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CHAPTER 8

International Claims and State Responsibility

A. CUBA CLAIMS TALKS

On December 8, 2015, the United States and Cuba held their first government-to-government claims discussion in Havana. See December 7, 2015 State Department media note, available at http://www.state.gov/r/pa/prs/ps/2015/12/250426.htm. Mary McLeod, Acting Legal Adviser for the U.S. Department of State, led the U.S. delegation. The media note identifies the variety of claims that are the subject of the talks:

> …claims of U.S. nationals that were certified by the Foreign Claims Settlement Commission, claims related to unsatisfied U.S. court judgments against Cuba, and claims of the United States Government. The Government of Cuba has also raised claims against the United States related to the embargo. …

The media note also explains that the reestablishment of diplomatic relations between the United States and Cuba allows the State Department to "more effectively represent U.S. interests and values in Cuba and strengthen our ties with the Cuban people." For more information about the process of reestablishing and normalizing relations with Cuba, see Chapter 9.

B. IRAN CLAIMS

In January 2015, the Iran-United States Claims Tribunal ("Tribunal") concluded hearings and began deliberations on Iran's claims in Case A/15 (II:A), pertaining to the United States' obligation to arrange for the transfer of Iranian property held by private parties in the United States. In March 2015, the Tribunal issued a correction in favor of the United States to its July 2, 2014 Award in Case A/15(IV); it denied the United States request for an additional award in that Case. In July 2015, the United States paid to Iran

the amount required by the Tribunal's July 2, 2014 Award (as corrected) in Case A/15(IV). On August 27, 2015, Iran indicated in a letter to the Tribunal that it disagreed with the United States' calculation of post-Award interest; the United States has responded to Iran's letter.

Professor David Caron was appointed to replace Judge Charles Brower as one of the three U.S.-appointed members of the Tribunal, effective December 2, 2015. See the website of the Tribunal, http://www.iusct.net.

C. HOLOCAUST ERA CLAIMS

1. U.S.-France Agreement on Compensation

As discussed in *Digest 2014* at 313-15, the United States and France negotiated an agreement regarding compensation for certain victims who were deported from France to Nazi labor and death camps during the Holocaust. In 2015, the U.S.-France "Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are not Covered by French Programs" entered into force and the U.S. State Department began accepting claims applications. Information and documents about the compensation program are available at www.state.gov/deportationclaims. The text of the Agreement follows and is available at http://www.state.gov/documents/organization/251005.pdf. The agreement includes an exchange of rectifying notes on June 10 and June 11, 2015 that make two corrections: (1) replacing "Vichy Government" with "de facto authority claiming to be the 'government of the French State,'" and making the equivalent replacement in the French text; and (2) replacing the word "seau" in the Annex of the French-language text with the word "sceau."

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* * * *

The Government of the United States of America, And The Government of the French Republic,

Hereinafter referred to jointly as "the Parties,"

Wishing to further develop the relations between their two countries in a spirit of friendship and cooperation and to resolve certain difficulties from the past,

Recognizing and condemning the horrors of the Holocaust, including the tragic deportation of Jewish individuals from France during the Second World War,

Noting that since 1946 the Government of the French Republic has implemented extensive measures to restore the property of and to provide compensation for victims of anti-Semitic persecution carried out during the Second World War by the German Occupation authorities or

the de facto authority claiming to be the "government of the French state", including a pension program designed to address the wrongs suffered by Holocaust victims deported from France and a specific program for orphans,

Noting that the Government of the French Republic remains committed to providing compensation for the wrongs suffered by Holocaust victims deported from France through such measures to individuals who are eligible under French programs,

Recalling that on July 16, 1995 the President of the French Republic solemnly recognized the State's responsibility in the process of deportation of those victims and an imprescriptible debt towards them,

Recognizing that some Holocaust victims deported from France, their surviving spouses and their assigns, were not able to gain access to the pension program established by the Government of the French Republic for French nationals, or by international agreements concluded by the Government of the French Republic in this area,

Having held discussions in a spirit of friendship and cooperation with the shared aim of resolving through dialogue issues relating to the non-coverage of such persons,

Resolved by common consent and by way of an amicable, extra-judicial and non-contentious manner to address the issue of compensation for such persons,

Believing that it is in the interest of both Parties to guarantee the foreign sovereign immunity of France for Holocaust deportation claims and to provide through this Agreement a mechanism for providing compensation for any and all claims brought by such persons,

Recognizing that France, having agreed to provide fair and equitable compensation to such persons under this Agreement, should not be asked or expected to satisfy further claims in connection with deportations from France during the Second World War before any court or other body of the United States of America or elsewhere,

Noting that this Agreement constitutes the exclusive and final means for addressing those claims between the United States of America and France,

Noting the Parties' intent that this Agreement should, to the greatest extent possible, secure for France an enduring legal peace regarding any claims or initiatives related to the deportation of Holocaust victims from France,

Having both consulted with various stakeholders, including representatives of Jewish communities, claimants, and members of legislative bodies regarding Holocaust deportation,

Believing that this Agreement will provide as expeditious as possible the mechanism for making fair and speedy payments to now elderly victims,

Have agreed as follows:

Article 1

For purposes of this Agreement, and except as otherwise indicated by use of a specific term:

1. Reference to "France" means the French Republic, the Government of the French Republic, any current or past agency or instrumentality of the French Government (whether owned in whole or in majority by the French Republic), their successor entities under any status, and any official, employee, or agent of the French Republic acting within the scope of his or her office, employment, or agency.
2. Reference to "French nationals" means natural persons who, at the time this Agreement enters into force, are nationals of the French Republic.
3. Reference to "Holocaust deportation" means the transportation of an individual from France towards a location outside of France during the Second World War as part of the anti-Semitic persecution carried out by the German Occupation authorities or the de facto authority claiming to be the "government of the French state".
4. Reference to "Holocaust deportation claim" means a claim for compensatory or other relief in connection with Holocaust deportation.

Article 2

The objectives of this Agreement are to:

1. Provide an exclusive mechanism for compensating persons who survived deportation from France, their surviving spouses, or their assigns, who were not able to gain access to the pension program established by the Government of the French Republic for French nationals, or by international agreements concluded by the Government of the French Republic to address Holocaust deportation claims;
2. Create a binding international obligation on the part of the United States of America to recognize and affirmatively protect the sovereign immunity of France within the United States legal system with regard to Holocaust deportation claims and, consistent with its constitutional structure, to undertake all actions necessary to ensure an enduring legal peace at the federal, state, and local levels of the Government of the United States of America.

Article 3

1. This Agreement shall not apply to Holocaust deportation claims of French nationals.
2. This Agreement shall not apply to Holocaust deportation claims of nationals of other countries who have received, or are eligible to receive, compensation under an international agreement concluded by the Government of the French Republic addressing Holocaust deportation.
3. This Agreement shall not apply to persons who have received, or are eligible to receive, compensation under the Government of the French Republic's compensation program

instituting a reparation measure for orphans whose parents died in deportation (Decree no. 2000-657 of 13 July 2000).

4. This Agreement shall not apply to Holocaust deportation claims of persons who have received compensation under another State's program providing compensation specifically for Holocaust deportation or who have received compensation under any program of any institution providing compensation specifically for Holocaust deportation.

Article 4

1. Within thirty (30) days of the date this Agreement enters into force, the Government of the French Republic shall transfer to the Government of the United States of America a payment of U.S. $60 million, to be used by the Government of the United States of America for making payments under this Agreement, as provided for in Article 6.
2. The Parties agree that this payment constitutes the final, comprehensive, and exclusive manner for addressing, between the United States of America and France, all Holocaust deportation claims not covered by existing compensation programs, which have been or may be asserted against France in the United States of America or in France.
3. The Parties further agree that any payment to an individual under this Agreement shall constitute the final, comprehensive, and exclusive manner for addressing all Holocaust deportation claims by that individual not covered by existing compensation programs, which have been or may be asserted against France in any forum.
4. In accordance with the applicable domestic procedures of the United States, the Government of the United States of America will deposit amounts received from the Government of the French Republic in an interest-bearing account in the United States Treasury until distribution, pursuant to a determination by the Secretary of State of the United States of America or his designee.

Article 5

Upon payment of the sum referred to in Article 4 of this Agreement, the Government of the United States of America:

1. By this Agreement, confirms its recognition in connection with any Holocaust deportation claims of:
   (i) the sovereign immunity of France and the property of France; and
   (ii) the diplomatic, consular, or official immunity of French officials, employees, and agents and the property of each,
   as such sovereign, diplomatic, consular, and official immunities are normally recognized within the United States legal system for other foreign states, their agencies, instrumentalities, officials, employees, and agents, and the property of each.
2. Shall secure, with the assistance of the Government of the French Republic if need be, at the earliest possible date, the termination of any pending suits or future suits that may be filed in any court at any level of the United States legal system against France concerning any Holocaust deportation claim.

3. Shall, in a timely manner, and consistent with its constitutional structure, undertake all actions necessary to achieve the objectives of this Agreement, which include an enduring legal peace, at the federal, state, and local levels of government in the United States of America and shall avoid any action that:
   a. Contradicts the terms of the Agreement, and in particular challenges the sovereign immunity of France concerning any Holocaust deportation claim; or
   b. Stands as an obstacle to the accomplishment and execution of the Agreement.
4. Shall require, before making any distribution payment to an eligible recipient under this Agreement, that the recipient execute a writing following the form of the Annex attached to this Agreement, including (i) a waiver of all of the recipient's rights to assert claims for compensatory or other relief in any forum against France concerning Holocaust deportation or pension programs related thereto; (ii) a declaration that the recipient has not received, and will not claim, any payment under French programs or an international agreement concluded by the Government of the French Republic relating to Holocaust deportation; and (iii) a declaration that the recipient has not received any payment under any other State's compensation program or under the compensation program of any foreign institution relating specifically to Holocaust deportation.

Article 6

1. The Government of the United States of America shall distribute the sum referred to in Article 4(1) of this Agreement according to criteria which it shall determine unilaterally, in its sole discretion, and for which it shall be solely responsible.
2. Notwithstanding the preceding paragraph:
   a. In developing criteria for distributing the sum referred to in Article 4(1), the United States shall consider the objectives of this Agreement set out in Article 2.
   b. Any Holocaust deportation claim of a person within the scope of Articles 3(1), 3(2), 3(3), or 3(4) of this Agreement is not eligible for compensation under this Agreement, and the United States of America, upon determining that a claim comes within the scope of Articles 3(1), 3(2), 3(3), or 3(4), shall declare inadmissible and reject any such claim.
   c. In determining whether a claim comes within the scope of Article 3(1), for administration of the distribution, the United States of America shall rely on the sworn statement of nationality appearing in the opening paragraph of the writing appearing as the Annex to this Agreement. In determining whether a claim comes within the scope of Article 3(2), 3(3), or 3(4), for administration of the distribution, the United States shall rely on the sworn representations numbered 5 and 6 in the writing appearing as the Annex to this Agreement, as well as on any relevant information obtained under Article 6(6) of this Agreement.
3. The Government of the United States of America or an entity designated by the Government of the United States of America shall have exclusive competence for distribution of the sum referred to in Article 4(1) of this Agreement, and the Government of the French Republic shall have no rights related to such distribution.
4. The Government of the United States of America shall take reasonable steps to provide sufficient notice about the distribution of funds under this Agreement to persons who

may qualify under the criteria determined by the Government of the United States of America pursuant to Article 6(1) of this Agreement.

5. In accordance with applicable domestic procedures of the United States of America, the Government of the United States of America shall provide an appropriate period of time for persons to submit a claim for compensation under this Agreement.
6. Subject to their respective applicable laws, the Parties shall exchange information helpful to implementation of this Agreement, including information required to ensure that no claimant receives an inadmissible payment pursuant to Article 6(2)(b) of this Agreement.
7. At the request of the Government of the French Republic, the Government of the United States of America shall each year provide a report on the implementation of this Agreement which shall include, at a minimum, statistical data related to payments and categories of beneficiaries. This obligation shall expire one year following the date on which the United States completes the distribution of the sum referred to in Article 4(1) of this Agreement as provided for in Article 6(1) of this Agreement.

Article 7

The Annex attached hereto forms an integral part of this Agreement.

Article 8

Any dispute arising out of the interpretation or performance of this Agreement shall be settled exclusively by way of consultation between the Parties.

Article 9

Each Party shall notify the other of completion of the national procedures required in order for this Agreement to enter into force, which shall occur on the first day of the second month following the day on which the later notification is received. The Parties recognize that, upon entry into force, this Agreement imposes binding international obligations.

Done at Washington, D.C., this 8th day of December, 2014, in duplicate, in the English and French languages, both texts being equally authentic.

* * * *

2. U.S. Statement of Interest in Pending Litigation

Article 5(2) of the 2014 U.S.-France Agreement creates an international obligation for the United States to secure the termination of U.S. litigation against France concerning any Holocaust deportation claim. However, that provision leaves the means by which termination would be effected to the discretion of the United States, and it requires the Government of France to assist in any such termination "if need be." As the defendant in such a lawsuit and consistent with the Foreign Sovereign Immunities Act, France would first assert its sovereign immunity by asking the trial court to dismiss the suit. At

that point, the United States may then support the request for dismissal with a filing that explains the United States' interest in the litigation.

The United States advocated for dismissal of Holocaust deportation claims in the U.S. District Court for Northern Illinois in favor of the compensation program established under the 2014 U.S.-France Agreement and the program overseen by the French Commission for the Compensation of the Victims of Acts of Despoilment Committed Pursuant to Anti-Semitic Laws in Force During the Occupation (known by its French acronym "CIVS"). The U.S. statement of interest in this case, *Scalin et al. v. SNCF*, No. 15-cv-3362 (N.D. Ill.), is excerpted below (with footnotes omitted) and available in full at http://www.state.gov/s/l/c8183.htm.

* * * *

D. The 2014 Executive Agreement

The United States recently reaffirmed its support for French efforts to compensate Holocaust victims and their families, including the specific efforts to address wrongs suffered in connection with the deportations from France. In December 2014, the United States and France signed an Executive Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are not Covered by French Programs ("2014 Executive Agreement," attached as Ex. B) designed to expand upon the French pension program providing compensation to surviving Holocaust deportees and surviving spouses of deportees, but which was available only to French nationals and nationals of countries with relevant international agreements with France. Pursuant to the 2014 Executive Agreement, France has provided the United States with a $60 million lump-sum payment to administer a program to cover U.S. citizens and other foreign nationals who are not eligible to receive compensation under the French pension program. *Id*. at art. 4(1).

The 2014 Executive Agreement specifically notes that France has instituted "extensive measures to restore the property of and to provide compensation for" Holocaust victims, including "a pension program designed to address the wrongs suffered by Holocaust victims deported from France and a specific program for orphans." *Id*. at Preamble. It also recognizes that "the Government of the French Republic remains committed to providing compensation for the wrongs suffered by Holocaust victims deported from France through such measures to individuals who are eligible under French programs." *Id*. The Agreement further reflects the two nations' shared desire to provide compensation for victims and their families in "an amicable, extra-judicial and non-contentious manner" and to secure "an enduring legal peace." *Id*. It recognizes that "France, having agreed to provide fair and equitable compensation to [certain Holocaust deportation victims] under this Agreement, should not be asked or expected to satisfy further claims in connection with deportations from France during the Second World War before any court or other body of the United States of America or elsewhere," and it notes "the Parties' intent that this Agreement should, to the greatest extent possible, secure for France an enduring legal peace regarding any claims or initiatives related to the deportation of Holocaust victims from France." *Id*.

The objectives and obligations set forth in the 2014 Executive Agreement underscore the continuing commitment of France to provide compensation for and resolve Holocaust-related claims, the United States' interest in seeking a resolution of such claims outside of judicial proceedings in the United States, as well as the recognition by both countries that the CIVS, the French deportation compensation programs, and the program for Americans created by the Agreement are the exclusive mechanisms through which Holocaust deportation claims against France can best be resolved.

E. Prior litigation against SNCF in U.S. courts

This is not the first lawsuit against SNCF in U.S. courts based on its conduct in deporting Holocaust victims from France during World War II. In 2006, a group of Holocaust survivors and heirs, including nationals of the United States, France, and other countries, filed suit on behalf of themselves and a putative class against France, SNCF, and a French national bank known as the Caisse des Dépôts et Consignations (CDC). See *Freund v. Repub. of France*, (S.D.N.Y. 06-cv-1637). The Freund suit focused its claims on alleged takings of personal property from individuals while in holding or transit camps and during the deportations. Plaintiffs alleged that confiscated property had been sold and that all of the proceeds from such sales were held by the CDC, and plaintiffs asserted that the court had subject matter jurisdiction under the [Foreign Sovereign Immunity Act's or] FSIA's "takings" exception to immunity, 28 U.S.C. 1605(a)(3). *Freund v. Repub. of France*, (S.D.N.Y. 06-cv-1637), Compl. ¶¶ 9, 20, 22, 57. The district court dismissed the case for lack of jurisdiction under the FSIA and found that, "even if jurisdiction were proper, the case presents serious justiciability issues that make abstention appropriate." *Freund v. Repub. of France*, 592 F. Supp. 2d 540, 545 (S.D.N.Y. 2008). … The court further explained that, even if it had jurisdiction, abstention would be appropriate based on principles of international comity, because eligible plaintiffs had an adequate and alternative forum in France through the CIVS and exceptional circumstances were present warranting abstention. *Id*. at 579-81. The Second Circuit affirmed this dismissal on sovereign immunity grounds, noting that the complaint contained "no specific allegation that SNCF itself currently possesses the stolen property or any derivative property," and in fact "the complaint itself runs counter to the possibility that the stolen property (or any derivative property) remains lodged with SNCF," because it alleged that CDC, not SNCF, received funds from sales and auctions of the property in question. *Freund v. Société Nationale des Chemins de Fer Français*, 391 F. App'x 939, 941 (2d Cir. 2010).

F. The instant litigation

The instant action before the Court, like the Freund action, asserts claims against SNCF for alleged takings of personal property from deportees during World War II. …

DISCUSSION

The United States supports dismissal of this action on four bases: (A) forum non conveniens grounds, (B) principles of international comity, (C) failure to exhaust domestic remedies, and (D) lack of subject matter jurisdiction under the FSIA. In the judgment of the United States, each basis constitutes an independent and valid justification for dismissing the present lawsuit.

A. The United States supports dismissal of Plaintiffs' claims based on *forum non conveniens* grounds because the CIVS constitutes an available alternative forum

Plaintiffs have available to them an alternative forum in which to adjudicate their claims, and the public and private interests in their claims weigh in favor of utilizing that forum. For this

reason, the United States supports dismissal of Plaintiffs' claims on *forum non conveniens* grounds. A district court has discretion to dismiss a case on these grounds where an alternative forum has jurisdiction to hear the case, and where the court "determines that there are strong reasons for believing [the case] should be litigated in the courts of another, normally a foreign, jurisdiction." *Fischer v. Magyar*, 777 F.3d 847, 852 (7th Cir. 2015), cert denied sub nom *Fischer v. Magyar Ilamyasutak Z.R.T.*, 135 S. Ct. 2817 (2015) (citation omitted). In undertaking this analysis, courts consider factors pertaining to the private interests of the litigants, such as the ease of access to sources of proof, the availability and costs of obtaining witnesses, and "all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981). Courts also consider factors related to the public interest, including "administrative difficulties flowing from court congestion," the "local interest in having localized controversies decided at home," and "the avoidance of unnecessary problems in conflict of laws or in the application of foreign law." *Id*. The focus of the inquiry "is the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." *Fischer*, 777 F.3d at 866. Where an alternative forum would have jurisdiction over the case, the district court may dismiss on *forum non conveniens* grounds "if trial in the plaintiff's chosen forum would be more oppressive to the defendant than it would be convenient to the plaintiff or if the forum otherwise creates administrative and legal problems that render it inappropriate." *Id*. (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422, 429 (2007)).

Although a defendant invoking *forum non conveniens* ordinarily "bears a heavy burden in opposing" a plaintiff's chosen forum, that burden "applies with less force" where the plaintiff's choice is not his or her home forum. …

The CIVS program created by the French Government constitutes an adequate forum for the Plaintiffs to adjudicate the claims they have asserted in this litigation. Claims brought in the CIVS are evaluated under relaxed standards of proof and paid expeditiously. See Eizenstat Decl. ¶ 20. Claimants are permitted to have representatives assist them, and are also assisted by the French Government if they live outside France and by victims' organizations. *Id*. ¶¶ 19-20. Claimants are also entitled to appeal adverse decisions. *Id*. ¶ 22. In addition, the CIVS issues regular public reports as part of its commitment to operate in a transparent manner. Id. ¶ 23. The CIVS has thus been able to make speedy, dignified payments to many deserving victims and is designed to provide comprehensive relief to a broader class of victims than would be possible in United States judicial proceedings. *Id*. ¶ 31. For all of these reasons, the CIVS provides Holocaust victims and their families, such as the Plaintiffs here, with an adequate remedy for takings claims brought against SNCF. See *Freund*, 592 F. Supp. 2d at 579-80.

The CIVS, moreover, constitutes an available forum for Plaintiffs' claims because it "permits eligible Plaintiffs who were victimized by French anti-Semitic legislation to file claims relating to material spoliations based on actions by SNCF." See *id*. at 580. Moreover, CIVS Chairman Michel Jeannoutot has clearly represented that the CIVS will exercise jurisdiction over the claims brought by Plaintiffs in this lawsuit, stating that "if items of the relatives of the [P]laintiffs were seized during the boarding of deportation trains or on these trains in French territory, the CIVS is willing and competent to entertain these claims," including claims pertaining to "spoliations during arrests, transfers and internment," and will "recommend compensation to which the claimant may be entitled." Supp. Decl. of Michel Jeannoutot, ECF No. 56-1, ¶ 10. Such representations are sufficient to establish the CIVS as an available alternative forum here. See *Freund*, 592 F. Supp. 2d at 580 (relying on representations from

CIVS Chairman to conclude that the CIVS is available to hear spoliation claims against SNCF). In these circumstances, the commitment of France to process the very claims at issue in this case supports dismissal on *forum non conveniens* grounds.

The public and private interests in this case also weigh in favor of Plaintiffs' adjudicating their claims in the CIVS. With respect to the private interest, the conduct that forms the basis of Plaintiffs' claims occurred overseas, and the majority of the evidence and witnesses is thus also likely to be located abroad. See *Fischer*, 777 F.3d at 870 (concluding that private interest weighed in favor of adjudicating claims in Hungary based in part on the fact that "Hungary is where much of the evidence and surviving witnesses are located" (citation omitted)); *Freund*, 592 F. Supp. 2d at 581 (noting the "undeniably strong connection" between claims against SNCF and France). SNCF is a French-owned railway, and two of the three named plaintiffs are citizens and residents of France; as French citizens, their preference to litigate in the United States is entitled to less weight. See *Sinochem*, 549 U.S. at 425. As for the public interest, France "has invested a substantial amount of time, efforts, and money in the CIVS process and looks to that system as the exclusive means of adjudicating Holocaust-related claims." *Freund*, 592 F. Supp. 2d at 580-81 (further noting that "the French government has made it clear that it believes France should be the sole forum for the adjudication of spoliation claims [brought against SNCF]"). More recently, France affirmed that it "remains committed to providing compensation for the wrongs suffered by Holocaust victims deported from France through such measures to individuals who are eligible under French programs." See 2014 Executive Agreement at Preamble. As set forth above, the United States consistently has supported France's efforts to provide a redress process and compensation for victims in a manner that serves the vital interest of compensating Holocaust victims more quickly and efficiently than the litigation process. See Eizenstat Decl. ¶¶ 36, 38. Given the weight of both the public and private interests in favor of adjudicating Plaintiffs' claims in France, dismissal of this case based on *forum non conveniens* grounds is warranted.

B. Principles of international comity support dismissal of Plaintiffs' suit

Similar considerations militate in favor of dismissal based on principles of international comity. "International comity is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Mujica v. AirScan Inc.*, 771 F.3d 580, 597 (9th Cir. 2014) (citation omitted). International comity seeks to maintain our relations with foreign governments by discouraging a U.S. court from second guessing a foreign government's judicial or administrative resolution of a dispute, or by otherwise sitting in judgment of the official acts of a foreign government. See generally *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). As such, comity "may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *Mujica*, 771 F.3d at 599 (citation omitted); see also *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (describing comity as "an abstention doctrine: A federal court has jurisdiction but defers to the judgment of the alternative forum").

Comity principles may be applied prospectively where, as here, there is no parallel action pending in the foreign state but the interests of the United States, the foreign government, and the international community all weigh in favor of U.S. courts abstaining from exercising jurisdiction. See *Ungaro-Benages*, 379 F.3d at 1238. In so doing, "courts evaluate several factors, including

the strength of the United States' interest in using a foreign forum, the strength of the foreign government's interests, and the adequacy of the alternative forum." *Id*. Multiple courts have relied on comity to dismiss Holocaust-era claims brought against foreign sovereigns in U.S. courts, including the similar claims advanced against SNCF in *Freund*. See, *e.g.*, *Ungaro-Benages*, 379 F.3d at 1238-41 (affirming dismissal of Holocaust-related expropriation claims against German banks in light of the United States and Germany's shared interest in having claims resolved using claims process established by the two countries via international agreement); *Freund*, 592 F. Supp. 2d at 580-82 (concluding that, for spoliation claims brought against SNCF, "the circumstances of this case justify abstention based on comity principles" and having plaintiffs pursue their domestic remedies in France).

Principles of comity similarly favor dismissal of Plaintiffs' claims in this case. For the reasons discussed in the preceding section, the United States has determined that the CIVS is an adequate alternative forum in which Plaintiffs should bring their claims. See *Ungaro-Benages*, 379 F.3d at 1238-39 ("Our determination of the adequacy of the alternative forum is informed by *forum non conveniens* analysis."). The interests of the United States and France also weigh in favor of dismissal. As a general matter, the United States consistently has maintained "that foreign courts generally should resolve disputes arising in foreign countries, where such courts reasonably have jurisdiction and are capable of resolving them fairly." *Mujica*, 771 F.3d at 609 (citation and internal brackets omitted). More specifically, the United States consistently has supported French efforts to establish a comprehensive system of broad-ranging administrative fora, including the CIVS, in which to adjudicate the claims of Holocaust victims and their families. And most recently, the 2014 Executive Agreement entered into by France and the United States further demonstrates the countries' intent to secure an "enduring legal peace" for claims related to the deportation of Holocaust victims from France. See 2014 Executive Agreement, at Preamble. In that document, the French Republic agreed to pay the United States $60 million, which the United States would use to provide compensation to certain Holocaust victims "not covered" by existing French programs. See 2014 Executive Agreement, at art. 4(2), (3). The French Republic also expressed its continued "commit[ment] to provid[e] compensation for the wrongs suffered by Holocaust victims deported from France through [administrative] measures to individuals who are eligible under French programs." *Id*. at Preamble. The 2014 Executive Agreement thus reflects France's willingness to consider claims such as those asserted in this case in the CIVS and the United States and France's joint understanding that parties who are eligible to assert claims through programs established by France should seek relief in the French administrative fora rather than in U.S. courts.

The United States' interest in having Plaintiffs avail themselves of the available administrative forum is especially strong in this case, where all or most of the parties to the dispute are French and the conduct giving rise to the claim occurred in France. See *Mujica*, 771 F.3d at 603 (considering the location of the conduct in question, the nationality of the parties, and the foreign policy interests of the United States as part of the comity analysis). Accordingly, comity supports requiring Plaintiffs to pursue their claims in the CIVS, which was established by the French government, with the support of the United States, "to address exactly these types of claims from the Nazi era." See *Ungaro-Benages*, 379 F.3d at 1240-41.

C. Plaintiffs should be required to exhaust the remedies available to them in France

For similar reasons, Plaintiffs should be required to pursue the remedies available to them in France before proceeding with litigation in U.S. courts. Although the FSIA itself does not require exhaustion, a district court retains the authority to require plaintiffs to exhaust their

domestic remedies as a prudential matter. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (observing that exhaustion of domestic remedies, including pursuing claims in international claims tribunals, is one principle "limiting the availability of relief in the federal courts for violations of customary international law," which should be considered "in an appropriate case"). Indeed, "international law favors giving a state accused of taking property in violation of international law an opportunity to redress by its own means, within the framework of its own legal system before the same alleged taking may be aired in foreign courts." *Fischer*, 777 F.3d at 855. Accordingly, "[s]o long as [P]laintiffs might get a fair shake in a domestic forum, international law expects [P]laintiffs at least to attempt to seek a remedy there first." *Id*. at 858.

Plaintiffs have not pursued the claims at issue in this case in the CIVS, which the French Government has made clear is an available forum for adjudication of their takings claims, as noted above. Nor have Plaintiffs "show[n] convincingly that such remedies are clearly a sham or inadequate or that their application is unreasonably prolonged." See *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 681 (7th Cir. 2012). Instead, it has been established that the CIVS would exercise jurisdiction over Plaintiffs' claims if they were brought in that forum. See Supp. Jeannoutot Decl. ¶ 10. Given the United States' longstanding and recently renewed support for resolving Holocaust-era claims involving France exclusively through the existing mechanisms described above, France "should first have the opportunity to address [Plaintiffs' claims], by its own means and under its own legal system, before a U.S. court steps in to resolve claims against a part of the [French] national government for these actions taken in [France] so long ago." See *Abelesz*, 692 F.3d at 682.

D. The takings exception to the FSIA is not a basis for jurisdiction in this case

Dismissal is also warranted for lack of subject matter jurisdiction under the FSIA. That statute provides the sole and exclusive framework for obtaining and enforcing judgments against a foreign state in U.S. courts. *Argentine Repub. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). Under the FSIA, a foreign sovereign and its agencies and instrumentalities are immune from suit in the United States unless a specific statutory exception applies. 28 U.S.C.§ 1604; *Samantar v. Yousuf*, 560 U.S. 305, 313-14 (2010).

Plaintiffs contend that the Court has jurisdiction over this case because SNCF is not immune under the takings exception in the statute. That exception states that a foreign state, or its agencies or instrumentalities, will not enjoy immunity where

> rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). In other words, "the expropriation exception defeats sovereign immunity where (1) rights in property are in issue; (2) the property was taken; (3) the taking was in violation of international law; and (4) at least one of the two nexus requirements is satisfied." *Abelesz*, 692 F.3d at 671 (citing *Zappia Middle E. Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000)).

In this case, Plaintiffs have failed to establish the fourth element of the exception, the nexus requirement. The FSIA sets forth two possible nexus requirements: (1) that the taken "property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or (2) that the taken "property or property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Plaintiffs here have not alleged that property taken from the deportees, or any property exchanged for that property, is present in the United States, so only the second nexus requirement is at issue. Yet Plaintiffs have not property plead that requirement, as they have failed to properly allege that they or their family members had specific property that was taken by government authorities and that SNCF still owns or operates any such property or property exchanged for such property.

While the Seventh Circuit has taken the position that the pleading standard for the elements of the takings exception is not "demanding," it has made clear that a complaint asserting such claims, which are analogous to claims for conversion of property, must allege the date and place of the conversion as well as a description of the property. See *Abelesz*, 692 F.3d at 687 (describing § 1605(a)(3) pleading standard as requiring an allegation that "[o]n date, at place, the defendant converted to the defendant's own use property owned by the plaintiff. The property consisted of describe." (quoting Form 15 from the Federal Rules of Civil Procedure)); see also *Crist v. Repub. of Turkey*, 995 F. Supp. 5, 11 (D.D.C. 1998) (holding that a complaint must include allegations about "the location and description of the allegedly dispossessed property" in order to satisfy § 1605(a)(3)). The complaint must also contain an "allegation of the value of the property." *Id*. Here, Plaintiffs' allegations fall short of meeting this standard. Plaintiffs define "property" to mean "any and all personal property, including cash, securities, silver, gold, jewelry, artwork, musical instruments, clothing, and equipment that was illegally, improperly, and coercively taken from the ownership or control of an individual during [a] [d]eportation." Compl. ¶ 3. Plaintiffs also make categorical assertions about all Holocaust deportees, alleging that, in general, SNCF confiscated their property and either converted it for the railway's own benefit or "turned it over to the Nazis in exchange for other [p]roperty." *Id*. ¶ 10.

Here, Plaintiffs make no allegations about the property that was purportedly taken from their family members by governmental authorities. The most specific allegation is that they "believe" that their relatives, like all deportees, had property with them when they boarded the train and that such property was taken. … But while these allegations may be based on sincerely held beliefs, the pleading standard for purposes of a takings claim in this Court requires more, including information about the location and date of the alleged takings, a description of what property was purportedly taken from Plaintiffs' relatives, and an estimate of the value of the property. See *Abelesz*, 692 F.3d at 687. Absent this information about the property that was allegedly taken in the first instance, it is not possible to conclude that SNCF still retains such property or any property exchanged for such property. This being the case, Plaintiffs have not met the pleading standard for the § 1605(a)(3) nexus requirement.

* * * *

D. NICARAGUA CLAIMS

On August 5, 2015, the United States government announced that it had lifted certain statutory restrictions on bilateral assistance and support for international loans to Nicaragua that had been imposed due to unresolved property claims against the government of Nicaragua. See press release on the Spanish language website of the U.S. Embassy in Nicaragua, available at http://spanish.nicaragua.usembassy.gov/pr_150805_restricciones_seccion_527.html. Section 527 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, prohibits U.S. assistance and support to any country in which U.S. citizens have not been provided an adequate remedy for outstanding claims against the government for confiscated property. The statutory prohibition on assistance and support had been applied to Nicaragua since the law's adoption, but Nicaragua had received assistance and support through an annual waiver exercised by the Secretary of State through a delegation of authority from the President.

Section 527 also provided for a registration period through August 2005 when property claims could be registered with the U.S. Embassy. A total of 3,166 claims were registered at the U.S. Embassy. Between July 2014 and July 2015, 30 property claims belonging to 16 U.S. citizens were resolved, including the remaining claims registered at the U.S. Embassy that fell under Section 527.

The United States government congratulated the Nicaraguan government on its diligence in settling remaining claims in 2015. Nicaragua will no longer require an annual waiver under Section 527 in order to receive U.S. government assistance and support.

E. IRAQ CLAIMS

1. Claims Under the October 7, 2014 Referral

The Foreign Claims Settlement Commission ("FCSC") has received 269 claims under the 2014 referral: 268 in Category A and 1 in Category C. No decisions have yet been issued. See http://www.justice.gov/fcsc/current-programs. For background on the 2014 referral, see *Digest 2014* at 315-16.

2. Claims Under the November 14, 2012 Referral

The FCSC received 28 claims under the 2012 referral and finished issuing final decisions on all claims in 2015. The FCSC has awarded $14,500,000 under this referral. The FCSC completed the claims adjudication program under this referral in early 2016. See http://www.justice.gov/fcsc/current-programs and https://www.justice.gov/fcsc/final-opinions-and-orders-5#s3. Some of the key Commission decisions on the Iraq claims under the 2012 referral are discussed below.

a. Claim No. IRQ-I-023, Decision No. IRQ-I-021 (2015) (Final Decision)

Claim No. IRQ-I-023 alleged sexual assault of the claimant by Iraqi officials, and was originally denied for failure to satisfy the burden of proof. On objection, both the claimant and his brother provided live testimony, and the Commission ultimately withdrew its denial and issued an award. The final decision describes the lower evidentiary burden in sexual assault claims, and cites several international law sources that discuss the reluctance of sexual assault and rape victims to report or discuss their experience. The original proposed decision was reversed largely based on the supplementation of live testimony (with opportunity to cross-examine) to support the written declarations that had previously been the only evidence in support of the claim. Excerpts follow from the final decision (with footnotes omitted).

* * * *

Sexual Assault Analysis: With this new evidence, Claimant has met his burden of proving the factual allegations of his claim. As the Commission has previously noted, claims of sexual assault present unique evidentiary problems. *See* Claim No. IRQ-I-009, Decision No. IRQ-I-004, at 10-11 (Proposed Decision) (2014). For one, the victim will often be the only witness to the incident other than the perpetrator(s). *Y. v. Slovenia*, App. No. 41107/10 (Eur. Ct. H.R. May 28, 2015) (Yudkivska, J., partly dissenting), *available at at* http://hudoc.echr.coe.int/eng?i=001-154728. In many cases, there may be no contemporaneous medical evidence, either because the victim was too ashamed to seek medical treatment or, as was the case during the Iraqi occupation of Kuwait, because medical treatment was not available in the immediate aftermath of the assault. *See* U.N. Comp. Comm'n Governing Council, *Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims)* (UNCC Serious Personal Injury or Death Report), at 35, 37, U.N. Doc. S/AC.26/1994/1 (May 26, 1994). Not surprisingly, victims of sexual assault are often very reluctant to share the details of their experience. *Report of the Panel of Experts Appointed to Assist the United Nations Compensation Commission in Matters Concerning Compensation for Mental Pain and Anguish*, attached as Annex VI to the UNCC's *Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individual Claims for Damages up to US$100,000 (Category "C" Claims)* ("UNCC Mental Pain and Anguish Report"), S/AC.26/1994/3 at 262 (Dec. 21, 1994); Special Rapporteur of the Commission on Human Rights, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation* ("Kälin Report"), ¶ 111, U.N. Doc. E/CN.4/1992/26 (Jan. 16, 1992) (by Walter Kälin); U.N. High Commissioner for Human Rights, *Istanbul Protocol: Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"), at 21, U.N. Doc. HR/P/PT/8/Rev.1 (Aug. 9, 1999). Indeed, some victims of sexual assault may not have shared their experience with their own spouse, let alone other family members. Office of the Prosecutor, Int'l Criminal Tribunal for Rwanda, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict*

Regions 22, 38, 44 (2014) ("ICTR Best Practices Manual"); UNCC Mental Pain and Anguish Report, *supra*, at 262.

Social and cultural factors must also be considered when assessing claims of sexual assault. For instance, in some cultures or societies, discussion of sexual matters is considered taboo. *See* Istanbul Protocol, *supra*, para. 149; ICTR Best Practices Manual, *supra*, para. 115. In some cases, especially for males, being the victim of a sexual assault may engender severe social stigma. *See* ICTR Best Practices Manual, *supra*, para. 39, 114. Such individuals "may feel irredeemably stigmatized and tainted in [their] moral, religious, social or psychological integrity." Istanbul Protocol, *supra*, para. 149.

In light of these considerations, the Commission reiterates that the "evidentiary burden for a sexual assault claim has generally been quite low." Claim No. IRQ-I-009, *supra*, at 10. The use of a standard of evidence that relies primarily on the victim's testimony is further justified in this program by the fact that, as the Commission has previously noted, Iraqi forces are known to have engaged in widespread rape during the occupation of Kuwait, the very period during which all of the claimants in this program were held hostage. *See* Claim No. IRQ-I-009, *supra*, at 11 (citing Kälin Report, *supra*, at 28-31; UNCC Serious Personal Injury or Death Report, *supra*, at 36-37); *Interim Report to the Secretary-General by the United Nations Mission Led by Mr. Abdulrahim A. Farah, Former Under-Secretary-General, Assessing the Losses of Life Incurred During the Iraqi Occupation of Kuwait, as Well as Iraqi Practices Against the Civilian Population in Kuwait*, at 8 (1991), *transmitted by Letter from the Secretary-General*, U.N. Doc. S/22536 (Apr. 29, 1991). Although Claimant was not in occupied Kuwait and we do not know whether the Iraqi guards in the hospital were connected in any way with the Iraqi occupying forces, the facts Claimant and his brother recount here are consistent with the well-documented history of Saddam Hussein's regime persecuting Shiite Muslims, a group to which Claimant belonged. *See* U.S. Dep't of State, *Iraq – Country Report on Human Rights Practices* (Feb. 23, 2000), http://www.state.gov/j/drl/rls/hrrpt/1999/410.htm.

Nevertheless, in its Proposed Decision, the Commission found insufficient evidentiary support for Claimants' allegations, noting that only two of the declarations submitted in support of the claim made reference to any sexual assault—Claimant's Supplemental Declaration and his brother's Declaration—and that both of these were sworn only in 2013. In this respect, the Commission noted that where a claim relies heavily on written statements, certain factors must be considered in determining how much weight to place on such statements. *See* Proposed Decision, *supra*, at 13-14. These include the length of time between the incident and the statement, whether the declarant is a party interested in the outcome of the proceedings or has a special relationship with the Claimant, and whether there has been an opportunity for cross-examination. *Id.* (internal citations omitted). At the time of the Proposed Decision, all of these factors weighed against the Commission relying heavily on those two declarations. For one, they were sworn 23 years after the alleged incident. *Id.* at 14. Moreover, the one declaration not from Claimant himself was from his brother, clearly a person with a special relationship to the Claimant. *Id.* Finally, at that point in the proceedings, the Commission had not subjected either declarant to any questioning. *Id.* Under these circumstances, the Commission concluded that these two declarations were insufficient to meet Claimant's evidentiary burden.

During the oral hearing, the Commission had the opportunity to hear live testimony from both Claimant and his brother, and to subject them to direct questioning. Both witnesses provided sincere, credible testimony, and offered a detailed account of what happened to Claimant while in Iraq ([name redacted] presenting the story as told to him by his brother). The

details in these accounts were consistent with each other and were not contradicted by any of the other declarations, such as Claimant's 2004 declaration, the 2013 declaration from Claimant's wife, and the 2013 declaration from the imam. Both witnesses answered the Commission's questions during the hearing in a forthright manner. This oral testimony thus helps buttress the declarations of Claimant and his brother. *See id.* (noting that where there has been an opportunity for cross-examination, "live, compelling testimony by the claimant can do much to support a claim." (citing Claim No. LIB-I-007, Decision No. LIB-I-024 (2011) (Final Decision))).

There is also other circumstantial evidence in support of the claim that can now be viewed in light of the oral testimony. For instance, Claimant's wife stated in her declaration that Claimant returned from the hospital "in something of a state of shock" and that he "threw his clothes into the garbage and told [her] not to touch them." She stated that he "did not want to talk about anything . . . [,] had great difficulty sleeping[,] and . . . would frequently wake up to horrifying nightmares that would cause him to scream out loud." This behavior allegedly continued after they returned home, and Claimant was prescribed Xanax to calm his anxiety. [Name redacted] also indicates that Claimant refused to speak about his hostage experience or seek counseling and that he became socially withdrawn. For his part, Mr. Abidi, the imam, echoed the assertion that Claimant had become withdrawn after his experience in Iraq, and that when he counseled him in 1995, the trauma was apparent. Mr. Abidi added that when Claimant spoke about his experience in Iraq, "he did so in very general terms – stating only that he had been abused and insulted by the Iraqi authorities on account of his Shiite faith."

While none of these observations are conclusive proof that Claimant was raped in Iraq, they are consistent with his claim, as they provide some evidence that he suffered the shame and psychological trauma that is commonly associated with sexual assault. Such trauma may include post-traumatic stress disorder (PTSD), ICTR Best Practices Manual, *supra*, para. 69; Istanbul Protocol, *supra*, paras. 231, 277, and indeed, Claimant's physician diagnosed him with PTSD in 2007—apparently attributed to his experience in Iraq—long before the commencement of this claims program.

In adjudicating claims of sexual assault such as this, the Commission must balance the need for substantiating evidence with the understandable reluctance of victims to discuss incidents of rape or even to seek medical assistance. *Cf. Partial Award: Western Front, Aerial Bombardment and Related Claims - Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26*, 126 R.I.A.A. 291, 323 (Eritrea-Ethiopia Claims Commission 2005) ("It is the task of the Commission . . . to balance the obvious difficulties posed by third-party and interview testimony against the natural inclination of victims (and even witnesses) not to speak publicly about rape."). Nothing, of course, diminishes the requirement that Claimant "have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity . . . of [his] claim." 45 C.F.R. § 509.5(b) (2014). Nevertheless, the Commission concludes that, in light of the lower evidentiary hurdle for sexual assault claims, and considering the fact that Claimant has presented compelling and credible testimonial evidence—evidence that the Commission was able to test through direct questioning— Claimant has proven to the Commission's satisfaction that he was the victim of a sexual assault.

Claimant has therefore demonstrated that he suffered a "serious personal injury" that was "knowingly inflicted" by Iraq. The Commission further finds that given the nature of the specific acts committed by Iraq giving rise to Claimant's injury, the severity of his serious personal injury constitutes a "special circumstance warranting additional compensation." *See* Claim No. IRQ-I-003, Decision No. IRQ-I-006 (Proposed Decision), at 11.

* * * *

b. Claim No. IRQ-I-024, Decision No. IRQ-I-012 (2015) (Final Decision)

Claim No. IRQ-I-024 alleged mock execution. Claimant testified that she, along with other hostages, was lined up at a bridge and held at gunpoint. The Final Decision, excerpted below, affirms the proposed decision denying the claim, discussing the standard for mock executions and concluding that claimant had not, in fact, been the victim of such an act.

* * * *

To be eligible for compensation under the 2012 Referral, the claimant's injury must have arisen from one of the four acts specifically mentioned in the Referral—*i.e.*, sexual assault, coercive interrogation, mock execution, or aggravated physical assault—or from some other discrete act, separate from the hostage experience itself, that is of a similar type or that rises to a similar level of brutality or cruelty as the four enumerated acts. Proposed Decision, *supra*, at 6 (quoting Claim No. IRQ-I-005, Decision No. IRQ-I- 001 (2014) at 7 (Proposed Decision)). The Proposed Decision reviewed relevant cases before international tribunals and concluded that a "mock execution" was defined as "a simulated or feigned execution whereby a perpetrator commits an act or acts that sufficiently mimic an actual execution so as to trick or deceive the victim into holding a reasonable (but ultimately false) belief that his or her death is imminent." *Id.* at 13 (internal citation omitted).

Claimant argues that the soldiers' actions at the bridge satisfy the Commission's definition of a mock execution, or were at least comparable in brutality to a mock execution. Claimant points in particular to the following: the hostages' Arabic-speaking U.S. embassy escort was no longer with them; the Iraqi officer at the bridge "was strikingly more menacing in his appearance and conduct than the soldiers at other checkpoints," calling to mind a Gestapo agent, and "shouted threateningly in Arabic"; the soldiers "brandished automatic weapons hanging at their waists . . . and waved, gestured, and pointed [them] to direct and control the hostages' movement[]"; the commands for the hostages to leave their vehicles and line up at the bridge "mimicked the assembling of victims to be executed by a firing squad[,]" as did the demand that the hostages remain still and not move; and the soldiers were also lined up across from the line of hostages, such that Claimant argues they "were positioned to act as [a] firing squad . . . ." Claimant contends that there was no apparent reason for this behavior other than to act out a mock execution. She argues that this is further evidenced by the soldiers' act of laughing at the hostages when they returned to their cars and insisting they say "thank you" as they drove away.

We turn first to the question of whether these alleged facts, viewed in context, constitute a "mock execution," as that term is used in international law and the 2012 Referral. As noted above, a mock execution must "trick or deceive the victim into holding a reasonable (but ultimately false) belief that his or her death is imminent," and this feeling must be precipitated by an "act or acts that sufficiently mimic an actual execution . . . ." This definition contains both

subjective and objective elements. Claimant must establish both that she believed her death was imminent, the subjective aspect of the definition, and that, from an objective standpoint, the acts of the Iraqi officials "sufficiently mimic an actual execution" so as to reasonably instill that belief. *Cf., e.g.*, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment, ¶ 56 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999) ("In the prosecution of an accused for a criminal offence, the subjective element must be tempered by objective factors; otherwise, unfairness to the accused would result because his/her culpability would depend not on the gravity of the act but wholly on the sensitivity of the victim."); *Prosecutor v. Kunarac, et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 162 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) (in applying "reasonable person" standard to determine when an act constitutes a crime, Trial Chamber properly analyzed the victim's "purely subjective evaluation of the act" as well as "objective criteria").

First, we find that Claimant actually and sincerely believed that she was about to be executed under the circumstances, thereby satisfying the subjective aspect of the definition. …

The crucial question, however, involves the objective aspect of the definition: did the soldiers' actions at the bridge, viewed together and in context, objectively manifest the type of "concrete . . . steps to act out an execution" that are required for a finding of mock execution? *See* Proposed Decision, *supra*, at 14. The Proposed Decision listed several examples of such conduct: the "cocking of a pistol, the firing of blanks, the placement of the gun directly on the victim's body, or (in the case of a mock lynching) the placing of a rope around the victim's neck." *Id.* at 13. These types of concrete acts are what distinguish a mock execution from a *threat* of execution, whether explicit or implicit.

Even assuming all the facts as Claimant describes them (facts that, we should emphasize, Claimant very credibly recounted), they do not make out a "mock execution," as that term has been used in international law and as the State Department used it in the 2012 Referral: the Iraqi officials simply did not perform a concrete act or a series of concrete acts that sufficiently mimicked an actual execution. In the context of this Iraq Claims Program, where the claimants were all hostages, the phrase "mock execution" cannot encompass all conduct that caused a victim to fear that she is about to be killed. All of the claimants in this program, including this Claimant, have already received compensation from the State Department for having been held hostage, and that compensation encompassed all of the "physical, mental, and emotional injuries generally associated with" having been held hostage or unlawfully detained. The threat that a hostage could be killed instantly and at any time is a fear generally associated with being held hostage, even if not every American hostage in Iraq at the time necessarily experienced such a threat. The presence of Iraqi officials with deadly weapons in post- invasion Kuwait and Iraq was ubiquitous. Under such circumstances, a definition of "mock execution" requiring merely that the victim reasonably fear that she could be killed would result in the finding of innumerable "mock executions." Stated differently, in a program aimed at providing *additional* compensation for *some* claimants when all eligible claimants were hostages of an authoritarian regime in a time of war and when Iraqi officials with deadly weapons were ubiquitous, a definition of "mock execution" that included all serious threats of death would sweep too broadly.

Claimant argues that the Commission should adopt a flexible definition of the term "mock execution" that would encompass the acts committed by the Iraqi soldiers at the Turkish border. Claimant does not, however, propose an alternative standard that would meaningfully distinguish instances of mock execution from the threat of death that generally accompanies being held hostage. Without such a distinction, particularly in the context of a program for

additional compensation for a subset of a group of claimants who were all hostages, a flexible standard of the sort proposed by the Claimant would introduce far too much subjectivity. Given the wide variety of circumstances in which hostages face threats of death, such an approach would be unworkable, particularly in the context of this program.

In sum, the Iraqi officials' actions at the border crossing did not constitute a "mock execution," because there was no "concrete act that mimic[ked] an actual execution . . . ." While the soldiers brandished weapons, they did not fire their guns, either with blanks or live ammunition, and the officer did not direct the soldiers to fire.

Without such actions, or some similar act or omission by the Iraqi soldiers, the circumstances Claimant describes are too similar in nature to many typical hostage-taking scenarios in which captives are held under armed guard. *See, e.g.*, Claim No. LIB-II-003, Decision No. LIB-II-016 (2011) (hostage-taking involving passengers on hijacked plane, who, among other things, were forced to hold hands up in the air while the hijackers threatened them with automatic weapons and grenades); *Finogenov v. Russia*, 2011-VI Eur. Ct. H.R. 365, 374, 377 (2011) (hostage-taking involving more than nine hundred victims held for three days under gunpoint in a booby-trapped theatre with eighteen suicide bombers positioned among the hostages, and during which several hostages were in fact killed during the rescue operation); *Wyatt v. Syrian Arab Republic*, 908 F.Supp.2d 216, 220-21 (D.D.C. 2012) (hostage-taking in which gunmen captured hostages while "'yelling and screaming and pointing their weapons'" at them, "'pushing [them] around and roughing [them] up[,]'" and then marched them miles through the wilderness before detaining them for three weeks, a period during which the victims "feared for their lives throughout"; on one occasion, "the gunmen lined the captives up in a row and pointed guns at them as though they were going to execute them[]" so as "to prevent them from attempting to escape"); … Regrettably, the desperate fear engendered by explicit or implicit threats of death is inherent in many hostage experiences. Claimant has already received compensation from the State Department for injuries generally associated with having been held hostage. *See* 2012 Referral, *supra*, n.3. Under these circumstances, the Commission concludes that Claimant was not subjected to a mock execution meriting additional compensation for a "serious personal injury" as that phrase is used in the 2012 Referral.

III. Act Similar in Brutality or Cruelty to Mock Execution

Claimant also argues that she is entitled to additional compensation in this program because she "suffered injuries as the result of actions comparable in brutality and cruelty to a mock execution[.]" Although this argument is intertwined with Claimant's argument that the Iraqi officials' actions constituted a mock execution *per se*, we can think of it as a distinct argument: in this program, we have held that claimants may be awarded additional compensation for injuries from acts of brutality comparable to the Referral's four enumerated acts (sexual assault, coercive interrogation, mock execution, or aggravated physical assault), even if the act was not one of those four.

In previous claims, however, we have awarded compensation for injuries caused by acts other than the Referral's four enumerated acts only when the Iraqi act was factually distinct from these four acts. For example, we awarded compensation to a claimant who suffered injuries because Iraq denied him access to vital medication. We also awarded compensation in two claims where the claimants were subjected to prolonged solitary confinement in near-total darkness and in appalling conditions, placed on a starvation diet, and forced to witness and listen to other persons being physically tortured. By contrast, we have never awarded compensation when the act in question, although factually similar to an enumerated act, does not satisfy the

definition of that act as set forth by the Commission. Such acts, by definition, are not comparable in seriousness to one of those acts, as required by the Commission's standard: Given the Referral's explicit listing of specific acts in the context of a program designed to provide a subset of a group of hostages "additional compensation" for "special circumstances," this approach best comports with the Referral's language and purpose. The Commission thus finds that Claimant's injuries were not caused by an act "comparable in brutality and cruelty to a mock execution" and, therefore, do not qualify as "serious personal injuries," as that term is used in the 2012 Referral.

* * * *

c. Claim No. IRQ-I-026, Decision No. IRQ-I-025 (2015) (Final Decision)

The claimant in Claim No. IRQ-I-026 received an award in the proposed decision based on her claim of sexual assault. However, she objected to the amount of the award ($1 million), claiming her injuries were more severe than those of others who received the same amount. The Commission's final decision includes a discussion of the degree to which it could analyze in depth the psychological harm among the various claimants in this claims program.

* * * *

We are not persuaded by Claimant's comparative arguments. In determining compensation, our task is to determine where on the continuum from zero to $1.5 million Claimant's injuries fall, based on the severity of those injuries relative to all other successful claimants in this program, … using the factors we have previously articulated, and taking into account the fact that we are making awards in this program in broad categories, *see* Claim No. IRQ-I-022, Decision No. IRQ-I-008, at 9 (2015) (Final Decision). The Proposed Decision awarded Claimant $1 million based on the injuries she suffered as a result of the sexual assault, injuries supported by various medical records and the Commission's own presumption of long-term emotional injury. In at least one other claim of sexual assault in this program, we made the same presumption and also awarded $1 million. … In contrast, the only claimants in this program to have been awarded $1.5 million—indeed, the only claimants to have been awarded more than Claimant—all suffered weeks of subhuman conditions, repeated merciless beatings, and brutal interrogations. *See* Claim No. IRQ-I- 001, Decision No. IRQ-I-005 (2014); Claim No. IRQ-I-002, Decision No. IRQ-I-007 (2014); Claim No. IRQ-I-022, *supra*; Claim No. IRQ-I-018, Decision No. IRQ-I-009 (2015). Thus, to show that she is entitled to $1.5 million, Claimant would have to show that the injuries Iraq inflicted on her are comparable to what it inflicted on those four other claimants.

Claimant has failed to do this. Rather than compare her experience to the most seriously injured claimants in the program, Claimant focuses on others who have received $1 million awards. She argues that the severity of her emotional injuries is greater than those of the mock-execution and other sexual-assault victims because she has been unable to pursue her career as a performing artist, causing her substantial loss of income and forcing her to live in extreme poverty: according to Claimant, she lost $200,000 per year in income and was "unemployed for

the past 23 years and forced to spend extended periods of time living on public assistance." Starting from that premise, she argues that the Commission should raise her award from $1 million to $1.5 million.

The problem with Claimant's argument is that it calls for a fine-grained comparative assessment of the precise severity of each individual claimant's psychological injuries. We simply cannot engage in such an inquiry in this program. As we noted in this program's very first claim, to "do an individualized determination of how 'serious' every claimant's [post-traumatic stress disorder] was" would force us to engage in "an unworkable analysis." Claim No. IRQ-I-005, Decision No. IRQ-I-001, at 12. This concern is part of what led us to decide to make awards in this program in broad categories. *See* Claim No. IRQ-I-022, Decision No. IRQ-I-008, *supra*, at 9. Indeed, for two salient reasons, this claim illustrates exactly why it is important that we not make distinctions based on details about the severity of a claimant's psychological injuries.

First, Claimant's allegations raise especially difficult questions about causation, questions that are inherently difficult to assess, especially in the context of this Commission's non-adversarial process. Claimant argues that the sexual assault led to emotional injuries that destroyed her performing career. But it is extremely difficult to know what could have caused her career to decline without extensive evidence about her career, her life, and any other possible psychological causes—evidence that would of course have to date back more than two decades. Moreover, it is difficult to know whether she could have pursued any other livelihood, whether comparably lucrative or not, without detailed evidence that this Commission simply cannot acquire. Indeed, Claimant has provided very little information about the effects of these injuries on her career in the years from 1993 to 2005 and has not submitted any evidence of treatment during that time. …

This problem is not unique to adjudicating this particular claim. Claimant's suggested approach to determining compensation would require the Commission to undertake this sort of impractical causation analysis in each and every claim. For instance, the Commission would have to determine how much of any given claimant's financial losses resulted from psychological injuries due to the sexual assault, as opposed to the hostage experience in general. The Commission would also have to determine how much of a claimant's financial losses can be attributed to the psychological effects of the sexual assault as opposed to any other factors that might affect a claimant's professional standing. Here, one would have to consider, for example the possibility of numerous other factors that could lead to the decline of a career in a highly volatile industry. The Commission simply cannot undertake such an analysis in a way that is fair to all claimants across all professions and stations in life. In a non-adversarial setting, the most the Commission can reasonably do is to find (or to presume) that a claimant suffered severe mental and emotional injuries as a result of her sexual assault and that these injuries have undermined her ability to make a living. Moreover, even if we were inclined to inquire into the causal connection in this claim, Claimant's evidence— including the dearth of evidence about the 12-year period from 1993 to 2005—would be insufficient to establish Iraq's liability for all of Claimant's mental-health troubles and career woes.

Second, this program's humanitarian purpose would not be well-served by awarding greater compensation to individuals whose financial losses from psychological injury are greater simply by virtue of their career path and relative financial success. Indeed, such an approach, in the context of a claims program such as this, would conflict with fundamental notions of justice, and more importantly, equity, which this Commission is required to apply. An approach that awards one claimant more than another on the basis of either pre-injury income or the amount of

income said to have been lost due to psychological injury would require treating claimants who were subjected to the exact same Iraqi act differently. Under Claimant's theory, she would receive more than someone else who had been subjected to the same rape simply because she suffered a greater change in her income from the years before the rape to the years after.

She supports this theory by noting that "the extent of the impairment of the health and earning capacity of the claimant" is one of the factors the Commission is to take into account. On that point, she is correct. But, by having us determine the financial losses of each individual claimant based on his or her career and likely future earnings, Claimant's approach would have us consider not just "'the extent of *impairment* of the . . . earning capacity of the claimant[,]'" Claim No. IRQ-I-001, *supra*, at 21-22 (citing I Marjorie M. Whiteman, *Damages in International Law* 628 (1937) (emphasis added), but also to quantitatively assess the *actual earning capacity itself*. The extent of impairment is not the same as the extent of the actual earning capacity: assessing the former does not require different victims of the same act to receive different compensation awards based on different earnings capacities, whereas assessing the latter would.

Nothing in our previous decisions in this or in other claims programs favors such an approach. Indeed, other claims programs for personal-injury compensation for violations of international law have eschewed making distinctions of this kind, including in the context of Iraq's invasion of Kuwait, the precise situation under which Claimant brings her claim. Even if we were to conclude that she had established the facts necessary to show that the rape caused her $200,000 in lost annual income, taking facts of this sort into account would require us to award more to her than to a low-wage rape victim. Treating victims differently when they are essentially alike from the perspective of the injury Iraq inflicted upon them would, in the context of this program, conflict with the notion of "equity," as we interpret that term in our statutory mandate.

Even if we viewed Claimant's argument as not premised on the idea that we need to do a detailed accounting of income losses but instead on the notion that the demise of her career and lengthy period of unemployment provide evidence of how great her psychological injuries were, we would not be inclined to countenance different award amounts based on different alleged levels of psychological injury from the same Iraqi act. In a non-adversarial proceeding with extraordinarily permissive rules of evidence, distinguishing between claimants on the basis of different alleged levels of psychological injury is also fraught with difficulties. In fact, these sorts of difficulties are exactly why we require claimants to prove a specific Iraqi act of sufficient brutality in order to show a "serious personal injury" in this program. *See* Claim No. IRQ-I-005, Decision No. IRQ- I-001, at 11-12 (2014) (Final Decision).

Finally, Claimant is not entitled to greater compensation because of the physical pain and suffering she endured. Again, Claimant seeks to create fine-grained distinctions in this program. In essence, Claimant argues that she suffered all the psychological harm that the mock-execution victims suffered *plus more* (i.e., the physical harm caused by the rape). But in this program, the Commission is making awards in broad categories. … We will thus not parse the details of the physical and emotional injuries that any given individual claimant suffered in order to determine compensation. By saying this, we are not saying that the sum total of Claimant's injuries is *identical* to those of the mock-execution victims, only that the act Iraq committed and the scope of the injuries Claimant suffered place her injuries in the same broad category as those of the mock- execution victims in this program.

Claimant has established that she was brutally raped, and as we noted in the Proposed Decision, we presume that she suffered long-term emotional harm, a presumption that her medical records and affidavits support. Except for the four claimants who were subjected to weeks of brutal interrogations, beatings, threats, and the like, Claimant's award of $1 million is the highest in this program. To the extent that the precise gradation of Claimant's emotional and physical harm might be higher or lower than others who suffered similar attacks or might depend on Claimant's particular career choice or financial status before or after the incident, we decline to increase or decrease the award from that amount. Of course, as we have noted in other claims in this program, we recognize that no amount of money can truly "compensate" Claimant in the literal sense of that word. She was brutally raped, and we have no illusions that money can in any sense make her whole. All we conclude is that, in the context of this program, her award should be $1 million.

* * * *

3. UN Compensation Commission

On October 28, 2015 Ambassador Pamela Hamamoto, Permanent Representative of the United States of America to the United Nations and Other International Organizations in Geneva, delivered remarks at the opening of the 80th Governing Council Session of the UN Compensation Commission ("UNCC"). For background on the UNCC, see *Digest 2013* at 249-50. As stated by Ambassador Hamamoto, the United States supported a Governing Council decision as requested by Iraq to extend the suspension of its payment obligations to the Compensation Fund until January 1, 2017, to free Iraqi resources for the crucial struggle against ISIL. Ambassador Hamamoto's remarks are excerpted below and available at https://geneva.usmission.gov/2015/10/28/ambassador-hamamoto-uncc-a-model-for-post-conflict-reconstruction-and-reconciliation/.

* * * *

Today's discussion will be largely driven by the difficult situation that Iraq faces. I want to say to our Iraqi colleagues: As you struggle against ISIL—our common enemy—you have the full sympathy, support, and solidarity of the United States.

In light of Iraq's extraordinarily difficult security circumstances and unusual budgetary challenges, last December this Council took the unusual step to postpone Iraq's payment requirement until January 1, 2016. At today's meeting we will decide what to do after that date.

Given the concurring views of the two parties—that is, Iraq's request for a further postponement by one additional year, and Kuwait's supportive response to that request—the United States will favor a Governing Council decision today to extend the postponement for an additional year, until January 1, 2017. This postponement would free Iraqi resources for the crucial struggle in which it is engaged.

At the same time, we believe it is imperative to have a clear plan leading to completion of the UNCC's mandate in a reasonable time, and to maintain the UNCC's positive reputation. These considerations also influence the Governing Council's decision today.

Thus, the Governing Council will continue its planning for the prompt and orderly wind-down of the UNCC. The staff level—now reduced from a high of 257 people to a minimal level of only four—indicates that this task is being addressed, as does the large volume of archiving and other concluding operations that they have completed.

While circumstances have delayed the UNCC's anticipated completion of its task, we still hope for this agency to finish its mandate within a few years, and then to close its doors. Once this happens, we expect that the UNCC's performance will stand as a UN success story that serves not only to discourage illegal acts of aggression, but also to showcase a positive example of post-conflict recovery and reconciliation.

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F. LIBYA CLAIMS

As discussed in *Digest 2013* at 242-43, the U.S. Department of State made a third referral of Libya claims to the FCSC on November 27, 2013. As of February 12, 2016, the FCSC has issued final decisions on 29 claims and proposed decisions on an additional 12 claims. It has received an additional 54 claims for which no decision has been issued. The total value of awards as of February 12, 2016 is $32.2 million.
See http://www.justice.gov/fcsc/current-programs. The following discussion focuses on some of the noteworthy opinions under the third Libya referral.

a. Claim No. LIB-III-021, Decision No. LIB-III-016 (2015) (Proposed Decision)

Claim No. LIB-III-021 was the Commission's first decision under the "special circumstances" category of the Third Libya Referral. Claimant's legs were blown off during a terrorist attack at Lod Airport in Tel Aviv, Israel, on May 30, 1972. The Commission's decision on this claim establishes the standard for determining which claims are compensable under this particular referral and the criteria to be considered when determining appropriate compensation. Excerpts follow from the Commission's proposed decision.[*]

* * * *

In light of the evidence detailed above, Claimant has proven that the severity of her physical injuries is a special circumstance warranting additional compensation under this claims program.

Nature and Extent of Injury: The Claimant's injuries are horrific and were life-altering. She lost both of her legs and has been unable to walk normally since the attack, more than 40 years ago. More than just the losing of her legs, she also had to experience the terror of the moment. As a news account put it shortly after the attack, she "felt something hit her feet[,] . . . saw a grenade rolling away[,] . . . . and buried her face in her arms as the grenade went off." She

[*] Editor's Note: the claimant objected to the amount awarded, and in 2016, the Commission issued a final decision raising the compensation from $4 million to $5 million.

further stated, "'I never lost consciousness.' . . . 'When I looked, I had no feet.'" She also had to witness the carnage and violence of the attack around her, as friends and fellow passengers suffered gruesome injuries right in front of her eyes, some dying on the spot.

Impact on Claimant's Major Life Functioning and Activities: Claimant's physical injuries have also had a substantial impact on her ability to perform major life functions. For one, her mobility is severely impaired. She lost both of her legs and has had to use a cane or a wheelchair to move about for the last four decades. At times, the pain of wearing the prostheses becomes so much that she simply hobbles around on her knees while at home. Moreover, she has never been able to find employment and had to drop out of university because it lacked facilities to accommodate her disability. In short, the terrorist attack has permanently disabled Claimant, severely limiting her freedom of movement and preventing her from undertaking numerous major life functions and activities.

Disfigurement: Claimant's injuries have left her terribly disfigured. She lost both legs below the knees. Moreover, she has extensive scarring. These injuries can never be completely hidden: she wears prostheses on both legs, walks with a limp, and requires a cane or wheelchair. Considering all these factors together, the Commission concludes that the severity of Claimant's injuries rises to the level of a special circumstance warranting additional compensation under Category D. Accordingly, she is entitled to compensation as set forth below.

* * * *

Having concluded that the present claim is compensable, the Commission must next determine the appropriate amount of compensation. As the Commission has previously stated in this program, assessing the value of intangible, non-economic damages is particularly difficult and cannot be done using a precise, mathematical formula. Assessing the *relative* value of such claims, as Category D of the November 2013 Referral contemplates, is almost as difficult. Moreover, neither Claimant nor the Commission's independent research has uncovered any relevant international-law precedent, except for the Commission's own decisions under Category D of the 2009 Referral program.

Those 2009 Referral decisions do, however, apply with equal force here: For one, the relevant language from Category D of the November 2013 Referral (at issue in this claim) is identical to that of Category D of the January 2009 Referral; moreover, both programs arise out of the same Claims Settlement Agreement. It thus makes sense to treat claims for additional compensation for especially severe physical injuries the same way in both programs.

Under Category D of the 2009 Referral, the Commission held that,

> in determining the appropriate level of compensation . . . , it will consider, in addition to the recommendation contained in the January Referral for Category D, such factors as the severity of the initial injury, the number of days claimant was hospitalized as a result of his or her physical injuries (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, and the nature and extent of disfigurement to the claimant's outward appearance.

See Claim No. LIB-II-118, Decision No. LIB-II-152, at 14. The Commission adopts this same standard of compensation for claims under Category D of the November 2013 Referral.

Severity of Initial Injury: Claimant's physical injuries are among the worst in any of the Commission's Libya claims programs. Her legs were blown off by exploding grenades in the midst of horrific violence and bloodshed. This alone would suffice for a significant award in this program.

Hospitalizations/Subsequent Surgeries: The attack and her initial injuries were of course only the beginning of Claimant's ordeal. She spent two months in the hospital in Israel, where she underwent numerous surgeries, including skin grafts and suturing, and then spent more than six months at the Rehabilitation Center in Puerto Rico, where she struggled to find comfortable prostheses. In the years that followed, she continued her treatment, at one pointing spending three and a half months at a rehabilitation center in New York and on at least two other occasions undergoing surgery to remove shrapnel remaining in her legs. As late as 1992, x-rays revealed that she still had shrapnel in her lower body. In sum, she has been hospitalized for significant periods of time and has undergone numerous surgical procedures over the years.

Permanent Impairment/Disfigurement: Claimant has been seriously and permanently impaired, and her outward appearance retains conspicuous physical disfigurements to this day. Her physical injuries have resulted in the Israeli National Insurance Institute giving her a permanent disability finding of 100%, and Dr. Llompart giving her at least 56% (20% whole person with regard to the right leg; 36% with regard to the left leg). While we have no details about how these percentages were determined, there is no question that she is permanently disabled to a substantial extent. She has serious mobility problems that affect all aspects of her life, and she has been unable to work for the past four decades. She has also been severely disfigured: both of her legs were lost in the terrorist attack, and she now has to wear prostheses, requiring her to use a cane and/or wheelchair to get around.

In light of these facts, and in consideration of the factors listed above, the Commission holds that $4,000,000.00 is an appropriate amount of compensation in this claim. Moreover, she is not entitled to interest: the Commission has previously held in all of its physical-injury awards under the Libya Claims Settlement Act programs (including those in the nearly identical 2009 Referral Category D claims), that compensable claims are not entitled to interest as part of the awards. That principle applies equally here. Accordingly, the Commission determines that the Claimant is entitled to an award of $4,000,000.00 and that this amount constitutes the entirety of the compensation that the Claimant is entitled to in the present claim.

* * * *

b. Claim No. LIB-III-030, Decision No. LIB-III-021 (2015) (Proposed Decision)

The Commission denied Claim No. LIB-III-030, which was brought by the fiancé of a victim of a terrorist attack for mental pain and anguish he suffered. The Commission disallowed the claim because the claimant was not a "close relative" of the decedent, as required under the referral. The proposed decision, excerpted below, discusses relevant international law on the question, as well as the practice of the 9/11 Victims Compensation Fund.[**]

[**] Editor's Note: The claimant objected, and the Commission reaffirmed its denial in a final decision issued in February 2016.

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The 2013 Referral Letter also requires a Category E Claimant to be a "close relative" of a decedent. The Commission has previously held that the term "close relative" in this category of claims comprises those relatives who are immediate family to the decedent: spouses, children, parents, and siblings. Claim No. LIB-III-028, Decision No. LIB-III-014, *supra*, at 6-7. Claimant does not contend that he was the decedent's spouse, child, parent or sibling. He argues, however, that he was her fiancé and that a fiancé should be considered within the degree of immediacy required to be considered a "close relative" for purposes of this program. In essence, he argues either that "fiancé" should be added to the list of close relatives or, put in slightly different terms, that, as decedent's fiancé, he was effectively close enough to being her spouse that he should count as a "close relative" for purposes of this program. To support his claim, Claimant has submitted evidence to establish that he was in fact decedent's fiancé. That evidence consists of his own affidavit as well as affidavits from decedent's family members attesting to Claimant's close relationship with the decedent, to the emotional harm he suffered as the result of decedent's death, and that Claimant and decedent planned to get married.

In deciding claims, the Commission is directed to apply, in the following order, "the provisions of the applicable claims agreement" and "the applicable principles of international law, justice and equity." 22 U.S.C. § 1623(a)(2) (2012). The "applicable claims agreement" here is the Libyan Claims Settlement Agreement, but it contains nothing relevant on the question of who qualifies as a "close relative" of a decedent. Therefore, pursuant to the ICSA, the Commission must turn to "the applicable principles of international law, justice and equity" to define the term "close relative." In the trio of "international law, justice and equity," the Commission turns first to international law to determine whether a fiancé constitutes a "close relative" within the meaning of the 2013 Referral.

In previous decisions interpreting the term "close relative," including in this very category of claims, the Commission has consistently held that the term applies to those relatives who are immediate family to the decedent: "spouses, children, parents[,] and siblings." *See* Claim No. LIB-III-028, Decision No. LIB-III-014, *supra*, at 6-7; *see also, e.g.*, Claim No. LIB-II-044, Decision No. LIB-II-001, at 6 (2010). If we were simply to apply this interpretation literally, Claimant would of course fail to satisfy the standard of a "close relative": he is not a spouse, child, parent, or sibling. However, in its first decision interpreting the term in one of the earlier Libyan claims programs, the Commission made clear that its holding was "for the limited purpose only of the unique parameters of Category B of this claims program, and without setting precedent for other categories or other claims programs." Claim No. LIB-II-044, Decision No. LIB-II-001, at 6. We did extend this interpretation to this very category of claims in this very claims program (i.e., Category E of this 2013 Referral), but that was in the context of a claim from a decedent's sister. Since the Commission has not previously had to face the question of whether to expand the definition of "close relative" to include fiancés in any other mental-pain-and-anguish claim, we turn now to that question.

We hold that the term "close relative" for the purposes of Category E of the 2013 Referral does not encompass a fiancé, absent documentation of a legally recognized relationship. Two factors are of importance here. First, the sparse international-law authority we have found provides no support for expanding the definition to include fiancés. Second, in the specific

context of adjudication before this Commission, which is non-adversarial, it is vital that eligibility for awards be tied, where possible, to objective and verifiable criteria. The category of fiancé is too open-ended to include within the definition of "close relative," particularly in the context of the facts of this claim. We emphasize, however, as we did in claims addressing the interpretation of "close relative" in an earlier Libyan claims program, that this holding is "for the limited purpose only of the unique parameters ... of this claims program and without setting precedent for ... other claims programs." *Id.*

First, our research has uncovered no compelling international-law authority defining "close relative" to include a fiancé in a program where claimants were able to file claims for additional compensation beyond the wrongful-death compensation paid to the decedent's estate. Nor have we identified any compelling international-law authority permitting fiancés to recover for mental pain and anguish. For example, in claims before the United Nations Compensation Commission ("UNCC"), the UNCC determined that only spouses, children, and parents were eligible for compensation for wrongful death. *Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims)*, S/AC.26/1994/1 (May 26, 1994); *Report and Recommendations Made by the Panel of Commissioners Concerning Part One the First Installment of Individual Claims for Damages Up To US $100,000 (Category "C" Claims)*, S/AC.26/1994/3 (Dec. 21, 1994), at pages 16-18; *Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Installment of Individual Claims for Damages Above US $100,000 (Category "D" Claims)*, S/AC.26/1998/1 (Feb. 3, 1998), at page 42.

Our reading of the term "close relative" is also consistent with the practice of the 9/11 Victims Fund, which, although not a source of international-law jurisprudence *per se*, has informed the Commission's decisions in previous Libya claims programs. Among the goals Congress had when establishing the 9/11 Victims Fund was to compensate the "relatives" of a deceased victim, a term that is, if anything, broader than the term "*close* relative" that we interpret here. Beyond the noneconomic damages awarded to the estate of all victims who died in the 9/11 attack, the Fund provided additional compensation to the decedents' spouses and dependents. In determining who qualified as a victim's spouse, the Fund limited recovery to "the person reported as spouse on the victim's Federal tax return for the year prior to the year of the victim's death." Only "[m]arriage certificates, recent joint tax returns and other similar evidence were accepted as presumptive proof of marriage." Fiancés were thus not entitled to the non-economic damages specially targeted for spouses and dependents.

Second, limiting claims to those with a legally recognized relationship that can be proven with objective and verifiable evidence is important for the functioning of a non-adversarial process such as the Commission's. The categories within our current interpretation of "close relative" (*i.e.* spouses, children, parents and siblings) can all be verified with relatively straightforward evidence of the legal relationship. In contrast, expanding the definition to include fiancés, at least those who do not have documentation of a legally recognized relationship with the decedent, could require the Commission to inquire into intimate personal details of the decedent's relationships without any means of verifying those details. Claimant argues that the Commission should adopt a "functional approach" to define who is a family member, citing Section 46 of the Restatement (Third) of Torts: Physical and Emotional Harm. We disagree. For one, this "functional approach" to defining "close relative" does not appear to have any support in international law. Furthermore, this "functional approach" would open the door to not only fiancés but also others who have purportedly "close" relationships with a decedent.

This would make the determination of who is a "close relative" subjective and less certain, thereby making the adjudication of claims programs more difficult, and potentially increasing the risk of exaggeration, fraud and abuse.

The evidence Claimant has submitted to support his claim illustrates the difficulty of relying on criteria that are not objectively verifiable with concrete documentation. In his Statement of Claim form, Claimant states that he was "in essence the [decedent's] spouse . . . ." He offers no evidence of a formal, legally recognizable marital state, such as a marriage certificate, a joint tax return, or indicia of a common law marriage. The evidence Claimant submitted does suggest a close relationship between Claimant and the decedent and describes the pain Claimant suffered as a result of the decedent's death. However, Claimant and the decedent, who were only 21 years old when the decedent was killed, did not cohabitate, did not have children together, and did not own property together. Nor had they set a specific wedding date. Weighing various facts of this sort to determine how close Claimant and decedent were, in the absence of affirmative evidence of a marital or comparable status, would complicate the eligibility criteria for a category of claims that is better seen as delineating a fixed-sum recovery for a specific set of individuals related to decedent by law. In short, Claimant may well have been "close" to the decedent, but he was not her "close *relative*" within the meaning of that phrase in Category E of the 2013 Referral.

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Cross References

ILC, **Chapter 7.D.**
TRIA and the FSIA, **Chapter 10.A.4.**
Investment dispute resolution, **Chapter 11.B.**
Arbitration, **Chapter 15.C.1.**