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March 6, 2003

The Honorable Donald Rumsfeld  
Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301-1000

Dear Mr. Secretary:

We write to urge the long overdue release from the U.S. military facility at Guantanamo Bay, Cuba of all members of the Taliban armed forces held solely because of their participation in the war in Afghanistan as well as any civilians with no meaningful connection to al-Qaeda. Unless these detainees are prosecuted for a crime, there is no legal basis for their continued detention; the 1949 Geneva Conventions require their release and repatriation. Any detainee implicated in war crimes, crimes against humanity, or other criminal offenses, including acts of terrorism, should be prosecuted by courts that meet international fair trial standards.

We also urge the United States to comply with the requirements of international human rights law with regard to persons held at Guantanamo who were apprehended outside areas of armed conflict and have no direct connection to an armed conflict. For such persons, even if they are alleged to be terrorist suspects, the laws of war do not apply. Under well-established human rights law, the United States cannot lawfully hold these detainees without charges and without providing them access to legal counsel.

During previous armed conflicts, the United States has been a firm supporter of the Geneva Conventions of 1949, recognizing the importance of respect for international humanitarian law. In part, that is because the United States has recognized its interest in securing the maximum legal protection for its own soldiers and citizens should they be captured during armed conflicts - a consideration of particular relevance today as the United States prepares for a possible war with Iraq. Compliance with the Geneva Conventions as they apply to the detainees held at Guantanamo Bay is thus not only required because of the binding commitments undertaken by the United States when it became a party to the conventions; it is also consistent with national goals and self-interest.

BRUXELLES GENEVA HONG KONG LONDON LOS ANGELES MOSCOW NEW YORK SAN FRANCISCO WASHINGTON

### Unlawful Continued Detention of Civilians

There have been numerous allegations that the detainees at Guantanamo include some civilians. In a December 22, 2002 article, the *Los Angeles Times* detailed the results of its investigation into the transfer of detainees from Afghanistan to Guantanamo Bay. Citing U.S. intelligence sources in Afghanistan, the *Los Angeles Times* reported that at least fifty-nine detainees at Guantanamo had no meaningful ties to the Taliban or al-Qaeda. The names of these men – forty-nine Afghans and ten Pakistanis – appeared on a list of prisoners, prepared by U.S. intelligence officers in Afghanistan, who did not meet screening criteria for transfer to Guantanamo. According to the U.S. officials cited, some of these detainees included civilians such as farmers, taxi drivers, cobblers, a fireworks vendor, and other laborers who had not taken up arms against the United States.

It is not uncommon for civilians to be apprehended during an armed conflict. Their brief detention while their civilian status is confirmed is often unavoidable. But the law does not permit the detaining power, in this case the United States, to simply hold such civilians as long as it chooses, for whatever reasons it chooses, and wherever it chooses.

Civilians typically qualify as "protected persons" under the Fourth Geneva Convention (Geneva IV, Art. 4). Under that convention, the United States is obliged to observe protections for civilians in the areas it occupies, which U.S. policy has interpreted as including "areas through which troops are passing and even on the battlefield." (Department of the Army, *The Law of Land Warfare*, Field Manual 27-10, par. 352). According to the International Committee of the Red Cross (ICRC) *Commentary*, "Even a patrol which penetrates into enemy territory without any intention of staying there must respect the conventions in its dealing with the civilians it meets" (ICRC, *Commentary to the Fourth Geneva Convention*, p.60).

The Fourth Geneva Convention permits the United States as an occupying power to keep civilians in detention ("internment") in only two situations: after prosecution before a properly constituted court, or for "imperative reasons of security" (Geneva IV, Art. 78). The United States has apparently not brought charges against any detainees at Guantanamo. It can therefore hold the civilian detainees only if a decision regarding the necessity of internment has been "made according to a regular procedure," in accordance with the convention, including an appeal and a review every six months (Geneva IV, Art. 78). The decision regarding the necessity of internment cannot be made collectively; "each case must be decided separately" (ICRC, *Commentary to the Fourth Geneva Convention*, p. 367). The United States is also obliged to periodically review the necessity of continued internment (Geneva IV, Art. 78) and to release each interned person "as soon as the reasons which necessitated his internment no longer exist" (Geneva IV, Art. 132). In any case, unless the person is serving a prison sentence, internment shall "cease as soon as possible after the close of hostilities" (Geneva IV, Art. 133).

We are not aware that U.S. officials have made individual determinations according to a regular procedure (with right to appeal and periodic review) concerning the security threat posed by any protected person under its control. If, as the *Los Angeles Times* has reported, U.S. intelligence officers in Afghanistan determined that at least some of the civilians sent to Guantanamo had no meaningful connection to the Taliban or al-Qaeda, it is difficult to conceive how their detention could be considered "imperative" for national security.

The Bush Administration has not acknowledged that any civilians are detained at Guantanamo. Instead, it has claimed that all persons held at Guantanamo are "unlawful combatants." However, if

the United States had followed the requirements of the Geneva Conventions and its own military regulations with regard to combatants, it could have determined through individual tribunals whether civilians had been transferred from Afghanistan to Guantánamo and detained there without legal justification.

Under the Geneva Conventions, all combatants captured during an armed conflict must be treated as prisoners-of-war (POWs), unless a "competent tribunal" determines otherwise. Under the 1957 U.S. Army Regulation 190-R, a military tribunal convened to determine the status of persons captured during an armed conflict can decide whether the person is: 1) a POW; 2) retained personnel (e.g., a doctor or chaplain) who thus qualifies as a POW; 3) an "innocent civilian who should immediately be returned to his home or released"; or 4) a "civilian internee who for reasons of operation security, or probable cause incident to criminal investigation, should be detained." If such tribunals had been convened, any civilians detained by the United States would have had an opportunity to challenge their designation as a combatant. Presumably, they could have demonstrated – as they apparently did to U.S. intelligence officers in Afghanistan – that they had no meaningful connection to the Taliban or al-Qaeda. The problem is compounded by the transfer of such civilians from Afghanistan to Guantánamo; the Fourth Geneva Convention prohibits the deportation of protected persons from the territory in which they were apprehended "regardless of [the] motive" (Geneva IV, Art. 49).

It is unclear whether the revised screening procedures now in use in Afghanistan provide adequate safeguards against the detention and transfer to Guantánamo of civilians and certain captured combatants who should have been questioned and released in relatively short order. The Department of Defense should continually monitor the screening and evaluation of detainees to ensure it functions properly. The *Los Angeles Times* article describes an almost pervasive fear among U.S. security officials of releasing someone who, despite the absence of any evidence of terrorist links whatsoever, may later commit a terrorist act. The U.S. government has a duty to ensure that this fear does not result in depriving innocent persons of their liberty for many months, if not years.

#### Unlawful Detention of Certain Captured Belligerents

The United States lacks a legal basis to keep in custody members of the Taliban armed forces detained solely for their role as combatants engaged in an armed conflict with the United States. The Third Geneva Convention permits the United States to detain POWs without charge for the duration of the armed conflict in which they were captured. For these Taliban soldiers, that conflict – the war between the United States and the government of Afghanistan – has ended. Such Taliban soldiers confined at Guantánamo who are not being prosecuted criminally must be released.

As Human Rights Watch has repeatedly noted in correspondence and conversations with the Bush Administration, in times of war between states party to the Geneva Conventions (such as Afghanistan and the United States), Article 4 of the Third Geneva Convention requires granting POW status to all captured members of the enemy's regular armed forces. This would include all captured members of the Taliban armed forces, as well as members of any militia that was part of those armed forces. When there is doubt as to whether any person captured in an international armed conflict is entitled to POW status, Article 5 of the Third Geneva Convention requires that a "competent tribunal" be convened to make the determination on a detainee-by-detainee basis. 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 Bush Administration, however, has insisted that it would not consider any of the captured members of the Taliban armed forces to be POWs. This refusal is based on a strained and erroneous reading of the plain language of the Third Geneva Convention, as we have previously explained in our letter to you of May 29, 2002. Moreover, the refusal to grant POW status to Taliban soldiers is a dramatic change from the U.S. government's expansive interpretation of the convention's requirements in previous armed conflicts. For example, during the Korean War, the United States accorded Chinese and North Korean soldiers POW status even though those countries had not yet ratified the Geneva Conventions.

Human Rights Watch is of the view that the intent of the Third Geneva Convention reflected in the language of Article 4 is to ensure that members of regular armed forces are granted POW status when captured. This interpretation is consistent with the overall aims of the Geneva Conventions, as well as ICRC commentary and past U.S. practice, and is in the long-term interests of the United States.

The POW designation has particular significance today because at least since the formation of the Hamid Karzai government in June 2002 – the United States is no longer at war with the Afghan government. Article 118 of the Third Geneva Convention requires that, at war's end, POWs who have not been convicted of a crime be released and repatriated. Ongoing fighting in Afghanistan with al-Qaeda and opposition forces is distinct from armed conflict with the Afghan government and provides no basis for continued detention of former Taliban soldiers.

Under the Geneva Conventions, if a combatant captured on the battlefield is not a POW, including persons labeled as "non-privileged" or "unlawful" combatants, they must be considered "protected persons" under the Fourth Geneva Convention. (Geneva IV, Art. 4.; see also *The Law of Land Warfare*, Field Manual 27-10, *Interpretation*, par. 247 which states: "[T]hose protected by Fourth Geneva also include all persons who have engaged in hostile or belligerent conduct but who are not entitled to treatment as prisoners of war.") The U.S. regulations for military tribunals that determine the status of captured persons reflect this interpretation of the conventions as they call for a decision that the detainee is either a POW or a civilian.

As discussed above, now that the armed conflict with the Afghan government has ended, the Fourth Geneva Convention requires the immediate release of all protected persons detained solely because of their participation in that conflict. The Geneva Conventions permit the internment of any protected person only upon an individualized determination of imperative security grounds. Thus, even the failure to recognize the POW status of captured Taliban soldiers is no justification for their continued detention.

#### 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. The United States has asserted that all detained terrorist suspects are being held as part of the worldwide war against terrorism, although the United States has not applied the Geneva Conventions or international human rights law to their cases. As noted, terrorist suspects detained during the war in Afghanistan, if not POWs, must be treated as protected persons in accordance with the Geneva Conventions.

Because al-Qaeda is not a state, other military operations against the group are covered by Common Article 3 of the Geneva Conventions, which governs armed conflicts that are not between two states party. Those detained as a result of such military operations must be protected from mistreatment as provided under Common Article 3 and customary international law. In addition, human rights law remains in effect for such individuals; they must be prosecuted in accordance with basic due process rights, unless the state has formally derogated from its obligations. These legal provisions apply no matter how the United States defines the war against al-Qaeda, whether as a worldwide conflict or a series of discrete military actions.

When al-Qaeda suspects or other alleged terrorists are apprehended outside areas of armed conflict and have no direct connection to such conflict, such as those apprehended in Bosnia-Herzegovina, 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 "enemy combatants." Indeed, to permit a government that is at war in one part of the world to detain people without charge apprehended elsewhere in the world without demonstrating participation in the armed conflict is to create a gaping and dangerous loophole in international human rights guarantees.

The United States has asserted that anyone apprehended for involvement in international terrorism against the United States may be treated as an enemy combatant, no matter where they are found and regardless of the circumstances. This open-ended expansion of the concept of armed conflict has no basis under international law. Where law enforcement is possible, the government must pursue these crimes and threatened crimes, serious as they are, through the criminal justice system with its attendant due process rights. In the absence of an imminent threat of violence that could not be met through traditional law enforcement means, no one would seriously suggest that a terrorist suspect on the streets of New York or Washington could be summarily shot. But if he were really an enemy combatant, such summary killing would be legitimate, as it is in war. In the case of terrorist suspects far from any recognized battlefield, if it is objectionable for the government to declare them enemy combatants for the purpose of shooting them on sight, it is equally objectionable to circumvent their due process rights and detain them summarily.

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

Sincerely,

/s/

Kenneth Roth  
Executive Director

Cc: Hon. Colin Powell, Secretary of State  
Hon. Alberto Gonzales, White House Counsel