgment was on appeal and that any effort at collection from Libya without governmental action would have been highly impractical. *Id.* at 39a...

3. In any event, this case would be a poor vehicle to consider whether the espousal of a plaintiff’s claims against a foreign sovereign can give rise to a taking. Ultimately, petitioners’ principal complaint is they are “not satisfied with the settlement negotiated by the Government on their behalf,” because it pays them only “pennies on the dollar” compared to their non-final district court judgment. That challenge to the particular distribution of the claims settlement fund in this case is highly factbound and unlikely to recur. It is also a nonjusticiable attempt to second-guess the substance of the settlement agreement itself—namely the amount of money secured from Libya and the Executive’s judgments about which claims merit compensation. As the Federal Circuit has explained, a “determination whether and upon what terms to settle the dispute with” a foreign country is “necessarily \* \* \* for the President to make in his foreign relations role.” *Belk*, 858 F.2d at 710. “A judicial inquiry into whether the President could have extracted a more favorable settlement would seriously interfere with the President’s ability to conduct foreign relations” and would present a nonjusticiable political question. *Ibid.*

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**Cross References**

*International Tribunals and Accountability Mechanisms*, **Ch. 3.C.**

*International Court of Justice*, **Ch. 7.B.**

*Expropriation Exception to Immunity: de Csepel v. Hungary*, **Ch. 10.A.2.**

*Investor-State dispute resolution*, **Ch. 11.B.**

*GE France v. Outokumpu Stainless USA*, **Ch. 15.C.**

*Cuba sanctions*, **Ch. 16.A.4.**