

**FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20579**

In the Matter of the Claim of	}	
	}	
	}	
5 U.S.C. §552(b)(6)	}	Claim No. IRQ-I-012
	}	
	}	Decision No. IRQ-I-028
	}	
Against the Republic of Iraq	}	
	}	

Counsel for Claimant:

Daniel Wolf, Esq.
Law Offices of Daniel Wolf

FINAL DECISION

Claimant objects to the Commission’s Proposed Decision denying his claim against the Republic of Iraq (“Iraq”). The Proposed Decision concluded that Claimant had not suffered an “aggravated physical assault,” as that phrase was used by the United States Department of State in its referral letter establishing this claims program. Claimant argues that the Commission’s Proposed Decision rested on a misinterpretation of the term “aggravated assault,” as that term is used in domestic U.S. law. We conclude that the domestic-law term “aggravated assault” has a different meaning from the phrase “aggravated *physical* assault” in the State Department’s referral letter, and that, even if Claimant may have suffered an “aggravated assault” under U.S. law, he did not suffer an “aggravated physical assault” under the proper definition of the latter phrase as used in the State Department referral letter. We thus affirm the Proposed Decision’s conclusion that this claim be denied.

BACKGROUND

Claimant brought a claim against Iraq based on mental and emotional injuries he suffered as a result of being held hostage in Iraq and Kuwait in August 1990. In that claim, he did not allege any physical injuries. The Commission denied the claim in a Proposed Decision entered on August 14, 2014. *See* Claim No. IRQ-I-012, Decision No. IRQ-I-028 (2014) (“Proposed Decision”). The Commission concluded that Claimant had not met his burden of proving that he had suffered a “serious personal injury” as contemplated in the State Department’s letter to the Commission establishing this program. *See Letter dated November 14, 2012, from the Honorable Harold Hongju Koh, Legal Adviser, Department of State, to the Honorable Timothy J. Feighery, Chairman, Foreign Claims Settlement Commission* (“2012 Referral” or “Referral”). That letter sets forth—and limits—the Commission’s legal authority to decide claims in this program. *See* 22 U.S.C. § 1623. The Proposed Decision held that Claimant failed to show he suffered an “aggravated physical assault,” as that term is used in the 2012 Referral, or any other act sufficiently cruel or brutal to entitle him to additional compensation beyond that which the State Department already provided him.

On August 27, 2014, the Claimant filed a notice of objection and requested an oral hearing. On March 27, 2015, he submitted a brief in support of his objection, along with further evidence, including both a declaration from an expert witness, Professor Paul H. Robinson, discussing the domestic American law of “aggravated assault” and five declarations from independent fact witnesses corroborating Claimant’s account of the assault he suffered. The Commission held an oral hearing on April 16, 2015; Claimant was the sole witness at the hearing, and his counsel also argued on his behalf.

DISCUSSION

The objection in this claim requires the Commission to determine the meaning of the 2012 Referral's phrase "aggravated physical assault." In particular, the Commission must decide whether the phrase "aggravated physical assault," as used in the Referral, includes an assault where (1) the assailant uses a deadly weapon to intimidate or instill fear in the victim, but does not otherwise strike, shoot at, or touch the victim with the weapon, and (2) the victim suffered no appreciable physical injuries, only psychological ones. As we explain in more detail below, we hold that it does not.

In its Proposed Decision, the Commission found that there was no international-law authority directly addressing the meaning of the term "aggravated physical assault."¹ In particular, we noted that assaults are not ordinarily the subject of international criminal law. We did find one use of the term "aggravated physical assault" in international law, in claims before the United Nations Compensation Commission ("UNCC"),² and we presumed that the State Department's reference to the term in the Referral was likely meant to draw on the UNCC's use of the term. The UNCC, however, never had occasion to define the term.

In the absence of relevant international law, we turned to domestic U.S. law for guidance. While the term "aggravated physical assault" is not found in domestic law, many U.S. jurisdictions do have a crime of "aggravated assault" (i.e., without the word

¹ 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 2010 U.S.-Iraq Claims Settlement Agreement, but that agreement contains nothing relevant on the question of what qualifies as an "aggravated physical assault." Therefore, pursuant to the ICSA, the Commission must turn to "the applicable principles of international law, justice and equity," starting with international law, to help determine what the term "aggravated physical assault" in the Referral means.

² The UNCC was created in 1991 as a subsidiary organ of the United Nations Security Council to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's 1990–1991 invasion and occupation of Kuwait.

“physical”). Although the term is not identical, the Commission looked to the concept of “aggravated assault” because “assault” itself normally implies a willful attempt or threat of physical force. Proposed Decision at 13-14. Accordingly, we assumed that an “aggravated assault” within the meaning of U.S. domestic law would almost always be an aggravated *physical* assault and then looked to the law defining the contours of “aggravated assault.” *Id.* We then noted that the precise meaning of “aggravated assault” varies from jurisdiction to jurisdiction in U.S. domestic law,³ but concluded that there was no need to choose among the variations because “under whatever definition we would choose, Claimant would need to show at least one of (1) actual serious bodily injury, (2) a substantial risk of death, (3) the actual use of a deadly weapon or (4) an attempt to cause bodily injury with a deadly weapon.” *Id.* at 15.

Under this standard, the Commission held that even if the evidence established the facts alleged in Claimant's declaration—*i.e.*, that an Iraqi security officer with his sidearm drawn grabbed Claimant by the throat with enough force to leave him gasping for air, and dragged him out of the courtyard by his neck—those facts do not describe an “aggravated physical assault” within the meaning of the Referral:

The only allegation in [Claimant's declaration] that might support a finding of an aggravated physical assault is Claimant's reference to the official having his “sidearm drawn.” That one reference, however, is insufficient to meet Claimant's burden: he has not alleged that the guard either (a) actually used the weapon or (b) attempted to use it in a way that would cause Claimant “bodily injury.” Thus, while it might theoretically be possible that a guard having his “sidearm drawn” could in certain circumstances support a claim for aggravated physical assault, Claimant has not met his burden to show facts to make out such a claim here.

Id. at 15-16.

³ Most tort and criminal law (including the law of assault) in the United States is state, not federal, law and can thus vary from state to state.

Claimant's objection assumes that the domestic law of "aggravated assault" applies here, and he argues that the Commission's conclusion "is based on a fundamental misapprehension" of that law. Claimant makes two arguments in support of his position, both of which challenge the Proposed Decision's understanding of what it means to "use" a weapon within the domestic "aggravated assault" jurisprudence. First, Claimant argues that under what he terms the "offensive touching" species of assault, known in the common law as battery, "the 'use' requirement is met in any case in which a deadly weapon is used in any manner that facilitates the commission of the underlying offense." As applied to the facts of his claim, Claimant states that the Iraqi officer's "open and flagrant display of his sidearm" constitutes a "use" of that sidearm so as to transform a "simple offensive touching-type assault into an aggravated one," because the display of the gun facilitated his choking (the "offensive touching") of Claimant. Second, Claimant argues that the Commission overlooked a different type of assault, one that he terms the offense of "instilling fear." According to Claimant, in an "instilling fear" claim, "the defendant acts to instill in his or her victim a fear of imminent bodily injury or death—an offense which, when committed with the use of a deadly weapon, is punishable as an aggravated assault." The exact term used to describe this form of crime varies from jurisdiction to jurisdiction: it is called "assault" in some jurisdictions, but can also be called "menacing," "threatening," "intimidation," or "terroristic threats." Claimant contends that he has established the "instilling fear" species of assault in this claim because "(1) the purpose and effect of the officer's conduct was to instill in [Claimant] a well-founded fear of imminent serious bodily injury or death, and (2) it involved the 'use' of a deadly weapon to create that fear."

We are not persuaded by Claimant's attempt to expand the definition of "aggravated physical assault," for purposes of the 2012 Referral, to include the outermost reaches of the concept of "aggravated assault" under U.S. criminal law. While the Proposed Decision did look to the definition of "aggravated assault" under domestic law in analyzing this claim, we do not believe that every "aggravated assault" under domestic law satisfies the Referral's definition of "aggravated physical assault." While we appreciate Claimant's helpful explanation of domestic law, it is ultimately the Referral's use of the phrase "aggravated physical assault" that we must interpret, not the domestic-law term "aggravated assault."⁴ Claimant has convinced us that in domestic law, "aggravated assault" need not necessarily involve any actual physical force, and threats themselves can suffice. However, an "aggravated assault" that lacks a certain level of physical force could not be what the State Department meant when it used the phrase "aggravated physical assault" in the Referral. To the extent that the domestic law of "aggravated assault" permits claims based on threats alone, it fails to account for the word "physical" in the term "aggravated physical assault."

In particular, in the context of this program, where the claimants were all hostages, the phrase "aggravated physical assault" cannot possibly encompass all situations in which an Iraqi official "instill[ed] fear" in a hostage through the "use" of a deadly weapon, even those involving an "offensive touching." All of the claimants in this program, including this Claimant, have already received compensation from the Department of State for all of the "physical, mental, and emotional injuries generally associated with" having been held hostage. Both the presence of a deadly weapon, such

⁴ See Proposed Decision at 11 ("Ultimately, we must determine what the 2012 Referral's use of the phrase 'aggravated physical assault' means.").

as a gun, and some form of touching would reasonably be generally associated with the act of holding a hostage. The presence of Iraqi officials with deadly weapons in post-invasion Kuwait and Iraq was ubiquitous. Under such circumstances, a standard requiring merely that a weapon be used to “instill fear” or facilitate “a simple offensive touching-type assault” would result in the finding of innumerable aggravated physical assaults.⁵ Such a result cannot be what the Department of State meant when it used the term “aggravated physical assault” in its referral letter to the Commission. In a program aimed at providing *additional* compensation for *some* claimants when all eligible claimants were hostages in a military dictatorship in a time of war and when Iraqi officials with deadly weapons were ubiquitous, a definition of “aggravated physical assault” based merely on “instilling fear” with a deadly weapon or “offensive touching” facilitated by a deadly weapon would sweep too broadly.

Such a broad definition of “aggravated physical assault” would also be more difficult to reconcile with the rest of the Referral’s language. The Referral lists four types of acts that may lead to a “serious personal injury,” and we have previously held that claims are compensable in this program only if Iraq committed one of those acts or an act of a “similar type or that rise[s] to a similar level of brutality or cruelty.” The four are sexual assault, coercive interrogation, mock execution, and aggravated physical assault. Using Claimant’s broad domestic-law meaning of “aggravated assault” would effectively render the reference to “mock execution” (and possibly the reference to “coercive interrogation”) superfluous: every mock execution and probably every coercive interrogation would surely be an aggravated physical assault under the “instilling fear”

⁵ See, e.g., Claim No. IRQ-I-016 Decision No. IRQ-I-016; Claim No. IRQ-I-020 Decision No. IRQ-I-024.

version of “aggravated assault.” They would just be particularly egregious “aggravated assaults.” While we do not hold that every “aggravated physical assault” needs to be precisely as cruel or inhumane as a mock execution or coercive interrogation, we think it highly unlikely that the State Department meant to include in the definition of “aggravated physical assault” every mock execution and coercive interrogation plus other “instilling fear” assaults that are significantly less severe, such as the assault in this claim.⁶ Although we do not view superfluity in the language of the Referral as dispositive here,⁷ we think it does provide one more indication of why we cannot ignore the word “physical” in the phrase “aggravated physical assault” and why, as we said in the Proposed Decision, an aggravated physical assault must be “so brutal that it either is intended to or actually does result in death, permanent disfigurement or significant damage to some body part or organ.” Proposed Decision at 17.

Therefore, having reconsidered the matter, we hold that to constitute an “aggravated physical assault” that could lead to a compensable “serious personal injury” in this program, the “physical” aspect of the assault must be aggravated. An “aggravated physical assault” must include a brutal physical contact, one that causes physical trauma.

For purposes of analyzing this claim, the Commission assumes the following facts: While Claimant was waiting with his colleagues in the border compound at the Iraqi-Jordanian border, an Iraqi officer looked at Claimant’s passport and then demanded that Claimant go with him. Claimant initially refused to go, but then began to comply. Just as he did, the officer grabbed Claimant by his neck and drew his weapon from its

⁶ See, e.g., *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669 (2007) (“caution[ing] against reading a text in a way that makes part of it redundant”).

⁷ See *United States v. Atlantic Research Corp.*, 551 U.S. 128, 137 (2007) (noting that “our hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs”).

holster. The officer then pulled Claimant forward and pushed him towards one of the compound's exits. During this time, the officer had his gun in his hand opposite Claimant; however, he neither touched Claimant with the gun nor pointed it directly at him. After leading Claimant along a dark street outside of the wall of the compound, the officer then led him back into the passport office where he demanded that some other Iraqi officials process Claimant's exit from the country. Claimant was then allowed to return to his colleagues and leave Iraq.

These facts do not make out an "aggravated physical assault" as the Referral uses that term. While Claimant no doubt suffered a terrifying experience during his harrowing escape from Iraq, including his experience at the border, the facts here do not satisfy the Referral's standard. First, the officer's brandishing of a weapon is not enough to make the incident an "aggravated physical assault." While the gun may have instilled fear in Claimant (or increased the fear he was already experiencing), it did not make Claimant's physical injuries any greater than they otherwise would have been. The gun did not, in other words, aggravate the physical aspects of Claimant's injuries in any way. Indeed Claimant does not claim to have been physically injured at all.

Second, the physical aspect of the assault Claimant suffered was not sufficiently aggravated to constitute an "aggravated physical assault" either. The only direct physical contact by the Iraqi official consisted of grabbing Claimant by the neck and briefly dragging him, and then pushing him towards the compound exit. At the oral hearing, Claimant's counsel was noncommittal on the question of whether the physical aspects of the encounter would suffice to make out even an "aggravated assault" under U.S.

domestic law.⁸ Even if they would, however, they are insufficient to constitute an “aggravated physical assault” in this program. As noted earlier, in order to satisfy the definition of “aggravated physical assault,” the facts must establish that the assault was physically brutal. Here, the officer’s brief grabbing of Claimant’s neck, along with the subsequent pushing of him to the compound exit and back to the passport control office was not sufficiently brutal to constitute an aggravated physical assault. Claimant does not allege that he suffered any physical injury to his neck or any other part of his body due to the officer’s assault. This fact alone suffices to show that the physical aspects of the officer’s assault were not aggravated.

Since Claimant did not therefore suffer an “aggravated physical assault” and the assault that he did suffer was not comparable in brutality or cruelty to any of the four acts listed in the Referral, any injuries he may have suffered from the incident do not constitute “serious personal injuries” within the meaning of that phrase in the 2012 Referral.⁹ For that reason, this claim must be denied.

⁸ Claimant’s counsel stated at the oral hearing that “...even though there might not be severe physical injury, [chocking,] at least in some jurisdictions... could be considered an aggravated battery or an aggravated assault; [however,] there are very few cases that actually address that.” While counsel stated that “there’s an argument definitely, that it would be a battery even absent the weapon” he did not make such an argument based on the facts of this claim either during the hearing or in his brief.

⁹ See Claim No. IRQ-I-005, Decision No. IRQ-I-001 (2014) (Final Decision), at 12.

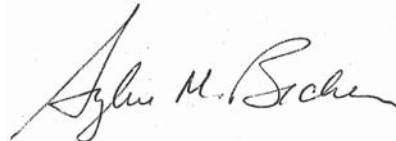
CONCLUSION

In sum, for the reasons discussed above and in the Proposed Decision, and based on the evidence and information submitted in this claim, the Commission concludes that the Claimant has not met his burden of proving that he has satisfied the requirement in the Referral that he have suffered a “serious personal injury.” Accordingly, the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed. This constitutes the Commission’s final determination in this claim.

Dated at Washington, DC, September 30, 2015
and entered as the Final Decision
of the Commission.



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

**FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20579**

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Republic of Iraq

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Claim No. IRQ-I-012

Decision No. IRQ-I-028

Counsel for Claimant:

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Law Offices of Daniel Wolf

PROPOSED DECISION

Claimant brings this claim against the Republic of Iraq (“Iraq”) based on injuries he suffered while being held hostage in Iraq in early August 1990. The United States Department of State has already provided him compensation for his experience as a hostage. He now seeks additional compensation based on a claim that Iraqi officials assaulted and threatened him at the Iraqi-Jordanian border as he left the country, and that this led to a variety of emotional injuries. Although we are sympathetic to all that Claimant endured as a result of his hostage experience, he has failed to show that Iraqi officials committed any act sufficiently cruel or brutal to entitle him to additional compensation beyond that which the State Department has already provided him. Therefore, the claim is denied.

BACKGROUND AND BASIS OF CLAIM

Claimant alleges that he was employed by Ernst & Young on a contract to provide financial consulting services for the Rasheed Bank in Baghdad, Iraq, when Iraq attacked Kuwait in August 1990. He claims that Iraq effectively held him hostage at his hotel for about one week before he managed to leave the country across the Iraqi-Jordanian border. This claim focuses on two allegations about his experience at that border crossing: (1) when an Iraqi soldier discharged an AK-47 a few feet from Claimant's head, and (2) when an Iraqi soldier grabbed Claimant by the neck and pulled him forward. Claimant's experiences and injuries are detailed in the Merits section below.

In 2001, Claimant sued Iraq in federal court for, among other things, hostage-taking. That case was pending when, in September 2010, the United States and Iraq concluded an *en bloc* (lump-sum) settlement agreement. *See Claims Settlement Agreement Between the Government of the United States of America and the Government of the Republic of Iraq*, Sept. 2, 2010, T.I.A.S. No. 11-522 ("Claims Settlement Agreement" or "Agreement"). The Agreement, which came into force in May 2011, covered a number of personal injury claims of U.S. nationals arising from acts of the former Iraqi regime occurring prior to October 7, 2004. Exercising its authority to distribute money from the settlement funds, the State Department provided compensation to numerous individuals whose claims were covered by the Agreement, including some, like Claimant, whom Iraq had taken hostage or unlawfully detained following Iraq's 1990 invasion of Kuwait. According to the State Department, this compensation "encompassed physical, mental, and emotional injuries generally associated with" being

held hostage or subject to unlawful detention.¹ Claimant states that the amount of the payment he received was based on a formula, consistently applied to all of the hostages, of \$150,000 plus \$5,000 per day of detention. For Claimant, this was \$185,000 total.

The State Department's Legal Adviser subsequently requested that the Commission commence a claims program for some of the hostages that it had already compensated. More specifically, the State Department authorized the Commission to award additional compensation to hostages who suffered a "serious personal injury," when that injury was "knowingly inflicted ... by Iraq" and the severity of that injury is a "special circumstance warranting additional compensation." The State Department made its request in a letter dated November 14, 2012 pursuant to its discretionary statutory authority. *See* 22 U.S.C. § 1623(a)(1)(C) (2012) (granting the Commission jurisdiction to "receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or of any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State"). The letter sets forth the category of claims as follows:

claims of U.S. nationals for compensation for serious personal injuries knowingly inflicted upon them by Iraq¹ in addition to amounts already recovered under the Claims Settlement Agreement for claims of hostage-taking² provided that (1) the claimant has already received compensation under the Claims Settlement Agreement from the Department of State³ for his or her claim of hostage-taking, and such compensation did not include economic loss based on a judgment against Iraq, and (2) the Commission determines that the severity of the serious personal injury suffered is a special circumstance warranting additional compensation. For the purposes of this referral, "serious personal injury" may include instances of serious physical, mental, or emotional injury arising from sexual assault, coercive interrogation, mock execution, or aggravated physical assault.

¹ A group of hostages, not including Claimant, received compensation for economic loss. The hostages that received compensation for economic loss are not before the Commission in this program.

¹ For purposes of this referral, “Iraq” shall mean the Republic of Iraq, the Government of the Republic of Iraq, any agency or instrumentality of the Republic of Iraq, and any official, employee or agent of the Republic of Iraq acting within the scope of his or her office, employment or agency.

² Hostage-taking, in this instance, would include unlawful detention by Iraq that resulted in an inability to leave Iraq or Kuwait after Iraq invaded Kuwait on August 2, 1990.

³ The payment already received by the claimant under the Claims Settlement Agreement compensated the claimant for his or her experience for the entire duration of the period in which the claimant was held hostage or was subject to unlawful detention and encompassed physical, mental, and emotional injuries generally associated with such captivity or detention.

See Letter dated November 14, 2012, from the Honorable Harold Hongju Koh, Legal Adviser, Department of State, to the Honorable Timothy J. Feighery, Chairman, Foreign Claims Settlement Commission (“2012 Referral” or “Referral”) at ¶ 3 & nn.1-3 (footnotes in original). The Commission then commenced the Iraq Claims Program to decide claims under the 2012 Referral. Commencement of Iraq Claims Adjudication Program, 78 Fed. Reg. 18,365 (Mar. 26, 2013).

Claimant submitted a timely Statement of Claim under the 2012 Referral, along with exhibits supporting the elements of his claim, including evidence of his U.S. nationality, his receipt of compensation from the Department of State for his claim of hostage-taking, and the severity of his alleged personal injuries.

DISCUSSION

Jurisdiction

The 2012 Referral's statement of the category of claims defines the Commission's jurisdiction. *See* 22 U.S.C. § 1623(a)(1)(C). Thus, the Commission has jurisdiction to entertain only claims of individuals who (1) are U.S. nationals and (2) "already received compensation under the Claims Settlement Agreement from the Department of State¹ for [their] claim of hostage-taking," where "such compensation did not include economic loss based on a judgment against Iraq[.]" 2012 Referral, *supra*, ¶ 3. Claimant satisfies both requirements, and the Commission thus has jurisdiction over this claim.

Nationality

This claims program is limited to "claims of U.S. nationals." Here, that means that a claimant must have been a national of the United States at the time the claim arose and continuously thereafter until May 22, 2011, the date the Agreement entered into force. Claim No. IRQ-I-005, Decision No. IRQ-I-001, at 5-6 (2014) (Proposed Decision). Claimant satisfies the nationality requirement. He has provided a copy of two U.S. passports: one from the time of the hostage taking (valid from April 18, 1986 to April 17, 1996) and his current one (valid from August 16, 2005 to August 15, 2015).

Compensation from the Department of State

The second requirement for jurisdiction under the 2012 Referral is that the claimant must have already received compensation under the Claims Settlement Agreement from the Department of State for his or her claim of hostage-taking, and that compensation must not have included economic loss based on a judgment against Iraq.

In support of this aspect of his claim, Claimant has submitted a copy of a Release he signed on August 20, 2011, indicating that he would accept a given sum from the Department of State in settlement of his claim against Iraq. He has also submitted a copy of an electronic notification from the Department of State that they submitted his claim for payment to the Department of Treasury on December 28, 2011. Claimant further stated under oath in his Statement of Claim, and the Commission has confirmed to its satisfaction, that this compensation did not include economic loss based on a judgment against Iraq. The Claimant has therefore satisfied this element of his claim.

In summary therefore, the Commission has jurisdiction over this claim under the 2012 Referral.

Merits

The 2012 Referral requires a claimant to satisfy three conditions to succeed on the merits of his or her claim. Claim No. IRQ-I-005, Decision No. IRQ-I-001 (2014) at 7-8 (Proposed Decision). First, the claimant must have suffered a “serious personal injury,” which may be “physical, mental, or emotional.” In order to satisfy this standard, the 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 comparable in seriousness to one of those four acts—that is, an act of a similar type or that rises to a similar level of brutality or cruelty as the four enumerated acts. *Id.* at 7.

The second requirement is that Iraq must have “knowingly inflicted” the injury. Thus, even where a claimant suffered a serious personal injury that satisfies the other

requirements in the 2012 Referral, it must be proven that Iraq knowingly inflicted the injury.²

The third requirement is that the Commission determine that the severity of the serious personal injury suffered constitutes a “special circumstance warranting additional compensation.” In making this determination, the Commission will consider the nature and extent of the injury itself (including the specific acts committed by Iraq giving rise to such injury), the extent to which the injury substantially limits one or more of the claimant’s major life activities (both in the immediate aftermath of the injury and on a long-term basis), and/or the extent to which there is permanent scarring or disfigurement that resulted from the injury. *Id.* at 8.

Here, Claimant’s primary allegations of “serious personal injuries” stem from two incidents occurring on August 8, 1990, while he was preparing to leave the country at an Iraqi border station near the Jordanian border: (1) in a courtyard outside an immigration office, an Iraqi soldier discharged an AK-47 a few feet from Claimant’s head, thereby leading Claimant to believe the Iraqi soldier might kill him; and (2) after Claimant entered the office and provided his passport, an Iraqi soldier grabbed Claimant by the neck and pulled him forward, causing him to gasp for air.³

Claimant has not proven that he suffered a “serious personal injury” within the meaning of the Referral. Although he no doubt suffered as a result of his hostage

² “Iraq” is defined in footnote 1 of the Referral.

³ In support of his claim, Claimant has provided, *inter alia*, his own declaration prepared for this proceeding, dated June 24, 2013; what appear to be two contemporaneous newspaper articles and one contemporaneous magazine article that report on Claimant’s hostage experience; several letters from medical professionals who state that they treated Claimant at various times, including a letter from Arnold W. Mech, M.D., dated February 12, 2003, a letter from John A. Jacobs, Ph.D., P.C., dated January 13, 2003, a letter from Todd M. Wien, M.D., dated January 6, 2003, and a letter from Carl Young, M.D., dated December 17, 2010. None of these letters are sworn declarations, nor has Claimant provided a *curriculum vitae* or any other professional information about these individuals.

experience, he cannot recover under this program because he has not established that his injuries arose from “sexual assault, coercive interrogation, mock execution, or aggravated physical assault” or any other discrete act, distinct from the hostage-taking itself, comparable in brutality or cruelty. We thus need not address the question of whether Iraq “knowingly inflicted” such an injury on him or whether the severity of his injuries constitutes a “special circumstance warranting additional compensation.”

Baghdad: Claimant states that, on August 2, 1990, the day Iraq invaded Kuwait, he was employed by Ernst & Young on a contract to provide financial consulting services for the Rasheed Bank in Baghdad, Iraq. That morning, Iraqi officials allegedly instructed him and his colleagues not to leave the grounds of the hotel where they were staying. Over the next several days, Claimant remained at the hotel “except when shuttled back and forth under Iraqi guard to the U.S. embassy, where [he and his colleagues were] debriefed on the situation” On August 6, 1990, someone claiming to be a U.S. Embassy official telephoned him and advised him “to get out of Iraq by any means that might be available.”

Travel from Bagdad to the Jordanian Border: So, two days later, on August 8, 1990, Claimant and his colleagues hired drivers to take them from Baghdad to the Jordanian border. On the six-hour trip to the border, Claimant felt “heightened tension and fear, knowing that [he] could be stopped by Iraqi authorities at any time, in which case [he] would be at grave risk of imprisonment, execution or some other terrifying fate.” When he arrived at the border, Iraqi border guards led him to a courtyard where a major speech by Saddam Hussein announcing the annexation of Kuwait could be heard over the loudspeakers. During the speech, Claimant states that he

walked inside the main building to find out what [he] needed to do to get [his] exit permission, but no one was receiving passports or processing papers [T]hen, all of a sudden, [he] heard the sound of machine gun fire just outside the building. [He] went outside to see what was happening—walking into a scene of complete pandemonium. The Iraqi soldiers were all firing their weapons spraying bullets in every direction and creating panic and disorder among the crowd of foreign nationals in the courtyard.

Claimant further states that one soldier facing him “discharged his AK 47 just a few feet from [Claimant’s] head.” Claimant continues: “It would have taken all of a split second for him to lower his weapon on me.... [H]e gave me an angry glare, which told me that he would kill me on the spot if I made a wrong move....” According to Claimant, “after several minutes, the gunfire mercifully came to an end, whereupon [Claimant] went inside the immigration office, presented [his] passport and waited for the Iraqi border authorities to give [him] permission to depart the country.”

Physical Assault and Departure from Iraq: Claimant asserts that, after he entered the immigration office, an Iraqi secret police officer requested to see his passport, instructed Claimant to follow him, and then, as they walked away, “turned toward [Claimant] suddenly with his sidearm drawn, grabbed [Claimant] by the neck and pulled [him] forward - causing [him] to gasp for air and [his] feet to drag beneath [him].” The officer “then took [his] passport and shoved it under a window.” Claimant states that his passport was returned a few minutes later, at which point he was allowed to return to the courtyard. He was then allowed to cross the border to Jordan a short while later. Claimant notes that he learned later that he had been singled out because, “as the only ‘Iraqi resident’ in [his] group, [his] exit stamp had to be stamped right on the residency permit in order to effectuate its cancellation, rather than elsewhere on the page, where it had been mistakenly stamped.”

Injuries Alleged: Claimant does not claim to have suffered any physical injuries; his sole claim of injury is that this “terrifying ordeal at the Iraqi/Jordanian border caused [him] severe and permanent psychological damage.” Claimant asserts that, upon his return to the United States, he was “preoccupied by [his] ordeal and unable to maintain concentration,” and that he was “mired in depression” and “trapped in ... a state of lethargy.” This, he says, led to periods of unemployment totaling seven months in 1991 and 1992. Claimant states that he was subsequently diagnosed by a psychiatrist, Arnold W. Mech, M.D., “as being afflicted with Post-traumatic Stress Disorder; Major Depressive Disorder Single Episode, Severe; Insomnia Sleep Disorder; and Organic Mood Disorder.” In his February 12, 2003 letter, Dr. Mech states that Claimant’s diagnosed injuries (except for the Organic Mood Disorder) “are a direct result of [Claimant’s] experience in Iraq” and that Claimant “is likely to suffer bouts of anxiety, depression and insomnia the rest of his life.” Similarly, Dr. Jacobs, a clinical psychologist who treated Claimant in 1996 and intermittently thereafter, opines in his January 13, 2003 letter that Claimant “will suffer persistent bouts of anxiety and depression and be in need of psychological and psychopharmacological assistance for the rest of his life.” Dr. Wien, a physician who treated Claimant for approximately nine years, asserts in his January 6, 2003 letter that Claimant “definitely suffers from post-traumatic stress disorder with chronic insomnia and periods of depression and anxiety, which I think are all related to his being held hostage and human shield in Iraq.” Finally, Dr. Young, a psychiatrist who has treated Claimant since 2009, opines that Claimant “will never be entirely free of some kind of anxiety management medication as the

effects of his trauma were simply far greater than initially diagnosed and not treated as quickly as they should have been following the events in August 1990.”

Claimant argues that the injuries he allegedly received from the two incidents at the Jordanian border qualify as “serious personal injuries” and are severe enough to constitute a “special circumstance warranting additional compensation” beyond that already provided by the State Department. In pointing to these incidents, he seeks to draw on the Referral’s inclusion of “aggravated physical assault” and “mock execution” in its list of acts that could cause a “serious personal injury.”

Analysis of Physical Assault: Claimant does not provide any legal authority for his contention that he was the victim of an “aggravated physical assault,” and our independent research has not uncovered any definition of the term that would lead us to conclude that the facts he has established about the incident at the Jordanian border constituted an “aggravated physical assault.”

Ultimately, we must determine what the 2012 Referral’s use of the phrase “aggravated physical assault” means. To do that, we must look first to international law. *See* 22 U.S.C. Sect. 1623(a)(2)(B). The problem is that assaults, at least in and of themselves, are not normally the subject of international criminal law. *See* ICC Statute Arts. 5-8; ICTY Statute Arts. 2-5; ICTR Statute Arts. 2-4; *see also* ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 81-183 (2d ed. 2008) (laying out and detailing the full array of crimes subject to international law with no mention of assaults, whether aggravated or otherwise). The term “aggravated physical assault” did appear, however, in United Nations Compensation Commission (“UNCC”) decisions arising out of claims from Iraq’s occupation of Kuwait, claims arising from the same circumstances as claims

in this program. The UNCC awarded compensation for “serious personal injuries,” and the Governing Council of the UNCC defined that phrase to include “instances of physical or mental injury arising from sexual assault, torture, *aggravated physical assault*, hostage-taking or illegal detention for more than three days or being forced to hide for more than three days on account of manifestly well-founded fear for one’s life or of being taken hostage or illegally detained.”⁴ The UNCC did not, however, define the phrase “aggravated physical assault.” Thus, while it seems plausible to think the State Department’s reference to “aggravated physical assault” in the 2012 Referral is drawn from and evokes the UNCC’s use of the same phrase, *cf.* Claim No. IRQ-I-005, Dec. No. IRQ-I-001, at 8-9 (noting similarities between the Referral’s language and that found in this decision of the UNCC’s Governing Council), the UNCC’s use of the phrase is not of direct help to us here.

Given the lack of any definition of “aggravated physical assault” in international law, the Commission must look to other sources for guidance. Ordinarily, in circumstances in which there is no international-law jurisprudence on a legal question, international law would require us to draw on “the general principles of law recognized by civilized nations.” *See* Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 1060; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1)(c) (“A rule of international law is one that has been accepted as such by the international community of states ... by derivation from general principles common to the major legal systems of the world.”); *id.* § 102(4) (“General principles common to the

⁴ UNCC Governing Council Decision 3, *Decision Taken by the Governing Council of the United Nations Compensation Commission During its Second Session, at the 15th Meeting, Held on 18 October 1991*, S/AC.26/1991/3, at 2 (Oct. 23, 1991) (emphasis added).

major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate”). This, in turn, would require us to look “to rules generally accepted by municipal systems ... and not to the municipal law of a particular state.” *Case Concerning Barcelona Traction, Light and Power Company, Ltd.*, Judgment (Belgium v. Spain), 1970 I.C.J. 3, 37 ¶50 (Feb. 5). This would then require us to “canvass all of the world’s great legal systems,” including “common law, ... civil law, ... significant religious legal cultures (including Islamic law), and ideological legal systems (including socialist law as practiced in China and elsewhere.” DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 14 (2d ed. 2006); *see generally* In re Subrogated Interests to Pan American World Airways, Inc., Claim No. LIB-II-171, Dec. No. LIB-II-161, at 28-30 (Proposed Decision) (2012).

Since Claimant has not provided us with any legal support for his argument and given that we have no reason to think the concept of “aggravated physical assault” would be treated differently in different countries—at least, in any way relevant to Claimant’s argument—we decline to canvass the world’s legal systems to adjudicate this claim. Rather, as we have in previous programs when international law is silent, we will look to United States law.⁵

Although United States law does not normally use the term “aggravated physical assault,” many jurisdictions in the United States do have a crime of “aggravated assault” (i.e., without the word “physical”). Given that “assault” itself normally implies a willful

⁵ *See, e.g., Claim of ROBERT B. MCCORMICK*, Claim No. IR-2091, Decision No. IR-0644 (1994) (citing the Restatement (Second) of Contracts); and *Claim of LOCKWOOD GREENE INTERNATIONAL, INC.*, Claim No. IR-2724, Decision No. IR-1210 (1993) (citing a treatise on U.S. construction law and an Eighth Circuit decision).

attempt or threat of *physical* force, it makes sense to use definitions of the phrase “aggravated assault” here, since an “aggravated assault” will almost always be an aggravated *physical* assault.

Under the law of most jurisdictions in the United States, an assault that qualifies as an “aggravated assault” usually requires greater severity than a simple assault, usually something such as serious bodily injury, a substantial risk of death or the use of a deadly weapon. Black’s Law Dictionary defines “aggravated assault” as “[c]riminal assault accompanied by circumstances that make it more severe, such as the intent to commit another crime or the intent to cause serious bodily injury, esp. by using a deadly weapon.” BLACK’S LAW DICTIONARY 137 (10th ed. 2013) (citing Model Penal Code Sect. 211.1(2)). “Serious bodily injury” is in turn defined as “serious physical impairment of the human body; esp., bodily injury that creates a substantial risk of death or that causes serious, permanent disfigurement or protracted loss or impairment of the function of any body part or organ.” *Id.* at 906-07 (citing Model Penal Code § 210.0(3)). The Model Penal Code defines “aggravated assault” in similar terms: a person is guilty of aggravated assault if he or she “(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.” Model Penal Code §211.1(2) (2001). Numerous states have adopted some variation of the Model Penal Code definition. *See, e.g.*, Texas Penal Code Ann. § 22.02 (West 2014); D.C. Code § 22-404.01 (LexisNexis 2014); 18 Pa. Cons. Stat. Ann. § 2702 (2014).

Although definitions of “aggravated assault” differ slightly from jurisdiction to jurisdiction, we need not choose a precise definition of “aggravated physical assault” to decide this claim: under whatever definition we would choose, Claimant would need to show at least one of (1) actual serious bodily injury, (2) a substantial risk of death, (3) the actual use of a deadly weapon or (4) an attempt to cause bodily injury with a deadly weapon. And the burden to do so would be his. *See* 45 C.F.R. § 509.5(b) (2013) (“The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.”).

The evidence Claimant has submitted is insufficient to establish that the alleged assault in the immigration office is an aggravated physical assault. Claimant’s only evidence about the alleged assault is his own declaration, and his description of the incident consists of one sentence, “As we walked away, he turned toward me suddenly with his sidearm drawn, grabbed me by the neck and pulled me forward — causing me to gasp for air and my feet to drag beneath me.” The bulk of his description of the incident is that he was “grabbed ... by the neck and pulled ... forward - causing [him] to gasp for air and [his] feet to drag beneath [him].” This does not constitute an “aggravated physical assault” within the meaning of the Referral. There is no indication that the act of the Iraqi official “create[d] a substantial risk of death or ... cause[d] serious, permanent disfigurement or protracted loss or impairment of the function of any body part or organ.” The only allegation in that one sentence that might support a finding of an aggravated physical assault is Claimant’s reference to the official having his “sidearm drawn.” That one reference, however, is insufficient to meet Claimant’s burden: he has

not alleged that the guard either (a) actually used the weapon or (b) attempted to use it in a way that would cause Claimant “bodily injury.” Thus, while it might theoretically be possible that a guard having his “sidearm drawn” could in certain circumstances support a claim for aggravated physical assault, Claimant has not met his burden to show facts to make out such a claim here.

Analysis of Courtyard Incident: Any injuries Claimant may have suffered due to the courtyard shooting incident similarly fail to qualify as “serious personal injuries” within the meaning of the 2012 Referral. In particular, even assuming the facts Claimant alleges to be true, the incident does not constitute a “mock execution.” The phrase “mock execution” for purposes of the 2012 Referral means “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.” Claim No. IRQ-I-024, Decision No. IRQ-I-012, at 13 (2014) (Proposed Decision). Here, Claimant states that “[he] heard the sound of machine gun fire just outside the building[,] ... went outside to see what was happening [and] walk[ed] into a scene of complete pandemonium.” Claimant says that he voluntarily left the building and entered the “pandemonium” of the courtyard. Further, according to Claimant, the soldier who “discharged his AK 47 just a few feet from [Claimant’s] head” did not seek Claimant out in any way; rather, it appears from Claimant’s statement that Claimant walked up to the soldier on his own accord. While that soldier may have given Claimant “an angry glare, which told [him] that he would kill [him] on the spot if [he] made a wrong move,” there is no indication that the soldier took any other concrete step or steps to act out an execution. While we have no reason to

doubt that Claimant was terrified, the facts here simply do not make out a claim of “mock execution” as international and domestic authorities have understood that term.

Further, neither of the incidents occurring at the Jordanian border constitutes an “act of a similar type or that rises to a similar level of brutality or cruelty” as an “aggravated physical assault” or a “mock execution,” or any of the other acts the Referral lists as examples of acts that can cause a “serious personal injury.” Each of the four acts enumerated in the 2012 Referral “evokes an extremely high level of brutality and culpability.” Claim No. IRQ-I-005, Decision No. IRQ-I-001 (2014) (Final Decision), at 6. An aggravated physical assault is an act so brutal that it either is intended to or actually does result in death, permanent disfigurement or significant damage to some body part or organ. Claimant has not alleged any physical injuries associated with the assault he allegedly suffered, let alone injuries comparable to the degree envisioned in cases of aggravated assault. Further, the act of dragging Claimant in the manner described would not carry with it the substantial risk of such injuries occurring. What makes a mock execution so cruel and brutal is the commission of acts that make the victim believe his or her death is *imminent*. Here, however, Claimant alleges only that the Iraqi soldier looked at him with “an angry glare.” Unlike a mock execution or similar act, Claimant could not have reasonably believed that his death was imminent in the sense we mean “imminent”: although he asserts that the soldier could have “lower[ed] his weapon on [him],” the soldier did not even do that. Nor did he commit any other act indicating that Claimant’s execution was imminent. Therefore, even if one could identify

injuries specifically attributable to these incidents, they would not constitute “serious personal injuries” under the 2012 Referral.⁶

Apart from the two incidents at the Jordanian border, Claimant points to no other discrete or specific act or acts that Iraq committed to cause his emotional injuries. Claimant contends, however, that injuries that arose solely from the hostage experience itself can warrant compensation through this program as long as those injuries are “substantially more severe than those suffered by the large majority of others who were subjected to Iraq’s hostage-taking policy”

Commission precedent requires us to reject this argument. As noted above, the phrase “serious personal injury” in the Referral means injuries arising from one of the Referral’s four enumerated acts or some other act of a similar type or a similar level of brutality or cruelty. *See* Claim No. IRQ-I-005, Decision No. IRQ-I-001 (2014); *see*

⁶ Although we make no factual findings about what happened at the Jordanian border, the only contemporaneous sources we have—two newspaper articles and a short magazine article—raise questions about Claimant’s description of the events there. One article, entitled “New Hill Man Recalls His Escape From Iraqi Capital” (undated but presumably soon after his release in 1990), discusses the firing of weapons that Claimant describes in his 2013 Declaration. That article quotes Claimant as stating that, while “peering out from the edge of the building, he could see that a couple of young soldiers with rifles were randomly shooting over the crowd, ‘blowing off steam’ after Saddam’s speech” Another article submitted by Claimant, entitled “N.C. Man Escapes In Cab, Group Bounces Across Iraqi Desert” (also undated but also presumably soon after his release), quotes a colleague as describing the shooting as “more like celebration stuff. . . . We were just a little scared at that point.” The magazine article, entitled “Between Iraq and a hard place,” has only one reference to the event, and it states simply, “At one point, machine-gun fire from trigger-happy soldiers gave [Claimant] a start, until he realized they were reacting to an inspirational speech by Saddam Hussein.”

Similarly, with regard to the incident in the immigration office, the first article reports Claimant as stating that the Iraqi official looked at his passport, told him that “it wasn’t stamped,” and “placed it in his pocket and walked away.” There is no indication in the article of Claimant having been assaulted during this incident. Instead, Claimant reportedly stated that it was “only through the intervention of a second official that [he] was able to find the man who took his papers and get them back.” The second news article, which describes his escape in considerable detail, similarly fails to mention any assault on Claimant. Rather, it reported that, “[a]fter four hours of hassles, the border guards cleared the Americans.” The magazine article also describes the taking of Claimant’s passport, but also does so without any reference to an assault: “Even more horrifying for [Claimant] was when an official disappeared with his passport. ‘My heart was in my throat. I will never ever forget that feeling of sickness.’ Finally, though, his passport was returned, and the border guards cleared them for departure”

supra at 6-7. Because Claimant alleges no other act beyond those at the Jordanian border, his claim must be denied.

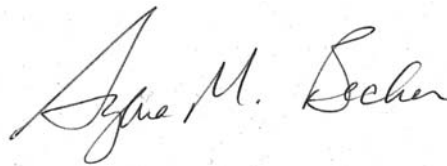
In sum, after carefully considering all of Claimant's evidence, the Commission concludes that the injuries alleged by Claimant do not constitute "serious personal injuries" within the meaning of the 2012 Referral. Although we sympathize with all that Claimant has experienced both during and since his captivity in Iraq, the terms of the 2012 Referral constrain the Commission to interpret the phrase "serious personal injury" in such a way that Claimant's injuries do not satisfy the Referral's meaning of that phrase.

Accordingly, this claim must be and is hereby denied.

Dated at Washington, DC, August 14, 2014
and entered as the Proposed Decision
of the Commission.



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days of delivery of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after delivery, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2013).