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Observations on the scope and application of the universal criminal jurisdiction in the work of the Council of Europe

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Public International Law Division,
Directorate of Legal Advice and Public International Law, DLAPIL

cahdi@coe.int - fax +33 (0)3 90 21 51 31 - www.coe.int/cahdi

OBSERVATIONS ON THE SCOPE AND APPLICATION OF THE UNIVERSAL CRIMINAL JURISDICTION IN THE WORK OF THE COUNCIL OF EUROPE

I. The Council of Europe's Conventions

Ten Conventions of the Council of Europe[1] contain provisions calling upon States to ensure that their internal law establishes the jurisdiction of their criminal courts to judge a given conduct, but none of them foresees the establishment of the so-called "universal' criminal jurisdiction. Notwithstanding the foregoing, the Council of Europe Conventions do not limit the possibility for the internal law of States Party to establish other types of jurisdiction[2] than that/those contemplated in the Conventions. The latter do not therefore prevent States Party whose internal law do so from making use of the so-called "universal" jurisdiction.

The explanatory memoranda of the Conventions containing provisions of this nature, but also of other Conventions, provide additional information in this respect and at times include direct references to the concept of "universal jurisdiction".[3] The explanatory memoranda are available on the Internet website of the Treaty Office of the Council of Europe: http://conventions.coe.int.

II. The work of the Committee of Ministers

The Committee of Ministers recently adopted a reply to Recommendation 1953 (2011) of the Parliamentary Assembly of the Council of Europe entitled "The obligation of member and observer states of the Council of Europe to co-operate in the prosecution of war crimes". Its reply makes reference to the issue of the "universal jurisdiction".

Reply of the Committee of Ministers to the Recommendation 1953 (2011) "The obligation of member and observer states of the Council of Europe to co-operate in the prosecution of war crimes" (Extracts)

Adopted at the 1145th meeting of the Ministers' Deputies (13 June 2012)

"(...) 5. With respect to the Assembly's recommendation that the Committee of Ministers instruct the European Committee on Crime Problems and the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters to assess – in transparent consultation with civil society – the application of the *aut dedere aut iudicare* principle (extradite or prosecute) and arrangements to transpose into domestic law the principle of universal jurisdiction over war crimes and crimes against humanity, the Committee of Ministers recalls that the principle "extradite or prosecute" is already enshrined in the European Convention on Extradition. According to Article 6 paragraph 2 of the Convention, a requested Party that refuses to extradite a national, shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken.

[1] European Convention on the Transfer of Proceedings in Criminal Matters (Council of Europe Treaty Series No. 73), Part II; European Convention on the Suppression of Terrorism (CETS No. 90), Article 6.1; Convention on the Protection of Environment through Criminal Law (CETS No. 172) Articles 5.1 and 5.2; Criminal Law Convention on Corruption (CETS No. 173) Article 17.1; Convention on Cybercrime (CETS No. 185) Article 22.1; Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) Articles 14.1 and 14.2; Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) Articles 31.1 and 31.2; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) Articles 25.1 to 25.6; Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210) Articles 44.1 to 44.4; Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211) Articles 10.1 and 10.2.

[2] CETS No. 73, Art. 5; CETS No. 90, Art. 6.2; CETS No. 172, Art. 5.3; CETS No. 173, Art. 17.4; CETS No. 185, Art. 22.4; CETS No. 196, Art. 14.4; CETS No. 197, Art. 31.5; CETS No. 201, Art. 25.9; CETS No. 210, Art. 44.7; CETS No. 211, Art. 10.6.

[3] See the explanatory memoranda of Conventions CETS No. 172 and 173, as well as that of the European Convention on the International Validity of Criminal Judgments (CETS No. 70).

6. The Committee of Ministers furthermore notes that several member States of the Council of Europe have acknowledged the principle of universal jurisdiction. However, there is no international consensus on the definition and scope of this principle, as the exercise of universal jurisdiction is in practice often subject to legal limitations defined in national legislation. Considerable challenges therefore remain for domestic legal systems to ensure the exercise of universal jurisdiction efficiently and effectively.

7. The Committee of Ministers therefore considers that the Council of Europe could reinforce the application of the principle of *aut dedere aut judicare* as a means of prosecuting war crimes effectively in cases where universal jurisdiction cannot be exercised. It also encourages enhancing co-operation between the member and observer States. The Committee considers that the standard-setting work in progress on the subject is already addressing the criminal law and criminal procedural law questions which arise in relation to the prosecution of war crimes.(…)"

III. The case-law of the European Court of Human Rights

The jurisdiction of the European Court of Human Rights extends "to all matters concerning the interpretation and application of the [European] Convention [on Human Rights] (hereafter ECHR) and the protocols thereto"[4] which are referred to it. Accordingly, the Court is not in a position to examine *in abstracto* the question of "universal jurisdiction".

The Court can only therefore verify the application of "universal jurisdiction" by the authorities of a State Party to the Convention in relation to the examination in a concrete case of the conformity of such an application with the rights and freedoms guaranteed by the Convention and the protocols thereto. The Court has for instance been called upon to conduct such a review in the cases *Jorgic v. Germany*[5] and *Ould Dah v. France*,[6] respectively in light of the provisions of Article 6 of the Convention which guarantees the right to a fair trial and the provisions of Article 7 of the Convention which guarantees the principle that offences and penalties must be defined by law.

Judgment in the case *Jorgic v. Germany* (Extracts)

" (…) **THE FACTS**

(…) 7. In 1969 the applicant, a national of Bosnia and Herzegovina of Serb origin, entered Germany, where he legally resided until the beginning of 1992. He then returned to Kostajnica, which forms part of the city of Doboj in Bosnia, where he was born.

8. On 16 December 1995 the applicant was arrested when entering Germany and placed in pre-trial detention on the ground that he was strongly suspected of having committed acts of genocide.

(…) **THE LAW**

55. The applicant complained that his conviction for genocide by the Düsseldorf Court of Appeal, as upheld by the Federal Court of Justice and the Federal Constitutional Court, which he alleged had no jurisdiction over his case, and his ensuing detention amounted to a violation of Article 5 § 1 (a) and Article 6 § 1 of the Convention (…)

64. The Court finds that the case primarily falls to be examined under Article 6 § 1 of the Convention under the head of whether the applicant was heard by a "tribunal established by law". It reiterates that this expression reflects the principle of the rule of law, which is inherent in the system of protection established by the Convention and its Protocols. "Law", within the meaning of Article 6 § 1, comprises in particular the legislation on the establishment and competence of judicial organs (see, inter alia, Lavents v. Latvia, no. 58442/00, § 114, 28 November 2002). Accordingly, if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not "established by law" within the

[4] Article 32 ECHR
[5] ECtHR, *Jorgic v. Germany*, No. 74613/01, judgment of 12 July 2007.
[6] ECtHR, *Ould Dah v. France*, No. 13113/03, decision on admissibility of 17 March 2009.

meaning of Article 6 § 1 (compare Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, §§ 99 and 107-08, ECHR 2000-VII).

65. The Court further reiterates that, in principle, a violation of the said domestic legal provisions on the establishment and competence of judicial organs by a tribunal gives rise to a violation of Article 6 § 1. The Court is therefore competent to examine whether the national law has been complied with in this respect. However, having regard to the general principle according to which it is in the first place for the national courts themselves to interpret the provisions of domestic law, the Court finds that it may not question their interpretation unless there has been a flagrant violation of domestic law (see, mutatis mutandis, Coëme and Others, cited above, § 98 in fine, and Lavents, cited above, § 114). In this respect the Court also reiterates that Article 6 does not grant the defendant a right to choose the jurisdiction of a court. The Court's task is therefore limited to examining whether reasonable grounds existed for the authorities to establish jurisdiction (see, inter alia, G. v. Switzerland, no. 16875/90, Commission decision of 10 October 1990, unreported, and Kübli v. Switzerland, no. 17495/90, Commission decision of 2 December 1992, unreported).

(…) 66. The Court notes that the German courts based their jurisdiction on Article 6 no. 1 of the Criminal Code, taken in conjunction with Article 220a of that Code (in their versions then in force). These provisions provided that German criminal law was applicable and that, consequently, German courts had jurisdiction to try persons charged with genocide committed abroad, regardless of the defendant's and the victims' nationalities. The domestic courts had therefore established jurisdiction in accordance with the clear wording of the pertinent provisions of the Criminal Code.

67. In deciding whether the German courts had jurisdiction under the material provisions of domestic law, the Court must further ascertain whether the domestic courts' decision that they had jurisdiction over the applicant's case was in compliance with the provisions of public international law applicable in Germany. It notes that the national courts found that the public international law principle of universal jurisdiction, which was codified in Article 6 no. 1 of the Criminal Code, established their jurisdiction while complying with the public international law duty of non-intervention. In their view, their competence under the principle of universal jurisdiction was not excluded by the wording of Article VI of the Genocide Convention, as that Article was to be understood as establishing a duty for the courts named therein to try persons suspected of genocide, while not prohibiting the prosecution of genocide by other national courts.

68. In determining whether the domestic courts' interpretation of the applicable rules and provisions of public international law on jurisdiction was reasonable, the Court is in particular required to examine their interpretation of Article VI of the Genocide Convention. It observes, as was also noted by the domestic courts (see, in particular, paragraph 20 above), that the Contracting Parties to the Genocide Convention, despite proposals in earlier drafts to that effect, had not agreed to codify the principle of universal jurisdiction over genocide for the domestic courts of all Contracting States in that Article (compare paragraphs 20 and 54 above). However, pursuant to Article I of the Genocide Convention, the Contracting Parties were under an erga omnes obligation to prevent and punish genocide, the prohibition of which forms part of the jus cogens. In view of this, the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing). Having thus reached a reasonable and unequivocal interpretation of Article VI of the Genocide Convention in accordance with the aim of that Convention, there was no need, in interpreting the said Convention, to have recourse to the preparatory documents, which play only a subsidiary role in the interpretation of public international law (see Articles 31 § 1 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969).

69. The Court observes in this connection that the German courts' interpretation of Article VI of the Genocide Convention in the light of Article I of that Convention and their establishment of jurisdiction to try the applicant on charges of genocide is widely confirmed by the statutory provisions and case-law of numerous other Contracting States to the Convention (for the Protection of Human Rights and Fundamental Freedoms) and by the Statute and case-law of the ICTY. It notes, in particular, that the Spanish Audiencia Nacional has interpreted Article VI of the Genocide Convention in exactly the same way as the German courts (see paragraph 54 above). Furthermore, Article 9 § 1 of the ICTY Statute confirms the German courts' view, providing for concurrent jurisdiction of the ICTY and national courts, without any restriction to domestic courts of particular countries. Indeed, the principle of universal jurisdiction for genocide has been expressly acknowledged by the ICTY (see paragraphs 50-51 above) and numerous Convention States authorise the prosecution of genocide in accordance with that principle, or at least where, as in the applicant's case, additional conditions – such as those required under the representation principle – are met (see paragraphs 52-53 above).

70. The Court concludes that the German courts' interpretation of the applicable provisions and rules of public international law, in the light of which the provisions of the Criminal Code had to be construed, was not arbitrary. They therefore had reasonable grounds for establishing their jurisdiction to try the applicant on charges of genocide.

71. It follows that the applicant's case was heard by a tribunal established by law within the meaning of Article 6 § 1 of the Convention. There has therefore been no violation of that provision.

72. Having regard to the above finding under Article 6 § 1, namely, that the German courts had reasonably assumed jurisdiction to try the applicant on charges of genocide, the Court concludes that the applicant was also lawfully detained after conviction "by a competent court" within the meaning of Article 5 § 1 (a) of the Convention. Accordingly, there has been no violation of that Article either. (…)"

Decision in the case *Ould Dah v. France*

"(…) **THE FACTS**

The applicant, Mr Ely Ould Dah, is a Mauritanian national, who was born in 1962. (…).

A. The circumstances of the case

(…) On 8 June 1999 the International Federation for Human Rights (Féderation Internationale des Ligues des Droits de l'Homme) and the Human Rights League (Ligue des droits de l'homme) lodged a criminal complaint against the applicant, together with an application to join the proceedings as civil parties, for acts of torture allegedly committed by him in Mauritania in 1990 and 1991. These criminal proceedings were based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984, which was ratified by France and came into force on 26 June 1987.

(…) On 1 July 2005 the Assize Court delivered two judgments. In the first one it sentenced the applicant to ten years' imprisonment for intentionally subjecting certain persons to acts of torture and barbarity and, in addition, causing such acts to be committed against other detainees by abuse of his official position or giving instructions to servicemen to commit such acts. The Assize Court referred, inter alia, to Articles 303 and 309 of the former Criminal Code, Article 222-1 of the Criminal Code, and to the New York Convention of 10 December 1984. In the second judgment it awarded damages to the various civil parties. (…)

COMPLAINTS

Relying on Article 7 of the Convention, the applicant complained that he had been prosecuted and convicted in France for offences committed in Mauritania in 1990 and 1991, whereas he could not have foreseen that French law would prevail over Mauritanian law; that French law did not classify torture as a separate offence at the material time; and that the provisions of the new Criminal Code had been applied to him retrospectively.

THE LAW

The applicant complained that he had been prosecuted and convicted by the French courts. He relied on Article 7 of the Convention (…)

The Court (…) notes that the applicant did not dispute the jurisdiction of the French courts, which is a question that does not fall within the scope of Article 7 of the Convention, but complained that they applied French law rather than Mauritanian law, in conditions that contravened the requirements of Article 7.

The Court observes that in its judgment Achour v. France it held that "the High Contracting Parties [are free] to determine their own criminal policy, which is not in principle a matter for it to comment on" and that "a State's choice of a particular criminal justice system is in principle outside the scope of the supervision it carries out at European level, provided that the system chosen does not contravene the principles set forth in the Convention" (see Achour v. France [GC], no. 67335/01, §§ 44 and 51 respectively, ECHR 2006-IV). (…)

Article 7 of the Convention embodies, in general terms, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and prohibits in particular the retrospective application of the criminal law where it is to an accused's disadvantage (see Kokkinakis v. Greece, judgment of 25 May 1993, Series A no. 260-A, § 52). (…)

The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII, and Achour, cited above, § 43). (…)

In the present case the Court notes that the French courts enjoy, in certain cases, universal jurisdiction, the principle of which is laid down in Article 689-1 of the Code of Criminal Procedure. They may thus try the perpetrator of an offence regardless of his of her nationality or that of the victim and the place of the offence, subject to two conditions: the perpetrator must be on French territory and must be tried in application of certain international conventions.

The Court notes that these two conditions were met in the present case. Firstly, the applicant – an officer in the Mauritanian army and a Mauritanian national – was prosecuted in France and arrested when he was in France in 1999 and ultimately convicted in absentia on 1 July 2005 for having committed acts of torture and barbarity in Mauritania in 1990 and 1991. Secondly, the Court notes that at the material time the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984, was already in force and had been since 26 June 1987, including in France, which had previously incorporated that Convention into domestic law by Law no. 85-1407 of 30 December 1985, inserting a new Article 689-2 into the Code of Criminal Procedure to that end.

Furthermore, the prohibition of torture occupies a prominent place in all international instruments on the protection of human rights, such as the Universal Declaration of Human Rights, or the African Charter on Human and Peoples' Rights which is of particular applicability on the continent from which the applicant originates. Article 3 of the Convention also prohibits in absolute terms torture or inhuman or degrading treatment. It enshrines one of the basic values of democratic societies, and no derogation from it is permissible even in the event of a public emergency threatening the life of the nation (see Aksoy v. Turkey, of 18 December 1996, Reports 1996-VI, § 62; Assenov and Others v. Bulgaria, judgment of 28 October 1998, Reports 1998-VIII, § 93; and Selmouni v. France [GC], no. 25803/94, § 95, ECHR 1999-V).

The Court considers, concurring with the case-law of the ICTY, that the prohibition of torture has attained the status of a peremptory norm or jus cogens (see Al-Adsani v. the United Kingdom, 21 November 2001, § 60, Reports 2001-XI). Whilst it has accepted that States may nonetheless claim immunity in respect of civil claims for damages for torture allegedly committed outside the forum State (ibid., § 66), the present case does not concern the question of a State's immunity in respect of a civil claim by a victim of torture, but the criminal liability of an individual for alleged acts of torture (see, conversely, Al-Adsani, § 61).

Indeed, in the Court's view, the absolute necessity of prohibiting torture and prosecuting anyone who violates that universal rule, and the exercise by a signatory State of the universal jurisdiction provided for in the Convention against Torture, would be deprived of their very essence if States could exercise only their jurisdictional competence and not apply their legislation. There is no doubt that were the law of the State exercising its universal jurisdiction to be deemed inapplicable in favour of decisions or special Acts passed

by the State of the place in which the offence was committed, in an effort to protect its own citizens or, where applicable, under the direct or indirect influence of the perpetrators of such an offence with a view to exonerating them, this would have the effect of paralysing any exercise of universal jurisdiction and defeat the aim pursued by the Convention of 10 December 1984. Like the United Nations Human Rights Committee and the ICTY, the Court considers that an amnesty is generally incompatible with the duty incumbent on the States to investigate such acts.

It has to be said that in the present case the Mauritanian amnesty law was enacted not after the applicant had been tried and convicted, but specifically with a view to preventing him from being prosecuted. Admittedly, the possibility of a conflict arising between, on the one hand, the need to prosecute criminals and, on the other hand, a country's determination to promote reconciliation in society cannot generally speaking be ruled out. In any event, no reconciliation process of this type has been put in place in Mauritania. However, as the Court has already observed, the prohibition of torture occupies a prominent place in all international instruments relating to the protection of human rights and enshrines one of the basic values of democratic societies. The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law. In addition, the Court notes that international law does not preclude a person who has benefited from an amnesty before being tried in his or her originating State from being tried by another State, as can be seen for example from Article 17 of the Statute of the International Criminal Court, which does not list this situation among the grounds for dismissing a case as inadmissible.

Lastly, it can reasonably be concluded (as did the Nîmes Court of Appeal) from Articles 4 and 7, read together, of the Convention against Torture, which provide for an obligation on States to ensure that acts of torture are offences under their own law and that the authorities take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State, that not only did the French courts have jurisdiction but French law was also applicable. The Court notes, moreover, that the United Nations Committee against Torture, in its conclusions and recommendations relating to France dated 3 April 2006, expressly welcomed the judgment of the Nîmes Assize Court convicting the applicant.

Having regard to the foregoing, the Court considers, in the present case, that the Mauritanian amnesty law was not capable in itself of precluding the application of French law by the French courts that examined the case by virtue of their universal jurisdiction and that the judgment rendered by the French courts was well founded. (…)

It follows that the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention. (…)"

The judgments and decisions can be consulted in their entirety on the website of the European Court of Human Rights: www.echr.coe.int

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