...

THE FACTS

The applicant, Mr Ely Ould Dah, is a Mauritanian national, who was born in 1962. He was represented before the Court by Mrs C. Waquet, a member of the *Conseil d'Etat* and Court of Cassation Bar.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

Between November 1990 and March 1991 clashes occurred between Mauritanians of Arab-Berber origin and others belonging to black African ethnic groups. Some servicemen from these ethnic groups, accused of mounting a *coup d'état*, were taken prisoner. Some of them were subjected to acts of torture or barbarity by their guards, among whom was the applicant, an intelligence officer at the Nouakchott army headquarters in Mauritania, holding the rank of lieutenant.

On 14 June 1993 an amnesty law was passed in favour of members of the armed forces and the security forces who had committed offences between 1 January 1989 and 18 April 1992 in connection with the events giving rise to armed conflict and acts of violence. By virtue of that law, no proceedings were brought against the applicant for offences committed against prisoners.

In August 1998 the applicant, who was by then captain of the Mauritanian army, arrived in France for a training course at the Montpellier Infantry Academy.

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 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "the United Nations Convention against Torture"), 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.

The applicant was arrested on 1 July 1999.

On 2 July 1999 an investigation was begun and the applicant was charged with committing acts of torture or barbarity. He was placed in pre-trial detention until 28 September 1999, before being released on bail. The applicant absconded on an unknown date. A warrant was issued for his arrest in April 2000.

On 25 May 2001 the investigating judge committed the applicant for trial on charges of committing, and aiding and abetting acts of torture and barbarity. The judge based the indictment on the witness evidence of nine former servicemen and the widow of a tenth serviceman. Two of the witnesses, who had taken refuge in France, had been confronted with the applicant during the investigation, while the others had provided written statements. The applicant appealed against the committal order.

In a judgment of 8 November 2001, the Investigation Division of the Montpellier Court of Appeal declared the applicant's appeal inadmissible on the ground that it had been lodged too late. The applicant appealed on points of law.

On 6 March 2002 the Court of Cassation quashed the Investigation Division's judgment and remitted the case to the Nîmes Court of Appeal.

In a judgment of 8 July 2002, the Investigation Division of the Nîmes Court of Appeal upheld the order of the investigating judge and committed the applicant for trial before the Gard Assize Court. It found that the condition provided for in Article 1 of the United Nations Convention against Torture was satisfied, as the acts in question had been carried out in the context of an "ethnic purge" and a massive campaign of repression conducted by the Mauritanian government in power at the time, and that the applicant had acknowledged having acted in an official capacity, within the meaning of the Convention provisions, as an intelligence officer and member of the investigating committee. The Investigation Division also considered that the provisions of Articles 689, 689-1 and 689-2 of the Code of Criminal Procedure and Article 7 § 2 of the United Nations Convention against Torture vested jurisdiction in the French courts to try the case, apply French law and override an amnesty law passed by a foreign State where application of that law would result in a breach of France's international obligations and render the principle of universal jurisdiction totally ineffective. As the principle of lawfulness did not preclude an offence from being defined in a treaty or an international agreement, the latter prevailing over the law, it held that while "acts of torture" had, since the new Criminal Code, been classified as a "separate crime" defined and punishable under Articles 222-1 et seq. of the Criminal Code, such acts had previously constituted an aggravating circumstance in respect of certain offences, and particularly the crime of aggravated assault provided for in Articles 303 and 309 of the Criminal Code, now repealed, which was a crime punishable by "five to ten years' imprisonment". The Investigation Division concluded that the offence with which the applicant was charged – which constituted a crime – was not time-barred and that the only limit in terms of punishment was that only those penalties applicable at the relevant time could be imposed, unless a more lenient criminal law had since been passed.

In a judgment of 23 October 2002, the Court of Cassation dismissed an appeal on points of law lodged by the applicant, finding that the

Investigation Division had justified its decision in respect of all the points raised by the applicant.

As the applicant had absconded, a summons to appear before the Assize Court was served at the public prosecutor's office on 13 May 2005.

On 30 June 2005 the trial was held before the Gard Assize Court. Counsel for the accused was heard in the latter's absence.

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 by 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 United Nations Convention against Torture. In the second judgment it awarded damages to the various civil parties.

B. Relevant law

1. The former Criminal Code

Article 303

"Any criminals, irrespective of the type of offence they have committed, who use torture or commit acts of barbarity in the execution of their crime shall be punished as being guilty of murder.

Anyone who, in perpetrating their offence, uses torture or commits acts of barbarity shall be punished by five to ten years' imprisonment."

Article 309

"Anyone who has intentionally wounded another or committed violence or assault resulting in sickness or total unfitness for work for more than eight days shall be liable to between two months' and two years' imprisonment and to a fine of between 500 and 20,000 francs or to one of those penalties alone. ..."

2. Article 222-1 of the new Criminal Code (created by Law no. 92-684 of 22 July 1992 and brought into force on 1 March 1994)

Article 222-1

"Anyone who subjects another to torture or to acts of barbarity shall be liable to fifteen years' imprisonment.

The first two paragraphs of Article 132-23 relating to the minimum term of imprisonment shall apply to the offence provided for in the present Article."

The circular of 14 May 1993, which contains commentaries on the new Criminal Code and the provisions of the Law of 16 December 1992, specifies as follows:

"[t]he expression torture and acts of barbarity shall retain the meaning currently ascribed to it in the case-law where such acts are referred to as an aggravating circumstance."

Both the crime instituted by the law and the former aggravating circumstance of torture or acts of barbarity presuppose the establishment of an *actus reus*, consisting of the commission of one or more acts of exceptional seriousness which go beyond mere violence and cause the victim severe pain or suffering, and *mens rea*, consisting of the intention to deny a person their human dignity (Indictment Division of the Lyons Court of Appeal, judgment of 19 January 1996, commentary in *Recueil Dalloz*, 1996, p. 258, and cited in Article 222-1 of *Code pénal* ("Criminal Code"), ed. Litec).

According to the case-law of the Court of Cassation, the new provisions relating to torture and acts of barbarity ensure continuity of the definition of the offence as expressed in the former Criminal Code (*Bull. crim.* 11 May 2005, *Bull.* no. 146, appeal no. 05-81331: a court which commits an accused for trial before the Assize Court on the ground that Article 222-3 § 2 of the new Criminal Code – making it a crime to commit torture or acts of barbarity concurrently with a sexual offence – ensures continuity of the offence provided for in former Article 333-1, introduced by the Law of 23 December 1980 and making it an offence to commit indecent assault accompanied by torture or acts of barbarity, makes a proper application of successive criminal laws).

The circular of 14 May 1993 also specifies that the provisions of the new Criminal Code are of much broader application than those of the United Nations Convention against Torture, the latter applying only to acts perpetrated by public officials for specific motives. It also indicates that the new definition remedies substantial loopholes in the punishment of the crime by allowing not only the degree of injury suffered by the victim to be taken into account, but also the seriousness of the violent act in question, irrespective of its consequences. In particular, it remedies the disadvantages arising from the inability to punish attempted wilful assault under the former system.

3. The Code of Criminal Procedure

Article 379-2

"An accused who fails to attend the opening of his or her trial without a valid excuse shall be tried *in absentia* in accordance with the provisions of the present chapter. The same shall apply where the accused is recorded absent during the proceedings and it is not possible to stay the proceedings pending his or her return. ..."

Article 379-5

"An accused who is convicted *in absentia* cannot appeal."

Article 689

"Perpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by the French courts either where French law is applicable under the provisions of Book I of the Criminal Code or another statute, or where an international convention confers jurisdiction on the French courts to deal with the offence."

Article 689-1

"Under the international conventions referred to in the following Articles, anyone who is guilty of having committed any of the offences listed in these provisions outside the territory of the Republic and is present in France may be prosecuted and tried by the French courts. The provisions of the present Article shall apply to attempts to commit these offences, whenever an attempt is punishable."

Article 689-2

"For the implementation of the [United Nations] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984, anyone guilty of committing torture within the meaning of Article 1 of the Convention may be prosecuted and tried in accordance with the provisions of Article 689-1."

4. International texts prohibiting torture

(a) The United Nations Convention against Torture

Article 1

"1. For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

Article 2

"1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture."

Article 4

"1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

Article 5

"1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases:

(a) when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State;

(c) when the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."

Article 6

"1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in Article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the States referred to in Article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction."

Article 7

"1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall 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. In the cases referred to in Article 5, paragraph 2, the standards of evidence required for

prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in Article 4 shall be guaranteed fair treatment at all stages of the proceedings."

(b) Other international texts

(i) Universal Declaration of Human Rights of 10 December 1948

Article 5

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

(ii) Geneva Conventions of 12 August 1949

Article 3 [common to the four Geneva Conventions]

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

...

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

..."

(iii) European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

(iv) International Covenant on Civil and Political Rights of 16 December 1966

Article 7

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

The United Nations Human Rights Committee stated in 1992 in its General Comment No. 20 on Article 7 of the International Covenant that it had noted that some States had granted amnesty in respect of acts of torture, while stating that "amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible" (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 (1994), p. 30).

(v) American Convention on Human Rights of 22 November 1969

Article 5

"1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

(vi) Additional Protocol No. 2 of 8 June 1977 to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts

Article 4

"...

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

..."

(vii) African Charter on Human and Peoples' Rights of 27 June 1981

Article 5

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment, shall be prohibited."

(viii) Statute of the International Criminal Court

Article 17
Issues of admissibility

"1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

(a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;

(d) the case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist, as applicable:

(a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;

(b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

5. Decisions of international courts

In a judgment of 14 February 2002 (*Case concerning the Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v. Belgium)*, the International Court of Justice observed that the Democratic Republic of the Congo was no longer invoking the matter of Belgium's claim to exercise universal jurisdiction and decided to confine its examination to the issue of respect for the immunities which the Congolese Minister for Foreign Affairs enjoyed in the exercise of his functions. The question of the Belgian judge's powers and, accordingly, the exercise of universal jurisdiction was nonetheless addressed by certain judges in separate opinions annexed to the judgment (particularly, in the above-mentioned case, with regard to the universal jurisdiction *by default* thus exercised by Belgium).

In the case of *Prosecutor v. Anto Furundzija* (judgment of 10 December 1998 (IT-95-17/1-T)), the International Criminal Tribunal for the former Yugoslavia held as follows:

"153. Because of the importance of the values it protects, this principle [the principle of the prohibition against torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.

154. Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.

155. ... It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing

> for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators ...
>
> 156. Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. ..."

Similar findings can be found in the judgments *Prosecutor v. Mucić and Others* (16 November 1998, IT-96-21-T, § 454) and *Prosecutor v. Kunarac* (22 February 2001, IT-96-23-T and IT-96-23/1, § 466).

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, which provides:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

A. The parties' submissions

1. The Government

The Government submitted, as their main argument, that the present application was an abuse of rights within the meaning of Article 17 of the Convention, as the applicant had committed acts that were contrary to Article 3 of the Convention during the events that had taken place in

Mauritania in 1990 and 1991, in other words acts aimed at the destruction of the rights and freedoms set forth in the Convention.

In the alternative, the Government considered that the application was manifestly ill-founded. They pointed out first of all that the French law applied to the applicant was accessible and foreseeable. At the material time, the rules of universal jurisdiction contained in the United Nations Convention against Torture had been incorporated into French law, namely, into Article 689-2 of the Code of Criminal Procedure which had been inserted by a Law of 30 December 1985. The United Nations Convention against Torture had, moreover, been legally ratified as early as 1985, before coming into force on 26 June 1987. Furthermore, acts of torture had been punishable under Article 303 of the former Criminal Code as aggravating circumstances. In the Government's submission, the applicant could not therefore claim that the law was inaccessible. They also rejected the applicant's submission that the criminal law was drafted in a language he did not understand, since the applicant had undergone military training of a very high level in France after passing an entrance examination in French. With regard to foreseeability, the Government observed that the applicant had been assisted by counsel of his own choosing and that the system of jurisdiction applied by the French courts derived from an international instrument of universal application and was therefore foreseeable. They considered, accordingly, that the applicant could not seriously claim to have been unaware that, as an intelligence officer in charge of a camp in which dozens of Mauritanian soldiers of sub-Saharan origin were tortured, the acts committed were punishable under international law and that he could not rely on a Mauritanian amnesty law, having regard to the blanket prohibition of torture enshrined in international law.

The Government submitted that the offence of torture had existed in French law before the entry into force of the new Criminal Code, at the time of the commission of the offence. Firstly, it was incumbent on States that had ratified the United Nations Convention against Torture to establish their jurisdiction in domestic law in respect of acts of torture, even where the acts in question had no direct link with the State. France had therefore adapted its legislation and enacted the provisions of Articles 689-1 and 689-2 of the Code of Criminal Procedure to that end. The Government pointed out, in particular, that the applicant had been convicted under Articles 303 and 309 of the Criminal Code applicable at the material time and also sentenced to ten years' imprisonment, which was the maximum sentence for torture at that time. They pointed out that while torture had not been a separate offence at the relevant time, it had nonetheless been legally classified as a criminal act carrying a criminal sentence.

Lastly, the Government observed that the exception provided for in Article 7 § 2 of the Convention was intended to prevent the legislation enacted after the Second World War with a view to punishing war crimes

and crimes against humanity from being called into question. In their submission, the "general principles of law recognised by civilised nations" referred to conventions for the protection of human rights of universal application. Under international law, the prohibition of acts of torture was not subject to any derogation.

2. The applicant

The applicant submitted that the reference to Article 17 of the Convention was irrelevant because he was not advocating the right of anyone to inflict torture. The purpose of his application was to determine the conditions in which a State could assume jurisdiction to judge a person and facts that did not concern it in any way, which was a sufficiently important question not to be eluded through Article 17. He pointed out that on changing regime, Mauritania had enacted an amnesty law that was designed to promote the reconstruction of the country, and that he claimed the benefit of that law.

Regarding the foreseeability of the law, his case was the first one of its kind in France and the possible jurisdiction of the French courts under the United Nations Convention against Torture did not mean that French law was applicable. Such an approach was, moreover, liable to render the law unforeseeable if all countries applied their own rules.

The applicant maintained that he had, furthermore, been convicted of an offence that had not been classified as a separate one at the material time.

Lastly, he submitted that the exception provided for in Article 7 § 2 was irrelevant to the question raised regarding application of the Mauritanian amnesty law, since an amnesty law did not amount to refusing to punish acts of torture, but was aimed at national reconciliation.

B. The Court's assessment

The Court reiterates at the outset that the purpose of Article 17 of the Convention, in so far as it refers to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention. Whereas no person may take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms, this Article, which is negative in scope, cannot be construed *a contrario* as depriving a physical person of the fundamental individual rights guaranteed by Articles 5 and 6 of the Convention (see *Lawless v. Ireland (no. 3)*, 1 July 1961, p. 45, § 7, Series A no. 3). In the Court's opinion, the same is true of the rights guaranteed under Article 7 of the Convention.

In the present case the applicant did not rely on the Convention in order to justify or perform acts contrary to the provisions of Article 3, but lodged

an application with the Court complaining of having been deprived of the guarantees afforded by Article 7 of the Convention. Consequently, he cannot be prevented from relying on them by virtue of Article 17 of the Convention.

The Court also 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 had applied French law rather than Mauritanian law, in conditions that contravened the requirements of Article 7.

The Court observes that in its *Achour v. France* judgment 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" ([GC], no. 67335/01, §§ 44 and 51, ECHR 2006-IV).

The Court also reiterates that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Korbely v. Hungary* [GC], no. 9174/02, § 69, ECHR 2008)

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*, 25 May 1993, § 52, Series A no. 260-A). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.

It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. When speaking of "law" ("*droit*"), Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statute law as well as case-law and implies qualitative requirements, including those of accessibility and foreseeability (see, in particular, *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V; *Achour*, cited above, §§ 41-42; and *Korbely*, cited above, § 70).

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).

Moreover, the Court reiterates that for the purposes of Article 7 § 1, however clearly drafted a provision of criminal law may be, in any legal system there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the States Parties to the Convention the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *S.W. v. the United Kingdom*, 22 November 1995, §§ 34-36, Series A no. 335-B; *C.R. v. the United Kingdom*, 22 November 1995, §§ 32-34, Series A no. 335-C; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; *Jorgic v. Germany*, no. 74613/01, § 101, ECHR 2007-III; and *Korbely*, cited above, § 71). Admittedly, that concept applies in principle to the gradual development of case-law in a given State subject to the rule of law and under a democratic regime, factors which constitute the cornerstones of the Convention, as its Preamble states, but it remains wholly valid where, as in the present case, an international instrument for the protection of human rights of universal scope has been enacted (see, *mutatis mutandis*, *Streletz, Kessler and Krenz*, cited above, § 82). Contrary reasoning would run counter to the very principles on which the system of protection put in place by the Convention is built (ibid., § 83).

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 United Nations

Convention against Torture 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*, 18 December 1996, § 62, *Reports* 1996-VI; *Assenov and Others v. Bulgaria*, 28 October 1998, § 93, *Reports* 1998-VIII; and *Selmouni v. France* [GC], no. 25803/94, § 95, ECHR 1999-V).

The Court considers, concurring with the case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY), that the prohibition of torture has attained the status of a peremptory norm or *jus cogens* (see *Al-Adsani v. the United Kingdom* [GC], no. 357631/97, § 60, ECHR 2001-XI). While 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, ibid., § 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 United Nations 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 United Nations Convention against Torture. 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 United Nations 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 that 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.

The question of the accessibility and foreseeability of the French law applied to the applicant now needs to be examined.

On this point the Court notes that at the time of the offence of which the applicant was accused, that is, prior to the entry into force of the new Criminal Code on 1 March 1994, both torture and acts of barbarity were expressly referred to in Article 303 of the Criminal Code. Under that provision, they constituted an aggravating circumstance resulting in either the same penalty as that incurred by a person guilty of murder, where they accompanied a crime, or in a prison sentence of between five and ten years

where they accompanied a major offence (*délit*). Article 309 referred to assault resulting in total unfitness for work for more than eight days.

The Court notes that the applicant was convicted, *inter alia*, under Articles 303 and 309 of the Criminal Code applicable at the relevant time, those provisions being expressly cited in the operative provisions of the decision. The applicant, for his part, considered that those provisions could not provide a basis for his conviction since they did not amount to separate offences but aggravating circumstances of the commission of a crime or major offence. Moreover, the judgment of the Assize Court expressly referred to Article 222-1 of the Criminal Code.

The Court notes, however, that acts of torture and barbarity were, as it has observed, expressly provided for in the Criminal Code applicable at the material time. The submission that at that time they constituted not separate offences but aggravating circumstances is not decisive in the present case: the perpetrator of a crime or major offence could in any event be legally accused of such acts, which constituted – on the basis of a special provision – supplementary elements distinct from the principal offence, resulting in a heavier penalty than the one carried by the principal offence. The Court notes, moreover, that the circular of 14 May 1993 commenting on the new offence expressly indicates that the expression "torture and acts of barbarity" retains the meaning ascribed to it in the case-law characterising such acts as aggravating circumstances. This was subsequently confirmed in the domestic case-law, the Court of Cassation even ruling that the new offences relating to torture and acts of barbarity ensured continuity of the offences provided for in the former Criminal Code. The Court also notes that the difference between the new offence and the former provisions can mainly be explained by the fact that the new provision is of broader application than that of the United Nations Convention against Torture since it was intended to remedy the loopholes in the legal provisions relating to prosecutions, but in situations that do not, however, relate to this case.

Furthermore, the penalty imposed on the applicant did not exceed the maximum one provided for in the former Article 303 of the Criminal Code applicable at the relevant time.

With regard to the provisions of Article 222-1 of the Criminal Code, which came into force on 1 March 1994, in the Court's view, these are essentially a development of the Criminal Code that have not introduced a new offence, but rather make legislative provision for conduct that had already been expressly referred to and classified as an offence by the former Criminal Code. It should be pointed out that the heaviest penalty available under Article 222-1 was not imposed on the applicant in the present case. There has not, therefore, been any problem of retrospective application.

Having regard to the foregoing, the Court considers that at the time when the offences were committed, the applicant's actions constituted offences that were defined with sufficient accessibility and foreseeability under

French law and international law, and that the applicant could reasonably, if need be with the help of informed legal advice, have foreseen the risk of being prosecuted and convicted for acts of torture committed by him between 1990 and 1991 (see, *inter alia*, *Achour*, cited above, § 54; *Jorgic*, cited above, § 113; and *Korbely*, cited above, § 70).

Accordingly, the applicant's conviction by the French courts was not in breach of Article 7 § 1 of the Convention.

In the light of that finding, the Court is not required to consider whether the conviction was justified under Article 7 § 2 of the Convention (see *Streletz, Kessler and Krenz*, cited above, § 108).

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

For these reasons, the Court unanimously

Declares the application inadmissible.