Paris, May 21, 2008

Ms. Rachida Dati
French Minister of Justice
13, place Vendôme
75042 Paris CEDEX 01, France

Copy to Mr. Bernard Kouchner
Minister of Foreign Affairs,
Quai d'Orsay,
75 Paris, France

Re: Intervention in the Donald Rumsfeld Torture Case

Your Excellency,

The plaintiffs organizations in the Donald Rumsfeld case write to you, in your capacity as Minister of Justice, in order to urge your intervention to correct the position taken by the Paris and Public Prosecutors in their attempt to grant former U.S. Secretary of Defense Donald Rumsfeld immunity from prosecution for ordering torture. It is your duty to reaffirm France's long-standing position, which is that former officials should never be exempted from criminal liability for international crimes, such as torture. This is particularly true in Mr. Rumsfeld's case, based on French national legislation.

On October 25, 2007, the International Federation for Human Rights (FIDH), its member organizations in the United States, the Center for Constitutional Rights (CCR) and in France, the « Ligue française des droits de l'Homme et du Citoyen » (LDH), as well as the European Center for Constitutional and Human Rights (ECCHR) filed a complaint before the Paris District Prosecutor against Mr. Rumsfeld, former U.S. Secretary of Defense, on the occasion of his private visit in Paris.

The complaint, with a solid foundation in both fact and law, alleges that Donald Rumsfeld is responsible for torture because he directly and personally elaborated and ordered the use of « harsh » interrogation techniques constituting torture; such techniques were implemented under his supervision, notably in the detention centers of Guantánamo Bay and Abu Ghraib (Iraq). Recent news reports publicly exposed the fact that starting in 2002, Mr. Rumsfeld personally micromanaged several torture sessions of terrorist suspects, which only confirmed the complaints' allegations.

Mr. Rumsfeld's actions are a violation of the 1984 Convention against Torture, ratified by both France and the United States, and directly implemented in French national legislation. As you are

aware, the French Code of Criminal Proceedings (Articles 689-1 and 698-2) provides that French courts have jurisdiction to try any alleged offender of the Convention that sets foot on French soil. This is how former Mauritanian official Ely Ould Dah was found guilty of torture and sentenced to ten years in prison by the Nimes Appeals Court on July 1, 2005.

On November 16, 2007, the Paris Prosecutor – without questioning the torture allegations – dismissed the complaint on the grounds of immunity, and purportedly based his decision on a position given by the French Ministry of Foreign Affairs.

In reply to the plaintiffs' filing contesting the dismissal, the Public Prosecutor of the Paris Appeals Court, on February 27, 2008, issued an opinion affirming the dismissal on the same immunity grounds.

Although this opinion cannot be formally appealed pursuant to the French Code of Criminal Procedure, it stands in stark contrast with well-established French and international law precedents. In light of the gravity of the crimes that are alleged, and the errors of law advanced by both prosecutors in this case regarding the principles of immunity, it is crucial that you intervene to reverse the dismissal.

Several reasons underscore the need for your intervention and in particular the following legal arguments:

1) Both Prosecutors' opinions fail to articulate any valid legal justification for the personal immunity of Mr. Rumsfeld, a *former* Secretary of Defense;
2) Both Prosecutors' opinions ignore the principle according to which there is no immunity for international core crimes such as torture; and
3) Immunity of former officials for such crimes goes directly against the very purpose of the French legislation implementing the provisions of the Convention against Torture, ratified by France.

In addition, new revelations have recently highlighted Mr. Rumsfeld's direct and personal responsibility for torture, as alleged in the complaint, demanding that the decisions be reconsidered.

1) There Are No Valid Legal Grounds for Attributing Personal Immunity to Mr. Rumsfeld, *Former* Secretary of Defense

Despite the fact that the Rumsfeld complaint was filed and based on French national law, and in particular on Articles 689-1 and 689-2 of the French Code of Criminal Procedure implementing the Convention against Torture, the Public Prosecutor based his opinion primarily on the February 14, 2002, judgment issued by the International Court of Justice (ICJ) in *Democratic Republic of Congo v. Belgium* (the "Yerodia Case"). In this heavily criticized case, the ICJ found that under customary international law a serving Minister of Foreign Affairs, like a Head of State, benefited from personal immunity and therefore was immune from prosecution "*throughout the duration of his or her office*." Yerodia Case, ¶ 54. However, the key factor present in that Yerodia Case is not present in this case: Rumsfeld, unlike Yerodia, was a *former* official at the time the complaint was filed. The underlying goal that the Yerodia Case was seeking to achieve, namely to not prevent a Minister of Foreign Affairs from exercising his or her functions in office due to arrest (Yerodia Case, ¶ 55), are simply not present.

The ICJ examined the specific nature of the functions of a Minister of Foreign Affairs, i.e., diplomatic activities that include the "*full powers to act on behalf of the State*." (Yerodia Case, ¶

53). In a flawed extended analogy, the Public Prosecutor advanced that the functions of a Secretary of Defense should fall under the ICJ immunity rationale. The Public Prosecutor cited no basis for the finding that a U.S. Secretary of Defense had the same roles and responsibilities as a Minister of Foreign Affairs. Reference simply to "*numerous travels abroad*" is not an adequate substitute for detailed and considered analysis of the functions and responsibilities of a Secretary of Defense, particularly in the context of deciding whether immunity should be granted. International travel was cited as relevant in the context of a Foreign Minister because the holder of such position, by definition, is "*responsible for the conduct of his or her State's relations with all other States*," which has a prerequisite the ability to travel internationally, and "*he or she is recognized under international law as representative of the State solely by virtue of his or her office*." *Yerodia Case*, ¶ 53. The same is not true – and indeed the Public Prosecutor did not find it to be true – for the Secretary of Defense. In addition, how can international travel for representation purposes be relevant in the case of a *former* official? In this case, Mr. Rumsfeld is a *former* official who was on a private visit to France. What is more, the *Yerodia Case* established the immunity of a Minister of Foreign Affairs *only for his time in office*.

This unsupported extension of immunity constitutes a giant step backward from the movement toward accountability of high-officials, which has characterized the development of international law since the Nuremberg trial. **It could confer permanent impunity from prosecution for international crimes not only to Heads of State and Foreign Ministers, but, by extension, to all government ministers both during and after their term of office.**

In an attempt to justify his position, the Public Prosecutor referred to a lower U.K. court decision from 2004 in the case against General Mofaz, Minister of Defense of Israel. Reliance on that case is flawed for at least two reasons: General Mofaz was a *serving* Minister of Defense at the time the arrest warrant was sought, and unlike the case against Rumsfeld, it was not a case for torture and did not implicate the U.K.'s obligations under the Convention Against Torture.

Because individual accountability for international core crimes is at a higher level of importance than the reasons justifying immunity of officials, the ICJ itself in the *Yerodia Case* affirmed that "*the* immunity *from jurisdiction enjoyed by* <u>*incumbent*</u> *Ministers for Foreign Affairs does not mean that they enjoy* impunity. … *Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility*." *Yerodia Case*, ¶ 60.

In other words, even for Heads of State, immunity ends when they leave office. This is why the ICJ concludes that immunity of "*certain holders of high-ranking office in a State, such as Head of State*" shall cease upon termination of such functions for acts accomplished while in office that were not related to the functions being carried out.

In addition, as you know, the Statute of the International Criminal Court excludes immunity from criminal jurisdiction for anyone, including Heads of State or Heads of Government, **even while in office**, for international core crimes.

2) There Is No Functional Immunity for International Core Crimes such as Torture

In this case, the immunity that would attach to an office, even if it were to be applied to Mr. Rumsfeld, a *former* Secretary of Defense, has no relevance in face of the crimes alleged. It is well-established that personal immunity of former officials only extends to the "*official acts*" accomplished while in office, **and not to international crimes which cannot be seriously considered official acts.** Significantly, the Public Prosecutor failed to mention the House of Lords'

decision in the *Pinochet* case, in which the U.K.'s highest court held that the official functions of a Head of State could not extend to actions that were prohibited as criminal under international law, including torture. The *Yerodia Case* also found that immunity extended only for the accomplishment of *officials* acts.

Yet, based on a flawed interpretation of the law, coupled with a significant factual error, the Public Prosecutor found that:

"*The charges against Mr. Rumsfeld cannot be dissociated from his functions since, in the complaint, he is accused of having initiated or at least tolerated practices, which, if confirmed, could fall under the New York Convention against Torture. (…) The situation, thus, is different from that, for instance of Augusto Pinochet Ugarte, who was accused of acts (kidnapping, sequestration, assassinations) that did not fall under the exercise of his functions as President but were marginal to them.*"

In other words, the Prosecutor found that to initiate or tolerate acts of torture would be part of one's normal official ministerial functions Apart from this deeply shocking reasoning, it must be noted that when the plaintiffs filed their case to the prosecutors, they argued and specifically elaborated that Mr. Rumsfeld must be prosecuted for having directly "*ordered and supervised*" torture – a which charge was, without a justification, wrongly replaced in the Public Prosecutor's opinion by "*initiated or at least tolerated*."

In addition to this factual error, the Prosecutor's legal reasoning is deeply flawed and ignored a very well established principle of international law recognized by many national courts, including France (see the *Khadafi case*) and the international tribunals, that three ICJ Judges in the *Yerodia case* reaffirmed in their separate concurring opinion: "*Serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform.*" They added: "*Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility*." (at ¶ 85)

In spite of this, the Public Prosecutor determined that "*this immunity cannot be set aside on the grounds that certain violations, because of their gravity, make it impossible to maintain it*." In contradiction to his very own reasoning, the Public Prosecutor also attempted to advance the argument that General Augusto Pinochet's situation was different, and found that contrary to the Pinochet case, the complaint's allegations of torture "*cannot be dissociated*" from Mr. Rumsfeld's official functions. Under both international and French law, which provide for the absolute prohibition of torture in all circumstances, torture is clearly no less recognized as a crime than kidnapping or assassination. It cannot be seriously argued that the latter crimes cannot be part of one's official functions, but that torture can.

3) The Very Purpose of French Legislation Implementing the Convention against Torture Cannot Coexist with Immunity for International Crimes

Unlike the *Yerodia Case*, which was decided under customary international law, the Rumsfeld case was brought under specific national legislation and treaty law. Article 689-2 of the French Code of Criminal Proceedings provides that, for the application of the Convention against Torture, "*any individual responsible for torture in accordance with article 1 of the Convention may be prosecuted and tried under the conditions set out in article 689-1*." The rule set out here would lose all meaning if it could be rendered useless through the unjustified and extensive grant of immunity. Article 1 of the Convention does not confer any type of immunity or jurisdictional privilege, and

clearly provides that acts of torture are those "*inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*"

If immunity was granted to former state officials for torture, explained Lord Browne-Wilkinson in the Pinochet case, "*the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive.*"

As recently as February 2008, when directly asked about prosecuting U.S. officials responsible for interrogations techniques constituting torture, such as waterboarding, the United Nations High Commissioner for Human Rights Louise Arbour publicly affirmed that violators of the Convention against Torture must be prosecuted under the principle of universal jurisdiction. She added "*There are several precedents worldwide of states exercising their universal jurisdiction . . . to enforce the torture convention and we can only hope that we will see more and more of these avenues of redress*." Immunity is clearly incompatible with the need to prosecute torturers – even American torturers and war criminals.

In addition, new revelations have recently underscored Mr. Rumsfeld's direct responsibility for torture as alleged in the complaint.

According to recent news reports, Mr. Rumsfeld, along with the most senior officials of the Bush administration, held dozens of secret meetings to discuss the torture of detainees held in CIA custody, in which they provided explicit approval of specific techniques to be used on individual detainees, including waterboarding, as well as the use of a combination of abusive interrogation techniques. According to these news reports, Mr. Rumsfeld was intimately and directly involved with the creation, approval, and specific details of the U.S. torture program post-9/11 and, with other officials, "*virtually choreographed*" some interrogation sessions. These revelations only confirm the seriousness of the complaint's allegations of personal criminal responsibility of Mr. Rumsfeld for torture.

Finally, in his February 27, 2008 letter, the Public Prosecutor considers that the legislation's conditions of application "*have not been met since Mr. Rumsfeld left France before any proceedings were able to initiate public action during his brief stay*."

However, it cannot, and it has not be disputed that Mr. Rumsfeld was in fact present on French soil at the moment the complaint was filed, which is sufficient to establish France's jurisdiction according to the conditions of application of Article 689-2 of the French Code of Criminal Procedure and of Article 1 of the Convention against Torture, ratified by France.

To confirm the thesis of the Public Prosecutor as to the necessity of an act of prosecution during the stay is a violation of the Convention, since, as in this case, it would be enough for the prosecutor to remain inactive in order to avoid France's obligation under the Convention.

Therefore, the departure of Mr. Rumsfeld, against whom the complaint was filed while he was on French territory, does not negate the necessity to open an investigation into the facts alleged against him.

Conclusion

Referring to what he called "*the obsolete doctrine that a Head of State is immune from legal liability,*" Justice Robert Jackson, Chief U.S. prosecutor at the Nuremberg Trials rightfully proclaimed: "*We do not accept the paradox that legal responsibility should be the least where power is the greatest.*" Given France's image in the world in the field of Human Rights, France's commitment to international justice, and the support France has shown to the national proceedings targeting former Heads of State such as Hissène Habré in Senegal or Augusto Pinochet in France, the opinion of the Public Prosecutor in the Rumsfeld case can only suggest an unacceptable double-standard.

As demonstrated above, there are serious grounds justifying the need for a legal rectification of the prosecutors' opinions, and the need to open an investigation into Mr. Rumsfeld's role in ordering torture. For these reasons, the plaintiff organizations request that you, Madame Dati, intervene so that the decision be reconsidered in order to avoid an « à la carte » fight against impunity.

Respectfully yours,

The Signatories:

Souhayr BELHASSEN, President of the International Federation for Human Rights (FIDH)

Michael RATNER, President of the Center for Constitutional Rights (CCR)

Wolfgang KALECK, General Secretary of the European Center for Constitutional and Human Rights (ECCHR)

Jean-Pierre DUBOIS, President of the Ligue des Droits de l'Homme et du Citoyen (LDH)