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# UNITED STATES OF AMERICA

## Memorandum to the US Attorney General – Amnesty International’s concerns relating to the post 11 September investigations

### **Introduction**

More than 1,100 people, mainly non-US nationals, have been taken into custody in the USA during the investigations into the attacks on the World Trade Center and the Pentagon on 11 September 2001. Many of them have reportedly been held under new government powers to detain people for questioning for an extended period before being presented to a court. Very little public information has been made available to date regarding the details of these detentions and information on some cases has been sealed through court orders. It is unclear at present exactly how many people remain in custody, although it is believed that hundreds may still be detained. Sources have indicated that only a small number of these individuals are being held as “material witnesses” and it remains unclear as to whether any-one has yet been charged in connection with the 11 September attacks. Many of the detainees are reported to be held on federal, state or local criminal charges unrelated to the attacks, or are detained because of alleged immigration violations.

Amnesty International recognizes the government’s obligation to take all necessary measures to investigate the crimes of 11 September and protect national security. However, the organization is concerned that the government may be violating its equal obligation to ensure that any such measures include safeguards for the protection of the fundamental rights of those arrested or detained. Under international law, even in states of emergencies, certain basic rights may not be suspended, including the right of every person not to be subjected to arbitrary detention, torture or other cruel, inhuman or degrading treatment or discrimination solely on the grounds of race, colour, sex, language, religion or social origin. Other rights which may not be suspended include the right of everyone charged with a criminal offence to be presumed innocent until proved guilty according to law, and certain fair trial rights under international humanitarian law, which must be respected even in times of armed conflict<sup>1</sup>.

Over 300 “terrorist” suspects are reported to have been detained in other countries since 11 September at the behest of the US authorities. Amnesty International is urging the US Government to promote and protect international human rights standards in the investigation of these cases too. It is further calling on the US government to fully respect all relevant safeguards if it intends to seek the extradition of any of these individuals. In addition, the organization reiterates its opposition to the proposed military tribunals to try foreign nationals accused of links to “international terrorism”.

The USA is a state party to various international human rights treaties - including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against

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<sup>1</sup> Set out in the Geneva Conventions of 1949

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) - whose fundamental principles Amnesty International fears are threatened in the context of the investigations into the 11 September attacks. Yet it is precisely during challenging times such as these that governments must be scrupulous in their adherence to such principles. To do otherwise undermines rather than reinforces the search for justice.

### **1. Safeguards relating to arrest or detention**

International standards provide that all persons who are arrested or detained (with or without charge) should be informed immediately of the reasons for the detention and notified of their rights, including the right of prompt access to and assistance of a lawyer; the right to communicate and receive visits; the right to inform family members of the detention and place of confinement; and the right of foreign nationals to contact their embassy or an international organization. Anyone arrested or detained who does not adequately understand or speak the language used by the authorities, has the right to be notified in a language they understand what their rights are and how to exercise them and to be provided with an interpreter if necessary.<sup>2</sup> These rights are important safeguards against arbitrary deprivation of liberty and incommunicado detention. Incommunicado detention has been condemned by the US Government and non and intergovernmental organizations as a serious human rights violation that often leads to other abuses, including torture.

Although US law requires that a detainee be informed of the right to counsel immediately upon arrest, Amnesty International is concerned that some of those arrested after 11 September were denied prompt access to counsel and were unable to inform their families of their whereabouts. Some detainees are reported to have been denied access to counsel for up to a week - far longer than is considered acceptable under international standards, even in emergencies.<sup>3</sup> In some cases, families have reported difficulty finding out where, or even if, their relatives have been detained.

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<sup>2</sup> These rights are contained, *inter alia*, under article 9 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the USA in 1992; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), adopted by consensus by the United Nations (UN) General Assembly in 1988; and the Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders.

<sup>3</sup> The Human Rights Committee ( which monitors states' compliance with the ICCPR) has stressed that "all persons arrested must have immediate access to counsel". The Body of Principles states that access to a lawyer may be restricted in the most exceptional circumstances "to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority to maintain security or good order" but that even here, this should not be delayed beyond a few days. The UN Special Rapporteur on Torture has recommended that, as torture is most frequently practised during incommunicado detention "... incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees should be given access to legal counsel within 24 hours of detention."

Detainees (some of whom were later released) have also reported being held for days without being informed why they were detained and without being questioned, contrary to international standards.<sup>4</sup> Several detainees report having been effectively cut off from the outside world for two weeks while their families searched for them. Others have reportedly been held for weeks after being cleared by the FBI of any criminal violations. Amnesty International has spoken to several lawyers who say they had difficulty in finding out why their clients were being held. The lack of information and secrecy surrounding detentions may prevent people from being able effectively to challenge their detention - another important right under international law.<sup>5</sup>

Frequent transfers of detainees to different places of detention, sometimes to different US states, can also serve to perpetuate the secrecy surrounding detention and undermine the detainee's ability to receive assistance of legal counsel.<sup>6</sup> International standards provide that detained persons have the right not only to notify their family promptly of their arrest but also of any transfer and the place to which they have been transferred.<sup>7</sup>

Concern has also been raised that foreign nationals may not have been given an opportunity in all cases to seek the assistance of their embassy or a country representative on arrest, as provided under the Vienna Convention on Consular Relations, which the USA ratified without reservations in 1969. Although they may choose not to exercise this right, all foreign nationals must be informed of their right to contact their consulate immediately upon arrest. It is the responsibility of the Department of Justice to ensure this right is protected whether or not the detainee is in federal or local custody and, where requested, to arrange without delay for contacting their consulate.

## **2. Rights of immigration detainees and asylum seekers**

Concern has been expressed that people held in the post-11 September sweeps for immigration violations - who in the USA have no right to government-assigned legal counsel - may be subject to summary removal proceedings without having the opportunity to defend themselves or obtain legal advice. A number of those arrested are reported to have agreed to

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<sup>4</sup> Article 9(2) of the ICCPR states that "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

<sup>5</sup> Article 9(4) of the ICCPR states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the detention and order his release if the detention is unlawful."

<sup>6</sup>For example, the attorney retained in the case of three immigrants from Mauritania picked up in Ohio on immigration violations in late September still had not met with them two weeks later as they had been moved several times to jails in Indiana, Kentucky, Tennessee and Louisiana.

<sup>7</sup> Principle 16(1) of the Body of Principles states "Promptly after arrest and on each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody."

voluntary departure soon after being taken into custody and it is unclear whether all had an opportunity to be legally represented.

The Immigration and Naturalization Service (INS) has issued guidelines which provide that INS detainees should be immediately informed of organizations able to give free legal assistance. However, Amnesty International is informed that these standards are not legally enforceable or consistently applied, particularly where such detainees are held in local jails. Immigration lawyers' groups say they fear many may be in detention without an effective opportunity to contact a lawyer or other representative. Some detainees arrested since 11 September report not being allowed to make phone calls for several days, or being moved to different locations, without being able to inform their families or lawyers.

Some of those detained may be asylum seekers, seeking protection from *refoulement* to a country where they are at risk of human rights violations, including torture. *The USA has enacted legislation, in keeping with its obligations under the Convention against Torture (see below), which states that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture".<sup>8</sup>*

Amnesty International urges that all asylum seekers have an opportunity to have their claims assessed in a fair and satisfactory procedure, as required under the 1951 Convention relating to the Status of Refugees (UN Refugee Convention). International standards provide that, as a general rule, asylum seekers should not be detained; those who are detained because of criminal violations or on security grounds should still have a full and fair hearing of their claim, and be able to see and challenge any evidence presented against them. No-one should be prevented from lodging an asylum application. Any determination to exclude an individual from refugee status on grounds recognized under the 1951 Convention should only be made after full consideration of the claim in a fair and satisfactory procedure.<sup>9</sup> A preliminary consideration that someone might fall under the provisions of the exclusion clauses should not hinder the full examination of the claim for asylum. No one should be forcibly removed without having had their individual need for protection assessed, with all the safeguards

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<sup>8</sup> United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture, adopted in October 1998, as part of the Foreign Affairs Reform and Restructuring Act.

<sup>9</sup> Under the Refugee Convention, "Acts of terrorism" may be recognized grounds for exclusion from refugee status when they constitute crimes against peace, war crimes, crimes against humanity, serious non-political crimes outside the country of refuge, or acts contrary to the purposes and principles of the United Nations (Article 1F of the Convention).

provided in human rights (including the right to be informed of the evidence, to rebut the evidence and to appeal against a decision to exclude).

Amnesty International also urges that the Department of Justice ensure that new, detailed INS standards for immigration detainees and asylum seekers introduced into some facilities earlier this year - which include better provision for attorney contact, contact with consular officials and visitation - are extended to all facilities, and rigorously applied.<sup>10</sup>

### **3. Powers to detain non-nationals under new “anti-terrorist” legislation: The Patriot Act**

#### **3 (1). Right to be brought promptly before a judicial or other authority**

Amnesty International understands that many of the post-11 September detentions took place under an emergency directive issued by the Attorney General on 19 September. This extended the time a non-national could be held in Immigration or Naturalization Service (INS) custody without charge from 24 hours to 48 hours “or to an additional reasonable time, if necessary, under an emergency, or in other extraordinary circumstances.”

This has since been superseded by the USA Patriot Act, “anti-terrorist” legislation passed by Congress which became law on 26 October 2001.<sup>11</sup> Section 236(A) (a) of the Act provides for the mandatory detention of a non-US national based on the Attorney General’s certification that he has “reasonable grounds to believe” that the individual is a “terrorist”, or supporter of “terrorist activity” or “is engaged in any other activity that endangers the national security of the United States.”<sup>12</sup> A person detained under this provision may be held for up to seven days without any charges, after which removal proceedings or charges must be instituted, or the detainee released.

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<sup>10</sup> The standards were introduced in January 2001 at 18 INS-owned and operated detention centres and facilities operated under contract by Corrections Corporation of America and Wackenhut. They were due to extend to some of the largest jails housing INS detainees under contract in June 2001. However, there are many smaller facilities and local jails which continue to house INS detainees where the standards (which are due to be introduced gradually) are yet to be applied.

<sup>11</sup> Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act.

<sup>12</sup> Definitions of terrorism for which non-nationals can be detained or deported under the Act are extremely broad and include membership of, or any “material support” for, any foreign or domestic organization designated as a “terrorist organization” by the Secretary of State or any group that publicly endorses acts of terrorism; and membership or support for (including soliciting funds) any group not designated as “terrorist” but deemed to support terrorism in some way. In the latter cases, the onus on the non-national to prove that his or her assistance was not intended to further terrorism.

While seven day detention without judicial supervision is not as open-ended as the emergency directive issued on 19 September, Amnesty International believes that it may be contrary to international standards which provide that all arrested or detained persons should be brought promptly before a judge or judicial authority.<sup>13</sup> Although no specific time limits are expressly contained under international standards, seven-day detention before someone is initially brought before a court exceeds what has been considered acceptable in cases reviewed by the Human Rights Committee as well as the European Court of Human Rights.<sup>14</sup>

Judicial review is an essential safeguard against arbitrary arrest or detention and to protect the well-being of those detained. Article 9(1) of the ICCPR provides that “Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention.” To ensure freedom from arbitrary detention, Article 9 (4) further provides that anyone “who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” The Human Rights Committee has stated that Article 9(1) is applicable to all deprivations of liberty, including “immigration control.”

Amnesty International urges that the seven day detention provision be subject to review. In the meantime, its application should be strictly monitored and anyone detained under this power should be informed of the specific grounds of the detention and be afforded prompt access to an attorney, relatives and consular representative if requested.

### **3 (2). Power to detain non-nationals indefinitely**

Section 236 (A) (a) of the Patriot Act allows the Attorney General to continue to detain non-nationals certified as a danger to national security after removal proceedings have been initiated. Under the legislation, a non-national whose removal “is unlikely in the reasonably foreseeable future” may be detained indefinitely, if the Attorney General considers that release “will threaten the national security of the United States or the safety of the community

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<sup>13</sup> Principle 11(1) of the Body of Principles states: “A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.” This applies to all detainees, whether or not held on a criminal charge. Article 9(3) of the ICCPR states: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or release..”

<sup>14</sup> Members of the Human Rights Committee have questioned whether detention for 48 hours without being brought before a judge is not unreasonably long (Report of the HRC, vol 1 (A/45/40), 1990, para 333, Federal Republic of Germany); in a death penalty case, the Committee ruled that a delay of one week from the time of arrest before the detainee was brought before a judge was incompatible with Article 9(3) of the ICCPR: “anyone arrested or detained in a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power...” (McLawrence v Jamaica, UN Doc. CCPR/C/60/D/702/1996). The European Court of Human Rights has ruled in a UK case that detaining a person for four days and six hours before bringing him before a judge was not prompt access (Brogan et al, United Kingdom, 29 November 1988, 145b Ser. A33 at 62).



or any person.” People detained under this broad provision could include non-nationals who cannot be removed because they are stateless; whose country of origin will not accept them; or who are granted relief from deportation because they would face torture if returned to their country of origin.

The legislation authorizes the Attorney General to detain people under the above provisions on mere suspicion that they are a threat to national security. Although the act provides for *habeas corpus* review of the detention<sup>15</sup> and six-monthly reviews by the Attorney General at which the detainee can submit evidence, it is unclear how much information the government will be required to produce in support of the certification that the non-national is a “terrorist” or supports “terrorism”. In the past, the Attorney General has detained non-nationals facing deportation on the basis of “secret evidence” of alleged terrorist links not made available to the detainees or their attorneys. Amnesty International considers that no-one should be detained on the basis of evidence they are unable to review or challenge. Such a procedure lacks the essential guarantees under international law to protect people from arbitrary or wrongful deprivation of liberty.

Amnesty International raised its concerns about the use of secret evidence in a letter to the Attorney General in July 2000 about the case of Dr Mazen Al-Najjar. Dr Al-Najjar is a Muslim cleric and academic who was held in jail for three and a half years pending an appeal against a deportation order imposed for overstaying his student visa. He was denied bail on the basis of classified evidence introduced by the government that he was a threat to national security, which was reviewed *in camera* by a judge without either Dr Al-Najjar or his attorney being present. Dr Al-Najjar - who denies any involvement with terrorism - was given only a one-sentence summary of the “evidence”. In May 2000 a US federal district judge ruled that the reliance on classified evidence to detain him breached his constitutional right to “confront and rebut that evidence” and to a “fundamentally fair hearing”. He was freed in December 2000 after a further hearing at which a court found the evidence insufficient to justify detention.<sup>16</sup> The Department of Justice has lodged an appeal against this ruling, which was still pending in November.

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<sup>15</sup> The Act provides that “in general” judicial review of any action or decision made under Section 236 (A), including judicial review of the merits of the Attorney General’s certification, is available “exclusively in habeas corpus proceedings” (Section 236(A) (a) 7 (b))

<sup>16</sup> In the May 2000 ruling, the judge had ordered a new bail hearing, the first phase of which would be an open record hearing, after which the government would still be permitted to present classified information, but only on condition that a “meaningful summary” was provided to Al-Najjar and his attorney. The open record hearing was held before another judge in August and October 2000, after which the judge ruled that there was no evidence that Dr Al-Najjar was a threat to national security. Dr Al-Najjar was released in December after the same judge went on to consider the government’s classified evidence, and concluded that it did not differ greatly from that presented during the open records proceeding and was again insufficient to constitute grounds for detention.

On 24 November 2001, Dr Al-Najjar was again taken into custody after the 11<sup>th</sup> Circuit Court of Appeals upheld his final deportation order. As he is a stateless Palestinian who has no country to return to, his case may become a test case under the new detention provisions, should he continue to be detained.

Last June the US Supreme Court issued a landmark ruling stating that the indefinite detention of non-US nationals whose final order of removal had been entered, but whose deportation was not “reasonably foreseeable”, was unconstitutional. The ruling applied to several thousand foreign nationals convicted of crimes in the USA who could not be deported because there was no country which would accept them. The ruling left open the possibility of the government continuing to detain non-nationals when limited to “specially dangerous individuals and subject to procedural protections”.<sup>17</sup> The ruling led to the release under strict supervision of more than 300 foreign nationals who were not considered a danger to the community. However, the Department of Justice has recently published new regulations invoking “special circumstances” such as terrorism, national security, danger to the community or health reasons (including mental disorders or contagious diseases) to keep “deportable” foreign nationals in custody. These rules apply in addition to the provisions of the Patriot Act.

Amnesty International believes that states should not detain people who are considered to be a threat to national security unless they are charged with recognizable criminal offences promptly and tried without delay *or* action is being taken to extradite or deport within a reasonable period. Amnesty International opposes the indefinite detention of foreign nationals for whom there is no realistic possibility of deportation being effected. Such a measure has the same effect as a severe criminal sanction (deprivation of liberty) but without the due process standards and safeguards contained in the criminal justice system. Amnesty International considers that this violates fundamental human rights and that anyone detained in such circumstances should be charged with a recognizably criminal offence and brought to trial or released.

The legislation requires the Attorney General to report to Congress every six months on the number of non US nationals certified as a suspected “terrorist” or national security risk; the grounds of the certification; the nationalities of the individuals so certified; length of detention; number granted relief from removal; number removed; number no longer certified; and the number released from detention.

This clause is important in providing public scrutiny of how the expanded removal/ detention provisions will be implemented. However, this should not prevent the government from providing information on arrests and detentions as they take place. Steps should be taken to avoid the secrecy surrounding the present detentions (see below).

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<sup>17</sup> *Zadvydas v Davis et al.*, 000 U.S.99-7791 (2001).

While Amnesty International's comments in this document are limited to the due process aspects of the detention powers under the Patriot Act, there are also concerns about the expanded definitions of "terrorism" under the Act, which civil rights groups fear could be used against non-nationals on the basis of their political beliefs and associations, who have not engaged in or supported "terrorism" (see note 9, above). Amnesty International will be monitoring implementation of the act and will present further comments in due course.

#### **4. Conditions of detention - ill-treatment**

Amnesty International is concerned that many of those detained during the 11 September sweeps are held in harsh conditions, some of which may violate international standards for humane treatment. There have also been allegations of physical and verbal abuse of detainees by guards, and failure to protect detainees from abuses by other inmates.

There has been concern for some years about the poor conditions under which immigration detainees are held in INS detention facilities or local jails. Although the INS promulgated new standards for the treatment of INS detainees earlier this year, as noted above, these standards are not universally applied (see section 2).<sup>18</sup> Amnesty International has received reports suggesting that immigration detainees arrested after 11 September are being subjected to more punitive conditions than before in some facilities. There are also reports that people of Muslim or Middle-Eastern origin are treated more harshly than other inmates. Reports include detainees being placed in solitary confinement and denied exercise; required to wear full restraints, including leg-irons, during visits; denied contact visits with families; given an inadequate diet; denied personal possessions and copies of books in Arabic, including the Quran.

Amnesty International is also concerned by reports that some people travelling to the USA since 11 September have been detained on arrival for questioning at US airports on security grounds and subjected to cruel, inhuman or degrading treatment, including being denied food for long periods and kept in shackles.

Examples of ill-treatment include:

- Hasnain Javed, a Pakistani student (held for three days in September for overstaying his visa) was allegedly beaten and had a tooth chipped by inmates who called him a "terrorist" while he was detained in jail in Wiggins, Mississippi. He reports that he tried to call for assistance through an intercom but guards failed to respond. Later that night he was allegedly stripped naked and again beaten by inmates; again guards failed to respond to his cries for help.

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<sup>18</sup> As well as better access to counsel, the standards cover a range of conditions including improved visitation with family and friends; rights of detainees to exercise their religion free from harassment and to participate in group religious activities.

- An Egyptian arrested on 3 October alleges he was ill-treated by guards in the Metropolitan Detention Center (MDC) in New York City. A magistrate ordered photographs to be taken of bruising to his arm which he said was caused by ill-treatment. The case is being investigated by the federal authorities. Osama Awadallah, a Jordanian man also in MDC, alleges that guards insulted his faith, kept him from sleeping and “roughed him up”.
- A Palestinian man detained since 22 September in a Texas jail for a visa violation, is reported to be held in solitary confinement with only one hour of exercise a week (in a small enclosed yard). He is shackled during non-contact visits with his family; denied personal property and, unlike other inmates, denied access to TV.
- A Saudi Arabian man detained on an immigration violation in Denton County Jail, Texas, initially spent a week without a mattress, bedding, blanket or clock to tell him when to recite his Muslim prayers; his conditions improved only after an appeal by his attorney to the regional INS director. He was allowed to see his wife eight days after his arrest and was made to wear leg-irons during the second non-contact visit; he is still allowed far fewer visits than other inmates have with relatives. He has reportedly asked to remain in solitary confinement through fear for his safety if held with other inmates.
- Detainees awaiting deportation in Mecklenburg County Jail, North Carolina, are alleged to have been stripped naked and blasted with cold air by guards in early November; the wife of one man reported that only inmates of Middle Eastern descent were subjected to this treatment and when her husband tried to complain of abuse during telephone calls, the calls were terminated by guards.
- Five Israelis arrested on 11 September in New York were held incommunicado for about a week, and were allegedly interrogated by police while blindfolded and in only their underwear.
- An elderly Maltese couple arriving in the USA in September for a vacation with their daughter (a US resident) were refused entry at Philadelphia airport, questioned extensively by INS officers and held overnight in a detention centre where they were allegedly denied all food and water, despite the woman being a diabetic. The husband (a 63-year old dermatologist with no criminal record) was kept in heavy wrist and foot chains until both were put on a plane home the next day.<sup>19</sup>

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<sup>19</sup>Information on these and other cases was obtained through contact with lawyers and relatives by Amnesty International and media reports.

Some of the above would violate the prohibition of torture or other cruel, inhuman or degrading treatment under the Convention against Torture and the ICCPR. In addition, Article 10 of the ICCPR states that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Some of the reported conditions fall short of specific provisions of the UN Standard Minimum Rules for the Treatment of Prisoners which stipulate, for example, that all prisoners and detainees should receive a minimum of one hour of outside exercise daily, and that restraints should be applied only when "strictly necessary" as a precaution against escape or to prevent damage or injury, and that "chains or irons shall not be used as restraints".

Amnesty International urges the Department of Justice to ensure that all prisoners and detainees are treated humanely in accordance with the above international standards, whether in local or federal facilities, or at airports. We urge the department to fully investigate all allegations of abuse of INS and other federal detainees held in local and federal facilities.

The recent standards promulgated for the treatment of immigration and asylum seekers should be extended to all facilities housing immigration detainees, including local and county jails. The INS should ensure that these are strictly monitored and adhered to.

## **5. Lack of information about detentions**

Amnesty International shares the concern expressed by many commentators and human rights advocates regarding the unprecedented levels of secrecy surrounding the 11 September detentions. While some information may be privileged on security or privacy grounds, the extraordinary lack of data does not appear to be justified or in the public interest. Without such data, it is impossible to assess how far the rights of those detained are being protected; the true extent of any abuses reported; whether or not there has been any practice of incommunicado detention on a systematic level; how effectively the authorities are dealing with such concerns.

On 29 October, Amnesty International and a group of US human rights organizations made a joint formal request to the Department of Justice to provide detailed information under the Freedom of Information Act on the arrests and detentions, including the identities and nationalities of those detained; their current status and location; and whether they have legal representation. The letter also seeks information on "All policy directives or guidance issued to officials about making public statements or disclosures about these individuals" and on the identities of any courts giving orders to seal information in specific cases.

The letter asks for the information to be provided urgently, referring to the "growing number of reports which, if accurate, raise serious questions about deprivations of fundamental due process, including imprisonment without probable cause, interference with the right to counsel, and threats of serious bodily injury" -- and states that "...the

unprecedented secrecy surrounding the detentions of several hundred individuals, which has now lasted for several weeks, in itself raises questions about the detentions” and “prevents any democratic oversight of the government’s response to the attacks”.

Amnesty International calls on the Department of Justice to provide the information requested without delay.

## **6. Discrimination**

Amnesty International welcomes the strong action taken by the Department of Justice to respond to attacks and acts of discrimination perpetrated against people perceived to be Muslim or of Middle-Eastern origin in the wake of 11 September. We understand that the Civil Rights Division (CRD) of the Department of Justice, working with US Attorneys and the FBI, has opened more than 60 civil and criminal investigations into acts by private individuals committed in retaliation for 11 September, including killings, death-threats, assaults, and attacks on mosques and businesses.

The CRD has also set up a National Origin Working Group to combat “post-terrorism discrimination” against targeted groups by receiving reports of “violations based on national origin, citizenship status and religion, including those related to housing, education, employment, access to government services, and law enforcement”; referring cases to the appropriate federal authorities; conducting outreach work with communities; and working to ensure the provision of effective services to victims of civil rights violations.

In welcoming these initiatives, we note that some concern has been expressed about the perceived, or potentially discriminatory effects of certain law enforcement measures, including the post-11 September detentions. It appears that many, if not most, of those detained in the 11 September investigations are Muslim men of South Asian or Middle-Eastern origin. Amnesty International is aware that the security forces may be acting on a range of intelligence and other information when questioning suspects or making arrests.

However, concern has been expressed that some people arrested in the 11 September investigations are being held in custody on relatively minor violations which would normally qualify for release on bail. As noted above, there are also complaints that some detainees who are Muslim or of Middle-Eastern origin are being treated more harshly than other inmates while in detention.

On 9 November 2001, the Attorney General issued a memorandum with instructions to federal prosecutors and state police anti-terrorist task forces to interview a further 5,000 named individuals in the USA on student, tourist or business visas. Although the names have not been released, sources have indicated that most people on the list are Middle-Eastern males aged between 18 and 33. Several state police chiefs have expressed concern about this directive on the ground that questioning immigrants who are not suspected of a crime -- unless such interviews are strictly voluntary -- may violate state laws and police guidelines which prohibit “racial profiling” (unfair treatment by law enforcement officials, including stops and searches, on the basis of race or ethnic origin).

The USA has ratified the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 5 of which calls on States Parties to undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee to everyone the right to equality before the law. In its report to the UN Committee on the Elimination of Racial Discrimination in September 2000, the US Government stated that "Racial discrimination by public authorities is prohibited throughout the United States, and the principle of non-discrimination is central to government policy throughout the country." The US delegation also told the Committee during its consideration of the US report in August 2001 that the Bush administration was committed to eliminating the practice of racial profiling.<sup>20</sup>

Amnesty International believes it is essential that the US Government remains as fully committed to upholding these principles of non-discrimination in the present challenging climate. Amnesty International urges that all precautions are taken to ensure that people are not arrested or detained or otherwise treated unfairly on grounds of their ethnic origin, race or religion. Such practices would violate standards under both international and US law.<sup>21</sup>

Amnesty International believes it is necessary to ensure that the strongest safeguards against discrimination prevail in implementing the Patriot Act. As the legislation gives the government extra-ordinary detention powers which apply only to non-nationals, it is particularly important to ensure that immigrant communities are not unfairly targeted.

Amnesty International is also concerned that the special military commissions allowed for under the Presidential Order of 13 November would also be discriminatory, in that they would apply only to non-US citizens who would be tried by a lesser standard of justice than US nationals. Amnesty International has called for this order to be revoked (see **11** below).

## **7. New rule permitting monitoring of inmate conversations with lawyers**

Amnesty International is deeply disturbed by a new interim rule introduced by the Department of Justice on 31 October 2001, which permits the Bureau of Prisons to monitor previously confidential written or verbal communications between attorneys and their imprisoned clients

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<sup>20</sup> Introductory remarks of the US delegation to the Committee in Geneva on 3 August 2001, during the Committee's examination of the USA's initial report on how it was implementing the provisions of CERD.

<sup>21</sup> Article 5 of CERD calls on states to "... guarantee the right of everyone without distinction as to race, colour, or nationality or ethnic origin, to equality before the law", including "equal treatment before the tribunal and all other organs administering justice" and the "right to security of person and protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual group or institution". Article 26 of the ICCPR states "All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

whenever the Attorney General certifies that “reasonable suspicion exists to believe” that an inmate may use such communication “to further or facilitate acts of terrorism”. This rule applies to all federal prisoners, and to people “held as witnesses, detainees or otherwise” by INS agents or other federal authorities.

Although the Department of Justice has stated that procedural safeguards will protect the right to attorney-client confidentiality regarding legal advice,<sup>22</sup> this rule erodes a fundamental principle under international standards, which requires governments to ensure that all arrested, detained or imprisoned people have a right to communicate with an attorney in full confidentiality.<sup>23</sup> Amnesty International is concerned that such discretionary power concentrated in the hands of a few law enforcement officials, with no judicial oversight, is inherently open to abuse. Confidentiality is an essential component of the right to effective representation by counsel. Such monitoring, particularly in the case of witnesses, unconvicted and pre-trial detainees, could severely compromise the right of accused or detained persons to have adequate facilities to prepare a defence, as required under Article 14 of the ICCPR (which sets out fair trial guarantees). It also undermines the presumption of innocence guaranteed under Article 14. Prisoners may feel inhibited in discussing not only matters relating to their case but also in reporting any abuses they may be suffering, through fear of retaliation. Confidential mechanisms for communicating with the outside, particularly attorneys, are an important safeguard against abuse.

Amnesty International considers that there are already appropriate remedies under existing federal law in cases where it is suspected that attorney-client communications may be used to further criminal activities. These remedies include court-ordered monitoring of communications where necessary, and other measures which are subject to appropriate judicial review. Amnesty International believes that the new rule should be repealed or at the very least a court order should be required in each case before any monitoring takes place.

## **8. Federal political prisoners held incommunicado following 11 September: new rule extending authority to detain prisoners in segregation**

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<sup>22</sup> The rule “requires that privileged information not be retained by the government monitors and that, apart from disclosures necessary to thwart an imminent act of violence or terrorism, any disclosures to investigators or prosecutors must be approved by a federal judge”.

<sup>23</sup> Principle 18(4) of the Body of Principles states: “Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official”. Principle 8 of the Basic Principles on the Role of Lawyers states: “All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within the sight, but not within the hearing, of law enforcement officials.”



Amnesty International is concerned by reports that more than a dozen federal prisoners serving sentences in federal prisons for various politically motivated offences unconnected with the 11 September attacks were removed from the general prison population on or shortly after 11 September and placed in solitary confinement in high security units. Some were denied phone calls with attorneys while in segregation; several were also denied all visits and mail and were effectively held incommunicado for between 10 days and two weeks. None was informed of the reasons for their removal to the high security units or for the suspension of visits and phone calls.<sup>24</sup>

Since then the Bureau of Prisons has issued an administrative directive allowing the Director to extend the time in which prisoners may be placed under "special administrative measures" (including segregation in high security units) on security grounds for renewable one-year periods.<sup>25</sup> Amnesty International is concerned that this may mean people being placed in solitary confinement for lengthy periods - even indefinitely - without adequate safeguards or review. Bearing in mind that long-term isolation can amount to cruel, inhuman or degrading treatment, Amnesty International is seeking more information from the Bureau of Prisons regarding this procedure including the precise grounds on which such measures may be invoked; what safeguards exist to ensure due process rights; and the conditions under which such prisoners will be held.

## **9. Interrogation techniques - The spectre of torture is raised**

Amnesty International is deeply concerned by media reports suggesting that US security forces may be considering using "pressure techniques" including the "truth serum" Sodium Pentothal in order to elicit information from detainees during interrogation. Such methods would violate human rights treaties to which the US is a party and would severely undermine the USA's standing in the international community.

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<sup>24</sup> Prisoners placed under such measures include Philip Berrigan, a 77-year-old peace activist serving a one-year and one-day prison sentence for damaging a military aircraft - he was reportedly taken from the prison's general population, denied visits and phone calls from his wife and placed in "incommunicado" segregation for 10 days; Antonio Comacho Negrón, a Puerto Rican independence activist serving time for bank robbery, who was held incommunicado in a SHU unit for 21 days; Marilyn Buck, serving a 70-year sentence for crimes connected to the Black Liberation Army, who was taken from the general prison population and placed in segregation part of which was "incommunicado"; Sundiata Acoli, in prison since 1973, placed in a SHU unit on 11 September where he remained for at least six weeks and was denied access to his attorney.

<sup>25</sup> The directive was published on 31 October 2001 as an "Interim rule with request for comments" to be implemented immediately.

The USA has ratified the ICCPR and the Convention against Torture which prohibit torture or other cruel, inhuman or degrading treatment in all circumstances, including times of national emergency.<sup>26</sup> In its report to the Committee against Torture<sup>27</sup> in October 1999, the US Government stressed that, although torture was not a distinct federal crime within US territory, existing federal and state laws already outlawed all acts falling within the definition of torture. The US made clear that:

*Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention constitutes a criminal offense under the law of the United States. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. U.S. law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a "state of public emergency") or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension.*<sup>28</sup>

Any withdrawal from such a clear affirmation of US policy in this area would send a grave signal to the international community about the USA's commitment to the respect and promotion of human rights. Any acceptance of torture in the United States risks eroding respect for the rule of law elsewhere. Furthermore, were the US Government to sanction even "moderate physical pressure" on even a few detainees, it would almost inevitably lead to an expanded use, as Amnesty International has found in more than 40 years of documenting the use of torture.

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<sup>26</sup> The Convention against Torture states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture" (article 2 (2)). The ICCPR similarly states that no derogation is permissible from Article 7, which prohibits torture or other cruel, inhuman or degrading treatment or punishment.

<sup>27</sup> The international body which monitors ratifying states' compliance with their obligations under the Convention against Torture.

<sup>28</sup> *US Department of State Initial Report of the United States of America to the UN Committee against Torture*, submitted to the Committee on October 15, 1999. The report also states: "While the constitutional and statutory law of the individual states in some cases offers more extensive or more specific protections, the protections of the right to life and liberty, personal freedom and physical integrity found in the Fourth, Fifth and Eighth Amendments to the United States Constitution provide a nationwide standard of treatment beneath which no governmental entity may fall. The constitutional nature of this protection means that it applies to the actions of officials throughout the United States at all levels of government; all individuals enjoy protection under the Constitution, **regardless of nationality or citizenship.**" (AI emphasis)

The UN Committee against Torture has stated that the application of so called “moderate physical pressure” as an authorized mode of interrogation clearly breaches the Convention against Torture. It has ruled that even if a suspect is believed to have information about imminent attacks against the state, the following methods of interrogation may not be used as they violate the prohibition on torture and ill-treatment: restraining in very painful conditions; hooding; playing of loud music; prolonged sleep deprivation; threats, including death threats; violent shaking; and using cold air to chill the detainee.<sup>29</sup>

Amnesty International opposes the use of Sodium Pentothal and other so-called “truth serum” drugs to interrogate suspects on the ground that this constitutes cruel, inhuman and degrading treatment and should therefore be prohibited as a method of eliciting information.<sup>30</sup> Such use would also constitute physical and psychological pressure outlawed under international standards on interrogations. Principle 21 of the Body of Principles states: “No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity or decision or his judgement.” The Inter-American Convention to Prevent and Punish Torture expressly defines torture as including “the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”<sup>31</sup> The use of such drugs in this context also constitutes a breach of medical ethics, in so far as medicine and medical expertise should never be used for any purpose other than evaluating, protecting, or improving the physical and mental health of prisoners and detainees.

Article 15 of the Convention against Torture obliges the state parties to “ensure that any statement which is established to have been made as the result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.” Other international standards exclude not only statements extracted under torture, but also those elicited as a result of other cruel, inhuman or degrading treatment or punishment.

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<sup>29</sup> UN Doc. CAT/C/SR.297, reporting on Israel’s compliance with the Convention against Torture - the committee recommended that interrogations by Israeli security officers applying these methods “cease immediately”.

<sup>30</sup> Use of drugs has been documented as a form of torture in a number of countries, including Chile and the former Soviet Union. Principle 6 of the Body of Principles states that “The term ‘cruel, inhuman or degrading treatment’ should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental...” Such use would also violate standards prohibiting compelled confessions.

<sup>31</sup>It has also been noted that under US case law confessions made under the influence of truth serums are also not “voluntary” and are consequently inadmissible as evidence: see Human Rights Watch “*The Legal Prohibition Against Torture*”, November 2001.

The Human Rights Committee has expanded the prohibition on the use of evidence obtained under duress, by stating that “the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.”<sup>32</sup> The Committee has further stated that: “[t]he law should require that evidence provided by ... any... form of compulsion is wholly unacceptable.”<sup>33</sup>

The USA has taken some important steps to meet its obligations under the Convention against Torture. It has enacted legislation affirming US policy not to return any person to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture, as required under Article 3 of the Convention. In 1994 it enacted a federal law extending US jurisdiction over any act of torture committed outside the USA by a US national or an alleged offender present in the USA regardless of nationality. It has also enacted the Torture Victims Protection Act, allowing both foreign nationals and US citizens to claim damages against any individual who engages in torture or extrajudicial killing under “actual or apparent authority or under color of law of any foreign nation”.

Amnesty International calls on the Attorney General to make public assurances that no techniques involving torture or other cruel, inhuman or degrading treatment, will be invoked or introduced during interrogation of suspects. The US Government should make it clear that abuses including torture, cruel, inhuman or degrading treatment and other improper methods by any branch of US law enforcement will not be tolerated under any circumstances and will be prosecuted as a crime.

#### **10. Suspects arrested in other countries**

Amnesty International believes that, when required, all states are obliged to cooperate in the detection, arrest, and prosecution of persons implicated in crimes, regardless of the nationality of the perpetrators or the victims. Such cooperation should, however, pay scrupulous respect to international human rights standards relating to arrest, detention, treatment, and trial. In this respect, Amnesty International urges the US Government to promote these standards at all times, particularly when its own agents are involved outside US territory.

The *Washington Post* reported on 22 November that “at the urging of the CIA, foreign intelligence services and police agencies in 50 countries have arrested and detained about 360 suspects with alleged connections to Osama bin Laden’s al Qaeda network or other violent terrorist groups” since the 11 September attacks.

Just as the US Government may not send detainees to another country to be interrogated if there are substantial grounds for believing that the person would be at risk of torture or other cruel, inhuman or degrading treatment or punishment, it has an obligation also

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<sup>32</sup> Human Rights Committee General Comment 20, para 12.

<sup>33</sup> Human Rights Committee General Comment 13, para 14.

to oppose the use of such treatment against any of the detainees arrested at its behest in other countries. For example, the FBI and CIA are reported to have been given access to, and to the interrogation sessions of, "Abu Ahmed", an alleged senior member of *al Qaeda* arrested by the authorities in Saudi Arabia, a country where torture and ill-treatment continues to be reported. If US agents become aware of any use of such treatment against detainees to whom they have access, they must publicly denounce it.

The USA may seek to obtain the extradition to the United States of detainees held abroad. In such cases, it should respect foreign laws and the provisions of relevant extradition treaties, in particular in cases where the extradition of suspects is barred in the absence of guarantees that the death penalty will not be sought by the retentionist country, in this case the United States. Amnesty International is concerned by the USA's past record and official sanctioning of the forcible abduction, or other "irregular rendition" of criminal suspects from abroad.<sup>34</sup>

In this regard, Amnesty International has asked the Department of Justice for information on the current legal status and whereabouts of Jamil Qaseem Saeed Mohammed. Mohammed, a Yemeni national reportedly wanted in connection with the bombing of the US destroyer, the *USS Cole*, in Yemen in October 2000 is reported to have been handed over in secret to US agents at Karachi International Airport in Pakistan on 26 October 2001 and flown to an unknown destination. In telephone calls to the Department of Justice, Amnesty International has been unable to establish the accuracy of the reports or the whereabouts of Jamil Mohammed, and repeats its request for information in this memorandum if indeed he was or is in US custody.

## **11. Proposed trials by special military commissions**

Amnesty International is deeply concerned by the Military Order signed by President George Bush on 13 November allowing for the trial by special military commissions of non-US citizens suspected of involvement in "international terrorism". It has called for the order to be revoked on the grounds that its proposals flout international fair trial standards.

The Military Order expressly bypasses established principles of law and evidence applied in the trials of people charged with criminal offences in US Courts and circumvents the fair trial protections provided for in US military courts under the USA's Uniform Code of Military Justice. Under the Military Order, conviction and sentence will be determined by a two-thirds majority of the members of the special military commission present at the time of the vote. Their decisions cannot be appealed to a higher court, and individuals cannot seek redress in any court anywhere in the world for any human rights violations that may occur during arrest, detention, or prosecution. In bypassing international fair trial standards, the

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<sup>34</sup> See *No return to execution: The US death penalty as a barrier to extradition* (Amnesty International Index: AMR 51/171/2001, November 2001).

Military Order contravenes US obligations under international law, specifically the International Covenant on Civil and Political Rights, ratified by the USA in 1992. Certain fundamental principles must be respected at all times, even in time of emergency, including the right of appeal.

Although the Military Order places the proposed military commissions under the jurisdiction of the Department of Defense, individuals currently under the jurisdiction of the Department of Justice fall within the scope of the Order. Amnesty International urges the Department of Justice to oppose the transfer of any suspect under its jurisdiction to the jurisdiction of the above military commissions. It has been reported that some officials in the US administration have raised the possibility of Zacarias Moussaoui, a French national of Moroccan origin arrested in Minneapolis on 17 August, being tried before the military tribunals. Amnesty International opposes his or any other trial before the proposed military commissions.

#### **A summary of Amnesty International's Recommendations**

Amnesty International urges that the US Attorney General and the Department of Justice to:

- Make public information on the total number of people arrested to date in connection with the 11 September investigations; dates and place of arrest; the number still detained and the reasons for the detention; length of time in detention; place of detention; and data on the race or ethnicity of those detained. Provide such information regularly on future arrests.
- Ensure that no-one is held incommunicado in custody.
- Publicly reaffirm the US Government's unequivocal opposition to the use of torture.
- Ensure that no person in federal custody, including those held in local or country jails, is subjected to torture or other cruel, inhuman or degrading treatment, and that law enforcement officials will not use methods of interrogation that constitute torture or other treatment prohibited under international standards.
- Ensure that all cases of alleged ill-treatment are thoroughly and impartially investigated, with the results made public. Those responsible for abuses, including discriminatory treatment, should be brought to justice.
- Ensure that everyone arrested or detained is provided with their rights under international standards, as set out under Article 9 of the ICCPR and the Body of Principles, including being informed of the reasons for arrest and given prompt access to attorneys and relatives and consular officials or representatives of other organizations as requested.

- Closely monitor the detention provisions of The Patriot Act, and ensure that arrested or detained persons are brought promptly before a judge and be able to challenge the lawfulness of their detention.
- No-one should be detained on national security grounds unless charged with a recognizable criminal offence and tried without undue delay or action is being taken to deport within a reasonable period. There must be a realistic possibility of deportation being effected. No-one should be deported or returned to a country where they may face torture.
- Ensure that no-one is detained on the basis of evidence they are unable to review or challenge.
- Ensure that INS standards for the treatment of immigration detainees and asylum seekers, introduced into some facilities earlier this year, are extended to all facilities housing such detainees. The standards should be strictly monitored and adhered to.
- Ensure that asylum seekers are generally not detained. If they are detained on security grounds they must be allowed a full and fair hearing of their claim as provided under the 1951 Refugee Convention.
- Ensure that no-one is arrested, detained, or subjected to or subjected to unfair or harsh treatment, on the grounds of their ethnic origin, race, nationality or religion.
- Promote and protect international human rights standards in the context of international investigative measures in the wake of 11 September, and in particular to ensure that any US agents with access to detainees in other countries denounce any human rights violations committed during the investigations.
- Not resort to the circumvention of extradition protections in the case of any individual whose custody the USA seeks.
- Oppose the transfer of any individual from Department of Justice jurisdiction to the jurisdiction of the special military commissions proposed by recent executive order. Support revocation of the order.