

UNITED STATES OF AMERICA

Amnesty International's briefing to the Committee on the Elimination of Racial Discrimination

Amnesty International (AI) submits the following issues of concern with regard to the Committee's consideration of the USA's combined fourth, fifth and six periodic reports under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) submitted in April 2007 and due to be considered at the 72nd session of CERD. This briefing focuses on concerns raised in the course of AI's work since the Committee's consideration of the USA's Initial Report in August 2001. These include racial disparities in law enforcement and the criminal justice system, and the discriminatory treatment of non-US nationals held by the US military in the context of the so-called "war on terror", the latter an issue not touched upon in the USA's report. We also address the government's failure to protect indigenous women from sexual violence and concerns about the treatment of displaced residents of New Orleans in the aftermath of Hurricane Katrina.

AI recognizes that there are many areas in which enjoyment of rights under the Convention are affected by race, colour, ethnicity or nationality, including access to health care, housing, education, employment and voting rights, which are addressed by other organizations and only some of which we refer to in this submission. AI trusts that all areas in which the USA falls short of its obligations under CERD will be given due attention in the Committee's review of the USA's report.

The USA emphasizes in its report how the US Constitution, federal and state laws, the judiciary and federal agencies provide protection against discrimination on the basis of race, colour, ethnicity or national origin. These are not always effective, however. For example, the burden on individual litigants to show proof of intent to discriminate, even where there may be compelling statistical evidence of a discriminatory effect, can make it extremely hard for such cases to prevail. Laws or policies targeting immigrants in the aftermath of 11 September 2001 have resulted in discriminatory treatment. Factors such as poverty and race can affect the right to equality before the law, with indigent defendants, for example, being reliant on often under-resourced legal aid systems. Amnesty International is also concerned by a reported fall under the Bush administration in the number of cases of racial discrimination and other civil rights violations investigated by the Justice Department's Civil Rights Division; federal civil rights statutes provide an important remedy by allowing the federal government to take action against state or local officials or agencies guilty of violating protected rights, including where there is evidence of systemic abuses.¹

Specific issues of concern are as follows:

¹ See, for example, Washington Post, *Civil Rights Focus Shift Roils Staff at Justice*, 13 November 2005; and an analysis by the independent data research group TRAC, *Civil Rights Enforcement by Bush Administration Lags*: <http://trac.syr.edu/tracreports/civright/106/>.

- **Torture and other ill-treatment by law enforcement officials; racial profiling:** *In relation to Article 2 (states should review governmental, national and local policies that have the effect of creating or perpetuating racial discrimination; bring an end to discrimination by all appropriate means); Article 5 (guaranteeing equality before the law; the right to security and protection of the person); and Article 6 (effective protection and remedies) of the Convention*

The pervasive discrimination faced by members of racial or ethnic minorities in the USA at the hands of law enforcement officials has been extensively documented by many organizations, including AI.² In jurisdictions across the USA, racial minorities have been found to be disproportionately the victims of police ill-treatment, unjustified stops and searches, physical abuse and unjustified shootings. Systematic abuses have been identified in some of the country's largest police departments, often involving units operating in inner-city areas largely populated by racial or ethnic minorities. While a number of police departments have improved their policies in recent years – some forced to take action following Justice Department “pattern and practice” investigations³ – others still do not have adequate systems for monitoring police abuses, such as checking for patterns of racism or tracking officers involved in repeated complaints.

A person's race or ethnicity can compound discrimination experienced by other vulnerable groups. For example, a recent AI study of gender-based violence by police towards lesbian, gay, bisexual and transgender (LGBT) people found that within the LGBT community people of colour and immigrants experienced a heightened risk of abuse (see AI's report *Stonewalled – Still Demanding Respect*, AI Index: AMR 51/001/2006).⁴

The question of impunity for officers responsible for abuses has been an ongoing concern in a number of cities, including Chicago, where evidence emerged in the late 1980s of the systematic torture of murder suspects by the Chicago Police Department's Area 2 police officers. Most of the victims were African American or other minorities. No officer has ever been prosecuted, despite indisputable evidence that torture occurred.⁵ The federal authorities

² AI's past reports include *USA: Rights for All*, chapter 3, (AI Index: AMR 51/35/98); *Race, Rights and Police Brutality* (AI Index: AMR 51/147/99); *Amnesty International's Concerns on Police Abuse in Prince George's County, Maryland* (AI Index: AMR 51/126/2002).

³ Under the Violent Crime Control Act of 1994, U.S.C. Section 14141, the Justice Department may pursue “pattern and practice” lawsuits against individual federal, state or local police agencies accused of systemic, department-wide patterns of civil rights violations. Such investigations have typically resulted in court-supervised Consent Decrees providing detailed reform plans, or memoranda of agreement setting out reforms.

⁴ <http://web.amnesty.org/library/index/engamr510012006>.

⁵ After years of inaction by the authorities, two special prosecutors were appointed to investigate the cases and produced a report confirming that scores of suspects were tortured under interrogation, including through suffocation and use of electric shocks, but said the cases were too old to warrant prosecutions. AI first reported on the cases in 1990. More details on these and other cases are

have recently opened an investigation into claims that officers involved in the cases committed perjury during civil lawsuits brought by torture victims. However, 26 alleged torture victims remain incarcerated, despite serious questions about the evidence on which they were convicted.⁶ There remains concern about the police complaints system in Chicago, where research has shown that a far smaller proportion of complaints of brutality are upheld than in other large police departments.

There have been increased efforts in recent years to address the problem of “racial profiling”: the targeting of individuals by law enforcement officials on the basis of their perceived racial, ethnic or national origin. Some law enforcement agencies are now required to collect data on the race or ethnic origin of people stopped by police. Such monitoring has sometimes been introduced as part of state-wide legislation or as a result of legal decisions or settlements reached as a result of Justice Department “pattern and practice” investigations (see above). However, disparate treatment continues to be reported. A 2006 study of police traffic stops in Los Angeles, for example, found that Latino and African American motorists were significantly more likely than white motorists to be asked by police to leave their vehicles and submit to searches.⁷ A national survey of police contacts with the public in 2005, released by the Justice Department in April 2007, found that, while black, white and Hispanic drivers were equally likely to be stopped by police, blacks and Hispanics were much more likely to be searched and arrested.⁸ The statistics were almost identical to a similar survey conducted in 2002.⁹ Most states still do not mandate the collection of data on racial profiling. While the raw data from surveys may be insufficient to firmly establish the reasons behind the disparities, AI believes the collection of such data, along with clear policies and adequate complaints mechanisms, would be a major step toward preventing racial profiling.

Hundreds of non-US nationals, primarily Muslim men of Arab or South Asian origin, were detained in the USA in the initial aftermath of the attacks on the World Trade Center and the Pentagon on 11 September 2001. Most were held for routine immigration violations and were often deprived of rights such as prompt access to counsel or the courts and were subjected to harsh treatment in detention.¹⁰ The vast majority were eventually released or deported without being charged with a crime. There was wide concern that the initial broad sweeps for suspects appeared to target individuals on account of their national or religious background, rather than for concrete suspicion of involvement in criminal activity. (See AI reports *USA: Memorandum to the US Attorney General on Amnesty International's concerns relating to the*

published in *USA: Summary of Amnesty International's Concerns on Police Abuse in Chicago* (AI Index AMR 51/168/99) <http://web.amnesty.org/library/Index/ENGAMR511681999>.

⁶ <http://www.co.cook.il.us/secretary/committees/CriminalJustice/FY2007/Reports/cj06-13-07.htm>.

⁷ *LA Police More Likely to Search Black, Hispanic Drivers*, Associated Press, 12 July 2006.

⁸ Bureau of Justice Statistics (BJS) *Special Report: Contacts between Police and the Public, 2005*, published April 2007, <http://www.ojp.gov/bjs/pub/pdf/cpp05.pdf>.

⁹ BJS, April 2005 (Findings from the 2002 National Survey).

¹⁰ A subsequent investigation by the Office of Inspector General (OIG), the Justice Department's watchdog agency, confirmed AI's findings that non-nationals picked up in the post-11 September sweeps were denied basic rights (<http://web.amnesty.org/library/Index/ENGAMR510792003>).

post 11 September investigations, AI Index: AMR 51/170/2001, and *Amnesty International's concerns regarding post September 11 detentions in the USA* (AI Index: AMR 51/044/2002).¹¹

While Article 1(2) of CERD states that the Convention shall not apply to distinctions, restrictions, exclusions or preferences applied by a State Party between citizens and non-citizens, the Committee has emphasized that non-citizens enjoy equal protection and recognition before the law and that any “non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law”.¹² The Committee has stressed that Article 1(2) should not be interpreted to undermine the “basis prohibition on discrimination” or to “detract in any way from the rights and freedoms enshrined in international human rights law”.¹³

Individuals from Muslim, Arab or South Asian communities (citizens as well as non-nationals) have continued to report being victims of racial profiling and subjected to unjustified stops and searches and sometimes detention by police and immigration or airline personnel. A study by Amnesty International USA (AIUSA) in 2004 found that racial profiling of citizens of Middle Eastern and South Asian descent, and others who appeared to be from these areas or were members of the Muslim and Sikh faiths, had substantially increased since September 2001.¹⁴

Other measures, such as the National Entry and Exit Registration System (NSEERS), introduced in September 2002, have been criticized by human rights groups, including AI, for their discriminatory application. NSEERS required males aged 16 and over from designated Arab and Muslim countries to register with the immigration authorities and be interviewed, finger-printed and photographed, and to submit to re-registration after one year. Hundreds of men and boys who complied with the first round of registrations were detained for alleged visa irregularities and many were subjected to harsh treatment in detention. Over 13,000 were placed in deportation proceedings, including people who reportedly had a claim to lawful status at the time of their arrest.¹⁵ While the mandatory registration requirement under NSEERS has been suspended, many still face deportation. Advocates argue that the focus on immigrants and non-immigrant aliens as potential “terrorists” has created undue fear within immigrant communities and obstacles for those seeking asylum.

¹¹ <http://web.amnesty.org/library/index/engamr511702001>,
<http://web.amnesty.org/library/index/engamr510442002>,
<http://web.amnesty.org/library/index/engamr510042003>.

¹² General Recommendation no. 30 (general comments) 2004, para. 2.

¹³ *Ibid.*

¹⁴ *Threat and Humiliation: Racial Profiling, Domestic Security and Human Rights in the United States*, AIUSA, September 2004. http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf.

¹⁵ AI news release: *USA: special registration process must be reviewed*
<http://web.amnesty.org/library/index/engamr510042003>.

In the report of his mission to the USA, made public in October 2007, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, criticized a number of “troubling developments in the law and practice of the United States concerning the treatment of immigrants, those applying for visas, and those claiming refugee status”. These included concern about the over-broad definition of providing “material support to terrorist organizations” contained under the USA Patriot Act and the mandatory detention of those suspected of such conduct and refusal of refugee status for such persons. The Special Rapporteur also expressed concern about the raising of the threshold concerning the reliability of asylum claims under the REAL ID Act of 2005.¹⁶

There is concern that broad powers given to local police in some jurisdictions to question people about their immigration status may encourage racial profiling of immigrant communities, going beyond any legitimate exercise of immigration law.¹⁷ Such measures are part of a growing trend of allowing state or local law enforcement agencies to enforce immigration law, often after reaching agreements with the Department of Homeland Security. Civil rights advocates believe that such moves threaten to erode trust between immigrant communities and local police leading to a fear of reporting crime and deterring migrants from using critical services, such as emergency medical care, to which they are entitled.

AI notes that the Department of Justice has issued policy guidance to federal law enforcement officials barring them from engaging in racial profiling; however these guidelines are non-binding. AI believes that more must be done to ensure that discriminatory treatment by law enforcement officials and racial profiling will not be tolerated. In particular, the US government should support passage of federal legislation to deter the practice. A current version of such legislation, The End Racial Profiling Act of 2007, if enacted, would ban racial profiling by federal police and provide federal funding to state and local police departments to adopt policies to prohibit the practice and establish effective complaints procedures.

The US Justice Department should vigorously enforce federal statutes prohibiting discrimination and other civil rights violations by law enforcement officials. It should reverse any trend resulting in a drop in federal civil rights cases involving racial discrimination, unequal protection under the law or other fundamental violations; enforce criminal statutes where appropriate; and pursue more “pattern and practice” investigations against law enforcement agencies accused of systematic abuses, including patterns of racial discrimination.

¹⁶ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (Mr Martin Scheinen): Mission to the United States of America*, <http://ohchr.org/english/issues/terrorism/rapporteur/visits.htm>.

¹⁷ See for example, reference to a plan by the sheriff of Maricopa County, Arizona, to saturate cities and valleys with sheriff's deputies to find and arrest undocumented migrants by questioning people about their immigration status during traffic stops and stops for minor infractions such as dropping litter (*Sheriff unveils migrant hotline: Some fear enforcement push encourages racial profiling*, Arizona Republic, 21 July 2007, <http://www.azcentral.com/arizonarepublic/local/articles/0721hotline0721.htm>).

- **Racial disparities in the criminal justice system:** *In relation to Articles 2, 5 (guaranteeing the right to equal treatment before the tribunals and all other organs administering justice) and 6 of the Convention.*

African Americans and other racial and ethnic minorities continue to make up a disproportionate share of inmates in US prisons and jails. According to the US Justice Department's Bureau of Justice Statistics (BJS), at mid-year 2006 black males constituted 41 per cent of the more than two million people in US prisons and jails, even though they comprise only around 13 per cent of the US population. The BJS found that 4.8 per cent of all black men were in custody at mid-year 2006, compared to about 0.7 per cent of white men and 1.9 per cent of Hispanic men. Overall, black men were incarcerated at 6.5 times the rate of white men. The incarceration rate for black women was 3.8 times that of white women, with Hispanic women 1.6 times more likely to be incarcerated than white women.¹⁸ While the causes of racial disparities in incarceration rates are complex and relate in part to differential crimes rates, as well as poverty, several studies have found that black and other minority defendants receive harsher treatment at various stages of the criminal justice system than similarly situated white defendants.¹⁹

There are also marked racial disparities in the juvenile justice system and in the rate at which children are incarcerated in the adult system for some crimes. A joint study published in October 2005 by AI and Human Rights Watch (HRW) reported that, as of 2004, at least 2,225 child offenders under 18 at the time of the crime were serving sentences of life imprisonment without the possibility of parole in the USA. AI considers this sentence to constitute cruel, inhuman or degrading punishment in the case of child offenders who are still developing physically, mentally and emotionally. The practice is also prohibited under Article 37 (a) of the UN Convention on the Rights of the Child. The AI/HRW study found that black youths nationwide were serving life without parole sentences at a rate 10 times higher than for white youth and constituted 60 per cent of all child offenders in this category. While the study was

¹⁸ Bureau of Justice Statistics: *Prison and Jail Inmates at Midyear 2006*.

<http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf>. The report did not give a breakdown of the percentage or numbers of incarcerated Native Americans; however, in some states they are incarcerated at far higher rates than their numbers in the state's general population.

¹⁹ See for example *Annotated Bibliography: Racial Disparities in the Criminal Justice System*, The Sentencing Project, Washington DC, 2003.

http://www.soros.org/initiatives/justice/articles_publications/publications/racialdisparities_bibliography_20030101/racialdisparitiesbib.pdf. There is also concern that the significantly higher mandatory minimum penalties for crack cocaine than powder cocaine have created unfair racial disparities in sentencing; the vast majority of those arrested for possessing or selling crack cocaine are African Americans, most of whom are low level offenders but receive far higher sentences than other similar level drugs offenders including powder-cocaine dealers who tend to be white or Hispanic. In its report to Congress in May 2007, the US Sentencing Commission reiterated its longstanding concern about the disparities in drugs sentencing laws stating that "The current severity of crack cocaine penalties mostly impact minorities", and recommended that Congress introduce legislation to modify sentencing policy in this area.

unable to draw conclusions from the data available as to the cause of the disparity, it was consistent with research studies which have found that minority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system in the USA.²⁰ AI has called on the USA to stop sentencing children to life imprisonment without parole and to grant children serving such sentences immediate access to parole procedures. (See *The Rest of Their Lives, Life without Parole for Child Offenders in the United States*, Amnesty International, Human Rights Watch²¹). Such measures have not been taken.

Concerns about disparities in treatment of black and white youth in the criminal justice system have been highlighted in the case of six black high school students in Jena, Louisiana, charged with assaulting a white student in December 2006, during a period of racial tension triggered by the hanging of a noose from a tree in the high school grounds by white students. Although the victim of the assault was discharged from hospital the same day, the black students were originally charged with crimes (including attempted second-degree murder) which could have put them in prison for decades. Mychal Bell, one of the accused, was tried in an adult court despite being a minor at the time of the alleged offence. Charges against the defendants were later reduced and Bell transferred to a juvenile court, following adverse publicity and lobbying from civil rights groups. Amnesty International has written to the Civil Rights Division of the US Justice Department urging it to investigate charges that the cases reflect a pattern of unequal treatment of black and white youths in the town. (see *USA: Amnesty International calls for urgent review of the case of the "Jena Six"*).²²

The Death Penalty

Eighty per cent of the more than 1,000 men and women executed in the USA since 1977 had been convicted of crimes involving white victims. Yet blacks and whites are the victims of murder in approximately equal numbers in the USA. At least one in six of the 350 African Americans executed in the USA since 1977 was tried in front of all-white juries.²³

Three US Supreme Court Justices concurring in the *Gregg v. Georgia* decision in 1976, the ruling which allowed executions to resume in the USA after almost a decade without them, acknowledged that in the death penalty experiment they were initiating, "mistakes will be made and discriminations will occur". Nevertheless, they refused to rule against a resumption of executions "on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner".²⁴ Their predictions about errors and

²⁰ See, for example, Eileen Poe-Yamagata and Michael A. Jones, *And Justice for Some* (Building Blocks for Youth Initiative for the National Council on Crime and Delinquency, 2000), <http://www.buildingblocksfor youth.org/justiceforsome/jfs/html>.

²¹ <http://web.amnesty.org/library/index/engamr511622005>

²² <http://web.amnesty.org/library/index/engamr511412007>

²³ *USA: The experiment that failed – a reflection on 30 years of executions*, AI Index: AMR 51/011/2007, January 2007,

[http://web.amnesty.org/library/pdf/AMR510112007ENGLISH/\\$File/AMR5101107.pdf](http://web.amnesty.org/library/pdf/AMR510112007ENGLISH/$File/AMR5101107.pdf).

²⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976), Justice White, joined by the Chief Justice and Justice Rehnquist, concurring in the judgment.

prejudice were right. More than 100 death row prisoners have been released since 1976 after evidence of their wrongful convictions emerged. Others have gone to their deaths despite compelling evidence of their innocence. Meanwhile studies have consistently shown that race, particularly race of the murder victim, plays a role in who is sentenced to death in the USA.

Yet the USA's report on CERD makes no mention of racial discrimination and the death penalty. In this regard, AI remains shocked that the US government told the UN Human Rights Committee in 2006 that "US constitutional restraints, federal and state laws, and governmental practices have... prevented the racially discriminatory imposition of the death penalty".²⁵ This is far from the truth. A 1987 Supreme Court ruling, *McCleskey v. Kemp*, placed a huge and enduring obstacle in the way of defendants seeking to challenge their death sentences on the basis of evidence of racial discrimination in sentencing. The political branches of government – whether at state or federal level – have done little or nothing to remedy this situation.

AI issued a report on this issue in 2003: *USA: Death by discrimination – the continuing role of race in capital cases*, AI Index: AMR 51/046/2003.²⁶ Studies conducted since then continue to highlight race as a factor in the capital justice system. A recent investigation of Georgia's death penalty conducted for the *Atlanta Journal-Constitution*, for example, concluded that prosecutors across Georgia were twice as likely to seek the death penalty in cases where the victim was white. The study also found that between 1995 and 2004, prosecutors were about six times more likely to seek death when an armed robber killed a white person.²⁷ A recent academic study of death row in the USA found that "blacks convicted of killing whites are more likely to be executed than other death row offenders." It concluded that "despite efforts to transcend an unfortunate racial past, residues of this fierce discrimination evidently still linger, at least when the most morally critical decision about punishment is decided... [T]he post-sentencing capital punishment process continues to place greater value on white lives".²⁸

Amnesty International opposes the death penalty in all cases, unconditionally. The organization continues to urge state and federal authorities to work for total abolition. A current lull in executions, possibly amounting to a *de facto* moratorium while the US Supreme Court considers the constitutionality of lethal injection as an execution method, provides an

²⁵ List of issues to be taken up in connection with the consideration of the second and third periodic reports of the United States of America, page 49. On file at Amnesty International.

²⁶ [http://web.amnesty.org/library/pdf/AMR510462003ENGLISH/\\$File/AMR5104603.pdf](http://web.amnesty.org/library/pdf/AMR510462003ENGLISH/$File/AMR5104603.pdf).

²⁷ See *A matter of life or death*, Atlanta Journal-Constitution, September 2007, <http://www.ajc.com/metro/content/metro/stories/deathpenalty/index.html>.

²⁸ Jacobs, D., Carmichael, J.T., Qian, Z., Kent, S.L., *Who survives on death row? An individual and contextual analysis*. American Sociological Review, August 2007, Volume 72, pages 610-632.

opportunity for the USA to reconsider its attachment to a punishment which a clear majority of countries have abolished in law or practice.²⁹

- ***Ill-treatment in detention*** : In relation to Article 5 of the Convention (guaranteeing the right to equality before the law; right to security of the person and protection by the State against violence or bodily harm)

AI has received allegations of racially motivated abuses by correctional officers of inmates of prisons or jails. They include allegations that inmates evacuated from a New Orleans jail after Hurricane Katrina were beaten and subjected to racial slurs by guards in the prison in Jena, Louisiana, to which they had been temporarily transferred in September 2006. AI joined other organizations in calling on the Justice Department to investigate the allegations but has received no information on whether this took place.

There were reports of ill-treatment of non-US nationals held in immigration detention in the aftermath of the 11 September 2001 attacks. In particular, AI raised concern about conditions in a high security unit in the federal Metropolitan Detention Centre, New York, where mainly Muslim detainees were held in extreme isolation and subjected to other deprivations and ill-treatment including inadequate exercise, cruel use of shackles and restricted visits (See AI's report on Post September 11 detentions, cited above, note 10). AI considers such treatment to constitute "cruel, inhuman or degrading treatment" in violation of international human rights law and standards. Prisoners (whether citizens or non-US nationals) accused or convicted of supporting terrorism may be subjected to Special Administrative Measures (SAMs), which can involve holding them in conditions of prolonged isolation, with restrictions on visits with family members or attorneys. AI has raised concern that such conditions can be unnecessarily punitive and, in the case of pre-trial detainees, may jeopardise their right to prepare a defence.³⁰ Some civil rights advocates have alleged that SAMs and other security restrictions are over-broad and applied unfairly and disproportionately to Muslim prisoners.³¹ The US government should ensure that all prisoners regardless of their security status are held in humane conditions and are not subjected to discriminatory treatment.

Reports of abuses in immigration detention centres persist, despite the nationwide non-binding detention guidelines referred to in the US government's report to the Committee. In

²⁹ See *Pause for thought – Another lethal injection halted by US Supreme Court*, AI Index: AMR 51/161/2007, 18 October 2007, [http://web.amnesty.org/library/pdf/AMR511612007ENGLISH/\\$File/AMR5116107.pdf](http://web.amnesty.org/library/pdf/AMR511612007ENGLISH/$File/AMR5116107.pdf).

³⁰ See *Amnesty International raises concern about prison conditions of Dr Sami Al-Arian* <http://web.amnesty.org/library/index/engamr511102003>.

³¹ See *Washington Post*, 25 February 2007, Facility Holding Terrorism Inmates Limits Communications. The article describes restrictions imposed on mainly Muslim inmates in a new Communications Management Unit in Terre Haute federal prison, Indiana. Attorneys claim that prisoners not convicted of terrorism and who are not a high security risk have phone calls and visits severely restricted, with all calls and mail monitored.

July 2007, the General Accountability Office (GAO), the investigative body for Congress, reported that many detained immigrants were improperly barred from making even an initial phone call to a lawyer, as required under the guidelines, and that the Immigration and Customs Enforcement agency (ICE) did not reliably track the number of complaints received or their outcome. There is concern among advocates that the soaring number of immigrants in detention, who include asylum-seekers, could affect their access to legal and other services and make them vulnerable to ill-treatment.³² Concerns have also been raised about deaths of detainees in federal immigration custody and access to health care and about the harsh, prison-like conditions prevailing in many immigration detention facilities, including those holding undocumented migrant families and children.³³

- ***Sexual Violence against Native American women.*** *In relation to Article 5(b)(guaranteeing the right to security of the person and protection against violence whether inflicted by government officials or by any individual group or institution); and Article 6 (effective protection and remedies) of the Convention*

In April 2007 AI published a report, *Maze of Injustice: The Failure to Protect Indigenous Women in the USA*.³⁴ The report describes how Native American and Alaska Native American women suffer disproportionately high levels of rape and sexual violence³⁵ but face barriers to accessing justice. This is due to the complex maze of tribal, state and federal jurisdictions created by the US Government, which allow perpetrators (most of whom are non-Indian) to escape justice; underfunding by the government of key services; and failure at state and federal level to pursue cases or take them seriously. AI's report describes how sexual violence against Native American women today is informed and conditioned by a legacy of widespread human rights abuses and marginalization of Indigenous peoples.

AI's recommendations include calling on Congress to fully fund and implement the Violence against Women Act (VAWA) which would allow detailed data collection on sexual violence against Indigenous women and a Tribal Registry to track offenders. AI also calls for vigorous prosecution of cases; increased funding for Indian health and forensic services for sexual assault victims; recognition of tribal jurisdiction over all offenders who commit crimes on tribal land and increased funding by the federal government for police forces in Indian Country and Alaska Native villages.

³² See for example, *Washington Post*, 13 July 2007 No Phone Calls for Many Detainees. The number of immigrants detained by the USA has tripled from 90,000 to 283,000 over the past five years. The daily detention population has risen from around 19,700 in 2005 to more than 30,000 in October 2007.

³³ See for example, *Agence France-Presse (AFP)*, Prison conditions prevail at US immigration holding center, 12 May 2007; *Washington Post*, 3 Jailed Immigrants Die in a Month, 15 August 2007.

³⁴ <http://web.amnesty.org/library/index/engamr510352007>.

³⁵ Justice Department figures indicate that American Indian and Native Alaskan women are 2.5 times more likely to be raped or sexually assaulted than women in the US in general. This figure, while disturbing, may grossly underestimate the problem as many women are too fearful of inaction to report their cases.

AI further recommends that federal and state governments take effective measures, in consultation and cooperation with Native American and Alaskan Native peoples, to combat prejudice and eliminate stereotyping of and discrimination against Indigenous peoples.

Since AI's report was published, the US congress has recommended increased funding by \$10 million to implement the VAWA for fiscal year 2008. This includes a proposal by the Senate for specific funding under VAWA Title IX (Tribal Title) to conduct a baseline research study on violence against Native American women and to create a Tribal protection order and sexual offenders registry. The House will consider whether to adopt these measures in their bill. AI is urging Congress and the US administration to ensure that these measures are funded in full for the fiscal year 2008 VAWA appropriation bill.

- ***Victims of Hurricane Katrina:*** *In relation to Article 5 of the Convention (guaranteeing the right to security of the person and to “economic, social and cultural rights, .. in particular: the right to housing” under article 5 (e) (iii))*

Inequalities based on class and race have been starkly highlighted in the aftermath of Hurricane Katrina, which devastated parts of the Gulf Coast in August 2005. In the immediate aftermath, following massive flooding in New Orleans, thousands of mainly poor, African American residents were left stranded for days in increasingly desperate and unsafe circumstances, without food, adequate shelter or even emergency medical care. Many were left vulnerable to attack as police abandoned the city. More than two years on, thousands of evacuees are still displaced with little prospect of returning to their homes. Many continue to live in precarious situations, in temporary accommodation throughout the United States, without work or their former networks of support.³⁶

Amnesty International is particularly concerned by proposals to demolish a large proportion of the public housing units from which New Orleans residents were evacuated after Hurricane Katrina, despite their being on relatively high ground and suffering only minor flooding. Residents, advocates and some experts believe the existing public housing units could be renovated and reoccupied by the former residents.³⁷ Before Katrina, there had already been

³⁶ *Road to New Life After Katrina is Closed to Many* The New York Times, 12 July 2007. See also Public Housing Authorities participating in Disaster Voucher Program: <http://www.hud.gov/offices/pih/publications/dhapprtcha.xls>. (Voucher recipients are dispersed among more than 100 public housing authorities across the states, most of whom have less than 3 families. Under the program, aid recipients will be allowed to move once).

³⁷ Kari Lydersen, *New Orleans Public Housing Residents Set to Fight Off Developers*, The Newstandardnews.net, February 27, 2006, available at: <http://newstandardnews.net/content/index.cfm/items/2868> (Citing tour of one development by Dr Marty Rowland, a civil engineer, who told reporters that all of the first floor apartments which suffered water damage could be habitable again with rewiring and restoration of utilities while second and third floor units were hardly damaged at all); Declaration of John E. Fernandez, *Anderson v. Jackson*, Civil Action No. 06-3298, available at: <http://www.justiceforneworleans.org/jfnodocs/Declaration.pdf> (John Fernandez, an associate professor of Architecture at M.I.T. stating his inspection and assessment “did

pressure to reduce public housing developments as the buildings stood on centrally located and thus valuable land. The post-Katrina rebuilding program (funded by the federal Department of Housing and Urban Development), through its emphasis on “mixed-income units”, has reportedly all but eliminated affordable housing in New Orleans. This has created a demographic shift in which poor, largely African American, communities are unable to return to their homes. The lack of housing opportunities for thousands of New Orleans residents is compounded by an absence of schooling, mental and physical health care opportunities and increased criminal and domestic violence. These challenges most keenly affect communities marginalized by race, ethnicity and class. (see “*Two Years After the Storm: Housing Needs in the Gulf Coast*”. *Senate Committee on Banking, Housing and Urban Affairs, Statement Submitted for the Record by Amnesty International USA, September 25, 2007*).

The right to adequate housing, enshrined in the Universal Declaration of Human Rights and supported by other international instruments, guarantees access to a safe, habitable, and affordable home with protection against enforced eviction. The prohibition of discrimination in the enjoyment of the right to housing is affirmed under Article 5 (e) of CERD.

AI has called on the US government to apply the Guiding Principles for Internally Displaced Persons (IDPs) to those displaced by Hurricane Katrina, and to recognize that they have a right to return voluntarily, in safety and dignity, to their homes or places of habitual residence. It has called for concrete measures to be taken, including ensuring the availability of housing for low-income IDPs returning to the Gulf Coast, and ensuring that IDPs are able to participate in the planning and management of their return, resettlement and reintegration into their communities (see *Statement Submitted for the Record*, above)

- ***Detention, treatment and trials of “enemy combatants”:*** *In relation to Article 5 (guaranteeing the right to equal treatment before the tribunals and all other organs administering justice; the right to security of the person and protection by the State against violence or bodily harm) and Article 6 of the Convention (guarantee of effective protection and remedies to all within the state party’s jurisdiction; the right to seek just and adequate reparations for any damage suffered as a result of discrimination).*

On 18 October 2006, then Attorney General Alberto Gonzales was asked: “If you, Mr Gonzales, were arrested and classified as an unlawful enemy combatant and you were an innocent person, what course of action would you take?” The Attorney General replied: “I

not find any conditions in which the integrity of the structure and exterior envelope of the buildings or the interior conditions of residential units themselves could not be brought to safe and liveable conditions with relatively minor investment.”); Reckdahl, Katy, *Like a Ton of Bricks*, Best of New Orleans.com, 24 October 2006, available at: http://www.bestofneworleans.com/dispatch/2006-10-24/news_feat.php (noting that during a recent walk through of the Lafitte housing development, Katrina water lines were clearly below the top of the buildings’ foundations).

want to emphasize that the Military Commissions Act does not apply to American citizens. Thus, if I or any other American citizen were detained, we would have access to the full panoply of rights that we enjoyed before the law.”³⁸

The US government has created for foreign detainees it labels as “enemy combatants” – a system of irremediableness and discrimination.³⁹ The Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA) curtail the right of judicial review of the lawfulness and conditions of detentions of “enemy combatants” and the right to remedy for human rights violations, but only in the cases of non-US citizens. This renders these laws themselves discriminatory, in violation of international law.

The MCA strips the US courts of jurisdiction to consider *habeas corpus* appeals from foreign nationals held as “enemy combatants” in US custody anywhere. Specifically, the MCA states,

“(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in... section 1005(e) of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

Foreign nationals held in Guantánamo are provided administrative review of their “enemy combatant” status by Combatant Status Review Tribunals (CSRTs), administrative bodies set up in 2004, more than two years after detentions began. These bodies consist of three military officers, who can rely on secret information undisclosed to the detainee or information coerced from the detainee or anyone else, in making its determinations. The detainee has no legal representation to assist him in this review. Under the DTA and MCA, judicial review is

³⁸ Alberto Gonzales hosts ‘Ask the White House’. 18 October 2006, <http://www.whitehouse.gov/ask/20061018.html>.

³⁹ All but one of the people currently held by the USA as “enemy combatants” are foreign nationals held outside the US mainland. However, the US government continues to hold Qatari national Ali Saleh Kahlah al-Marri in indefinite military custody inside the USA. Ali al-Marri has been held as an “enemy combatant” in the USA since June 2003. The US government continues to assert that it can so hold him without charge or trial and that the Military Commissions Act applies to him, therefore denying him the right to challenge his detention via habeas corpus. The case was argued in front of the full Fourth Circuit Court of Appeals on 31 October 2007. A decision was pending at the time of writing. Whatever the decision, it will likely be appealed to the Supreme Court, keeping Ali al-Marri in detention without charge or trial into the indefinite future, unless the administration were to decide to deport him or transfer him to civilian custody (from which he was transferred in June 2003 on the basis of a Presidential order).

limited to a single federal court and effectively to the narrow question of whether the CSRT operated according to the procedures devised for it by the administration, and consistent with US law to the extent that such law is considered to apply. The government maintains that this system of review is an "adequate" substitute for habeas corpus review. Amnesty International profoundly disagrees.⁴⁰

As a state party to the CERD, the USA must "assure to everyone within [its] jurisdiction effective protection and remedies" against discrimination, including on the basis of national origin, as well as the right to seek "adequate reparation or satisfaction for any damage suffered as a result of such discrimination" (Article 6). The MCA is discriminatory in relation to the right to judicial review and to remedy for violations. Consistent with the CERD, Article 2.1 of the International Covenant on Civil and Political Rights (ICCPR) requires the state party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind" including on the basis of national origin. Two of the rights recognized in the ICCPR are the right of anyone deprived of their liberty to be able to challenge the lawfulness of their detention in a court and the right to an effective remedy for violations of rights under the treaty. The UN Human Rights Committee has underlined that these two key rights are among those which cannot be curtailed even in times of public emergency that threatens the life of the nation.⁴¹

Under the MCA, only foreign nationals designated as "unlawful enemy combatants" can be subjected to trial by military commission. In promoting the Act, the White House stressed that "Americans cannot be tried by the military commissions the administration has proposed. Americans accused of war crimes and terrorism-related offences will continue to be tried through our [civilian] courts or courts-martial."⁴² Amnesty International believes that trials under the Military Commissions Act will fail to comply with international standards.⁴³ Clearly, if the US authorities constitute a tribunal which hands down to a foreign national standards of justice which are inadequate and lower than a US citizen accused of the same offence would receive in an already constituted court, the trials before it would fail to meet the test of fairness; they would clearly be discriminatory.

Under the ICCPR, all persons are equal before the law, entitled without any discrimination to the equal protection of the law (Article 26), and "shall be equal before the courts and tribunals" (Article 14). Each state party to the ICCPR undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights enshrined in the

⁴⁰ USA: *No substitute for habeas corpus: six years without judicial review in Guantánamo*, AI Index: AMR 51/163/2007, November 2007 <http://web.amnesty.org/library/Index/ENGAMR511632007>.

⁴¹ CCPR/C/21/Rev.1/Add.11, General Comment 29 (31 August 2001), *States of Emergency (article 4)*, paras. 14 and 16.

⁴² Myth/Fact: The administration's legislation to create military commissions. The White House, 6 September 2006, <http://www.whitehouse.gov/news/releases/2006/09/20060906-5.html>.

⁴³ USA: *Justice delayed and justice denied? Trials under the Military Commissions Act*, AI Index: AMR 51/044/2007, March 2007, <http://web.amnesty.org/library/Index/ENGAMR510442007>.

treaty, without distinction of any kind, including on the basis of national origin (Article 2). The Human Rights Committee has stated the general rule that “each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens.”⁴⁴

Similarly under CERD, everyone has the right to “equal treatment before the tribunals and all other organs administering justice” (Article 5). As noted above, the Committee on Elimination of Racial Discrimination has called on parties to CERD, of which the USA is one, to ensure in the administration of justice “that non-citizens enjoy equal protection and recognition before the law” and any “non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law”.⁴⁵ The Committee has stressed that although Article 1.2 provides for the possibility of differentiating between citizens and non-citizens, that article should not be interpreted to undermine the “basic prohibition on discrimination” or to “~~de~~ detract in any way from the rights and freedoms enshrined in international human rights law, including the ICCPR.”⁴⁶

There have been consistent allegations of the torture or other ill-treatment of foreign nationals held as “enemy combatants”, both in interrogation and as a result of harsh conditions of detention. AI has reported that interrogation techniques with apparent discriminatory intent have been employed against Muslim detainees.⁴⁷

The US government has also confirmed that it has been operating a secret detention and interrogation program in the “war on terror”. The “enhanced” interrogation techniques employed in this program are widely reported to have violated the international prohibition on torture and other ill-treatment. In July 2007, President Bush issued an executive order effectively giving this program the green light to continue. The executive order states that the secret program is to be used for “alien” detainees fulfilling the criteria for subjection to such custody. In other words, it reserves certain unlawful practices for use against foreign nationals.

While not all differential treatment on the basis of nationality violates international law, states must ensure and respect human rights without distinction as to national origin.⁴⁸ The UN

⁴⁴ General Comment 15, 1986. The position of aliens under the Covenant.

⁴⁵ *Ibid.*, footnote 8.

⁴⁶ *Ibid.*, para 2.

⁴⁷ See pages 30-40 of *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, AI Index: AMR 51/145/2004, October 2004, [http://web.amnesty.org/library/pdf/AMR511452004ENGLISH/\\$File/AMR5114504.pdf](http://web.amnesty.org/library/pdf/AMR511452004ENGLISH/$File/AMR5114504.pdf).

⁴⁸ Thus, for example, “the [Human Rights] Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]. General Comment 18, *Non-discrimination* (1989), para. 13. See also General Comment 23 (1994), “a State party is required under [article 2.1 of the ICCPR] to ensure that the rights protected under the Covenant

Human Rights Committee, for example, in its authoritative interpretation of the ICCPR in relation to aliens who come within the jurisdiction of the state party, has stated:

“Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment... Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person... Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law... Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights.”⁴⁹

Secret detention violates the right not to be subjected to torture or other cruel, inhuman or degrading treatment, the right of all detainees to be treated with humanity and respect for the inherent dignity of their person, and the right to judicial review of the lawfulness of detention.⁵⁰

Under the terms of the executive order, no US citizen could be placed in the CIA secret detention program. Foreign nationals should not be placed in it either.

Amnesty International is calling for all those held as “enemy combatants” to be able to challenge the lawfulness of their detention in an independent, impartial and competent court and to release if the detention is unlawful. Anyone who is not released should be promptly charged with a recognizable criminal offence and brought to trial without undue delay in an independent, impartial and competent court – not a military commission – in full accordance with international fair trial standards and without recourse to the death penalty.

The MCA and DTA should be repealed or amended to bring them into compliance with international law. The secret detention program should be abolished. All detainees should be provided access to remedies and reparations.

are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25.

⁴⁹ General Comment 15, *The position of aliens under the Covenant* (1986).

⁵⁰ USA: *Law and executive disorder: President gives green light to secret detention program*, AI Index: AMR 51/135/2007, August 2007, <http://web.amnesty.org/library/Index/ENGAMR511352007>.