

## THE ARBITRARY DETENTION OF IMMIGRANTS AFTER SEPTEMBER 11

By: Omar C. Jadwat\*

### Introduction

On January 27, 2004, the ACLU delivered a petition<sup>1</sup> to the United Nations Working Group on Arbitrary Detention in Geneva on behalf of thirteen men. The petitioners, all Muslims from South Asia or the Middle East, were arrested and detained by the United States government following the September 11, 2001 terrorist attacks. More than two years after the attacks, three of the men were still incarcerated in immigration detention facilities; the rest had been deported from the United States. None was ever charged with having any connection to the attacks or to any other terrorist activity.

The petition, drafted by lawyers from the ACLU and Debevoise & Plimpton, asks the Working Group to rule that the United States government's treatment of these men violated international standards. The facts and circumstances of each petitioner's case are described in detail, but the petition also makes clear that the policies and practices it addresses were widespread. Hundreds of Muslim immigrants were subjected to these policies and practices in the months following September 11, 2001. Their families and communities continue to feel the consequences. The Working Group now has the opportunity to provide a measure of justice to those who were harmed.

## The United Nations Working Group on Arbitrary Detention

The United Nations Working Group on Arbitrary Detention is a unique entity in the international legal system. Established by the United Nations Commission on Human Rights in 1991, it consists of five independent experts appointed by the Commissioner of Human Rights. The Working Group is mandated to consider complaints from individuals anywhere in the world.<sup>2</sup> The experts—judges and other legal professionals—meet three times a year for sessions lasting from five to eight days each. After considering a complaint and the response (if any) of the government involved, the Working Group ordinarily rules on whether the detention is arbitrary and issues a written opinion; however, the body reserves the right not to rule in certain circumstances.

The petition raises claims under Category II and Category III of the Working Group's mandate.<sup>3</sup> In Category II, "the deprivation of liberty results from the exercise of [certain fundamental] rights and freedoms," including the right to equal treatment under the law guaranteed by Article 26 of the International Covenant on Civil and Political Rights ("ICCPR").<sup>4</sup> In Category III, "the total or partial nonobservance of the international norms relating to the right of a fair trial ... is of such gravity as to give the deprivation of liberty an arbitrary character."

### Category II Claims

With respect to Category II, the petitioners argue that their post-September 11 detentions were arbitrary because arrests were indiscriminate and haphazard and disproportionately affected Muslim men from South Asian and Middle Eastern countries. International precedent establishes that a state may violate ICCPR Article 26 even by actions that are not discriminatory in intent, if the actions have a disparate impact on individuals of

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a particular race, religion, or national origin and the differential treatment is not objective and reasonable.<sup>5</sup>

The petition sets out evidence clearly showing that the United States government's arrest and detention policies had a disproportionate impact and lacked any objective or reasonable basis. One source of this evidence is the United States government itself. In June 2003, the Justice Department's Inspector General issued a report confirming many of the allegations that detainees and advocates had previously voiced.<sup>6</sup> Of particular relevance to the petitioners' disparate impact claim, the Inspector General's report confirms that the detainees were "almost exclusively" men and that the vast majority of them came from South Asia and the Middle East.<sup>7</sup> As to the basis for the arrests, the report admitted that many detainees were "arrested more by virtue of chance encounters or tenuous connections to a [possible terrorism] lead rather than by any genuine indications of a possible connection with or possession of information about terrorist activity"; that the government "made little attempt to distinguish between aliens arrested as subjects of a . . . lead and those encountered coincidentally"; and that the classification of detainees as "of interest" to the terrorism investigation was "indiscriminate and haphazard" and "in many cases weak."<sup>8</sup>

The petitioners' own stories further illustrate the lack of objective or reasonable bases for their arrests. Petitioner Sadek Awaed met voluntarily with the FBI approximately five times in an effort to assist them in their investigation. He was subsequently stopped by local police for a traffic violation and turned over by them to the INS, which detained him. Petitioner Sarwar Yamen was arrested and detained in the course of what appeared to be a general raid of Afghan homes. Petitioner Khaled Albitar was detained after the FBI came to his home looking for someone else. Petitioner Ansar Mahmood was initially arrested because he asked a security guard to take a photograph

of him in a scenic area that happened to overlook a water treatment facility.

Moreover, the petitioners' accounts include evidence of *intentional* discrimination, in line with observations in some non-governmental reports.<sup>9</sup> For example, Sadek Awaed was asked by a police officer whether he was Middle Eastern. When he answered in the affirmative, the officer responded: "Got you, motherfucker." It was only at this point that the officer contacted the INS and Mr. Awaed was taken into federal custody. Other Petitioners had similar experiences. When Mohamed Elzaher asked his arresting officer why his treatment as an immigrant would differ after September 11 since he had nothing to do with the terrorist attacks, the arresting officer responded, "because you're a fucking Muslim."

### Category III Claims

The petition alleges a number of serious violations of international due process standards, again drawing on the petitioners' individual stories, the government's own admissions, and reports from non-governmental organizations for substantiation. Briefly, the violations alleged include:

- Failing to promptly inform detainees of the charges against them;
- Failing to promptly bring detainees before a judicial authority;
- Categorically denying detainees release on bond;
- Subjecting detainees to investigative detention without judicial oversight; and
- Denying detainees access to legal counsel.

Many of these violations relate to the United States government's "hold until cleared" policy, under which individuals

were detained under the authority of the immigration laws until the FBI affirmatively cleared them of connections to terrorism. Leaving aside, for the purposes of the petition, the question of whether this ad hoc and unfettered preventive detention scheme has any validity under United States law, the petitioners identified specific provisions in the ICCPR and the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (adopted by the General Assembly in 1988 through Resolution 43/173) that these practices contravene.

### **Progress of the Petition**

In May 2004, the Working Group acknowledged receipt of the petition and informed the petitioners that it had transmitted the cases of the three petitioners then in detention to the United States for its response. The State Department provided an incomplete and inaccurate response to the Working Group in September. The petitioners filed a reply shortly thereafter. The petition remains pending before the Working Group.

### **Coordinated Reporting**

At the same time that the petition was filed, the ACLU issued a report titled “America’s Disappeared: Seeking International Justice for Immigrants Detained After September 11.”<sup>10</sup> The report introduced the petition and provided personal profiles of nine of the petitioners. While the petition itself focused on the facts directly relevant to the legal claims presented, the profiles in the report provided more textured descriptions of the men and what they had been through. It also provided a glimpse of the hardships that deportation visited on many of the petitioners and their families.

“America’s Disappeared” also explained the role of the petition in an array of ACLU responses to the post-September 11

roundup, including domestic litigation, advocacy with the United States government and consulates of other nations, visits to detention facilities, and cooperative work with the Human Rights Commission of Pakistan to locate and visit individuals who had been deported.

In conjunction with International Human Rights Day on December 10, the ACLU is releasing a second report titled “Worlds Apart: How Deporting Immigrants After September 11 Tore Families Apart and Shattered Communities.”<sup>11</sup> This report provides further context for the petition by examining the effect of the United States government’s post-September 11 policies and practices on the families and communities of those arrested and deported. The ACLU and the Open Society Institute are also jointly sponsoring a roundtable discussion about the devastating secondary effects of post-9/11 human rights abuses on immigrant families and communities.

### **Conclusion**

We await the Working Group’s eventual ruling on the petition. A declaration from this international body that the United States violated international standards will provide the petitioners, and others similarly affected, with some closure. Even in the absence of a ruling, however, the petition and its related reports provide those who were wrongfully detained and deported with an opportunity to tell their stories. They also remind the United States government that advocates will not hesitate to subject its actions to scrutiny by international bodies and to measure those actions by international norms.

### **Endnotes**

<sup>1</sup><http://www.aclu.org/files/openfile.cfm?id=14801>

<sup>2</sup> See Working Group on Arbitrary Detention, Fact Sheet No. 26, Section III.

<sup>3</sup> *Id.*, Annex IV.

<sup>4</sup> Opened for signature Dec. 16, 196, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). The United States is a party to the ICCPR.

<sup>5</sup> See United Nations Human Rights Committee, General Comment 18, ¶ 7; *Vries v. The Netherlands*, Human Rights Committee, Communication No. 182/1984 (Apr. 9, 1997), ¶ 12.3 (1987); Human Rights Committee, Comments on Peru, UN Doc. CCPR/C/79/Add.67 (1996), ¶ 13 (differential treatment must be objective and reasonable).

<sup>6</sup> United States Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*.

<sup>7</sup> *Id.* at 20-21.

<sup>8</sup> *Id.* at 41-42, 69, 70.

<sup>9</sup> See, e.g., Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* (Aug. 2002) (“where Muslim men from certain countries were involved, law enforcement agents presumed some sort of a connection with or knowledge of terrorism until investigations could subsequently prove otherwise”).

<sup>10</sup> <http://www.aclu.org/files/openfile.cfm?id=14799>

<sup>11</sup> <http://www.aclu.org/files/openfile.cfm?id=17159>