

Benatta: betrayed by a country, career and creed

*How timing and avionics expertise funneled a man seeking
freedom into a hellhole of torture and despair*

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Introduction

September 11th 2001 marks a day that will be remembered in history for the atrocious terrorist attacks against the United States (US). On that day more than 3,100 individuals lost their lives it what was the largest terrorist attack in US history. The US authorities were immediate in their response to bring all those individuals involved in the attacks to justice. Unfortunately, the response on American soil was haphazard and unreasonable, and came at the cost of depriving the fundamental human rights of hundreds of immigrants.

In the days and months after September 11th, hundreds of immigrant, Muslim males were arrested and arbitrarily detained for months and even years as if they had been perpetrators of the attacks. The US's objective was to detain first and ask questions second. In this regard the US was practicing a preventative detention scheme.

Although the US is largely responsible for the arbitrary detention of over 1,200 Muslim men shortly after September 11th, Canada has also been party to abandoning the rule of law in an effort to bring those responsible for the attacks to justice. In this regard, the following will outline one individual in particular, Mr. Benamar Benatta, who was illegally transferred to the US by Canadian authorities on September 12th 2001 where he was detained for nearly five years.

The reason for his detention was that the Canadian authorities represented to the US that Mr. Benatta was of 'high involvement' in the September 11th attacks. Although the paper will focus largely on Mr. Benatta, the research gathered reveals an enormous scale of human rights violations that occurred in the US towards immigrants in the weeks and months after the attacks. For that purpose, the discussion will go beyond Mr. Benatta's ordeal and focus on the topic of the mass arbitrary detention scheme committed by the US. With regards to Mr. Benatta,

Canada's liability will be discussed in detail. The subsequent treatment of both Mr. Benatta in the US, as well as hundreds of other immigrants who were detained by US authorities will also be highlighted in detail. Several breaches of International law both by Canada and the US will be discussed. Lastly, international criminal law implications will be focused on with regards to the US detention scheme. It will be argued that the arbitrary detention of over 1,200 immigrants constituted a crime against humanity as outlined in Article 7 of the Rome Statute. However, as a result of the jurisdictional issues between the International Criminal Court (IC) and the US, there is only a minute likelihood any government bodies or officials will face prosecution by the ICC.

I. The Facts: Benamar Benatta

Benamar Benatta was born Muaskar City in Algeria on May 16th, 1974¹. Mr. Benatta became a member of the Algerian Armed Forces in 1992 where he eventually obtained the rank of lieutenant by 1998². Prior to 1998 Mr. Benatta also attended the University of Blida and trained as an aeronautical engineer, with an emphasis on avionics electronics³. Essentially Mr. Benatta was able to fly planes.

Mr. Benatta came to the US on a military training exercise for the Algerian Armed Forces in December 2000⁴. Mr. Benatta's goal, unbeknownst to his peers, was to desert the Algerian

¹ Affidavit , Benamar Benatta, (2007) <www.benamarbenatta.com/documents/benamar-benatta.pdf> at October 2nd 2007, 1

² Ibid.

³ Internal Inquiry into the actions of Canadian Officials: Motion for Standing By Benamar Benatta (2007) <www.benamarbenatta.com/documents/benamar-benatta.pdf> at November 2nd

⁴ *United Nations Economic and Social Council Civil and Political Rights: Including the Question of Torture and Detention* E/CN.4/2005/6/Add.1(2004) (Sixty first session item 11 (b) of the provisional agenda) 67

Military upon expiration of the military training exercise⁵. The reason Mr. Benatta wanted to desert the Algerian Armed Forces was because he feared for his life while in the military. It has been documented that he had been threatened by the GIA, the armed wing of the Islamic Salvation Front (FIS)⁶. Mr. Benatta has also seen unconscionable acts committed by the Algerian Armed forces and was forced on occasion to commit unconscionable acts against his will⁷.

It should be noted the Algerian military has been documented torturing prisoners in what are deemed to be ‘torture chambers’⁸. It is extremely dangerous to attempt to desert the Algerian military as those who are caught could face torture and even summary execution⁹. Mr. Benatta reasonably believed he would not be able to desert the military until he was outside of Algeria¹⁰.

In April 2001, at the end of the military training exercise, Mr. Benatta was supposed to return home to Algeria with the military. Instead, he travelled to New York City with the intention of claiming asylum¹¹. Mr. Benatta was made aware that attempting to seek asylum in the US was extremely difficult and his chances would be far better off if he attempted to do so in Canada¹². Also, Mr. Benatta was fluent in French and this made him reasonably believe he would have a far easier time seeking asylum at the Canadian border. Mr. Benatta decided that

⁵ Affidavit, above n1, 8, 9.

⁶ Ibid 6-7.

⁷ Ibid.

⁸ Robert Fisk, *Conscript tells of Algeria's torture chambers* UK News (1997) <<http://www.algeria-watch.org/mrv/mrvtort/Reda.htm>> at 12 November 2007

⁹ Internal, above n 3, 4.

¹⁰ Affidavit, above n 5.

¹¹ Ibid.

¹² Ibid 10.

applying for asylum in a Western country would be his best chance but he feared being deported because he was extremely wary about what would happen to him if he returned to Algeria¹³.

Mr. Benatta decided that he would obtain a false identity card, otherwise known as a ‘green card’ and make his claim for asylum once he entered into Canada. On September 5th 2001 Mr. Benatta crossed the border at Fort Erie, Ontario, and presented Canadian immigration officials his false ‘green card’ and a false Social Security Card; his legitimate Algerian passport being in his luggage¹⁴. The Canadian border officials suspected the documents were false: when they pulled him aside for questioning, he immediately made known to them his intention to seek asylum in Canada¹⁵. He made the Canadian border officials aware that he feared for his life if he returned to Algeria. Mr. Benatta was detained at the Niagara Detention Centre and given a detention review date for Sept 12th 2001¹⁶.

On September 11th 2001 the heinous attacks on the World Trade Centre occurred. Mr. Benatta was completely unaware of the attacks¹⁷. The following day on September 12th Mr. Benatta appeared before an immigration adjudicator without counsel or even contact information to obtain counsel or legal aid¹⁸. The adjudicator ordered Mr. Benatta’s continuing detention for an additional week until a review which was scheduled for September 19th 2001¹⁹. Unfortunately for Mr. Benatta, the detention review never took place. Instead, on September 12th Mr. Benatta was interviewed repeatedly about the acts of September 11th; his asylum claim was

¹³ *American Civil Liberty Union: Worlds Apart: How Deporting Immigrants After 9/11 Tore Families Apart and Shattered Communities* (2004) <<http://www.aclu.org/FilesPDFs/worldsapart.pdf>> at October 10th, 8

¹⁴ Affidavit, above n 1, 11.

¹⁵ Ibid.

¹⁶ Ibid 13.

¹⁷ Ibid 15.

¹⁸ Internal Inquiry, above n 3, 6.

¹⁹ Ibid 7.

not mentioned²⁰. Finally, and still on September 12th 2001, Mr. Benatta was driven across the border by two Canadian officials and handed over to American officials²¹.

Canadian authorities made American authorities aware of Mr. Benatta's profile and provided misinformation that lead the US to perceiving Mr. Benatta to be responsible for the September 11th attacks²².

In all Mr. Benatta was detained in various detention centers in New York City for a period of 58 months²³. His detention was oppressive and he was tortured and abused by American officials. Mr. Benatta believes the Canada government is largely responsible for his detention and inhumane treatment in the US for nearly five years of his life. Mr. Benatta suffered and continues to suffer physically, psychologically, and emotionally. Mr. Benatta has suffered irrecoverable damage to his reputation. He has also lost his ability to earn an income and his ability to work in his chosen field of engineering because he has been connected to international terrorism²⁴.

II. Mr. Benatta's Claim against Canada

On July 16th 2006 Mr. Benatta's lawyer, Ms. Nicole Chrolavicius, submitted a statement of

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Anushka Asthana, *Domestic Detainee From 9/11 Released* (2006) The Washington Post<www.cbsnews.com/stories/2003/06/03/attack/main556665.shtml> at November 26th 2007

²⁴ Statement of Claim, Benamar Benatta, Ontario Superior Court of Justice (2007) <www.cbc.ca/toronto/news/pdf/benatta-statement-091207.pdf> at November 20th 2007, 24

claim outlining specific damages against numerous defendants of the Canadian Government.

Mr. Benatta's claims were as follows²⁵:

- (a) Damages for negligence, negligent investigation, breach of statutory duty, false imprisonment, assault and battery, complicity to torture, conspiracy, misfeasance in public office, injurious falsehood, defamation, breaches of sections 7, 9 12, and 15 of *the Canadian Charter of Rights and Freedoms* and breaches of customary international law in the amount of \$25,000,000 ("TWENTY-FIVE MILLION DOLLARS");
- (b) Special damages in an amount to be determined with particulars provided prior to trial;
- (c) Punitive, exemplary and / or aggravated damages in the amount of \$10,000,000 ("TEN MILLION DOLLARS");
- (d) Costs of the action;
- (e) Such further relief as this Honourable Court deems just.

It should be noted all the defendants mentioned next are legal entities who are liable for the torts committed by their agents and servants pursuant to specific legislation.

The Defendants named in Mr. Benatta's claim were as follows²⁶:

- (a) Her Majesty The Queen in Right of Canada;
- (b) The Attorney General of Canada;
- (c) Citizenship and Immigration Canada;
- (d) The Canadian Border Security Agency;
- (e) The Canadian Security Intelligence Service;
- (f) Lawrence MacAulay, the Solicitor General of Canada during the relevant period;
- (g) Foreign Affairs and International Trade Canada;
- (h) Agents/servants who are as yet unidentified

²⁵ Ibid.

²⁶ Ibid.

III. Canada's International violations

Mr. Benatta's statement of claim also noted several breaches by the Canadian Government of customary international law. The following are tortuous violations of customary international law as stated on Mr. Benatta's claim²⁷:

- (a) Violations of Article 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR) and the principles of the Universal Declaration of Human Rights;
- (b) Violations of the UN Standard Minimum Rules of Treatment of Prisoners;
- (c) Violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

IV. Detained in the United States

Mr. Benatta believes Canadian officials transferred him to the US because he was a Muslim who knew how to fly planes²⁸. His belief was not without merit. The American Civil Liberties Union (ACLU) has documented in two separate papers the arbitrary detention of hundreds of immigrants in the US post September 11th²⁹. The exact figure is impossible to know because the US would never reveal such information; however Benatta was among approximately 1,200 or so men detained by US law enforcement agents in the frenzied weeks

²⁷ Ibid.

²⁸ Affidavit, above n1, 46

²⁹ American Civil Liberties Union *Americas Disappeared: Seeking International Justice for Immigrants Detained After September 11* (2004) 1

after Sept. 11, 2001³⁰. The important thing to note is the detainees had one thing in common: almost all were Arab or South Asian men, and almost all were Muslim³¹. The other thing in common was they were all denied basic rights normally afforded to those detained in the US and other democratic countries³². Benatta in particular had a most unfortunate résumé: an Algerian and a Muslim, he was an avionics technician and, like most of the others, he lacked proper immigration papers³³.

In January 2004, represented by lawyers from the ACLU, a group of thirteen men who had been detained in the US filed a petition with the UN Working Group on Arbitrary Detention³⁴. Mr. Benatta was the only petitioner from Algeria, however the remaining twelve were all Muslim of Middle Eastern descent and, according to the ACLU, all alleged the following³⁵:

- i) The US detained petitioners as suspected terrorists even where there was no evidence they had engaged in criminal activity of any sort;
- ii) The US imprisoned petitioners under a “hold until cleared” policy that effectively imposed a presumption of guilt;
- iii) The US’ arbitrary and haphazard arrest and detention policies were directed almost entirely against Muslim men of South Asian or Middle Eastern descent.
- iv) The US denied petitioners access to counsel, failed to inform them promptly of the charges against them or to bring them before a judge, and denied them release on bond.
- v) The US incarcerated petitioners in degrading and inhumane conditions.

³⁰ Michael Powell, "A Prisoner of Panic After 9/11," *The Washington Post*, Washington, November 29, 2003.

³¹ Ibid.

³² *Worlds Apart*, above n 13, 1.

³³ Powell, Above n 30.

³⁴ *Worlds Apart*, above n 13, 1-2.

³⁵ Ibid.

Mr. Benatta's affidavit confirms the above. But, perhaps even more importantly, two US government inquiries into the detention and treatment of immigrants confirm the allegations made by Benatta and the other petitioners.

i. Reports of the Office of the Inspector General

First, in June 2003, the Office of the Inspector General (OIG) of the Department of Justice (DOJ) issued a 198-page report, titled *'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'*³⁶. Before going into the content of the report it is important to note that the OIG has a high level access to government and investigative policies after September 11th as they are a part of the DOJ³⁷. The ACLU therefore has confidently confirmed these reports issued by the OIG are the most comprehensive about the treatment of September 11th detainees³⁸. This first report documented how the DOJ handled these detainees, including their processing, their bond decisions, the timing of their removal from the US or their release from custody, their access to counsel, and their conditions of confinement³⁹.

The report confirms that upon detention, detainees were not notified of any charges against them⁴⁰. In this regard the detainees were unaware of why they were being detained. There were also significant delays in obtaining legal representation and requesting bond hearings⁴¹. Also, the report sheds light on the DOJ's policy to keep non-citizens in detention

³⁶ Americas Disappeared, above n 29, 2.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Office of the Inspector General of the Department of Justice *'Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* (December 2003) 1

⁴⁰ *Government Report Faults Justice, FBI, Immigration and Prison Officials* (2003) Human Rights Watch <<http://www.hrw.org/press/2003/06/us060203.htm>> at 2 November 2007

⁴¹ Ibid.

until the FBI cleared them of possible links to terrorism⁴². However the “clearance” process operated to keep detainees in custody even after their immigration cases had been resolved and they had been ordered deported to their home countries, if indeed they were ordered to be deported⁴³. The report noted there was a blanket denial of bail⁴⁴ and criticizes the use of a “no bond” policy that overrode judicial orders to release detainees on bond while their immigration cases were pending⁴⁵.

The report also touched on the claims of physical and verbal abuse by some correctional staff at the MDC; however as will be addressed, the OIG supplementary report in December 2003 went into far more detail in this regard. Lastly, the report offered several recommendations to the Federal Bureau of Investigations (FBI), the Immigration Naturalization Services (INS), the Department of Homeland Security (DHS), and the Federal Bureau of Prisons (BOP) in order to prevent further problems potential detainees would endure.

Despite the recommendations to improve the processing of detaining immigrants, the Inspector General noted in the report that she believed “the chaotic situation and uncertainties surrounding the detainees' role in the September 11 attacks, and the potential of additional attacks, explain many of the problems that were found in the review, but they do not explain or justify all of them”⁴⁶. CBS news ran a story on the first OIG report and noted the OIG report in June 2003 fell short of alleging that Justice Department policies toward the detainees violated

⁴² Ibid.

⁴³ Ibid.

⁴⁴ OIG, above n 38, chapter 5 part 3.

⁴⁵ Government Report, above n 40.

⁴⁶ Ibid.

their civil rights or any federal laws⁴⁷. The second OIG report was far more critical of the treatment of the detainees. It focused mainly on the abuse allegations noted by the petitioners interviewed by the UN Working Group on Arbitrary Detention, including Mr. Benatta.

The OIG report titled *'The Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York'* was made public in December 2003. As the title suggests, the report details the allegations that staff members of the BOP and the Metropolitan Detention Center (MDC) in Brooklyn, New York, physically and verbally abused alien detainees⁴⁸. To begin, it was noted in this report that in the first 11 months after September 11th, 762 aliens were detained in connection with the FBI terrorism investigation for various immigration offenses including overstaying visas and entering the country illegally⁴⁹. However, 84 of these aliens, including Mr. Benatta, were assessed by the FBI as "high interest" and detained at the MDC⁵⁰. Again as already noted, the number of September 11 detainees is estimated to be in excess of 1,200. The intriguing statistic is that approximately 129 of the detainees had been charged with minor criminal offences, but none had been charged with any terrorist-related crimes from 2001-2003⁵¹. Nevertheless, innocent immigrants detained at the MDC were documented to be tortured and abused.

ii. Treatment at the Metropolitan Detention Center

(a) Physical Abuse

⁴⁷ *Report Blasts Detainee Treatment* CBS News (2003)

<<http://www.cbsnews.com/stories/2003/06/03/attack/main556665.shtml>> at November 25th 2007

⁴⁸ OIG, above n 38.

⁴⁹ Ibid 2.

⁵⁰ Ibid.

⁵¹ William Schulz, *Committing Human Rights Violations at Home* (excerpted from 'Tainted Legacy 9/11 and the Ruin of Human Rights' Thunder's Mouth Press, 2003)

The MDC generally houses men and women either convicted of criminal offenses or those awaiting trial or sentencing⁵². As mentioned, Mr. Benatta was among the 84 aliens given the status of “high interest”. As a result Mr. Benatta was placed in a “special housing unit” and assigned high security status⁵³. After consolidating approximately 30 detainees’ reported allegations against approximately 20 MDC staff members, the second OIG report sorted the allegations of physical abuse into the following six categories⁵⁴:

- i) Slamming detainees against walls;
- ii) Bending or twisting detainees’ arms, hands, wrists, and fingers;
- iii) Lifting restrained detainees off the ground by their arms,
- iv) Stepping on detainees’ leg restraint chains;
- v) Using restraints improperly;
- vi) Handling detainees in an otherwise rough or inappropriate manner

Mr. Benatta’s affidavit confirms the above; however he is far more specific with regards to his treatment and the injuries he received. Mr. Benatta notes: “I was beaten regularly by the MDC guards. I repeatedly had my head slammed against the wall and the guards routinely stepped on my leg shackles causing injury”⁵⁵. As well, there was additional abuse alleged that was not mentioned in the OIG report. For instance, while in the special housing unit Benatta was isolated in a solitary, illuminated cell for twenty-four hours a day, and was woken up every half-hour by the guards’ loud knocking on his door⁵⁶. He could not leave his cell except when FBI

⁵² OIG, above n 38.

⁵³ Jameel Jaffer, ‘Petition to the United Nations Working Group on Arbitrary Detention’(January 27, 2004) 16

⁵⁴ OIG, above n 38, 6.

⁵⁵ Affidavit, above n 1, 26.

⁵⁶ Jaffer, above n 53.

agents arrived to interrogate him⁵⁷. The guards wrote ‘WTC’ in chalk outside of his cell further implicated him in the September 11th attacks⁵⁸.

(b) Verbal Abuse

Verbal abuse by the MDC guards towards the detainees has also been documented in the second OIG report. The report confirmed detainees alleged guards and staff members verbally abused them on numerous occasions. The report notes the verbal abuse consisted of racist comments which suggested the detainees were involved in the September 11th attacks. Specifically, comments such as “terrorists,” “mother fuckers,” “fucking Muslims,” and “bin Laden Junior” were made to the detainees frequently⁵⁹. There were also a number of threats, including death threats.

iii. Breaches of US Domestic Law?

Most of the immigrants detained after the attacks were arrested on immigration charges such as overstaying their visa or not having correct immigration papers⁶⁰. The Attorney General has the legal authority to keep a non-citizen confined pending conclusion of his or her deportation proceedings only if there is evidence of the individual's dangerousness or risk of

⁵⁷ Ibid.

⁵⁸ Affidavit, above n 27.

⁵⁹ OIG, above n 38, 28.

⁶⁰ *United States Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* (2002) Human Rights Watch <<http://www.hrw.org/reports/2002/us911/>> at November 21 2007

flight⁶¹. Of course this legislation is extremely broad and essentially amounts to a system whereby the non-citizens are deemed guilty until proven innocent. For instance, non-citizens release from jail has been contingent on government ‘clearance’, that is, a decision that they were not linked to nor had knowledge about terrorist activities⁶². Essentially, the DOJ “promulgated new rules and issued new policies that permitted detainees to be held without charge in cases of an undefined ‘emergency’⁶³. These new rules allowed blanket closure of immigration hearings to the public, including detainees' family and friends. As well, the INS was authorized to keep detainees in jail despite immigration judges' orders that they be released on bond”⁶⁴. These new rules of course provided for an imbalance of fundamental human rights in favour of national security.

With regards to specific US legislation, three days after the attacks the US congress passed the broadly-framed *Authorization for the Use of Military Force (AUMF)*. The *AUMF* was used to justify the administration violations of international law⁶⁵. The legislation granted the executive branch the authority to “*use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001*”⁶⁶. For five years the legislation operated in the US, depriving individuals of their fundamental human rights. Finally in 2006 the *AUMF* was held to be invalid after the ruling of the US Supreme Court in *Hamdan v. Rumsfeld (2006)*. The impact of the ruling has been noted to be “without question, the single most significant Supreme

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ *Summary of Hamdan v. Rumsfeld - Supreme Court Geneva Conventions Case (2006)* Civil Liberty Union<<http://civilliberty.about.com/od/waronterror/p/hamdan.htm>> at November 12 2007

⁶⁶ Ibid

Court ruling to date dealing with the war on terror” and confirmed that all non-citizen prisoners are protected by the Geneva Conventions⁶⁷.

Perhaps the most significant legislation passed to combat the ‘War on Terror’ was the *USA Patriot Act 2001*. Specific provisions of the Act give the US Attorney General extremely broad powers with respect to detaining immigrants. Section 412 is an example. According to section 412(a), “the AG must continue detention of such noncitizen until the individual is removed from the US, or until the individual is determined not to be removable”⁶⁸. The last piece of this provision, ‘or until the individual is determined not to be removable’, is extremely ambiguous and affirms the broad powers of detention of the Act⁶⁹.

Lastly, section 412(a) reads, “if such noncitizen is ordered removed, but removal is unlikely in the reasonably foreseeable future, detention may be continued for additional periods of up to six months, but only if the release of the individual ‘will threaten the national security of the US or the safety of the community or any person’⁷⁰. Although some sections of the *Patriot Act* are operating on a sunset clause, section 412 is not and is still in legal operation.

iv. International Violations by the US

Such abuse and detention conditions that Mr. Benatta and over 1,200 other non-citizens had to endure from shortly after the September 11th attacks are inconsistent with basic human

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Manuel D. Vargas, *New Developments in Representing Non-Citizens Post-September 11* Director, Immigrant Defense Project New York State Defenders Association
<http://www.nysda.org/idp/docs/fileL_02_NewDevelopmentsReprntingNonCitizensPostSept11_5_15_02_.pdf> at November 3 2007, 5

⁷⁰ Ibid.

rights protected by international standards. Detention at the MDC and the use of its high security prison regime has been determined by the UN Working Group on Arbitrary Detention to be a form of torture⁷¹. This determination is important because “in October 1994 the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was ratified and became binding on the US”⁷². However, the US declared the Convention is not self executing and can only be implemented through domestic legislation⁷³.

There are other international violations. The practices at the MDC violate Article 9 of the ICCPR⁷⁴. More specifically, ICCPR establishes that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."⁷⁵ Further, the ICCPR also prohibits any "cruel, inhuman or degrading treatment or punishment"⁷⁶. As well, Article 9 of the Universal Declaration of Human Rights maintains “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”⁷⁷. Furthermore, the detainees were placed in conditions at the MDC that breach the “The Universal Declaration of Human Rights”⁷⁸. Lastly, the UN Standard Minimum Rules for the Treatment of Prisoners⁷⁹ was also violated.

V. Crimes against Humanity and the ICC

⁷¹ *United Nations Economic and Social Council Civil and Political Rights: Including the Question of Torture and Detention* E/CN.4/2005/6/Add.1 (2005) 69.

⁷² *Consideration of Reports Submitted by States Parties under Article 19 of the Convention* (2000) United Nations CAT

<[http://193.194.138.190/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/fd58acc3c4d77447802568cf0030f212/\\$FILE/G0040656.pdf](http://193.194.138.190/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/fd58acc3c4d77447802568cf0030f212/$FILE/G0040656.pdf)> at November 20th 2007, 4

⁷³ *Ibid* 7.

⁷⁴ United Nations, above n 71, 69.

⁷⁵ *International Covenant on Civil and Political Rights 1976*, 10

⁷⁶ *International Covenant on Civil and Political Rights 1976*, 7

⁷⁷ *Americas Disappeared*, above n 28, 1.

⁷⁸ *Ibid* 4.

⁷⁹ *Internal*, above n 3, 12-13.

The ICC has jurisdiction over the most serious crimes of international concern: genocide, crimes against humanity, war crimes, and aggression⁸⁰. For our purposes, Article 7, crimes against humanity, will be highlighted. Individually speaking, it would not be possible to maintain Mr. Benatta's detention was a breach of Article 7. The reason is Article 7 involves the commission of certain acts, such as murder, torture, imprisonment, persecution and other inhumane acts in a certain context: they must be part of a widespread or systematic attack directed against a civilian population⁸¹.

When taking into account the fact the detention scheme targeted over 1,200 Muslim immigrants, the argument for crimes against humanity becomes apparent. The latter part of the definition, 'must be part of a wide spread or systematic attack' is extremely important as both terms have always been regarded as elements of an offense⁸². Specifically, both terms have been contemplated by the ICTR in Akayesu: "The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims⁸³. Also, the concept of 'systematic' may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources"⁸⁴.

There is substantial reason to believe the detention scheme carried out by the US against non-citizens was a crime under Article 7. The 'widespread' element is arguably satisfied in that

⁸⁰ Robert Cryer, *An Introduction to International Criminal Law and Procedure* (1st ed, 2007) 125

⁸¹ Ibid 187.

⁸² W.J. Fenrick, "Should Crimes Against Humanity Replace War Crimes?", 37 *Columbia J. Trans. L.* 767 (1999) 777

⁸³ *Crimes Against Humanity And The Principles Of Legality: What Could the Potential Offender Expect?* (2005) Murdoch University Electronic Journal of Law < <http://www.murdoch.edu.au/elaw/issues/v7n1/sautenet71.html>> at November 27th 2007 18

⁸⁴ *The Prosecutor v. Akayesu* (1998) ICTR-96-4-T

the US apprehended over 1,200 non-citizens shortly after Benatta was taken into custody⁸⁵.

Also, the amount of government resources used for the detention scheme, such as police officers, federal agents, and the State and Federal prison systems, gives further context to just how substantial the scheme was. For instance, over two dozen government bodies lead terrorism investigations after the attacks⁸⁶.

With regards to ‘systematic’, the detention scheme by the US has been noted on several occasions to have “systematically targeted and detained Arab and Muslim men carried out with unprecedented secrecy”⁸⁷. This fact alone would likely satisfy the element of ‘systematic’.

Although the detention efforts were relatively secret in the weeks after the attacks, US officials actually condoned the US tactics of systematic mass arrests and detention of immigrants. For instance, on October 25, 2001, US Attorney General John Ashcroft brandished the tactic of arresting detainees as a weapon, and in a statement effectively equated immigrants with terrorism: "Let the terrorists among us be warned," he said. "If you overstay your visa – even by one day – we will arrest you"⁸⁸.

It should also be mentioned that with regards to ‘systematic’, the June 2003 OIG report confirmed the allegations that the ACLU and other civil rights organizations had been raising since the government first began rounding up Muslim immigrants after September 11. It found that the arrests were "indiscriminate" and "haphazard" and that the INS routinely arrested people who had no connection to criminal activity, let alone terrorism⁸⁹. The report stated: “Even in the hectic aftermath of the September 11 attacks, we believe the FBI should have taken more care to

⁸⁵ Powel, above n 30.

⁸⁶ *Criminal Enforcement Against Terrorists* (2002) A TRAC Special Report Supplement <<http://trac.syr.edu/tracreports/terrorism/supp.html>> at November 28th 2007

⁸⁷ Americas Disappeared, above n 28.

⁸⁸ Powell, above n 30.

⁸⁹ OIG, above n 38.

distinguish between aliens who it actually suspected of having a connection to terrorism as opposed to aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism⁹⁰.

Lastly, the final term ‘directed against any civilian population’ is arguably satisfied when taking into account the number of immigrants who had no relationship with the ‘War on Terror’. Although the US deemed its terrorist legislation to be a tool used in the ‘War on Terror’, the sheer lack of convictions for terrorist crimes in the years between September 11th and the present determine that the vast majority of the 1,200 immigrants were completely innocent and in no way connected to any terrorist crimes.

To begin, US President George Bush stated in June 2005 that "federal terrorism investigations have resulted in charges against more than 400 suspects, and more than half of those charged have been convicted"⁹¹. However, statistics determine a largely different view. To be specific, as of July 2007, only 62 defendants have been convicted of federal crimes of terrorism⁹². Even more specifically, “juries convicted nine defendants, 30 defendants pleaded guilty and 11 pleaded guilty to other charges. There were eight acquittals and four dismissals”⁹³.

Another interesting point is when looking at cases that would be considered high profile with regards to terrorist crimes, such as planning or participating in terrorism, many of the highest profile cases did not involve terrorist cells operating in the US⁹⁴. Moreover, “Since 9/11,

⁹⁰ Office of the Inspector General of the Department of Justice *‘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’* (June 2003).

⁹¹ Dan Eggen and Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges Statistics Often Count Lesser Crimes* (2005) Washington Post Staff Writers <<http://www.washingtonpost.com/wp-dyn/content/article/2005/06/11/AR2005061100381.html>> at November 12 2007

⁹² *Terrorist Trials, 2001- 2007 Lessons Learned* “A Publication of the Center on Law and Security at the NYU School of Law” (2007) <<http://www.lawandsecurity.org/publications/TTRC2007Update1.pdf>> at October 2007

⁹³ Adam Liptak and Leslie Eaton, *Terrorism convictions on the decline since Sept. 11th* (2007) New York Times <<http://www.detnews.com/apps/pbcs.dll/article?AID=/20071025/NATION/710250402>> at November 15th 2007

⁹⁴ *Terrorist Trials*, above n 92.

there seems to have been only one such arrest, indictment, and conviction, the case of Martin Siraj, who was convicted in 2006 of planning to bomb a New York City subway station”⁹⁵. This fact firmly supports the US’s arrest and detention of over 1,200 immigrants was indeed completely arbitrary.

There may, however, be an argument from the US that immigrants are not in fact considered ‘citizens’ by definition. For instance, Union Aid Abroad, the overseas humanitarian aid agency of the ACLU, has defined a civilian to be “a *citizen* not part of the state through participation in the military or police force”⁹⁶. When this definition is used it is clear immigrants such as Benatta would not be a civilian for the purposes of the Article 7 and, as a result, the US would be able to avoid the jurisdiction of Article 7. Therefore much would depend on the statutory interpretation of ‘civilian’.

Lastly, the term ‘attack’ is also satisfied. An ‘attack’ need not involve the use of armed force and can encompass mistreatment of the civilian population⁹⁷. It must also be noted that for the crime to be committed the perpetrators must have *mens rea*, or knowledge of the attack⁹⁸. Essentially the prosecution would have to prove that a perpetrator knew that the acts being committed were connected to a "widespread or systematic" attack⁹⁹. In this regard the focus can be placed on US officials who had authority to allow the detention schemes. US officials, including the Attorney General and the Solicitor General, would certainly be implicated; as well as various government bodies including the DOJ, INS, DHS and the FBI. These individuals and government bodies would certainly have had the knowledge the detention scheme was to be focused on Muslim male immigrants, as this group was primarily targeted.

⁹⁵ Ibid.

⁹⁶ *Union Aid Abroad*

<http://www.apheda.org.au/campaigns/burma_schools_kit/resources/1074040257_16812.html> at November 28th 2007

⁹⁷ Robert Cryer, *International Criminal Law and Procedure* (1st ed.)2006 195

⁹⁸ Crimes Against Humanity, above n 89, 23.

⁹⁹ Ibid 24.

There are also clear examples of violations of ‘prohibited acts’ with regards to committing a crime against humanity. For instance, s 1 (d) lists ‘Deportation or forcible transfer of population’ as a crime against humanity¹⁰⁰. The term refers to forced displacement of persons by expulsion or other coercive acts in the area in which they are lawfully present, without grounds permitted under international law¹⁰¹. There may be an argument that only those immigrants who had lawful visa status at the time of arrest and detention can use this as a listed prohibited act. Nonetheless, ‘Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law’ under s 1 (e) would without doubt be considered a prohibited act committed against the detainees¹⁰².

Moreover, the imprisonment must be arbitrary to constitute a crime against humanity and that does not mean simply a minor procedural defect would expose the authorities involved to international persecution¹⁰³. As well, it must be satisfied that the ‘gravity of conduct’ be such that there is a violation of fundamental rules of international law¹⁰⁴. Certainly, then, Mr. Benatta would have a great argument here as it appears no detainee has been locked up as long as him¹⁰⁵. And as already mentioned his detention was in violation of several international conventions and laws.

Another prohibited act in Article 7 is ‘torture’ as per s 1(f)¹⁰⁶. The fact that the United Nations Working Group on Arbitrary Detention has deemed the treatment Mr. Benatta and the other ACLU petitioners to be torture is likely all that is needed for this requirement of the ICC. It

¹⁰⁰ *Rome Statute of the International Criminal Court* 2001 Article 7 s 1 (d)

¹⁰¹ Cryer, above n 80, 204

¹⁰² *Rome Statute of the International Criminal Court* 2001 Article 7 s 1 (e)

¹⁰³ Cryer, above n 80, 205

¹⁰⁴ Cryer above n 80, 205-206

¹⁰⁵ Criminal Enforcement, above n 92.

¹⁰⁶ *Rome Statute of the International Criminal Court* 2001 Article 7 s 1 (f)

has been mentioned that the prohibition against torture is well established in numerous international conventions and instruments, including the Universal Declaration of Human Rights¹⁰⁷.

Another prohibited act for the purpose of Article 7 is ‘persecution’ listed in s 1(h). Persecution is defined in the ICC statute as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity"¹⁰⁸. Statistically revealing that the vast majority of over 1,200 immigrant detainees were male and Muslim from Middle Eastern countries would likely satisfy the requirement of an ‘intentional’ form of persecution. The latter part of the definition is satisfied – as already mentioned the detention scheme and treatment of the detainees was in breach of international law. As well, the collective group that was intentionally targeted were primarily Muslim males.

Ultimately the detention scheme implemented by the US in the days and months following the September 11th attacks may be regarded as a crime against humanity under the Rome Statute. However it is clear the US, in not ratifying the Rome Statute, will likely be unscathed by Article 7 and that the ICC, notwithstanding the detention scheme may be considered a crime against humanity under the Rome Statute.

VI. A Major Hurdle: Jurisdiction of the ICC

¹⁰⁷ Cryer above n 80, 206

¹⁰⁸ Ibid.

The US signed the Rome Statute on Dec 31st 2000 under President Clinton; however the Bush administration did not ratify the statute¹⁰⁹. As a result, the US are not party to the ICC and do not formally recognize its authority to prosecute US nationals.

There are, however ways in which the US, as a non-party, can fall under the jurisdiction of the ICC. First, a non-party state can accept *ad hoc* jurisdiction of the court¹¹⁰. It is important to note if states accept jurisdiction for the crime in question this has the consequence of acceptance of jurisdiction for all the crimes relevant to the situation¹¹¹. To put it plainly, the US under the Bush Administration will never accept the jurisdiction of the ICC as a means to prosecute its own government bodies and officials. In fact, the US opposes the ICC outright. For instance, The Bush administration's hostility to the ICC was apparent in 2002 as the US was concerned with the prospect that the ICC may exercise its jurisdiction to conduct prosecutions of US military, political officials and personnel¹¹².

The Bush administration is so opposed to the ICC and the prospect of its jurisdiction prosecuting US officials, as per Article 12, that Congress passed the *American Service members' Protection Act (ASPA)* in 2002 in an effort to weaken the position of the ICC. Some important provisions in ASPA state that there is a prohibition on US cooperation with the ICC and also a provision authorizing the US to "use all means necessary and appropriate" to free US personnel detained by the ICC¹¹³.

¹⁰⁹ Cryer above n 80, 140

¹¹⁰ *Rome Statute of the International Criminal Court* 2001 Article 12 (3)

¹¹¹ Cryer above n 80, 137

¹¹² *The United States and the International Criminal Court* (2005) < <http://www.hrw.org/campaigns/icc/us.html>> at November 2nd 2007

¹¹³ Ibid.

Another means of bringing a matter before the ICC is by a referral by the Security Council acting under Chapter VII of the Charter of the United Nations¹¹⁴. However there is an issue with regards the US having veto power to block any referral. Out of the 15 members, the US, China, Russia, Britain and France possess the privilege of having veto power. The US is by no means unwilling to use its veto: since 1982, the US has utilized its veto power 32 times in favour of its close ally, Israel¹¹⁵. Again, even if the other permanent members of the Security Council decided to refer the matter the ICC, the US would have the power to prevent such a referral by using its veto power.

VII. Conclusion

The US's actions in arbitrarily detaining over 1,200 male, Muslim immigrants shortly after the September 11th attacks was unreasonable and haphazard. It was unreasonable because a vast majority of the detainees, including Mr. Benatta, were not involved in terrorist activities in any way, let alone any other criminal activities. However this did not prevent the detainees from being deprived of numerous procedural and fundamental human rights. It was haphazard because the detention scheme was preventative in nature and targeted Muslim males who were non-citizens living in the US.

Despite the unfortunate and greatly saddening result of the attacks on September 11th, the US government did not accomplish any benefit by the detention scheme. The impact on hundreds of non-citizens and their families will be faced for years to come. Mr. Benatta in particular will never be the same. He lost almost five years of his life to detention and mistreatment in the US

¹¹⁴ Cryer, above n 80, 133

¹¹⁵ Rajan, Chella "Global Politics and Institutions" *Frontiers of a Great Transition*. (Vol. 3) Tellus Institute (2006).

prison system for alleged crimes he did not commit. Like many other immigrants caught up in the detention scheme, Mr. Benatta only sought a better life when he chose to go to North America. Although he probably could not contemplate a worse situation than he what he endured in the Algerian Armed Forces, his suffering in the US was the direct result of the Canadian Government's actions in illegally transferring him to the US and fraudulently misrepresenting him to be a terrorist.


Reluctantly, Canada has officially acknowledged Benatta's claim: lawyers for the Canadian government have agreed to mediate the claim in August 2008.

Lawyers for Mr. Benatta should be confident a settlement will occur through mediation as it is likely the Canadian government will want to avoid the negative media attention that would result if their officials' negligence were to go to trial. Mr. Benatta is one step closer to the justice he deserves, as an innocent man who suffered needlessly.

About the author:

Joel Chrolavicius is a CLA member due to graduate with a Juris Doctor of Law degree from Bond University, Queensland, in September 2008. He is interested in human rights issues and volunteers in a few capacities, including doing appeals for war veterans denied disability pensions and working with a community legal centre to help people who can't afford private representation.

The Benatta case is being handled in Canada by Joel's sister, Nicole, who works for a small law firm in Toronto. Nicole is a specialist in constitutional law and human rights.

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