

THE LEGAL ADVISER  
DEPARTMENT OF STATE  
WASHINGTON

April 28, 1999

Morton Sklar, Director  
World Organization Against Torture USA  
1015 18<sup>th</sup> St., NW -- Suite 400  
Washington, DC 20036

Dear Mr. Sklar:

I am writing on behalf of the Secretary of State in response to your letter of April 12, 1999. You have raised several concerns related to the regulations recently promulgated by the Department of State concerning implementation of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Torture Convention") in extradition cases. I want to assure you that the Department is and has been fully implementing its obligation under the Torture Convention not to extradite a person to another State where he would be more likely than not to be tortured. As noted in the Federal Register, the regulations, issued as required by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Public Law 105-277), record procedures already in place. We are confident that these regulations and the procedures followed are in full compliance with the requirements of the Torture Convention.

As you are undoubtedly aware, the process of extradition from the United States is controlled by section 3181 et seq. of Title 18 of the U.S. Criminal Code. Under those provisions, a person must first be found extraditable through a judicial proceeding. For a person found extraditable, sections 3184 and 3186 place the decision as to whether or not to extradite with the Secretary of State.\* Under the long-established "rule of non-inquiry," courts do not address issues raised concerning the treatment of

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\* Within the Department of State, the statutory authority to make decisions on signing of extradition warrants has been delegated only to the Deputy Secretary. Thus, all requests for surrender are submitted to the Secretary personally (or an Acting Secretary) or to the Deputy Secretary.

fugitives on return to the country requesting their extradition, holding instead that such issues are reserved to the Secretary of State in making the final extradition decision. See e.g., Ahmad v. Wigen, 910 F.2d 1063, 1064-66 (2d Cir. 1990).

In order to ensure compliance with our obligation under the Torture Convention, the Department has advised all bureaus in the Department and all posts abroad that the Secretary will consider whether a person facing extradition "is more likely than not" to be tortured in the country requesting extradition when appropriate in making an extradition decision. All Department bureaus and posts abroad have been requested to provide any information relevant to the issue of torture in a particular extradition case to the Office of the Legal Adviser and the Bureau of Democracy, Human Rights and Labor.

In each case where allegations relating to torture are made or the issue is otherwise brought to the Department's attention, appropriate offices review and analyze available information relevant to the case in preparing a recommendation to the Secretary. If the person wanted for extradition has attempted to raise this issue during judicial proceedings, any relevant information provided to the court is reviewed. The fugitive, on his own or through counsel, and other interested parties may also submit additional written documentation to the Department of State for consideration in reaching the decision on extradition. The review also considers other information available to the Department concerning judicial and penal conditions and practices of the requesting country, including the information contained in the State Department's annual Country Reports on Human Rights Practices, and the possible relevance of that information to the individual whose surrender is at issue. The Bureau of Democracy, Human Rights and Labor, which edits the Country Reports and prepares them for delivery to Congress as well as providing advisory opinions on asylum requests and withholding of removal, is a key participant in this process.

Based on the resulting analysis of all relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions or after receiving assurances she deems appropriate. This range of options can only truly be

exercised by the executive branch, through its foreign affairs function.

You have specifically raised the case of Ramon Aldasoro Maguna-Celaya, a Basque from Spain. I understand that Mr. Aldasoro's extradition case is still in judicial proceedings. A stay of extradition is in place while his case is being considered by the 11<sup>th</sup> Circuit. If a final decision is made by the court that he is extraditable, his case will be referred to the Secretary for decision on surrender. If the matter is referred to the Secretary, Mr. Aldasoro may provide written submissions detailing any concerns about the possibility that he may face torture if extradited. The Department's procedures will be followed and all relevant information carefully considered.

You have also questioned the absence of an adjudication process on this issue and asked for clarification of the statement in section 95.4 of the Department's regulations that the Secretary's final decision is a matter of executive discretion not subject to judicial review. As discussed above, sections 3184 and 3186 clearly make this decision a matter of the Secretary's discretion. Nothing in the Torture Convention requires that the international obligation undertaken by the United States in the extradition context must be implemented by the judicial rather than the executive branch. Indeed, the Torture Convention was ratified by the United States on the understanding that it was not self-executing.

The recent enactment of section 2242 calling for promulgation of the regulations does not change this fact. It states that the international obligation under Article 3 of the Torture Convention "shall be the policy of the United States" and requires the issuance of regulations. In so doing, section 2242 explicitly provides that "no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy" (with an exception for cases under the Immigration and Nationality Act, not applicable to extradition). This is consistent with the judicially developed rule of non-inquiry.

Finally, because these regulations involve a foreign affairs function of the United States, they are exempt from the notice and comment requirement of 5 U.S.C. 553.

I hope that this information is helpful to you. If the Department can be of further assistance, please do not hesitate to contact us.

Sincerely,

A handwritten signature in cursive script, appearing to read "David R. Andrews". The signature is written in black ink and is positioned below the word "Sincerely,".

David R. Andrews