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to the OSCE

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DATE: 736-7028 736-7620
TO: Frank Gaffney / JoAnn + Josh
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FROM: Nicole Sobotka
PAGES INCLUDING COVER SHEET: 4 + Cover
SUBJECT:

Frank - this is the recent
DDIHR letter + last year's letter
(which you will remember we did
respond to. You should have a copy
of that somewhere)

Thanks So Much!
Nicole

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Office for Democratic Institutions and Human Rights

The Director

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H.E. Ambassador
Stephan M. Minikes
Head of the US Mission to the OSCE
Vienna

Warsaw, 08 July 2003

Dear Ambassador,

I write to you with a view to clarifying a number of open questions, which have arisen following an apparent decision by US authorities to try several cases in front of the Military Commission. In particular these questions relate to the *Military Commission Instruction on Crimes and Elements for trial by Military Commission* issued on 30 April 2003. In this respect, I would also like to reiterate ODIHR's earlier observations, raised by my predecessor in a letter 22 November 2001, concerning the compliance of the Military Order dated 13 November 2001 with international fair trial standards and principles of non-discrimination, which I hereby enclose.

At the outset I would like to express the continuing sympathy of the ODIHR with the United States in respect of the tragic events of 11 September 2001. We recognize the need for extraordinary measures to ensure that effective action can be taken to protect national security and the interests of citizens. At the same time it must be emphasized that the OSCE has consistently maintained that it is crucial that the legitimate right of participating States to combat terrorism be exercised in full accordance with international law including international human rights law and OSCE commitments.

These commitments (elaborated e.g. in the 1990 Copenhagen Document) guarantee the right to a fair trial and due process to all individuals as does the International Covenant on Civil and Political Rights (ICCPR), to which the U.S. is party.

In particular, we would be interested in receiving further information about constraints on the right of the defendant to choose his/her legal counsel and the constraints on the preparation of his/her defense, as well as restrictions on the availability of potentially exculpatory evidence to defense counsel and the right of the defendant and his/her counsel to be present at trial. These issues have been brought to our attention recently by a number of non-governmental organizations and have been commented on also by the UN Special Rapporteur on the Independence of Judges and Lawyers recently.

I would also be grateful to receive more information on the definition of "armed conflict" under Military Commission Instruction No.2 to include attempted crimes, in

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UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: CHARLES E LAHIGUERA

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particular with regard to the definition contained in Article 2 of the Geneva Conventions in relation to internal armed conflicts.

Allow me also to underline that all OSCE participating States have committed themselves to ensuring the utmost transparency of their judicial proceedings including the explicit commitment to allow the presence of observers at proceedings before courts. The Copenhagen Document 1990, paragraph 12, states:

The participating States, wishing to ensure greater transparency in the implementation of commitments undertaken in the Vienna Concluding Document under the heading of the human dimension of the CSCE, decide to accept as a confidence building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law; it is understood that proceedings may only be held in camera in the circumstances prescribed by law and consistent with obligations under international law and international commitments.

In the view of the above commitments, I would be grateful if you could provide the ODIHR with further information on the trials to be held before the Military Commission as well as on the more specific questions I have raised concerning the legal framework in which they are to be held.

I look forward to your response and remain,

with best regards,

Sincerely yours,



Christian Strohal
Ambassador