

*

* *

OULD DAH V FRANCE

ANALYSIS OF A REQUEST DISMISSED BY THE EUROPEAN COURT OF HUMAN RIGHTS:

SEEKING AN EXTENSION OF FRENCH UNIVERSAL JURISDICTION

Adrien PRADELS¹ | September 7, 2026

* *

*

§ABSTRACT. One of the conclusions of the case *Attorney-General of the Government of Israel v Adolf Eichmann* was the following: “It is the universal character of the crimes in question: international crimes which vests in every State the authority to try and punish those who participated in their commission”.² One of the modern illustrations of this principle is the universal jurisdiction of the French courts, which transcends the national sovereignty of the French State. Indeed, it grants to the latter the power to prosecute an individual without any direct connection with him, who had, according to GROTIUS, “excessively violate[d] the law [...] of nations with respect to anyone”.³

¹ TOULOUSE CAPITOLE UNIVERSITY & EUROPEAN HORIZONS TOULOUSE (EHT), ADRIEN.PRADELS@GMAIL.COM, [LINKEDIN](#). EHT is a global think tank founded in Toulouse in 2019 in order to promote reflection and dialogue on the future of the European project, European integration, and the European Union. The mission of this policy incubator is to raise awareness, spark debate, and bring European youth closer to the European project. To this end, EHT seeks to promote dialogue and exchange among European students, and is committed to enabling all students interested in the future of Europe to express their opinions.

² *Attorney-General of the Government of Israel v Adolf Eichmann* (1961) 36 ILR 298; *In the Matter of the Extradition of John Demjanjuk* (ND Ohio 1985); *Demjanjuk v Petrovsky* 776 F 2d 571 (6th Cir 1985).

³ Hugo GROTIUS, *De Jure Belli ac Pacis* (Book II Chapter XX §XL 1925).

§1. Nowadays, according to the INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY), “[i]t has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes”.⁴ Moreover, Articles 689 to 689-11⁵ of the Code of Criminal Procedure (CPP) stipulate that an individual cannot be sentenced if there is not an exact,⁶ accessible punishment foreseen⁷ for the infraction committed. As for Article 689-2, it provides the legislative provisions for the offence of torture according to the CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT of the United Nation (UNCAT).⁸ Indeed, the French universal jurisdiction is conventional-based: it is the provisions of ratified international treaties that enable its application.

§2. The decision of the EUROPEAN COURT OF HUMAN RIGHTS⁹ (ECTHR) given on 17 March 2009 opposed the French Republic against Mr ELY OULD DAH, an intelligence lieutenant officer in Mauritania.¹⁰ The latter is accused of acts of torture and barbarity committed against Mauritaniens of Arab-Berber origin and others belonging to black African ethnic groups (between November 1990 and March 1991). Nevertheless, no proceedings were undertaken towards the applicant, by virtue of an amnesty law from his home state (on 14 June 1993).¹¹

§3. Concerning the French proceedings, the applicant arrived in France in August 1998, and was arrested on 1 July 1999.¹² In its decision of 8 July 2002, the Investigation Division of the Nîmes Court of Appeal found that the offences had been committed as part of a large-scale ethnic purge, conducted during a campaign of repression by the Mauritanian authorities. Furthermore, Articles 689-2 of the CPP, combined

⁴ *Prosecutor v Anto Furundzija* no IT-95-17/1-T (ICTY, 10 December 1998) para 156.

⁵ “Any person who is present in France may be prosecuted and tried by French courts for any of the offences listed in the following articles, committed abroad, as provided by the relevant international conventions.”

⁶ Cesare BECCARIA, *Traité des délits et des peines* (1764).

⁷ Jean-Rousseau MONTESQUIEU, *De l'esprit des lois* (1748).

⁸ “For the application of the CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, adopted in New York on 10 December 1984 [General Assembly resolution 39/46], may be prosecuted and tried under the conditions laid down in Article 689-1 any person guilty of torture within the meaning of Article 1 of the Convention.” The latter was ratified by France and came into force on 26 June 1987.

⁹ This jurisdiction will be referred to below as the “Court”. The designation of the other jurisdictions will be specified.

¹⁰ *Ould Dah v France* req no 13113/03 (ECTHR, 17 March 2009) <hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-91980%22]}>.

¹¹ Law No 93-23 of 14 June 1993 on amnesty, Islamic Republic of Mauritania, which concerned the armed forces and the security forces who had committed offences between 1 January 1989 and 18 April 1992, “Any complaint, any verbal statement and all survey documents related to that period and concerning a person who has benefited from this amnesty will be closed without further action”.

¹² Following a criminal complaint filed by the INTERNATIONAL FEDERATION FOR HUMAN RIGHTS and the HUMAN RIGHTS LEAGUE, which had brought civil proceedings for alleged acts of torture under the aforementioned UNCAT.

with Article 7 §2¹³ of the EUROPEAN CONVENTION OF HUMAN RIGHTS¹⁴ empowered French courts to set aside a foreign amnesty law where necessary to ensure the effective exercise of universal jurisdiction.¹⁵ On 1 July 2005, the Gard Assize Court convicted the applicant *in absentia*, sentencing him to ten years' imprisonment for acts of torture and barbarity, confirming the French jurisprudential position.¹⁶

§4. The applicant subsequently complained of a violation of Article 7 of the Convention,¹⁷ advancing that he could not reasonably have foreseen that French law would take precedence over Mauritanian law, and that the French courts had retroactively applied the provisions of the new Criminal Code.¹⁸ The French Government argued that the complaint was manifestly ill-founded since Article 689-2 CPP, which implements UNCAT, has been in force since 1987; the prohibition of torture was therefore comparable to a “general principle of law recognized by civilized nations”, preventing reliance on the Mauritanian amnesty law.

§5. *Does the French courts' exercise of universal jurisdiction allow French criminal law to prevail over foreign law when adjudicating an undefined international crime?*

§6. The European Court of Human Rights unanimously declared the application ill-founded and so inadmissible under Article 35 §§3 and 4 of the Convention.¹⁹ The Court reiterated that Article 17 permits no derogation,²⁰ as it provides “effective safeguards against arbitrary prosecution”.²¹ It also emphasized that retroactive criminalization²² and analogy²³ in criminal matters should not be confused with legislative and jurisprudential developments.²⁴

¹³ “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.”

¹⁴ This text will be referred to below as the “Convention”. The destination of the other conventions will be specified.

¹⁵ According to the Law of 16 December 1992 “[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.”

¹⁶ “[t]he crime [...] 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”, CA Lyon 19 January 1996, D 1996, 258.

¹⁷ Article 7 §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.” Article 7 §2, *opt. cit.*

¹⁸ Law No 92-1336 (16 December 1992), entered into force on 1 March 1994.

¹⁹ “3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is [...] manifestly ill-founded [...]”; “4. The Court shall reject any application which it considers inadmissible under this Article.”

²⁰ *Lawless v Ireland* App no 332/57 (ECtHR, 1 July 1961) para 7.

²¹ *Korbely v Hungary* App no 9174/02 (ECtHR, 19 September 2008) para 69.

²² *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) para 52.

²³ *Coëme et alii. v Belgium* App nos. 32492/96, 32492/547, 32492/548, 33209/96, and 33209/210 (ECtHR, 18 October 2000) para 145.

²⁴ *Cantoni v France* App no 17862/91 (ECtHR, 15 November 1996) para 29.

§7. Thus, in addition to prevailing over Mauritanian law thanks to the French universal jurisdiction, thus defending an imperative international value, French criminal law was legally applicable in this case, reflecting the gradual internationalisation of the latter.

I. The normative reassertion of the international penalization of acts of torture and barbarity: the acknowledgement of the jurisdiction of French criminal law

§8. Although France has universal jurisdiction to try acts of torture and barbarity, the legality of giving it precedence over foreign jurisdiction appears to be debatable. Therefore, in order to break the shield granted to the prosecuted by the Mauritanian amnesty law (B), the Court has to confirm the supranational and imperative value of the prohibition of torture (A).

A. A jurisprudential and peremptory norm: the *jus cogens*

§9. The question of whether or not France has universal jurisdiction has been settled: the accused is a foreign national who was arrested on French territory for having committed a crime under the provisions of the Criminal Code. However, the applicability of French law is more uncertain. According to Article 3 of the Convention and the AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (which apply on the continent of the prosecuted), the torture is strictly prohibited by being considered as a common value in international law.²⁵ The latter has especially acquired the status²⁶ of a peremptory norm.

§10. Once again, according to the ICTY, the *jus cogens* nature of the prohibition against torture is “a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules”.²⁷ Indeed, this interdiction is, according to Pieter KOOIJMANS, the Special Rapporteur on Torture of the United Nations for the ICTY, “designed to produce a deterrent effect, in that it signals to all members of the international community”²⁸ that it enshrines in human rights treaties “an absolute right, which can never be derogated from”.²⁹

²⁵ *Aksoy v Turkey* App no 21987/93 (ECTHR, 18 December 1996) para 62.

²⁶ *Al-Adsani v the United Kingdom* App no. 35763/97 (ECTHR, 21 November 2001) para 60.

²⁷ *Prosecutor v Anto Furundzija* (ICTY, 10 December 1998) para 153. See also P KOOIJMANS, ‘Report of the Special Rapporteur on Torture’ (19 February 1986) UN Doc E/CN.4/1986/15, para 1, 3; *Committee of US Citizens Living in Nicaragua v Reagan* 859 F 2d 929, 949 (DC Cir 1988).

²⁸ *Prosecutor v Anto Furundzija* no IT-95-17/1-T (ICTY, 10 December 1998) para 154.

²⁹ *Prosecutor v Anto Furundzija* no IT-95-17/1-T (ICTY, 10 December 1998) para 144.

§11. Furthermore, the Court observe that whether immunity can be granted to a State, it is not the case for an individual prosecuted for acts of torture and barbarity, in order to neutralize his criminal liability.³⁰ Thus, “one of the consequences of the *jus cogens* character [...] is that every State is entitled to [prosecute] individuals accused of torture, who are present in a territory under its jurisdiction”.³¹

B. The obliteration of the foreign law in favor of the universal jurisdiction of the French courts

§12. What is more, the French universal jurisdiction has to be combined with the French legislation, unless it would be deprived of its very essence, being unable to impose the provisions of the UNCAT. The Court observed 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 [...] the High Contracting Parties [being free] to determine their own criminal policy”.³² This way, given the fact the French courts enjoy a universal jurisdiction, it may try the perpetrator of an offence regardless of his or her nationality.³³

§13. In addition, the Human Rights Committee of the United Nations considers that “an amnesty is generally incompatible with the duty incumbent on the States to investigate such acts”.³⁴ According to the Court, an amnesty law may “serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture”.³⁵ This is why, in accordance with Article 17 of the ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, an individual benefiting from an amnesty can still be tried in a foreign State.

§14. Moreover, the legislative act having been enacted before the trial of the applicant, it can be considered abusive towards international law. Regarding the case studied, it is clear that the Mauritanian amnesty law had for sole purpose to exonerate the accused from his guilt. This state of mind is confirmed by the ICTY: the “perpetrato[r] of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State. [A] foreign court [could] therefore be asked *inter alia* to disregard the legal value of the national authorising act”³⁶.

³⁰ *Ibid*, para 61.

³¹ *Opt. cit.* para 156.

³² *Achour v France* App no 67335/01 (ECTHR, 29 March 2006) subparas 44 and 51.

³³ *Ould Dah v France* req no 13113/03 (ECTHR, 17 March 2009), 16.

³⁴ Human Rights Committee, ‘General Comment No 20: Article 7 (Prohibition of Torture)’ (10 March 1992) UN Doc HRI/GEN/1/Rev.9 Vol I.

³⁵ *Prosecutor v Anto Furundzija* no IT-95-17/1-T (ICTY, 10 December 1998) para 155.

³⁶ *Prosecutor v Anto Furundzija* no IT-95-17/1-T (ICTY, 10 December 1998) para 155.

§15. *The Court concludes the judgment of the French courts was well founded by virtue of their universal jurisdiction, and so the Mauritanian amnesty law was not able to prevent the application of French law. This way, the Court is now able to verify the respect of the legality principle, the criminal offence having to be clearly defined, accessible, and foreseeable.*

II. The imperative transcendence of international law in domestic law: the lawfulness principle of crimes and offences respected

§16. The ECtHR was also required to assess whether the French courts had respected the principle of legality of crimes and penalties, a cornerstone of Article 7 of the Convention. This analysis thus demanded verification that the offence of torture, as applied to the applicant, was both accessible (A) and foreseeable (B) at the material time.

A. An accessible offence, established through statutory text and case law

§17. To determine the accessibility of French Law, the Court examined the legal basis used by French courts: the applicant was convicted under Articles 303³⁷ and 309³⁸ of the French Criminal Code of 1810. Although torture did not yet constitute an autonomous offence, this did not render the conduct inaccessible or imprecise. Indeed, the absence of a stand-alone offence does not preclude the use of aggravating circumstances as elements capable of elevating the gravity of an offence and increasing the applicable penalty.

§18. The 14 May 1993³⁹ interpretative circular reinforced this understanding, by clarifying that “torture and acts of barbarity” were well-defined aggravating circumstances, carrying identifiable legal consequences. French case law further demonstrated that when a criminal provision is repealed and reintroduced in a new codification,⁴⁰ courts may ensure continuity by treating previous aggravating circumstances as precursors to later autonomous offences.⁴¹ As the Court of Cassation has repeatedly

³⁷ “All criminals, whatever their name, who use torture or commit barbaric acts to commit their crimes shall be punished as guilty of murder. / Those who, for the execution of their offences, use torture or commit barbarous acts shall be punished by five to ten years of rigorous imprisonment.”

³⁸ “Any person who, voluntarily, has inflicted blows or committed acts of violence or assault resulting in illness or total inability to work for more than eight days shall be punished by imprisonment from two months to two years and a fine of 500 F to 20,000 F or one of these two penalties only.”

³⁹ Circular of 14 May 1993, presenting the provisions of the new Criminal Code.

⁴⁰ Cass crim 21 November 1990, No 90-80.534, Bull crim No 397, 998.

⁴¹ Cass crim 27 April 1994 No 94-80.547, Bull crim No 157, 357.

held,⁴² when new statutory provisions maintain the underlying criminality of prior offences, continuity of incrimination is preserved.⁴³

§19. Taken together, Articles 4 and 7 of the UNCAT, requiring States to criminalize torture and to prosecute perpetrators confirmed that the prohibition of torture was clearly defined in both statutory texts applicable at the material time and in the settled judicial interpretation.⁴⁴ As a matter of fact, the Court provided an elegant solution to what might otherwise have been a delicate domestic law issue.

B. A foreseeable offence and a prospective criminalization

§20. Regarding the foreseeability criteria, the applicant claimed that Article 222-1⁴⁵ (French Criminal Code of 1994), which made torture an autonomous offence, could not have been anticipated in 1990. However, the ECtHR reiterated that judicial interpretation is permitted as long as “the resultant development is consistent with the essence of the offence and could reasonably be foreseen”.⁴⁶ Article 222-1, in this light, did not create a new crime, but rather codified and refined conduct already punishable under the former Criminal Code. Moreover, the national court did not impose the fifteen-year penalty associated with that provision; instead, the applicant was sentenced under Articles 303 and 309,⁴⁷ which were in force at the time of the acts.

§21. Thus, no retroactive increase of penalty occurred, and ARTICLE 112-1 of the Criminal Code was respected.⁴⁸ What is more, the United Nations Committee against Torture “welcom[e] the Nîmes Assize Court’s decision of 1 July 2005 to sentence the Mauritanian captain Ely Ould Dah, in absentia, to 10 years’ imprisonment for crimes of torture”.⁴⁹ Accordingly, the French courts did not violate Article 7 §1⁵⁰ of the Convention: the applicant’s conviction rested on legal provisions that were accessible, foreseeable, and fully compatible with France’s international obligations.

⁴² Cass crim 11 May 2005, No 05-81.331, Bull crim No 146, 3.

⁴³ Cass crim 6 December 1995, No 95-84881, Bull crim No 72, 1090.

⁴⁴ *Jorgic v Germany* App no 74613/01 (ECtHR, 12 October 2007) para 101.

⁴⁵ “Subjecting a person to torture or barbaric acts is punishable by 15 years of imprisonment.”

⁴⁶ *S.W. v the United Kingdom* App no 20166/92 (ECtHR, 22 November 1995) subpara 36.

⁴⁷ *Opt. cit.*

⁴⁸ “Only acts that constitute an offense on the date on which they were committed are punishable.”

⁴⁹ Committee against Torture, ‘Conclusions and Recommendations: France’ (7-25 November 2005) UN Doc CAT/C/FRA/CO/3, para 14.

⁵⁰ *Opt. cit.*

§22. Therefore, by declaring on the one hand the full jurisdiction of French law and on the other hand the inadmissibility of the request, the Court’s decision reinforces universal national jurisdiction. Its action is therefore fully in line with its primary mission, i.e. to provide the necessary tools to States Parties to prevent impunity on the international stage. According to the words of the TRIAL OF GERMAN MAJOR WAR CRIMINALS, sitting at Nuremberg in October 1946, “individuals have international duties which transcend the national obligations of obedience imposed by the individual State”.⁵¹

* *

*

⁵¹ INTERNATIONAL MILITARY TRIBUNAL (1 October 1946), Vol. 1, 42.