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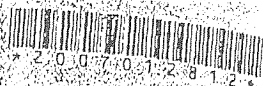
IMPLEMENTATION OF GENERAL ASSEMBLY RESOLUTION 60/251  
OF 15 MARCH 2006 ENTITLED "HUMAN RIGHTS COUNCIL"

Report of the Special Rapporteur on the independence of judges and lawyers,  
Leandro Despouy

Addendum

Situations in specific countries or territories\*

The present document is being circulated in the languages of submission only as it greatly exceeds the page limitations imposed by the relevant General Assembly resolutions.



ENG

threat, the investigation obtained a subpoena from the Rustavi City Court to get the information from the mobile phone company concerning the calls received on Ms. Bekauri's cell phone. The Government indicated that the investigation is still under way and assured the Special Rapporteur that all necessary measures were and shall be in future taken to secure the interest of justice as well as human rights of the injured person in this case.

### Special Rapporteur's comments and observations

153. The Special Rapporteur thanks the Government of Georgia for its cooperation and the substantive information it provided in response to the above allegations. He notes with great appreciation that Ms. Lela Bekauri was questioned and given the status of victim and would appreciate receiving additional information concerning the further developments in the investigation and the measures which are being carried out to ensure Ms. Bekauri's protection.

Germany

### Communications sent

154. On 13 July 2006, the Special Rapporteur sent an allegation letter expressing concern about an alleged violation of the independence of the judiciary in Germany in relation to a criminal complaint filed on 29 November 2004 against 10 high-ranking civil and military officials of the United States of America, including Secretary of Defense Donald Rumsfeld. According to the information received, the criminal complaint was filed with the German Federal Prosecutor's office at the Karlsruhe Court by the Berlin attorney Wolfgang Kaleck of the Republican Attorneys' Association, the New York-based Center for Constitutional Rights, the International Federation for Human Rights and Lawyers Against the War, on behalf of first four and later 17 Iraqi plaintiffs who allege they were the victims of very serious crimes amounting to torture, including severe beatings, sleep and food deprivation, hooding and sexual abuse, when they were detained in Iraq by the United States military. The complaint was filed under the German Code of Crimes against International Law (hereinafter "the German Code"). The charges include violations of the German Code which outlaws killing, torture, cruel and inhumane treatment, sexual coercion and forcible transfers. The German Code reportedly makes criminally responsible those who carry out such 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 Code reportedly grants German courts what is called universal jurisdiction for the above-described crimes, in light of article 1, part 1, section 1 of the Code, which states: "This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany." This is said to mean that those who commit serious crimes under this Act can be prosecuted, wherever found. Therefore, the German Code reportedly places a prosecuting duty on the German prosecutor for all such crimes, irrespective of the location of the person, the crime, or the nationality of the persons involved. According to the

information received, mainly originating from non-governmental organizations and the press, following the filing of the complaint, strong pressure was exercised by the United States of America on Germany to obtain the dismissal of the complaint. Such pressures included open threats to the effect that the bilateral relations between the two countries could be at risk if the complaint was not dismissed. In addition, the Pentagon was said to have openly threatened the German prosecution by indicating that Donald Rumsfeld would not attend the Munich Security Conference in February 2005 if the complaint was not dismissed. On 10 February 2005, two days before the Conference, the German prosecutor issued a decision to dismiss the case, thereby allowing Secretary Rumsfeld to attend. The Special Rapporteur expressed deep concern that a decision by the prosecutor on a case involving such serious crimes has been taken in a context of strong political pressure exerted by the country of citizenship of the defendants. He noted that it was difficult to believe that whereas the prosecutor had been seized of the matter for little more than two months, the decision to dismiss the complaint came just two days before the Munich Conference, just in time to allow the Secretary of Defense to attend. In addition, the Special Rapporteur expressed concern about the weakness of the legal justification of the dismissal. The prosecutor justified the dismissal by alleging that by virtue of the principle of subsidiarity, the German system should only prosecute under universal jurisdiction when the State first called upon to adjudicate (in this case the State of citizenship of the defendants), or an international court, is unwilling or unable to prosecute, and that in this case there are no indications that the authorities of the United States of America are refraining or would refrain from prosecuting the violations described in the complaint. According to the prosecutor, the prosecution of the violations is therefore left to the judicial authorities of the United States of America, and he therefore dismissed the case. In relation to this analysis, the Special Rapporteur emphasized that the criminal procedures against low-ranking figures for crimes committed in Abu Ghraib and other detention facilities have shown the unwillingness of the military criminal justice system to look into the involvement of those higher up the chain of command. Moreover, in the United States of America's military criminal justice system, the main defendant, Donald Rumsfeld, sits as the ultimate convening authority; therefore, the basic requirements for an independent trial cannot be fulfilled. Also, the Congress of the United States of America, vested by the Constitution with oversight authority, failed to seriously investigate the abuses and none of the various commissions appointed by the military and the Bush administration has been willing to investigate higher up the chain of command to consider what criminal responsibility lies with the military and political leadership. Finally, there are no international or Iraqi courts that can carry out investigations and prosecutions since the United States of America has not joined the International Criminal Court, thereby foreclosing the option of pursuing a prosecution in international courts, and Iraq has no authority to prosecute since the United States of America gave immunity to all its personnel in Iraq from Iraqi prosecution. In the light of the elements mentioned above, which suggest that the prosecutorial authority would have failed to act in an impartial, independent and objective manner, the Special Rapporteur expressed his deep concern regarding the violation of the principle of the independence of the judiciary as enshrined in recognized international norms and standards, including article 14 of the International Covenant on Civil and Political Rights and the Basic Principles on the Independence of the Judiciary, in particular principle 1, which states "The independence of the judiciary shall

be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary, and principle 4, which states "There shall not be any inappropriate or unwarranted interference with the judicial process". In addition, guideline 4 of the Guidelines on the Role of Prosecutors stipulates that "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".

155. Moreover, the elements mentioned above, added to the unusually short length of the decision to dismiss and the lack of reference to the extensive arguments and documents submitted by the plaintiffs, suggest that the prosecutor has failed to comply with his obligations of independence, impartiality and objectivity, in particular as set out under guideline 13 which states: "In the performance of their duties, prosecutors shall: (a) carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination; (b) protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect". The Special Rapporteur pointed out that such duties are even more compelling when the crimes to be prosecuted are committed by public officials and still more so when they relate to grave violation of human rights, as set out in guideline 15, which states: "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 and, where authorized by law or consistent with local practice, the investigation of such offences".

#### Communications received

156. On 22 August 2006 the Government of Germany replied to the allegation letter sent by the Special Rapporteur on 13 July 2006. The Government stated that on 29 November 2004, Berlin attorney (Wolfgang Kaleck) filed a criminal complaint on behalf of the United States Center for Constitutional Rights and 17 Iraqi nationals against Secretary of Defense Donald Rumsfeld and others relating to alleged offences under the German Code of Crimes against International Law (CCAIL). The way in which this complaint was dealt with by the Public Prosecutor General of the Federal Court of Justice, the public prosecutor responsible for prosecuting crimes under the CCAIL, was in accordance with German law. Contrary to the assumption made by the Special Rapporteur, the Public Prosecutor General of the Federal Court of Justice was not in fact issued with any instructions by the Federal Ministry of Justice, nor was any other influence exerted on him by the Federal Government to persuade him not to launch investigations into the occurrences at Abu Ghraib. The Public Prosecutor General of the Federal Court of Justice based his decision of 10 February 2005 not to follow up on the complaint on section 153f of the German Code of Criminal Procedure (*Strafprozessordnung – StPO*), which relates to the principle of universal jurisdiction found in the CCAIL, and which states that under certain conditions the prosecutor has discretion to refrain from starting an investigation. The Public Prosecutor General published the full reasons for this step in a press release. The complainants' appeal against the non-institution of an investigation was rejected by the Higher Regional Court

in Stuttgart on 13 September 2005. Irrespective of the fact that in this particular case the Public Prosecutor General's decision not to launch an investigation had not been taken pursuant to instructions or under undue influence, it should be noted that the fact that public prosecutors in Germany are as a matter of principle subject to instructions is in line with the relevant United Nations instruments and guidelines.

157. With respect to universal jurisdiction under the CCAIL and the principle of subsidiarity, the Government stated that while universal jurisdiction applies to offences under the CCAIL, which means that no link of any kind to Germany is required for prosecutions under that Act, it does not legitimate prosecutions unconditionally and without further ado. The aim of the CCAIL is to put an end to impunity. This must, however, be done against the backdrop of non-interference in the affairs of other States. This conclusion is also to be drawn from article 17 of the Rome Statute of the International Criminal Court, in the light of which the CCAIL is to be read. The German legislator did not make allowances for subsidiarity in the CCAIL itself; no exceptions to universal jurisdiction were made. Rather, universal jurisdiction was made the general rule and the principle of subsidiarity, enshrined in the Rome Statute, was taken account of by means of a procedural rule inserted into the StPO as section 153f at the time of adoption of the CCAIL. The Rome Statute is used as an interpretive aid for the application of the German CCAIL. The duty to prosecute crimes under the CCAIL is thus not absolute if other jurisdictions are called upon to act. In the first instance, the country where the offences were committed or the State of citizenship of the defendants or victims, or a competent international court, should act. The jurisdiction of unrelated third-party States is to be viewed as a fallback jurisdiction designed to avoid impunity, but it should not unreasonably sideline the primary forums.

158. The decision taken by the Public Prosecutor General of the Federal Court of Justice within his discretion on the basis of these conditions was also found by the Higher Regional Court in Stuttgart to be subject to no fault on points of law (decision of 13 September 2005). The Stuttgart Higher Regional Court examined whether the conditions set out in section 153f were fulfilled and affirmed that they were, and also considered whether the Public Prosecutor General had properly exercised the discretion given to him for this purpose or whether he had overstepped the line and acted arbitrarily. The Higher Regional Court in Stuttgart held that the Public Prosecutor General's decision which was the subject of the complaint was not arbitrary, nor was it outside his discretion.

159. The position of Public Prosecutor's Offices in Germany is in conformity with the requirements of United Nations instruments and guidelines. The Public Prosecutor's Office in Germany is an organ of the criminal justice system, equal in rank to the courts. It is charged with investigating crimes and presenting cases in court. The Public Prosecutor's Office puts the criminal courts in a position to exercise their judicial powers, and is thus part of the judicial system, without having judicial powers of its own. Insofar as it is mandatory for the Public Prosecutor's Office to prosecute certain offences, and it has a monopoly on bringing prosecutions, it acts as a "guardian of the law". Its duty to prosecute ensures that the law is applied uniformly and fairly and prevents arbitrariness. Public prosecutors are not independent, as are the judiciary, but are bound by the instructions of

their superiors (and ultimately the Minister of Justice) and are thus to that extent part of the executive. The Public Prosecutor's Office is accountable to parliament through the Minister of Justice, who is also under the same duty to ensure that prosecutions are brought. This system of accountability is supported by the general instructions that prosecutors must abide by, as well as by reporting duties and instructions in specific cases. These controls are in conformity with the relevant United Nations instruments and guidelines. Also, neither the European Convention on Human Rights nor article 14 of the International Covenant on Civil and Political Rights stipulates that prosecutors must be independent and cannot be given orders by their superiors. As regards the Guidelines on the Role of Prosecutors, it should be clearly stated that the inclusion of the list of means of exerting undue pressure does not mean that prosecuting agencies must in all situations be entirely independent and subject to no instructions from superiors whatsoever.

### Special Rapporteur's comments and observations

160. The Special Rapporteur thanks the Government for its cooperation and for the information it provided in its reply of 22 August 2006. He notes with concern that the alleged perpetrators of the violations referred to in his allegation letter of 13 July 2006 have still not been prosecuted in the United States of America, and that on the contrary new legislation has been adopted in that country which practically impedes the prosecution of public officials suspected of being responsible for those acts. In light of this development, he notes that a new complaint has been submitted to the German prosecutor by the plaintiffs. In this context, the Special Rapporteur hopes that this complaint will be considered with the required independence, in accordance with applicable international norms and standards.

### Greece

#### Communications sent

161. On 2 June 2006, the Special Rapporteur sent a joint allegation letter together with the Special Representative of the Secretary-General on the situation of human rights defenders concerning Theo Alexandridis, legal counsel with the Greek Helsinki Monitor (GHM), and other staff members of GHM. GHM is an organization that monitors and reports on human rights violations in Greece, including violations against the Roma community. According to the information received, on 19 April 2005 the Greek Minister of Health and the Secretary-General of Social Solidarity publicly accused non-governmental organizations of "existing only on paper" and of "publishing negative reports on the basis of unreliable, exaggerated and misleading information on the victims of the smuggling of human beings in Greece, in order to obtain an increase in funding from the Greek Ministry of Foreign Affairs". It is reported that GHM was specifically named in these accusations. It is further reported that GHM lodged a complaint against the Minister of Health and the Secretary-General of Social Solidarity. On 13 October 2005 Mr. Alexandridis was arrested and detained in the Psair neighbourhood of Aspropyrgos, near Athens. It is reported that Mr. Alexandridis had gone to the police station to lodge a complaint against parents of non-Roma children who had allegedly committed violent acts against demonstrators protesting