

**TO THE HONORABLE MEMBERS OF THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,
ORGANIZATION OF AMERICAN STATES**

**REQUEST BY THE INTERNATIONAL HUMAN RIGHTS LAW GROUP, THE
CENTER FOR CONSTITUTIONAL RIGHTS, AND THE CENTER FOR JUSTICE AND
INTERNATIONAL LAW FOR PRECAUTIONARY MEASURES UNDER ARTICLE 25
OF THE COMMISSION'S REGULATIONS**

By the undersigned, appearing as counsel for petitioners under the provisions of Article 23 of the Commission's Regulations:

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I. INTRODUCTION

Petitioners seek the urgent intervention of this Commission to prevent continued unlawful acts that threaten the rights to liberty and personal security of the dozens of Muslim men of Arab and South Asian origin in the custody of the Immigration and Naturalization Service (INS). These individuals have been detained as part of the investigation following the September 11 terrorist attacks and have either been ordered deported or have agreed to voluntary departure. Despite being willing and able to be deported or voluntarily leave the country, the individuals continue to be detained, without substantive charge or probable cause, beyond the period necessary to secure their removal from the United States. Upon information and belief, the sole reason these individuals remain in detention is because the United States requires that they be “cleared” of any connection to terrorism prior to departure and release.

The United States has in place, through the Immigration and Naturalization Act (INA) and other federal regulations, provisions that govern the entry, status, and removal of non-U.S. nationals, and the INS is charged with enforcing these provisions. The INS is bound, just as any other U.S. law enforcement agency, to afford anyone it detains the due process of law guaranteed by the U.S. constitution and fundamental principles of international human rights law. The continued detention of these individuals is inconsistent with U.S. law and violates international human rights law.

Accordingly, Petitioners are requesting Precautionary Measures to protect the detainees’ rights to be free from arbitrary or prolonged detention and to protect other fundamental human rights, including the right to equality before the law, the right to protection of personal integrity and family life, and the right to due process guarantees, such as recognition of juridical

personality and access to court proceedings. These rights are protected pursuant to Articles I, II, V, XVII, XVIII, XXV, and XXVI of the American Declaration on the Rights and Duties of Man (ADRDM).

II. STATEMENT OF FACTS

In the weeks and months following the September 11, 2001 terrorist attacks on the United States, more than 1,200 non-U.S. nationals were taken into custody in the United States in nationwide sweeps for possible terrorists.¹ Almost all the individuals detained were Muslims of Arab or South Asian origin, or were believed to be such. The vast majority of these individuals were held, or are presently being held, by the INS for protracted periods of time solely on immigration violations (9 /11 INS detainees). Although the exact number of these detainees is currently unknown, as of June 2001, the Justice Department reported 74 individuals were still being held on immigration-related charges and are in custody of the INS.² Most of the 9/11 INS detainees have been held for minor immigration violations such as overstaying their visas or working in the United States without authorization. These violations are civil offenses which, if prosecuted at all prior to September 11, would only have merited release on bail pending U.S. immigration court appearances that may have resulted in removal to the individual's country of origin. Post-September 11, the 9/11 INS detainees have been routinely denied bail and have been subjected to prolonged detention pending immigration proceeding.

¹ Amnesty International, USA: Amnesty International's concerns regarding post September 11 detentions in the USA, AI Index: AMR 51/044/2002, p. 14-16 (March 2002), available at <http://www.aiusa.org/usacrisis/9.11.detentions2.pdf>.

² Christopher Newton, *Justice Department reveals 147 people still held in connection to Sept. 11 investigation*, Associated Press, Friday, June 14, 2002.

More disturbing is that many of the 9/11 INS detainees who have been granted the right to voluntarily depart the United States or who have been ordered deported by an immigration judge, remain detained long after the timeframe within which the INS is required to effectuate their removal (“9/11 INS Detainees Ordered Deported or Granted Voluntary Departure”).³ These individuals are the focus of this request. Under U.S. law, the INS has a maximum of 90 days to effectuate removal after a final deportation order, and detainees have 120 days to leave the country following a voluntary departure order.⁴ If deportation can be effectuated earlier than the maximum time allotted, then the United States must do so. In some cases, such individuals have been held for up to four months beyond the expiration of their deportation order.⁵ In other cases, the INS continued to detain individuals who had obtained voluntary departure orders, preventing them from leaving the country despite their ability and willingness to do so.

The only reason for the continued detention of the 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure is that the detainees must wait to be officially “cleared” of ties to terrorism by U.S. officials – despite the fact they were never charged with, or legally held on, terrorism charges – before they will release them.⁶ While the process is not a transparent one, it appears that final clearance is issued by senior sections of the Justice Department and the FBI.⁷ The “clearance” process is unrelated to the immigration charges under which the detainees are being held, and is a process that effectively reverses the presumption of innocence. The clearance

³ Although INS secrecy makes it difficult to determine the number of detainees who currently fall within this category, as of February 18, 2002, the New York Times reported that there were approximately 87 such individuals. See Christopher Drew, with Judith Miller, *Though Not Linked to Terrorism, Many Detainees Cannot Go Home*, N.Y. Times, Feb. 18, 2001.

⁴ See 8 U.S.C. § 1231(a)(1) (90 day removal period); 8 U.S.C. § 1229(a)(2) (120-day period for voluntary departures)

⁵ Drew and Miller, *Supra* note 3

⁶ *Id.*

⁷ Jim Edwards, *Attorneys Face Hidden Hurdles in September 11 Detainee Cases: More than 500 Are Detained on Immigration Charges; Normal Process Has Been Warped by Justice Department’s Intervention*, Lawyers Say, N.J. L.J., Dec. 3, 2001, at 1.

process can take weeks or even months, and at times, there is a lack of communication between the government departments involved in the process.⁸ This confusion further delays an already ambiguous process.

The U.S. government has shrouded the 9/11 INS detainees in secrecy, making it difficult to determine the current number of 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure. Although some of these detainees may have been deported or allowed to voluntarily depart the country, it is probable that others have been added to the category as well. The U.S. has blocked access to the legal status, names, and nationalities of almost all 9/11 INS detainees. In November and December 2001, Human Rights Watch was repeatedly denied access to detention facilities where 9/11 INS Detainees were being held; in one letter, the wardens of two NY Detention Facilities told Human Rights Watch that the events of September 11 required them to minimize "activities not critical to the day-to-day operations of the institution."⁹ Such official responses have severely impeded the public from gaining essential details on 9/11 INS detainees.

In an effort to further veil information on 9/11 INS detainees, the INS issued a regulation on April 18, 2002, preventing state, local, and other non-federal immigration detention facilities from releasing the names or other information relating to any immigration detainee being held by the INS unless expressly authorized by federal law, regulations, or Executive Orders.¹⁰

Petitioners can provide specific details of one man who falls within this category.

- On September 28, 2001, Amjad Baig, a Pakistani citizen, was arrested for attempting to use a false passport. Mr. Baig plead guilty on January 9, 2002 and was sentenced to time served on February 13, 2002. On March 13, 2002, Mr. Baig was transferred to

⁸ *Id.*

⁹ See Human Rights Watch, *United States: Rights Groups Denied Access*, Human Rights News, Washington, D.C., December 14, 2001, available at <http://www.hrw.org/press/2001/12/USdetainees1214.htm>

INS custody, and on March 18 an immigration judge ordered him deported. Mr. Baig secured the necessary travel documents and arranged for his departure. The INS could have secured his removal from the United States within a matter of days and even though there was no probable cause to believe that he had any involvement in the September 11 terrorist attacks, Mr. Baig remains in custody today at the Metropolitan Detention Center, past the 90 days the United States had to effectuate his deportation.

Petitioners are aware of, and have spoken with, legal counsel for other similarly situated detainees who remain in INS detention but none of them have been willing to be individually named or go public with their stories out of fear of retaliation by prison officials. This fear is well founded as 9/11 INS detainees have been subject to brutal and inhumane treatment.¹¹ Additionally, legal counsel retained by those detained have reported to petitioners that the United States has responded to complaints from these detainees by issuing dubious federal criminal charges against them in an apparent effort to justify their prolonged detention.¹²

Although 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure who currently remain in U.S. custody are reluctant to be specifically named or to provide details regarding their detention, information from detainees who have already been deported or allowed to leave the United States provide evidence of a pattern and practice of continued detention, without charge, of Muslim men of Arab and South Asian origin who have been ordered deported or have agreed to leave the country. The Center for Constitutional Rights recently filed a class

¹⁰ 8 CFR §§ 236 and 241.

¹¹ See Amnesty International, USA: *Memorandum to the US Attorney General – Amnesty International’s Concerns relating to the post 11 September investigations*, AI Index: AMR 51/170/2001, (November 2001), available at http://www.aiusa.org/usacrisis/ashcroft_letter.pdf, p. 9-11. See also *Infra* p. 9.

¹² See Chisun Lee, *INS Detainee Hits, U.S. Strikes Back*, The Village Voice, January 30 – February 5, 2002, detailing the case of Shakir Baloch, a Canadian of Pakistani descent. Baloch was arrested as part of the investigation into the September 11 terrorist attacks and was detained for 3 months without being charged with a crime. He filed a

action civil rights lawsuit addressing such treatment but only names plaintiffs who have been deported and are thus not at risk of further retaliatory abuse. That complaint cites the following scenarios:

- On October 31, 2001, 18 days after his arrest on immigration charges, Mr. [Ibrahim] Turkmen, a Muslim and Turkish national, accepted a voluntary departure order, after an Immigration Judge assured him that he could shortly return to Turkey. Mr. Turkmen was detained for another four months, until February 25, 2002, when he was “cleared” for release.
- On October 17, 2001, 17 days after his arrest on immigration charges, Mr. Asif-Ur-Rehman Saffi, a Muslim and native of Pakistan and citizen of France, was issued a deportation order, effective immediately. The INS kept Mr. Saffi in custody for another four and one-half months, until March 5, 2002, when he was “cleared” for release.
- Following his arrest on immigration charges, on December 20, 2001, Mr. Amjed Jaffri, a Muslim and native of Pakistan and landed immigrant of Canada, received a final deportation order. Despite this Order, the INS kept Mr. Jaffri in custody for another three and one-half months, until April, 2002, when he was “cleared” for release.

In all three cases, the detainees were held for several months even though the INS could have secured their removal from the United States within a matter of days and even though there was no probable cause to believe that they had any involvement in the September 11 terrorist attacks. The INS made no effort to justify their continued detention as there was no probable cause of criminal activity. Although the INS required that they remain in detention until cleared of terrorist ties, upon information and belief, the INS had no basis to suspect them of terrorism

other than their religion and/or country of origin.

In addition to the ongoing deprivation of liberty, the 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure suffer ongoing harm to their reputations by being categorized and treated as presumed terrorists, which, upon information and belief, is based primarily or exclusively upon their religion and/or country of origin.

The detainees also face irreparable harm to their personal security from the threat of physical violence. In November 2001, Amnesty International submitted a memorandum to the U.S. Attorney General which reported allegations that Muslim men of Arab or South Asian descent are being treated more harshly than other inmates, with abuse and ill-treatment coming from both other inmates and prison guards.¹³ In March 2002, Amnesty International issued a follow-up report documenting several allegations of verbal and physical abuse directed towards 9/11 INS detainees.¹⁴ Although current detainees are reluctant to come forward with accounts of abuse, information from former detainees indicates the type of physical abuse threatening 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure during their prolonged arbitrary detention. As noted in the lawsuit filed by the Center for Constitutional Rights,

- While Mr. Jaffri was confined in MDC, he was subjected to physical and verbal abuse. When he was first brought to MDC's Special Housing Unit, for example, one John Doe Defendant, in the presence of Doe Defendants, told him: "Whether you [participated in the September 11 terrorist attacks] or not, if the FBI arrested you, that's good enough for me. I'm going to do to you what you did." The John Doe Defendant then slammed Mr. Jaffri's head into a wall, severely loosening his lower front teeth and causing him

illegally, a charge immigration lawyers say was rarely prosecuted in the past.

¹³ *Supra* note 11 at 9-11.

¹⁴ *Supra* note 1 at 27-32.

extreme pain. Mr. Jaffri felt pain and discomfort from that injury throughout his stay at MDC. He was never, however, allowed to see a dentist.

- Upon his arrival in the Special Housing Unit, Mr. [Asif-ur-Rehman] Saffi was subjected to physical and verbal abuse. The John Doe Defendants bent back his thumbs, stepped on his bare feet with their shoes, and pushed him into a wall so hard that he fainted. After Mr. Saffi fell to the floor, they kicked him in the face. The lieutenant in charge, one of the John Doe Defendants, called Mr. Saffi a terrorist, boasting that Mr. Saffi would be treated harshly because of his involvement in the September 11 terrorist attacks and threatening to punish him if he ever smiled.

Relevant U.S. Law

Section 1231(a)(1)(A) of the INA provides that after an immigration court issues a deportation order, the U.S must effectuate the deportation within 90 days (in this section referred to as the “removal period”).¹⁵ The purpose of the 90 days is to allow the INS to effectuate the departure of the individual; it is not a time for the government to initiate or continue an investigation or to initiate a “clearance” process. The INA provides that the 90-day removal period can be extended and an alien may remain in detention “if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien’s departure or conspires or acts to prevent the alien’s removal subject to an order of removal.”¹⁶ As noted previously, there is no indication that the INS failure to remove the detainees within the 90-day

¹⁵ 8 U.S.C. §1231(a)(1)(A), “Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days.” See *In re Soliman*, 134 F. Supp.2d 1238, 1246 (N.D. Ala. 2001) (“According to [this] section, the Attorney General must remove an alien who has been ordered removed from the United States within 90 days.”)

¹⁶ 8 U.S.C. § 1231(a)(1)(c).

period in these cases is driven or caused by the detainees' failure to apply for travel documents or prevent their departure. In fact, upon information and belief, the detainees have proper travel documents and arrangements and their home countries will accept them.

Under other limited circumstances that do not apply here, the law permits the detention of certain aliens beyond the removal period, where, for example, repatriation is difficult because they do not have nationalities or they are nationals of countries that do not have a repatriation treaty with the United States. However, even in these cases, the U.S. Supreme Court ruled, in *Zadvydas v. Davis*, that such individuals may be detained only for "periods reasonably necessary to bring about [their] removal from the U.S." and that these post-removal detentions cannot be indefinite.¹⁷ None of the detainees in this request come within this exception.

On November 14, 2001, the U.S. government promulgated an interim INS regulation interpreting *Zadvydas* and setting in place a review process for individuals detained beyond the timeframe the INS has to effectuate removal.¹⁸ The INS regulation permits certain categories of individuals who have been ordered removed, but have not been deported during the removal period, to be detained for an additional six months, *but only as a period reasonably necessary to bring about their removal*. Neither of these categories encompasses the detainees in this request. One category is those individuals who were at issue in *Zadvydas*.¹⁹ Another category is those individuals the INS determines to be especially dangerous.²⁰ The INS has not determined any of the detainees as being especially dangerous.

¹⁷ *Zadvydas v. Davis*, 533 U.S. 678 (2001), citing "serious constitutional problems" with indefinite detentions of immigrants who could not be deported. The Court interpreted a "reasonable time" to be six months following the 90 days.

¹⁸ See Continued Detention of Aliens Subject to Final Order of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001). This interim regulation, however, was not passed in accordance with Constitutional procedure and is not even in line with the most recent legislation on this issue, notable the USA PATRIOT Act.

¹⁹ 8 C.F.R. §241.13.

²⁰ 8 C.F.R. §241.14 (f)

This interim regulation allows the INS to continue to detain individuals when the attorney general or deputy attorney general certifies in writing that the secretary of State has reason to believe that releasing the individual would have potentially serious foreign policy consequences for the United States.²¹ No such certification has been made regarding the detainees in this request.

The interim INS regulation also requires the INS to continue to detain a removable individual after the initial 90-day time period if written determinations have been made finding the individual is a terrorist threat or presents national security concerns.²² Again, no such written determinations have been made regarding the detainees in this case.

There is no indication that the INS is unable to effectuate removal (or voluntary departure) of the 9/11 INS Detainees Ordered Deported or Granted Voluntary within the statutory period. The extension of the removal period in these cases is not being used for immigration purposes, but rather for investigative or some other unspecified purposes, contrary to the legislative intent of the regulation.

III. RIGHTS VIOLATED BY THE UNITED STATES

The United States' detention of the 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure violates a panoply of basic rights protected by regional and international human rights law. This request focuses on those that are urgent and causing irreparable harm—specifically violations of the right to liberty, personal integrity, due process, and equality before the law under Articles I, II, V, XVII, XVIII, XXV, and XXVI of the ADRDM.

²¹ 8 C.F.R. §241.14 (c).

²² 8 C.F.R. §241.14 (d).

A. Human Rights Violations Relating to Arbitrary and Prolonged Detention

The right to liberty under Article I of the ADRDM concerns the exercise of physical freedom. This right is not absolute, however, as Article XXV permits the restriction of an individual's liberty in certain instances, though any such restriction must be informed by the norms prescribed under Article XXV. As the facts show, those persons detained have been deprived of their liberty and their current detention is administrative in nature. The Commission has interpreted Article XXV to cover both administrative and judicial detentions. In its 2000 Annual Report, in reference to migrant workers, the Commission noted that "[t]he principle of due process ... applies not only to court decisions, but also to decisions made by administrative bodies."²³ Consequently, the detainees fall within the ambit of Article XXV of the ADRDM. The issue then is to determine whether the United States is complying with the norms set out in Article XXV or whether these detentions are arbitrary. In determining what constitutes arbitrary detention, this Commission should consider several factors, beginning with the text of Article XXV, which provides:

1. No person may be deprived of his liberty except in cases and according to the procedures established by pre-existing law;
2. Each individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court; and
3. All detainees have the right to be tried without undue delay or released

²³ Annual Report of the Inter-American Commission on Human Rights 2000, OEA/Ser./L/V/II.111, doc.20 rev., 16 April 2002. The report notes that the principle that minimum due process guarantees are required even in administrative proceedings was affirmed by the European Commission on Human Rights in *Hortolomei v. Austria*, April 1998, pg. 38. See also Loren Laroye Reibe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz v. Mexico, Case 11.610, Inter-Am. C.H.R., para. 46 (1999)

Article XXVI further protects the due process of individuals, providing that every accused person is presumed innocent until proven guilty. These provisions indicate the minimal procedural guarantees that must be followed.

The Commission's jurisprudence provides guidance in interpreting Article XXV guarantees. The Commission has recently upheld these guarantees in the *Mariel Cubans Case*, which also involved INS custody of non-U.S. nationals.²⁴ In the *Mariel Cubans Case*, the Commission held the provisions of the INA under which the Mariel Cubans were being detained failed to comply with the requirements of Articles I and XXV of the Declaration because the provisions did not recognize any right to liberty on the part of the petitioners. Specifically, the INA provided the Attorney General "with largely unrestricted authority to detain excludable aliens pending their removal, subject to the Attorney General's discretionary authority to 'parole' the aliens into the United States."²⁵ In that case, the Commission found the domestic law giving such unrestricted authority to the Attorney General "*per se* inconsistent" with Articles I and XXV of the Declaration. This rendered the detention arbitrary. The 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure in this request are similarly subject to such an unrestricted 'detain and parole' authority—in this case, the so-called "clearance" process. But even more egregious is that this clearance process is not predicated on any law. In the *Mariel Cubans Case*, the United States at least referred to provisions of the INA as a legal justification for the continued detention of the Mariel Cubans. However, there are no relevant legislative provisions that outline the "clearance process" currently in place, there has been no official statement on the procedures and safeguards that guide such a process, and there is no right to any

²⁴ *Rafael Ferrer-Mazorra et al. v. United States* (Mariel Cubans Case), Case 9903, No. 51/01.

form of administrative appeal. In many cases, neither the detainees nor their attorneys have been able to establish why their cases are being delayed and why they are still in U.S. custody long after the requisite time to effectuate their departure. Neither has the United States offered the detainees or their attorneys any legal basis for the continued detention. This detention awaiting “clearance” amounts to a presumption of guilt requiring detention as opposed to a presumption of innocence mandating liberty, irreparably harming the detainees right to liberty, due process, and personal integrity.

Similarly the Commission, in *Coard et al. v. United States*, held that even in situations where detainees are held for alleged security reasons, detainees are still afforded the right to be heard and appeal any decision “without undue delay.” This procedure “ensures that the decision to maintain a person in detention does not rest with the agents who effectuated the deprivation of liberty, and ensures a minimal level of oversight by an entity with the authority to order release if warranted. This is a fundamental safeguard against arbitrary or abusive detention, and the relevant provisions of the American Declaration ... establish[es] that this protection is to be afforded with the least possible delay.”²⁶ However, in the present case, the decision to maintain detention of the 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure does rest with the agents who effectuated their deprivation of liberty – the FBI and INS, as the detainees remain in U.S. custody until one or both of these agencies provide “clearance” for them to be removed. In *Coard*, the Commission found that a delay of even six days amounted to undue delay. In the cases of the 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure, the delay has at times exceeded four months.

²⁵ *Id.* at ¶ 217.

²⁶ *Coard et al v. United States*, Case 10,951, Inter-Am. C.H.R. Report No. 109/99, (1999), ¶ 60.

Even if the United States has a set procedure for keeping these detainees in custody beyond the time required to effectuate their departure, any such procedure must meet certain criteria established by the Commission in the *Maribel Cubans Case*. For instance, the Commission has found detentions arbitrary when the procedures fail to define with sufficient particularity the grounds upon which the petitioners have been deprived their liberty; the procedures are subject to a degree of discretion on the part of officials that exceeds reasonable limits; or the procedures fail to provide for detention reviews at reasonable intervals.²⁷ None of these safeguards is in place regarding the treatment of the 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure.

The Inter-American Court of Human Rights also provides useful jurisprudence. In applying the standards on arbitrary detention found in the American Convention on Human Rights,²⁸ the Court noted, in the *Gangaram Panday Case*, that under Article 7, no one may be “deprived of his or her personal freedom except for reasons, cases, or circumstances expressly defined by law (material aspect) and, furthermore, subject to strict adherence to procedures set forth in that law (formal aspect).²⁹ The Court also noted that no one should be detained or jailed for causes or methods that are legal but incompatible with respect for fundamental human rights

²⁷ See *Supra 21* at ¶ 221.

²⁸ In applying the Declaration, it is necessary to consider its provisions in the context of the international and Inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged. I/A Comm. H.R., Annual Report 2000, *Juan Raul Garza v. United States*, Case 12.243, Report No. 52/01, OEA/Ser./L/V/II.111, doc. 20 rev. (April 16, 2001), at ¶ 88. See I/A Ct. H.R., Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC- 10/89 of July 14, 1989, Inter-Am. Ct. H.R. (Ser. A) No. 10 (1989), ¶ 37, pointing out that in determining the legal status of the American Declaration, it is appropriate to look to the Inter-American System of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have in 1948.

²⁹ *Gangaram Panday Case*, Judgment, Inter-Am. Ct. H.R. June 21, 1994, at 47.

because they are unreasonable, unforeseeable, or disproportionate.³⁰ In the *Loayza-Tamayo Case*, the Court found a violation of the right to liberty under Article 7 when Peruvian authorities detained Ms. Loayza-Tamayo for ten days without charge and kept her in detention for 15 days after a final judgment was handed down by a military court.³¹ The Court has also found, in the *Cesti Hurtado Case*, that a deprivation of liberty occurs when a government refuses to abide by a court ruling ordering the release of an individual.³² In *Cesti Hurtado*, the Court ruled, “As a result of the refusal of the military authorities to obey and execute the legitimate order of the Public Law Chamber and of the subsequent detention, prosecution and sentencing of Gustavo Cesti Hurtado, the State violated his right to personal liberty as guaranteed in Article 7.1. 2 and 3 of the Convention.”³³

International jurisprudence on the right to liberty and arbitrary detention can be found in the work of several UN mechanisms. The United Nations Working Group on Arbitrary Detention considers arbitrary those “deprivations of liberty, which for one reason or another are contrary to relevant international provisions laid down in the Universal Declaration on Human Rights on in the relevant international instruments ratified by States.”³⁴ Similarly, the Human Rights Committee (HRC) has found deprivations of liberty analogous to the ones suffered by the 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure to be in violation of the International Covenant on Civil and Political Rights (ICCPR) prohibition against arbitrary detention.³⁵

³⁰ *Id.*

³¹ *Loayza Tamayo Case*, Judgment, Inter-Am. Ct. H.R. September 17, 1997.

³² *Casi Hurtado Case*, Judgment, Inter-Am Ct. H.R. September 29, 1999.

³³ *Id.* at ¶ 143.

³⁴ Fact Sheet No. 26, The Working Group on Arbitrary Detention.

³⁵ The United States ratified the ICCPR without reservation, understanding, or declaration in relation to this article on the right to liberty and security in person.

The HRC has denounced state practices that allow for the continued detention of persons after the completion of their final sentences as arbitrary detention. The INS practice of continuing to detain individuals with a deportation or voluntary departure order after the adjudication and/or resolution of immigration charges against them raises similar concerns. In *Netto v. Uruguay*, Beatriz Weismann and Alcides Lanza, two Uruguayan citizens, were detained for ten and five months, respectively, after they had served their sentences.³⁶ Although the government claimed that “prompt security measures” justified their continued detention, the Committee still found a violation of the prohibition against arbitrary detention because both were held after the completion of their sentences.³⁷ Detention was also considered arbitrary because neither had effective access to legal assistance during their detention and neither was able to effectively challenge their arrest and detention.³⁸ Similarly, in *Mpandanjila v. Zaire*, eight Zairian parliamentarians were sentenced to fifteen years imprisonment, and a Zairian businessman was sentenced to five years imprisonment on charges of plotting to overthrow the government.³⁹ All nine individuals were held in prison for almost a year despite an amnesty decree and were later subjected to an “administrative banning measure” and subsequently deported along with their families to different parts of the country where they suffered deprivations of liberty despite a second amnesty decree.⁴⁰ The Committee found that these continued deprivations of liberty constituted arbitrary detention, since the individuals had all previously received amnesty orders.⁴¹

³⁶ *Netto v. Uruguay*, Human Rights Comm., 9th Sess., Communication No. 8/1077, U.N. Doc CCPR/C/D/8/1977 (1980).

³⁷ *Id.* ¶ 16.

³⁸ *Id.*

³⁹ *Mpandanjila v. Zaire*, Human Rights Comm., 27th Sess., Communication No. 138/1983, U.N. Doc. CCPR/C/27/D/138/1983 (1986).

⁴⁰ *Id.* ¶ 8.2.

⁴¹ *Id.* ¶ 9.

Likewise, the current “clearance” practice adopted by the United States raises similar concerns. An undetermined number of individuals under final order of deportation or voluntary departure have continued to be detained until they are “cleared” by either the F.B.I. and/or the Department of Justice.⁴² The clearance process can take weeks or even months and attorneys are often not informed about the “clearance” status of their clients. Under the standard articulated in *Netto* and *Mpandanjila*, the continued detention of 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure constitutes arbitrary detention that cannot be justified as either security measures or “special circumstances.”⁴³

Similarly, the European Court of Human Rights has held that improper, arbitrary detention under the European Convention of Human Rights exists when a state party continues to detain an individual after a final order of release. Specifically, in *Quinn v. France*, the Court found that French authorities had kept Quinn in detention to instigate extradition proceedings, which acted as a block to the release order given previously that day.⁴⁴ The Court held that this constituted a breach of Article 5 of the Convention because an order was given for Quinn’s release “forthwith.”⁴⁵ Thus, *Quinn* suggests that continued detention after a final order of release may be arbitrary where the continued detention is based on the government’s belief that further charges *may be* instituted against the individual.

The continued arbitrary detention of the 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure violates Articles I, XXV, and XXVI of the ADRDM.

⁴² *Supra* note 5.

⁴³ *See* Continued Detention of Aliens Subject to Final Order of Removal, 66 Fed. Reg. 56967 (Nov. 14, 2001) (allowing continued detention of aliens under final order under “special circumstances”).

⁴⁴ *Quinn v. France*, 21 Eur. Ct. H.R. 529, ¶ 37 (1996).

⁴⁵ *Id.* ¶ 43.

B. Human Rights Violations Relating to Equality before the Law

As described above, the United States' treatment of the 9/11 INS Detainees Order Deported or Granted Voluntary Departure violates international human rights law ensuring equality before the law. Article II of the ADRDM protects the right to equality before the law, without distinction as to race, sex, language, creed or any other factor. Detainees' race, religion, sex, ethnic, and/or national origin has played a determinative role in the United States' decision to detain them initially, and then to keep them detained beyond the point at which removal must have been effectuated. Detainees are all Muslim men of Arab or South Asian origin. As mentioned above, the INS has selectively targeted this population in its prosecution of minor immigration violations and has subjected only this population to disproportionately harsh penalties and detention conditions that are not the norm with other immigrant populations. Such discrimination violates article II of the ADRDM.

C. Human Rights Violations Relating to the Protection of Honor, Personal Reputation, and Family Life

Article V of the ADRDM provides the right to protection of honor, personal reputation, and family life. As noted above, detainees suffer ongoing harm to their reputations by being categorized and treated as terrorists, which, upon information and belief, is based primarily or exclusively upon their religion and/or country of origin. Furthermore, family members have had great difficulty finding out whether their loved ones had been arrested and detained, and if so, where they were being held and when they would be released or sent back to their country of origin. Family members have also been barred from immigration proceedings.

D. Human Rights Violations Relating to the Right of Everyone to Juridical Personality and Civil Rights and the Right to a Fair Trial

The United States has removed any juridical personality from the 9/11 INS Detainees Ordered Deported or Awaiting Voluntary Departure by keeping them detained without legal justification. Article XVII of the ADRDM mandates that every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy basic civil rights. Detainees, however, have found themselves in a situation where they are subject to an undefined “clearance” process, a process in which they cannot participate, in particular one in which they cannot seek legal review of their continued detention. Article XVIII recognizes that every person may resort to the courts to ensure respect for his legal rights, and that a procedure should be in place whereby the courts will protect him from acts of authority that, to their prejudice, violate any fundamental constitutional rights. Detainees have a legal right to be released from their arbitrary and indefinite detention or, alternatively, they have a right to have their final immigration court orders implemented. Yet as the facts describe, an undefined, non-legal process now controls their detention, denying them any juridical rights or access to review the procedure.

IV. PRECAUTIONARY MEASURES ARE NECESSARY TO AVERT IRREPARABLE HARM

Petitioners seek the urgent intervention of this Commission, in order to prevent continued unlawful acts by the United States, which are causing irreparable harm to the fundamental human rights of the 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure. Under Article 25 of its regulations, the Commission may intercede in “serious and urgent cases,

and whenever necessary according to the information available . . . to prevent irreparable harm to persons.’⁴⁶ This is such an urgent case and the harm inflicted is ongoing and irreparable.

The obvious serious and urgent cases threatening irreparable harm to persons are cases where a person’s life is at risk. The Commission has the authority to adopt precautionary measures in this case in which Petitioners allege that specific articles of the ADRDM have been violated. The Commission regularly adopts Precautionary Measures in such circumstances.⁴⁷ The Commission has adopted Precautionary Measures when a person’s liberty and personal integrity are at risk, as exemplified in its recent adoption of Precautionary Measures in the *Case of the Detainees in Guantanamo Bay Cuba*.⁴⁸ In that case, the Commission requested the United States to “ensure that the legal status of each of the detainees is clarified and that they are afforded the legal protections commensurate with the status that they are found to possess.”⁴⁹ The Commission found that “absent clarification of the legal status of the detainees . . . the rights and protections to which they may be entitled under international or domestic law cannot be said to be the subject of effective legal protection by the State.”⁵⁰ Implicit in the Commission’s findings was their concern for the negative impact their indeterminate legal status could have on both their physiological and psychological integrity. In the present request, the 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure have all had their cases

⁴⁶ Article 25(1), Rules of Procedure of the Inter-American Commission on Human Rights.

⁴⁷ For example, the 2001 Annual Report indicated that the Commission had issued precautionary measures in three cases: *Thomas Nevius*, Case No. 12.368 (precautionary measures requested on April 4, 2001, Governor of Nevada appointed experts to examine petitioner's mental faculties); *Robert Bacon Jr.*, Case No. 12.381 (precautionary measures requested on April 25, 2001 and repeated on October 2, 2001, Governor commuted sentence to life imprisonment without parole); *Gerardo Valdez Maltos*, Petition No. P0353.2001 (precautionary measures requested on June 14, 2001, indefinite stay of execution by Oklahoma Court of Criminal Appeals pending outcome of domestic proceeding.

⁴⁸ *Case of the Detainees in Guantanamo Bay, Cuba*, Granting of Precautionary Measures, Inter-American Commission on Human Rights, March 13, 2002.

⁴⁹ *Id.*

⁵⁰ *Id.* p. 4

determined, but continue to be held without legal justification. Any detention that arbitrarily deprives an individual of his/her liberty causes that person irreparable harm. The person so detained can never reclaim the time lost while they were unlawfully detained and each additional day they are subject to such detention causes them further irreparable harm. The 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure also continue to face serious threats to their physical and psychological integrity as a result of the arbitrary deprivation of their liberty. The fact that the United States has refused to define their legal status has left the detainees without a means to effectively challenge the basis for their continued detention . Additionally, the fact that the United States has failed to provide a justification for their detention has given them the perception that justice cannot be attained and their cases may languish without resolution indefinitely. Meanwhile, the detainees continue to experience physical and verbal assaults by prison guards and other inmates. This suffering is continuous and ongoing, causing irreparable harm. Furthermore, these detainees suffer ongoing harm to their reputations and family life by being categorized and treated as terrorists, which upon information and belief, is based primarily or exclusively upon their religion and/or country of origin.

In determining the meaning of irreparable harm, this Commission should take into consideration not only its previous decisions on Precautionary Measures, but also the jurisprudence of the Inter-American Court on Human Rights on the grant of Provisional Measures.⁵¹ This is especially so given that the Court's authority to issue the latter derives from

⁵¹ Although the United States is not a party to the Convention, and thus Article 25 of the Rules of Procedure of the Inter-American Commission on Human Rights applies rather than Article 63 of the Inter-American Convention on Human Rights, due to the similarity between these two provisions, jurisprudence interpreting Article 63(2) is relevant in interpreting the meaning of the term "irreparable harm."

Article 63(2) of the American Convention on Human Rights, which contains language virtually identical to that of Article 25 of this Commission's Rules of Procedure.⁵²

Precautionary Measures are warranted whenever a petitioner faces a serious threat to his or her physical, psychological or moral integrity.⁵³ Such threats have been found where petitioners are detained. In *Loayza Tamayo*, for example, the Court issued Provisional Measures to end solitary confinement and incommunicado detention imposed on a person who had been committed for the crime of terrorism against Peru.

Restrictions on access to counsel and other impingements on due process rights can also constitute "irreparable harm." In *Manriquez v. Mexico*,⁵⁴ when the Mexican authorities denied a prisoner's attorney access to her client because she refused to subject herself to a strip search, the Commission asked Mexico to adopt Precautionary Measures to allow the full exercise of the prisoner's due process rights and judicial guarantees. These rights and guarantees included allowing his attorney to visit him to prepare his defense, to ensure confidentiality in attorney-client conversations and to afford his attorney dignified and non-discriminatory treatment. In the present request, the United States has subjected the detainees to discriminatory treatment and violated their basic due process rights (such as reversing the presumption of innocence and denying the detainees of any juridical character) by detaining them without a basis in law or a defined process that the detainees could engage in or challenge.

In addition to their essentially preventive nature, the purpose of Provisional Measures is to provide effective protection for fundamental rights, inasmuch as they seek to avoid irreparable

⁵² Article 63 of that Convention relevantly provides that: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not submitted to the Court, it may act at the request of the Commission."

⁵³ *Loayza Tamayo Case*, Provisional Measures, Inter-Am. Ct. H.R. July 2, 1996.

damage to persons. Thus, in the *Ivcher Bronstein case*,⁵⁵ the Court ordered Provisional Measures to protect the petitioners' physical, psychological and moral integrity, and preserve their right to due process. In that case, the Peruvian government stripped one of the petitioners of his naturalized Peruvian citizenship and divested him of his ownership of a television station ostensibly because that station had broadcast programs critical of influential government officials. The Court concluded that the damage one of the petitioners had sustained, in part *due to the failure to accord due process*, was of enormous magnitude, would be very difficult to redress in full and was being aggravated on a daily basis.⁵⁶

When seeking Precautionary Measures, the Commission has found that it is not necessary to identify individually the people who are in danger of suffering irreparable harm and has granted precautionary measures on behalf of whole communities, unions, and civil associations. In the *Haitians and Dominicans of Haitian Origin Case*, the Commission granted Precautionary Measures on behalf of "thousands of persons of Haitian origin and Dominicans of Haitian descent who had been expelled by the authorities of the Dominican Republic, through collective round-ups, and without legal procedures to properly determine the nationality and family ties of the expelled persons."⁵⁷ In 2001, the Commission granted Precautionary Measures to the people of La Granja, Ituango municipality, in Antioquia, Colombia.⁵⁸ The Precautionary Measures were granted for the municipality as whole and individuals were not specifically named. Also in 2001, the Commission granted Precautionary Measures on behalf of members of the National

⁵⁴ Case 11.509, Report No. 2/99, Inter-Am. C.H.R. (1999)

⁵⁵ Provisional Measures, Inter-Am. Ct. H.R., November 23, 2000

⁵⁶ See also *Paniagua Morales case*, Provisional Measures, Inter-Am. Ct. H.R., January 29, 2001 (provisional measures warranted because of risk to the life and personal safety of a witness).

⁵⁷ See, *Case of Haitians and Dominicans of Haitian Origin in the Dominican Republic*, Provisional Measures. Inter-Am C. H.R., Annual Report 1999.

⁵⁸ I/A Comm. H.R., Annual Report 2001, at 21.

Association of Peasant and Indigenous Women of Colombia (ANMUCIC).⁵⁹ Though only the president of the association was named, the Commission granted measures to protect the lives and persons of all the unnamed association members.

Similarly, in this request, the exact number of persons in need of Precautionary Measures is not known, nor are they all individually named. The persons do, however, form a distinct class – they are Muslim men of Arab or South Asian descent, or those who are believed to be so by U.S. authorities, who have been detained by the INS and ordered deported or granted voluntary departure, yet remain detained after the time the U.S. legally had to effectuate their departure.

Petitioners confirm that the individuals are detained in federal, state, and local INS detention facilities and that, by virtue of their detention, their identities are known to the United States. In addition, they are all in a situation of similar risk of continuing injury to their fundamental rights. Precautionary Measures may therefore be issued for them as a known but unnamed group. This is especially important given the continuing refusal of the United States to release the names and nationalities of the detainees.

The 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure will suffer irreparable harm if the Precautionary Measures are not ordered. The requested Precautionary Measures are directed and narrowly tailored toward the avoidance of that harm. Among other things, the United States continues to detain these individuals without justification or explanation. Furthermore, the United States is failing to disclose the names of all 9/11 INS detainees who are being held under such circumstances.

⁵⁹ *Id.* at 14.

The facts set forth in this Request for Precautionary Measures establish *prima facie* violations of Articles I, II, V, XVII, XVIII, XXV and XXVI of the ADRDM and the risk of irreparable harm.

V. CONCLUSION AND REQUEST FOR PRECAUTIONARY MEASURES

Petitioners respectfully seek the Commission's intervention and the issuance of the following Precautionary Measures, requesting that the United States government:

1. Release the 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure.
2. Allow for the implementation of any final orders for deportation or voluntary departure.
3. Provide a justification for the basis on which these detainees have been held so that they can effectively seek proper legal remedies.
4. Ensure detainees are provided equal treatment under the law.
5. Require the United States to protect the honor, reputation, and family life of the detainees.
6. Request that the United States protect the due process rights of the detainees, including the detainees' right to juridical personality, access to courts, and a presumption of innocence.
7. Request the United States treat the detainees humanely and accordance with principles and norms of international law.
8. Identify all 9/11 INS Detainees Ordered Deported or Granted Voluntary Departure by name, nationality, and address, where known.

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