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**IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251
OF 15 MARCH 2006 ENTITLED “HUMAN RIGHTS COUNCIL”**

**Written statement* submitted by the International Federation of Human Rights
Leagues (FIDH), a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is
circulated in accordance with Economic and Social Council resolution 1996/31.

[31 May 2007]

* This written statement is issued, unedited, in the language(s) received from the
submitting non-governmental organization(s).

Violations of the Principle of Independence and Impartiality of the Judiciary and the Independence of the Legal Profession of Prosecutors in the German Case against Donald Rumsfeld and others for War Crimes

On 27 February 2006, the International Federation for Human Rights (FIDH), the Center for Constitutional Rights (CCR – FIDH member league in the United States), the Republican Attorneys' Association (RAV), and Lawyers Against the War (LAW) submitted a complaint to the United Nations Special Rapporteur on the Independence of Judges and Lawyers, claiming that the German Federal Prosecutor's dismissal of a torture case which was filed by Iraqi citizens against Secretary of Defense Donald Rumsfeld and others was dismissed for political reasons. The complaint was submitted to Mr. Leandro Despouy, on behalf of Iraqi citizens who were victims of torture and cruel, inhumane and degrading treatment when detained by the U.S. military in Abu Ghraib prison and other detention facilities centers in Iraq and Afghanistan.

The criminal case brought under the German Code of Crimes against International Law (CCIL) in November 2004 requested an investigation into war crimes allegedly carried out by high ranking American civilian and military officials, including (former) U.S. Secretary of Defense Donald Rumsfeld and current Attorney General Alberto Gonzales. The charges included violations of the German Code, "War Crimes against Persons," which outlaws killing, torture, cruel and inhumane treatment, sexual coercion and forcible transfers. The Code makes criminally responsible those who carry out the above acts as well as those who induce, condone or order the acts. It also makes commanders liable, whether civilian or military, who fail to prevent their subordinates from committing such acts.

The German CCIL grants German Courts what is called Universal Jurisdiction for the above-described crimes. The recourse to the German universal justice system seemed necessary as the United States has clearly and repeatedly shown that it is unwilling to investigate the criminal responsibility of the officials named in the complaint.

United States' Repeated Threats and Political Pressure on Germany in Order to Obtain a Dismissal of the Rumsfeld Case Constituted a Violation of the Independence of the Judiciary

As soon as the lawsuit against Donald Rumsfeld and others was made public, the Pentagon warned German authorities that such "frivolous lawsuits", if taken seriously by the German judiciary, would affect the broader US-Germany relationship. In addition, the Pentagon canceled Rumsfeld's participation at February 2005 Munich Security Conference until the prosecutor finally rejected the complaint, two days before the conference took place. Deutsche Press-Agentur reported on 13 December 2004 "*Rumsfeld to scrap German visit if probe launched.*" By the end of January 2005, as the German Federal Prosecutor still had not officially refused to begin investigating the allegations made in the complaint, the US embassy in Germany announced that Secretary of Defense Rumsfeld had canceled his trip to Munich, while US defense secretaries have rarely missed the Munich Conference.

On 10 February 2005, a day before the Munich conference, the German Federal Prosecutor dismissed the complaint with very limited legal justification. Two days later Secretary of Defense Rumsfeld made his appearance at the Security Conference, where he delivered a speech, confirming that the reason he threatened not to come was directly related to the dismissal of the criminal complaint against him and other high officials.

The behavior of the American Government and especially of the Pentagon to pressure German prosecutorial authorities to reject the complaint not for legal reasons but for political interests is an irrefutable violation of the universally recognized principles of the independence of the judiciary, in particular established in the “Basic Principles on the Independence of the Judiciary,” adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

States also have the crucial duty to ensure that prosecutors can carry out their professional functions impartially and objectively, therefore both the United States and Germany committed a violation of that principle in the present case. Guideline No. 4 of the “Guidelines on the Role of Prosecutors,” adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, provides: “*States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.*” The timing of the dismissal combined with the threat not to attend the international conference is clear evidence that the pressure exercised was very strong.

German Prosecutor Did Not Fulfill his Duties in an Independent, Impartial and Objective Manner

The circumstances surrounding the dismissal, the unusual short length of the decision to dismiss and the lack of valid legal arguments or in-depth analysis as well as the lack of reference to the extensive additional evidence and documents submitted by the plaintiffs to his office in the end of January 2005, all indicate that the Prosecutor failed to act in an independent and impartial manner. This was in violation of the “Guidelines on the Role of Prosecutors.” Furthermore, prosecutors have even stronger duties to act in an independent way when the case submitted to them is related to the protection of human rights and to the prosecution of public officials. A crucial provision in the “Guidelines” says that “*Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law.*”

Finally, requirements of independence and prompt duty are all the greater when the case submitted provides the prosecutor with evidence of torture, such as the case filed in Germany. The Committee Against Torture did state that a public prosecutor commits a breach of his duty of impartiality if he fails to appeal for the dismissal of a judicial decision in a case where there is evidence of torture. (Communication N° 60/1996, *Khaled Ben M'Barek v. Tunisia*)

The Second Rumsfeld Case

The legal justification for the dismissing in the 2004 case was that, according to the Prosecutor: “*there are no indications that the authorities and courts of the United States of America are refraining, or would refrain, from penal measures as regards the violations described in the complaint.*” The passage of the Military Commissions Act of 2006 immunizing American officials and others from prosecution in the United States and much new evidence show this is not the case. Taking account of extraordinary new information that has come to light over the past two years, an updated 400-page complaint was filed in

November 2006 by CCR, FIDH and RAV on behalf of 12 Iraqi citizens who were held in Abu Ghraib, and one Saudi citizen still held at Guantánamo. More than 40 organizations and individuals joined the case as co-plaintiffs. Also, Rumsfeld's resignation the week before the filing meant that he could no longer try to claim immunity as a head of state or government official.

On 27 April 2007, Germany's Federal Prosecutor announced the refusal to proceed with an investigation. In the decision, the Prosecutor argued that the crimes were committed outside of Germany and the defendants neither reside in Germany, nor are they currently located in Germany, nor will they soon enter German territory. However, the German law of universal jurisdiction expressly states that it is a universal duty to fight torture and other serious crimes, no matter where they occur or what the nationality of the perpetrators and victims is. What's more, in the 2004 case, three of the defendants were still living in Germany, and yet, the former Prosecutor rejected the complaint.

The prosecutor also stated that investigations would not have had a reasonable chance of succeeding, but in addition to providing extensive evidence in the form of publicly-available documents and government memos, attorneys had secured the cooperation of General Janis Karpinski, former commander of Abu Ghraib and other U.S.-run prisons in Iraq, as well as other witnesses and victims who were willing to travel to Germany to testify before the court in Karlsruhe or meet with prosecutors to help them determine how to proceed with the case.

We believe that in the 2006-2007 Rumsfeld case, the German Federal Prosecutor, again, failed to fulfill his (her) duties in an independent, impartial and objective manner. In fact, the Federal Prosecutor's Office has systematically refused to take up a single case under the universal jurisdiction law for the five years since it was passed.

FIDH, CCR, RAV and LAW ask all members of the Human Rights Council to:

- **reaffirm the independence of the prosecutor, in particular for acts of torture involving public officials.**
- **address its concerns and recommendations to all the parties involved and to publicly shed light on the violations committed respectively by the United States government and the German justice system.**
