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公民权利和政治权利

关塔那摩湾被拘留者的状况

任意拘留问题工作组主席兼特别报告员勒伊拉·泽鲁居伊、法官和律师的独立性问题特别报告员莱安德罗·德斯波伊、酷刑和其他残忍、不人道或有辱人格的待遇或处罚问题特别报告员曼弗雷德·诺瓦克、宗教或信仰自由问题特别报告员阿斯马·贾汉吉尔，以及人人享有可达到的最高水准的身心健康的权利问题特别报告员保罗·亨特的报告。

概　要

本联合报告由人权委员会特别程序的五位任务承担者提交，这五人自 2004 年 6 月以来一直在共同关注被关押在关塔那摩湾美国海军基地的被拘留者的状况。

第一节叙述所有五项任务共有的法律框架。第二至第五节概述每项任务特有的法律框架，以及与这些任务相关的侵犯人权情况的具体指称。最后一节是结论和建议。

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目 录

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导　言

1. 本报告是任意拘留问题工作组主席、法官和律师的独立性问题特别报告员、酷刑和其他残忍、不人道或有辱人格的待遇或处罚问题特别报告员、宗教或信仰自由问题特别报告员，以及人人享有可达到的最高水准的身心健康的权利(享有可达到的最高水准的健康的权利或健康权)问题特别报告员进行的一项联合研究的结果。

2. 自 2002 年 1 月以来，这五名任务承担者一直在关注被关押在关塔那摩湾美国海军基地的被拘留者的状况。2004 年 6 月，他们决定组成一个小组继续执行这项任务，因为相关状况属于其中的各项任务所涉的范围。每个任务承担者都侧重与关于建立各机制的相关的人权委员会决议所确定的任务有关的法律、指称和建议。不过，任务承担者认为，通过提交一份关于这一问题的联合报告而不是提交五份单独的报告，他们能够更好地履行对委员会的报告义务。

3. 在研究所涉状况过程中，他们不断请求美国主管机构给予合作。2004 年 6 月 25 日，他们致函美国政府，之后又发送了几份催复函，请该国政府允许他们访问关塔那摩湾，以便从囚犯本人那里收集第一手资料。在 2005 年 10 月 28 日的行动，美国政府向五名任务承担者中的三名人员发出为期一天的访问邀请，邀请他们“访问[关塔那摩湾]国防部拘留设施”。这项邀请规定，“访问将不包括与被拘留者单独谈话或探访被拘留者”。在 2005 年 10 月 31 日至政府的答复中，任务承担者对这一邀请，包括访问的短暂期限以及只有其中三人被允许前往访问表示接受，并告知美国政府：这次访问将于 2005 年 12 月 6 日进行。但是，他们不接受访问不包括与被拘留者单独谈话这一安排，因为这将与特别程序承担的实况调查任务的职权范围相抵触，而且会妨碍对关押在关塔那摩湾的被拘留者的状况作客观、公正评估这一目标。由于政府没有明确表示将尊重这些职权范围，任务承担者于 2005 年 11 月 18 日决定取消这次访问。

4. 所以，本报告依据的是政府对任务承担者发送的关塔那摩湾拘留状况问题单所作的答复，任务承担者与目前居住在法国、西班牙和联合王国的关塔那摩湾获释人员或在释放后又在这三个国家被拘留的人员 [1] 进行的谈话，以及为某些关塔那摩湾被拘留者辩护的律师对任务承担者发送的问题单的答复。报告还依据公共利益可获取的资料，包括非政府组织编写的报告、已解密的的美国官方文件中所载的资

料以及媒体报道。本报告提出了若干重要和复杂的国际人权问题。鉴于没有作实地访问并受篇幅的限制，本报告应当视为对与关塔那摩湾被拘留者相关的国际人权法的一次初步评述。依照惯例，于 2006 年 1 月 16 日向美国政府提供了本报告草稿。该国政府在2006年1月31日的回信中，请求将其答复附于本报告定稿之后(见附件)。根据该国政府 2006 年 1 月 31 日的答复，对报告草稿作了一些修改。

5. 据美国政府截至 2005 年 10 月 21 日提供的资料，大约有 520 名人员被关押在关塔那摩湾。从该拘留所于 2002 年 1 月建立起直到 2005 年 9 月 26 日，共有 264 人被从关塔那摩湾转移，其中 68 人被移交给包括巴基斯坦、俄罗斯联邦、摩洛哥、联合王国、法国和沙特阿拉伯在内的其他国家政府拘押。截至 2005 年 10 月 21 日，布什总统共指定 17 名被拘留者有资格受到一个军事委员会的审理。其中，自那时以来有三人被美国移送至原籍国，这三人现已在原籍国获释。截至 2005 年 12 月，共有九名被拘留者被移交军事委员会。[2]

一、法律框架

A. 人权与反恐措施

6. 在 2001 年 9 月 11 日美利坚合众国遭受袭击之后，安全理事会通过了第1373(2001)号决议，要求所有国家采取全面的立法、程序、经济措施和其他措施，防止、禁止并惩治恐怖主义行为。该决议序言部分投身“有必要依照《联合国宪章》……”。

7. 在随后的决议中，安全理事会以及大会在确认有必要打击恐怖主义的同时，呼吁所有“国家确保为打击恐怖主义而采取的任何措施都能与其在国际法尤其是国际人权法、难民法和人道主义法之下的所有义务相一致”。[3] 秘书长 [4] 、人权事务高级专员 [5] 和人权委员会重申了这项基本原则，委员会呼吁所有相关的特别程序和机制及联合国人权条约机构在任务范围内联系打击恐怖主义的措施，考虑保护人权和基本自由。[6]

B. 美利坚合众国在国际法之下的义务

8. 美国已加入与关塔那摩湾被拘留者的状况相关的一些人权条约，其中最重要的是《公民权利和政治权利国际公约》(《公民权利和政治权利公约》)、《禁止酷刑和其他残忍、不人道或有辱人格的待遇或处罚公约》(《禁止酷刑公约》)和《消除一切形式种族歧视国际公约》(《消除种族歧视公约》)。[7] 1977 年 10 月 5 日，美国签署《经济、社会、文化权利国际公约》(《经社文权利公约》)，但该国尚未批准这项公约。这些条约的一些条款反映了习惯国际法的规范。禁止酷刑规定更是具有强制性法规地位。

9. 美国还是与关塔那摩湾被拘留者状况相关的一些国际人道主义法条约的缔约国，这些条约主要有：《一九四九年八月十二日关于战俘待遇之日内瓦公约》(《日内瓦第三公约》)和《一九四九年八月十二日关于战时保护平民之日内瓦公约》(《日内瓦第四公约》)，这两项公约的许多条款被认为体现了习惯国际法原则。虽然美国不是《日内瓦四公约》第一附加议定书和第二附加议定书的缔约国，但这两项议定书中的某些条款，特别是《第一附加议定书》第 75 条，被认为应予适用，因为这些条款被确认对习惯国际法起到解释作用。[8]

C. 美国在国际人权法之下的义务的范围

10. 《公民权利和政治权利国际公约》第二条规定，“……每一缔约国承担尊重和保证在其领土内和受其管辖的一切个人享有本公约所承认的权利，不分种族、肤色、性别、语言、宗教、政治或其他见解、国籍或社会出身、财产、出生或其他身份等任何区别。”

11. 尽管第二条提及“在[一缔约国]领土内和受其管辖的人员”，但负责监测《公约》执行情况的人权事务委员会则明确指出，“一缔约国必须尊重并保证受该缔约国管辖或实际控制的任何人享有《公约》规定的权利，即便相关人员并非位于该缔约国境内”。[9] 同样，国际法院在关于在被占领的巴勒斯坦领土上建造隔离墙引起的法律后果的咨询意见中 [10] 确认，国家的管辖权主要具有领土性质，但认为，《公民权利和政治权利国际公约》适用于“一国在其本身领土之外行使管辖权过程中作出的行为”。[11] 据此，关塔那摩湾在美国和古巴的国际租借协议及美国国内

法之下的特殊地位，并不能限制美国在国际人权法之下对关塔那摩湾被拘留者的义务。所以，美国对关塔那摩湾被拘留者承担着在国际人权法之下的义务。

D. 限制和克减

12. 《公民权利和政治权利国际公约》以及其他国际人权文书包括一些具体条款，允许国家限制、约束或在极为特殊情况下克减《公约》所载权利。根据规定，在威胁到国家生存的具体情况下，可以实行克减。《公民权利和政治权利国际公约》第四条第(1)款就克减措施作出了一些程序性和实质性保障规定：国家必须正式宣布实行紧急状态；克减程度必须以紧急情势所严格需要者为限；克减措施不得与国家承担的其他国际义务相抵触；克减措施不得具有歧视性质。

13. 克减属于非常和临时措施："《公约》规定，即便是在武装冲突期间，对《公约》规定实行克减的措施只有在相关局势威胁到国家生存的情况下方可采取"。[12] 一旦公共紧急情势或武装冲突不复存在，就必须立即取消克减措施。最为重要的是，克减措施必须以紧急情势"严格需要者"为限。这项相称性规定意味着，当同一目标可通过采用侵扰程度较低的手段达到时，就不能实行克减。[13] 在 2001 年 9 月 11 日的事件之后，美国没有按照《公约》第四条第 3 款的规定，就对《公民权利和政治权利国际公约》或任何其他人权条约的正式克减作出通知。

14. 并非所有权利都能加以克减，即便是在威胁到国家生存的公共紧急情势或武装冲突期间，也是如此。《公民权利和政治权利国际公约》第四条第 2 款对不得加以克减的权利作了规定。这些包括生命权(第六条)、禁止实施酷刑和残忍、不人道或有辱人格的待遇或处罚(第七条)、承认每个人在法律面前的人格(第十六条)，以及思想、良心和宗教自由(第十八条)。虽然规定享有自由的权利和载有这项权利相应的程序保障条款的《公约》第九条，以及规定受到公正审理的权利的第十四条，并不在第四条所列的不得减损的权利之列，但人权事务委员会在第 29 号一般性评论(2001)中表示，"程序保障条款不得受制于将会规避对不得克减的权利的保护的措施。"因此，第九条和第十四条的主要内容，如人身保护、无罪推定和最低限度的公正审判权利等，必须得到充分尊重，即便在紧急状态期间也是如此。[14]

E. 国际人道主义法和人权法的互补性

15. 国际人道主义法和国际人权法的适用不是相互排斥的，而是相互补充的。正如人权事务委员会在第 31 号(2004)一般性评论中指出的：

> “《公约》也适用于适用国际人道主义法规则的武装冲突情况。尽管就某些《公约》权利而言，国际人道主义法更为具体的规则也许特别有助于解释《公约》权利，但这两方面的法律是相辅相成的，而不是相互排斥的。”

16. 在关于使用或威胁使用核武器的合法性的咨询意见中，国际法院申明《公民权利和政治权利公约》适用于武装冲突。国际法院表示，“不被任意剥夺生命的权利也适用于敌对状态。不过，至于何为任意剥夺生命，检验标准须由适用的特别法即在武装冲突中适用的法律来确定”。[15] 在关于在被占领巴勒斯坦领土上建造隔离墙引起的法律后果的咨询意见中，国际法院确认了其观点：“人权公约提供的保护并不在武装冲突情形中停止，但适用[《公民权利和政治权利公约》]第四条规定的那种克减条款的情况除外”。[16]

二、任意拘留及法官和律师的独立性

17. 任意拘留问题工作组主席[17]以及法官和律师的独立性问题特别法官员，甚为关注美国对关塔那摩湾拘留所中的被拘留者适用的法律制度。他们认为，对这些被拘留者适用的法律制度严重损害了法治和一些基本的普遍确认的人权，而这些人权是民主社会的实质。它们包括在法庭上对拘留的合法性提出质疑的权利(《公民权利和政治权利公约》)，第九条第(4)款)，以及受到称职、独立和不偏不倚的法院进行的公正审理的权利(《公民权利和政治权利公约》，第十四条)，这两项权利保护每个人免遭任意拘留和不公正处罚，并保障无罪推定原则。

18. 对关塔那摩湾被拘留者实行的法律制度，由 2001 年 11 月 13 日《关于在反恐战争中拘留、处置和审理某些非公民的军事命令》[18] (下称“军事命令”)加以规定。依据该制度，可以在不提出指控或不进行审理的情况下无限期地拘留嫌疑人，或由一军事委员会对嫌疑人进行审理。本节从上述两项任务的角度，评述拘留的法律依据和可用来对拘留提出质疑的补救办法。接着，本节对这些军事委员会是否符合关于公正审理和法庭的独立性的最起码的国际法要求这一问题进行评述，具体而

言，这些要求载于《公民权利和政治权利公约》第 14 条，以及《关于司法机关独立的基本原则》和《联合国关于律师作用的基本原则》。

A. 关塔那摩湾的剥夺自由情况

19. 美国政府就剥夺关塔那摩湾被拘留者的自由提出的基本论点是，“战争法允许美国──以及任何其他交战国──在战事持续期内拘留敌方战斗人员，不对其提出指控，也不准其聘请律师。拘留不是一种惩治行为，而是一种出于安全和军事考虑必须作出的行为。拘留的目的在于不让战斗人员继续拿起武器同美国交战”。尽管工作组主席和特别报告员不会使用“敌方战斗人员”这一措辞，但他们赞同这一观点：凡是在国际武装冲突过程中作出交战行为并且被冲突双方中的一方(美国)俘虏的人，可在战事持续期内被拘留，只要这种拘留的目的是不让战斗人员继续拿起武器同美国交战。[19] 实际上，这些原则包含着战争法与人权法之间在剥夺自由问题上的一个基本差别。在国际人道主义法所涵盖的武装冲突情形中，这项规则构成允许剥夺自由的特别法，而依据《公民权利和政治权利公约》第九条规定的人权法，此种剥夺自由则构成对人生自由权利的侵犯。

20. 美国将关塔那摩湾被拘留者列为“敌方战斗人员”，以此证明拘留这些人员并剥夺其对剥夺自由的合法性提出异议的权利是合理的。出于工作组主席和特别报告员将在本报告篇幅允许的限度内阐明的理由，将关塔那摩湾被拘留者作为“敌方战斗人员”加以持续拘留，事实上的确构成任意剥夺人身自由权利。

21. 由于“在战事持续期内在不提出指控、不得聘请律师的情况下”实施的拘留严重偏离既定的人权法，因此极有必要区分美国在武装冲突过程中抓获的被拘留者和在并不涉及武装冲突的情形之下抓获的被拘留者。在这方面，应当指出的是，全球打击恐怖主义的斗争本身并不构成须适用国际人道主义法的武装冲突。[20]

B. 武装冲突过程中抓获的被拘留者

22. 《日内瓦第三公约》规定，在“两个或两个以上缔约国间所发生的一切经过宣战的战争或者其他武装冲突”(第二条第一款)的情形中，凡是“作出交战行为并非敌方俘虏的人”，可作为战俘被拘留，直至战争结束。《日内瓦第四公约》规定，冲突一方可以将对该方的安全构成威胁或意图伤害该方的平民拘留(“拘禁”)(第

六十八、七十八和七十九条)，或以战争罪对相关平民提起诉讼(第七十条)。一旦国际武装冲突结束，战俘和被拘留者就必须获释，[21] 但因可起诉的犯罪和仍在对其进行刑事程序的战俘和平民被拘禁者，可被拘留至此种程序结束。[22] 由于拘留不具有战俘地位的战斗人员的理由是不让他们再次拿起武器同拘留方交战，因此应当对这些人员适用相关的规则。换言之，一旦国际武装冲突结束，就必须释放不具战俘地位的交战者或对其提出指控。

23. 为继续审讯目的无定期拘留战俘和平民被拘留者，不符合《日内瓦四公约》的规定。[23] 可靠人士提供的资料和特别程序任务承担者同曾在关塔那摩湾被拘留的人所作的谈话证实，持续拘留的目的主要不是不让战斗人员再次拿起武器同美国交战，而是获取信息，搜集有关“基地”网络的情报。

24. 工作组主席和特别报告员指出，尽管美国武装部队仍然在阿富汗和其他国家作战，但他们目前并没有参与《日内瓦第三和第四公约》的两个缔约方之间的国际武装冲突。所以，在仍在进行的美国部队参与的非国际性武装冲突中，允许在不遵守《公民权利和政治权利公约》第九条规定的保障措施的情况下实行拘留的特别法，不能再作为此种拘留的依据。

C. 在不存在武装冲突的情况下抓获的被拘留者

25. 关塔那摩湾的被拘留者有许多是在(被捕时)并没有发生有美国参与的武装冲突的地点被抓获的。2001 年 10 月在波斯尼亚和黑塞哥维那被拘留的六名阿尔及利亚籍男子，便是一个众所周知、有充分资料证明的例子，[24] 另外，许多其他被拘留者是在国际人道主义法并不适用的类似情况下被捕的。因此，不能援引允许美国在不提出指控、不准聘请律师的情况下在战事延续期内拘留交战人员的法律规定作为拘留的依据。

26. 当然，这并不是说任何关塔那摩湾被拘留者都不应当被剥夺自由。实际上，打击恐怖主义斗争方面的国际义务可能要求所有国家都必须逮捕和拘留其中的一些人员。但是，此种剥夺自由须遵循人权法尤其是《公民权利和政治权利公约》第九条第十四条。这包括在法庭上在赋予基本的正当程序权利(如确保独立性和公正性)的程序中对拘留的合法性提出异议的权利，得知逮捕的理由的权利，得知这些理由所依据的证据的权利，得到律师协助的权利，以及在合理时间内受审或者被释放的

权利。任何被剥夺自由的人都必须持续、有效的诉诸人身保护程序，对这项权利的任何限制都应当受到极大的关切。

D. 在司法机构对拘留的合法性提出异议的权利

27. 工作组主席和特别报告员指出，在美国最高法院作出裁决允许被拘留者求助于联邦法院之前，关塔那摩湾被拘留者在几年中对剥夺了对拘留的合法性提出异议的权利和聘请律师的权利。2004 年 6 月，最高法院在 Rasul 诉布什案中 [25] 裁定，美国法院有权审理对关押在关塔那摩湾海军基地的外国公民被拘留的合法性提出的异议。但是，截至编写本报告之时(即尽管关塔那摩湾从开始关押被拘留者至今已有四年多时间)，美国联邦法院尚未依据案件实质对任何一件人身保护申请作出裁决。

28. 鉴于对 Rasul 案件的裁决，政府于 2004 年 7 月 7 日成立了战斗人员身份审查庭——一个由三名军士组成的机构——以便审查拘留的合法性。在此之后，负责审理关塔那摩湾被拘留者的人身保护申请的美国地区法院裁定：战斗人员身份审查庭的程序“剥夺了[被拘留者]对拘禁提出异议的公平机会”，因而未能遵守最高法院裁定的规定。[26] 据政府提供的资料，战斗人员身份审查庭已经对所有目前被拘押在关塔那摩湾的人员的身份作了审查。[27] 美国还于 2004 年 5 月 11 日设立了行政审查委员会，以便每年审查每个被拘留者的拘留状况。但这些机构并不符合《公民权利和政治权利公约》第九条第 3 款的要求，该条款规定，“任何应刑事指控被……拘禁的人，应当被迅速带见审判官或其他经法律授权行使司法权利的官员，并有权在合理的时间内受审判或被释放”；不符合《公民权利和政治权利公约》第九条第 4 款的要求，该条款规定，“任何因逮捕或拘禁被剥夺自由的人，有资格向法庭提起诉讼，以便法庭能够不拖延地决定拘禁他是否合法以及如果拘禁不合法时命令予以释放”；也不符合《公民权利和政治权利公约》第十四条的要求，理由如下：

(a) 战斗人员身份审查庭和行政审查委员会没有包含对“法庭”概念(第九条第 4 款)或“行使司法权力”概念(第九条第 3 款)至关重要的独立性保障措施；

(b) 同任务承担者见面的被拘留者律师对战斗人员身份审查庭和行政审查委员会的程序规则提出严重关切，这些规则没有规定被拘留者有权聘

请辩护律师。[28] 此外，对被拘留者在审理其案件时在场的权利的限制，以及对其了解关于其为非法交战人员的指控所依据的材料和证据的权利的限制，损害了程序的合法性和正当性；

(c) 任务承担者同被拘留者进行的交谈证实了这一指称：将其中多数人员拘留的目的，不是对他们提出刑事指控，而是从他们身上获取有关其他恐怖主义嫌疑人的情报。的确，虽然这一拘留所已经建立四年，但迄今没有任何被拘留者受到审判，而且目前只有九名关塔那摩湾被拘留者的程序接近审判阶段；[29]

(d) 看来，在确定被拘留者身份方面，战斗人员身份审查庭依据的是美国政府最近单方面拟订的概念，而不是关于交战和战斗人员身份的现行国际人道主义法；

(e) 即便在战斗人员身份审查庭认定被拘留者不是“敌方战斗人员”，不应再被拘留的情况下，相关人员也不一定随后获释。例如，在战斗人员身份审查庭认定应将一些维吾尔族人释放后九个月，这些人仍被关押在关塔那摩湾。[30]

29. 2005 年的《被拘留者待遇法》加剧了战斗人员身份审查庭和行政审查委员会程序的缺陷引起的关切。该法规定，“任何法庭或法官都无权受理或审理(1)国防部在古巴关塔那摩湾拘留的外国人提出的或代表该人提出的人身保护令申请”。[31] 这方面的例外是，哥伦比亚特区美国上诉法院保留裁定战斗人员身份审查庭作出的任何最后裁决的效力的权力。不过，上诉法院只是有权审查相关程序是否得到恰当遵循，而无权过问战斗人员身份审查庭的裁决的实质。[32]

E. 受到有管辖资格、独立的法庭审理的权利

30. 《公民权利和政治权利公约》第十四条第 1 款规定，“人人有资格有一个依法设立的合格的、独立的和无偏倚的法庭进行公正、公开的审讯”。[33] 《关于司法机关独立的基本原则》确认，“人人有权接受普通法院或法庭按照业已确定的法律程序的审讯。不应设立不采用业已确定的正当法律程序的法庭来取代应属于普通法院或法庭的管辖权”。[34] 《军事命令》规定，被拘留者须由专门为关塔那摩湾被

拘留者设立的军事委员会负责审理，这就无法对这些被拘留者适用普通民事法庭或军事法庭的既定程序。

31. 人权事务委员会第 13 号一般性评论(1984)将《公民权利和政治权利公约》第十四条解释为：第十四条中的公正审理基本规定既适用于普通法庭，也适用于专门法庭。[35] 委员会注意到，某些国家设有审理平民的军事法庭，委员会认为，“这会给公平、公正和独立司法带来严重问题”；并认为，“设立此种法庭往往是为了能够适用不符合通常司法标准的特别程序”。委员会得出结论认为：“此种法庭对平民的审理应当属于非常例外的情况，而且应当在真正提供第十四条规定的充分保障的条件下进行”。[36] 所以，军事委员会也应当充分遵守第十四条列明的规定，并遵守公平审理的保障规定。

32. 关塔那摩湾军事委员会采用的程序难以与《公民权利和政治权利公约》第十四条相调和。根据军事命令，军事委员会法官由“任命署”任命，该署归国防部乃至总统领导和负责。法官应当由武装部队军官担任，可由任命署免职。此种规定不仅意味着行政部门对委员会法官任免事务的干涉，而且也意味着行政部门对委员会法官的充分控制：司法机构须保持独立性的规定遭到违反。此外，解决管辖权冲突的公正的司法机构似乎缺乏：有关管辖和权限问题的决定由任命署作出，从而使军事委员会不受司法机关的控制。

33. 最后，《军事命令》规定，被任命担任委员会法官者只需具备起码的法律知识。委员会成员资格上的缺陷对正常和公平审理构成障碍，因而违反了这一基本规定：“获甄选担任司法职位的人应是受到适当法律训练或在法律方面具有一定资历的正直、有能力的人”。[37] 被拘留者受到精通法律的法官审理的权利遭到侵犯，尽管《经修订的军事委员会命令》(第一号)对此作了弥补：规定对多数法律问题的裁决由首席法官负责，首席法官须由美国武装部队任何军种的军法官担任。

F. 受到公正审理的权利

34. 受到公正审理的权利在《公民权利和政治权利公约》第十四条、《日内瓦第三公约》第一百零五条和一百零六条，以及《第一附加议定书》第七十五条(该条被认为起着解释习惯法的作用)中得到确认。[38] 正如人权事务委员会在第 29 号一般性评论中确认的，[39] 任何国家都不得在任何情况下克减这项受到公正审理的基本原

则。《军事命令》确认“进行充分、公正审理”的义务，但其规定却并未保障这项权利。

35. 《军事命令》对在本人在场情况下受审理的权利实行限制。另外，被告自任辩护人或通过自己选定的律师为其辩护的权利遭到侵犯，因为如上所述，军事委员会规定，辩护律师由任命署直接任命，并规定任命署可“出于合理理由”将辩护律师解职。依据《军事命令》，可自行聘请普通律师，但该律师须符合一些规定，其中包括：经认定可以接触机密资料；签订诉讼和承办案件保密协议；自费前往关塔那摩湾，以及同意不擅自离开关塔那摩湾基地等。此外，某些资料和证据可能不让普通律师接触，而且出于国家安全原因，普通律师可能无法出席审理。所有这些规定都危及《公民权利和政治权利公约》第十四条第 1 款之下得到公正审理的权利，以及第十四条第 3 款(乙)项和(丁)项规定的具体的“最低限度保障”，这些“最低限度保障”是：能够有相当时间和便利在自己选定的律师协助下准备辩护；并质疑提出的对本人不利的证据。这些规定应显然违反了《关于律师作用的基本原则》。[40]

36. 充分准备辩护的权利(《公民权利和政治权利公约》第十四条第 3 款(乙)项和《关于律师作用的基本原则》)[41] ——包括接触文件和其他证据以及直接和间接讯问对被告不利的证人和其他证人的权利——没有得到保障，因为《军事命令》规定，“被告可在首席法官确定的必要和可供程度上获得证人和文件为自己辩护”。[42] 另外，从 2005 年 8 月的《经修订的军事委员会命令》(第一号)来看，不允许被告和被告选定的辩护律师接触“受保护资料”的理由仍然过于宽泛，尽管该命令在这方面对 2002 年 3 月的《军事命令》作了某些改进。不过，依据 2005 年 12 月的《被拘留者待遇法》，美国一上诉法院现在负责判定委员会是否对被告作了“充分和公正审理”，并判定受理被告事先未曾看到的证据的做法是否与其受到公正审理的权利相一致。但是，工作组主席和特别报告员依然高度关切的是，充分准备辩护的权利并没有在军事委员会进行的程序中受到充分保护。

37. 工作组主席和特别报告员还对从关塔那摩湾被拘留者身上获取情报所依据的条件表示关注。曾在那里被拘留的人员告诉他们：改善严酷的拘留条件的权力掌握在审讯员手中，此种改善还取决于“合作”的态度。被拘留者遭到频繁审讯，遭受强大压力，以迫使其承认自己是“基地”组织成员或揭发他人。在这样的条件下收集证据，会使对本人或他人提出的任何指控的可信度受到影响。

38. 在不无故拖延的情况下受到审理的权利(《公民权利和政治权利公约》，第十四条第 3 款(丙)项)，既涉及审理应当开始的时间，也涉及审理应当结束的时间。[43] 在目前关押在关塔那摩湾的总共 500 多名被拘留者中，迄今为止被移交军事委员会的不到 10 人。绝大多数被拘留者虽已被关押数年，但仍未受到任何指控。[44] 由于他们继续遭到拘留，他们在不无故拖延的情况下受到审理的权利目前遭到侵犯。

39. 关于受到公开审理的权利，《军事命令》允许法庭出于某些“国家安全”原因进行秘密审理。

40. 最后，军事委员会的裁决原先仅由国防部长任命的一个小组加以复审，美国总统可对这些裁决作最后复审。2005 年 12 月的《被拘留者待遇法》规定，哥伦比亚特区美国上诉法院有权判定军事委员会作出的任何最后裁决的效力。但是，此种复审的范围非常有限。因而，《公民权利和政治权利公约》第十四条第 5 款规定的向一独立法庭提出上诉的权利也受到严重限制。

三、酷刑和其他残忍、不人道或有辱人格的待遇或处罚

41. 不遭受酷刑和其他残忍、不人道或有辱人格的待遇或处罚的权利，在《公民权利和政治权利公约》第七条中得到明确规定。《禁止酷刑公约》对酷刑作了界定，并详细规定了缔约国为防止酷刑行为和其他残忍、不人道或有辱人格的待遇或处罚而应当采取的行动。

42. 《禁止酷刑公约》第二条第二款规定，“任何特殊情况，不论为战争状态、战争威胁、国内政局动荡或任何其他社会紧急状态，均不得援引为施行酷刑的理由。”免遭酷刑和残忍、不人道或有辱人格的待遇或处罚的权利是一项不得克减的权利，所以，任何特别情况都不得作为实行克减的依据。人权事务委员会和禁止酷刑委员会一贯强调禁止酷刑的绝对性质，并强调，此种禁止规定在任何情况下甚至在战争期间或在打击恐怖主义过程中，都不得被克减。[45]

43. 禁止酷刑及“损害个人尊严的做法尤其是侮辱性和有辱人格的待遇”的规定，也载于 1949 年《日内瓦四公约》的共同条款第三条，美国是这四项公约的缔约国。此外，禁止酷刑是强制性法规的一部分。造成严重痛苦或创伤，或对身体或

身心健康造成严重损害的酷刑和其他不人道行为，也在国际刑法之下被禁止，而且在某些情形中可构成危害人类罪和战争罪。[46]

44. 相关国际标准特别是《禁止酷刑公约》的禁止酷刑规定，还包含不驱回原则(第三条)，迅速调查指控的违法行为并将犯罪者绳之以法的义务，禁止实行不得与外界接触的拘留，以及禁止在诉讼过程中使用通过酷刑获得的证据等。

45. 鉴于上述，美国有义务充分遵守关于禁止酷刑和虐待的规定。酷刑问题特别报告员注意到美国对《禁止酷刑公约》和《公民权利和政治权利公约》作出的保留，这些保留表示：美国认为自己受禁止残忍、不人道和有辱人格的待遇规定的约束，但只是在此种待遇是指《美国宪法》第五、第八和/或第十四条修正案所禁止的残忍、特别和不人道的待遇或处罚这一限度内。[47] 在这方面，特别报告员员愿提及相关条约机构的关切，这些机构对美国未能将与《公约》定义相一致的酷刑罪列入国内立法，并对美国提出的保留非常宽泛深表遗憾。[48]

A. 缺乏明确性/规则含糊不清

46. 从 2001 年起，美国政府在正式重申其遵守绝对禁止酷刑的规定的同时，[49] 制定了一些实际上弱化这项禁令的政策。一个实际的例子，是时任司法部负责法律顾问局的助理部长、现任联邦法官的 Jay S. Bybee 于 2002 年 8 月 1 日至时任美国总统顾问、现任司法部长的 Alberto Gonzales 的备忘录，该备忘录试图大为缩小酷刑定义的范围，并称，由于有必要进行正当防卫，因此违反禁止使用酷刑做法的法律是可以允许的。[50] 特别报告员注意到，如美国政府对 2005 年 10 月 21 日的调查表作出的答复所示，这一备忘录已被司法部 2004 年 12 月 30 日的一份备忘录取代。

47. 但是，此后国防部的一些内部备忘录则设法拓宽“对付抗拒态度的方法”方面允许采取的做法的范围(还见下文 B 节)。2003 年 4 月 16 日，签发了一份批准采用 24 种具体方法的备忘录。该备忘录的引言说，“美国武装部队应当继续以人道方式，并在恰当以及与军事必要性相一致的程度上，以符合《日内瓦四公约》原则的方式对待被拘留者。”[51] 这一提法意思含糊不清，因为它意味着军事必要性可以凌驾于《日内瓦四公约》原则之上。在这方面，特别报告员还指出，在对调查表的答复中，美国一律使用“酷刑”一词，没有提及“残忍、不人道和有辱人格的待遇和处罚”。

48. 参议院 2005 年 10 月 5 日举行的辩论颇能说明问题。[52] 参议员麦凯恩在谈到允许采用和不允许采用的审讯方法方面存在的混乱现象时说，“这同时也意味着，规则上的混乱现象再次变得十分严重。我们有如此多不同的法律标准和漏洞，以至于我们的律师和将军们感到困惑。让我们为在实地的监狱服役的士兵们想想吧。” [53] 2005 年 12 月 15 日，布什总统接受《国防部拨款法案》麦凯恩修正案，该修正案禁止对国防部拘留的人员和美国政府在世界各地拘押或管制的人员施行残忍、不人道和有辱人格的待遇或处罚，从而澄清了含糊不清的规则，并使禁止残忍、不人道和有辱人格的待遇或处罚的规定成为法律，[54] 特别报告员对此表示欢迎。副总统切尼和中央情报局局长戈斯曾设法明确地将中央情报局排除在禁止残忍、不人道和有辱人格的待遇或处罚的法律规定的适用范围之外，但他们未能做到这一点，特别报告员认为，这是一种显著的进步。

B. 审讯方法

49. 在如 A 节所述对何为酷刑和虐待作出含糊不清地解释之后，国防部长于 2002 年 12 月 2 日批准了以下审讯方法，这些方法显然超出了先前的做法(载于《陆军野战教范》(FM34-52))的范围。

- “采用疲劳姿势(如站立姿势)，持续时间不超过四小时；
- 单独拘留，最长 30 天；
- 运送和审问过程中可将被拘留者的头部罩住；
- 剥夺光线和听觉刺激；
- 移去所有舒适物品；
- 强迫修饰(剃除脸部须毛，等等)；
- 取走衣服；
- 进行长达 20 小时的审问；
- 利用被拘留者特有的恐惧心理(如恐犬症)施加压力。” [55]

50. 在 2003 年 1 月 15 日将上述备忘录废止之后，[56] 国防部长于 2003 年 4 月 16 日批准了以下审讯方法：[57]

- “B.给予奖励/取消奖励即舒适物品；

- S.改变周围条件，可包括将被拘留者暴露在极端气温之下以及剥夺光线和听觉刺激等；
- U.操纵环境：改变环境，引起适度不适(如调节气温或散发某种难闻的气味)；
- V.调整睡眠；调整被拘留者的睡眠时间(如将睡眠周期从晚间改为白天)。这一方法不属于剥夺睡眠。
- X.单独隔离：将某个被拘留者与其他被救者隔离关押，同时仍然遵循基本的待遇标准。”

51. 上述方法与《公约》酷刑定义所列五个要素中的四个要素相吻合(所涉行为由政府工作人员作出；他们有着明确的目的，即收集情报、获取信息；这些行为是故意作出的；受害者处于无能为力的状况)。但是，要符合《公约》的酷刑定义，受害者须受到严重的身心痛苦或创伤。为了侮辱受害者而施行的待遇可以构成有辱人格的待遇或处罚，即便受害者没有遭受严重痛苦或创伤。很难抽象地判定取走衣服等行为是否构成有辱人格待遇或处罚。不过，脱去被拘留者的衣服，尤其是在当着妇女的面以及考虑到文化上的敏感性的情况下，可在个别情形中造成严重心理压力，并可构成有辱人格的待遇甚至酷刑。用犬进行恐吓被拘留者的做法也是如此，特别是在明知某人有恐犬症的情况下。[58] 将某人暴露在极端气温之下，如果持续时间很长，自然会造成严重痛苦。

52. 通过与曾经在关塔那摩湾被拘留的人员进行交谈，特别报告员得出结论认为，其中的一些方法，尤其是用犬恐吓、将人暴露在极端气温之下、连续数日剥夺睡眠，[59] 以及长时间单独拘留等，可被视为造成严重痛苦。[60] 他还强调，同时使用这些方法则更可能构成酷刑。欧洲委员会议会也认为，许多被拘留者遭受构成酷刑的虐待，这些虐待事件经常发生，而且是在美国政府知情并与其有牵连的情况下发生的。[61] 联合王国上议院议员，Craighead 的霍普勋爵持同样的看法，他说，“[美国主管机构准许在关塔那摩湾采用的]某些做法，如在我们自己的国家批准采用，将会使人们的良知受到震撼”。[62]

C. 拘留条件

53. 尽管可以想象，在开始时，所采用的拘留条件是出于维持秩序和安全的原因确定的，但后来这些拘留条件似乎被用来“对付抗拒态度”和施加压力。[63] 此外，这些条件与调查方法密切相关。[64] 现有大量证据表明，一些旨在迫使被拘留者合作的做法，如扣留衣服或清洁卫生用品、牢房内从不熄灯、[65] 禁止交谈、[66] 文化和宗教骚扰、[67] 感觉剥夺、恐吓、实行无定期拘禁从而使人无望获释，以及不让被拘留者求助于独立法庭等，得到采用并且造成了严重的精神健康问题。[68] 另外，将被拘留者长期关押在防备最为严密的囚室内，会使其遭受压力。[69] 有报告说，虽然 30 天隔离监禁是允许的最长期限，但一些被拘留者在经过很短的间歇之后又中心遭到隔离监禁，因此，他们的半隔离监禁时间最长达 18 个月。[70] 根据人权事务委员会的裁决，旨在施加压力的长期单独监禁和类似措施，构成对《公民权利和政治权利公约》第十条第 1 款规定的被拘留者享受人道待遇和作为人固有的尊严受到尊重的权利的侵犯，而且还可能构成违反《公民权利和政治权利公约》第七条的不人道待遇。[71]

D. 过度使用武力

54. 现在不断有报告说，在三种情况下常常出现过度使用武力的现象：在运送过程中；[72] 在“初步反应部队”的行动过程中，以及在为对付绝食而采用的强迫喂食过程中。第三种情况将在关于健康权的第五节中得到简要述及。据辩护律师报告说，为进行强迫喂食而采用的某些方法无疑构成酷刑。[73] 由于无法通过与被强迫喂食的被拘留者以及医生、护士和监狱看守私下交谈的方式在实地核实这些指称，因此，必须认为这些有恰当根据的指称所涉情况属实。在运送和初步反应部队的行动过程中实施的待遇，由图片 [74] 和录像资料 [75] 证明。这些图片显示，在运送和初步反应部队的行动过程中，被拘留者戴上镣铐，被链条捆住，头部被罩住，被迫戴上耳机和护目镜。这些图片还显示，被拘留者遭到拳打脚踢，而且如果抵抗，就会被初步反应部队的士兵强行脱去衣服并强行剃须。曾在关塔那摩湾被关押的人的证词证实了这些情况。[76] 特别报告员认为，此种待遇构成酷刑，因为它会给受害者遭受严重痛苦和创伤，其目的在于恐吓和/或惩罚。

E. 移交、特别引渡、不驱回

55. 不断有报告说，关塔那摩湾的一些被拘留者遭到引渡并被强行送回有可能遭受酷刑的国家。例如，Al Qadasi 先生在 2004 年 4 月被移交给也门。自那时以来，他的律师和一些国际非政府组织对他作了探访。据他的律师说，他事先没有被告知很快将被送回也门，因而无法提出上诉。4 月初，有人强行对他进行了一次注射，致使他失去知觉并出现幻觉。当他在几天之后恢复知觉时，发现自己已被关押在萨那监狱，他说他在监狱遭到毒打而且被剥夺食物。[77] 从收到的资料来看，特别报告员认为，美国采取的“特别引渡”做法构成对《禁止酷刑公约》第三条和《公民权利和政治权利公约》第七条的违犯。[78]

F. 缺乏公正调查/法不治罪

56. 正如本报告前面已经指出的，被拘留者长期无法诉诸司法程序。对关于遭受酷刑或残忍、不人道或有辱人格的待遇的指称的调查，由行政部门不同单位负责进行，[79] 而且缺乏公正性。目前，似乎没有对任何遭受酷刑或虐待的指称的任何独立的司法调查，这些人违反了国际最低标准。因而，没有任何人因犯有酷刑行为而被绳之以法。[80] 令人关切的是，似乎有人试图让犯有酷刑或虐待行为者逍遥法外。[81] 特别报告员认为，关于关塔那摩湾发生酷刑的虐待事件的各种指称没有受到任何独立调查，这表明美国在《禁止酷刑公约》第 12 条和第 13 条之下的义务遭到违犯。因此，他赞同欧洲议会对美国政府作出的这一呼吁：“为被美国拘留的所有被剥夺自由者进行公正、独立的调查，查明遭受酷刑和虐待的指称”。[82]

四、宗教或信仰自由和宗教不容忍

A. 适用的国际标准

57. 《公民权利的政治权利公约》第十八条和 1981 年《消除基于宗教或信仰原因的一切形式的不容忍和歧视宣言》，规定保护宗教或信仰自由权利。人权事务委员会第 22 号一般性评论对第 18 条作了如下解释：“已经受到某种正当限制的人，如犯人，仍然享受在与此种限制的具体性质最为充分一致的限度内表明其宗教或信

仰的权利。”[83] 被剥夺自由的人不得被剥夺其宗教或信仰自由权利。这些标准必须适用于所有拘留设施中的每个人，不论其宗教信仰如何。[84]

58. 《公民权利和政治权利公约》第十八条第 3 款规定，“表示自己的宗教或信仰的自由，仅只受法律所规定的以及为保障公共安全、秩序、卫生或道德、或他人的基本权利和自由所必需的限制”。[85] 关于这些限制，委员会“认为，应当对第十八条第 3 款作狭义解释：不得基于该条款没有明确规定的理由实行限制，即便可以对受到《公约》保护的其他权利实行相关限制，如以维护国家安全为由实行此种限制。”[86] 此外，根据《公民权利和政治权利公约第四条，宗教或信仰自由权利在任何情况下都不得受到解释。

59. 最后，《日内瓦第三和第四公约》规定，缔约方必须尊重的武装冲突过程中被剥夺自由的人的宗教信仰和宗教习俗，这些人包括战俘、被拘禁者和其他类型的被拘留者。这包括信奉宗教、接触神职人员，以及禁止基于宗教实行歧视等。[87]

B. 据报告的侵犯人权的指称

60. 阅读一些官方文件和报告及通过谈话获得资料可以发现，某些审讯方法虽然对某些教派成员来说极为有辱人格，但美国主管机构却允许采用这些方法。[88] 另一些做法可能是专门为了触犯被拘留者的宗教禁忌而设计的，而参与拘押、审讯和处置被拘留者的人再三采用这些做法(如使用女审讯员，这些审讯员“在审讯过程中表演腿间舞”[89] (lap dance))。还有报告说，这些方法在被拘留者祷告之前被采用，而且在某些情形中，不允许被拘留者事先清洗，因而这些人就无法祷告。

61. 在现在实行的一些官方认可的审讯方法[90] 中，有一种方法允许移走宗教物品(如《可兰经》)。这构成对被拘留者的宗教或信仰自由权利的无端限制。

62. 有关《可兰经》等宗教物品可能遭到不当处置的报道，尤其受到关注。2005 年 5 月 23 日，宗教或信仰自由问题特别报告员就此致函美国政府。政府 2005 年 8 月 18 日的答复详细通报了在出现这些指称之后进行的调查情况，还通报了对拘留设施工作人员适用的现行措施和准则。政府表示，已经查明五起看守和审讯员故意或无意中对《可兰经》处置不当的案件，所涉行为包括踢踩《可兰经》[91] 等。

63. 一些被拘留者称，他们被迫修饰，包括剃去胡须、头发和眉毛等。

64. 关塔那摩湾一名随军穆斯林神职人员被撤职一事引起了人们的进一步关注。该人后来因涉嫌犯有间谍活动而被捕，并被单独监禁 76 天。据称，无人接替他的工作，因此后来无人为穆斯林被拘留者主持宗教仪式，这就违反了《囚犯待遇最低限度标准规则》。[92]

65. 最后，令人感到关切的是，有报道说，美国暗中或公开鼓励或容忍将穆斯林与恐怖主义相联系的做法，例如，被拘留者被问及在多大程度上相信伊斯兰教教义。

五、从享有可达到的最高水准的身心健康的权利

66. 健康权源自人的尊严，并体现在以下与当前情况相关的国际文书中：《世界人权宣言》第二十五条第(一)款；《经济、社会、文化权利国际公约》(《经社文权利公约》)第十二条；《消除一切形式种族歧视国际公约》第五条(辰)款第(4)项，以及《儿童权利公约》第 24 条。虽然美国既没有批准《经社文权利公约》，也没有批准《儿童权利公约》，[93] 但美国是指两项公约的签署国，因此该国“负有义务不得采取任何足以妨碍条约目的及宗旨之行动”。[94] 美国还是世界卫生组织的参加方，因而该国已经接受这些原则：“享有可达到的最高水准的健康是每个人的最基本的权利之一”。[95]

67. 特别报告员的任务涵盖报告“全世界” [96] 的健康权的落实情况，各国需要同特别报告员充分合作，便利他完成这项任务，[97] 同时侧重弱势群体的健康问题。[98] 所以，特别报告员的任务范围涉及处理关塔那摩湾出现的健康权遭受侵犯的指称。

68. 除了国家承担着源自健康权的义务以外，卫生保健专业人员也承担着某些源自国际人权法的健康权职责。[99]

69. 健康权包括得到及时、恰当的保健，以及获取安全饮用水和适足食物及卫生条件等健康基本要素的权利。[100] 国际人权文书还对各国规定了为犯人提供健康的生活条件，以及高质量卫生保健包括精神保健的义务。[101]

70. 健康权问题特别报告员受到了关于关塔那摩湾存在健康权──获取卫生保健和健康基本要素的权利──遭受侵犯情况的严重和可靠的举报。[102] 这些报告说，(一) 监禁条件对被拘留者的精神健康造成了极大的损害；(二) 卫生保健的提供取决

于同审讯员的合作态度；(三) 卫生保健被剥夺，受到无故拖延而且不充分；(四)被拘留者受到违背其意愿的治疗，包括对被拘留者用药和强迫喂食等；(五) 卫生专业人员一贯违反专业道德标准，从而不可能向被拘留者提供高质量的卫生保健。虽然所有这些指称都非常严重，但考虑到报告篇幅有限，特别报告员将只述及两个问题：精神健康及卫生专业人员的道德责任，包括与强迫喂食有关的道德责任。

A. 精 神 健 康

71. 据报告，被拘留者自被捕之时起受到的待遇以及他们的监禁条件，对其中许多人的精神健康造成了严重影响。[103] 相关待遇和条件包括：将被拘留者抓获并转至海外某地；在转移过程中施行感觉剥夺和其他虐待；将人关押在缺乏适当卫生条件的笼子里，并将其置于极端气温之下；仅允许进行极为有限的活动和洗漱；蓄意使用胁迫性审讯方法；长期单独监禁；文化和宗教骚扰；剥夺或严重拖延与家人的联系；实行无定期拘留，被拘留者不知道自己的命运将会如何；以及不允许求助于独立法庭等。[104] 这些条件致使一些被拘留者患有严重精神疾病，仅 2003 年就发生了 350 起自我伤害事件，使得个别人员或多人想要自杀，并致使大量人员长期绝食。[105] 这些严重的精神健康后果很可能对许多人造成长期影响，从而将在多年内给被拘留者及其家属造成卫生保健负担。[106]

B. 卫生保健专业人员的道德义务，包括与强迫喂食有关的道德义务

72. 特别报告员曾经在他的报告中强调，卫生保健专业人员在促进、保护和落实健康权方面发挥着不可或缺的作用。[107] 但是，在以往，一些卫生保健专业人员往往在胁迫之下参与侵犯健康权和其他人权的行为。[108] 针对这些不法行为，国际人权文书对卫生保健人员的行为作了规定。例如，《公民权利和政治权利公约》规定，“……对任何人均不得未经其自由同意而施以医药或科学试验”。[109] 此外，人权事务委员会曾请缔约国提交报告，通报大会 1982 年 12 月 18 日第 37/194 号决议通过的《关于医务人员、特别是医生在保护被拘禁和拘留的人不受酷刑和其他残忍、不人道或有辱人格的待遇或处罚方面的任务的医疗道德原则》的适用情况。[110]

73. 《联合国医疗道德原则》适用于所有卫生保健专业人员。这些原则规定，卫生保健专业人员有以下情形之一的，即属于违反医疗道德：(a) 与被拘留者相处，“其目的……超出确定、保护或增进……的身心健康以外”；(b) 利用其知识和技能协助对被拘留者进行“可能对其身心健康……有不利影响……的审讯”；(c) 证明被拘留者可以接受任何“可能对其身心健康不利……的待遇或处罚”。《联合国原则》还规定，这些原则不得基于包括社会紧急状态在内的任何理由加以克减。

74. 世界医学协会在《东京宣言》(1975 年)中通过了类似的道德标准，美国医学协会随后通过了这些标准。[111] 《东京宣言》规定，医生不得参与实施任何形式的残忍、不人道或有辱人格的待遇，不得在此种待遇实施过程中在场，也不得提供任何知识便利作出此种行为。医生的基本作用是减轻痛苦，任何其他动机都不得超越这一目的。[112] 国际护士理事会也对有害身心健康的审讯程序及被拘留者遭受的不人道待遇予以谴责：[113]“护士的基本职责是促进健康、预防疾病、恢复健康并减轻痛苦。”[114] 这些国际商定的道德规范因隐含于健康权中，并构成健康权的一个组成部分。卫生保健专业人员遵守此种道德标准，对于实现健康权至关重要。

75. 特别报告员收到的报告——其中许多已得到美国军方的调查证实[115]——说，关塔那摩湾的卫生保健专业人员有系统地违反《联合国医疗道德原则》和《东京宣言》所载的普遍接受的道德标准，并且违反既定的医疗保密规则。一些指称的违反情况有：(a) 为审讯目的透露病历，或以其他方式透露健康信息，从而违反保密规则；[116] (b) 参与审讯，为审讯提供咨询或在审讯时到场；[117] (c) 在实施包括适用药物和强迫喂食在内的未经同意而采取的做法过程中在场或参与实施此种做法。[118] 总之，报告表明，某些卫生保健专业人员与对被拘留者的健康有害的虐待行为有牵连。这种不道德行为侵犯了被拘留者的健康权，也违反了卫生保健专业人员与健康权相关的义务。

76. 红十字国际委员会的一份报告说，“医疗服务的获取似乎已被作为胁迫做法的一部分，这意味着犯人将不会同医生合作。犯人从审讯员那里得知，审讯员了解他们的病历，其结果是犯人不再信任医生”。[119] 特别报告应感到关切的是，被拘留者透露给卫生保健专业人员的信息已被用来惩罚和威胁前者，所以，被拘留者已经认识到，他们不能信任卫生保健专业人员。因而，被拘留者可能不去寻求医治，或者即便寻求医治，可能也不会向保健专业人员透露获得充分和恰当医治所需的一

切信息。就绝食而言，被拘留者和卫生保健专业人员之间的相互信任关系，对卫生保健专业人员向绝食者提供与道德原则相一致的健康信息和咨询至关重要。

77. 美国国防部颁布了与《联合国医疗道德原则》相对应的《医疗方案原则》，但两者在一些方面有着明显差异。最重要的是，美国的原则仅适用于“专业医患治疗关系”中的卫生保健专业人员。[120] 根据这一角色区分，美国承认，精神病学专家和心理学专家参加了为审讯提供专家意见的“行为科学咨询小组”，但指出，这些人员的参加并无不当之处，因为他们并不处在于被拘留者的医患关系中。此外，美国认为，此种小组的目的是协助“进行安全、合法、合乎道德规范和有效的审讯”。[121]

78. 然而，获准在关塔那摩湾使用的审讯方法并不与“进行安全、合法、合乎道德规范和有效的审讯”这一目标相一致，[122] 而且这些方法对被拘留者的精神健康造成了不利影响。再者，《联合国原则》和其他的卫生保健专业人员道德规范并没有根据卫生保健专业人员的作用进行区分。这些原则规范的前提是：卫生保健专业人员的知识和技能不能用来对人类造成损害，因此，专业人员担任的具体职务并不重要。[123] 从卫生保健专业人员“利用其知识和技能”，以任何方式协助进行“可能损害”（着重号后加)被拘留者的身心健康的审讯这一程度上说，这些人员违反了专业道德规范，也侵犯了被拘留者的健康权。[124]

79. 来自关塔那摩湾的消息证实，医生和其他卫生保健专业人员正在参与对被拘留者进行强迫喂食的行动。[125] 对绝食人员进行强迫喂食，会引起一些独特的人权问题。其中一个问题涉及对被拘留者进行强迫喂食所采用的方式，对此，本报告在关于酷刑的那一节中作了评述。[126] 另一个问题是强迫喂食不论以何种方式进行所涉及的道德规范及合法性，由于本报告篇幅受到极大限制，下文将仅对此作简要评述。

80. 《东京宣言》和《马耳他宣言》规定，如果被拘留者能够知晓绝食的后果，医生就不得参与对其进行强迫喂食的行动。[127] 这一立场基于整个人权法中重复出现的基本原则，即个人自主权。除世界医学协会以外，美国医学协会和许多其他组织也都核可了《东京宣言》。[128] 另外，2004 年，在以损害安全为由而被拘留的巴勒斯坦人进行绝食过程中，红十字会报告说，红十字会医生将“敦促当局不要对被拘留者进行强迫喂食”。[129] 此外，一些国内法院以个人有权拒绝医治为依据裁定：

国家不得对犯人进行强迫喂食。[130] 虽然另一些国内法院采取不同立场，但不清楚这些法院是否都适当考虑到了相关的国际标准。[131]

81. 美国政府说，国防部的政策规定，在绝食威胁到关塔那摩湾被拘留者的生命时，卫生保健专业人员可对其进行强迫喂食。[132] 但是，美国的政策违背个人自主权原则、违背世界医学协会和美国医学协会的政策，也不符合红十字会医生的立场（如上段所述）、一些国内法院以及许多其他机构的立场。

82. 从健康权角度来看，对医疗的知情同意至关重要，[133] “以此类推”，拒绝治疗的权利也至关重要。[134] 一个有正常思维能力的被拘留者和任何其他人一样，有权拒绝治疗。[135] 总之，在未经同意的情况下对一个有正常思维能力的被拘留者进行治疗——包括强迫喂食——构成对健康权的侵犯，也构成对卫生保健专业人员道德规范的违反。

六、结论和建议

A. 结 论

83. 国际人权法适用于对关塔那摩湾被拘留的状况的分析。甚至可以说，人权法在任何时候甚至在紧急状态和武装冲突情况中都适用。反恐战争本身并不构成须适用国际人道主义法的武装冲突。美利坚合众国尚未将对《公民权利和政治权利国际公约》或它加入的任何其他国际人权条约作出的任何克减通知联合国秘书长或条约的其他缔约国。

84. 关塔那摩湾的被拘留者有权依据《公民权利和政治权利公约》第九条，在一司法机构对将其拘留的合法性提出异议，并在拘留被认定缺乏恰当法律依据的情况下获释。这项权利目前遭到侵犯，而且所有关押在关塔那摩湾的人继续遭到拘留这一情况，构成违反《公民权利和政治权利公约》第九条的任意拘留。

85. 美国政府行政部门充当关塔那摩湾被拘留者的法官、公诉人和辩护律师，这构成对《公民权利和政治权利公约》第十四条所列受到独立法庭正常审理的权利的各项保障规定的严重违反。

86. 美国政府试图联系反恐斗争重新界定“酷刑”，以便允许采用依据国际公认的酷刑定义将被禁止的某些审讯方法，这极为令人关注。过去几年中在允许和禁止采用的审讯方法方面出现的混乱状况尤为令人震惊。

87. 国防部批准的审讯方法，尤其是在同时得到采用的情况下，构成违反《公民权利和政治权利公约》第七条和《禁止酷刑公约》第十六条的有辱人格待遇。如果在谈话涉及的单个事例中，受害者经历剧烈疼痛或创伤，那么所涉行为就构成《公约》第 **1** 条界定的酷刑。此外，总的拘留条件，特别是拘留期限的不确定性和长期单独拘禁，构成不人道待遇，并构成对健康权的侵犯，以及对《公民权利和政治权利公约》第十条**第 1** 款规定的被拘留者受到人道待遇和作为人固有的尊严受到尊重的权利的侵犯。

88. 在运送过程中以及在初步反应部队的行动中再三过度使用武力，以及对绝食的被拘留者进行强迫喂食，必须视为构成《禁止酷刑公约》第 1 条界定的酷刑。

89. 将一些人员引渡到被引渡者及可能遭受酷刑的国家——**Al Qadasi** 先生便是其中的一个例子——构成对不驱回原则的违反，而且也违反《禁止酷刑公约》第 3 条和《公民权利和政治权利公约》第七条。

90. 对遭受酷刑和虐待的指称不进行任何公正的调查，致使犯有酷刑和虐待行为者逍遥法外，这构成对《禁止酷刑公约》**第 12** 和 **13** 条的违反。

91. 现有可靠迹象表明，在不同情况下，关塔那摩湾拘留设施中的被拘留者的宗教信仰权利遭到侵犯，这构成违反《公民权利和政治权利公约》第十八条和 1981 年《宣言》的情况。尤其令人关切的是，其中一些违法行为竟然是得到主管机构批准的。此外，有些审讯方法基于宗教歧视，目的是伤害被拘留者的宗教感情。

92. 关塔那摩湾的总体监禁条件构成对健康权的侵犯，因为这些监禁条件源自对义务的违反，而且已经使得许多被拘留者的精神健康严重恶化。

93. 关于关塔那摩湾卫生保健专业人员违反道德标准的指称，以及此种违反对被拘留者得到的医疗保健服务包括精神医疗保健服务的质量的影响，也受到严重关注。

94. 对拘留者受到的待遇及其拘禁条件，迫使被拘留者长期绝食。对有正常思维能力的被拘留者进行强迫喂食，构成对健康权的侵犯，也致使任何可能参与强迫喂食做法的卫生保健专业人员的道德义务遭到违反。

B. 建 议

95. 对恐怖主义嫌疑人的拘留应当依据遵守相关国际法订立的保障规定的刑事程序进行。据此，美利坚合众国政府应当或是依照《公民权利和政治权利公约》第九条第 3 款和第十四条，立即将所有关塔那摩湾被拘留者提交审理，或是不再拖延地将其释放。还应当考虑了一个具备管辖资格的国际法庭审理恐怖主义嫌疑人。

96. 美国政府应当不再拖延地关闭关塔那摩湾拘留设施。在关闭这些设施以及将被拘留者转到美国境内的候审拘留设施之前，政府应当避免采取任何构成酷刑或残忍、不人道或有辱人格的待遇或处罚、基于宗教的歧视以及对健康权和宗教信仰自由权利的侵犯的做法。具体而言，国防部批准采用的所有特别审讯方法都应当立即废止。

97. 美国政府应当避免驱逐、送回、引渡关塔那摩湾被拘留者，并且避免将其移交给有大量理由认为被移交者可能遭受酷刑的国家。

98. 美国政府应当确保每个被拘留者都有权就所受的待遇提出申诉，有权要求有关方面立即处理此种申诉，如遇请求，对申请的处理应当以非公开方式进行。如有必要，可由他人代为提出申诉，或由被拘留者法定代表或其家属提出申诉。

99. 美国政府应当确保由一个独立机构对所有酷刑或残忍、不人道或有辱人格的待遇或处罚的指称进行彻底调查，并确保所有被认定犯有、下令作出、容忍或纵容此种行为的人——包括相关的最高层军事和政治领导人在内——都能被绳之以法。

100. 美国政府应当确保依照《禁止酷刑公约》第 14 条，向所有酷刑或残忍、不人道或有辱人格的待遇或处罚的受害者提供公正、充分的赔偿，包括提供便利尽可能充分的康复的手段。

101. 美国政府应当向拘留设施工作人员提供充分培训，以便使受训者认识到他们有义务遵守关于被拘留的待遇的国际人权标准，包括尊重宗教信仰自由权利，并确保受训者重视文化问题。

102. 美国政府应当修改《美国国防部医疗方案原则》，以使其与《联合国医疗道德原则》相一致。

103. 美国政府应当确保关塔那摩湾主管人员不对能够作出合理判断并知晓绝食后果的任何被拘留者进行强迫喂食。美国政府应当邀请独立的卫生保健专业人员以符合国际道德标准的方式，在整个绝食期内对绝食者进行监测。

104. 所有五名任务承担者都应当能够充分、不受限制地访问关塔那摩湾设施，包括能够私下同被拘留者谈话。

Annex *

Notes

[1] These interviews were carried out with the consent of the Governments concerned (France, Spain and the United Kingdom). Similar requests have been addressed by the five mandate holders to Afghanistan, Morocco and Pakistan in order to meet with former detainees currently residing in the three respective countries. No response has been received so far.

[2] Response of the United States of America, dated 21 October 2005 to the inquiry of the Special Rapporteurs dated 8 August 2005 pertaining to detainees at Guantánamo Bay, p. 52. For more updated information, see the fact sheets of the US Department of Defense (available at http://www.defenselink.mil/news/Aug2005/d20050831sheet.pdf>), according to which, as of 31 August 2005, there were four "cases where detainees are charged and the case is under way", with another eight subject to the president's jurisdiction under his November 2001 military order. According to further fact sheets posted by the Department of Defense on its website, in December 2005 five further detainees had "charges … referred to a military commission", bringing the total of detainees referred to a military commission to nine as of the end of December 2005.

[3] Declaration annexed to Security Council resolution 1456 (2003). Relevant General Assembly resolutions on this issue are 57/219, 58/187 and 59/191. The most recent resolution adopted by the Security Council is 1624 (2005), in which the Security Council reiterated the importance of upholding the rule of law and international human rights law while countering terrorism.

[4] Statement delivered by the Secretary-General at the Special Meeting of the Counter-Terrorism Committee with Regional Organizations, New York, 6 March 2003, http://www.un.org/apps/sg/ sgstats.asp?nid=275.

[5] Speech delivered by the United Nations High Commissioner for Human Rights at the Biennial Conference of the International Commission of Jurists (Berlin, 27 August 2004), http://www.unhchr.ch/huricane/huricane.nsf/NewsRoom?OpenFrameSet.

[6] See Commission on Human Rights resolutions 2003/68, 2004/87 and 2005/80.

[7] The United States has entered reservations, declarations and understandings with regard to a number of provisions of these treaties. Most relevant are the reservations to article 7 of ICCPR and article 16 of the Convention against Torture, as noted in paragraph 45.

[8] "The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions", Remarks of Michael J. Matheson, Deputy Legal Adviser, United States Department of State, in The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: "A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions", *The American University Journal of International Law and Policy*, vol. 2, No. 2 (Fall 1987), pp. 419-431.

[9] Human Rights Committee, general comment No. 31 (2004), CCPR/C/21/Rev.1/Add.13, para. 10.

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* Annexes I and II are being circulated in the language of submission only.

[10] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Reports 2004 (9 July 2004).

[11] Ibid., para. 111. The ICJ reached the same conclusion with regard to the applicability of the Convention on the Rights of the Child (para. 113). As far as the Convention against Torture is concerned, articles 2 (1) and 16 (1) refer to each State party's obligation to prevent acts of torture "in any territory under its jurisdiction". Accordingly, the territorial applicability of the Convention to United States activities at Guantánamo Bay is even less disputable than the territorial applicability of ICCPR, which refers (art. 2 (1)) to "all individuals within its territory and subject to its jurisdiction".

[12] Human Rights Committee, general comment No. 29 (2001), CCPR/C/21/Rev.1/Add.11, para. 3.

[13] Ibid.

[14] Ibid., paras. 15-16.

[15] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, at p. 240 (8 July 1996), para. 25.

[16] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion*, I.C.J. Reports 2004 (9 July 2004), para. 106.

[17] The Commission on Human Rights resolutions governing the Working Group mandate it "to investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards" (1991/42, 1997/50 and 2003/31). In its report to the Commission on Human Rights at its fifty-ninth session, the Working Group gave a Legal Opinion regarding deprivation of liberty of persons detained at Guantánamo Bay (E/CN.4/2003/8, paras. 61 to 64). On 8 May 2003, the Working Group issued its Opinion No. 5/2003 concerning the situation of four men held at Guantánamo Bay, finding that it constituted arbitrary detention. The Working Group also reflected developments in United States litigation relating to Guantánamo Bay in its report to the Commission in 2005 (E/CN.4/2005/6, para. 64).

[18] This Military Order has been complemented by several subsequent Military Commissions Orders, i.a. Military Commission Order No. 1 of 21 March 2002, which was superseded on 31 August 2005 by the Revised Military Commission Order No. 1, Military Commission Order No. 2 of 21 June 2003 (subsequently revoked), Military Commission Order No. 3 of 5 February 2004 (superseded by Military Commission Order No. 3 of 21 September 2005), Military Commission Order No. 4 of 30 January 2004 (subsequently revoked), Military Commission Order No. 5 of 15 March 2004, and Military Commission Order No. 6 of 26 March 2004: reference to the "Military Order" in the text should be read as referring to the series of Military Commissions Orders.

[19] Response of the United States of America dated 21 October 2005, to Inquiry of the UNCHR Special Rapporteurs dated 8 August 2005, Pertaining to Detainees at Guantánamo Bay, p. 3.

[20] See Official Statement of the International Committee of the Red Cross (ICRC) dated 21 July 2005 regarding "The relevance of IHL in the context of terrorism" (available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705?OpenDocument>): "International humanitarian law (the law of armed conflict) recognizes two categories of armed conflict: international and non-international. International armed conflict involves the use of armed force by one State against another. Non-international armed conflict involves hostilities between government armed forces and organized armed groups or between such groups within a state. When and where the 'global war on terror' manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law. For example, the armed hostilities that started in Afghanistan in October 2001 or in Iraq in March 2003 are armed conflicts. When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply. Instead, domestic laws, as well as international criminal law and human rights govern. […] The designation 'global war on terror' does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict."

[21] Third Geneva Convention relative to the Treatment of Prisoners of War, art. 118, and Fourth Geneva Convention relative to the Treatment of Civilian Persons, art. 133 (1).

[22] Third Geneva Convention, art. 119 (5), and Fourth Geneva Convention, art. 133.

[23] Third Geneva Convention, art. 17 (3), and Fourth Geneva Convention, art. 31.

[24] For the circumstances of the arrest and transfer to Guantánamo Bay of the six men see the decision of the Human Rights Chamber for Bosnia and Herzegovina of 11 October 2002 in case No. CH/02/8679 et al., *Boudellaa & Others v. Bosnia and Herzegovina and Federation of Bosnia and Herzegovina*, available at www.hrc.ba. See also the report of Mr. Amir Pilov of 10 August 2004 on his visit to Guantánamo Bay from 26 to 29 July 2004 as official representative of Bosnia and Herzegovina in accordance with the respective order of the Human Rights Chamber.

[25] See, *Rasul v. Bush*, 542 U.S. 446, 124 S.Ct. 2686 (2004).

[26] See US District Court for the district of Columbia, decision of 31 January 2005 *In re Guantánamo Detainees Cases*, 355 F. Supp. 2d 443, at 468-478.

[27] Response of the United States of America dated 21 October 2005, to Inquiry of the UNCHR Special Rapporteurs dated 8 August 2005, Pertaining to Detainees at Guantánamo Bay, p. 47.

[28] The CSRT and ARB rules do not provide detainees with the right to receive legal assistance, but provide instead for a "personal representative" with no legal training required and no duty of confidentiality whatsoever. See also US District Court for the district of Columbia, decision of 31 January 2005 *In re Guantánamo Detainees Cases*, 355 F. Supp. 2d 443, at 468-478, where the District Court says (at 472) that "there is no confidential relationship between the detainee and the Personal Representative, and the Personal Representative is obligated to disclose to the tribunal any relevant inculpatory information he obtains from the detainee. Id. Consequently, there is inherent risk and little corresponding benefit should the detainee decide to use the services of the Personal Representative".

[29] See supra note 2.

[30] According to the information available, it appears that already in 2003 the United States Department of Defense determined that the 15 Uighurs did not present a threat to the security of the United States. In 2004, the Department of Defense determined that the 15

Uighurs do not have any intelligence value for the United States and should be released. According to the information provided by US lawyers acting on behalf of the Uighur detainees, in March 2005 the CSRT decided that six of the Uighurs were not "enemy combatants". The Response of the United States to the Special Rapporteurs states that "arrangements are underway" for the release of 15 detainees determined not to be "enemy combatants" by the CSRT by March 2005 (Response of the United States of America dated 21 October 2005, to Inquiry of the UNCHR Special Rapporteurs dated 8 August 2005, Pertaining to Detainees at Guantánamo Bay, p. 47), which could be an indication that in fact all 15 Uighurs have been found by the CSRT not to be "enemy combatants". However, the United States neither intend to return the 15 prisoners to the People's Republic of China, where it is feared that they would be at risk of being killed, tortured or ill-treated, nor allow them to settle in the US. The existence of prisoners whose release poses problems because they reasonably fear repatriation is acknowledged in the Response of the United States (p. 50). In the habeas corpus case brought by two of the Uighurs before the United States District Court for the District of Columbia (*Qassim v. Bush*), the United States Government first failed to inform the court and the detainees' attorneys that the habeas corpus petitioners had been found not to be "enemy combatants". It then argued that it is continuing their detention on the basis of "the Executive's necessary power to wind up war time detentions in an orderly fashion" (*Qassim v. Bush*, Opinion Memorandum of 22 December 2005, *2005 U.S. Dist. LEXIS 34618*, para. 4). The District Court concluded that "[t]he detention of these petitioners has by now become indefinite. This indefinite imprisonment at Guantánamo Bay is unlawful." (Ibid., para. 8.) Despite this finding, the District Court concluded that it had no relief to offer, i.e. it could not order their release (ibid., para. 16).

[31] Detainee Treatment Act of 2005, included in the Department of Defense Appropriations Act 2006, Section 1005.

[32] Ibid., Section 1005 (2) (A), (B), and (C).

[33] See also article 9 (4): "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 his detention and order his release if the detention is not lawful."

[34] Principle No. 5 of the Basic Principles on the independence of the Judiciary, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[35] Human Rights Committee, general comment No. 13 (1984), para. 4, and *Kurbanov v. Tajikistan*, Communication No. 1096/2002, Views of the Human Rights Committee of 6 November 2003, para. 7.6.

[36] General comment No. 13, supra note 35, para. 4.

[37] Principles No. 10, Basic Principles on the Independence of the Judiciary (see supra note 34).

[38] See supra note 8.

[39] General comment No. 29, supra note 12, paras. 10-11: "States parties may in no circumstance invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence."

[40] United Nations Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

[41] Principles No. 1 and 5 as well as 16 and 21 of the Basic Principles on the Role of Lawyers (see note supra 40).

[42] See Rule 100 of the List of Customary Rules of International Humanitarian Law, published as an annex to the ICRC Study on customary international law: "No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees." (http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/$File/irrc_857_Henckaerts.pdf).

[43] General comment No. 13, supra note 13, para. 10.

[44] See supra note 2.

[45] See, e.g., CCPR/CO/77/EST (Estonia), para. 8; CCPR/CO/76/EGY (Egypt), para. 16; CCPR/CO/75/YEM (Yemen), para. 18; CCPR/CO/75/NZL (New Zealand), para. 11; CCPR/75/MDA (Moldova), para. 8; CCPR/CO/74/SWE (Sweden), para. 12; CCPR/CO/73/UK (United Kingdom), para. 6; CAT/C/XXIX/Misc.4 (Egypt), para. 4; CAT/C/CR/28/6 (Sweden), para. 6 (b).

[46] Articles 6 (b) and (c) of the 1945 Charter of the Nuremberg International Military Tribunal; Principle IV (b) and (c) of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and the Judgement of the Tribunal; articles 2 (b) and 5 (f) of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia; articles 7 (1) (f) and 8 (2) (a) (ii) of the 1998 Rome Statute for the International Criminal Court.

[47] See Multilateral Treaties deposited with the Secretary-General, Status as at 31 December 2004. Vol. 1, 183 and vol. 1, 286. Reservations to ICCPR at http://www.ohchr.org/english/countries/ratification/4_1.htm "(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Reservations to ICCPR at http://www.ohchr.org/english/countries/ratification/9.htm#reservations (1) That the United States considers itself bound by the obligation under article 16 to prevent "cruel, inhuman or degrading treatment or punishment", only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. See Multilateral Treaties deposited with the Secretary-General, Status as at 31 December 2004. Vol. 1, 183 and vol. 1, 286.

[48] Conclusions and Recommendations of the Committee against Torture: United States of America. 15/05/2000 A/55/44, paras. 175-180. "179. The Committee expresses its concern about: (a) The failure of the State party to enact a federal crime of torture in terms consistent with article 1 of the Convention; (b) The reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention; [...] 180. The Committee recommends that the State party: (a) Although it has taken many measures to ensure compliance with the provisions of the Convention, also enact a federal crime of torture in terms consistent with article 1 of the Convention and withdraw its reservations, interpretations and understandings relating to the Convention;" and Concluding Observations of the Human Rights Committee: United States of America. 03/10/95. CCPR/C/79/Add.50; A/50/40, paras. 266-304. "279. The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant. […] 292. The Committee recommends that the State party review its reservations, declarations and understandings with a view to withdrawing them, in particular reservations to article 6, paragraph 5, and article 7 of the Covenant."

[49] E.g. US President in a February 2002 memorandum reiterated the standard of "humane treatment" (see Church report, p. 3); also: During a visit to Panama on 7 November 2005 President Bush said: "Our country is at war, and our government has the obligation to protect the American people. […] And we are aggressively doing that. […] Anything we do to that effort, to that end, in this effort, any activity we conduct, is within the law. We do not torture." See at: http://www.whitehouse.gov/news/releases/2005/11/20051107.html (accessed on 8 December 2005), but for more ambiguous statements see also Amnesty International, "United States of America. Guantánamo and beyond: The continuing pursuit of unchecked executive power," AI Index: AMR 51/063/2005 (13 May 2005) and Human Rights Watch, Getting Away with torture? Command Responsibility for the U.S. Abuse of Detainees, vol. 17, No. 1 (G) (April 2005).

[50] "For the foregoing reasons, we conclude that torture as defined in and proscribed by Sections 2340-2340A, covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like post-traumatic stress disorder. Additionally, such severe mental pain can arise only from the predicate acts listed on Section 2340. Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture. […] Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability."

[51] The interrogation techniques approved on 2 December 2002 (see paragraph 49 and note 55), were rescinded by Secretary of Defense memorandum for the commander, United States Southern command of 15 January 2003 on "Counter-Resistance Techniques". A Working Group on Detainee Interrogations within the Department of Defense was established by Secretary of Defense memorandum for the General Counsel of the Department of Defense of 15 January 2003 on "Detainee Interrogations". Based on the final report of the Working Group of 4 April 2003, interrogation techniques were approved by Secretary of Defense memorandum for the commander, US Southern command of 16 April 2003 on "Counter-Resistance Techniques in the War on Terrorism". According to the update to Annex I of the second periodic report of the United States of America to the Committee Against Torture, (submitted on 21 October 2005), on 17 March 2005, the Department of Defense determined that the Report of the Working Group on Detainee Interrogations is to be considered as having no standing in policy, practice, or law to guide any activity of the Department of Defense (http://www.state.gov/g/drl/rls/55712.htm). See also CAT/C/48/Add.3/Rev.1, para. 78, dated 13 January 2006.

[52] http://thomas.loc.gov/cgi-bin/query/D?r109:1:./temp/~r1099i99u4:b0.

[53] "Several weeks ago, I received a letter from CPT Ian Fishback, a member of the 82nd Airborne Division at Fort Bragg, and a veteran of combat in Afghanistan and Iraq, and a West Point graduate. Over 17 months, he struggled to get answers from his chain of command to a basic question: What standards apply to the treatment of enemy detainees? But he found no answers. In his remarkable letter, he pleads with Congress, asking us to take action to establish standards to clear up the confusion, not for the good of the terrorists but for the good of our soldiers and our country. […] The advantage of setting a standard for interrogation based on the field manual is to cut down on the significant level of confusion that still exists with respect to which interrogation techniques are allowed. The Armed Services Committee has held hearings with a slew of high-level Defense Department officials, from regional commanders to judge advocate generals to the Department's deputy general counsel. A chief topic of discussion in these hearings was what specific interrogation techniques are permitted, in what environments, with which DOD detainees, by whom and when. The answers have included a whole lot of confusion. If the Pentagon's top minds can't sort these matters out, after exhaustive debate and preparation, how in the world do we expect our enlisted

men and women to do so? Confusion about the rules results in abuses in the field. We need a clear, simple, and consistent standard, and we have it in the Army Field Manual on interrogation. That is not just my opinion but that of many more distinguished military minds than mine." To be found at: http://thomas.loc.gov/cgi-bin/query/D?r109:1:./temp/~r1099i99u4:b0.

[54] See also Press Briefing with National Security Advisor Stephen Hadley on the McCain Amendment of 15 December 2005 at: http://www.whitehouse.gov/news/releases/2005/12/20051215-5.html (last accessed on 21 December 2005): "As you know, our policy has been not to use cruel, inhuman or degrading treatment at home or abroad. That has been our policy. The legislative agreement that we've worked out with Senator McCain now makes that a matter of law, not just policy. And it makes it a matter of law that applies worldwide, at home and abroad."

[55] Jerald Phifer to Commander of Joint Task Force 170, memorandum of 11 October 2002, "Request for Approval of Counter-resistance Techniques", which was attached to William J. Haynes II to Secretary of Defense, memorandum of 27 November 2002, "Counter-resistance Techniques", and approved by Secretary Rumsfeld on 2 December 2002. (http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf).

[56] Secretary of Defense memorandum for the commander, US Southern command of 15 January 2003 on "Counter-Resistance Techniques".

[57] See footnote 51. See also overview given by the Executive Summary of the Church report ("Executive Summary", US Department of Defense, available to the public since March 2005, http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf).

[58] The technique of using dogs, as confirmed in various interviews with ex-Guantánamo Bay detainees, was explicitly authorized as part of the "First Special Interrogation Plan" (pp. 13 and 14) - see in Army Regulation 15-6, Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility (1 April 2005, amended 9 June 2005) (The Schmidt Report). See also point 12, "Using detainees individual phobias (such as fear of dogs) to induce stress" of the Jerald Phifer to Commander of Joint Task Force 170, memorandum, "Request for Approval of Counter-resistance Techniques," 11 October 2002, which was attached to William J. Haynes II to Secretary of Defense, memorandum, "Counter-resistance Techniques", 27 November 2002, and approved by Secretary Rumsfeld on 2 December 2002 *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf.

[59] Dept. of Defense, Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility, Army Regulation 15-6: Final Report (1 April 2005; amended 9 June 2005; published 14 July 2005); also: "*What were the measures most difficult to cope with in your view? - Sleep deprivation. They were forcing us to change the cells, the boxes we were held in, for every 15 minutes. And that was going on for three to four months. Every 15 minutes we were supposed to change. No sleep, nothing. So sleep deprivation.*" Interview with Airat Vakhitov on 18 November 2005 in London.

[60] Cases of Moazzam Begg, Rustam Akhmiarov, Airat Vakhitov - interviews of 18 November 2005.

[61] Resolution 1433 of 26 April 2005, para. 7 ii.

[62] Opinions of the Lords of Appeal for Judgement in the case *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* of 8 December 2005. Session 2005-06- UKHL 71, para. 126.

[63] "The ICRC feels that interrogators have too much control over the basic needs of detainees. That the interrogators attempt to control the detainees through use of isolation. Mr. Cassard stated that the interrogators have total control of the level of isolation in which the detainees were kept; the level of comfort items detainees can receive; and also the access of basic needs to the detainees." DoD, ICRC Meeting with M.G. Miller on 09 OCT 03, memo from JTG GTMO-SJA to Record (9 October 2003).

[64] Ibid.

[65] "Check into lowering the lights at night to help with sleeping." DoD, General observations and meeting notes *in* memo from Staff Judge Advocate to Commander Joint Task Force 160, Initial observations from ICRC concerning treatment of detainees (21 January 2002).

[66] "Detainees feel some rules, i.e. no talking, cause higher stress, and feel talking would help to release stress." DoD, General observations and meeting notes *in* memo from Staff Judge Advocate to Commander Joint Task Force 160, Initial observations from ICRC concerning treatment of detainees (21 January 2002). See also: "The detainees request that the 'no talking rule' be lifted. 22 January 2002: Approved in part as of that date. Detainees may carry on normal conversations." DoD, memo from Staff Judge Advocate to file, Concerns voiced by the International Committee of the Red Cross (ICRC) on behalf of the detainees (24 January 2002).

[67] See also Chapter IV of this report.

[68] See also Chapter V (1) of this report.

[69] "The ICRC concern is that the caged cells plus the maximum-security regime exerts too much pressure on detainees." DoD, ICRC Meeting with M.G. Miller on 09 OCT 03, memo from JTG GTMO-SJA to Record (9 October 2003); see also: "Mr. Cassard continued with his report by stating that the Maximum Security Unit (MSU) has not changed since their last visit. According to Mr. Cassard, detainees are in MSU for 30 days, released for a short period of time, and then put back into MSU for another 30 days. Mr. Cassard stated that this type of punishment is harsh and that some detainees are put in MSU at the request of interrogators." DoD, ICRC Meeting with M.G. Miller on 09 OCT 03, memo from JTG GTMO-SJA to Record (9 October 2003).

[70] See e.g. interview with Moazzam Begg of 18 November 2005.

[71] Human Rights Committee, general comment No. 20 (1992), para 6; and *Polay Campos v. Peru*, Communication No. 577/1994, Views of the Human Rights Committee of 6 November 1997, para. 8.4. On the extensive case law of the Human Rights Committee on conditions of detention see also Manfred Nowak, United Nations Covenant on Civil and Political Rights - CCPR Commentary, 2nd revised edition, N.P. Engel Publisher, Kehl/Strasbourg/Arlington 2005, at pp. 172 et seq. and 244 et seq.

[72] See section 2 about authorized interrogation techniques; see also picture on cover of Michael Ratner and Ellen Ray: "Guantánamo. What the World Should Know." June 2004.

[73] "They are being force-fed through the nose. The force-feeding happens in an abusive fashion as the tubes are rammed up their noses, then taken out again and rammed in again until they bleed. For a while tubes were used that were thicker than a finger because the smaller tubes did not provide the detainees with enough food. The tubes caused the detainees to gag and often they would vomit blood. The force-feeding happens twice daily with the tubes inserted and removed every time. Not all of the detainees on hunger strike are in hospital but a number of them are in their cells, where a nurse comes and inserts the tubes there." Accounts given by Attorney Julia Tarver (28 October 2005). On the qualification of

certain methods of force-feeding as amounting to torture see, e.g., the judgement of the European Court of Human Rights in *Nevmerzhitsky v. Ukraine* (Appl. No. 54825/00), para. 98.

[74] See also: http://www.thememoryhole.org/mil/gitmo-pows.htm.

[75] See Human Rights Watch, *Getting Away with Torture? Report*, available at www.hrw.org/reports/2005/us0405/) p. 75 and footnote 306 citing Paisley Dodds, "Guantánamo Tapes Show Teams Punching, Stripping Prisoners", Associated Press, 1 February 2005.

[76] "Recently-revealed videotapes of so-called 'Immediate Reaction Forces' (or 'Extreme Reaction Force' (ERF)) reportedly show guards punching some detainees, a guard kneeing a detainee in the head, tying one to a gurney for questioning and forcing a dozen to strip from the waist down." Human Rights Watch, *Getting Away with Torture? Command Responsibility for the US Abuse of Detainees*, vol. 17, No. 1 (G) (April 2005), p. 75 citing Paisley Dodds, "Guantánamo Tapes Show Teams Punching, Stripping Prisoners", Associated Press, 1 February 2005, or: "[I]f you said you didn't want to go to interrogation you would be forcibly taken out of the cell by the [Initial Reaction Force] team. You would be pepper-sprayed in the face which would knock you to the floor as you couldn't breathe or see and your eyes would be subject to burning pain. Five of them would come in with a shield and smack you and knock you down and jump on you, hold you down and put the chains on you. And then you would be taken outside where there would already be a person with clippers who would forcibly shave your hair and beard. Interrogators gave the order for that to be done; the only way in which this would be triggered would be if you were in some way resisting interrogation, in some way showing that you didn't want to be interrogated. Or if during interrogation you were non-cooperative then it could happen as well." Center for Constitutional Rights, *Statement of Shafiq Rasul, Asif Iqbal and Rhuhel Ahmed, "Detention in Afghanistan and Guantánamo Bay"* (4 August 2004), para. 290, *available at* http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf; see also the Al Dossari incident reported by several NGOs and in the book "Inside the Wire" by Erik Saar, a former Guantánamo Bay military intelligence interpreter.

[77] "He stayed there for 13 months in solitary confinement in an underground cell. He was routinely beaten and received only rotten food and was prevented from using the toilet. He was then temporarily transferred to Ta'iz prison, where he was also not provided food and had to rely on his family to feed him. In June 2005 he was transferred back to Sana'a prison, where he is still held without being aware of any charges." Allegation based on Declaration of Attorney Tina M. Foster of 17 November 2005.

[78] The same assessment was made by the Council of Europe's Parliamentary Assembly, which found that "the United States has, by practising 'rendition' (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and to cruel, inhuman or degrading treatment, in violation of the prohibition on non-refoulement" resolution 1433 of 26 April 2005, para. 7 vii.

[79] See also the response of the US Government to the questionnaire of 21 October 2005, which indicated that allegations were investigated by officials of the Department of Defense.

[80] See also: Army Regulation 15-6, Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility (1 April 2005, amended 9 June 2005) (The Schmidt Report). As can be seen from it, practically no action was taken in response to acts of inhuman or degrading treatment even if the practice was unauthorized.

[81] E.g. a leaked FBI e-mail stated "If this detainee is ever released or his story made public in any way, DOD interrogators will not be held accountable because these torture techniques were done by the 'FBI' interrogators." E-mail from Unknown to G. Bald, et al., Re.: Impersonating FBI at GTMO (5 December 2003), *available at* http://www.aclu.org/torturefoia/released/FBI_3977.pdf.

[82] European Parliament resolution on Guantanam. P 6_TA(2004)0050. At: http://www.europarl.eu.int/omk/sipade3?PUBREF=-//EP//NONSGML+TA+P6-TA-2004-0050+0+DOC+WORD+V0//EN&L=EN&LEVEL=0&NAV=S&LSTDOC=Y&LSTDOC=N.

[83] Human Rights Committee, general comment No. 22 (1993), CCPR/C/21/Rev.1/Add.4, para. 8.

[84] In her previous report to the General Assembly (A/60/399), the Special Rapporteur analysed, in the context of her mandate, the international standards applicable to persons deprived of their liberty.

[85] ICCPR, art. 18 (3). See similarly, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, art. 1 (3) (25 November 1981).

[86] General comment No. 22, supra note 83, para. 8.

[87] See, inter alia, article 3 common to the four Geneva Conventions; articles 34 and 35 of the Third Geneva Convention; articles 76, 86 and 93 of the Fourth Geneva Convention; article 75, paragraph 1, of Additional Protocol I and articles 4 and 5 of Additional Protocol II.

[88] Techniques such as the use of dogs were explicitly authorized as part of the "First Special Interrogation Plan" (pp. 13 and 14) - see in Army Regulation 15-6, Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility (1 April 2005, amended 9 June 2005) (The Schmidt Report).

[89] A technique that the Schmidt Report, supra note 88, found to be authorized (FM 34-52) and approved by SECDEF as mild, non-injurious physical touching. The same report found the rubbing of perfume to have been authorized, as well as leaning over detainees and whispering in their ears that the situation was futile. In addition, the wiping of menstrual blood on a detainee in March 2003 was considered authorized to show the futility of the situation.

[90] Secretary of Defense memorandum for the commander, US Southern command of 16 April 2005 on "Counter Resistance Techniques in the War on Terror". See supra, para. 50.

[91] Response of the United States of America, dated 21 October 2005 to the inquiry of the Special Rapporteurs dated 8 August 2005 pertaining to detainees at Guantánamo Bay, p. 21 et seq.

[92] Standard Minimum Rules for the Treatment of Prisoners. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[93] The Convention of the Rights of the Child defines a child as "every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier". CRC, article 1. Three juveniles, under the age of 16 years, were transferred from Guantánamo Bay to their home country in early 2004 after over one year in detention. US Department of Defense, News Release, "Transfer of Juvenile Detainees Completed" accessed at http://www.defenselink.mil/releases/2004/nr20040129-0934.html 20 December 2005); CNN World, "U.S. Frees Teens at Guantánamo Bay" (29 January 2004). It is unknown how many juveniles remain in Guantánamo Bay. Omar Ahmed Khadr, a Canadian, who was 15 years old at the time of his arrest and his transfer to Guantánamo Bay in 2002, remains in Guantánamo Bay today. Defence Counsel Questionnaires.

[94] Vienna Convention on the Law of Treaties, article 18. Although the United States has not ratified the Vienna Convention, it is generally recognized as a restatement of previous law.

[95] Constitution of the World Health Organization, preamble setting forth principles accepted by Contracting Parties.

[96] Commission on Human Rights resolution 2005/24, para. 20 (c).

[97] Ibid, para. 7.

[98] Ibid, para. 5.

[99] Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000), E/C.12/2000/4, para. 42.

[100] Ibid, para. 5.

[101] See United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted 30 August 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/CONF/611, annex I, E.S.C. res. 663C, 24 UN ESCOR Supp. (No. 1) at 11, E/3048 (1957), amended E.S.C. res. 2067, 62 UN ESCOR Supp. (No. 1) at 35, E/5988 (1977) paras. 9-22.

[102] The Special Rapporteur received information from, among other sources, interviews with former detainees, family members of current detainees and lawyers representing former and current detainees.

[103] US Department of Defense, Joint Task Force 170, Guantánamo Bay, Memorandum for the Record: ICRC Meeting with MG Miller on 9 October 2003 (indicating ICRC was concerned about mental health of detainees due to pressures imposed by, among other conditions, interrogator control over detainees' basic needs, duration of interrogations, cage-type cells, isolation, restrictions on books and shaving as punishment); Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantánamo" *The New York Times* (30 November 2004) (reporting ICRC stated that keeping detainees indefinitely without knowing their fate would lead to mental health problems); Physicians for Human Rights, *Break Them Down*: *Systematic Use of Psychological Torture* (2005) pp. 52-54.

[104] Neil A. Lewis, supra note 103; Physicians for Human Rights, supra note 103; Tipton Report accessed at http://www.ccr-ny.org/v2/reports/report.asp?ObjID=UNuPgz9pc0&Content=577 (2 December 2005); Presentations of Former Detainees, Conference: The Global Struggle Against Torture: Guantánamo Bay, Bagram and Beyond, hosted by Reprieve and Amnesty International in London, UK (19-21 November 2005).

[105] Physicians for Human Rights, supra note 103, pp. 52-53.

[106] Ibid. at 50.

[107] E/CN.4/2003/58, para. 95.

[108] A/60/348, para. 9.

[109] Article 7 (2). A commentator has described the detention facilities at Guantánamo Bay as an experiment. Jane Meyer, "The Experiment", *The New Yorker* (11 and 18 July 2005).

[110] Human Rights Committee, general comment No. 21 (1992, replaces general comment No. 9 concerning humane treatment of persons deprived of liberty). States parties report to

both the Human Rights Committee and the Committee against Torture on the implementation of international standards for medical ethics. See, e.g., the fourth periodic report of Uruguay to the Human Rights Committee (CCPR/C/95/Add.9, paras. 65-69) and the second periodic report of Algeria (CAT/C/25/Add.8, para. 6).

[111] The World Medical Association is an independent confederation of professional associations, representing approximately 80 national medical associations.

[112] These principles are consistent with medical ethics applicable under international humanitarian law. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, article 16; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, article 10.

[113] International Council of Nurses, "Nurses Role in the Care of Prisoners and Detainees" adopted 1998.

[114] Ibid.

[115] Office of the Surgeon General Army, "Final Report: Assessment of the Detainee Medical Operations for OEF, GTMO, and OIF (13 April 2005) (The Kiley Report); Army Regulation 15-6, Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility (1 April 2005, amended 9 June 2005) (The Schmidt Report).

[116] See Neil A. Lewis, supra note 103 (ICRC report stated "medical files of detainees were 'literally open' to interrogators"); G. Bloche and J. Marks, "Doctors and Interrogators at Guantánamo Bay" 353;1 New England Journal of Medicine 6, 6 (7 July 2005); Interview with former detainee Rustam Akhmiarov, London (18 November 2005).

[117] The Kiley Report, supra note 115, at 1-8 (Behavioural Science Consultation Teams (BSCT) "consisted of physicians/psychiatrists and psychologists who directly support detainee interrogation activities"); Neil A. Lewis, supra note 103 (ICRC workers "asserted that some doctors and other medical workers at Guantánamo were participating in planning for interrogations", in what the report called "a flagrant violation of medical ethics"); The Schmidt Report, supra 115, at 17 (medical records indicated monitoring of body temperature of detainee being exposed to extreme cold); G. Bloche and J. Marks, supra note 116.

[118] M. Sullivan and J. Colangelo-Bryan, "Guantánamo Bay Detainee Statements: Jum'ah Mohammed AbdulLatif Al Dossari, Isa Ali Abdulla Al Murbati, Abdullah Al Noaimi and Adel Kamel Abdulla Haji" (May 2005) at 16 (statement of Mr. Al Noaimi); Interviews with former detainees Rustam Akhmiarov and Airat Vakhitov, London (18 November 2005); Defence Counsel Questionnaires (reporting non-consensual drugging, including injections, and force-feeding through nasal tubes, as well as participation of health professionals in monitoring health for interrogations).

[119] See Neil A. Lewis, supra note 103 (quoting ICRC report).

[120] US Department of Defense, Medical Program Principles and Procedures for the Protection and Treatment of Detainees in the Custody of the Armed Forces of the United States (3 June 2005).

[121] The Kiley Report, supra note 115, 1-8.

[122] They have included, among others, subjecting detainees to sleep deprivation, 20-hour interrogations day after day, months of isolation, loud music and strobe lights, extremes of heat

and cold, short shackling to an eye-bolt on the floor, and exploiting phobias, such as instilling fear with military dogs. Interrogators also sexually and culturally humiliate detainees, subjecting them to forced nudity in front of females, forcing them to wear a woman's bra on the head and calling female relatives whores. The Schmidt Report, supra note 115. See also chapter III (2) supra.

[123] L. Rubenstein, C. Pross, F. Davidoff and V. Iacopino, "Coercive US Interrogation Policies: A Challenge to Medical Ethics", 294:12 Journal of the American Medical Association 1544, 1545 (28 September 2005).

[124] United Nations Principles, Principle 5 (emphasis added).

[125] See e.g., *Majid Abdulla Al-Joudi v. George W. Bush*, Civil action No. 05-301, US District Court for the District of Columbia (26 October 2005); Charlie Savage, "Guantánamo medics accused of abusive force-feeding: Detainees' Lawyers go before Judge" *The Boston Globe* (15 October 2005); Tim Golden "Tough U.S. Steps in Hunger Strike at Camp in Cuba" *The New York Times* (9 February 2006).

[126] See supra para. 54.

[127] Declaration of Tokyo, supra para. 74 and note 111; World Medical Association, Declaration of Malta (1992); see generally, Reyes Hernan, "Medical and Ethical Aspects of Hunger Strikes in Custody and the Issue of Torture" extract from "Maltreatment and Torture" (1998) (providing the history and rationale for the prohibition against doctors participating in force-feeding of prisoners) accessed at ICRC, http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList302/92B35A6B95E0A5A3C1256B66005953D5 (8 February 2006).

[128] American Medical Association, Policy H-65.997 Human Rights (AMA endorses World Medical Association's Declaration of Tokyo) accessed at American Medical Association, http://www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/H-65.997.HTM (10 February 2006).

[129] "Israel: Visits to detainees on hunger strike" accessed at ICRC http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/75579B6BB769D3B5C1256EFD0047576F (9 February 2006).

[130] See, e.g., *Secretary of State for the Home Department v. Robb* [1995] Fam 127 (United Kingdom); *Thor v. Superior Court*, 21 California Reporter 2d 357, Supreme Court of California (1993); *Singletary v. Costello*, 665 So.2d 1099, District Court of Appeal of Florida (1996).

[131] See, generally, Mara Silver, "Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation", 58 Stanford Law Review 631 (2005) (collecting US jurisprudence on force-feeding of detainees).

[132] Response of the United States of America dated 21 October 2005 to Inquiry of the UNCHR Special Rapporteurs dated 8 August 2005 Pertaining to Detainees at Guantánamo Bay, at 19.

[133] CESCR, general comment No. 14, supra note 99, paras. 8, 34.

[134] See *Cruzan v. Director Missouri Department of Health*, 497 U.S. 261, 269-70 (1990) (recognizing the right to refuse treatment as the logical corollary to the doctrine of informed consent).

[135] See *Secretary of State for the Home Department v. Robb*, supra note 130; see also Chair of the Board of Trustees of the American Medical Association, Duane M. Cady, M.D., *AMA to the Nation, AMA unconditionally condemns physician participation in torture*, (20

December 2005) accessed at http://www.ama-assn.org/ama/pub/category/15937.html (10 February 2006) (clarifying that "every patient deserves to be treated according to the same standard of care whether the patient is a civilian, a US soldier, or a detainee" and acknowledging that the AMA position on forced feeding of detainees is set forth in the Declaration of Tokyo.

Annex II

Letter dated 31 January 2006, addressed to the Office of the High Commissioner for Human Rights, by the Permanent Representative OF the United States of America to the United Nations and Other International Organizations in Geneva

"We have received your letter dated January 16, 2006, enclosing an advance unedited copy of the report of four Special Rapporteurs and the Working Group on Arbitrary Detention on the situation of detainees in Guantánamo Bay ('Unedited Report'). Your letter asked for any factual clarifications regarding the Unedited Report by 31 January and noted that 'changes made will not be of a substantive nature'.

The United States Government regrets that it has not received sufficient opportunity to provide a fuller response to the factual and legal assertions and conclusions in the Unedited Report. Despite the substantial informational material presented by the United States to the Special Rapporteurs in 2005 regarding Guantánamo and the offer to three of the Special Rapporteurs to visit the facility to observe first hand the conditions of detention, there is little evidence in the Unedited Report that the Special Rapporteurs have considered the information provided by the United States. We offered the Special Rapporteurs unprecedented access to Guantánamo, similar to that which we provide to U.S. congressional delegations. It is particularly unfortunate that the Special Rapporteurs rejected the invitation and that their Unedited Report does not reflect the direct, personal knowledge that this visit would have provided. Rather, the Unedited Report is presented as a set of conclusions - it selectively includes only those factual assertions needed to support those conclusions and ignores other facts that would undermine those conclusions. As a result, we categorically object to most of the Unedited Report's content and conclusions as largely without merit and not based clearly in the facts.

An example of this problematic approach is how the Unedited Report deals with the force-feeding of detainees. The U.S. Government has provided information that in the case of detainees who have gone on hunger strikes, Guantánamo authorities have authorized involuntary feeding arrangements, monitored by health care professionals, to preserve the life and health of the detainees. Rather than reporting the factual information provided by the United States on when and how involuntary feeding is authorized and how it is carried out, the Unedited Report simply states categorically that 'excessive force was used routinely' for this purpose and that 'some of the methods used for force-feeding definitely amount to torture'. This is untrue, and no such methods are described in the Unedited Report. Moreover, it is bewildering to the United States Government that its practice of preserving the life and health of detainees is roundly condemned by the Special Rapporteurs and is presented as a violation of their human rights and of medical ethics.

We are equally troubled by the Unedited Report's analysis of the legal regime governing Guantánamo detention. Nowhere does the report set out clearly the legal regime that applies according to U.S. law. The United States has made clear its position that it is engaged in a

continuing armed conflict against Al Qaida, that the law of war applies to the conduct of that war and related detention operations, and that the International Covenant on Civil and Political Rights, by its express terms, applies only to 'individuals within its territory and subject to its jurisdiction'. (ICCPR article 2 (1)). The Report's legal analysis rests on the flawed position that the ICCPR applies to Guantánamo detainees because the United States 'is not currently engaged in an international armed conflict between two Parties to the Third and Fourth Geneva Conventions'. This, of course, leads to a manifestly absurd result; that is, during an ongoing armed conflict, unlawful combatants receive more procedural rights than would lawful combatants under the Geneva Conventions. Numerous other discussions in the Unedited Report are similarly flawed.

The United States is a country of laws with an open system of constitutional government by checks and balances, and an independent judiciary and press. These issues are fully and publicly debated and litigated in the United States. To preserve the objectivity and authority of their own Report, the Special Rapporteurs should review and present objective and comprehensive material on all sides of an issue before stating their own conclusions. Instead, the Special Rapporteurs appear to have reached their own conclusions and then presented an advocate's brief in support of them. In the process they have relied on international human rights instruments, declarations, standards, or general comments of treaty bodies without serious analysis of whether the instruments by their terms apply extraterritorially; whether the United States is a State Party - or has filed reservations or understandings - to the instrument; whether the instrument, declaration, standard or general comment is legally binding or not; or whether the provisions cited have the meaning ascribed to them in the Unedited Report. This is not the basis on which international human rights mechanisms should act.

The Special Rapporteurs have not provided a meaningful opportunity to the United States to consult on the draft report or to rebut factual and legal assertions and conclusions with which we fundamentally disagree. The United States reserves the opportunity to reply in full to the final Report, but in the meantime requests that this letter be attached to the Report as an interim reply.

Regards,"

(*Signed*):Kevin Edward Moley
Ambassador
Permanent Representative
of the United States of America
