



*European Center for Constitutional and
Human Rights, ECCHR*

and FIDH International Bureau

**Mr. Bernard KOUCHNER
Minister of Foreign Affairs**

Thursday December 6, 2007

OPEN LETTER

Your Excellency,

The International Federation for Human Rights (FIDH), its leagues in the United States, the Center for Constitutional Rights (CCR) and in France, the « Ligue des droits de l'Homme et du Citoyen » (LDH), as well as the European Center for Constitutional and Human Rights (ECCHR) filed, last October 25, 2007, a complaint before Paris District Prosecutor against Mr. Donald Rumsfeld, former United States' Secretary of Defense.

This complaint, solidly based in fact and in law, accuses Donald Rumsfeld to be responsible of torture for having directly and personally elaborated and ordered the use of « harsh » interrogation techniques constituting torture, and implemented them under his supervision, notably in the detention centers of Guantanamo Bay and Abu Ghraib (Iraq), in violation of the Convention against Torture of 1984, ratified and implemented by France.

The organizations that filed the complaint were stunned by the arguments put forward in the letter of Mr. Jean Claude Marin, Paris District Prosecutor, to support his decision to dismiss the complaint. According to this decision:

“The services of the [French] Ministry of Foreign Affairs indicated that in application of the rules of customary international law established by the International Court of Justice, immunity from criminal jurisdiction for Heads of State and Government and Ministers of Foreign Affairs continues to apply after termination of their functions, for acts carried out during their time of office and hence, as former Secretary of Defense, Mr. Rumsfeld, by extension should benefit from this same immunity for acts carried out in the exercise of his functions.”

While one can understand that the French Ministry of Foreign Affairs be consulted, it is difficult to accept, if only in the name of the separation of powers, that the Ministry's opinion be validated by the Prosecution, without any further verifications, when it was based on a flagrant mistake in interpreting the law.

Indeed, the Prosecutor's decision, if it were to be confirmed, would constitute a giant step backward from the movement toward accountability for heinous crimes perpetrated by high-officials, which has characterized the development of international law since Nuremberg.

His interpretation would 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.

Yet, neither international conventional law, applicable here, nor international customary law, confers any type of criminal immunity to Mr. Rumsfeld, *former* American Secretary of Defense, on a *private* visit to France.

On the contrary, it is well-established that, after the end of a term of office, immunity from criminal jurisdiction cannot be opposed for acts of such gravity, constituting crimes under international law.

As you know, according to article 689-1 of the French Code of Criminal Proceedings:

« In application of the international conventions referred to in the following articles, any individual may be prosecuted and tried by French courts, if he or she is in France, and is responsible of having perpetrated, outside of the [French] Republic territory, one of the following offenses listed by these articles. »

And article 689-2 then provides that :

« For the application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on December 10, 1984, 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. »

These articles, based on the Convention against Torture, provide for universal jurisdiction before French courts, which enables the prosecution and repression of acts of torture, wherever they were perpetrated and whatever the nationality of their authors or their victims is, as long as the author is on the French territory.

In addition, article 1 of the Convention, excluding any type of immunity or jurisdictional privilege, 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. »*

The rule set out in article 689-2 of the French Code of Criminal Proceedings would lose all meaning if it could be rendered useless through the illegitimate and extensive use of the notion of immunity.

Your Department's interpretation amounts to giving *de facto* impunity for all former high-level executives responsible for international crimes and turns the French territory into a haven for torturers. Its only objective is to give priority to the diplomatic and political relationships between states over justice and the rule of law.

Besides, the signatories on this letter can only note the striking contradiction between the support your Department has shown to the national proceedings targeting former Heads of State – in particular against Hissène Habré in Senegal or Augusto Pinochet in France – and its opinion given in the Rumsfeld case.

Finally, given France's image in the world in the field of Human Rights, the above-mentioned decision, if it were to be confirmed, would create a dangerous precedent that a number of countries would not miss referring to.

For these reasons, the plaintiffs organizations and all the members of FIDH International Bureau meeting on the weekend of December 1st, 2007 in Paris, request that, Mr. Kouchner, you intervene so that the position of your Department be reconsidered in order to avoid an application « à la carte » of the fight against impunity.

Respectfully yours,

The Signatories:

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Michael RATNER, CCR President
Jean-Pierre DUBOIS, LDH President
Wolfgang KALECK, ECCHR Secretary General

And the members of FIDH International Bureau:

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