Human Rights Watch
January 28, 2002

The Honorable Condoleezza Rice
National Security Advisor
The White House
Washington, DC

Dear Ms. Rice,

We write concerning the legal status of the Guantanamo detainees. Our views reflect Human Rights Watch's experience of over twenty years in applying the Geneva Conventions of 1949 to armed conflicts around the world. We write to address several arguments advanced for not applying Article 5 of the Third Geneva Convention of 1949, which, as you know, requires the establishment of a "competent tribunal" to determine individually whether each detainee is entitled to prisoner-of-war status should any doubt arise regarding their status. Below we set forth each of the arguments offered for ignoring Article 5 as well as Human Rights Watch's response.

Argument: The Geneva Conventions do not apply to a war against terrorism.

HRW Response: The U.S. government could have pursued terrorist suspects by traditional law enforcement means, in which case the Geneva Conventions indeed would not apply. But since the U.S. government engaged in armed conflict in Afghanistan – by bombing and undertaking other military operations – the Geneva Conventions clearly do apply to that conflict. By their terms, the Geneva Conventions apply to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Both the United States and Afghanistan are High Contracting Parties of the Geneva Conventions.

Argument: A competent tribunal is unnecessary because there is no "doubt" that the detainees fail to meet the requirements of Article 4(A)(2) for POW status.

HRW response: Article 5 requires the establishment of a competent tribunal only "[s]hould any doubt arise" as to whether a detainee meets the requirements for POW status contained in Article 4. The argument has been made that the detainees clearly do not meet one or more of the four requirements for POW status contained in Article 4(A)(2) – that they have a responsible command, carry their arms openly, wear uniforms with distinct insignia, or conduct their operations in accordance with the laws and customs of war. However, under the terms of Article 4(A)(2), these four requirements apply only to militia operating independently of a government's regular armed forces – for example, to those members of al-Qaeda who were operating independently of the Taliban's armed forces. But under Article 4(A)(1) these four requirements do not apply to "members of the armed forces of a Party to the conflict as well as members of militia … forming part of such armed forces." That is, this four-part test would not apply to members of the Taliban's armed forces, since the Taliban, as the de facto government of

Afghanistan, was a Party to the Geneva Convention. The four-part test would also not apply to militia that were integrated into the Taliban's armed forces, such as, perhaps, the Taliban's "55th Brigade," which we understand to have been composed of foreign troops fighting as part of the Taliban.

Administration officials have repeatedly described the Guantanamo detainees as including both Taliban and al-Qaeda members. A competent tribunal is thus needed to determine whether the detainees are members of the Taliban's armed forces (or an integrated militia), in which case they would be entitled to POW status automatically, or members only of al-Qaeda, in which case they probably would not be entitled to POW status because of their likely failure to meet the above-described four-part test. Until a tribunal makes that determination, Article 5 requires all detainees to be treated as POWs.

Argument: Even members of the Taliban's armed forces should not be entitled to POW status because the Taliban was not recognized as the legitimate government of Afghanistan.

HRW response: As Article 4(A)(3) of the Third Geneva Convention makes clear, recognition of a government is irrelevant to the determination of POW status. It accords POW status without qualification to "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power." That is, the four-part test of Article 4(A)(2) applies only to militia operating independently of a government's armed forces, not to members of a recognized (Article 4(A)(1)) or unrecognized (Article 4(A)(3)) government's armed forces. Thus, whether a government is recognized or not, members of its armed forces are entitled to POW status without the need to meet the four-part test.

This reading of the plain language of Article 4 is consistent with sound policy and past U.S. practice. As a matter of policy, it would undermine the important protections of the Third Geneva Convention if the detaining power could deny POW status by simply withdrawing or withholding recognition of the adversary government. Such a loophole would swallow the detailed guarantees of the Third Geneva Conventions – guarantees on which U.S. and allied troops rely if captured in combat. This reading is also consistent with past U.S. practice. During the Korean War, the United States treated captured Communist Chinese troops as POWs even though at the time the United States (and the United Nations) recognized Taipei rather than Beijing as the legitimate government of China.

Argument: Treating the detainees as POWs would force the United States to repatriate them at the end of the conflict rather than prosecuting them for their alleged involvement in terrorist crimes against Americans.

HRW response: POW status provides protection only for the act of taking up arms against opposing military forces. If that is all a POW has done, then repatriation at the end of the conflict would indeed be required. But as Article 82 explains, POW status does not protect detainees from criminal offenses that are applicable to the detaining powers' soldiers as well. That is, if appropriate evidence can be collected, the United

States would be perfectly entitled to charge the Guantanamo detainees with war crimes, crimes against humanity, or other violations of U.S. criminal law – more than enough to address any act of terrorism against Americans – whether or not a competent tribunal finds some of the detainees to be POWs. As Article 115 of the Third Geneva Convention explains, POWs detained in connection with criminal prosecutions are entitled to be repatriated only "if the Detaining Power [that is, the United States] consents."

Argument: Treating the detainees as POWs would preclude the interrogation of people alleged to have information about possible future terrorist acts.

HRW response: This is perhaps the most misunderstood aspect of the Third Geneva Convention. Article 17 provides that POWs are obliged to give only their name, rank, serial number, and date of birth. Failure to provide this information subjects POWs to "restriction" of their privileges. However, nothing in the Third Geneva Convention precludes interrogation on other matters; the Convention only relieves POWs of the duty to respond. Whether or not POW status is granted, interrogators still face the difficult problem of encouraging hostile detainees to provide information, with only limited tools available for the task. Article 17 states that torture and other forms of coercion cannot be used for this purpose in the case of POWs. But the same is true for all detainees, whether held in time of peace or war. (See, e.g., Article 2 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which the U.S. has ratified: "No exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." See also Articles 4 and 5, making violation of this rule a criminal offense of universal jurisdiction.)

Article 17 of the Third Geneva Convention provides that POWs shall not be "exposed to any unpleasant or disadvantageous treatment of any kind" for their refusal to provide information beyond their name, rank, serial number, and date of birth. That would preclude, for example, threats of adverse treatment for failing to cooperate with interrogators, but it would not preclude classic plea bargaining – that is, the offer of leniency in return for cooperation – or other incentives. Plea bargaining and related incentives have been used repeatedly with success to induce cooperation from members of such other violent criminal enterprises such as the mafia or drug traffickers. These would remain powerful tools for dealing with the Guantanamo detainees even if a competent tribunal finds some of them to be POWs.

Argument: The detainees are highly dangerous and thus should not be entitled to the more comfortable conditions of detention required for POWs.

HRW response: In light of the two prisoner uprisings in Afghanistan, we do not doubt that at least some of the Guantanamo detainees might well be highly dangerous. Nothing in the Geneva Conventions precludes appropriate security precautions. But if some of the detainees are otherwise entitled to POW status, the Conventions do not allow them to be deprived of this status because of their feared danger. Introducing unrecognized exceptions to POW status, particularly when done by the world's leading military power,

would undermine the Geneva Conventions as a whole. That would hardly be in the interest of the United States, since it is all too easy to imagine how that precedent will come back to haunt U.S. or allied forces. Enemy forces who might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally creative reasons for denying POW protections.

In conclusion, we hope the U.S. government will agree to establish the "competent tribunal" required by Article 5 of the Third Geneva Convention for the purpose of determining case by case whether each detainee in Guantanamo is entitled to prisoner-of-war status. That decision would uphold international law, further U.S. national interests, and not impede legitimate efforts to stop terrorism.

Respectfully,

Kenneth Roth
Executive Director