

Human Rights Watch

Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

<https://www.hrw.org/news/2002/05/29/us-growing-problem-guantanamo-detainees>

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As the U.S. administration prepares to send some 150 new detainees to Guantanamo Bay, Human Rights Watch warned that their legal status is growing more problematic by the day.

In a [letter](#) sent this week to U.S. Secretary of Defense Donald Rumsfeld, Human Rights Watch challenged plans that the Bush administration has floated to pursue troubling lines of prosecution or even to hold the detainees indefinitely without trial.

"The Bush administration cannot hold people indefinitely without charge or send them to countries where they might be tortured," said Kenneth Roth, executive director of Human Rights Watch. "As time goes by and the number of detainees grows, so does the pressure on the U.S. government to act."

Roth said that the Bush administration has a legal obligation to determine the detainees' status in accordance with the Geneva Conventions, and then to launch criminal prosecutions where credible evidence exists. The Bush administration could reasonably prosecute some detainees at Guantanamo for conspiracy, so long as it does not define "conspiracy" too broadly.

With the imminent completion of new cells at the U.S. Naval Base at Guantanamo and anticipated transfer of approximately 150 detainees from Afghanistan, the number of persons held at Guantanamo is expected to exceed 500.

Human Rights Watch warned that the US administration had a responsibility not to transfer or repatriate detainees to countries where they may be at risk of torture. The U.S. government has not returned prisoners it captured in Afghanistan to China, for instance, and this policy needs to be applied more widely.

The points raised in the letter include:

Despite President Bush's claim to be applying the "principles" of the Third Geneva Convention regulating prisoner-of-war (POW) status, the United States continues to violate the Geneva Conventions, particularly with respect to Taliban detainees. This shortsighted transgression sets a dangerous precedent that could come back to haunt U.S. and allied servicemembers who are captured by enemy forces in this or future wars. Washington's refusal to treat the detainees as POWs is perplexing because it would in no way inhibit legitimate U.S. efforts to interrogate or prosecute people who have participated in terrorist acts.

There is no legal basis to treat as "battlefield detainees" suspects who are captured outside Afghanistan and have no direct relationship with the armed conflict. In such cases, the designation is a transparent effort to circumvent the requirement of international human rights law that these suspects be criminally charged or freed.

New regulations address many of the faults in President Bush's proposed military commissions, but flaws remain, including the failure to provide appeal to a civilian court, such as the appeal allowed in courts-martial to the United States Court of Appeals for the Armed Forces. The lack of independent appeal allows the executive to serve as both prosecutor and judge, undermining public confidence in the proceedings and increasing the possibility of injustice.

It could be appropriate to prosecute the Guantanamo detainees for the crime of conspiracy if a suspect can be shown to have joined a criminal enterprise knowing of its criminal purpose and with the intent of furthering its criminal objectives. But it would be dangerous to apply conspiracy theories too loosely. Given the variety of reasons that Afghans and foreigners joined the Taliban, membership in a criminal conspiracy should not be presumed from mere armed presence in Afghanistan.

The Geneva Conventions permit many of the detainees to be held until the end of active hostilities. But at some stage the genuine armed conflict in Afghanistan will give way to a rhetorical war - more akin to law enforcement efforts against other criminal activity, such as drug trafficking or the mafia, that also involves potential loss of life. At that point, detention without criminal charges is no more

appropriate for the Guantanamo detainees than it would be for a street-level drug dealer picked up in any American city.

The U.S. government has a duty to avoid transferring or assisting in the transfer of any detainee to a country where he risks torture. Violation of this duty carries criminal penalties enforceable in principle in any court worldwide.

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