

UNCLASSIFIED

RELEASED IN FULL

I23

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

May 11, 2004

Mr. Christophe Girod
Head of Delegation
International Committee of the Red Cross
Regional Delegation to the US and Canada
2100 Pennsylvania Avenue, N.W., Suite 545
Washington, DC 20037

Dear Mr. Girod,

Thank you for your letter and verbal note of March 9, 2004 concerning the February transfer for prosecution of seven nationals of the Russian Federation from Guantanamo Bay. I understand you have already had discussions on the matter with representatives of the Departments of Defense and State.

As you are aware, the legal framework under which the United States is operating with respect to Guantanamo detainees is the customary law of war and international principles regarding asylum and protection from persecution and torture that apply during armed conflict.

In situations involving the potential release of detainees, we endeavor to address an individual's repatriation concerns including those who present credible non-refoulement concerns. We appreciate whatever assistance the ICRC may provide in identifying third countries that we may approach to accept released detainees who have expressed repatriation fears. While there is no obligation under the law of war to satisfy every objection to repatriation, we nevertheless endeavor to address these matters, at least for those who present credible non-refoulement concerns.

The circumstances are somewhat different, however, when a detainee is transferred to the control of another government for prosecution for crimes that would normally disqualify a person from protection under asylum principles. Even in such a case, the United States has

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: FRANK E SCHMELZER
DATE/CASE ID: 10 SEP 2004 200303827

UNCLASSIFIED

UNCLASSIFIED

- 2 -

made clear that it does not expel, return ("refouler") or extradite individuals to other countries where it believes it is "more likely than not" that they will be tortured. Before transfer from Guantanamo to the control of another government, United States policy is to obtain specific assurances from the receiving country that it will provide humane treatment and not torture the individual to be transferred. In determining whether it is "more likely than not" that an individual would be tortured, the United States takes into account the treatment the individual is likely to receive upon transfer, including *inter alia* the expressed commitments of officials from the receiving country. I can assure you that the United States would pursue any credible report and take appropriate action if we had reason to believe that these assurances would not be, or had not been, honored.

Our decisions with respect to detainees are made on a case-by-case basis, taking into account the particular circumstances of the transfer, the country, and the individual concerned. In the case of the Russians recently transferred for detention, investigation and prosecution in Russia, we obtained assurances from senior Russian authorities that the detainees will be treated humanely in accordance with Russian law and obligations. Russian obligations include those under the European Convention on Human Rights, the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights. We are also aware that the Russian government has generally permitted the ICRC to conduct prison visits in the past and hope your delegation would inform us if ICRC representatives in Russia encounter problems visiting the individuals transferred to Russia from Guantanamo. We may also pursue access to these individuals as appropriate and necessary. In these circumstances, we are satisfied that the Russian government will honor its assurances and that the detainees will also have the ability to redress any violations of the relevant obligations under Russian law.

If a case were to arise in which the assurances we have obtained from another government are not sufficient when balanced against an individual's specific claim, we would not transfer a detainee to the control of that government unless the concerns were satisfactorily

UNCLASSIFIED

UNCLASSIFIED

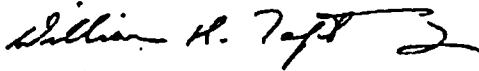
- 3 -

resolved. We do not agree with the assertion in the verbal note of March 9, 2004 that international law prescribes any specific procedures for resolving such concerns. Your suggestion of a review by an independent body with the opportunity of appeal would be contrary to longstanding U.S. practice (and the practices of other nations) of entrusting such issues to the Government's discretion for decision after a review of the circumstances. These decisions are made at senior levels through a process involving officials most familiar with international legal standards and obligations and the conditions in the countries concerned.

Whether a detainee is being considered for release or for transfer for investigation and prosecution under national criminal laws, the pre-departure interview conducted by the ICRC can assist in identifying particular concerns that may not have arisen during communications between U.S. officials and detainees. We appreciate the ICRC's communications on these matters and assure you that they are given full consideration.

I know that the ICRC shares the goal of the United States to accelerate the review process and releases from Guantanamo and recognizes the importance of pursuing criminal prosecutions, whether by the United States or other governments prepared to do so. The United States remains committed to consultation and dialogue with the ICRC and looks forward to developing constructive solutions whenever differences arise so that we may achieve our common goals.

Sincerely,



William H. Taft, IV

UNCLASSIFIED