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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

List of items discussed and decisions taken
Abridged report

44th meeting
Paris, 19-20 September 2012

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

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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

44th meeting, Paris, France, 19-20 September 2012

List of items discussed and decisions taken
Abridged report

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 44th meeting in Paris on 19 and 20 of September 2012 with Ms Edwige Belliard (France) in the Chair. The list of participants is set out in Appendix I to the meeting report.[1]

2. The CAHDI adopted its agenda as set out in **Appendix I** to the present report.

3. The CAHDI adopted the report of its 43rd meeting (Strasbourg, 29-30 March 2012), and authorised the Secretariat to publish it on the CAHDI's website.

4. The CAHDI took note of the developments concerning the Council of Europe since the last meeting of the Committee, as presented by Mr Manuel Lezertua, Jurisconsult and Director of Legal Advice and Public International Law (DLAPIL), set out in Appendix III to the meeting report. The CAHDI took note in particular of the recent developments concerning the Council of Europe Treaty Series as well as of the observations of DLAPIL on the scope and the application of the universal criminal jurisdiction in the work of the Council of Europe as set out in **Appendix II** to the present report.

5. The CAHDI considered the decisions of the Committee of Ministers relevant to its work. The Committee adopted its comments to the Parliamentary Assembly Recommendation 1995 (2012) "The International Convention for the Protection of all Persons from Enforced Disappearance" as set out in **Appendix III** to the present report.

6. The CAHDI considered national practices and case-law regarding State immunities on the basis of information provided by the delegations and invited them to submit or update their contributions to the relevant CAHDI database. The CAHDI took note in this respect of the updated contribution from Spain.

The CAHDI pursued its exchange of views on possibilities for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities. It took note of the reply submitted by Spain to the relevant questionnaire.

The Committee also took stock of the state of ratifications of the United Nations Convention on Jurisdictional Immunities of States and Their Property by the States represented within the CAHDI.

7. The CAHDI further considered the issue of organisation and functions of the Office of the Legal Adviser of the Ministry for Foreign Affairs on the basis of contributions from delegations. The delegations were invited to submit or to update their contributions to the relevant database at their earliest convenience. The CAHDI took note in this respect of the contributions submitted by Montenegro and Spain.

[1] Document CAHDI (2012) 20 prov

8. The CAHDI took note of the information regarding cases that have been submitted to national tribunals by persons or entities removed from the lists established by the UN Security Council Sanctions Committees. The delegations were also invited to submit or to update their contributions to the database on national implementation measures of UN sanctions and respect for human rights. The CAHDI took note in this respect of the updated contributions submitted by Ireland and the United States, as well as the contribution submitted by Spain.

9. The CAHDI addressed the issue of the accession of the European Union to the European Convention on Human Rights. The CAHDI took note of the Report of the 75th meeting of the Steering Committee for Human Rights (CDDH, Strasbourg, 19-22 June 2012) and of the report of the first negotiation meeting between the CDDH and the European Commission on the accession of the European Union to the European Convention on Human Rights (Strasbourg, 21 June 2012). In this respect, the Chair recalled the renewal of the mandate of Mr Erik Wennerström as observer of the CAHDI to the negotiation meetings between the CDDH and the European Commission. The CAHDI took note of the information transmitted by Mr Wennerström following the 2nd negotiation meeting (Strasbourg, 17-19 September 2012).

10. The CAHDI took note of cases brought before the European Court of Human Rights (ECtHR) involving issues of public international law and further invited delegations to keep the Committee informed of any judgments or decisions, pending cases or relevant forthcoming events.

11. In the context of its consideration of issues relating to the peaceful settlement of disputes, the CAHDI considered the last version of the document containing information on the International Court of Justice's jurisdiction under international treaties and agreements (document CAHDI (2012) 13 rev) and invited the delegations to submit to the Secretariat any relevant information for the update of the document.

12. In the framework of its activity as the European Observatory of Reservations to International Treaties, the CAHDI considered a list of outstanding reservations and declarations to international treaties and the follow-up given to them by the delegations. It invited delegations to submit to the Secretariat any relevant information for the update of the summary table as set out in document CAHDI (2012) 14 Addendum prov.

13. Concerning the work of the International Law Commission (ILC) and of the Sixth Committee, the CAHDI took note of the exchange of views between the Chair of the CAHDI, the Jurisconsult and Director of DLAPIL and the ILC (Geneva, 4 July 2012) and held an exchange of views with Sir Michael Wood, member of the ILC, on the recent activities of the latter.

14. With regard to consideration of current issues of international humanitarian law, the CAHDI took note of the presentation made by the representative of the International Committee of the Red Cross and held an exchange of views with Mr Fausto Pocar, President of the International Institute of Humanitarian Law.

15. The CAHDI took note of recent developments concerning the International Criminal Court (ICC).

16. The CAHDI took stock of recent developments concerning the implementation and functioning of other international criminal tribunals.

17. The CAHDI proceeded with exchanges of views regarding topical issues of international law.

18. In accordance with *Resolution CM/Res(2012)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods*, the CAHDI elected Liesbeth Lijnzaad (Netherlands) and Paul Rietjens (Belgium), respectively as Chair and Vice-Chair of the Committee for one year, as of 1 January 2013.

19. The CAHDI decided to hold its 45th meeting in Strasbourg on 25-26 March 2013. The Committee instructed the Secretariat, in liaison with the Chair of the Committee, to prepare in due course the provisional agenda of this meeting.

20. The CAHDI decided to inform the Secretary General that it considered it inappropriate to respond positively to the request for observer status within the CAHDI submitted by the International Institute for Humanitarian Law and underlined, however, that it was appropriate to pursue contacts with this Institute and to invite it to present to the CAHDI its reflections under the item of the agenda devoted to International Humanitarian Law when deemed useful for the Committee's work.

APPENDIX I

AGENDA

I. INTRODUCTION

1. Opening of the meeting by the Chair, Ms Edwige Belliard

2. Adoption of the agenda

3. Adoption of the report of the 43rd meeting

4. Statement by the Director of Legal Advice and Public International Law, Mr Manuel Lezertua

II. ONGOING ACTIVITIES OF THE CAHDI

5. Committee of Ministers' decisions of relevance to the CAHDI's activities, including requests for CAHDI's opinion

6. Immunities of States and international organisations

a. State practice and case-law

- recent national developments and updates of the website entries
- exchange of national practices on possibilities for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities

b. UN Convention on Jurisdictional Immunities of States and Their Property

7. Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs

a. Questions dealt with by offices of the Legal Adviser which are of wider interest and related to the drafting of implementing legislation of international law as well as foreign litigation, peaceful settlements of disputes, and other questions of relevance to the Legal Adviser

b. Updates of the website entries

8. National implementation measures of UN sanctions and respect for human rights

9. European Union's accession to the European Convention of Human Rights (ECHR)

10. Cases before the European Court of Human Rights involving issues of public international law

11. Peaceful settlement of disputes

12. Law and practice relating to reservations and interpretative declarations concerning international treaties: European Observatory of Reservations to International Treaties

- List of outstanding reservations and declarations to international treaties

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. The work of the International Law Commission (ILC) and of the Sixth Committee

- Presentation of the work of the International Law Commission (ILC) and of the Sixth Committee by Sir Michael Wood, Member of the ILC

- Exchange of views between the ILC, the Chair of the CAHDI and the Director of DLAPIL, Geneva, 4 July 2012

14. Consideration of current issues of international humanitarian law

- Intervention by Mr Fausto POCAR, President of the International Institute of Humanitarian Law

15. Developments concerning the International Criminal Court (ICC)

16. Implementation and functioning of other international criminal tribunals (ICTY, ICTR, Sierra Leone, Lebanon, Cambodia)

17. Topical issues of international law

IV. OTHER

18. Election of the Chair and Vice-Chair of the CAHDI

19. Date, venue and agenda of the 45th meeting of the CAHDI

20. Other business

APPENDIX II

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[2] 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[3] 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".[4] 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

[2] 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.

[3] 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.

[4] 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).

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.

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"[5] 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*[6] and *Ould Dah v. France*,[7] 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

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

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 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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APPENDIX III

COMMENTS OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

ON RECOMMENDATION 1995 (2012) OF THE PARLIAMENTARY ASSEMBLY "THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE"

1. On 28 March 2012, the Ministers' Deputies communicated to the Steering Committee for Human Rights (CDDH) and the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments, Recommendation 1995 (2012) of the Parliamentary Assembly on "*The International Convention for the Protection of All Persons from Enforced Disappearance*".

2. Under the terms of this Recommendation, the Parliamentary Assembly:

- reiterated its support for the *International Convention for the Protection of All Persons from Enforced Disappearance*;

- nevertheless recalled that the United Nations Convention notably:

  - fails to fully include in the definition of enforced disappearances the responsibility of non-State actors;
  - remains silent on the need to establish a subjective element (intent) as part of the crime of enforced disappearance ;
  - refrains from placing limits on amnesties or jurisdictional and other immunities ;
  - severely limits the temporal jurisdiction of the Committee on Enforced Disappearances ;

- invited the Committee of Ministers to:

  - urge all the Council of Europe member States which have not yet done so to sign, ratify and implement this Convention;

  - consider launching the process of preparing the negotiation, in the framework of the Council of Europe, of a European Convention for the Protection of All Persons from Enforced Disappearance.

3. At its 44th meeting (Paris, 19-20 September 2012), the CAHDI examined the aforementioned recommendation and adopted the following comments.

4. From the outset, the CAHDI welcomes the entry into force of the *United Nations International Convention for the Protection of All Persons from Enforced Disappearance* as well as the setting up of its monitoring mechanism, and in particular the Committee on Enforced Disappearances.

5. Moreover, the CAHDI notes that at its 65th meeting, the CDDH adopted an "Opinion on Recommendation 1995 on the International Convention for the Protection of All Persons from Enforced Disappearance" (Appendix III to its report of 1 July 2012, document CDDH(2012)R75), stating that it "*does not recommend at this stage carrying out new normative work in this field*". The CDDH considered that it was "*premature at this stage to assess the effectiveness of the United Nations Convention system*". The CAHDI agrees with the CDDH on this point, considering that it is too early to judge the effectiveness of the United Nations Convention, which came into force on 23 December 2010.

6. The first three points listed in the recommendation are (1) extending the definition of the crime of enforced disappearance to acts committed by non-State actors – on this point, the CAHDI

underlines that an Article 3 imposing obligations on States where acts of enforced disappearance are committed by non-State actors was added at the request of a number of States during the negotiations on the United Nations Convention, (2) including a subjective element (intent) in the definition, and (3) adding a provision to preclude amnesties and jurisdictional immunities. The CAHDI considers that it would be inappropriate to reopen the debate on these questions during any negotiations to be held in the framework of the Council of Europe. Indeed, the analysis of the *travaux préparatoires* of the United Nations Convention clearly demonstrates that these points have already been discussed in depth and the text of the United Nations Convention is the result of the consensus reached under these negotiations. It is not established that any new negotiations at the European level could produce any significant changes on these points.

7. In connection with the fourth point concerning the temporal jurisdiction of the Committee on Enforced Disappearances, this restriction would seem to have been prompted by the concern not to unduly burden the Committee right from the outset. The Committee can consequently only deal with cases of enforced disappearance emerging after the entry into force of the United Nations Convention, even where the causes of the disappearance have not yet been determined at the date of its entry into force. The CAHDI notes that this monitoring mechanism held its first session in November 2011. It has not yet examined any communications, but should receive, by the end of the year, the reports on implementation of the Convention by some twenty States having ratified it. It is therefore difficult for the moment to assess its functioning. Furthermore, the CAHDI stresses that the restriction on the temporal jurisdiction of the Committee on Enforced Disappearances is counterbalanced by the existence of mechanisms responsible for dealing with situations emerging before the entry into force of the United Nations Convention. These bodies operate both at the international level (in its reports, the Working Group on Enforced or Involuntary Disappearances, set up under Resolution 20 (XXXVI) of the Human Rights Commission of 18 December 1992, sets out observations on the individual communications submitted to it) and at the European level. In particular, the European Court of Human Rights has already ruled in cases of enforced disappearances, and declared itself competent *ratione temporis* to examine, under Article 2 in its procedural aspect, an allegation of enforced disappearance occurring prior to the entry into force of the ECHR in respect of the country in question (see *inter alia* the case of *Varnava et al. v. Turkey* [Grand Chamber], No. 16064/90, judgment of 18 September 2009).

8. The CAHDI notes that the United Nations Convention has only 34 States Parties to date, including only 11 Council of Europe member States. It is important to invite "*all the Council of Europe member States which have not yet done so to sign, ratify and implement this convention*", as Recommendation 1995 (2012) of the Parliamentary Assembly suggests, and to invite them to consider recognising the competence of the Committee on Enforced Disappearances. It would therefore be useful to focus efforts primarily on the universalisation of the United Nations Convention.

9. At this stage, the CAHDI considers that it is too early to assess the effectiveness of the United Nations Convention and its monitoring mechanism. It will only become possible to conduct such an assessment in light of the manner in which the States Parties implement this Convention as well as the practice adopted by the Committee on Enforced Disappearances.