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The Honorable Donald Rumsfeld
Secretary of Defense
The Pentagon
Washington, DC 20301

Dear Mr. Secretary:

We are writing to reiterate our concern that the U.S. government is still not complying with the requirements of international human rights and humanitarian law in determining the legal status and future disposition of persons detained at Guantanamo Bay and in Afghanistan and its vicinity. The broad public debate following the issuance of the November 13 order establishing military commissions resulted in regulations that addressed many of our concerns. But additional steps must still be taken to ensure U.S. compliance with international standards. The detainees' status must still be determined in accordance with the Geneva Conventions. The United States should then prosecute, within a reasonable time and with adequate due process, those detainees accused of committing or plotting criminal acts, including war crimes, crimes against humanity, and terrorism. Such prosecutions would be far better than the unlawful alternatives of holding detainees indefinitely without trial or extraditing them to countries where they risk torture.

**Legal Status**

Currently, the United States is reportedly holding 384 prisoners at Guantanamo Bay and about 150 in or near Afghanistan. On February 7, 2002, President Bush announced that the U.S. government would apply the "principles of the Third Geneva Convention" of 1949 to captured members of the Taliban, but would not consider any of them to be prisoners-of-war (POWs) under that convention. As for captured members of al-Qaeda, he said that the U.S. government considered the Geneva Conventions inapplicable but would nonetheless treat the detainees humanely.

As Human Rights Watch has repeatedly noted in correspondence and conversations with the Bush administration, in time of war between states party to the Geneva Conventions (including both Afghanistan and the United States), Article 4 of the Third Geneva Convention requires granting POW status to all members of a government's regular armed forces, whether the government is diplomatically recognized (Art. 4(1)) or not (Art. 4(3)). This rule requires the United States to grant POW status to all captured Taliban soldiers who were regular members of Afghanistan's armed forces. It also requires granting POW status to the members of any militia, whether Afghan or not, that was part of these armed forces (Art. 4(1)). This latter requirement might embrace some al-Qaeda members, such as those in the so-called 55th Brigade, who were operating as a part of the Taliban military. When there is doubt as to status, Article 5 of the Third Geneva Convention requires the United States to convene a "competent tribunal" to apply the legal rules on a detainee-by-detainee basis, and to treat detainees as POWs until the tribunal determines otherwise. Until now, the United States has never taken exception to this straightforward and appropriate rule: during the Gulf War, for example, more than one thousand Article 5 tribunals were convened.

The U.S. government's unwillingness to recognize as POWs the captured members of Afghanistan's armed forces requires a strained reading of the plain language of the Third Geneva Convention. Bush

administration officials have asserted that the meaning of "regular armed forces" as used in the Third Geneva Convention encompasses the requirements of having a responsible command, wearing fixed insignia, carrying arms openly, and conducting operations in accordance with the laws of war – requirements that they assert the Taliban detainees have not met. However, the text of Article 4 applies this four-part test only to members of irregular militia operating outside the structure of a government's regular armed forces (Art. 4(2)). It contains no such explicit requirements for members of government forces (Art. 4(1) & (3)).

Even if this four-part test were to be read by implication into the term "regular armed forces," as the Bush administration claims, the United States has no right to assert categorically that all Taliban detainees fail the test. For example, although the Taliban did not wear classic, Western-style uniforms, their choice of clothing made them distinguishable from ordinary civilians to most people familiar with Afghanistan. The Taliban did not routinely operate by sending troops behind enemy lines disguised in civilian clothing – a breach of the principle of distinction that could lead to loss of POW status. Similarly, it remains to be shown that Taliban troops, in the armed conflict with the United States, regularly failed to carry arms openly, lacked a chain of command, or violated the laws of war (violations that would be distinct from their widely recognized repression of women, minorities, and religious dissenters, as well as from war crimes committed before the United States entered the war). Thus, even under the Bush administration's reading of Article 4, a factual showing must still be made on a case-by-case basis before denying POW status to Taliban detainees. No such showing has been made.

The administration's unwillingness to apply in full the Geneva Conventions to persons captured in Afghanistan is perplexing given that doing so would in no way compromise efforts to interrogate or bring to justice those responsible for terrorist attacks against the United States. POWs cannot be punished or disciplined for refusing to give more than their name, rank, serial number, and date of birth (Geneva III, Art. 17), but nothing precludes their being interrogated more broadly. That means that the array of inducements and incentives used to encourage cooperation in regular criminal cases can also be used with the detainees. (Under the Fifth Amendment to the U.S. Constitution, criminal suspects in the United States cannot be punished for refusing to answer *any* question, let alone the four questions that POWs are obliged to answer, but inducements are routinely used to encourage their cooperation. Prohibitions against torture and mistreatment apply to all detainees, not only those with POW status.)

Furthermore, while POWs may not be prosecuted for taking up arms, they may be convicted for war crimes, crimes against humanity, and other criminal acts, including acts of terrorism (Geneva III, Arts. 82 *et seq.*) Indeed, Human Rights Watch actively supports such prosecutions. Detained non-privileged or "unlawful" combatants who are ineligible for POW status and meet certain nationality requirements must be considered "protected persons" under the Fourth Geneva Convention (Geneva IV, Art. 4; *see* also Department of the Army (U.S.), The Law of Land Warfare, Field Manual, par. 247). But they, too, can be prosecuted for any crimes they commit. (See also Article 75 of the First Additional Protocol of 1977 to the Geneva Conventions (setting forth minimum customary protections even for those who fail to meet the nationality requirements of the Fourth Geneva Convention)).

The U.S. government's refusal to apply Article 4 of the Third Geneva Convention departs from longstanding U.S. practice, such as during the Korean War when captured People's Republic of China troops were recognized as POWs even though the PRC had not yet become a party to the Geneva Conventions. Human Rights Watch is of the view that the intent of the Third Geneva Convention – reflected in the language of articles 4(1) and 4(3) – is to ensure that members of regular armed forces are granted POW status when captured. This interpretation complies with international law and is in the

best long-term interests of the United States. Adopting the contrary reading would, for instance, automatically deprive POW status to captured special-forces troops who are wearing civilian dress. It would also allow governments such as Iraq to deny POW status to captured pilots based on facile allegations that they had violated the laws of war. It is precisely at the moment of capture by enemy forces when servicemembers are most in need of the protections of the Third Geneva Convention. It is thus dangerously short-sighted for the United States to be violating that convention so blatantly.

**Arbitrary Detention**

The prohibition against arbitrary detention is a longstanding principle of international law. A detention is arbitrary if it violates existing laws, if it is for an indefinite or indeterminate period, or if there is no possibility to challenge its lawfulness. The Geneva Conventions provide one possible ground for detention that is not arbitrary. The Third Geneva Convention allows POWs to be detained without charge ("internment") for the duration of the armed conflict in which they are captured (Geneva III, Art. 21). The Fourth Geneva Convention allows similar detention for "protected persons," which, as noted, would include people of specified nationalities who take part in hostilities but are ineligible for POW status (Geneva IV, Arts. 41-46), although periodic review is required in the latter case (Geneva IV, Art. 43).

In asserting that the Geneva Conventions do not apply to alleged members of al-Qaeda, the Bush administration has rejected this authorized basis for detention and undermined its own case for holding al-Qaeda suspects without trial. The administration's position is that even though these detainees were apprehended in Afghanistan while engaged in armed conflict against the United States, they are not combatants protected by the Geneva Conventions but mere common criminal suspects. This position is wrong as a matter of law, since the Geneva Conventions regulate the capture of the members of any organized force that is engaged in armed conflict with a state party. Moreover, the administration's position effectively lends support to claims that these detainees are being held arbitrarily, since if they are mere criminal suspects, they should have been charged with a criminal offense and provided the opportunity to challenge the legality of their detention. The only alternative – administrative detention without criminal charge – is permissible under international law only in narrow circumstances during a state of emergency threatening the life of the nation (International Covenant on Civil and Political Rights, Art. 4). The United States has not claimed that these circumstances exist. Alleged members of al-Qaeda thus must either be afforded protection under the Geneva Conventions or criminally charged without further delay and prosecuted in accordance with due process requirements.

**Detainees from Outside the War Zone**

In addition to persons captured during the armed conflict in Afghanistan, the United States has taken into custody alleged terrorist suspects from other locations, including Bosnia-Herzegovina. When persons are apprehended outside areas of armed conflict and have no direct connection to the conflict, the Geneva Conventions are inapplicable. Instead, the protections of international human rights law apply. These include the requirements of being formally charged, informed of one's rights, and permitted access to legal counsel. International humanitarian law provides no basis in such circumstances for circumventing these requirements by purporting to hold such persons as "battlefield detainees." Indeed, to permit a government that is at war in one part of the world to detain people without charge elsewhere in the world without demonstrating participation in the armed conflict is to create a gaping and dangerous loophole in international human rights guarantees. It is certainly not in the long-term interest of the United States to promote such an exception to rights that are universally deemed essential to any peacetime criminal justice system.

**Prosecutions**

To date, the United States has provided little information about possible prosecutions of persons being held at Guantanamo or in or near Afghanistan. Human Rights Watch favors prosecution of people who can be shown to have committed or plotted violence against civilians. However, we believe it essential that the accused in any such prosecution be given due process protections as provided by international law.

Human Rights Watch has addressed elsewhere our concerns with the proposed military commissions, including the lack of any right of appeal to an independent civilian court similar to the appeal provided from courts-martial to the United States Court of Appeals for the Armed Forces. A major reason cited by the Bush administration for holding military commissions – to protect witnesses and court officers – is much less applicable to courts of appeal, which hold short oral arguments without the presentation of witnesses or evidence. By excluding appeal to an independent civilian court, the executive branch proposes to serve as prosecutor, judge and jury. The lack of such appeal also increases the possibility that the secrecy regulations adopted for the commissions will be abused, depriving the public of the ability to assess the fairness of the proceedings. Such shortcomings will inevitably call into question the legitimacy of any verdict handed down.

The Geneva Conventions provide that POWs accused of war crimes and other offenses must be tried before "the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power" (Geneva III, Art. 102). A similar rule applies to appeals (Geneva III, Art. 106). In the case of people held by the United States who are or should be recognized as POWs, this would mean courts-martial or civilian courts. Trial of such detainees before military commissions that fall short of the procedural protections of a court-martial – particularly with respect to the lack of appeal to an independent court – violates this requirement. As for suspects apprehended in the United States, there is no justification for trying them before military commissions so long as the U.S. judicial system is functioning. Moreover, even for people held outside the United States, it is beyond the traditional scope of military commissions to try persons apprehended in places where there is no armed conflict.

**Conspiracy**

Human Rights Watch is concerned about reports that the U.S. government is considering prosecuting detainees under loose conspiracy theories. (E.g., Neil A. Lewis, "U.S. Weighing New Doctrine for Tribunals," *The New York Times*, April 21, 2002.) We recognize that conspiracy prosecutions are appropriate if it can be proved that a suspect joined a criminal enterprise knowing of its criminal purpose and with the intent of furthering its criminal objectives. However, we caution against inferring such intent from mere participation in the armed conflict in Afghanistan. For example, joining forces with the Taliban to defend its government does not necessarily imply active support for al-Qaeda's alleged plans to kill civilians. Even joining al-Qaeda does not necessarily imply an intent to further its alleged crimes against civilians, since many al-Qaeda members were apparently seconded to the Taliban war effort, as illustrated by the 55th Brigade. Theoretically, fighters who assisted the Taliban might have done so to provide a safe haven for al-Qaeda and its alleged criminal activity, but that would require specific proof, since many fighters seem to have taken up arms to defend an Islamist regime, without reference to al-Qaeda's international activities. From the perspective of the September 11 attacks, al-Qaeda was a large presence in Afghanistan, but that is not necessarily the perspective of the average fighter who joined the battle earlier. In short, we welcome conspiracy prosecutions as one tool to bring to justice people who in fact knowingly advanced a project of committing war crimes and crimes against humanity, but we caution against simplistic assumptions about the intent to be drawn from a suspect's involvement in military activity in Afghanistan.

**Release from Detention**

Under the Geneva Conventions, POWs are to be "released and repatriated without delay after the cessation of active hostilities" (Geneva III, Art. 118). A similar rule governs "protected persons" such as unlawful combatants. (Geneva IV, Art. 133). Those charged and convicted for war crimes or other offenses can be incarcerated past the conclusion of the war until their sentence is served (Geneva III, Art. 119; Geneva IV, Art. 133).

The key question, thus, is: when have "active hostilities" concluded? We assume that the answer to this question will be relatively straightforward in Afghanistan. Once active international armed conflict in Afghanistan ceases, all Taliban detainees who have not been criminally charged should be released and repatriated.

However, in the case of al-Qaeda, we recognize that its activities have allegedly not been limited to Afghanistan. Insofar as al-Qaeda operatives are engaged elsewhere in "active hostilities" – ongoing armed conflict – against the United States, some have argued that an analogy could be made to state-to-state armed conflict that would delay the obligation to release al-Qaeda detainees. However, there is a difference between "active hostilities" and a rhetorical war. At some point, the "war" against terrorism will be no different from the "war" against drug trafficking or the mafia – a useful rhetorical device to rally support against dangerous criminal activity, but not an indication of active armed conflict. When such circumstances arise, international law would clearly require that al-Qaeda be treated as a law enforcement matter subject to the restrictions of international human rights law, rather than as a military matter subject to the looser constraints of international humanitarian law. That is, under provisions of the International Covenant on Civil and Political Rights, from which the United States has made no derogation, the only lawful ground for holding al-Qaeda members in such circumstances would be on criminal charges. Holding them as "battlefield detainees" – whether as POWs or as unlawful combatants – would be no more appropriate than detaining alleged members of drug-trafficking cartels without charge or trial.

The Bush administration's reported comments about the future fate of al-Qaeda detainees have not always made this distinction clear (see, e.g., Katharine Q. Seelye, "Rumsfeld Backs Plan to Hold Captives Even if Acquitted," *The New York Times*, March 29, 2002), with the result that doubts about the lawfulness of U.S. conduct have increased. We hope you will find an opportunity in the near future to clarify this issue.

**Transfer of Detainees to Third Countries**

Media reports have indicated that the United States has repatriated or assisted in the repatriation of suspected al-Qaeda suspects to their home countries. Countries named include Uzbekistan, Egypt, Russia and others with poor human rights records. International law prohibits states from sending persons to a country where they are likely to be subject to serious violations of their human rights. As a Party to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), the United States may not expel, return ("refouler") or extradite a person to another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture." The Convention against Torture further provides that for the purpose of determining whether there are such grounds, "the competent authorities shall take into account all relevant considerations including…the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights" (CAT, Art. 3). The U.S. State Department's *Country Reports on Human Rights Practices* provide ample evidence of such a pattern in the countries mentioned above. The

Convention against Torture prohibits government officials from not only committing torture, but also engaging in any act that constitutes complicity in torture (CAT, Art. 4). Violation of this prohibition is a crime subject to prosecution in any competent court worldwide.

In light of these strict prohibitions, the U.S. government must not send or help to send suspects to any country where torture is regularly practiced. We welcome the fact that, with these concerns evidently in mind, the U.S. government has reportedly not sent any prisoners taken in Afghanistan to China. We urge the administration to apply this important rule more broadly.

Thank you for your attention to these issues. We would be pleased to discuss these issues with you at your convenience.

Sincerely,

/s/

Kenneth Roth
Executive Director