DJF

CR 2008/5 (translation)

CR 2008/5 (traduction)

Friday 25 January 2008 at 10 a.m.

Vendredi 25 janvier 2008 à 10 heures

8 The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the continuation of the first round of oral argument of the French Republic. I now give the floor to Professor Ascensio.

Mr. ASCENSIO:

THE ALLEGED VIOLATIONS OF THE TREATY OF FRIENDSHIP AND CO-OPERATION OF 27 JUNE 1977 AND THE CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS OF 27 SEPTEMBER 1986

1. Madam President, Members of the Court, I concluded my statement yesterday evening with an explanation of the reason why the argumentation leading to the Republic of Djibouti's principal submission could only be rejected. Thus, our attention should turn this morning to the Applicant's two subsidiary lines of argument.

B. The Applicant's arguments in the alternative

2. In the alternative, the Republic of Djibouti maintains that France breached its obligations under Article 1 of the 1986 Convention by its unlawful refusal to transmit the Borrel file, that refusal being set out in a letter dated 6 June 2005 or, and this is the second submission in the alternative, in a letter dated 31 May 2005[1]. The difference between the two submissions thus lies exclusively in identifying the letter which informed the Djiboutian authorities of the refusal of mutual assistance. We will note, by the way, that the Republic of Djibouti is not in fact very sure of its assertion that it never received the letter of 31 May 2005, because it goes to the trouble of putting forward a second submission in the alternative.

3. As for the rest, the argument offered by the Applicant's counsel was identical and consisted of analysing the substance and implementation of Articles 2 and 17 of the Mutual Assistance Convention at the time when the French authorities considered Djibouti's letter rogatory of 3 November 2004. While the Republic of Djibouti alleges a violation of Article 1, it does so by linking Articles 2 and 17, or rather merging them, which leads it to subsume these two articles

[1] CR 2008/3, p. 36, para. 4 (Doualeh).

9 under the most general provision of the Convention, namely Article 1. This plainly results from the interpretation of these articles first offered during the first round of oral argument.

4. The position of the Republic of Djibouti set out in the Memorial was completely different. There, the legal argument involving the alleged violation of the 1986 Convention was split into two prongs. The first dealt with execution of the international letter rogatory and the second the obligation to state reasons for the refusal of mutual assistance[2]. The Republic of Djibouti there maintained that there had been two violations of the Convention, one involving Articles 3 and 5, and the other Article 17. Thus, it very clearly severed Article 17 from the rest of the Convention and complained that France had failed to notify it of the reason for the refusal of mutual assistance[3].

5. In the view of the French Republic, and in accordance with the Djiboutian authorities' initial position, the two issues must still be analyzed separately, because the legal obligations in question, that is to say those deriving from Article 2 and those deriving from Article 17, are distinct. That is why I shall respond to the Republic of Djibouti's two alternative lines of argument together, distinguishing the issue of the ground for the refusal of mutual assistance (A) from the obligation to give reasons (B).

6. It will thus become apparent that the reasons underlying the refusal to transmit the Borrel file were fully in accordance with the Convention, more specifically the provisions of Article 2 *(c)*. Accordingly, this article, just like Article 1, was not violated by the French Republic. It will then become clear that France has in no way breached the obligation to state reasons appearing in Article 17 of the Convention, since the Republic of Djibouti is fully informed of the reasons having led to the refusal of mutual assistance. Moreover, a mere violation of Article 17 would not in and of itself constitute a violation of Article 1 of the Convention.

(1) The reason for the refusal of mutual assistance

7. Madam President, the grounds for the refusal of mutual assistance must now be examined. Under Article 2 of the Convention a refusal was possible; it was imperative in this case, because

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[2]MD, pp. 43 and 45.

[3]MD, pp. 46-48, paras. 119-124.

10 France considered that execution of the letter rogatory from Djibouti would have conflicted with its essential interests. These are the two points which will be expounded.

8. First of all, a refusal of mutual assistance is possible under Article 2 of the Convention on one of the three grounds there set out. The relevant one in the present case is the third, which the Convention describes as follows:

> "Assistance may be refused:
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> . . . . . .
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> *(c)* if *the requested State considers* that execution of the request is likely to prejudice its sovereignty, its security, its ordre public or other of its essential interests." (Emphasis added.)

9. The language employed expressly confers on the requested State the exclusive discretionary power to determine on its own what are its essential interests. This follows from the wording "the requested State considers". The same wording is moreover used in the first ground, which is to say the case of a request concerning a political offence, an offence connected with a political offence or a fiscal, customs or foreign exchange offence. On the other hand, it does not appear in the second, which corresponds to the classic dual-criminality requirement. This is one more reason to accord it all the importance it deserves in the third ground.

10. Professor Condorelli was kind enough to point out in his statement that a series of possessive pronouns underscores the fact that it is for the requested State alone to interpret this provision[4]. Similarly, he observed that this type of provision was standard in conventions on mutual assistance in criminal matters and he cited Article 2 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959[5].

11. I shall however carefully avoid taking up the term "a self-judging clause", which he used[6]. Aside from the fact that it is not easy to translate into French, it obviously carries a pejorative connotation in the mind of counsel for the Applicant. This is probably undeserved,

11 given the substantial State practice in this area, as he himself observed. It might be added that provisions of the same type as those we are now discussing appear not only in bilateral conventions

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[4]CR 2008/2, p. 18, para. 18 (Condorelli).

[5]CR 2008/2, p. 17, para. 17 (Condorelli).

[6]CR 2008/2, p. 18, para. 18 (Condorelli).

on subjects other than mutual assistance in criminal matters, such as some bilateral investment treaties, but also in multilateral conventions. Here we might mention Article XXI of the General Agreement on Tariffs and Trade, Article XIV*bis* of the General Agreement on Trade in Services, and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

12. In respect of criminal matters, it is easy to understand why such a clause exists. Penal affairs are among those which involve the sovereignty of States and put their security or *ordre public* at risk. As this is a particularly sensitive field, States pay particular heed to the scope of the undertakings they assume in the matter. That is why States, while willing to negotiate and enter into conventions on mutual assistance in criminal matters, do so only on certain conditions, very standard ones by the way, in order to prevent the mutual assistance provided from prejudicing their sovereignty, security, *ordre public* or other essential interests. It follows that, unless we are to emasculate the provisions establishing exceptions to the principle of mutual assistance — exceptions which, I repeat, are very standard — it is for the requested State, and it alone, to decide, in accordance with procedures under its internal law, whether or not a particular instance of mutual assistance prejudices its essential interests.

13. After the treaty practice, let us now turn our attention to the international jurisprudence. Here again, Professor Condorelli has lightened the task for me, because he quoted at length from the Court's 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America*[7]. There the Court recognized the existence of clauses stating that the State concerned, and it alone, was entitled to define its essential interests, and it applied this *a contrario* to find jurisdiction in that case, as it was dealing with a clause that did not so state (*Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222).

12 14. Counsel for the Applicant attempts however to limit the reach of this dictum of the Court in two ways, by relying first on general international law and second on the 1986 Convention itself.

15. In respect of general international law, he cites the case concerning *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America)*[8], specifically the passage in which the Court stated, in respect of the latitude enjoyed by Moroccan customs

[7]CR 2008/2, p. 20, paras. 21 and 22 (Condorelli).

[8]CR 2008/2, p. 22, para. 26 (Condorelli).

authorities in calculating the customs value of goods under Article 95 of the Act of Algeciras, that that power "must be exercised [by those authorities] reasonably and in good faith" (*Judgment, I.C.J. Reports 1952*, p. 212). But that was a matter of executing obligations under a treaty — very specific and technical obligations moreover — not *excluding the application* of a treaty. Nor obviously did it involve safeguarding a State's essential interests.

16. The Republic of Djibouti also relies on a "raft of recent arbitral awards relating to investments" said to reveal "a clear tendency to interpret these clauses as in no way precluding the jurisdiction of the arbitrator to verify whether reliance on the derogation is in fact justified"[9]. Actually, it is highly doubtful that these arbitral awards reflect a "clear tendency". True, Professor Condorelli cited the award in the *LG&E* v. *Argentina* case, which supports his position[10]. But another award stands for the opposite: the *CMS* v. *Argentina* award[11]. It was found in that award that some treaties, like those adopted along the lines of the United States 2004 model bilateral investment treaty, contained provisions granting a State unfettered discretion in assessing its essential interests. An application was lodged to annul the award and the *ad hoc* committee hearing it rendered its decision on 25 September 2007[12]. Committee members criticized a number of aspects of the award, but not this one.

13 17. Thus, the groundswell of case law wished for by the Applicant has not occurred. Maybe simply because the most reasonable course is to recognize the existence and effects of these clauses.

18. In this regard, a closer look at the jurisprudence of the Court is no doubt appropriate. It is possible to draw a parallel between clauses of this type and reservations placed by some States on their declarations, under Article 36, paragraph 2, of the Court's Statute, recognizing the compulsory jurisdiction of the Court. Thus, in the case concerning *Certain Norwegian Loans (France* v. *Norway)*, the Court considered the French reservation excluding from the scope of its declaration differences "relating to matters which are essentially within the national jurisdiction *as*

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[9]CR 2008/2, pp. 22-23, para. 28 (Condorelli).

[10]CR 2008/2, p. 23, para. 28 (Condorelli).

[11]ICSID Tribunal, arbitral award, *CMS Gas Transmission Company* v. *Argentine Republic*, No. ARB/01/8, 12 May 2005, para. 373.

[12]Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, *CMS Gas Transmission Company* v. *Argentine Republic*, ICSID case No. ARB/01/8 (Annulment Proceeding), 25 Sept. 2007.

understood by the Government of the French Republic" (*Judgment, I.C.J. Reports 1957,* p. 21). The Court, recognizing by virtue of reciprocity that Norway could rely on the same limitation in respect of its declaration recognizing the compulsory jurisdiction of the Court, upheld the application of the reservation. It then held that it was without jurisdiction, as Norway argued that the case fell essentially under its national jurisdiction. According to the Court, "the reservation as it [stood] and as the Parties recognize[d] it" should be given effect (*ibid*., p. 27).

19. In the present case, there is no need to look for the two Parties' recognition of the provision in question, since it is a treaty provision, the product of the joint will of the Republic of Djibouti and the French Republic. It is simply a matter of giving the provision effect "as it stands", in accordance, I might add, with a time-honoured rule of the law of treaties (*Acquisition of Polish Nationality, Advisory Opinion, 1923, P.C.I.J., Series B, No. 7, p.* 20*; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p.* 25, para. 51).

20. With this last remark, we can also begin to respond to Professor Condorelli's second series of arguments, based on the 1986 Mutual Assistance Convention itself.

21. Under the law of treaties, Article 2 must be interpreted "in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary*

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Objection, Judgment, I.C.J. Reports 1996 (II), p. 812, para. 23). But the interpretation offered by the Applicant disregards the ordinary meaning of Article 2 that leads to giving it effect as it stands. That interpretation equally disregards the object and purpose of the Convention on Mutual Assistance in Criminal Matters, as I described it a short while ago. The only thing given consideration is the context[13], which is said to justify merging Articles 2 and 17 of the Convention, even though they stand far apart in the treaty. But I shall return to this subject a bit later in connection with the true meaning of Article 17.

22. It is also very curious to seek support in the "good practices" adopted within the European Union by means of the Joint Action of 29 June 1998[14]. The Joint Action is an instrument

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[13]CR 2008/2, p. 23, para. 29 (Condorelli).

[14]CR 2008/2, p. 27, para. 38 (Condorelli).

adopted under a treaty, the Treaty on European Union, which bears no relation to the 1986 Convention between France and Djibouti.

23. What remains is the contention that the 1986 Convention would be rendered ineffectual by the French Republic's interpretation of Article 2. This is a great exaggeration and in no way in keeping with international mutual assistance practice. Moreover, the obligations of means in the Convention plainly remain applicable to all requests. It is precisely thanks to the implementation of its internal procedure that the requested State will be in a position to determine whether or not the request prejudices its essential interests. Not only does this not constitute a violation of the 1986 Convention, this is the only reasonable interpretation possible of Articles 1, 2 and 3.

24. But it is undoubtedly high time to put an end to a rather abstract discussion. France felt able to provide the Court with a set of documents the material in which was sufficient to allow you, Members of the Court, to conclude that there has been full compliance with Article 2 of the 1986 Convention in the present case. These documents were annexed to the Counter-Memorial of the French Republic[15].

25. In Annex XXI of its Counter-Memorial France provided a complete copy of the 8 February 2005 order [*soit communiqué*] by investigating judge Sophie Clément, deciding to refuse to transmit the Borrel file. The decision was expressly based on the ground set out in

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Article 2 *(c)*, thereby honouring the obligations under the 1986 Mutual Assistance Convention. Furthermore, the decision provides details on the risks of prejudice to the sovereignty, security, *ordre public* and essential interests of France. It is thus apparent that the decision by the French judicial authorities is not open to challenge.

26. During the investigation into Judge Borrel's murder, the investigating judge successfully requested the declassification of notes prepared by the French secret services.

27. The procedure for declassification is laid down in the Act of 8 July 1998. Under Article 4, the French judicial authority is alone authorized to have possession of these documents, because that authority alone is entitled to request them. When a judge seeks the declassification of a document, he or she must submit a request to that end to the administrative authority responsible

[15]CMF, Anns. XV and XXI.

for the classification. In practice, the judge's request is sent to the competent minister, who himself or herself refers the matter to the *Commission consultative du secret de la défense nationale* [National Defence Secrets Consultative Committee]. It is only after receiving the Committee's opinion that the minister can decide to declassify and ultimately provide the document to the judge. This procedure is justified by the sensitivity, notably in respect of fundamental interests of the nation, of the information contained in classified documents. Nevertheless, the Consultative Committee's opinions themselves are easily accessible, since they are published in the Official Journal of the French Republic.

28. Under current French law, the Consultative Committee cannot respond to a request for communication from a foreign or international judicial authority. As France stated in its Counter-Memorial, a bill to amend French law to enable the International Criminal Court to obtain documents in this way is currently under study; this may be explained by the role assigned to the Court in its Statute.

29. Now that the French procedure for seeking declassification has been described, we can return to the request made by the Djiboutian authorities.

30. As the investigating judge explained, transmitting the file to the Djiboutian authorities "would entail indirectly delivering French intelligence service documents to a foreign political authority". It is therefore impossible to transmit a file containing such information, especially since, and I shall return to this, the entire file is by now rife with information of this sort.

16 31. Commenting on this decision, the Applicant launched in its first round of oral argument into a completely conjectural discussion of the content of the declassified notes. The Co-Agent of the Republic of Djibouti thus referred to the opinion given on 27 January 2005 by the National Defence Secrets Consultative Committee. He observed that only two pages had been declassified and doubted that the information on those two pages could have permeated the entire file of the investigation in the *Borrel* case[16].

32. Once again, our opponents feign ignorance of basic elements of the case.

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[16]CR 2008/2, p. 50, para. 69 (van den Biesen).

33. In fact, the French Republic only annexed the 27 January 2005 opinion of the National Defence Secrets Consultative Committee to its Counter-Memorial as an illustration. But a different exhibit, Annex XV, referred to a large number of documents which were included in the Borrel file and the communication of which would be likely to prejudice essential interests of France. Annex XV is a letter from the Director of Criminal Affairs and Pardons at the Ministry of Justice to the Paris State Prosecutor on the subject of transmitting the Borrel file. Here is what the relevant passage says:

> "I would draw your attention to the need to omit from the certified copy of the proceedings any documents likely to prejudice the sovereignty, the security, the *ordre public* or other essential interests of the Nation, in particular those referred to by the Minister of Defence in his note, a copy of which is attached, namely twelve notes from the DGSE transmitted to the judicial authority on 29 March 2004 and three further notes from the DGSE and ten notes from the DPSD transmitted on 13 December 2004."

34. The Director of Criminal Affairs and Pardons concluded as follows:

> "The communication of French intelligence service documents cannot therefore be envisaged, in so far as it would provide a foreign political authority with information likely seriously to compromise the above-mentioned interests."

35. I will point out that the initials "DGSE" stand for *Direction générale de la sécurité extérieure* [Directorate-General for External Security] and "DPSD" *Direction de la protection de la sécurité de la défense* [Directorate for the Protection of Defence Security]. The first of these intelligence agencies reports to the Ministry of the Interior and the second to the Ministry of Defence.

17 36. Thus, more than 25 notes containing protected information were declassified and included in the investigation file requested by Djibouti.

37. Further, in the order *[soit transmis]* of 8 February 2005, the investigating judge Sophie Clément did not confine herself to referring to a single declassified note. She spoke of a number of documents. Once again, I shall quote the relevant passage from the document, found in Annex XXI of the French Counter-Memorial:

> "On several occasions in the course of our investigation, we have requested the Ministry of the Interior and the Ministry of Defence to communicate documents classified under 'defence secrecy'.
>
> The *Commission Consultative du Secret de la Défense Nationale* delivered a favourable opinion on the declassification of certain documents.

> The above-mentioned ministries, following that opinion, transmitted those documents to us."

38. The Court's attention needs to be drawn to the fact that these numerous notes were incorporated at different times into the file of the investigation then under way in the chambers of Vice-President Sophie Clément. As a result, it was as and when the notes became part of the file that the investigating judge made use of them in taking various steps in the investigation: questioning, letters rogatory, expert opinions. Because of this constant process, it was impossible to consider elements of the file to be separable from the content of the notes.

39. Indeed, these notes could in particular: bear out — or not — the earlier orientation of the investigation; lead it in a new direction; be so important as to receive frequent citation in later proceedings and as to steer the course of subsequent investigation. It is self-evident, Madam President, that I have no knowledge of the content of these notes. Accordingly, the conjecture by the Applicant does not induce me to disclose any specific information, if that was the goal.

40. Madam President, Members of the Court, since the French Republic executed the request for mutual assistance in accordance with Articles 2 and 3 of the 1986 Mutual Assistance Convention, and *a fortiori* in accordance with Article 1 of that Convention, it did not violate any of its international obligations. It therefore remains to be determined whether the Republic of

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Djibouti can legitimately accuse France of having breached the obligation, found in Article 17 of the Convention, to state reasons for the refusal of mutual assistance.

(2) The obligation to give reasons

41. The Republic of Djibouti cannot argue that there has been a violation of the obligation to give reasons for the refusal of mutual assistance. It cannot do so because the process of co-operation between the two States unfolded in such a way that the Djiboutian authorities unquestionably knew the reason for the refusal.

42. We must first look again at the content of Article 17 of the 1986 Convention and at its position in the Convention. The article merely states that "[r]easons shall be given for any refusal of mutual assistance". There is no denying that the wording is terse, that it imposes no specific form, no time-limit and no particular degree of specificity and that it does not expressly require an official communication to the requesting State. Incidentally, when requiring an *official* communication, other conventions of this type add a notification obligation to this provision.

43. Furthermore, this article is relegated to the end of the treaty. If the Parties had intended to make this a requirement for the lawfulness of a refusal of mutual assistance, they would have placed a paragraph on this subject in Article 2 itself, or would have so specified in the provision. It must be inferred from this that the obligation laid down in Article 17 is separate from those which have been discussed thus far.

44. The question which then arises is what content must appear in the statement of reasons required to be given to the requesting State. When a refusal serves to protect information relating to the State's essential interests, it is quite obvious that the content must not amount to communicating that information. The only remaining possibility is therefore to specify which ground is being asserted under Article 2 of the Convention to justify the refusal of mutual assistance. In the present case, this was the ground provided for in Article 2 *(c)*. This is how Article 17 relates to Article 2. And to say so in no way conflicts with the idea that the two provisions are legally autonomous and lay down separate legal obligations, contrary to what the Republic of Djibouti claims[17].

19 45. In the present case, France communicated the reason for the refusal to the Djiboutian authorities. The Director of Criminal Affairs and Pardons at the Ministry of Justice of the French Republic addressed a letter on this subject, on 31 May 2005, to the Ambassador of the Republic of Djibouti in Paris. The document appears as Annex V of the Counter-Memorial. After explaining that, in accordance with domestic law, the French executive authorities had transmitted the request for mutual assistance to the judicial authority, he wrote:

> "the investigating judge . . . considered that Article 2 *(c)* of the Convention on Mutual Assistance in Criminal Matters between France and Djibouti of 27 September 1986 had to be applied and that this did not allow a favourable response to be given to the request from your judicial authorities".

46. The reference to Article 2 *(c)* of the 1986 Convention was sufficient to satisfy in full the obligation to state reasons appearing in Article 17. Nothing required a fuller statement of reasons; on the contrary, everything called for confining the statement to the reasons set out in Article 2. Otherwise, the requested State would have been forced to disclose the very information which it had the right to withhold under the Convention in order to protect its essential interests.

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[17] CR 2008, p. 26, para. 36.

47. The French authorities were surprised to learn of the letter addressed by the Ambassador of Djibouti in Paris to the Public Prosecutor of Djibouti on 25 July 2007. This letter is one of the supplementary documents transmitted to the Registry of the Court by the Republic of Djibouti on 21 November 2007. In it, the Ambassador informed the Agent of the Republic of Djibouti that the efforts made to find the letter from the French authorities had been unsuccessful.

48. Unfortunately, France is no more able to show that the letter was received by the embassy of the Republic of Djibouti in Paris. The reason is very simple. French administrative bodies, confident of the efficiency of the post office on French soil, send their correspondence by ordinary post, that is to say without asking for an acknowledgment of receipt. France therefore does not have proof of receipt.

49. Nevertheless, the reason given in the letter of 31 May 2005 was perfectly consistent with the previous exchanges between the two States. In this respect, and contrary to what the Ambassador of Djibouti maintains, direct exchanges between him and the French Ministry of Justice are not out of place. For proof, one need only refer to a document which the Republic of

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Djibouti annexed to its Memorial, as Annex 19, which is an example of such an exchange. As for the 1986 Convention, its Article 14 provides for direct communications between the Ministries of Justice of the two States and even, in case of urgency, between judicial authorities of the two States. Transmittal through the embassies and Ministries of Foreign Affairs is thus merely a convenient practice, given the distance between the two States, and in no way a requirement of protocol.

50. It is also necessary to place the letter of 6 June 2005, from France's Ambassador to Djibouti to the Djiboutian Minister for Foreign Affairs and International Co-operation[18], in context. He informed him that France was not in a position to comply with the request for the transmission of the Borrel file. He wrote "is not" in a position, not "is no longer" in a position, as the Republic of Djibouti asserted in its Memorial[19]. While it is true that he did not state the reason for the refusal, that is understandable, because the French authorities thought that the statement of reasons had been given on 31 May to Djibouti's Ambassador in Paris by the Director of Criminal Affairs

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[18]CMF, Ann. XXII.

[19]MD, p. 46, para. 119, and p. 37, para. 90.

and Pardons at the Ministry of Justice. Otherwise, it is obvious that the Ambassador would have stated the reason. Thus, the good faith of the French authorities cannot be questioned.

51. In any event, the argument that no information at all was provided is refuted by the conduct of the Djiboutian authorities. First, if the letter of 31 May 2005 was never received, it is very hard to understand why the Republic of Djibouti never expressed the least surprise or undertook the slightest diplomatic demarche to learn the reason for the refusal, whether with the French Ambassador to Djibouti or directly with the Ministry of Justice. This is even harder to grasp in that, as we have seen, regular contacts have always been maintained. And this silence lasted until the time when Djibouti's Application was filed with the International Court of Justice on 9 January 2006.

52. Secondly, it was known even before the request was made that there was a risk that the presence of documents covered by defence secrecy would prevent the transmission of the Borrel file. On 16 December 2003, Djibouti's Minister for Foreign Affairs and International Co-operation

21 wrote to the French Minister for Foreign Affairs, expressing his desire to see the French judicial proceedings concerning Judge Borrel's murder brought to a conclusion. He asked him "to remove all obstacles . . . including the 'defence-secret' claim"[20]. As the investigating judge had succeeded in having the "defence-secret" status lifted, the issue of the declassified information was certain to arise in connection with any request for transmission of the Borrel file.

53. It is apparent from the words themselves of the Application instituting proceedings that the Republic of Djibouti is fully aware of the ground for the refusal of mutual assistance. Paragraph 13 asserts that "[t]he investigating judge refused . . . to transmit the Borrel file to the Djiboutian judicial authorities on the ground that 'the transmission of this record is contrary to France's fundamental interests'". The same knowledge of the reason appears in paragraph 146 of the Memorial, where the Republic of Djibouti is careful to use the conditional, but the phrase "contrary to France's fundamental interests" is to be found there as well. Moreover, it is specified that the refusal figures in a letter from Sophie Clément, the investigating judge in Paris. The specificity with which both the source and the ground are identified shows that Djibouti knows, and

[20]MD, Ann. 13.

has always known, the result of the internal procedure and the ground for the refusal of mutual assistance. It can moreover be seen from what follows in the Memorial that Djibouti understands only too well that this reason is linked to Article 2 *(c)* of the 1986 Convention, all the while denying any linkage — but that is not the problem here[21].

54. Lastly, the Republic of Djibouti itself is conscious of the weakness of its argument. That is no doubt why it had to claim twice in its Memorial that the French Ambassador to Djibouti had written "is no longer", instead of "is not"[22]. This was plainly done to create an impression that the French authorities were guilty of self-contradiction, an impression which is not in the least produced by other facts. And yet these words were never written.

55. It is therefore patently obvious that the Djiboutian authorities were fully informed of the reason for the refusal of mutual assistance.

56. In the alternative, if the Court were nevertheless to find that Article 17 has not been
22 complied with, it would be necessary to consider the consequences of that. First, a violation of Article 17 does not imply a violation of Article 1 at the same time. Accordingly, the Court should in all events reject the Republic of Djibouti's two submissions in the alternative. What is more, by now the Republic of Djibouti undeniably has full knowledge of the grounds for the refusal of mutual assistance. The exchange of written pleadings and the oral proceedings before the Court have elucidated them, probably to a degree greater than required by Article 17 of the Convention. Consequently, the aspect of the dispute concerning the statement of reasons for the refusal of mutual assistance has become moot.

57. Madam President, Members of the Court, it remains for me to conclude by recalling the main points of this statement:

(i) no legal obligation under the 1977 Treaty of Friendship and Co-operation has been violated by the French Republic;

(ii) the claim cannot be upheld that the 1977 Treaty of Friendship and Co-operation has been violated by virtue of an alleged violation described as "serious" of the Convention on Mutual Assistance in Criminal Matters of 27 September 1986;

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[21]MD, p. 55, paras. 147-150.

[22]MD, p. 46, para. 119, and p. 37, para. 90.

(iii) the 1986 Convention on Mutual Assistance in Criminal Matters has not been violated as a result of the refusal to carry out the undertaking supposedly represented by the letter of 27 January 2005, because the internal procedure was still then in progress;

(iv) the refusal to transmit a copy of the Borrel file to the Republic of Djibouti was justified under the 1986 Convention on Mutual Assistance, in particular Article 2 thereof;

(v) France has not violated the obligation under Article 17 of the Convention to give reasons for the refusal of mutual assistance;

(vi) in the alternative, the violation of the obligation to give reasons for the refusal of mutual assistance does not constitute a violation of Article 1 of the Convention;

(vii) further in the alternative, the aspect of the dispute concerning the obligation to give reasons for the refusal of mutual assistance has become moot.

58. Madam President, Members of the Court, I thank you sincerely for your attention and ask you, Madam President, to give the floor to Professor Pellet.

23 The PRESIDENT: Thank you, Professor. I now give the floor to Professor Pellet.

Mr. PELLET: Thank you very much, Madam President. Madam President, Members of the Court, let me begin by imparting a piece of news that I believe you will not be sad to hear: we think that we shall be able — at the risk, perhaps, of having you to ask you to allow us a few extra minutes after 1 p.m. — to complete our first round of oral argument this morning, and will not need to use the hour and a half scheduled for this afternoon.

THE ALLEGED ATTACKS ON THE IMMUNITY OF CERTAIN DJIBOUTIAN OFFICIALS

1. Madam President, it falls to me to demonstrate that Djibouti's claims concerning the alleged violations of the obligation to prevent attacks on the person, freedom and dignity of an internationally protected person are unfounded. Thereafter, in a separate pleading, but following on immediately, I shall briefly consider — though entirely in the alternative -- the matter of the legal consequences of the allegedly wrongful acts committed by France.

2. Madam President, the Republic of Djibouti thought it appropriate to tack on to the *Case concerning certain questions of mutual assistance in criminal matters*, which has given its name to

these proceedings, a number of episodes that are linked only indirectly and artificially to those questions, such as the invitation to testify that was addressed to the President of Djibouti or the arrest warrants issued against two Djiboutian officials in connection with a different matter, concerning not the judicial investigation into the death of Bernard Borrel, but another investigation, conducted by a different judge at a different court and relating to subornation of perjury.

3. In any event, as I demonstrated yesterday, none of those events is connected, from a legal perspective, with the "refusal by the French governmental and judicial authorities to execute an international letter rogatory", issued on 3 November 2004 by an investigating judge at the Djibouti *Tribunal de grande instance* and seeking "the transmission by the French side of the record of the

24 investigation in the *Borrel* case"[23], which forms the exclusive subject-matter of the Republic of Djibouti's Application. Consequently, the Court does not have jurisdiction to hear these claims, and, indeed, some of them relate to acts that occurred after the Application was made and are patently not covered by the consent to the Court's jurisdiction given by letter of the French Minister for Foreign Affairs of 25 July 2006 in respect of "the subject of the Application and strictly within the limits of the claims formulated therein . . ."[24]. It is, therefore, only absolutely in the alternative that I shall seek to demonstrate that the claims of the Republic of Djibouti are not, in any event, justified on the merits.

4. As I do so, I shall distinguish, as we did in out Counter-Memorial[25], and as Djibouti's representatives also did in the course of their oral arguments, between the invitations to testify addressed to President Guelleh, on the one hand, and the witness summonses and arrest warrants issued against other Djiboutian nationals, on the other.

I. THE INVITATIONS TO TESTIFY ADDRESSED TO THE PRESIDENT OF THE REPUBLIC OF DJIBOUTI

5. On the first point, let me begin by reiterating that France recognizes in full the absolute nature of the immunity from criminal jurisdiction and the inviolability that foreign Heads of State enjoy. I shall then demonstrate that the invitations to testify that were addressed, in 2005 and 2007,

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[23]Application, para. 2; see also para. 12 and MD, p. 9, para. 3.

[24]MD, Ann. 2.

[25]CMF, p. 47-62.

to President Ismaël Omar Guelleh, involved no attack on those immunities or the President's dignity.

A. France recognizes the absolute nature of the immunity from criminal jurisdiction and the inviolability that foreign Heads of State enjoy

6. Madam President, Djibouti is deploying considerable efforts to show that "the French State acknowledged the existence of customary principles and rules protecting *inter alia* the freedom and dignity of Heads of State"[26]. To that end, Djibouti cites several international

25 instruments, foremost among them, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 14 December 1973[27].

7. Although France in no way disputes that foreign Heads of State benefit, under international law, from complete protection for their freedom and dignity (and this is reflected in the absolute nature of their immunity, at least when in office), it cannot agree that this principle derives from the 1973 Convention. The definition of internationally protected persons is set out in Article 1 of the Convention only "[f]or the purposes of this Convention"; and the offences to which it relates are exclusively murder, kidnapping or other attacks "upon the person or liberty of an internationally protected person" and "likely to endanger his person or liberty". That bears no relation to the facts of this case. I imagine that even our adversaries will grant France that.

8. In contrast, we have little difficulty in accepting that, by analogy, the guarantees laid down for the benefit of the representatives of States by the 1961 Vienna Convention on Diplomatic Relations and the 1969 New York Convention on Special Missions "apply *a fortiori* to the highest organs of States and in particular to the Heads of Foreign States"[28], even though the legal regime governing immunity for which the two provide may vary in detail -- in relation to immunity from civil jurisdiction, for instance. But there is no need scour conventions to establish that, under customary law, in the exercise of their duties, foreign Heads of State enjoy full immunity from criminal jurisdiction (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 20-21, para. 51*)* and, *a fortiori*, inviolability.

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[26]MD, p. 49, para. 130.

[27]See Application, p. 9, para. 16 or MD, p. 49, para. 129-130.

[28]MD, p. 50, para. 131.

9. We therefore accept, without hesitation or restriction that, to use the words which the Institute of International Law employed in its Vancouver resolution of 2002 on "[i]immunities from Jurisdiction and Execution of Heads of State and Government in International Law", the

26 authorities of a State must take "all reasonable steps to prevent any infringement of a [Head of State's] person, liberty or dignity"[29] and that "[i]n criminal matters, the Head of State shall enjoy immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity"[30].

10. And France is not taking this approach this approach as a matter of expediency. In the case of *Certain Criminal Proceedings in France*, which is currently pending before the Court, the representatives of the French Republic had the honour to make the following submission concerning specifically, invitations to testify addressed to a foreign Head of State:

> "32. In conformity with international law, French law embodies the principle of the immunity of foreign Heads of State . . . There are no written rules deriving from any legislation relating to the immunities of States and their representatives. It is the jurisprudence of the French courts which, referring to customary international law and applying it directly, have asserted clearly and forcefully the principle of these immunities. The clearest and most recent expression of this jurisprudence lies in the important judgment handed down on 13 March 2001 by the Criminal Chamber of the Court of Cassation in the Khadafi case, so called from the name of the Libyan Head of State . . .
>
> 33. . . .this decision makes it perfectly clear that the French courts apply international custom and, in particular, the customary principle which confers immunity from jurisdiction and enforcement on foreign Heads of State . . .
>
> [a]s regards immunities, French law is very clear about the absolute immunity which attaches to the person of a foreign Head of State . . ."[31]

And to cite a further example:

> "We have promised nothing, we have said that French law does not allow of the prosecution of a foreign Head of State; that is not a promise, it is a finding of law."[32]

11. In its Order for the indication of provisional measures of 7 June 2003, the Court noted those statements[33], which are equally applicable to the case that has brought us here today.

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[29] *IIL Yearbook*, Vol. 69, 2000-2001, p. 744 (www.idi-iil.org/idiF/resolutionsE_van_02_en.PDF), Art. 1.

[30] *Ibid*., Art. 2.

[31] CR 2003/21, p. 10 (Abraham).

[32] *Ibid.*, p. 14 (Abraham).

[33] *Certain Criminal Proceedings in France (Republic of the Congo* v. *France), Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003*, p. 109-110, para. 33.

Moreover, they can be summed up in just a few words: French law does not just recognize, it also guarantees absolute immunity from criminal jurisdiction (the only jurisdiction material to this case) and complete inviolability for Heads of State when in office. And the invitations to testify

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addressed to the President of the Republic of Djibouti in 2005 and 2007 surely do not cast doubt on that.

B. The invitations to testify addressed to the President of the Republic of Djibouti did not infringe his immunity from jurisdiction or his dignity

12. Madam President, the quotations which I have ventured to make from our pleadings of 2003 are taken from oral arguments which very specifically concerned an invitation to testify which the Republic of Congo claimed — mistakenly, in fact — had been addressed to the Congolese Head of State in connection with a criminal investigation; and this had been done on the basis of Article 656 of the French Code of Criminal Procedure. Given the role which that provision plays in this case also, it is no doubt helpful to quote the whole text of the first subparagraph of that article:

> "The written statement of a representative of a foreign power shall be requested through the intermediary of the Minister for Foreign Affairs. If the request is granted, the statement shall be received by the president of the court of appeal or a judge delegated by him."

13. In other words:

— contrary to what the Djiboutian side is claiming, the "requests" made pursuant to that provision are not "summonses" but merely invitations which the addressee is free to accept or not to accept;

— that is apparent from the entirely unambiguous expression: "If the request is accepted . . ."; if it is not, the refusal to make a statement puts an end to the procedure, and no further action is possible;

— if it is accepted, the statement, after having been requested through the diplomatic channel, is received by the president of the court of appeal or the judge whom he has delegated;

— it can only be a written statement.

14. Madam President, I do not believe that there has been an attack or the threat of an attack on the person, freedom or dignity of President Guellah. There is nothing ignominious about

"telling the whole truth", and the French legal system is such that a foreign Head of State is entirely at liberty to maintain his silence, if he so wishes, without anyone being able to criticize him for it.

28 And should he decide — freely — to disclose what he knows, his statement is received with the discretion, solicitude and respect that the high rank of the office of the person who has chosen to provide a statement merits, when that individual is the representative of a foreign State.

15. Such statements are in all respects compatible with the requirements of international law which, contrary to what the Djiboutian side claims[34], certainly does not preclude internationally protected persons being invited to testify in connection with a criminal investigation. Furthermore, the 1961 Convention on Diplomatic Relations and the 1969 Convention on Special Missions are very clear about this: "A diplomatic agent *is not obliged* to give evidence as a witness"[35]; and, indeed: "The representatives of the sending State in the special mission and the members of its diplomatic staff *are not obliged* to give evidence as witnesses."[36] They are not *obliged*; but they may do so, and, of course, there is nothing to say that they cannot be *invited* to do so.

16. The requests to that effect which were addressed to President Guellah could not, therefore, constitute an attack on his honour or his dignity. But since the circumstances in which they were made differ, I shall consider them separately.

1. The "witness summons" of 17 May 2005

17. Madam President, let me say this straight out: the "witness" summons that Mrs. Sophie Clément, an investigating judge at the Paris *Tribunal de grande instance*, addressed to the President of the Republic of Djibouti on 17 May 2005[37] failed to comply with the provisions of Article 656 of the Code of Criminal Procedure, which are the only provisions that permit a French judge to take the statement of a foreign Head of State. That procedural act, which was not followed up, is null and void under French law and, therefore, clearly, did not cause any harm to the Applicant.

18. Moreover, there are three points which should be made clear:

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[34]MD, p. 50, para. 131, or p. 51, para. 135.

[35]Vienna Convention on Diplomatic Relations of 4 April 1961, Art. 31(2).

[36]New York Convention on Special Missions of 8 Dec. 1969, Art. 31(3).

[37]MD, Ann. 28.

— firstly, the request involved no element of threat: "I invite you to attend . . .";

29 — secondly, no wrongful act was imputed to President Guelleh, who was invited to testify "in respect of the acts alleged against: X"; and

— thirdly, the fact that this procedural act was not founded on any kind of "suspicion" — contrary to Djibouti's contentions[38] — is also apparent from the fact that the President was invited to testify as an ordinary witness and not as a *témoin assisté* [legally represented witness].

19. A brief explanation is probably called for here. In French law, since the Law of 15 June 2000, a distinction has been made between two categories of witness:

— "normal" or "ordinary" witnesses, whom the investigating judge wishes to interview because he considers that they may have information that will help uncover the truth, but who are certainly not suspects. As Article 101 of the Code of Criminal Procedure states, the investigating judge may summons "any person whose statement appears useful to him"; however, "persons in relation to whom serious and corroborating evidence exists that they have taken part in the acts which the investigating judge is reviewing *may not be heard as [ordinary] witnesses*"[39]; and

— in those cases they have, of necessity, to be interviewed as *témoins assistés* [legally represented witnesses] whom the judge, in fact, regards as suspects, believing that he has evidence against them[40]; if that evidence is confirmed, the judge may proceed to "charge" (or, as we used to say, indict) the person concerned[41].

20. If President Guelleh had been summoned as a *témoin assisté* [legally represented witness], there would certainly have been grounds for debate, but he was not and could not have been, since the testimony of the representative of a foreign power cannot be requested other than within the strict confines laid down by Article 656 of the Code of Criminal Procedure, failing which it is null and void. That perhaps is why, in both its Application and its Memorial, Djibouti claimed that President Guelleh was "summoned to give statement[] as *témoin[] assisté[]* [legally

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[38]See Application, p. 14, para 16. See also MD, p. 26, para. 60 and pp. 30-31, para. 71-72.

[39]Code of Criminal Procedure, Art. 105.

[40]Art. 113-1 and 113-2.

[41]Art. 113-8.

represented witness] in connection with a criminal complaint against X for subornation of perjury"[42]. That claim is wrong on two counts: the summons in question was addressed to him in connection with the judicial investigation into the death of Bernard Borrel, as an ordinary witness — and certainly not as a *témoin assisté* [legally represented witness], as the Applicant finally recognized, moreover, in the words of Mr. van den Biesen, last Monday[43].

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21. There is something else that is very striking. At Monday's hearing, counsel for Djibouti stressed that the witness summonses were based on a standard form, and he made much of the similarities between those that were addressed to Djibouti's Ambassador in Paris in 2004 and President Guelleh in 2005, on the one hand, and another addressed to one Madam Foix on 15 October 2007[44] — those documents appear in Annexes 25 and 28 of Djibouti's Memorial and in Annex 7 of the documents which Djibouti produced on 21 November last year respectively, and they have been reproduced in the dossiers which have been distributed to you here. And yet, Mr. van den Biesen felt compelled to comment on "the striking difference between the convocations addressed to the Ambassador and the President, on the one hand, and the one addressed to Madam Foix, on the other: the summons addressed to Madam Foix contains an *avertissement* — a warning — explaining the legal consequences of a refusal to appear before the judge", whereas the documents addressed to the Ambassador and the Head of State contain no such warning[45]. Surprisingly, Mr. van den Biesen fails to draw any conclusion from that observation: "One may only guess, Madam President, the reasons for the respective judges of instruction to not include this *avertissement* in the convocations sent to the Ambassador and the President."[46]. And that is it; he does not even attempt to answer the conundrum he has described . . . and yet the answer is simple — I would go as far as to say obvious: the investigating judge had no intention of subjecting these high-ranking figures from Djibouti to any form of threat of compulsion. In regard to the requests to testify which were addressed to them, the implication of opening formula ("I

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[42]Application, para. 13; see also MD, p. 30, para. 70 and pp. 67-68 , "Submissions", paras. 2 and 6.

[43]CR 2008/1, p. 37, para. 13.

[44]CR 2008/1, p. 37, para. 18 (van den Biesen).

[45]CR 2008/1, pp. 38-39, paras 19-20 (van den Biesen).

[46]*Ibid*., p. 39, para. 20.

invite you . . .") becomes patently clear: these invitations to testify are entirely devoid of any threat of compulsion.

31 22. Let me read out, with your permission, Madam President, the aptly described "witness summons", addressed to Madam Foix on 15 October 2007[47]. It starts in the same way, but it is the end that is relevant: the "warning" follows after the reference to the "[n]ature of the acts" -- let me read it to you in full:

> "If you fail to attend or refuse to attend, you may be compelled to do so by the law enforcement agencies, in accordance with the provisions of Article 109 of the Code of Criminal Procedure.
>
> The witness is further informed that, under Article 434-15-1 of the Penal Code, failure to attend without excuse or justification is punishable by a fine of €3,750."[48]

23. Neither the invitation to testify that was addressed to the Ambassador of Djibouti, nor that addressed to President Guelleh included those statements, although they are quite customary. This is because while Madam Foix is summonsed to appear, those high-ranking figures are simply invited. To use an analogy that is, perhaps, more familiar to lawyers within the common law system, an "ordinary" witness like Madam Foix (I have no idea who she is, Madam President, but, clearly, she is not an internationally protected person . . .) must testify *sub poena*, whereas the Ambassador and the President are invited to do so of their own free will and without threat.

24. Against all the evidence, Mr. van den Biesen claims: "However, the non-inclusion of this warning in the convocations, obviously does not suspend Article 109 of the French Code of Criminal Procedure nor the above-mentioned provision of the French Criminal Code" -- and he stresses: "non-appearance is punishable under French law and may lead to the use of public force"[49]. That is all quite true, Madam President — perfectly true in the case of ordinary witnesses who, like Madam Foix, are summoned subject to the application of Article 109 of the Code of Criminal Procedure and Article 434-15-1 of the Penal Code. However, that is absolutely not the case for the representatives of foreign powers, who fall exclusively within the scope of Article 656, the provisions of which guarantee them full respect for their immunity. I would add that the

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[47] Ann. 7 of the documents lodged with the Court's Registry on 21 Nov. 2007.

[48] In bold in the text.

[49] CR 2008/1, p. 39, paras 20 and 21.

"warning" that appears on the summons addressed to Madam Foix is the customary and general formula which is applied to *all* "ordinary" witnesses under the French system, pursuant to
32 Article 101(3) of the Code of Criminal Procedure[50]. Its omission was clearly not accidental and plainly indicated that it was not the intention of Judge Clément to rely on Articles 101 *et seq* of the Code of Criminal Procedure — just as she could not have relied on them, had she wished to interview the President of the French Republic, as we can see from the decision of the Court of Cassation which counsel for Djibouti cited[51]. I have to confess that I do not see the connection: Mr. Chirac -- in relation to whom that judgment was handed down -- was not, so far as I know, the representative of a foreign power.

25. I would add in passing that the Mr. van den Biesen's repeated reference to the *Hostages*[52] case seems to me to be rather gratuitous: to compare an invitation to testify (which is not accompanied by any threat of compulsion whatsoever) to an attempt to compel hostages to testify borders on the ludicrous. And the Court's judgment in the *Yerodia* case, which counsel for Djibouti also cites[53], it is not relevant either — although the comparison is less insulting — specifically because, in this case, the investigating judge was careful to ensure that the invitation contained no element of threat whatsoever. Whereas, as is clear from the extract from the judgment that the Applicant cited, "[t]he fact that the warrant is enforceable is clearly apparent from the order given to 'all bailiffs and agents of the public authority . . . to execute this arrest warrant'" *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* p. 29, para. 70); in this case, the removal of the customary enforcement clause shows, equally clearly, that the invitation addressed to President Guelleh was not enforceable.

Madam President, I need some further time to complete this section. Would you like me to stop now for the pause?

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[50]See CMF, Ann. XXV.

[51]CR 2008/1, p. 41, para. 27 (citing: Court of Cassation, sitting in plenary, 10 Oct. 2001).

[52]CR 2008/1, p. 40, para. 25; see also p. 49, para. 54 and p. 51, para. 59.

[53]*Ibid*., para. 26.

The PRESIDENT: Yes, Professor Pellet. We'll take a short pause at this juncture.

The Court adjourned from 11.25 a.m. to 11.40 a.m.

33 The PRESIDENT: Please be seated.

Mr. PELLET: Thank you very much.

26. Madam President, as I said before the pause, Judge Clément invited the President of the Republic of Djibouti to testify as an ordinary witness and not a *témoin assisté* [legally represented witness]; that means that she did not consider that there was any charge imputable to him, and, indeed, that this was no ordinary witness summons but an invitation to testify which involved no threat of compulsion. Nonetheless this was an irregular procedural act, in terms not of international but of French law, as France acknowledged unequivocally immediately Djibouti's Ambassador to France had protested against that document by Note Verbale of 18 May 2005, pointing out that the document in question did not observe the provisions of French law[54].

27. It is a fact that the investigating judge failed to take account of the formal requirements contained in Article 656 of the Code of Criminal Procedure, which are the only provisions applicable in this case and which preclude any possibility of the representative of a foreign power testifying other than voluntarily. A request to that effect ought to have been addressed to him "through the intermediary of the Minister for Foreign Affairs", to whom the investigating judge failed to refer the matter; and the statement ought to have been received by the president of the court of appeal or a judge delegated by him.

28. And so, on the evening of 18 May (that is to say the same day as the Embassy's protest was received, and the day after the invitation to testify had been dispatched), the spokesperson for the Ministry for Foreign Affairs issued a clarification which took full account of the concerns of Djibouti's Ambassador. That clarification was read out on the airways by the spokesperson, and, in particular, was broadcast on Radio-France-Internationale (RFI) — the radio station with the largest audience outside France in the world.

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[54]MD, Ann. 29.

A copy of the text of the spokesperson's statement to RFI[55], which reproduces the terms of the communiqué broadcast that same day by the Ministry for Foreign Affairs, was sent, on the following day, 19 May, to Djibouti's Ambassador in Paris[56]. At that day's press briefing, the spokesperson for the *Quai d'Orsay*, reiterated the previous day's statement[57].

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29. Counsel for Djibouti made a mistake during Monday's oral argument. He affirmed, on several occasions, that the "convocation" addressed to President Guelleh on 17 May 2005 could not be related to Article 656 of the Code of Criminal Procedure, claiming that "this Article 656 is part of a written procedure"[58]. However, Madam President, that is also largely true of the procedures under Articles 101 *et seq*. The testimony of persons heard on the basis of the latter is received not by the president of the court of appeal but by the investigating judge (or a police officer delegated by him) and, usually, in the judge's office — whereas Article 656 contains no such specification. But, in both cases, the testimony is transcribed in writing: that is specified within the actual text of Article 656, whereas it is provided for not in Article 101 itself but in Articles 106 and 107. But there the differences end. In both cases, the testimony takes the form of a written document placed in the investigation file and, finally, the form of a written statement.

30. Aside from the fact that a person called upon to testify on the basis of Article 656 does not take an oath, the real — and only material — difference for our purposes, is that an "ordinary witness" is summoned to testify under threat of being compelled to do so by the law enforcement agencies, whereas the representative of a foreign power is invited to do so of his own free will. In the present case, it is perfectly clear that, although the "convocation" of 17 May 2005 from the investigating judge failed to observe the formal requirements of Article 656, the judge did rule out both the application of Article 101 and the possibility of any form of compulsion. Similarly, although the invitation addressed to President Guelleh failed to comply with the provisions of Article 656, it was not contrary to any of the rules of international law protecting the immunity, honour and dignity of foreign Heads of State.

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[55]CMF, Ann. XXIX.

[56]*Ibid*.

[57]CMF, Ann. XXX.

[58]CR 2008/1, p. 39, para 23; see also, p. 45, para. 42 and p. 48, para. 53 (van den Biesen).

31 The Applicant's allegation that France has made itself responsible for "breaches of the
35 elementary principles of international courtesy and customary law relating to immunity"[59], is, consequently, a fabrication. It is not easy to define the concept of the respect due to the dignity of a Head of State, an "elusive notion", to cite my much lamented friend, Sir Arthur Watts[60]; and it is not entirely clear whether the Applicant is relating the issue merely to international courtesy or to an obligation under customary international law. But I do not consider it necessary to embark upon these Byzantine disputes. It is hard to see how a simple invitation to testify, which was not accompanied by any threat of enforcement, could, in any way, constitute an attack on the dignity of a Head of State.

32. Madam President, several conclusions may be drawn from this episode, whose significance the Applicant has exaggerated in an extremely contrived manner.

33. Firstly, the mistake by the investigating judge caused no damage to the Republic of Djibouti: neither the immunity from jurisdiction of President Guelleh, nor his dignity were called into question by an inappropriately termed "witness summons", which reflected no suspicion in regard to the President and was not followed up. Nor, of course, could it be: contrary to what Mr. van den Biesen claims[61], it goes without saying that there is *no* threat, not the slightest threat, that the testimony requested under the "convocation" of 17 May could have been compulsorily obtained:

— there was never any question of this, and the wording of the document shows that this was specifically not the intention of the investigating judge;

— there was never any question of this, and nor could there have been; any attempt of that nature would have been null and void, since only the provisions of Article 656 of the Code of Criminal Procedure are applicable.

34. Secondly, if France's responsibility could have been engaged as a result of this — it could not, but let us make the assumption for the purposes of the debate — the investigating judge's retraction, immediately after the document at issue had been dispatched (the very next day,

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[59]CR 2008/1, p. 16, para 9 and CR 2008/3, p. 535, para. 2 (Doualeh).

[60]"The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *RCADI*, 1994-III, 247, p. 41.

[61]CR 2008/1, p. 44, para. 35.

36 remember), in a particularly clear and formal manner, would at least constitute amply sufficient reparation. It is barely worth mentioning that satisfaction — which "may consist in an acknowledgment of the breach"[62] — is a method of reparation that is perfectly acceptable in international law[63], something that the Djiboutian side appears to accept, moreover[64]. That method of reparation is particularly appropriate for "moral" damage "arising from the very fact of the breach of the obligation", which would constitute the worst case here[65]. I repeat, we do not believe that France's international responsibility could have been engaged by this episode, which has caused no damage to the Applicant State (even though *French* law has not been fully complied with). But, in the unlikely even that the Court were to take the opposite view, the recognition by the Minister for Foreign Affairs that the Paris investigating judge had made a mistake, should have (and did) put an end to the dispute on that point. And that bring me to the third conclusion that Djibouti's application elicits on the matter.

35. Thirdly, and in any event, as France has demonstrated in its Counter-Memorial[66], regardless of the improbable hypothesis which I have just described, there is no reason for the Court to rule on Djibouti's request for the withdrawal or annulment of a request for testimony which was never followed up and was immediately retracted by the Minister for Foreign Affairs. However, we look at it, the (again, very contrived) dispute which Djibouti feels it must contest, clearly exists no longer and the "[t]he present case [namely that episode] is one in which 'circumstances that have . . . arisen render any adjudication devoid of purpose" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J Reports 1963*, p. 38; *Nuclear Tests, Judgments, I.C.J Reports 1974*, p. 271, para. 58 and p. 477, para. 61)

37 Let us not forget, Madam President that, according to the Court's very wise words "[w]hile judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the

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[62]Art. 37(2) of the Articles of the ILO on Responsibility of States for internationally wrongful acts, annexed to resolution 83/56 of the General Assembly of 12 Dec. 2001.

[63]See Art. 34 and 37, *ibid.*

[64]See MD, PP. 64-65, paras 178-180; CR 2008/3, p. 32, para. 48 (van den Biesen).

[65]United Nations, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10*, Report of the International Law Commission to the General Assembly, doc. A/56/10, commentary on Art. 37 (Report of the International Law Commission, Fifty-third session, 2001, p. 263, para. (3) of the commentary); see also para. (4) of the commentary.

[66]CMF, p. 53, para. 4.22.

less true that the needless continuation of litigation is an obstacle to such harmony" (*ibid.*; see also *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 38).

36. Last but not least, I would reiterate that the Court does not have jurisdiction to entertain that aspect of the case.

2. The invitation to testify of 14 February 2007

37. This consideration holds good *a fortiori* regarding the invitation to testify addressed to President Guelleh on 14 February 2007.

38. This procedural act is not related to the 2004 international letter rogatory, any more than the one in 2005 — which is enough to leave the Court without jurisdiction over the Djiboutian claims (which are somewhat unclear) in this connection. In addition, however, this is an act subsequent to the Application, which therefore obviously cannot be covered by the consent given by France to the Court's jurisdiction.

39. That being said, in contrast to the summons of 17 May 2005, the invitation to testify addressed to President Guelleh on 14 February 2007 by the investigating judge in the case on the death of Bernard Borrel scrupulously obeys the provisions of Article 656 of the Code of Criminal Procedure, which I read before the break.

40. Firstly, it was requested "through the Minister for Foreign Affairs", as evidenced by the letter from Mme. Clément to the Minister of Justice dated 14 February 2007[67].

41. And so:

— on 15 February 2007 the Minister of Justice sent the request to his colleague in Foreign Affairs (by a letter in which he referred expressly to Article 656 of the Code of Criminal Procedure[68];

38 — on the same day the Director of the Private Office of the Minister for Foreign Affairs communicated the request to the Diplomatic Adviser to the President of the French Republic for this to be transmitted to the President of Djibouti, who was attending a France-Africa summit in Cannes; he also referred to Article 656;

[67]CMF, Anns. XXXII and XXXIV.

[68]CMF, Ann. XXXII.

— on 16 February the Minister for Foreign Affairs informed the Minister of Justice that Mme. Sophie Clément's request had been transmitted to the representatives of the President of the Republic of Djibouti[69], and

— on 19 February he informed him that "the Djiboutian delegation has since confirmed that President Guelleh does not intend to respond to this request"[70].

42. The invitation to testify addressed to President Guelleh on 14 February 2007 confirms in all respects that France scrupulously observes the immunity enjoyed by foreign States, as illustrated by Article 656 of the Code of Criminal Procedure. This episode also shows that Mme. Clément, guided by the 2005 precedent, fully intended to abide strictly by these rules: in her letter of 14 February in which she asks the Minister of Justice to make contact with the Minister for Foreign Affairs "with a view to *seeking the consent* of Mr. Ismaël Omar Guelleh", she states that she "*wish[es] to obtain* the testimony of [the latter]"[71]. It is not possible to show greater deference.

43. Last Monday Mr. van den Biesen was wondering why this invitation had been addressed to the President of Djibouti during a France-Africa conference held in Cannes. The other side's counsel could easily have answered the question had he not made the mistake that I pointed out a few moments ago on the meaning of the word "written" in the text of Article 656: of course the statement envisaged by this provision is made in writing, but is received by a senior judge. It is therefore natural and lawful for the investigating judge to address this request to him while he was on French territory, and the Minister for Foreign Affairs had no reason not to give effect to it. At
39 the same time, if I may say so, the Minister of Justice "dotted the i's" by stating in a communiqué issued the same day that "having regard to international custom and the law, heads of State enjoy the same immunities as diplomats and consequently cannot be compelled to testify in French legal proceedings"[72].

44. The press communiqué the same day from the embassy of the Republic of Djibouti in Paris says the same when it refers to "the immunity from jurisdiction to which any head of State in

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[69]Cf. CMF, Ann. XXXIII.

[70]*Ibid.*

[71]CMF, Ann. XXXIV (emphasis added).

[72]Documents submitted to the Court by Djibouti on 21 November 2007, Ann. 3; see also the dispatch of 14 February 2007, Ann. 2.3.

office is entitled when travelling abroad"[73]. Even if this communiqué might have been issued somewhat hastily, because it states that the invitation to testify was not sent through the Ministry of Foreign Affairs although this formality was observed in full, the fact remains that the embassy did *not* dispute the possibility that a "summons" (the word used by the communiqué) could be addressed "to a representative of a foreign State" when travelling in this way.

45. This is doubtless because it is apparent that Mr. van den Biesen, rather than disputing the validity of the invitation to give evidence contained in the investigating judge's letter of 14 February 2007, directed all his forces to an invitation to give evidence which he says "must have existed"[74] early in the afternoon of 1 February and allegedly did not meet the requirements of Article 656. There is no trace in the file of this phantom request, which exists only in the imagination of Djibouti's counsel, anxious to prove by all possible means that the episode of 2007 was "a clear repetition of the events that took place on 17 May 2005"[75]. Had this been the case, the "invitation" would again have been contrary to the provisions of Article 656 of the French Code of Criminal Procedure, but it would not have infringed the immunities or the dignity of President Guelleh. Anyway, this time the invitation to testify of 14 February 2007 cannot be criticized in any way from the viewpoint of French law.

40 46. Since the Djiboutian head of State had declared that he did not wish to comply with this request, there the matter rested. We are a long way from the "kind of judicial hounding of the Republic of Djibouti" to which the latter refers in its Memorial[76].

47. The conclusions are self-evident, Madam President:

— there has been no infringement of the immunities of the President of the Republic of Djibouti, or of his dignity, of course, by an invitation to testify which he was entirely free to accept or reject;

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[73]Documents submitted to the Court by Djibouti on 21 November 2007, Ann. 1.

[74]CR 2008/1, p. 48, para. 50.

[75]CR 2008/1, p. 47, para. 48; see also p. 49, para. 56.

[76]MD, p. 40, para. 99.

— this invitation, which was not accompanied by any compulsion or threat thereof conforms in all respects to diplomatic customs and to the principles of international law applicable to the heads of foreign States;

— the refusal, which did not have to be justified and was not justified, by President Guelleh to give written testimony has closed the episode and any decision by the Court here on this point is in any case without object;

— in any event, Madam President, Members of the Court, I say again that your honourable Court has no jurisdiction to rule on Djibouti's claims concerning it because the invitation to testify of 14 February 2007 bears no relation to the subject of the Djiboutian Application in respect of which France has agreed to appear before you, and furthermore is subsequent to that Application.

II. PROCEDURAL ACTS REFERRING TO OTHER DJIBOUTIAN OFFICIALS

48. Madam President, in addition to its grievances, real or imaginary, over procedural acts relating to President Guelleh, the Republic of Djibouti asserts that France has flouted its international obligations by summonses addressed to "high-ranking figures in Djibouti, and by issuing international arrest warrants against the latter"[77], calling for these to be withdrawn and cancelled[78].

49. I do not think that these requests relate to the "arrest warrants against two Djiboutian citizens" of October 2006, which are mentioned in passing in the Memorial, doubtless to add weight[79]: these are private individuals who are entitled to no special protection under international law and the other side does not claim that the issue of those warrants amounts to a breach of France's international obligations.

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50. Similarly I do not think we should spend time on the invitation to testify issued on 21 December 2004 to the Ambassador of Djibouti in Paris by investigating judge

[77]MD, p. 67, Conclusions, para. 2.

[78]*Ibid*., p. 68, para. 6.

[79]MD, p. 33, para. 78.

Baudouin Thouvenot as part of defamation proceedings following the filing of a civil action for public defamation by Mrs. Borrel[80].

51. I can understand why the Republic of Djibouti is formulating no submission in this connection and I note that the lengthy catalogue of claims by Djibouti read by its Agent during the hearings on Tuesday afternoon does not mention this episode.

52. The claims that remain for us to deal with are those that concluded the Memorial:

— the summoning as legally represented witnesses of Messrs Hassan Saïd Khaireh and Ali Djama Souleiman, which you can find, Madam President, Members of the Court, in Annex 11 of the documents submitted to the Court on 21 November; and

— the arrest warrants issued against the same persons by the *Chambre d'instruction* of the Versailles Court of Appeal on 27 September 2006; these, which had not been produced by Djibouti to this Court, form Annexes VII and VIII to the French Counter-Memorial.

53. The witness summonses addressed to these two persons by Mr. Thierry Bellancourt, the Vice-President of the Versailles *Tribunal de grande instance* and investigating judge in the proceedings relating to the action for subornation of perjury filed by Mrs. Borrel in October 2002, were transmitted to the persons concerned by the French Minister of Justice through his Djiboutian opposite number[81], in accordance with the provisions of Articles 13 and 14 of the Convention on Mutual Assistance of 27 September 1986 — about which you have heard much on quite a different subject.

42 54. Since the persons concerned did not comply with these summonses, the *Chambre d'instruction* of the Versailles Court of Appeal, taking the view that "there are . . . serious or corroborative indications making it likely that [the persons concerned] may have participated in committing the offence of subornation of perjury", by judgment dated 27 September 2006 issued arrest warrants against them and decided that these warrants should "also be executed in the form of European arrest warrants"[82].

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[80]MD, Ann. 25. See CMF, pp. 6-7, paras. 1.13-1.14.

[81]See MD, Ann. 30 and documents submitted to the Court by Djibouti on 21 November 2007, Anns. 11.1 and 11.2.

[82]CMF, Ann. VII.

55. From the international law viewpoint these procedural acts raise the same questions and call for the same comments.

56. And first, as I have just stated, these also are not related to the case about which the investigating judge of the Djibouti *Tribunal de grande instance* issued an international letter rogatory in November 2004. So I shall once again refer merely in the alternative to the reasons of substance, for which in any event these claims can only be rejected.

57. These are chiefly two in number:

— firstly, the persons concerned are not entitled to special international protection by virtue of their duties;

— secondly, Djibouti cannot hide behind the breaches of the 1986 Convention that it imputes to France in order to evade (or help its nationals to evade) obligations derived from that instrument.

1. The immunity from jurisdiction relied on by Djibouti for the benefit of its nationals is inadmissible

58. According to the information given by the Republic of Djibouti, those concerned are "respectively the State Prosecutor of the Republic of Djibouti and the Djiboutian Head of National Security"[83]. Contrary to what is asserted by our opponents, those duties are not of a kind to exonerate those performing them from their obligations in criminal matters. And I must make it unequivocally clear that it is obviously not enough that the Government of Djibouti should have deemed it expedient to appoint one of the two parties concerned as agent, then counsel, of the

43 Republic of Djibouti before this Court for that appointment to confer on that person immunities from which he cannot benefit as regards facts prior to that appointment. At the most, Mr. Souleiman can rely on the immunities necessary to him to perform that mission — immunities which France has always scrupulously respected itself and ensured are respected by others.

59. Having said this, there is no reason to grant a State prosecutor of the Republic or a head of national security immunities from jurisdiction for ordinary crimes or offences. Seeking to

[83] MD, p. 52, para. 138.

establish the contrary, Djibouti, which deals with this question in its Application via paralipsis, relied, in a short passage in its Memorial[84], on:

— the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons;

— the Judgment of this Court in the *Arrest Warrant* case; and

— the 1961 Convention on Diplomatic Relations and the 1969 Convention on Special Missions.

However, none of these texts is of much help to it.

60. Madam President, the fascination which the 1973 Convention apparently holds for our opponents is hard to understand. As I have already said, that Convention has strictly no connection with the facts of our case and there seems to me little point in reverting to it — other than to note that, in any event, the definition of the persons protected other than heads of State or government and ministers for foreign affairs provides no particular argument which might enable the two interested parties to be included:

> "For the purposes of this Convention:
>
> 1. "internationally protected person" means:
>
> . . . . . .
>
> *(b)* any representative or official of a State . . . who . . . is entitled pursuant to international law to special protection . . .".

This is answering the question whether officials are entitled to special protection by the question itself: it is they who are so entitled under international law. And this, you will agree, does not take us very far.

44 61. The Judgment of the Court in the *Arrest Warrant* case is certainly more instructive, even though your distinguished Court took care to explicitly state that it was only considering the question of the immunity from criminal jurisdiction "of a . . . Minister for Foreign Affairs" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 21, para. 51), which, in customary law, is only granted immunities "to ensure the effective performance of [his] functions on behalf of [his] respective State"[85]. I am not going to

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[84]MD, pp. 51-52, paras. 137-138.

[85]*Ibid.*, p. 21, para. 53.

read out paragraphs 53 and 54 of your 2002 Judgment; they are reproduced in paragraph 4.31 of the French Counter-Memorial. This is a most important passage — and one which broadly explains the solution you adopted in that case, which turns upon the wholly "exogenous" character, (originating outside) of the functions of a minister for foreign affairs. Patently, this is not the case of a head of *national* security or of a prosecutor.

62. In an attempt to prove the contrary, Djibouti, on 21 November last, produced two sets of documents "concerning the international functions" respectively of the Prosecutor of the Republic of Djibouti and the Head of National Security of Djibouti. In both cases these are a somewhat mixed bag of documents, comprising above all — besides certain more exotic documents — invitations abroad and various mission orders issued recently.

Just a few remarks here:

1. It is surprising to note a sudden, curious multiplication in the foreign missions contemplated by the two Djiboutian officials in recent months. As regards Mr. Souleiman Ali, Djibouti issued a mission order dating from 1999[86], another in 2004 (to travel to France)[87], a third in January 2006[88]; and the four others are concentrated in the period between 19 June and 7 November 2007[89]. The documents produced in support of the assertion of the international nature of Mr. Saïd Khaireh's functions are similarly spread out in time. Both of them show that, when preparing the written pleadings in the present case, the Applicant noticed that it
45 could be important to establish the international nature of the functions of these two officials. And let no one tell us that these are examples taken at random or easier to find than other older ones: the files of all States are replete with documents of this type and it would have been an easy matter, for very capable counsel of Djibouti, to make a more convincing selection if the facts had come up to their expectations.
2. With reference more particularly to Mr. Saïd, I would point out that the organizational diagram of the presidency of the Republic of Djibouti produced by Djibouti in November[90] absolutely

[86]Documents submitted to the Court by Djibouti on 21 November 2007, Ann. 9.1.

[87]Ann. 9.2.

[88]Ann. 9.3.

[89]Anns. 9.4-98.

[90]Ann. 10.1.

does not show that his functions were essentially related to other countries. Moreover, Djibouti expressly acknowledges that, "[w]ith respect to his functions, France is right to emphasize that, like those of the Public Prosecutor they are 'essentially internal'"[91].

3. Where Mr. Souleiman is concerned, Professor Condorelli also immediately conceded that "[t]here is no denying . . . that his duties are 'essentially internal'"[92]. This limitation of his international role fits in with the description of his functions, as shown by the texts instituting a Prosecutor of the Republic which are quoted and analysed in the French Counter-Memorial[93]. Moreover, it is remarkable that, of the six documents produced, three concern Djibouti's representation at the Conference of States Parties to the ICC Statute. In general, with the possible exception of one of them, which it must be acknowledged is really *intuitu personae* or, rather, *intuitu functionis* (it is an invitation to attend the regional conference of the Association of Prosecutors of Africa)[94], these invitations and missions are in no way linked to the function of State Prosecutor performed by Mr. Souleiman: he was appointed for them (essentially after the present dispute crystallized); any number of other Djiboutian officials could easily also have been appointed. And,

46 4. if I may add a brief personal note, I can assure you, Madam President, that as professor and public servant of the French Republic, I receive more invitations and make more trips abroad than Messrs. Saïd and Souleiman put together — and yet, I fear I could not reasonably claim the immunities they claim — unless I am wrongly arrested by the Dutch police when I have the privilege of pleading before you . . .

63. This is because immunities are not granted to officials of the State simply because, in the exercise of their functions, they may, fairly occasionally, or even regularly, have to make trips abroad. This only applies if such immunities are indispensable to those missions being carried out and provided they are inherent to the functions concerned. It is this reasonably restrictive — or simply reasonable view — which is expressed by your Judgment of 2002, which stresses "the

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[91]CR 2008/3, p. 13, para. 19.

[92]CR 2008/3, p. 8, para. 7 (Condorelli quoting the CMF, p. 57, para. 4.32).

[93]CMF, pp. 57-58, para. 4.32.

[94]Documents submitted to the Court by Djibouti on 21 November 2007, Ann. 9.4.

nature of the functions exercised by a Minister for Foreign Affairs" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 21, para. 53), who represents the State "solely by virtue of his or her office" (*ibid.*, p. 22, para. 53), which is clearly not the case either of a head of national security or State Prosecutor, to whom it may fall to represent their State, but who must, in order to do so, be entrusted with a special missions and present full powers — which also means that they may *not* represent the State (in that the special missions with which they may be entrusted may just as well be performed by others).

64. This is also why Djibouti's reliance on the 1969 Convention on Special Missions[95], to which, moreover, neither France nor Djibouti are parties, is equally unconvincing. As its name indicates, a "special" mission is set up on an *ad hoc* basis in order to, in accordance with the definition given in Article 1 *(a)* of the Convention, "[deal] . . . on specific questions or perform . . . a specific task". It consists of "representative[s] of the sending State" an expression which means "any person on whom the sending State has conferred that capacity"[96] — which also means both

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that anyone may have the status of representing the State in connection with a special mission whenever the sending State so decides and informs the receiving State thereof and when the latter does not object to it, and that no one enjoys this status, *ipso facto*, by virtue of his functions within the State. Messrs. Saïd and Souleiman no more than anybody else. In consideration of which, *if* Djibouti and a third State agree to use a special mission "to deal with . . . [a] specific question" and if the Republic of Djibouti decides to nominate either of the two persons concerned to it, it might be agreed that the immunities laid down in Article 31 of the 1969 Convention would in any event be opposable to the States parties to that Convention[97]. But apart from the fact that, as I have said, this is not the case either of France or Djibouti, it is, in any event, not in this way that the problem is posed in this case, and it is therefore pointless to question the codifying character (or not) of this provision: neither of the two persons concerned was arrested or threatened with arrest on the occasion of a special mission.

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[95]MD, p. 53, para. 139.

[96]Art. 1 *(e)*.

[97]CR 2008/3, p. 9,. para. 9 (Condorelli).

65. It goes without saying that the 1961 Vienna Convention is not relevant either[98]: neither Colonel Saïd nor Mr. Souleiman are diplomats and the immunities laid down for diplomats are not applicable to them.

66. It follows from all this that neither of the two leading figures concerned, by virtue of his functions, enjoys the immunity from jurisdiction on which Djibouti relies and there was nothing to prevent them being summoned as legally represented witnesses by the Versailles investigating judge, or to prevent the *Chambre d'instruction* of the Court of Appeal from issuing arrest warrants against them following their refusal to answer that summons to appear.

67. Before concluding on this point, I must point out the curious argument by Professor Condorelli according to which, if I have understood him properly, the pressures concerned were brought to bear by the State Prosecutor in the exercise of his official duties — or, perhaps, in connection with a special mission the person concerned made to Brussels in 2002[99]? In any event, if such a "mission" was meant to provide the person concerned with the protection of

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certain immunities, that could only have been with respect to Belgium (if that country had agreed to that mission[100] — which there is serious reason to doubt), but in any case that would be without effect vis-à-vis France, which was completely foreign to the "mission" in question.

68. As neither the exercise of the functions, nor the law applicable to special missions could reasonably be relied on in support of the claimed immunities the person concerned supposedly enjoyed in the context of the acts of which he is suspected and which earned him a summons to appear as a legally represented witness by the investigating judge in Versailles, then an arrest warrant, counsel of Djibouti doggedly takes another tack. He questions the jurisdiction of the French judge to investigate the case — the case, I would remind you, relating to subornation of perjury and not the case concerning the causes of the death of Bernard Borrel. Apart from its lack of jurisdiction to rule on Djibouti's submissions concerning this other case, it is clear that there is no way in which the Court could be called upon to assess the scope of the jurisdiction of a national court — at least, in such circumstances.

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[98]Application, p. 9, para. 16; MD, p. 52, para. 139.

[99]CR 2008/3, pp. 9-10, paras. 10-11 and p. 12, para. 17 (Condorelli).

[100]See Art. 2 of the Convention on Special Missions of 8 Dec. 1969.

69. But even if, for the sake of the discussion, we leave aside the manifest lack of jurisdiction of this Court in this respect — which, moreover, counsel of Djibouti eventually acknowledges[101] — but only after having sought to sow doubt in peoples minds, a doubt I wish to remove, it goes without saying that Mr. Condorelli's arguments on this point cannot be accepted.

70. To begin with, he makes a show of indignation at the alleged exercise of a "kind of peculiar universal jurisdiction . . . which would enable a French criminal court to exercise its authority to prosecute a foreigner accused of offences manifestly unrelated to international crimes, which were allegedly committed abroad, against a victim, who was also foreign and was allegedly implicated in events also said to have happened abroad!"[102]. Shortly afterwards, Mr. Condorelli made the same allegations about the suspected pressures on witnesses to which Mr. Saïd was subjected[103]. In both cases, this is a very poor way of posing the problem — and this way of doing
49 it takes hardly any note of the terribly painful human aspects of the present case. But in legal terms, such an assertion cannot withstand examination of the conditions in which the Versailles *Tribunal* was seised.

71. In this connection, it will suffice to recall that, on 19 November 2002, Mrs. Borrel, a French citizen, brought a civil action with the senior investigating judge of the *Tribunal de grande instance* in Paris for subornation of perjury on the ground of the pressures allegedly brought to bear on a certain Mr. Alhoumekani, to get him to withdraw the terms of his testimony implicating Djiboutian dignitaries in the death of her husband, Bernard Borrel. Following the transfer of the case ordered by the *Cour de cassation*[104], that case was investigated at the *Tribunal de grande instance* in Versailles.

72. Articles 113-6 to 113-8 of the French Criminal Code lay down the jurisdiction of French courts for every crime perpetrated abroad against a French victim — which is the case here — on condition that the victim has filed an official complaint with the French courts — as occurred also

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[101]CR 2008/3, p. 12, para. 16 (Condorelli).

[102]CR 2008/3, p. 10, para. 13 (Condorelli).e

[103]CR 2008/3, pp. 13-14, para. 20 (Condorelli).

[104]CMF, Ann. VI.

in this case. This has nothing to do with any claim to exercise universal jurisdiction by the Versailles *Tribunal*.

73. As regards the argument that the position of the French courts constitutes "an impressive example of double standards"[105], on the pretext that an investigating judge in Paris, by an order not to proceed of 7 February 2002[106], found that the French courts lacked jurisdiction to entertain a civil action initiated by Messrs. Hassan Saïd and Mahdi Ahmed Cheick for false testimony and complicity[107], it is no more solidly established: indeed, the plaintiffs, Djiboutian (not French) nationals, reported facts committed abroad by one of their compatriots. This is not a case of double standards — simply of different solutions to problems posed in different terms. In the case of Madam Borrel's complaint, the French courts can base themselves on a title of jurisdiction linked to the nationality of the victim, in the case of the complaint of Messrs. Saïd and Cheick, the court seised could not rule — without being accused (rightly this time) of exercising a universal jurisdiction with no title as basis.

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74. But in legal terms, the principal argument put forward by Professor Condorelli (which is novel when compared with the arguments in the Memorial) is stranger still. It is based on the principle that "any State must regard the acts of the organ of a foreign State acting in an official capacity as attributable to that State, and not to the person possessing the status of organ, who cannot be held criminally liable for it as an individual"[108]. In fact, by itself, there is nothing extravagant about this proposition, and I would be careful not to contradict the authorities asserting it, which my learned opponent quoted at length[109]. What is debatable is not the principle; it is the truly unacceptable consequences he draws from it — moreover, more by implication than explicitly.

75. Hence, Madam President, the point of departure is that, when they act in an official capacity, the organs of the State do not engage their own responsibility, but that of the State; consequently their acts enjoy the immunities of the State. So far, no problem. And we are also

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[105]CR 2008/3, p. 11, para. 13 (Condorelli).

[106]Ann. 8.2 to the documents filed in the Registry of the Court on 21 November 2007.

[107]CR 2008/3, pp. 10-11, para. 13 (Condorelli).

[108]CR 2008/3, p. 12, para. 17; see also p. 14, para. 21 and p. 15, para. 23 (Condorelli).

[109]CR 2008/3, pp. 15-17, paras. 24-30 (Condorelli).

agreed, still with Professor Condorelli, that on the other hand, outside certain organs or categories of organs that can be counted on the fingers of one hand (head of State, minister for foreign affairs, head of government and diplomats — to varying extents moreover), it is totally excluded "that it can be claimed that persons enjoying the status of an organ of State, even of a high rank, benefit from personal immunity (also known as *ratione personae*) in any way comparable to that which international law accords to the highest organs of States!"[110]. Where the shoe pinches is the "join" between these two propositions.

76. For Professor Condorelli, while virtuously defending himself against the charge of "heresy" consisting in granting absolute immunities to the organs of the State other than the handful I have just mentioned, resolutely commits heresy in the facts. Although he recognizes that these other organs — including the State Prosecutor and the Head of National Security of
51 Djibouti — enjoy not personal immunities (as Djiboutian claimed in its Memorial)[111], but only functional immunities[112], my opponent in fact deprives the distinction of all effect: for him, everything falls within the latter, for everything falls within official functions — including, it would seem, subornation of perjury.

77. This cannot be the law — or rather, this cannot be the consequence of the just principles enunciated on behalf of our opponents. There must be — and is — a difference between the absolute immunities enjoyed by certain organs of the State (of which the State Prosecutor and Head of National Security of Djibouti do not form part) and the functional immunities, which apply to all the other organs. The difference resides in a "presumption": in the case of an incumbent Head of State (or Minister for Foreign Affairs) the "presumption of immunity" is absolute and probably irrebuttable. It is covered by the immunities and that is all; on the other hand, where the other officials of the State are concerned, that presumption does not operate and the granting (or refusal to grant) of immunities must be decided on a case-by-case basis, on the basis of all the elements in the case. This supposes that it is for national courts to assess whether we are dealing with acts performed — or not — in the context of official functions.

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[110]CR 2008/3, p. 15, para. 23 (Condorelli).

[111]MD, pp. 51-52, paras. 137-138.

[112]CR 2008/3, p. 15, para. 23 (Condorelli).

78. Any argument to the contrary would be devastating and would signify that all an official, regardless of his rank or functions, needs to do is assert that he was acting in the context of his functions to escape any criminal prosecution in a foreign State. This defies reason and happily does not correspond to the practice of States. To quote just one example taken from French case law: the executive director of the merchant shipping directorate of the Malta Maritime Authority, in this capacity responsible for delivering the flag, was personally indicted in the legal proceedings opened following the sinking of the oil tanker *Erika*. His status as official in no way prevented criminal proceedings being taken against him. And it was only after "normal" criminal proceedings that the French *Cour de cassation* recognized the merits of his position that he was "accused of acts of public power performed in the context of his duties on behalf and under the control of the State of Malta"; consequently, the *Cour de cassation* ruled that he should, as agent of the State, enjoy the immunity from criminal jurisdiction granted to foreign States[113].

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79. In this case of subornation of perjury, there was obviously nothing to prevent — or which now prevents — those concerned from invoking the immunities Djibouti now relies on in their name before the French Criminal Court. But to do so, they must enable it to appraise their arguments to this effect. Neither of the two has availed itself of those immunities — even by letter. Admittedly, as I showed a few moments ago, the curious arguments put forward by Professor Condorelli on this point are scarcely likely to convince judges. Instead of doing so, those concerned have focused on the so-called non-reciprocity allegedly constituted by France's conduct.

80. Madam President, it is highly paradoxical to note that the Applicant, which sets so much store by full compliance with the 1986 Convention, openly breaches it where summonses of those persons as legally represented witnesses are concerned, since it refused to allow the witnesses concerned to answer them.

81. Madam President, at the end of this statement, I think I have shown that the procedural actions taken by France in connection with the various cases (which the Applicant wrongly presents as a whole, when they concern completely separate cases) in no way infringed the immunities or dignity of the Djiboutian officials concerned;

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[113] *Chambre criminelle*, 23 Nov. 2004, No. de pourvoi 04-84265, *Bull. crim.* 2004, No. 292, p. 1096 (available at http://www.legifrance.gouv.fr).

(1) the request to testify addressed to the Djiboutian Head of State in 2005 did not fall within the provisions of Articles 101 *et seq.* of the Code of Criminal Procedure and was obviously not accompanied by any threat of enforcement; it had no repercussions and is not such as to form the object of a legal decision by the Court;

(2) on the other hand, the invitation to testify addressed to President Guelleh in 2007 was perfectly valid in form and substance and in keeping with diplomatic usage; the refusal by the senior official to whom it was addressed to answer it drew a line under that episode; all the same,

(3) France fully acknowledges the absolute principle of the immunity from criminal jurisdiction of foreign heads of State;

53 (4) matters are different where Messrs. Saïd and Souleiman are concerned, whose functions in no way justify the absolute, general immunity from jurisdiction invoked by Djibouti in their favour; consequently,

(5) the summonses to testify as legally represented witnesses which they did not answer and the arrest warrants issued against them are not at odds with any international obligation of France; on the other hand,

(6) by standing in the way of those persons testifying, the Republic of Djibouti violated the international obligations incumbent upon it under the 1986 Convention on Mutual Assistance in Criminal Matters;

(7) and lastly, I repeat, I am only formulating these conclusions in the alternative: these procedural actions are not covered by the consent given by the French Republic to consideration of the Application by the Court, which therefore does not have jurisdiction to entertain it.

With your permission, Madam President, I now turn, without any link, to the second part of my presentation which, in fact, is a separate short pleading.

THE LEGAL CONSEQUENCES OF THE ALLEGED WRONGFUL ACTS OF THE FRENCH REPUBLIC

1. This last presentation of the first round on behalf of the French Republic will, one might almost say "according to custom", be given over to an examination of the consequences of the alleged wrongful acts for which Djibouti holds France responsible. It must be said, however, that there is a slightly "masochistic" element to this compulsory exercise: the Respondent, after having

explained at length the reasons for which the grievances held against it are ill founded and the engagement of its responsibility completely out of the question, now comes, in its last presentation, to envisage the consequences of internationally wrongful acts of which it refutes the reality. It is appropriate to do so, but it can only be in the alternative, "out of precaution", in the entirely unlikely perspective that you, Members of the Court, uphold a part of the argumentation which the Republic of Djibouti has presented to you.

2. Moreover, in the present instance, Chapter 5 of the Counter-Memorial of France analyses in a fairly comprehensive manner the consequences which could ensue from the — hypothetical — engagement of the responsibility of France in the present case[114] and I must say that I did not notice anything in the otherwise lengthy presentation by Mr. van den Biesen on the "remedies" requested by Djibouti such as to make us alter our position. I would consequently be most unhappy with myself if I were to inflict on you, Members of the Court, a long presentation, which could only be of academic rather than practical interest. And it seems that I can confine myself to summarising the concrete facts of the matter in the light of the elements presented on Tuesday afternoon by the other Party.

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3. Nonetheless, to do so I will follow a different pattern to that adopted by Mr. van den Biesen. It seems highly artificial to address at the same time and in an undifferentiated and vague manner all of the very numerous requests made by Djibouti such as they were expressed in the submissions presented by its Agent at the hearing on Tuesday. In particular, the same "remedies" cannot be applied to the alleged violation constituted by the refusal to comply with the letter rogatory on the one hand and to the alleged violations of immunities on the other. Thus I will address separately the submissions regarding the one matter and the other, while following more or less the order of the submissions of the Republic of Djibouti (in their new version).

4. However, two caveats of a general nature need to be made clear:

— first, submissions 1 and 2 are quite clearly related to the refusal by France to comply with the international letter rogatory of November 2004 and those listed as numbers 3 to 8 with the

[114] CMF, pp. 63-72.

issues of immunities, the three following submissions appear to me to be of a "transversal" nature";

— second, I insist on reiterating in the strongest manner possible that the French Republic did not give its consent to the Court to examine the issues relating to the immunities of Djiboutian officials, which are not covered by the subject of the Application as defined by the applicant State.

It goes without saying that I will not return to the issue of compensation, since Djibouti has now officially withdrawn its submissions on the matter[115].

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1. Djibouti's submissions regarding the refusal to comply with the international letter rogatory

5. Madam President, the Applicant's submissions with respect to the letter rogatory have, between the Memorial and the oral proceedings, become extremely complicated. The objective remains unchanged: Djibouti asks the Court to enjoin France to transmit the "Borrel file", but both the reasoning for and method of such a handover have undergone "refinements", which call for brief commentary in both cases.

6. According to submission No. 1, the Court is requested to adjudge and declare "that the French Republic has violated its obligations under the 1986 Convention"[116]. That is a submission aimed at obtaining satisfaction and on the principle of which we have nothing more to say, if not, of course, that we dispute its validity; however, I do not think that it is of interest to return to the matter: it was the subject of Chapter 3 of our Counter-Memorial and of the entire presentation of my friend and colleague Hervé Ascencio.

7. But it is what follows which is more disturbing, as the Republic of Djibouti actually does revisit the reasons (in the alternative) which should, in its opinion, prompt you to draw such conclusions. Indeed, it asks you to conclude that France violated its obligations:

(i) by not acting upon its undertaking of 27 January 2005 to execute the letter rogatory addressed to it by the Republic of Djibouti dated 3 November 2003;

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[115]CR 2008/3, p. 18, para. 2 (van den Biesen).

[116]CR 2008/3, p. 36, para. 4.1 (Doualeh).

(ii) in the alternative, by not performing its obligation pursuant to Article 1 of the aforementioned Convention following its wrongful refusal given in the letter of 6 June 2005;

(iii) in the further alternative, by not performing its obligation pursuant to Article 1 of the aforementioned Convention following its wrongful refusal given in the letter of 31 May 2005; [117]

In so doing, Djibouti definitely confuses the grounds and the submissions[118]; to use the formula employed by the Court in the *Fisheries* case: "[t]hese are elements which might furnish reasons in

56 support of the Judgment, but cannot constitute the decision" (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 126)[119].

8. Be that as it may, it is not of great importance, even if the Court has in the past warned against the disadvantages of such confusion[120]. However, the alternative reasons put forward by the applicant State call for a number of comments:

— as was demonstrated by Hervé Ascencio on Thursday afternoon[121], it is completely impossible to speak of an "undertaking" in reference to the letter from the Principal Private Secretary to the Minister of Justice to the Ambassador of Djibouti in Paris dated 27 January 2005[122], in any respect as an undertaking to transmit the file, a decision which could only be taken by the investigating judge; if there is any "undertaking", it was only made by the author of the letter with respect to speeding up the procedure; but that obligation of conduct cannot be viewed as a promise regarding the result; the now principal submission of the other Party cannot therefore

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[117] *Ibid.*

[118] See CMF, p. 13, para. 2.19, and the cited jurisprudence and the response of Djibouti in CR 2008/2, p. 27, para. 16 (Condorelli).

[119] See also *Minquiers and Ecrehos (France/United Kingdom), Judgment, I.C.J. Reports 1953*, p. 52; *Nottebohm (Liechtenstein v. Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, p. 16; *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; and *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 449, para. 32.

[120] See *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, pp. 125-126. See also *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 32; and *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 28.

[121] CR 2008/4, p. 55, para. 40.

[122] MD, Ann. 21.

be upheld; the problem for Djibouti is that the reasons invoked to support its conclusions in the alternative are not any more solidly founded;

— they attest to an interesting incertitude and demonstrate that even the Applicant itself has considerable difficulty in determining what could be the act giving rise to the internationally wrongful act which it attributes to France: is it the letter of 6 June 2005 or that of 31 May 2005 (which incidentally it claims never to have received — although it quoted the text of it in its Application; in any event, the fact that it is referred to in its submissions runs counter to the request that it be held as "non-existent" "for the purposes of the present case")?[123]

— further, if the Court were to hold that any one of those reasons was valid, *quod non*, it would certainly not mean that it could or should order the French Republic to transmit all or part of the "Borrel file" to the Republic of Djibouti.

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9. And that brings me to the second of Djibouti's submissions which is aimed at precisely that. But it seems to me that serious objections stand in the way of this request, both because, as a general rule, it is not the function of the Court to issue orders to sovereign States and because, in the present case, it would be in marked conflict with the spirit itself of the 1986 Convention on Mutual Assistance.

10. As the Court clearly indicated in a famous passage of the Judgment in the *Northern Cameroons* case: "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29.)

11. Among those limitations, the most fundamental is the one which prompts the Court to refrain from issuing orders to sovereign States. As early as 1925, in the *Mavrommatis Jerusalem Concessions* case, the Permanent Court of International Justice emphasized that "the fact that the Court has been enabled to affirm the concessionaire's right to have his contracts readapted, cannot give it the power itself to determine the method of such readaptation" (*Mavrommatis Jerusalem Concessions, Judgment No. 5, 1925, P.C.I.J., Series A, No. 5*, p. 50).

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[123] CR 2008/2, p. 34, para. 20 and p. 41, para. 45 (van den Biesen).

12. The present Court has reiterated the principle of that position in, among others, the Judgment in the *LaGrand* case: "the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 516, para. 128 (7); see also *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 62, para. 31). And you adopted a comparable position in the *Arrest Warrant* case (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 32, para. 76). Similarly, the European Court of Human Rights concluded very clearly that:

> "[i]t is not the Court's function to indicate which measures Ireland should take in this connection; it is for the State concerned to choose the means to be utilised in its domestic law for performance of its obligation under Article 53"[124].

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In the present case, the Court is in even less of a position to act in place of the French Republic to impose the precise consequences arising from its decision in that, to quote the terms of the 1951 Judgment in the *Haya de la Torre* case, the choice of the method of execution "could not be based on legal considerations, but only on considerations of practicability or political expediency; it is not part of the Court's judicial function to make such a choice" (*Haya de la Torre (Colombia/Peru), Judgment, I.C.J. Reports 1951*, p. 79).

13. These considerations of a general nature are, in the present case, borne out and strengthened by the very spirit of the 1986 Convention on Mutual Assistance, which Professor Ascencio has demonstrated does not posses the absolute and automatic character that Djibouti would like to attribute to it. He has also shown that its drafting reflects, on the contrary, the concern of the Parties to safeguard their respective sovereignty and to accord each other a considerable power of appreciation which, and I say this with all the respect which I have for the Court, I do not think could be substituted by this Court. That is particularly apparent from the drafting of Article 2, paragraphs *(a)* and *(c)*.

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[124]Case of *Johnston and Others* v. *Ireland*, Judgment of 18 December 1986, Application No. 9697/82, Series A No. 112, para. 77.

14. In any case, Madam President, and this is a point which is crucial to my mind, I have great difficulty understanding how the other Party can establish as a principle at one and the same time:

— that the *Borrel* case is not the subject of the present proceedings[125]; and

— that, nevertheless, the Court could order France to hand over the "Borrel file" to Djibouti, without any knowledge of its contents.

There is nothing fortuitous in the central role attributed by the 1986 Convention to the judicial authorities by each of the contracting parties, nor to the exclusive role which French law acknowledges for the investigating judge in ruling on international letters rogatory such as those issued by the Djiboutian authorities in the present case: only those authorities are and only that judge is, in theory, in possession of the record of investigation; only those authorities and that judge have all the information necessary to enable them to assess the possibilities for executing such international letters rogatory. Without the complete documentation, any assessment will necessarily be based on an incomplete appreciation which does not make it possible to take a decision in full knowledge of the facts.

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15. As for Djibouti's submission requesting, in the alternative, that the "Borrel file" should be transmitted "to the Republic of Djibouti within the terms and conditions determined by the Court"[126], this presumably refers to the — very strange — "proposal" made by Mr. van den Biesen whereby we could hand over to the Court the documents (two pages, he said) in respect of which defence secrecy has been lifted, so as to enable it to assess whether or not their transmission would be likely to prejudice the essential national interests of France[127]. Without dwelling on the unusualness of this suggestion, it seems to me that this really changes nothing, and once again comes down to asking the Court to substitute its own assessment for that of the investigating judge, on the basis of documentation which will still be incomplete, whereas the domestic judge took her decision on the basis of the case file as a whole.

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[125]See MD, p. 10, para. 5 and p. 15, para. 20; CR 2008/1, p. 13, para. 3 (Doualeh).

[126]CR 2008/3, p. 36, para. 4.2 (ii) (Doualeh).

[127]CR 2008/2, p. 51, para. 72 (van den Biesen).

16. The order for execution requested by Djibouti being ruled out, and the Applicant having abandoned seeking compensation for the damage it has allegedly suffered, satisfaction would then be the only means of providing reparation for this prejudice which, in any event, is certainly no more than moral — if one accepts both that France's conduct constituted an internationally wrongful act, *quod non*, and that it caused prejudice to the Applicant, *quod non*. If, by some remote chance, the Court were to find that to be the case, France considers that, as the Republic of Djibouti indicated in its Memorial, "the determination by the Court of the wrongfulness of the conduct of the French Republic in this case will constitute appropriate satisfaction"[128].

17. Appropriate — and, to my mind, more than adequate — satisfaction. But Djibouti does not stop there, and has no hesitation in requesting further that the Court should decide "that the French Republic shall cease its wrongful conduct and abide strictly by the obligations incumbent on it in the future" — there is no problem with that — and that it "shall provide the Republic of
60 Djibouti with specific assurances and guarantees of non-repetition of the wrongful acts complained of"[129]. Of what kind? Mr. van den Biesen spelled them out: France would firstly have to undertake to apply the 1986 Convention in good faith in future; secondly, not to refuse requests for judicial assistance for reasons other than those set out in Article 2; and lastly, even if such a reason existed under Article 2, to resolve the problem in accordance with the principle of good faith and with the European guidelines laid down in the Joint Action adopted by the Council of the European Union in 1998 on "good practice in mutual legal assistance in criminal matters"[130]!

It does not seem helpful to me to dwell on the eccentricity of this last request — why on earth should the Parties to this dispute have to apply an internal text of the European Union? Not only are these submissions as a whole somewhat offensive to my country — and ill-founded — they are also certainly not in keeping with the spirit of the guarantees of non-repetition whose principles have been accepted by the Court[131], but which it has always applied with moderation and discernment. The object of the guarantees sought by Djibouti is, no more and no less, that France

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[128]MD, p. 65, para. 180.

[129]CR 2008/3, p. 37, paras. 4.10-4.11 (Doualeh).

[130]CR 2008/3, pp. 25-26, paras. 26-28 (van den Biesen).

[131]Cf. *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, pp. 512-514, paras. 123-125.

should undertake to apply in good faith the Convention on Mutual Assistance which it concluded with Djibouti in 1986. However, Madam President, the simple fact that France ratified it is sufficient to establish that it undertook to comply with its provisions. Such a submission reflects a worrying abuse of the concept of guarantees of non-repetition. Furthermore, I have the gravest doubts as to whether — even if the violation of the Convention relied upon by Djibouti were to be established, because of the non-transmission of the Borrel file — that single violation, which could only result from a misapplication of Article 2 *(c)*, would be likely to justify a request for guarantees of non-repetition. As far as I am aware, with this one exception, France has never refused to execute a request for mutual assistance from Djibouti. In any event, it seems to me absurd that the Court should be called upon to declare in the operative part of its judgment that *pacta sunt servanda* — but that it is what the opposing Party is asking it to do.

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II. DJIBOUTI'S SUBMISSIONS REGARDING THE ALLEGED VIOLATIONS OF THE IMMUNITIES OF DJIBOUTIAN OFFICIALS

18. Madam President, the Applicant's submissions Nos. 3 to 8 seek to draw conclusions from the alleged attacks on the immunities, honour and dignity of the President of the Republic of Djibouti and on the person, freedom and honour of the Public Prosecutor and the Head of National Security of Djibouti[132]. I shall comment only very briefly on these lengthy submissions, even if it means returning to them next Tuesday, should the need arise.

19. Submissions Nos. 3 to 5 concern the invitations to testify addressed to President Guelleh. They call for the following comments, in telegraphic style:

(1) even though neither invitation is an attack on the dignity of the Djiboutian Head of State, a careful distinction should be made between the invitation, or "summons", of 17 May 2005 (which did not comply with the procedures laid down by Article 656 of the French Code of Criminal Procedure) and that of 14 February 2007;

(2) the first, in 2005, has been the subject of an apology from the French authorities — which in itself would be a form of reparation, if an internationally wrongful act had been involved; moreover, this procedural document is in any case obsolete and there would be no point in

[132] CR 2008/3, pp. 36-37 (Doualeh).

"declar[ing] it null and void", if only because, even though it has not been formally "withdrawn", it is null and void in the eyes of the French law, and was in any event replaced by the invitation to testify of 14 February 2007;

(3) the latter, addressed properly and with all the necessary respect to President Guelleh, was not in any way an attack on his honour or dignity, and his refusal to respond to it drew a line under the episode; I would add that

(4) there is a free press in my country and, even if one may perhaps regret some of the reporting of these procedural steps in the media, that does not engage France's responsibility, in accordance with the well-established principle of international law whereby the State is never responsible for the actions of individuals.

20. As regards the submissions concerning the State Prosecutor of Djibouti (I would recall that, at the time of the events, he had not yet been appointed Public Prosecutor) and the Head of
62 National Security, we do not dispute that, on the basis of what the Court decided in the *Arrest Warrant* case, it could take the view that France is obliged to declare "null and void" not the summonses for them to attend as *témoins assistés* [legally represented witnesses], but the arrest warrants issued against them because they had not responded to those summonses. For that, however, the Court would have to find either that these were internationally protected persons — which Djibouti no longer seems to be claiming — or that the subornation of perjury of which they are not accused (they fully benefit from the presumption of innocence), but suspected, fell within the exercise of their functions; however, since it is established that they do not enjoy the immunities which they are claiming by virtue of their offices, such a finding can only be made by a French judge, on the basis of the evidence put before him.

21. Madam President, Members of the Court, these brief remarks bring to an end the first round of France's oral argument, since as I indicated at the beginning of the sitting, we did not think it necessary to use the half of this afternoon which was also available for the first round. I am grateful for the few extra minutes which you have allowed me. Thank you for your attention, and I wish you all an excellent weekend.

The PRESIDENT: Thank you, Professor Pellet.

The Court notes that the French Government has thus completed its first round of oral argument this morning. The Court will therefore not hold a sitting this afternoon at 3 p.m., as was initially scheduled.

I am now going to put a question to France, before giving the floor to Judges Koroma, Simma and Bennouna and Judge *ad hoc* Guillaume, who also have questions to put to the Parties.

Here is my question. Ce matin, le conseil a indiqué que la République française n'avait aucun moyen de savoir si la lettre du 31 mai 2005 adressée à l'ambassadeur de Djibouti par le directeur des affaires criminelles et des grâces avait jamais été reçue.

La République française garde-t-elle trace des lettres qu'elle adresse à des représentants d'autres Etats ? Si tel est le cas, le document en question pourrait-il être présenté à la Cour?

63 I now give the floor to Judge Koroma. Judge Koroma.

Le JUGE KOROMA: Je vous remercie, Madame le président. Dans sa requête introductive d'instance, la République de Djibouti a prié la Cour de dire et juger que la république française était juridiquement tenue d'exécuter la commission rogatoire internationale concernant la transmission aux autorités judicaires djiboutiennes du dossier relatif à la procédure d'information ouverte dans l'«Affaire contre X du chef d'assassinat sur la personne de Bernard Borrel» et que les autorités françaises devaient immédiatement remettre le dossier aux autorités djiboutiennes. La République de Djibouti pourrait-elle davantage préciser le but de la commission rogatoire ? Merci.

Le PRESIDENT : Je vous remercie, Monsieur le juge Koroma. Judge Simma, you have the floor.

Judge SIMMA: Thank you, Madam President. I should like to put the following question to France. Article 17 of the Convention of 27 September 1986 on Mutual Assistance in Criminal Matters between Djibouti and France provides: "Reasons shall be given for any refusal of mutual assistance".

What is the practice of France with regard to the obligation to provide reasons for a refusal to comply with requests that are based on treaty clauses corresponding to Article 3 of the said Convention? Could France provide the Court with examples of its practice in this regard?

Is France's practice relating to this obligation applied to Member States and non-Member States of the European Union in the same manner? Thank you.

The PRESIDENT: Thank you. Judge Bennouna, you have the floor.

Judge BENNOUNA: Thank you, Madam President. My question is to the Republic of Djibouti and is as follows. The Republic of Djibouti requested in the alternative on 22 January 2008 that "the French Republic shall immediately after the delivery of the Judgment by the Court . . . transmit the "Borrel file" to the Republic of Djibouti within the terms and conditions
64 determined by the Court" (CR 2008/3, p. 36). Can the Republic of Djibouti explain what conditions, in its view, the Court might attach to this transmission? Thank you.

The PRESIDENT: Thank you. Mr. Guillaume, you have the floor.

Judge GUILLAUME: Thank you, Madam President. My question is as follows. In paragraph 146 of its Memorial, the Republic of Djibouti cites a letter from the investigating judge, Mrs. Sophie Clément, dated 11 February 2005. Could we have a copy of that letter? Thank you, Madam President.

The PRESIDENT: Thank you very much. The texts of these questions will be transmitted to the Parties in writing as soon as possible. The Court would be grateful if the Parties could reply to these questions during the second round of oral argument.

That brings today's sitting to an end. The hearings will resume on Monday 28 January at 10 a.m. with the second round of oral argument of the Republic of Djibouti. Djibouti will present its final submissions at the end of the sitting. I would recall that the French Republic will take the floor on Tuesday 29 January at 3 p.m. for its second round of oral argument. France will present its final submissions at the end of that sitting. Each of the Parties will have a session of three hours available to it.

The purpose of this second round of oral argument is to enable each of the Parties to reply to the arguments advanced orally by the other Party. The second round must therefore not constitute a repetition of statements made earlier by the Parties, which are also not obliged to avail themselves of the entire time allocated to them.

Thank you very much, and the sitting is closed.

The Court rose at 1.15 p.m.