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CR 2008/1 (translation)

CR 2008/1 (traduction)

Monday 21 January 2008 at 3 p.m.

Lundi 21 janvier 2008 à 15 heures

8 The PRESIDENT: Please be seated. The Court meets today, pursuant to Article 43 and the following Articles of its Statute, to hear the oral arguments of the Parties in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*.

Before recalling the principal phases of the present proceedings, I would like to indicate initially that Judge Abraham deemed that he should not take part in the decision of the case, in accordance with Article 17, paragraph 2, of the Statute of the Court. Pursuant to Article 31 of the Statute and Article 37, paragraph 1, of the Rules of Court, France appointed Mr. Gilbert Guillaume as judge *ad hoc* for the case.

Since the Court does not include upon the Bench a judge of the nationality of the Republic of Djibouti, that Party has availed itself of its right, under Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc* to sit in the case: it chose Mr. Abdulqawi Ahmed Yusuf.

Article 20 of the Statute provides that "[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously". Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*.

In accordance with custom, I shall first say a few words about the career and qualifications of each judge *ad hoc* before inviting them to make their solemn declarations.

Mr. Gilbert Guillaume, of French nationality, has a degree in law and a postgraduate diploma in political economy and economic science from the University of Paris; he also holds a diploma from the Paris Institut d'études politiques and is an alumnus of the Ecole nationale d'administration. An eminent jurist, he has combined the careers of judge and senior official at national and international level. Mr. Guillaume is an honorary member of the French Council of State, after having served as a Councillor of State. He was France's representative on the Legal Committee of the International Civil Aviation Organization (ICAO) and, as such, Chairman of the Committee from 1971 to 1975. He was Chairman of the Conciliation Commission of the Organisation for Economic Co-operation and Development (OECD) and subsequently became the

9 Director of Legal Affairs of that organization. Mr. Guillaume has been the Director of Legal Affairs at the French Ministry of Foreign Affairs and, as such, acted *inter alia* as the Agent of

France before the Court of Justice of the European Communities and the European Court of Human Rights. He was a Member of the International Court of Justice from 1987 to 2005 and President of the Court from 6 February 2000 to 5 February 2003. Mr. Guillaume has been chosen as judge *ad hoc* in the cases concerning *Certain Criminal Proceedings in France (Republic of Congo* v. *France)* and the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*. A member of the Permanent Court of Arbitration since 1980, Mr. Guillaume has sat as Arbitrator in a large number of disputes.

Mr. Abdulqawi Ahmed Yusuf, of Somali nationality, holds a doctorate in political science (international law) from the Graduate Institute of International Studies of the University of Geneva, and has a doctorate in law from the Somalia National University. He has held numerous teaching posts around the world, in particular at the Faculty of Law of the University of Geneva; he has also taught at the European University Institute in Florence. Mr. Yusuf is the Legal Adviser to the United Nations Educational, Scientific and Cultural Organization (Unesco), and the Director of the Office of International Standards and Legal Affairs of that organization. Previously, he had worked as Assistant Director-General at the United Nations Industrial Development Organization (UNIDO) and held various positions at the United Nations Conference on Trade and Development (UNCTAD). He has represented Somalia on several occasions before the Organisation of African Unity and the Arab League.

In accordance with the order of precedence fixed by Article 7, paragraph 3, of the Rules of Court, I shall first invite Mr. Guillaume to make the solemn declaration prescribed by the Statute, and I would request all those present to rise.

Mr. GUILLAUME:

> "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

10 The PRESIDENT: Thank you. I shall now invite Mr. Yusuf to make the solemn declaration prescribed by the Statute.

Mr. YUSUF:

"I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: Thank you. Please be seated. I take note of the solemn declarations made by Mr. Guillaume and Mr. Yusuf and declare them duly installed as judges *ad hoc* in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*.

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I shall now recall the principal steps of the procedure so far followed in this case.

On 9 January 2006, the Republic of Djibouti filed in the Registry of the Court an Application instituting proceedings against the French Republic in respect of a dispute concerning

"the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the 'Case against X for the murder of Bernard Borrel', in violation of the Convention on Mutual Assistance in Criminal Matters between the [Djiboutian] Government and the [French] Government, of 27 September 1986, and in breach of other international obligations borne by the French Republic to the Republic of Djibouti".

In respect of the refusal to execute an international letter rogatory, the Application also alleged the violation of the Treaty of Friendship and Co-operation concluded between France and Djibouti on 27 June 1977. The Application further referred to the issuing, by the French judicial authorities, of witness summonses to the Djiboutian Head of State and senior Djiboutian officials, allegedly in breach of the provisions of the said Treaty of Friendship and Co-operation, as well as of the principles and rules governing the diplomatic privileges and immunities laid down by the Vienna Convention on Diplomatic Relations of 18 April 1961 and the principles established under customary international law relating to international immunities, as reflected in particular by the

11 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973.

In its Application, Djibouti indicated that it sought to found the Court's jurisdiction on Article 38, paragraph 5, of the Rules of Court and was "confident that the French Republic w[ould] agree to submit to the jurisdiction of the Court to settle the present dispute".

Article 38, paragraph 5, of the Rules of Court provides that:

> "When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case."

The Registrar, in accordance with this provision, immediately transmitted a copy of the Application to the French Government and informed both States that, pursuant to that provision of the Rules, the case would not be entered in the General List, nor would any action be taken in the proceedings, unless and until the State against which the Application was made consented to the Court's jurisdiction for the purposes of the case.

By a letter dated 25 July 2006 and received in the Registry on 9 August 2006, the French Minister for Foreign Affairs informed the Court that "the French Republic consent[ed] to the Court's jurisdiction to entertain the Application pursuant to, and solely on the basis of . . . Article 38, paragraph 5", of the Rules of Court, thereby making it possible to enter the proceedings in the General List of the Court.

By an Order dated 15 November 2006, the Court fixed 15 March 2007 and 13 July 2007, respectively, as the time-limits for the filing of the Memorial of the Republic of Djibouti and the Counter-Memorial of the French Republic. Those pleadings were duly filed within the time-limits so prescribed.

The Parties not having deemed it necessary to file a Reply and a Rejoinder, and the Court likewise having seen no need for these, the case was therefore ready for hearing.

On 22 November 2007, the Republic of Djibouti filed additional documents which it wished to produce in the case. By a letter dated 4 December 2007, the Agent of the French Republic informed the Court that her Government had no objection to the production of these documents,

12 while observing firstly that this lack of objection could not "be interpreted as consent to an extension of the jurisdiction of the Court as accepted by France in the letter dated 25 July 2006" and, secondly, that "some of the documents produced constitute[d] publications which are readily available, within the meaning of Article 56 [, paragraph 4,] of the Rules of Court". By letters of 7 December 2007, the Registrar notified the Parties that the Court had decided to authorize the production of the documents concerned and had duly taken note of the observations made by the

Agent of France regarding the interpretation to be given to her lack of objection to the production of the said documents.

After ascertaining the views of the Parties, the Court, pursuant to Article 53, paragraph 2, of the Rules of Court, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

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I note the presence at the hearing of the Agents, counsel and advocates of both Parties. In accordance with the arrangements for the organization of the oral proceedings which have been decided by the Court, the hearings will comprise a first and a second round of oral argument. The first round of oral argument will begin today and will close on Friday 25 January 2008. The second round of oral argument will begin on Monday 28 January 2008 and will close on Tuesday 29 January 2008.

I now give the floor to H.E. Mr. Siad Mohamed Doualeh, Agent of the Republic of Djibouti.

Mr. DOUALEH:

INTRODUCTION

1. Madam President, Members of the Court, it is a great honour for me to stand here before you as Agent of the Republic of Djibouti to introduce the first round of oral pleadings of the Republic of Djibouti in this case between it and the French Republic. The presence of the Republic

13 of Djibouti before this Court as Applicant evinces its deep attachment to the principle of the peaceful settlement of disputes. Since its accession to independence in 1977, the Republic of Djibouti has chosen to participate in international life as a State which respects international law. This is the philosophy which prompted my country to accept the compulsory jurisdiction of your Court for all legal disputes between it and any other State accepting the same obligation. The submission of this dispute to your Court marks a major step in the history of the small State of Djibouti, which gained independence only 30 years ago.

2. However, allow me, Madam President, to render unto Caesar what is Caesar's. Although the case was filed in the Court by way of an application by the Republic of Djibouti under Article 40, paragraph 1, of the Statute of the Court and Article 38, paragraph 5, of the Rules of Court and not by way of a special agreement, the idea of submitting this dispute to this, the most illustrious of international courts, emerged during a meeting between the then President of the French Republic and the President of the Republic of Djibouti. On that basis, it seemed useful and necessary for Djibouti to have recourse to the International Court of Justice in order to find a definitive solution to the legal dispute as well as the diplomatic tensions to which the procedure of mutual assistance between the Republic of Djibouti and the French Republic has given rise in the context of the famous *Borrel* case.

3. Of course, we are not meeting today for the Court to rule upon the *Borrel* case, to which I shall revert in a few moments. Only, every effect having its cause, it is important to stress at the outset that the traditionally most amicable relations between the French Republic and the Republic of Djibouti gradually became tarnished and deteriorated as a result of the *Borrel* case. Had it not been for that case, the ins and outs of which still remain confused and contradictory, there would have been no real obstacle to co-operation between France and Djibouti in the area of mutual assistance. Similarly, without this case, the Djiboutian authorities would never have been faced with the defamation and injuries which they have suffered for years, in disregard of their status and the guarantees conferred on them by international law in the exercise of their duties.

14

4. Notwithstanding the deplorable upsets there have been from time to time in relations between France and Djibouti in the wake of the *Borrel* case, the Republic of Djibouti wishes to solemnly reiterate its faith in the ideals of international justice and the close ties characterizing relations between the Djiboutian and French peoples. Djibouti remains convinced that both the spirit and the letter of international law will once again triumph within the walls of the Peace Palace. Owing to its unique status as "principal judicial organ of the United Nations", we are wholly confident that your Court will give full legal effect to the principles of equality, friendship and good-faith co-operation among nations.

5. Contrary to the Respondent which, much to the surprise of the Republic of Djibouti, has expressed reservations as to the Court's jurisdiction *ratione materiae* and *ratione temporis* in the

present dispute, the Republic of Djibouti is convinced that an adequate and definitive settlement of this dispute in its *entirety* is what is needed to brighten the now very stormy skies of relations between the French Republic and the Republic of Djibouti. Only a ruling with the authority to put an end to all the internationally wrongful acts by the French authorities could re-establish the *status quo ante* in Franco-Djiboutian relations and fully restore Djibouti's sovereign rights. The Republic of Djibouti expects neither more nor less of your Court and hopes that the French Republic, notwithstanding its conduct in manifest breach of international law, will this week embrace the same constructive mindset.

6. Madam President, Members of the Court, let me recall here that the contemporary international legal order revolves around and is based upon a sacrosanct principle: that of equality between States. This principle is the guarantor of stability in international relations. It is also fundamental to preventing and avoiding the development in international society of a state of nature in which the strong dominates the weak. If anything is certain, it is the fact that in the essential domain of mutual assistance relating to the *Borrel* case, the French Republic's action has been at the opposite extreme to the principle of equality between States. Admittedly, the Republic of Djibouti is only a small State consisting of 700,000 inhabitants, pitted against a State with a population of over 60 million inhabitants. True, the Republic of Djibouti is among the poorest and least advanced countries in the world, a situation which cannot possibly be compared with one of the richest and most powerful in the world. Yet these characteristics do not *de jure* preclude the obligation to respect the principle of equality between States and one of its corollaries, reciprocity in international relations.

7. The actions of the French Republic in manifest breach of its international obligations in the domain of mutual assistance are all, *mutatis mutandis*, violations of the principle of equality between States and call into question those principles — such essential ones — of the international order of reciprocity, friendship and co-operation between States. Every State, regardless of its size and degree of development, has the right to enjoy respect, friendship and co-operation in full measure. At the same time, every State — even a rich and powerful one — has a duty to ensure with all due diligence that its executive, legislative and judicial organs respect those founding

principles of the civilized world, equality, co-operation and friendship. This is why your Court is more than ever before called upon today to give primacy and force to the rule of international law.

8. Apart from the litigious side of every dispute in general, it must be borne in mind that the presence of Djibouti and France before your esteemed Court is motivated by a strong desire to reinforce the links of co-operation and friendship. This is fully in keeping with the Treaty of Friendship and Co-operation between the French Republic and the Republic of Djibouti, signed in Djibouti in 1977, which, in its preamble, proclaims the desire of the two States "to fulfil the purpose and principles of the Charter of the United Nations for the promotion of international co-operation and friendly relations among nations". As the Republic of Djibouti will not tire of repeating in its oral pleadings, it wishes the Court to reach a positive settlement of the dispute in order to unblock a situation which has persisted for too long and has a pernicious effect on international co-operation between France and Djibouti. At stake are the essential interests of the Republic of Djibouti as a sovereign State. The conduct attributable to the French authorities prejudices the normal functioning of the Djiboutian State through the discredit cast upon its highest authorities, including the President of the Republic, and prevents some of its senior officials from fully performing their duties.

9. Madam President, Members of the Court, few States would have agreed to submit, with the patience and tolerance displayed by Djibouti for years, to the prejudice suffered by some of its highest officials. In the face of the lack of good-faith co-operation, but above all the breaches of the elementary principles of international courtesy and customary law relating to immunity, the Republic of Djibouti has unfailingly responded with a constant desire, in good faith, to preserve the historical relations of friendship and co-operation between the two peoples. Djibouti has preferred to respect its international commitments by giving France access to all the necessary and appropriate channels for the realization of mutual assistance. The Djiboutian authorities have thus singled themselves out by their dynamism and determination to afford France "the widest measure" of mutual assistance, going so far as to place Djibouti's human and financial resources at its disposal and, on two occasions, opening the gates of the presidential palace to French investigators, judges, journalists and civil parties — something inconceivable in France!

10. The Court is certainly aware of the sustained media attention which has accompanied and surrounded the *Borrel* case. By no means is it the intention of the Republic of Djibouti to give the Court its opinion on the lingering effects and consequences of this media campaign. However, it wishes to draw the attention of the Court to the "Findings of Mrs. Marie-Paule Moracchini", a French judge who investigated the *Borrel* case for a number of years. This report, which is included in the case documents before you, provides an objective view of the ins and outs of the case, including its treatment by the civil parties and the media. It is easy to see, moreover, that the latter's actions did not really lead to the adoption of a clear position by the French authorities aimed at guaranteeing respect for international law within the limits of their jurisdiction.

11. In this connection it should be underlined, Madam President, that the French Republic's respect for the law and the commitments undertaken by it has often been lacking in this case. The clearest example relates to the undertaking first given to execute the international letter rogatory requested by the Republic of Djibouti, an undertaking later reiterated, then reneged upon, following France's unexpected about-face, which consisted in replying to the Djiboutian request with a definitive "no". This breach of the undertakings and assurances given dashed Djibouti's legitimate expectations based on the rules and principles set out in the Convention on Mutual Assistance in
17 Criminal Matters of 1986. And yet, Madam President, Members of the Court, you will agree with me that no State is entitled to breach its international obligations as it chooses, contrary to the essential principle *pacta sunt servanda* and, moreover, to prejudice the immunities of another State, however small, poor or weak.

12. The *Borrel* case, which served as a receptacle for violations of international law by France, cannot eclipse or empty of legal effect the principles and rules of international law applicable in the case and on which Djibouti intends to base its oral arguments. As I emphasized at the beginning of this statement, various internationally wrongful acts imputable to the French Republic are bound up with the *Borrel* case. That case originated in the proceedings opened by the French judicial authorities following the death, in October 1995, of Judge Bernard Borrel on the territory of the Republic of Djibouti. The death of Judge Borrel gave rise to various theories as to the cause of death, so much so that it would be more appropriate to speak of the *Borrel* "cases" than of a Borrel case in the singular. While at first the suicide theory was favoured, particularly by

the French authorities, a private forensic examination subsequently cast doubt upon it. The murder theory then emerged, a murder which, according to some assertions, was the result of a plot cobbled together by those in political power in Djibouti at the time, in complicity with certain French authorities. A third theory also emerged, linking the death of Judge Borrel to paedophile networks in Djibouti. In other words, total uncertainty surrounds the cause of death of Judge Borrel. That uncertainty means that uppermost in our minds must be the presumption of innocence, a fundamental principle recognized by virtually all modern legal systems and enshrined in the Universal Declaration of Human Rights. This uncertainty also implies that the possibility of the *Borrel* case in any way influencing the proceedings on the merits before the Court should be avoided.

The PRESIDENT: Could I interrupt to ask if you might speak a little more slowly.

M. DOUALEH: All right. I shall do so.

The PRESIDENT: Oui. It is easier for those who are following in English. Thank you.

18 M. DOUALEH: Very well.

13. Apart from the uncertainty referred to, it is, on the other hand, total clarity and transparency which have characterized the attitude of the Republic of Djibouti following the opening in France of an investigation "against X for the murder of Bernard Borrel". The opening of this investigation marks the continuation of exemplary good-faith co-operation by the Djiboutian authorities in the *Borrel* case. Djibouti spared no effort to guarantee close and complete co-operation in "the widest measure" of execution of the international letters rogatory presented by the French Republic in connection with the *Borrel* case, instancing the *lex scripta* of the Treaty of Friendship and Co-operation and of the Convention on Mutual Assistance in Criminal Matters. In exchange, when Djibouti called upon France to reciprocate in the execution of an international letter rogatory intended to make it possible once and for all to reveal all the circumstances of the death of Judge Borrel, it ultimately found itself facing a simple refusal, one, moreover, for which no reasons were given.

14. Madam President, Members of the Court, the refusal by the French Republic in fact conceals a conflict between the French executive and judiciary regarding the appropriate treatment to be given to the international letter rogatory presented by the Republic of Djibouti. This is a contextual element which cannot be ignored. Just as it is undeniable that the internal rivalries in Djiboutian politics also played a role in the context of the *Borrel* case. The only testimony implicating the Djiboutian authorities in the death of Judge Borrel came from a founder member of the so-called "government in exile" of Djibouti[1], Mr. Alhoumekani, the content of whose testimony has been seriously questioned not only by Judge Moracchini in her "Findings", to which I shall refer later, but also by an order delivered by another investigating judge at the Paris *Tribunal de grande instance*[2]. In passing it should be said that another person whose testimony

19

subsequently supported that of Mr. Alhoumekani, namely Mr. Iftin, is also a member of the same alleged "government in exile".

15. Notwithstanding these contextual elements, the Republic of Djibouti is of the view that a settlement of this dispute must not be conditioned by the internal legal and political tensions in France and Djibouti. The Republic of Djibouti wishes the Court to reach a judgment which would preserve the integrity of the treaty context governing mutual assistance between France and Djibouti. Let there be no mistake: we are concerned here with questions of international law. Nothing more, but nothing less! I take the liberty of emphasizing this because the Respondent might be tempted to overlook this point.

16. As Applicant, the Republic of Djibouti is seeking to obtain a judgment by the International Court of Justice on matters falling within the scope of the Treaty of Friendship and Co-operation, the 1986 Convention and the applicable rules and customary and conventional principles in the sphere of immunities. The Republic of Djibouti is not asking the Court to concern itself with the *Borrel* case as such, but with the conduct attributable to the French authorities in the application of the various international rules governing, on the one hand, co-operation between the two States regarding mutual assistance in criminal matters and, on the other hand, the prevention of

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[1]See "Extract from the website of the Government in exile of Djibouti, 'Composition of the Government in Exile of Djibouti', 12 July 2006", documents submitted to the Court on 21 Nov. 2007, Ann. 8, pp. 47-50.

[2]"Decision not to proceed, Paris *Tribunal de grande instance*, 7 Feb. 2002", documents submitted to the Court on 21 Nov. 2007, Ann. 8, pp. 51-53.

attacks on the person, freedom or dignity of nationals enjoying international protection. The Republic of Djibouti ventures to hope that the French Republic will confine itself to these aspects of international law.

17. As indicated in the Application and Memorial of the Republic of Djibouti, the subject of the dispute is based on three types of breaches attributable to the French authorities. First, there are breaches in the application of the Treaty of Friendship and Co-operation between the French Republic and the Republic of Djibouti of 27 June 1977. Second, there are breaches in the application of the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic of 27 September 1986. Third, there are breaches regarding the rules relating to international protection enjoyed by the supreme authorities of the State as well as by other senior bodies.

20 18. Madam President, Members of the Court, the timetable of the oral arguments of the Republic of Djibouti will be as follows. This afternoon the questions of the jurisdiction of the Court, the immunity of the President of the Republic and the violation of the Treaty of Friendship and Co-operation will be presented in turn. Tomorrow, Tuesday morning, the Republic of Djibouti will present its views on the question of the violation of the 1986 Convention, as well as on the issue of the immunity of certain senior Djiboutian officials. Lastly, the Republic of Djibouti will devote Tuesday afternoon to the legal consequences of the internationally wrongful acts imputable to the French Republic and to the conclusions and submissions of Djibouti in this case.

19. Thank you, Madam President, for your kind attention. May I ask you to give the floor to Professor Luigi Condorelli.

The PRESIDENT: I thank the Agent of the Republic of Djibouti and give the floor to Professor Condorelli.

Mr. CONDORELLI:

JURISDICTION OF THE COURT

1. Introduction

1. Madam President, Members of the Court, it is a great honour for me to appear once again before the Court and I wish to express my sincerest gratitude to the Republic of Djibouti for giving me this opportunity.

2. Madam President, when on 9 August 2006 the Application instituting proceedings submitted on 4 January 2006 by the Republic of Djibouti (and filed in the Registry on 9 January) was able to be entered in the Court's General List, following the declaration dated 25 July 2006 by the French Republic formally expressing France's consent to the Court's jurisdiction in the present case, Djibouti believed for a moment that we would be able — in the ensuing written and oral exchanges before the Court — to dispense with all argument on the issue of your jurisdiction, which appeared clear beyond all doubt, France having indeed expressed its consent on 25 July 2006
21 allowing the Court "to entertain the Application" by Djibouti: granted, nothing more than what is in the Application, but nothing less. Now, in its Memorial of 15 March 2007, the Applicant scrupulously confined itself to that: it discussed the ins and outs of its Application and requested the Court to adjudge and declare that the claims set out in the Application, and those claims alone, were justified in law. In short, nothing less than was in the Application, but most certainly nothing more. Accordingly, Djibouti was convinced that the oral argument could focus entirely on the merits of the case before you.

3. The Applicant was thus astonished at the content of the French Counter-Memorial, Chapter 2 of which sets out various objections relating to matters involving the Court's jurisdiction in the present case. The language appearing in the very recent letter from the Agent of France to the Registrar (namely, the letter of 4 December 2007 on the subject of the additional documents submitted by the Applicant on 21 November 2007) summarizes these objections most clearly: first, according to the Respondent, certain claims asserted by the Republic of Djibouti in its Memorial exceed the bounds of the dispute which France consented to have submitted to the Court; and, second, they are inadmissible. Faced with these unexpected challenges, the Applicant is constrained to describe to the Court the reasons militating in favour of rejecting the assertions by France which I in turn have just summarized.

4. A preliminary clarification is however called for, so that the subject-matter of the following remarks will be sharply defined. It is true that the Republic of Djibouti in its Application stated that it reserved the right, if need be, to invoke international instruments capable of founding the jurisdiction of the Court in the present case, above and beyond the "sole basis" recognized by France in its declaration of 25 July 2006 (that is, Article 38, paragraph 5, of the Rules of Court). In its Counter-Memorial, the Respondent vociferously takes issue with this position and argues, first, that there are no such instruments and, second, that it is too late to invoke them at this stage in the proceedings. Madam President, please allow me to make clear that the Applicant firmly maintains its position in respect of its rights in this regard, but prefers not to dwell on this point at present. For two reasons: the first is that, after analysing the terms of France's written pleadings, the

22

Applicant sees that reliance on other bases for the Court's jurisdiction appears unnecessary in the present case to enable the Court to adjudicate all the claims in Djibouti's Application; the second reason is that the Applicant prefers to avoid putting France in an awkward position, given the Respondent's apparent desire to limit as much as possible the scope of its willingness to submit the lawfulness of its actions to review by the Court.

2. Consent by States as the basis for the Court's jurisdiction

5. Madam President, the Court has reaffirmed countless times, and has been unshakeable in its rigour and consistency in doing so, that "the Court has jurisdiction in respect of States only to the extent that they have consented thereto" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Judgment, I.C.J. Reports 2006*, p. 32, para. 65). In the extensive collection of expressions used by the Court to voice this principle, the phrasing is sometimes more spun out and diffuse, but the concept is unchanging: thus, for example, the Court has expressed itself in these very didactic terms:

> "the Court, under its Statute, does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States entitled to appear before the Court; . . . the Court has repeatedly stated that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction; and . . . the Court therefore has jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Provisional*

Measures, Order of 10 July 2002, I.C.J. Reports 2002, p. 241, para. 57; see also *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 132, para. 20).

6. As we all know, Djibouti is the only Party present in this courtroom to figure among the States having "in general form" recognized your jurisdiction, which it did by its declaration of 18 July 2005, pursuant to Article 36, paragraph 2, of the Statute. In the absence of an analogous general declaration in force on the French side, and in the absence of a special agreement, predating the reference to the Court, the Republic of Djibouti wished to see the consent given *ad hoc* which would be necessary to found the Court's jurisdiction in this specific case and, with this goal in mind, took the path recommended by Article 38, paragraph 5, of the Rules of Court. As we all know, this provision opens the way for a unilateral referral to the Court, which can however

23

produce the desired effect only if the State against which the application is lodged consents to your jurisdiction.

7. In its Memorial, Djibouti explicitly manifested its keen appreciation to the French Government for having consented, on 25 July 2006, to the Court's jurisdiction to entertain Djibouti's Application, and wishes now to reiterate this expression of gratitude. It is indeed an excellent thing that your Court can contribute, in fulfilling its eminent mission, to restoring the friendly relations between the two countries which have been, and still are, so deeply upset, as a result of factors centring on the matter commonly known as the *Borrel* case, and of related insinuations and practices affecting the honour and dignity of senior officials of Djibouti.

3. The case of State consent resulting from separate and successive acts

8. Madam President, even before Article 38, paragraph 5, of the Rules of Court was laid down, it was recognized — thanks to an already long-standing pronouncement by the Court — that "there is nothing to prevent the acceptance of jurisdiction, as in the present case, from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement" (*Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 28). It is self-evident that precisely in the case of "separate and successive" acts, the task for the Court is to understand to what extent these distinct acts, employing different words, give rise to a real consent, an *in idem placitum consensus* (to use the Romans' expression), that is to say an agreement on a single, specific subject precisely delineating

the scope of the Court's jurisdiction. The Court is, in short, here being asked, as is always the case with issues of this type, to exercise its "*compétence de la compétence*". One might say in your own words:

> "It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties: '[I]t is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions.'"
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> (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30. See also *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case (New Zealand* v. *France), Order of 22 September 1995, I.C.J. Reports 1995*, p. 304, para. 55.)

9. The basic principle is simple. When proceedings are initiated before the Court by way of unilateral application, in accordance with Article 40 of the Statute, it is the application which delimits *ratione materiae* the subject of the dispute and the claim(s) presented to the Court. France's Counter-Memorial comprehensively reviews the relevant international jurisprudence on this subject, rightly describing it as "long-standing and established"[3] and beginning with the precursor, which is a genuine *locus classicus*, one might say, of international law: "under Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case [Memorial], though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein" (*Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14).

10. It goes without saying that, if a respondent's consent has not been given *ante hoc*, but comes *post hoc*, in keeping with the scenario outlined in Article 38, paragraph 5, of the Rules of Court (which is operative in our case), the extent of the Court's jurisdiction will then inescapably depend on the scope and terms of the *post hoc* consent. Of course, the State against which the application is submitted cannot broaden (or indeed transform) the dispute as compared with the scope of the application. But that State can, by its declaration, very well give only partial consent, and by so doing narrow the jurisdiction of the Court by comparison with that contemplated in the

[3] CMF, p. 10, para. 2.8.

application, just as it can, moreover, consent to nothing at all and in this case prevent the Court from settling even the slightest part of the dispute, unless of course other bases for jurisdiction are present.

11. In brief, to determine the scope of the Court's jurisdiction in the present dispute, you will first have to analyse and interpret the Application to ascertain exactly what claims the Republic of Djibouti wished to submit to you for judgment; and you will then have to interpret the French
25 declaration of 25 July 2006 to ascertain whether or not France has consented to the Court's exercise of its jurisdiction over all these claims, or possibly only some of them. Obviously, if the French side has given only partial consent, those claims by Djibouti not covered by France's declaration of consent will escape your jurisdiction.

4. The principles governing the interpretation of unilateral declarations concerning the jurisdiction of the Court

12. Madam President, Members of the Court, you are confronted here with two unilateral declarations concerning the jurisdiction of the Court which intersect and combine with each other. Your jurisprudence is rich in guidance on the subject of interpreting unilateral declarations of this type. Thus, the Court has said a number of times that such a declaration "must be interpreted as it stands, having regard to the words actually used" (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 47), and must be applied "as it stands" (*Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 27); you have also made clear that the Court "cannot base itself on a purely grammatical interpretation of the text" (*Anglo-Iranian*, *op. cit.*, p. 104; *Fisheries Jurisdiction*, *op cit.*), given that what must be sought is "the interpretation which is in harmony with a natural and reasonable way of reading the text" *(ibid.)*; you have laid emphasis on the notion that such declarations "are to be read as a whole" *(ibid.)*. But, most important of all, your Court has underlined the objective sought in determining the meaning of what you have defined to be "a unilaterally drafted instrument" (*ibid.*, para. 48): to identify the true intention of the drafter of the instrument.

13. Granted, the jurisprudence which I am citing usually involved declarations under Article 36, paragraph 2, of the Statute. But that in no way detracts from the relevance of your

teachings in the present case, as it still involves the interpretation of unilaterally drafted instruments. With your leave, I shall cite a few passages which are particularly eloquent on this subject: "since a declaration under Article 36, paragraph 2, of the Statute is a unilaterally drafted instrument, the Court has not hesitated to place a certain emphasis on the intention of the depositing State" *(ibid.)*. And: "The Court will thus interpret the relevant words of the declaration . . . in a natural and reasonable way, having due regard to the intention of the State concerned . . ." (*ibid.*, para. 49). Your Court elsewhere observed, in regard to the historical reasons underlying the origin of a particular unilateral declaration: "such considerations cannot . . . prevail over the intention of a declarant State, as expressed in the actual text of its declaration" (*Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction, Judgment, I.C.J. Reports 2000*, p. 31, para. 44).

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14. Is the "intention of the declarant State" not identifiable in perfectly clear terms if each of the two declarations is analysed "as a whole", the words actually used being interpreted "in a natural and reasonable way" and without "basing oneself on a purely grammatical interpretation of the text"? Let us see point by point, beginning with the Application of the Republic of Djibouti.

5. The interpretation of Djibouti's Application in terms of the Court's jurisdiction *ratione materiae*

15. Madam President, Members of the Court, it is probably possible to criticize Djibouti's Application — and indeed France does so — for the less than perfect wording of the text that appears under the heading "Subject of the dispute", on the ground that the text merely refers to the "refusal by the French governmental and judicial authorities to execute an international letter rogatory . . ." etc. It is indeed true that there is no reference to attacks on the immunities, privileges and prerogatives of Djibouti's Head of State and other high-ranking figures in Djibouti. However, that kind of imperfection, as indeed certain minor errors of substance, which France criticizes in both the Application and the Memorial, cannot prevent the Court from perceiving clearly the intention of the declarant State, Djibouti, as that intention emerges with absolute clarity from the declaration as a whole, if that declaration is construed by according the words used their "natural and reasonable" meaning. Nor should we forget the very familiar doctrine of the Permanent International Court of Justice to the effect that: "The Court, whose jurisdiction is international, is

not bound to attach to matters of form the same degree of importance which they might possess in municipal law." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34; see also *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary*
27 *Objections, Judgment, I.C.J. Reports 1963*, p. 28.) In the final analysis, the Respondent cannot claim that it is necessary to single out certain lines in the Application (namely those that appear under the heading "Subject of the dispute"), contrasting them with the remainder of the Application, when that Application forms a "whole", and the heading "Nature of the claim" an integral part of that whole, setting out in detail the various claims on which the Applicant is asking the Court to give judgment. Those claims relate explicitly and specifically, on the one hand, to France's breaching of its obligations in relation to mutual assistance and, on the other, to the violation of the principles of international law whereby attacks on the person, freedom and dignity of the Head of State and high-ranking figures in the Republic of Djibouti are prohibited. That was and remains the explicit intention of the Applicant, set out in words whose "natural and reasonable" meaning is perfectly plain to anyone seeking to analyse them in good faith.

16. Madam President, permit me to emphasize this point: Djibouti's Application requests the Court to adjudge and declare that these various claims are well founded in law and — contrary to what is claimed in the Counter-Memorial of France — that Application is careful to avoid confusing the claims made with the legal grounds relied upon. That is perfectly apparent if we look at the heading of the Application entitled "Statement of the grounds on which the claim is based" (paras. 14-17). As the Court may easily ascertain, for each of the claims — including paragraph 16 on "attacks on the person, freedom or dignity of an internationally protected person" — a summary account of "the grounds on which the claim is based" is provided. In short, the intention set out in the Application is, unquestionably, to seise the Court of a dispute which consists of a number of claims and, therefore, extends beyond the mere matter of France's violation of its obligations in respect of mutual assistance.

6. The scope of France's consent to the Court's jurisdiction *ratione materiae*

17. Let me turn now to closer consideration of the unilateral declaration by France, in the form of the letter of the Minister for Foreign Affairs of the French Republic of 25 July 2006, by

28 which France "consents to the Court's jurisdiction to entertain the Application" of Djibouti (for your convenience, you will find that letter in the file that we have given to you). As I mentioned earlier, France could very well have consented only partially to the Court's jurisdiction in relation to the Application: it could, for example, have accepted the Court's jurisdiction solely in relation to the issue of mutual assistance in the strict sense, and withheld its consent from the other claims made in the Application. But did it do so?

18. Madam President, Members of the Court, the answer to that question must be "no". If the text of the letter is read in a "natural and reasonable way" — to use the Court's own words — we have inevitably to conclude that France has called into question neither the subject of the dispute nor the nature of the claims, as set out in Djibouti's Application. France has, indeed, consented to the Court ruling on all of the claims which Djibouti has made and, of course, on nothing more. What else could be meant by the statement that the consent of France is valid "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated . . ." in Djibouti's Application? France has, therefore, agreed that all of the claims set out in the Application fall within the scope of the Court's jurisdiction *ratione materiae* and may, consequently, be decided by the Court.

19. Furthermore, Madam President, it should be pointed out that the French Counter-Memorial finally acknowledges — albeit rather casually, using a form of words that the Applicant has no hesitation in taking as its own and which is worth quoting verbatim here — that "it is not the French Republic's intention to assert any ground for the Court's lack of jurisdiction, as long as Djibouti's claims remain strictly limited to those set out in the Application"[4]. That, Madam President, Members of the Court, is precisely the case: nothing which Djibouti submitted to the Court in its Memorial goes even slightly beyond the claims made in the Application, which France has consented to have adjudged by the Court. The French Republic cannot now retract the consent which it clearly expressed on that matter and must accept the consequences of that consent — as the Court itself so elegantly defined them in 1985: "The Court must not exceed the

29 jurisdiction conferred on it by the Parties, but it must also exercise that jurisdiction to its full

[4]CMF, p. 8, para. 2.2.

extent." (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 23, para. 19.)

20. It should, moreover, be pointed out that there is one area in regard to which, in the 2006 document, France expressed the desire to restrict the scope of its consent to the Court's jurisdiction: this, however, relates not to the material scope of that jurisdiction, but to its basis. As far as France is concerned, the Court can base its jurisdiction in this case on Article 38, paragraph 5, of the Rules of the Court only. That early indication of the refusal (subsequently elaborated on in the Counter-Memorial) to accept Djibouti's argument that bases for jurisdiction other than Article 38, paragraph 5, could be relevant in this case further demonstrates that France, on the other hand, had no intention of limiting its consent *ratione materiae* to the Court's jurisdiction to settle the claims set out in the Republic of Djibouti's Application. Clearly, therefore, France accepted the Court's jurisdiction in relation to the whole of the dispute, as identified and defined by the Application as a whole, and the Court cannot permit France to change tack at this juncture and seek to curtail the subject of the dispute and reduce the nature and scope of the claims set out by Djibouti in its Application, by partially retracting, in its Counter-Memorial, the consent which it gave in its declaration of 25 July 2006. I should draw attention here to an extremely pertinent dictum of the Court, according to which: "It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its declaration in whole or part, cannot divest the Court of jurisdiction." (*Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957,* p. 142.)

7. The link between the claims set out in Djibouti's Application

21. Since, by its declaration, France agreed that the Court should rule on all of the claims set out in Djibouti's Application, there is little point in dwelling — as the Counter-Memorial does — on the fact that the link between the claims is, allegedly, inadequate: in point of fact, France alleges that Djibouti's claims concerning the immunities, privileges and prerogatives of high-ranking figures in Djibouti bear no direct relation to the question of the French authorities'

30 refusal to execute the international letter rogatory pertaining to the *Borrel* case[5]. As I demonstrated to the Court just a moment ago, an allegation of that nature, even if true, would be without relevance, since France has recognized the jurisdiction of the Court to decide whether or not all of the claims set out in Djibouti's Application are well founded, however close the link between them may or may not be. But it should be pointed out even now that the French allegation is, moreover, quite simply wrong.

22. It is in fact quite apparent from France's Counter-Memorial itself and the annexes thereto that the opening of proceedings for subornation of perjury against high-ranking figures in Djibouti at the Versailles court (which itself constitutes — as I shall later demonstrate — a violation of the principles of international law pertaining to immunities) directly and decisively influenced the decision to refuse to execute the letter rogatory. The Respondent claims that the decision to refuse execution was taken not by the executive authorities of the French Republic but by the investigating judge at the Paris *Tribunal de grande instance* responsible for the *Borrel* case, in her Order of 8 February 2005[6]. That order actually cites, as the first reason justifying refusal, the inclusion in the case file of documents concerning the investigation opened at the Versailles court for subornation of perjury against Djibouti's State Prosecutor and Head of National Security[7]. In those circumstances, it is hard to see how the Respondent can argue that there is no "relation" between the claim concerning the failure by France to execute the letter rogatory which the Applicant presented and the claim relating to France's breaching of its obligations regarding the immunities to be accorded to high-ranking figures in Djibouti.

8. The Court's jurisdiction *ratione temporis*

23. Consideration of the Respondent's objections analysed so far therefore allows us to conclude that there can be no shadow of a doubt that the Court has jurisdiction *ratione materiae* in relation to all of the claims set out in Djibouti's Application. However, it remains for me to discuss

31 a final objection concerning the limits to the Court's jurisdiction: this time, limits not *ratione materiae* but *ratione temporis*. France in fact alleges that

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[5]CMF, p. 14, para. 2.22.

[6]CMF, p. 36, paras. 3.66 *et seq*.

[7]CMF, Ann. 21.

> "in the unlikely event that the Court were to find jurisdiction in principle to decide the lawfulness of these judicial processes, even though they bear absolutely no relation to Djibouti's international letter rogatory of 2004, it is obvious that the Court could not exercise its jurisdiction in respect of facts arising subsequent to the Application"[8].

In other words, Djibouti's claims concerning the violations which occurred after 9 January 2006, the date on which the Applicant referred the matter to the Court, are alleged to be inadmissible. This would apply in particular to the claim concerning "the invitation to testify sent to the President of the Republic of Djibouti in February 2007"[9] and the claim relating to the arrest warrants issued in October 2006 against two senior Djiboutian officials, pursuant to the judgment by the Versailles Court of Appeal of 27 September 2006[10].

24. Madam President, the Court cannot accept such an allegation, which is clearly unfounded in law. To begin with, it should be borne in mind that, in paragraph 26 of its Application, the Applicant reserved the right to "amend and supplement the present Application" in the course of the proceedings. It is true that, as the Permanent International Court of Justice held in the case concerning *Société Commerciale de Belgique*, and as this Court has on many occasions reaffirmed, "the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably", and "the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments into another dispute which is different in character" (*Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 266-267; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 213-214.). It is, however, hard to see how it could be argued that, if the Court agreed to consider the claims which Djibouti set out in its Memorial, including those relating to events after 9 January 2006, "the subject of the dispute originally submitted to the Court would be transformed" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), op. cit.*, p. 267, para. 70) and "the Court would have to consider a number of questions that appear to it to

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[8]CMF, p. 14, para. 2.23.

[9]CMF, p. 15, para. 2.24.

[10]CMF, p. 15, para. 2.25.

be extraneous to the original claim" (*ibid*., p. 266, para. 68). In point of fact, none of the claims which Djibouti has made are new or extraneous to the initial claims: they all relate to the claims set out in the Application and are based on the same legal grounds.

25. It is true that some of the claims have been brought up to date in the light of recent developments in the dispute between the Parties. But no one could prevent the Parties from doing this and, consequently, supplementing their claims to take account of events which took place after the Court was seised of the dispute. The Court has certainly recognized that possibility. In its Judgment in the case concerning *Fisheries Jurisdiction*, for example, the Court had no hesitation in considering admissible a claim for compensation which the applicant first made in its memorial and which related to events that postdated the application: in order to establish its jurisdiction in the case, the Court had only to determine that the matter raised by the applicant "is part of the controversy between the Parties" and that the related claim "is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of the Application" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72). Madam President, the circumstances are clearly the same in this case: there can be no doubt that the matters subsequent to Djibouti's Application that are raised in its Memorial are (to use the Court's own words) matters "arising directly out of the question which is the subject-matter of the Application". These are, in fact, new violations which would not have occurred, had France rigorously complied with its international obligations referred

33 to in the Application, which specifically cited the violation by the Respondent of the principles of international law concerning the freedom, dignity and immunities of those high-ranking figures in the Republic of Djibouti.

Conclusion

26. Members of the Court, let me sum up my oral argument thus. The Republic of Djibouti requests the Court to dismiss all of the objections which France has raised concerning the scope of the Court's jurisdiction *ratione materiae* and *ratione temporis*. The Applicant therefore requests the Court to decide that it has jurisdiction to rule on the merits in respect of all of the claims which the Applicant set out in its Application and elaborated upon in its Memorial.

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27. Madam President, may I thank you and ask you to give the floor now to the Deputy Agent of the Republic of Djibouti, Mr. Phon van den Biesen.

The PRESIDENT: Thank you Professor Condorelli. We shall now take a brief pause. The sitting is adjourned for a few minutes.

The Court adjourned from 4.20 p.m. to 4.35 p.m.

The PRESIDENT: Please be seated. Maître van den Biesen.

Mr. van den BIESEN:

ATTEINTES À L'IMMUNITÉ, À L'HONNEUR ET À LA DIGNITÉ DU PRÉSIDENT DE L'ETAT DEMANDEUR

Remarques liminaires

1. Madame le président, Messieurs de la Cour, c'est pour moi aussi un grand honneur et un immense plaisir de me présenter devant la Cour une fois de plus. C'est même un honneur et un plaisir tout particuliers, compte tenu des spécificités qui sont celles de la présente affaire : car le

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demandeur, en l'espèce, est un Etat minuscule, classé parmi les pays les plus pauvres du globe — un Etat minuscule qui sollicite la protection de ses droits dans le cadre d'un différend qui l'oppose à un pays qui reste l'un des plus importants et des plus influents de la planète. Si bien que ce qui se jouera ici pendant ces quelques jours, et à quoi nous contribuerons tous, relève de l'exercice de l'une des attributions éminemment nobles de la justice : assurer la protection du faible contre le fort. Or, cette protection devient perceptible dans un cadre où l'une et l'autre des Parties sont — en tant que Parties — placées sur un pied de complète égalité — égalité dans leur position devant cette Cour, la Cour internationale de Justice. Cette affaire présente par ailleurs un autre trait distinctif : le défendeur, en l'espèce, a choisi de consentir à la saisine de la Cour pour trancher les questions en jeu. L'on ne saurait mésestimer l'importance de ce choix : la République française

montre ainsi au monde son inclination à privilégier un mode de règlement pacifique et civilisé des différends internationaux et, ce faisant, met en lumière, et renforce, l'autorité dont est investie la Cour en tant qu'organe judiciaire principal de l'Organisation des Nations Unies.

2. En d'autres termes, aussi fortes que soient les convictions qui les divisent, les deux Parties en cause s'accordent avant tout à penser que c'est effectivement au Palais de la Paix que, de préférence, il convient de chercher à régler leurs désaccords.

Introduction

3. Madame le président, ainsi que l'ont rappelé les précédents orateurs, plusieurs questions sont en jeu en l'espèce. Des questions qui sont étroitement liées entre elles, et qui se sont traduites par une série d'actions et d'omissions — en partie simultanées — du défendeur qui toutes, de l'avis du demandeur, sont à l'origine de la violation de plusieurs de ses droits au regard du droit international. Parmi elles figurent les atteintes à l'immunité, à l'honneur et à la dignité du président de l'Etat demandeur, d'une part, et les atteintes à la dignité et à l'immunité de deux de ses représentants, d'autre part. A l'évidence, ainsi que l'a indiqué le demandeur dans son mémoire, ces atteintes doivent être considérées comme allant à l'encontre du but et de l'esprit de coopération de bonne foi sous-tendant le traité d'amitié et de coopération[11]. Bien que ces violations puissent être considérées comme de nature assez semblable, elles présentent des différences tant du point de vue des principes que des faits. Cela nous a conduits à dissocier les violations dont a été victime le président de celles dont ont été l'objet les deux fonctionnaires.

35 4. Je me consacrerai aujourd'hui à l'appréciation des faits concernant le président de l'Etat demandeur, et M. Condorelli examinera, demain, ceux qui concernent le procureur général et le chef de la sécurité djiboutiens.

5. Ma plaidoirie d'aujourd'hui s'articule autour de deux incidents, qui, l'un comme l'autre, étaient destinés à impliquer le président de Djibouti dans les instructions ouvertes en France au sujet de l'affaire Borrel :

— la «convocation à témoin» du 17 mai 2005 adressée par le juge chargé de l'instruction sur le meurtre de M. Borrel, Mme Sophie Clément ;

[11] MD, par. 125.

— une convocation de même nature, émanant du même juge d'instruction, datée du 14 février 2007.

Avant de nous pencher de plus près sur ces deux convocations, il conviendrait de préciser brièvement quelques points de droit.

Le droit

6. Madame le président, la Cour, dans l'affaire relative au *Mandat d'arrêt*, a estimé que,

> «de même que les agents diplomatiques et consulaires, certaines personnes occupant un rang élevé dans l'Etat, telles que le chef de l'Etat…, jouissent dans les autres Etats d'immunités de juridiction, tant civiles que pénales» (*Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C.I.J. Recueil 2002*, p. 20-21, par. 51).

7. Le défendeur semble également s'inspirer de cet arrêt[12]. Il a indiqué en outre, dans son contre-mémoire :

> «La République française reconnaît pleinement, et sans restriction, le caractère absolu de l'immunité de juridiction et, à plus forte raison, d'exécution, dont disposent les chefs d'Etat étrangers.»[13]

Le défendeur exprime une position analogue dans les divers communiqués de presse qu'il a publiés en rapport avec les convocations dont il est question en l'espèce[14]. Il est donc légitime, Madame le président, de conclure qu'il n'existe pas de grande divergence de vues entre les Parties quant à l'existence de règles de droit international coutumier protégeant l'immunité, l'honneur et la dignité d'un chef d'Etat, et à la signification générale de ces règles.

36 8. Les Parties semblent en revanche être en désaccord sur la pertinence, en l'espèce, de la convention de 1973 sur la protection et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques[15]. Comment, toutefois, pourrait-on nourrir le moindre doute sur la pertinence que revêt la disposition énoncée au paragraphe 3 de l'article 2 de cette convention, qui évoque clairement l'existence incontestée et le

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[12] CMF, par. 4.9.

[13] CMF, par. 4.6.

[14] Communiqué de presse, cabinet du garde des sceaux, ministre de la justice de la République française, 14 février 2007, annexe 3 des documents additionnels soumis à la Cour par la République de Djibouti le 21 novembre 2007, p. 7.

[15] Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques, du 14 décembre 1973 — entrée en vigueur le 20 février 1977.

caractère contraignant des «obligations qui, en vertu du droit international, incombent aux Etats parties de prendre toutes mesures appropriées pour prévenir d'autres atteintes à la personne, la liberté ou la dignité d'une personne jouissant d'une protection internationale» ? Cette disposition confirme, et confirme d'une manière qui ne laisse aucun doute, que les atteintes à la dignité des personnes jouissant d'une protection internationale relèvent entièrement de la protection offerte par les règles de droit international coutumier garantissant l'immunité des chefs d'Etat.

9. Madame le président, l'affaire relative au *Mandat d'arrêt* présente quelques autres caractéristiques intéressantes. Dans cette affaire, la Cour n'avait pas été priée de se prononcer spécifiquement sur le degré d'immunité auquel pouvait prétendre un chef d'Etat. Néanmoins, cinq juges au moins l'ont fait. Dans leurs opinions individuelles et dissidentes respectives, tous ont, à leur manière, affirmé qu'effectivement, les chefs d'Etat avaient droit à un autre niveau de protection, un niveau supérieur, cette prérogative trouvant son origine et sa raison d'être dans le fait qu'ils personnifient l'Etat (*Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C.I.J. Recueil 2002*, opinion individuelle commune de Mme Higgins, M. Kooijmans et M. Buergenthal, p. 87, par. 80 ; *ibid.*, opinion individuelle de M. Koroma, p. 61, par. 6 ; *ibid.*, opinion dissidente de M. Al-Khasawneh, p. 96, par. 2).

10. Dans l'une de ces opinions, trois juges — vous, Madame le président, ainsi que MM. les juges Buergenthal et Kooijmans — ont fait référence à la résolution adoptée, en 2001, par l'Institut de droit international à sa session de Vancouver. Cette résolution vient, elle aussi, étayer la thèse du demandeur en l'espèce. En effet, elle établit une distinction entre immunité en matière pénale, laquelle est affirmée de manière absolue[16], et immunité en matière civile ou administrative, laquelle n'est pas reconnue en tant que telle, si ce n'est dans le cas d'actes accomplis par un chef d'Etat dans l'exercice de ses fonctions officielles[17]. Toutefois, en ce qui concerne les cas relevant

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du domaine civil et administratif, pour lesquels aucune immunité n'est prévue, la résolution dispose expressément qu'«aucun acte lié à l'exercice de la fonction juridictionnelle ne peut être accompli à [l']endroit [du chef d'Etat] lorsqu'il se trouve sur le territoire d['un] Etat [étranger] dans l'exercice

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[16] Article 2 de la résolution de l'Institut de droit international relative aux immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international, adoptée le 26 août 2001 (rapporteur spécial : M. Joe Verhoeven), disponible à l'adresse : http://www.idi-iil.org/idiF/resolutionsF/2001_van_02_fr.PDF.

[17] *Ibid.*, art. 3.

de ses fonctions officielles»[18]. De toute évidence, la garantie qu'offre cette dérogation à la non-protection de l'immunité s'explique, une fois de plus, par la position particulière qu'occupe le chef d'Etat. Le fait que cette même protection soit énoncée dans le contexte d'un régime de protection nettement moins contraignant que celui prévu en matière pénale prouve que les convocations adressées au chef de l'Etat demandeur alors qu'il se trouvait en visite officielle en France constituaient clairement une atteinte à son immunité, à son honneur et à sa dignité.

Les deux convocations

11. Compte tenu du très large accord existant entre les Parties sur les règles essentielles du droit coutumier qui s'appliquent à la fonction présidentielle, j'aborderai maintenant les faits pertinents relatifs aux deux convocations ainsi que leur interprétation.

12. Les Parties conviennent que deux convocations ont bien été adressées au président de Djibouti : la première, le 17 mai 2005, et la seconde, le 14 février 2007. Le défendeur le confirme explicitement dans son contre-mémoire : «En l'espèce, le chef d'Etat djiboutien a été convoqué, à deux reprises, par un magistrat instructeur français en tant que simple témoin.»[19]

13. En outre, compte tenu de l'explication fournie par le défendeur sur les différences entre un témoin et un témoin assisté, il n'y a aucun désaccord entre les Parties sur le sens de ces deux dénominations[20]. Le demandeur considère que le président de Djibouti n'a pas été cité à comparaître en tant que témoin assisté, mais seulement en tant que témoin, et que cette citation était exclusivement liée à l'enquête sur l'assassinat de M. Borrel.

14. C'est sur ce point que les divergences semblent commencer à se faire jour, et je vais donc examiner ces deux convocations plus en détail.

38 **17 mai 2005**

15. En mai 2005, le président de Djibouti a rendu une visite officielle au président de la République française. Le 17 mai 2005, le juge d'instruction chargé de l'enquête Borrel, Mme Sophie Clément, profitant de sa présence en France, a envoyé une lettre au président de

[18] *Ibid.*

[19] CMF, par. 4.8; voir également CMF, par. 4.16.

[20] CMF, par. 4.7.

Djibouti en personne, aux bons soins de l'ambassade de Djibouti à Paris. Cette lettre a été envoyée par simple télécopie[21].

16. La lettre contient un titre en majuscules indiquant : convocation à témoin (soit dit en passant, Madame le président, le titre ainsi que l'adresse apparaissent bien dans l'original français, mais pas dans la traduction fournie par le Greffe).

17. Par cette lettre, le président du demandeur était invité à se présenter en personne au bureau du juge Clément. Selon la lettre, cette comparution devait avoir lieu le lendemain, le 18 mai 2005 au matin, à 9h30. L'objet de la comparution était également précisé : le président devait être entendu.

18. Il ressort clairement de la forme de la lettre que le tribunal de grande instance utilise un document type pour ce genre de convocation, document dans lequel, semble-t-il, certaines parties peuvent être supprimées ou ajoutées, en fonction des spécificités de l'affaire ou des préférences de l'expéditeur. Le dossier actuel contient trois convocations de ce genre : la convocation de l'ambassadeur de Djibouti en date du 21 décembre 2004[22], la convocation du président en date du 17 mai 2005[23] et la convocation de Mme Geneviève Foix, datée du 15 octobre 2007[24]. Ces convocations, Madame le président, se trouvent toutes dans le dossier de plaidoirie. Elles sont toutes rédigées en des termes rigoureusement identiques, y compris la phrase introductive, dans laquelle le verbe principal est «inviter».

19. Il existe une différence frappante entre les convocations adressées à l'ambassadeur et au président, d'une part, et celle adressée à Mme Foix, d'autre part : cette dernière contient un avertissement — une mise en garde — précisant les conséquences juridiques d'un refus de comparaître devant le juge. Il y est indiqué que, conformément à l'article 109 du code de

39 procédure pénale français, le témoin qui ne comparaît pas peut y être contraint par la force

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[21] MD, annexe 28.

[22] MD, annexe 25.

[23] MD, annexe 28.

[24] Lettre en date du 21 novembre 2007 adressée à la Cour par le demandeur, annexe 7.

publique[25]. Il y est également indiqué que, conformément à l'article 434-15-1 du code pénal français, le défaut de comparution est passible d'une amende de 3750 euros (ce qui, soit dit en passant, représente près de deux fois le revenu annuel moyen d'un citoyen de Djibouti).

20. L'on ne peut que deviner, Madame le président, les raisons qui ont conduit les juges d'instruction respectifs à ne pas faire figurer cet avertissement dans les convocations envoyées à l'ambassadeur et au président. Toutefois, le fait que cette mise en garde n'ait pas été incluse dans ces convocations n'a évidemment pas d'effet suspensif sur l'application de l'article 109 du code de procédure pénale français ni de la disposition susmentionnée du code pénal français.

21. Compte tenu de ces particularités de la convocation du 17 mai 2005 et de ce qui ressort des termes employés, il ne saurait y avoir de doute qu'il est clairement demandé au destinataire, le président de Djibouti, de comparaître en personne afin d'être entendu en tant que témoin, le défaut de comparution étant punissable en droit français et pouvant conduire à l'usage de la force publique.

22. Voyons à présent quelle est l'interprétation du défendeur. Ce dernier affirme que la convocation n'est pas ce que son libellé donne à entendre qu'elle est; cherchant, clairement, à la transformer en autre chose, il avance qu'elle devrait être considérée, non comme une convocation à témoin, mais comme une invitation à déposer[26]. Puis, le défendeur se lance dans une explication du véritable sens d'une disposition tout à fait différente du code de procédure pénale français — à savoir l'article 656 —, tout en insistant sur son caractère volontaire[27].

23. Mais, Madame le président, cet article 656 s'inscrit dans le cadre d'une procédure écrite, c'est-à-dire d'une procédure qui a pour objet d'obtenir une déposition écrite de la part du représentant d'une puissance étrangère. Il s'agit là, Madame le président, d'une question tout à fait différente. Pour ce type de demande, la procédure pénale française exige l'entremise du ministère

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[25] Art. 109 : "Any person summoned to be heard in the capacity of a witness is obliged to appear, to swear an oath, and to make a statement, subject to the provisions of Articles 226-13 and 226-14 of the Criminal Code . . . If the witness does not appear or refuses to appear, the investigating judge may, on the request of the district prosecutor, order him to be produced by the law-enforcement agencies."

http://www.legifrance.gouv.fr/WAspad/RechercheSimpleArticleCode;jsessionid=H9yPy7wOAo40OpfMHh0Dhh5mOwnIiaXiq5DSOCy8F52Z7U9uIx72!1357326563!iwsspad4.legifrance.tours.ort.fr!10038!-1!-374008625!iwsspad6.legifrance.tours.ort.fr!10038!-1.

[26] CMF, par. 4.8.

[27] CMF, par. 4.10.

des affaires étrangères. Dès lors qu'elle vise à obtenir une déposition écrite, la procédure de
40 l'article 656 n'est pas assortie d'une demande de comparaître en personne au bureau du juge d'instruction à une date et à une heure données ; il n'en résulte pas que la personne à qui la demande est adressée sera interrogée oralement par le juge d'instruction, et elle ne prévoit pas de sanctions pénales dans l'hypothèse où la déposition ne serait pas présentée.

24. Le défendeur a sans doute raison sur la nature de la procédure de l'article 656, en particulier lorsqu'il met l'accent sur son caractère volontaire et sur les nombreuses précautions procédurales dont elle est entourée, y compris tous les égards liés à la fonction de l'intéressé en sa qualité de représentant d'un Etat souverain[28]. Cependant, toutes ces particularités ne se retrouvent tout simplement pas dans la convocation à témoin envoyée au président du demandeur le 17 mai 2005, laquelle est clairement une convocation fondée sur l'article 101 du code de procédure pénale français. A l'évidence, le défendeur tente ici de créer un écran de fumée pour nous empêcher de nous faire une idée claire de la forme, du sens, ainsi que des conséquences de la convocation à témoin. Les faits dont nous avons connaissance font que cette tentative est tout simplement vouée à l'échec.

25. Dans l'affaire des *Otages de Téhéran*, la Cour a estimé qu'une simple tentative «de contraindre les otages [c'est-à-dire les diplomates] à témoigner» serait suffisante pour constituer une violation des dispositions pertinentes de la convention de Vienne de 1961 (affaire relative au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran), arrêt, C.I.J. Recueil 1980*, p. 37, par. 79). Dès lors qu'il est généralement admis que les règles relatives aux immunités dont jouissent les agents diplomatiques reflètent le droit coutumier, et qu'elles peuvent par conséquent être appliquées par analogie aux chefs d'Etat, il est clair que cette observation formulée par la Cour s'appliquerait à fortiori à un chef d'Etat.

26. De manière similaire, la Cour a, en l'affaire du *Mandat d'arrêt*, estimé que la simple émission d'un mandat d'arrêt qui, aux termes de la législation nationale pertinente, est susceptible de conduire à l'arrestation de la personne concernée, constituerait comme telle et en elle-même une violation de l'immunité du ministre des affaires étrangères (affaire relative au *Mandat d'arrêt du*

[28] CMF, par. 4.11.

11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C.I.J. Recueil 2002, par. 70).

27. Compte tenu de ces précédents, la question qui reste posée est de savoir dans quelle mesure la «convocation» de l'article 101 est liée à l'article 109 du même code français, lequel prévoit le recours à la force publique. Madame le président, qui, mieux que la Cour de cassation du

41 défendeur, pourrait fournir une interprétation faisant autorité de ces dispositions ? Il a été demandé à la Cour de cassation d'apprécier la légalité d'une invitation à témoigner, invitation qui avait été adressée au président Chirac. Eh bien, voici ce que la plus haute juridiction française a indiqué :

> "[T]he President of the Republic cannot, during his term of office, be heard as a legally represented witness, or be placed under judicial examination, summoned to appear or committed for trial for any offence before any organ of ordinary criminal jurisdiction; whereas neither can he be obliged to appear as a witness pursuant to Article 101 of the Code of Criminal Procedure, since, under Article 109 of the said Code, there attaches to that obligation a measure of publicly enforceable constraint and it is sanctioned by a criminal penalty."

Autrement dit, la Cour de cassation a jugé que le lien entre les deux dispositions était tel que l'article 101 s'accompagnait effectivement, par le biais de l'article 109, du soutien de la force publique. Et c'est pour cette raison que la plus haute juridiction française a jugé qu'une convocation adressée au président français aux termes de l'article 101 était illicite.

28. Compte tenu de ce qui précède, il ne saurait y avoir de doute que la convocation à témoin envoyée par télécopie au président de l'Etat demandeur le 17 mai 2005 devrait également être considérée comme illicite au regard du droit international. M. Michel Cosnard, dans sa contribution au colloque de la Société française de droit international organisé en 2001, a formulé *in abstacto* une conclusion similaire[29].

29. Le défendeur réduit tout cela à une question de forme et déclare :

> «Il ne fait pas de doute que, sur la forme, cette convocation ne respectait pas les prescriptions de l'article 656 du code de procédure pénale dès lors qu'elle n'avait pas été transmise au chef de l'Etat djiboutien [soit] par «l'entremise du ministère des affaires étrangères», soit par la voie diplomatique.»[30]

Il ne fait pas de doute que le défendeur a raison sur ce point particulier, sur ce point mineur. Seulement, ce que nous examinons ici n'est *pas* une question ayant trait au respect ou au

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[29] Cosnard, «Les immunités du chef d'Etat», *in* Actes du colloque de la Société française de droit international (Clermont-Ferrand 2001), Paris, 2002, p. 255.

[30] CMF, par. 4.20.

non-respect d'une certaine exigence procédurale de l'article 656 — tout simplement parce que la présente convocation à témoin n'est *pas* une demande régie par cet article —, mais une convocation d'une nature totalement différente, régie par l'article 101 du code de procédure pénale

42 français. Il convient de relever que cet écran de fumée est en fait la seule — l'unique — réponse que le défendeur a formulée au sujet de la convocation du 17 mai 2005. Le contre-mémoire ne contient pas la moindre ébauche d'une thèse selon laquelle le recours à une convocation au titre de l'article 101 pourrait, d'une quelconque manière, être licite au regard du droit international, lorsque la personne à laquelle cette convocation est adressée est un chef d'Etat. Par conséquent, si les Parties semblent s'accorder sur le droit, le défendeur, pour tenter d'étayer sa thèse, présente les faits d'une manière totalement dépourvue de fondement et complètement invraisemblable.

30. Ainsi que nous l'avons rappelé dans le mémoire[31], dès réception de la convocation envoyée par télécopie le 17 mai 2005, l'ambassadeur de Djibouti à Paris adressa immédiatement une lettre de protestation au ministère des affaires étrangères français[32]. A ce stade, l'ambassadeur était tout à fait au courant des données juridiques et factuelles dont il était question ; en effet, il avait l'expérience de ce genre de convocation, puisque, peu de temps auparavant — à savoir le 21 décembre 2004 —, il en avait lui-même reçu une[33]. A l'occasion de cet incident, le chef du protocole français ne se mêla pas d'opérer une métamorphose, mais se contenta de présenter ses excuses, excuses qu'il formula dans sa lettre du 14 janvier 2005. Il y indiquait :

> "I also confirm that, in accordance with Article 656 of the Code of Criminal Procedure, a written statement from a representative of a foreign power is requested through the Ministry of Foreign Affairs. As that was not done in the present case — a fact which I deplore — I ask you to accept my apologies for this breach of diplomatic custom."[34]

En outre, le chef du protocole informa l'ambassadeur que le juge d'instruction qui avait envoyé cette convocation avait reconnu son erreur et déclaré que ledit document devait être considéré comme nul et non avenu. A cette occasion, le défendeur ne tenta donc pas de se cacher derrière un quelconque rideau de fumée ni de dire au destinataire ce qu'il essaie de nous dire

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[31] MD, par. 75.

[32] Note de l'ambassadeur de la République de Djibouti à Paris, 18 mai 2007, MD, annexe 29.

[33] MD, annexe 25.

[34] *Ibid.*, annexe 27.

aujourd'hui, à savoir que cette convocation *n*'est *pas* ce que son libellé donne à entendre qu'elle est et qu'il s'agirait de l'invitation prévue à l'article 656.

31. Dans la lettre de protestation contre la convocation qu'il adressa au président, l'ambassadeur invita le ministre, dans des termes dénués d'ambiguïté, à confirmer que cette

43 convocation devait être considérée comme nulle et non avenue et qu'il prendrait toutes les mesures nécessaires à l'égard du juge d'instruction[35]. Le ton de cette lettre visait clairement à manifester le désarroi du demandeur ; ce désarroi était d'autant plus grand que, comme l'ambassadeur l'indiqua aussi au ministre, vingt et une minutes après que le juge d'instruction eut effectivement transmis la télécopie contenant la convocation — le bordereau indique qu'il était 15 h 51 —, l'agence France-Presse — à 16 h 12 — relayait l'existence de ce document. D'un point de vue médiatique, il s'agissait là d'une véritable prouesse de la part de l'agence France-Presse. Toutefois, la publication de cette information soulève toutes sortes de questions quant au fonctionnement de la justice française. Certes, cela n'est naturellement pas, en soi, l'affaire de Djibouti, mais ce comportement en particulier porte atteinte à sa relation avec la République française et est également susceptible d'engager la responsabilité internationale du défendeur. En tout état de cause, il aurait été permis d'attendre du ministre français des affaires étrangères une réponse immédiate contenant à tout le moins — je dis bien, à tout le moins — le même type d'excuses que celles qui furent présentées lors de la convocation illicite de l'ambassadeur, une réponse offrant une explication et indiquant ce que l'exécutif français pouvait — et donc allait — faire pour éviter qu'elle ne se reproduise.

32. Aucune réponse de la sorte ne fut adressée au demandeur. Cela dit, le ministère répondit effectivement à l'ambassadeur : il lui envoya la transcription d'un entretien donné en direct par le porte-parole du ministère à une station de radio française. Aucune lettre de couverture n'était jointe à cette transcription, en dehors d'un bordereau de télécopie portant la mention «pour votre information»[36]. Dans le cadre de l'entretien en question, l'intéressé explique en termes généraux que tous les chefs d'Etat en exercice bénéficient d'une immunité et que la France entend faire

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[35] Voir plus haut, note 24.

[36] CMF, annexe XXIX.

respecter ce principe. Il poursuit en expliquant que le code de procédure pénale contient certaines dispositions au sujet des dépositions écrites demandées au représentant d'une puissance étrangère.

33. Il ne s'agit pas là d'une manière particulièrement élégante de répondre à une lettre de protestation émanant du représentant d'un Etat avec lequel la République française a convenu d'entretenir des relations amicales dans le cadre d'un traité d'amitié. En outre, cette réponse ne peut, ni en substance ni du point de vue de la forme — et encore moins en termes de bonne foi et de coopération constructive —, être considérée comme une réaction satisfaisante à la lettre de l'ambassadeur. Ne peut pas l'être davantage — tant s'en faut — le fait de soumettre deux ans plus

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tard, cette fois-ci à la Cour, un autre communiqué de presse du 18 mai 2005, ce que le défendeur a fait dans son contre-mémoire[37]. Ce communiqué avait un contenu similaire à la transcription que le défendeur avait adressée à l'ambassadeur de l'Etat demandeur le 19 mai 2005.

34. Madame le président, il est bien beau d'éclairer la presse sur la teneur de l'article 656, ainsi que le défendeur l'a fait dans le communiqué, mais cela ne règle pas le problème, à savoir que cette convocation à témoin est celle qui est visée par l'article 101. De plus, le fait d'indiquer dans ce communiqué de presse que la République française «entend faire respecter» le principe de l'immunité ne peut pas non plus être considéré comme une réponse appropriée à la substance de la lettre de l'ambassadeur. Dans ces communiqués de presse, il est clairement omis d'évoquer l'erreur faite par le juge d'instruction.

35. En fait, ce type de réponse ou, plutôt, de non-réponse à la lettre du demandeur ajoute encore au caractère frappant et à la gravité des atteintes portées à l'immunité, à l'honneur et à la dignité du chef de l'Etat djiboutien. Jusqu'à ce jour, ni le demandeur ni son président n'ont reçu la moindre notification, sous quelque forme que ce soit, indiquant que la convocation du 17 mai 2005 doit être tenue pour nulle et non avenue. Le chef de l'Etat djiboutien refusant naturellement de se rendre à la convocation, il demeure actuellement passible de sanctions au regard du droit français, et la force publique peut être utilisée à son encontre pour le contraindre à comparaître devant le juge d'instruction concerné.

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[37] CMF, annexe XXX.

36. Le défendeur n'a pas saisi l'occasion que lui offrait la procédure qui nous réunit ici pour formuler des excuses, donner des garanties et assurances de non-répétition, ou faire l'un et l'autre.

37. Madame le président, les faits relatifs à la convocation du 17 mai 2005 ne peuvent être contestés d'un point de vue raisonnable. Partant, il ne peut pas non plus être raisonnablement contesté que, en lui adressant cette convocation, la République française a bel et bien porté atteinte à l'immunité ainsi qu'à l'honneur et à la dignité du président de l'Etat demandeur.

38. La réponse ou, plutôt, la non-réponse de la République française à la lettre de protestation de l'ambassadeur de Djibouti devrait, en elle-même, être considérée comme une autre atteinte à l'immunité, à l'honneur et à la dignité du président djiboutien — une atteinte dont force est de conclure qu'elle se poursuit encore à l'heure actuelle, le défendeur ayant refusé de déclarer la convocation du 17 mai 2005 nulle et non avenue.

45 **Le 14 février 2007**

39. Ainsi que je l'ai rappelé plus tôt, dans son contre-mémoire, le défendeur a déclaré : «En l'espèce, le chef d'Etat djiboutien a été convoqué, à deux reprises, par un magistrat instructeur français en tant que simple témoin.»[38] Nous venons d'examiner la première convocation. J'en viens maintenant à la seconde, qui fut émise le 14 février 2007 lors du séjour du président djiboutien en France à l'occasion de la vingt-quatrième conférence des chefs d'Etat d'Afrique et de France, qui devait se tenir à Cannes les 15 et 16 février 2007. Cette conférence réunissait non seulement quarante-neuf délégations d'Afrique, mais aussi des représentants de l'Organisation des Nations Unies et de l'Union africaine, Mme Angela Merkel représentant l'Union européenne, en sa qualité de présidente en exercice[39].

40. M. Condorelli s'est arrêté sur les questions de compétence soulevées par le défendeur à l'égard de la demande du 14 février 2007[40]. Je m'attacherai à examiner la nature de cette seconde tentative visant à faire déposer le président en qualité de témoin.

41. Tout d'abord, il est difficile de saisir comment les organes judiciaires et exécutifs du défendeur ont pu tenter une nouvelle fois de mêler le président à l'instruction de l'affaire Borrel en

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[38] CMF, par. 4.8 ; voir aussi par. 4.16.

[39] http://www.ambafrance-uk.org/Africa-France-summit-Final.html

[40] CR 2008/1, par. 23-25 (Condorelli).

tant que témoin, sans faire la moindre mention des événements de mai 2005 concernant la convocation à témoin.

42. Ensuite, le moment choisi pour cette nouvelle tentative et la manière dont celle-ci a été mise en œuvre sont encore plus frappants. Dans le contre-mémoire, le défendeur plaide que, cette fois-là, seule la procédure écrite visée à l'article 656 du code de procédure pénale français était en jeu. Pourquoi fallait-il alors porter cette demande à l'attention du président au beau milieu d'une conférence des chefs d'Etat d'Afrique et de France ? Puisque la forme écrite était de rigueur ici, la demande formulée au titre de l'article 656 aurait dû être transmise au président par l'entremise de l'ambassadeur de la République française à Djibouti, où que le président se trouvât alors.

46 43. Apparemment, le juge d'instruction préféra choisir l'événement très médiatisé qu'était la réunion des chefs d'Etat africains en France pour inviter derechef le président de l'Etat demandeur à jouer un rôle dans le cadre de l'instruction sur l'assassinat du juge Borrel. Apparemment, le ministre français des affaires étrangères n'a vu aucune raison de faire savoir au juge Clément qu'il transmettrait la demande au président par l'entremise de l'ambassadeur français à Djibouti, afin de lui permettre de la traiter à son retour à Djibouti, au lendemain de la clôture de la conférence. Après tout, la procédure prévue à l'article 656 n'oblige pas le ministre des affaires étrangères à suivre les suggestions du juge au sujet du moment de la transmission de l'invitation et de ses modalités pratiques.

44. Là encore, les raisons pour lesquelles le juge et le ministre ont l'un et l'autre choisi de procéder ainsi peuvent seulement être supposées. En revanche, au-delà des suppositions, il est certain que la justice française a ici aussi informé la presse très tôt, cette fois avant même de transmettre l'information aux représentants de Djibouti.

45. Le 12 novembre 2007, nous avons transmis à la Cour trois coupures de presse. La première démontre que *L'Express* a été en mesure de publier la nouvelle dès 13 h 41. L'article indique que le juge Clément a demandé à entendre le témoin le vendredi, à Paris. La deuxième coupure de presse montre que *Le Monde* publiait une information similaire à 14 h 2. Cet article utilise les mêmes termes que *L'Express.* Il indique que le juge Clément veut entendre le président le vendredi, à Paris. La troisième coupure de presse, publiée par l'*Associated Press* à 14 h 50, contient un article mis à jour précisant que le juge Clément «a convoqué comme témoin» le

président de l'Etat demandeur. L'article annonce en outre que le président est convoqué pour le vendredi. L'origine de cette information est mentionnée à deux reprises dans l'article : ce sont des «sources judiciaires». Ces trois organes de presse sont des médias respectés qui n'ont pas la réputation de publier une nouvelle sans avoir procédé à une double vérification ni de citer une source particulière si, en fait, cette source n'est pas la bonne.

46. Sitôt parues ces informations, l'ambassadeur djiboutien publia un communiqué, dans lequel il élevait une protestation et évoquait l'incident, de même nature, survenu en mai 2005[41].

47. En réponse à cette protestation, les autorités françaises n'écrivirent pas directement à l'ambassadeur de Djibouti pour lui présenter des excuses ou, à tout le moins, des explications. Le

47 ministère de la justice publia toutefois au cours de l'après-midi un communiqué de presse, dans lequel il mentionnait la «convocation adressée ce jour au président de la République de Djibouti à titre de témoin»[42]. Le ministère y rappelait aussi que les chefs d'Etat ne pouvaient être contraints de témoigner. Comme le faisaient les coupures de presse, le ministre de la justice, cette fois, mentionnait expressément une «convocation … à titre de témoin», et indiquait aussi que cette convocation était adressée au président. Les termes dans ce communiqué sont plus ou moins les mêmes que ceux utilisés dans le communiqué publié par le ministère des affaires étrangères le 19 mai 2005, à l'occasion de la première convocation à témoin[43].

48. Ces divers documents du 14 février 2007 montrent qu'il s'agit ici d'une répétition à l'identique de l'épisode du 17 mai 2005. Apparemment, le juge d'instruction a, de nouveau, cherché à obtenir une déposition du président de l'Etat demandeur, que celui-ci aurait dû faire, en personne, à Paris, deux jours après l'envoi de la convocation.

49. Ainsi que je l'ai déjà indiqué, le défendeur reconnaît que le président a été convoqué à deux reprises. Le demandeur n'ayant pas soumis la deuxième convocation — pour la simple raison qu'il ne l'a jamais reçue —, le défendeur a affirmé, dans son contre-mémoire, qu'il le ferait à notre

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[41] Communiqué de l'ambassade de la République de Djibouti à Paris afférent à la demande d'audition de S. E. M. Ismail Omoar Guelleh, 14 février 2007, annexe 1 des documents additionnels soumis à la Cour par la République de Djibouti le 21 novembre 2007, p. 1.

[42] Communiqué de presse, cabinet du garde des sceaux, ministre de la justice de la République française, 14 février 2007, annexe 3 des documents additionnels soumis à la Cour par la République de Djibouti le 21 novembre 2007, p. 7.

[43] CMF, annexe XXX.

place — il la soumettrait, pour la commodité de la Cour, en tant qu'annexe IV[44]. Dans la liste des annexes, le titre de cette annexe IV est exactement le même que celui de l'annexe III ; seule la date est différente. Ainsi, l'annexe III était censée reproduire la convocation du 17 mai 2005, l'annexe IV celle du 14 février 2007. Or, le document classé sous l'annexe IV s'est révélé être non pas l'«invitation à déposer comme témoin» annoncée dans le contre-mémoire, mais une «lettre en date du 14 février 2007 adressée par le ministre des affaires étrangères au ministre de la justice» — ce qui vise, à l'évidence, tout autre chose qu'une convocation — et, par ailleurs, la lettre en question figurait, précisément sous ce titre, à l'annexe XXXIV. Le demandeur a donc prié la Cour, le 3 janvier 2008, d'inviter le défendeur à rectifier ce qui était apparemment une erreur et à soumettre le document auquel correspondait le titre de l'annexe IV. Il a fait de même en ce qui

48 concerne l'annexe III. Le défendeur a, le 7 janvier 2008, informé la Cour qu'il n'était fait qu'une seule référence à l'annexe IV dans le corps de son contre-mémoire, au paragraphe 1.6 — ce qui n'est pas entièrement vrai, puisqu'elle est également mentionnée au paragraphe 4.24, lequel indique que la convocation, «pour la commodité des juges de la Cour, figure en annexe IV du présent contre-mémoire»[45]. Le défendeur affirmait aussi que ne figurait pas, à l'annexe IV, d'invitation à déposer comme témoin distincte, mais seulement la lettre également soumise en tant qu'annexe XXXIV.

50. La confusion qui apparaît dans la liste et l'intitulé de ces annexes au contre-mémoire pourrait très bien être le reflet de la tension perceptible entre le pouvoir exécutif et le pouvoir judicaire français, qui semble se manifester dans les divers incidents examinés en l'espèce. En tout état de cause, il ressort clairement des coupures de presse évoquées plus haut et du communiqué de presse émis par le ministère de la justice peu après que la nouvelle de la convocation eut été publiée, qu'au début de l'après-midi, une convocation à témoin a en effet dû exister. Il découle clairement du communiqué que le ministère a trouvé plusieurs lacunes dans la convocation initiale.

51. Quelques heures plus tard, toujours le 14 février 2007, à 18 h 59[46], le juge d'instruction Sophie Clément envoya un message par télécopie au ministre français de la justice pour lui

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[44] *Ibid.*, par. 4.24.

[45] *Ibid.*

[46] Voir les informations sur l'envoi de la télécopie, qui apparaissent en tête de la lettre concernée.

demander de prier le ministre français des affaires étrangères d'inviter le président de l'Etat demandeur à témoigner dans le cadre de l'enquête sur l'assassinat du juge Borrel. Il ne fait aucun doute que cette lettre n'est pas la convocation à laquelle renvoyaient les informations parues dans la presse et qui était mentionnée dans le communiqué de presse.

52. La suite donnée aux faits survenus le 14 février 2007 semble avoir pris la tournure d'une démarche se rapprochant de la procédure définie à l'article 656 dont j'ai parlé plus tôt. L'épisode s'est achevé par le refus du président de témoigner, refus qui a été communiqué aux autorités françaises le 16 février 2007[47].

53. La lettre du 14 février 2007 n'indique pas que le juge souhaite obtenir une déposition *écrite* du président. Il y est annoncé que celui-ci séjournera dans un hôtel de Cannes pendant plusieurs jours. Force est de conclure qu'une analyse conjointe de tous les faits montre que le juge

49 d'instruction a clairement réessayé d'obtenir que le président soit entendu en personne en qualité de témoin dans l'enquête sur l'assassinat de M. Borrel. Ainsi, cette tentative visait, du moins initialement, à suivre la procédure prévue à l'article 101 du code de procédure pénale français. Comme nous l'avons vu, selon cette procédure, le refus de comparaître peut être puni en droit français et conduire au recours à la force publique[48].

54. Comme nous l'avons également vu, dans l'affaire du *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran)*, la Cour avait déclaré qu'une simple tentative visant à citer les otages à témoigner équivaudrait à une violation des règles relatives à l'immunité des diplomates, règles qui sont le reflet du droit coutumier et peuvent, par analogie, s'appliquer aux chefs d'Etat.

55. Que par la suite la procédure semble s'être transformée en une procédure régie par l'article 656 ne change rien aux faits qui montrent qu'une tentative a bel et bien existé et a même été communiquée à la presse avant d'être menée à terme. Cette manière de faire a de toute évidence placé dans une situation embarrassante le président de l'Etat demandeur qui était alors arrivé en France pour assister à une conférence à laquelle il était expressément invité par son homologue français — d'autant plus embarrassante que le défendeur n'a pas jugé bon à l'époque

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[47] CMF, annexe XXXIII.

[48] Code de procédure pénale, art. 109 ; voir, ci-dessus, par. 18.

de présenter des excuses, d'apporter des précisons ou d'entrer d'une manière ou d'une autre en communication directe avec les représentants de l'Etat demandeur, démarche qui pourtant aurait été perçue comme une tentative de remédier aux atteintes à l'immunité, à l'honneur et à la dignité du président djiboutien.

56. Le fait que l'épisode du 14 février 2007 était en réalité une répétition de celui du 17 mai 2005 renforce la gravité de ces atteintes. Ce fait démontre également que le demandeur a toutes les raisons de craindre que le défendeur persiste dans cette conduite à moins que la Cour ne l'invite à y mettre un terme.

Obligation de prévenir

57. Madame le président, il est, en droit international, généralement reconnu que les Etats sont tenus de prendre toutes les mesures nécessaires à la protection de la personne, de la liberté et de la dignité de personnes jouissant d'une protection internationale, dont les chefs d'Etat. L'article 29 de la convention de Vienne sur les relations diplomatiques, à laquelle la France et Djibouti sont parties, dispose que «[l]a personne de l'agent diplomatique est inviolable. Il ne peut être soumis à aucune forme d'arrestation ou de détention. L'Etat accréditaire le traite avec le respect qui lui est dû, et prend toutes mesures appropriées pour empêcher toute atteinte à sa

50 personne, sa liberté et sa dignité.» De même, aux termes de l'article 29 de la convention sur les missions spéciales,

> «[l]a personne des représentants de l'Etat d'envoi dans la mission spéciale ainsi que celle des membres du personnel diplomatique de celle-ci est inviolable. Ils ne peuvent être soumis à aucune forme d'arrestation ou de détention. L'Etat de réception les traite avec le respect qui leur est dû et prend toutes mesures appropriées pour empêcher toute atteinte à leur personne, leur liberté et leur dignité.»

Dans ce contexte, il importe de signaler de nouveau que le paragraphe 3 de l'article 2 de la convention de 1973 sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques, utilise un langage similaire et renvoie à l'existence de telles règles en droit international coutumier en disposant ce qui suit :

> «Les paragraphes 1 et 2 du présent article ne portent en rien atteinte aux obligations qui, en vertu du droit international, incombent aux Etats parties de prendre toutes mesures appropriées pour prévenir d'autres atteintes à la personne, la liberté ou la dignité d'une personne jouissant d'une protection internationale.»

58. Le défendeur semblait être conscient de cette obligation internationale qui lui incombe quand il a déclaré le 18 mai 2005 par l'intermédiaire du porte-parole de son ministère des affaires étrangères que «tout chef d'Etat en exercice bénéficie de l'immunité de juridiction dans ses déplacements à l'étranger. Il s'agit là d'un principe constant du droit international que la France entend faire respecter.»[49] Par cette déclaration, la France manifestait sa volonté de prendre toutes les mesures requises pour préserver l'immunité et la dignité d'un chef d'Etat en exercice qui était en visite officielle sur son territoire, ainsi qu'une reconnaissance générale du statut juridique de cette règle. En tout état de cause, le contre-mémoire ne contient pas d'objections à cette obligation de prévenir, qui constitue un aspect important de l'obligation générale de respect due aux chefs d'Etat étrangers.

Conclusions

59. Madame le président, Messieurs de la Cour, les faits présentés sont clairs et ne peuvent être interprétés que d'une seule façon. La première convocation, celle du 17 mai 2005, ne peut être perçue autrement que comme une convocation fondée sur l'article 101 du code de procédure pénale français qui trouve son pendant exécutif dans l'article 109 du même texte tandis que, aux termes de l'article 434-15-1 dudit code, le défaut de comparution est punissable. La délivrance de cette convocation constitue une claire violation de l'immunité dont bénéficie, comme tout autre chef
51 d'Etat, le président de l'Etat demandeur. Le deuxième épisode — largement médiatisé — devrait tout au moins être interprété comme une autre tentative de citer le président en vue d'obtenir sa déposition orale. Nous avons montré qu'il ressort de la jurisprudence de la Cour que le seul fait d'essayer de citer un chef d'Etat à témoigner dans le cadre d'un système qui prévoit le recours éventuel à la force publique constitue aussi une violation manifeste de l'immunité qui est due au président de l'Etat demandeur comme à tout autre chef d'Etat. Que cette tentative n'ait pas abouti ne change rien à cette violation, cette démarche ayant été largement relayée à l'initiative du demandeur et son existence ayant été confirmée par le ministre de la justice dans son communiqué de presse.

[49] CMF, annexe XXX.

60. Les violations en cause se sont aggravées et multipliées en raison de la manière dont l'exécutif français a choisi de réagir aux protestations fermes — et tout à fait justifiées — que l'ambassadeur djiboutien avait immédiatement adressées dans les deux cas aux autorités françaises. En ces deux occasions, les réponses des autorités françaises pourraient en elles-mêmes être qualifiées d'atteintes graves à l'honneur et à la dignité du président djiboutien. En même temps, cette attitude est loin d'être conforme aux dispositions du traité d'amitié et de coopération du 27 juin 1977, sur lequel M. Condorelli va revenir dans un instant.

61. Les faits invoqués dans cette partie de notre plaidoirie montrent également que le défendeur a plusieurs fois manqué à son devoir de prévenir toutes atteintes de sa part à l'immunité, la dignité et l'honneur du président djiboutien et que ce manquement est devenu plus manifeste encore lorsqu'il a de nouveau essayé d'obtenir la déposition orale du président djiboutien.

62. Madame le président, me voici arrivé à la fin de mon exposé. Je vous prie de bien vouloir rappeler M. Condorelli à la barre.

Le PRESIDENT : Merci, Maître van den Biesen. Je donne maintenant la parole à M. Condorelli.

52 Mr. CONDORELLI:

The Treaty of Friendship and Co-operation between the French Republic and the Republic of Djibouti of 27 June 1977

Premise

1. Madam President, Members of the Court, in the present case the Republic of Djibouti, as it indicated in its Application instituting proceedings and argued in greater detail in its Memorial, relies on two bilateral agreements tying it to the French Republic and requests the Court to adjudge and declare that France is responsible for violating them: these are the Treaty of Friendship and Co-operation of 27 June 1977 and the Convention on Mutual Assistance in Criminal Matters of 27 September 1986. Let me indicate the order in which we propose to put to the Court the Djiboutian viewpoint on these two agreements.

2. In the first part of this presentation, I will focus my remarks on the 1977 Treaty and show the Court the role it has to play, in the Applicant's view, for the purposes of settling the dispute that has been brought before it. Then, tomorrow morning, in the second part of this same presentation, I will have the honour to discuss the relevant provisions of the 1986 Convention with a view to clarifying the legal framework applicable to mutual assistance with regard to letters rogatory. Subsequently, Mr. van den Biesen will analyse the facts of the case and demonstrate that France's refusal to execute the letter rogatory presented by Djibouti, as well as being a violation of the principles of friendship and co-operation between the two countries, is an internationally wrongful act under the 1986 Convention, engaging the international responsibility of the Respondent.

1. The legally binding nature of the 1977 Treaty

3. Madam President, before turning in detail to the breaches of the 1977 Treaty for which the Republic of Djibouti holds France responsible, a general remark needs to be made. This important remark is prompted by the fact that the Respondent does not merely contend that it has not violated any of the obligations deriving from the 1977 Treaty: France's Counter-Memorial goes much further than such a claim, since it suggests to the Court an interpretation of the 1977 Treaty which — we cannot pretend otherwise — is a very unpleasant surprise for the Applicant and has
53 given rise to serious concern as to how the bonds of friendship and co-operation between the two countries, so solemnly and plainly proclaimed in the Treaty, are viewed on the French side. It is an interpretation which, to be honest, can only create doubts as to the future of their relations, the framework for which in international law — as far as Djibouti has always understood it — has now been left open to debate.

4. As I emphasized at the outset, France contends that no obligation capable of effect in terms of mutual judicial assistance derives from the 1977 Treaty: that is a question of interpretation which has been placed before the Court and to which I will return shortly. And it is true that the Respondent seems to admit in other respects that "[l]egal obligations appear in the Treaty . . . in certain areas of co-operation having nothing to do with judicial co-operation in criminal matters . . ."[50]; looking ahead, I would say that this lack of connection with mutual

[50]CMF, p. 19, para. 3.7.

assistance is highly debatable, as we shall see very shortly. But the issue that Djibouti wishes to raise now is another one. It is that subsequently in the Counter-Memorial, when discussing the object and purpose of the Treaty, the Respondent expresses itself in a completely different vein, no doubt contradicting itself; ultimately, it implies that beyond the multiple declarations of a purely political nature, no real legal obligation is imposed on the parties.

5. Here I must quote a significant passage from the Counter-Memorial: "It should . . . be recalled that the Treaty's object and its purpose are friendship and co-operation, that is to say concepts so broad that it is impossible to infer from them anything other than a *general intention* needing to be given concrete form through specific obligations."[51] And the Respondent adds — taking a stance which I emphasize has disturbing implications: *"If the object and the purpose of the Treaty are set against its provisions, it becomes clear that the States parties wished above all formally to lay down the guiding principles and objectives for their co-operation in the future."*[52] Those words, Madam President, cannot, to my mind, have two different meanings: there is but one meaning! The argument put forward is that the 1977 Treaty limits itself in substance to sketching out the guidelines for future co-operation; in short, it is a draft programme for the years ahead, a mere project giving rise as such to no real obligations for the time being.

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6. Members of the Court, that is not how the Republic of Djibouti has understood the 1977 Treaty until now: it has always viewed it and continues to view it as an instrument whose legally binding scope for the parties to it is in no way diminished by its undeniably political nature: in other words, an instrument laying down a general obligation, as well as more specific obligations, to co-operate in all the areas covered both directly and indirectly by its provisions.

7. A first general comment must be made in this respect: in 1977 the two States could easily have limited themselves to proclaiming, by a solemn political declaration, their common intention to maintain friendly relations in the future, involving close co-operation in all areas. But that is not what they decided to do: they negotiated and then signed a treaty in due form, which they then ratified in accordance with their relevant national constitutional procedures. For the record, the French ratification instrument contains the standard phrase: "We declare that it [the Treaty] is

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[51]CMF, p. 20, para. 3.9; emphasis added.

[52]*Ibid;* emphasis added.

accepted, ratified and confirmed and promise that it will be faithfully carried out."[53] In short, in view of the instrument chosen, it clearly appears that the aim pursued by the Contracting Parties was and continues to be that of binding themselves by means of a genuine legal commitment giving rise to all the effects of an authentic international agreement.

8. But there is a great deal more than just that general comment. In Djibouti's opinion, it is enough to analyse the text with a minimum of attention in order to be convinced of the legally binding nature of the Treaty. Indeed, can one really talk of a vague "general intention" in relation to "future [i.e., potential] co-operation", when the majority of the Treaty's provisions are clearly expressed as obligations? Article 1, for example, stipulates that the parties "decide" to found their relations on equality, mutual respect and peace: it does not say that they "propose" or "contemplate" doing so! In Article 2, the parties do not express a mere wish, they "proclaim their

55 firm desire to preserve and strengthen" their ties of co-operation and friendship. Again, in Article 3 and Article 4, the notion of undertaking occurs four times (the parties, first, "undertake" to consult each other on the stability of the currency; second, they "undertake" to consult each other on problems of mutual interest; third, they "decide" to extend to each other all possible assistance in achieving the objectives they have set; fourth, they "undertake" to develop and reinforce co-operation between their two countries in the areas of culture, science, technology and education): these are not therefore mere programmes to be defined in the future, but real obligations undertaken in the present. Moreover, the lists of areas in which the parties undertake to co-operate are clearly indicative, and not exhaustive.

9. Further, Djibouti is very surprised to see France pass over in complete silence the first part of Article 5 of the 1977 Treaty, which is, however, as we shall see in a moment, of great relevance to the current dispute: it states that the parties "shall foster" co-operation between the various public and private national organizations, not that they are contemplating fostering co-operation. Indeed, everyone knows that the use of the future tense in a treaty provision implies in principle that an obligation is involved: in other words, "shall foster" means "undertake to foster", and not "should foster" or "will try to foster as far as possible". I might note in passing that the Registry of

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[53] In the document published by the Court containing the Application of Djibouti (2006, General List No. 136), see p. 22.

the Court made no mistake on this point: in the — admittedly not official — English translation of the 1977 Treaty included in the document published by the Court containing Djibouti's Application[54], the expression "favoriseront la coopération" has been correctly translated as "shall foster co-operation"[55]. "Shall", and not "should".

10. In short, while it is true that any treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context (as provided for by Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties), we cannot see how it can be claimed that the 1977 Treaty should be classified — as France essentially appears to wish — as a legally non-binding instrument.

11. Madam President, the Republic of Djibouti will listen very carefully to the viewpoint
56 which France will wish to express as clearly as possible, no doubt later in the week, on the question of whether it really considers that the 1977 Treaty in fact gives rise to no more than a kind of "general intention" with regard to co-operation between the parties, without establishing any real legal obligations. Above all, however, the Applicant attaches considerable importance to how the Court deals with this issue: your decision will play a major role in future relations between the two countries, irrespective, I repeat, of the interpretation that the Court decides to adopt on the specific question of whether or not the *sub judice* conduct of France, including its refusal, without giving reasons, to execute the letter rogatory concerning the *Borrel* case, constitutes a violation of the 1977 Treaty.

12. I have already argued that the actual terms of the provisions of the 1977 Treaty, understood in accordance with their ordinary meaning, clearly show that that Treaty does indeed impose on the parties real legal obligations, admittedly of a general nature, but no less binding because of that. What now needs to be clarified, firstly, is the areas covered by the obligations in question; secondly, we shall identify the principles relating to the methods of co-operation; and thirdly, we will look at the circumstances in which it is legitimate to assert that one of those obligations has been violated.

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[54]2006, General List No. 136.

[55]Page 21 of the document referred to.

3. The extent *ratione materiae* of the obligation of co-operation under the 1977 Treaty

13. The first problem is really not a problem at all: in fact what is at issue in the 1977 Treaty is co-operation in all areas, because the parties "undertake to consult each other" on all "problems of mutual interest" and "decide to extend to each other all possible assistance" in these matters, to cite again the wording of Article 3, paragraph 2. Moreover, it has already been stressed that co-operation between the various public and private national organizations is also the subject of a specific obligation, laid down in Article 5: the duty to "foster" such co-operation. It follows that a party which seriously and unjustifiably impedes such co-operation on a problem of mutual interest, instead of facilitating it, thereby fails to comply with the requirements of the 1977 Treaty. And it goes without saying that co-operation between the legal systems of the two countries in terms of

57 mutual assistance in criminal matters is fully included in this context, with regard to the commitments already referred to arising from Articles 3 and 5.

14. Article 6 of the 1977 Treaty is also relevant in this connection. It refers to a France-Djibouti Co-operation Commission, which is to "oversee the implementation of the principles and the pursuit of the objectives defined in the present Treaty". This Commission's terms of reference also include monitoring "the application of the various agreements entered into between the two States" (Art. 6, para. 2), which quite obviously involves checking that the application of these other instruments (including without the slightest doubt the 1986 Convention) is in accordance with the 1977 Treaty. In fact, the 1977 Treaty "oversees", so to speak, all the other successive bilateral agreements, including the 1986 Convention, and must be observed in all areas with which they are concerned. In other words, all agreements subsequent to 1977 must be interpreted and applied in the light of the object and purpose of the 1977 Treaty and the undertakings regarding co-operation that derive from it.

15. Madam President, it is true that the France-Djibouti Co-operation Commission, having been formally established at the outset, has not been used since. However, this in no way prejudices the role and relevance of the Treaty principles in resolving any problem regarding the application of other co-operation agreements between the two countries, including the 1986 Convention: so in applying the latter, there must be scrupulous observance not only of its own provisions, but also of the principles of the Treaty! Since there is no recourse in bilateral

practice to the work of the Commission to check that this is the case, it is the direct responsibility of each State to see that the Treaty is complied with in all the areas that it covers. And now, within the limits of the present dispute, that task falls to the Court, because the two States have agreed to recognize your jurisdiction on this subject.

16. Having shown in this way that the argument advanced by France that no obligation capable of effect in terms of mutual judicial assistance derives from the 1977 Treaty, I still have to consider the scope of the obligations of co-operation that the Treaty imposes upon the parties. The norms of the Treaty do not come into play solely in the areas referred to by the subsequent bilateral

58 agreements mentioned in Article 6: the obligations of conduct laid down are applicable to all "problems of mutual interest", whether or not these are also covered by specific treaties. In other words, the Republic of Djibouti is convinced that any unjustified refusal to consult each other, to give mutual assistance and to co-operate if important interests are at stake might well amount to an unfriendly act contrary to the principles embodied in the 1977 Treaty of Friendship and Co-operation, and therefore constitute an internationally wrongful act under the Treaty.

17. It should be stressed that Djibouti is very careful not to claim — as France would have you believe — that it is possible to infer obligations from the object and purpose of the Treaty which bear no direct relation to the specific fields dealt with by the Treaty, which, as we know very well, your Court has ruled inadmissible[56]. To identify the obligations which it accuses the Respondent of violating, the Applicant does not refer solely to the preamble of the Treaty, or to a vague principle in its wording concerning peaceful and friendly relations between the parties. Djibouti refers to various provisions of the Treaty and to the *undertakings* that these impose as regards co-operation; of course, interpretation of these must take account of the object and purpose of the Treaty, as well as its preamble and Article 1. Therefore, France is wrong to rely in its Counter-Memorial on your Court's famous *obiter dictum* in the 1986 *Nicaragua* Judgment (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 137, para. 273); the truth of that statement is unquestionable, but it is irrelevant in the present case.

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[56]CMF, p. 20, para. 3.11.

4. The principles laid down by the 1977 Treaty relating to the methods of co-operation

18. I now come to the second point requiring clarification, still relating to the binding effects of the Treaty. The latter does not confine itself to stating in which areas the parties are under a general obligation to co-operate, combined with more specific duties. It also lays down how this obligation should be discharged, i.e. what principles and methods are to be applied when co-operating. Co-operation must be based on "mutual respect for national sovereignty, non-interference in the internal affairs of each State and protection of their reciprocal interests" (as

59 stated in the preamble) and on "equality, mutual respect and peace", as stated by Article 1 as a binding requirement.

19. Madam President, regarding the central importance of Article 1 of the 1977 Treaty, the Republic of Djibouti is pleased to rely on the entirely relevant and *in terminis* conclusion of the Court on the analogous Article I of the Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States of America of 15 August 1955. Quite obviously I am referring to the *Oil Platforms* case. First of all in that case, the Court decided in its 1996 Judgment on the preliminary objections that "Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied" *(Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 814, para. 28). Subsequently, in its Judgment of 2003 on the merits, your distinguished Court used the provision in question in a most remarkable way, seeing it as highly relevant to the choice of interpretation for other clauses in the same Treaty (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 182, para. 41). Djibouti expects the Court to adopt the same approach *mutatis mutandis* in the present case.

4. Internationally wrongful acts under the 1977 Treaty

20. Having made clear which areas are covered by the obligations of co-operation arising from the 1977 Treaty and the principles to be adhered to regarding the methods used in co-operation, we must now turn our attention to the circumstances in which it is legitimate to assert that there has been a breach of one of these obligations. The French Counter-Memorial claims that Djibouti's interpretation of the Treaty would result, without any point or logic, in "systematically redoubling" the binding obligations on the Parties in terms of co-operation: any violation of one of

the conventions entered into after 1977 (such as the 1986 Convention) "would lead *ipso facto* to a violation of the 1977 Treaty"[57]. But this is not the argument that Djibouti maintains and submits to the Court.

60 21. Firstly, as I have already stated, it might well be that the obligations of co-operation laid down by the 1977 Treaty could be breached by unfriendly conduct that would seriously and unjustifiably impede co-operation between the public organizations of the two parties and run counter to the principle of proper mutual respect between them, even if outside the areas covered by other bilateral agreements, such as the 1986 Convention.

22. Secondly, Djibouti certainly does not claim that any violation, even a random violation of little importance, of one of the specific co-operation agreements between the two countries, such as the 1986 Convention, would automatically and simultaneously give rise to violation of the 1977 Treaty. On the other hand, the position is quite different if what occurs should be defined as a serious violation of the 1986 Convention capable of producing tensions between the two countries and seriously affecting their relations, and if in addition such a violation is committed without a minimum of satisfactory explanation or even with no explanation whatever. Madam President, Members of the Court, this is exactly what has happened in the case brought before you, as a result of France's unjustified refusal to execute Djibouti's letter rogatory regarding the *Borrel* case, as the further pleadings will make clear.

23. Moreover, this kind of action by France stands out clearly as an unacceptable rejection of the obligations of friendship and co-operation prescribed by the 1977 Treaty, if put into its global context: a context characterized by other profoundly unfriendly acts, involving repeated violation by France of international principles protecting the honour, immunities and privileges of the highest authority in the Republic of Djibouti; characterized also by criminal proceedings (still in connection with the *Borrel* case) instituted with disregard for international law against senior Djiboutian officials; and, lastly, by hate campaigns in the press sustained by private groups and also by official circles (such as the *Syndicat de la Magistrature*), without the French Government feeling the need to dissociate itself clearly from these by taking a firm stand. The abandonment by

[57] CMF, p. 21, para. 3.12.

France of the "mutual respect" referred to in Article 1 of the 1977 Treaty is unacceptable, a clear violation of the conventional principles in force governing relations between the two countries.

61 24. The Court should not underestimate the scope of the reference to the "equality" and due "mutual respect" between the parties during co-operation in all the areas covered by the 1977 Treaty, as expressly required by Article 1 thereof. This implies in particular that each party performing its obligations of co-operation in good faith is entitled to expect reciprocal treatment from the other, which France does not dispute in principle, moreover. Nor does France dispute that Djibouti has "fully executed"[58] all the letters rogatory issued by France concerning the *Borrel* case. However, the Respondent argues that, in its opinion, no relationship of reciprocity can be established between Djibouti's entirely co-operative attitude and the refusal by France to execute the letter rogatory issued by Djibouti, also concerning the *Borrel* case. We are told from the other side of the Bar that this is because, under the 1986 Convention, each request for assistance must be considered "individually"[59]. In other words, the success of one party in several requests for assistance is no bar to that party's right to refuse, where appropriate, another request for mutual assistance, even if it is linked to the same case.

25. Madam President, *in abstracto*, this viewpoint can certainly be defended. Moreover, we shall be showing the Court soon (or tomorrow) that France's refusal to comply with Djibouti's letter rogatory without giving reasons, which is at the heart of the present dispute, must be defined in itself, taken individually, as an unacceptable violation of the 1986 Convention. But if that is the case, i.e., if the Court decides to accept Djibouti's view and defines France's conduct as a serious violation of the 1986 Convention, the Applicant then asks it to consider a subsequent issue: to judge whether such a violation, because of its intrinsic seriousness and the context already outlined in which it is situated, represented by other associated internationally wrongful acts which clearly infringe the immunities and dignity of the Head of State and senior officials of the Republic of Djibouti, should not be regarded as a major violation of the 1977 Treaty of Friendship and Co-operation.

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[58]CMF, p. 23, para. 3.20.

[59]CMF, p. 23, para. 3.21.

62 **5. Conclusion**

26. To end, Madam President, let me draw the following conclusion: the Applicant begs the Court to take full account of the 1977 Treaty for the purposes of settling the present dispute. The Applicant asks your Court to afford this Treaty the central role due to it in the interpretation of subsequent bilateral instruments such as the 1986 Convention: in other words, all those instruments must be understood and applied in the light of the commitments to co-operation which flow from the Treaty. The Applicant asks you in addition to adjudge and declare that, over and above the violations of the 1986 Convention and of the principles governing diplomatic immunities, privileges and prerogatives, the conduct *sub judice* attributable to France is to be regarded as an obvious breach of the obligations of friendship and co-operation laid down by the bilateral Treaty of 27 June 1977.

Thank you, Madam President, Members of the Court.

The PRESIDENT: Thank you, Professor Condorelli. The hearing is adjourned until tomorrow morning at 10 a.m.

The Court rose at 6 p.m.