SEPARATE OPINION OF JUDGE *AD HOC* YUSUF

[Translation]

I. Jurisdiction of the Court — II. Violation by France of the 1986 Convention on Mutual Assistance in Criminal Matters (CMACM) — A. Violation by France of Article 1, paragraph 1, of the Convention on Mutual Assistance in Criminal Matters — B. Violation by France of Articles 2 and 3, paragraph 1, and Article 17 of the Convention on Mutual Assistance in Criminal Matters — III. Attacks on the immunity from jurisdiction and inviolability of the Head of State of Djibouti — A. The witness summons of 17 May 2005 — B. The witness summons of 14 February 2007.

1. Even though I have voted in favour of paragraph 1 *(a)*, *(b)* and *(c)* and paragraph 2 *(a)* of the operative part, I disagree with the Court on key points in the decision, in particular the issue of the Court's jurisdiction *ratione temporis*, the extent of the violations by France of the Convention on Mutual Assistance in Criminal Matters of 27 September 1986, and the attacks on the immunity, inviolability, honour and dignity of the Djiboutian Head of State.

I. Jurisdiction of the Court

2. I accept paragraph 1 *(a)* and *(b)* of the operative part, in which the Court states that it has jurisdiction to entertain not only the dispute relating to execution of the letter rogatory addressed by the Republic of Djibouti to France on 3 November 2004 but also that relating to the witness summonses addressed to the President of the Republic of Djibouti on 17 May 2005 and to two senior Djiboutian officials on 3 and 4 November 2004 and 17 June 2005. I also accept paragraph 1 *(c)* of the operative part, in which the Court states that it has jurisdiction to adjudicate upon the dispute concerning the witness summons addressed to the President of the Republic of Djibouti on 14 February 2007. On the other hand, I disagree with the Court over the reasoning that led it to that conclusion. Also, I do not accept paragraph 1 *(d)* of the operative part, because in my view the Court had jurisdiction to adjudicate upon the dispute concerning the arrest warrants issued on 27 September 2006 against two senior Djiboutian officials.

3. The reasoning of the Court displays inconsistencies both in logic and in law. The Court asserts that its jurisdiction to entertain acts subsequent to the filing of the Application is governed by what France expressly accepted in its letter of 25 July 2006. France's consent was valid "'only for the purposes of the case'", i.e., "regarding 'the dispute forming

the subject of the Application strictly within the limits of the claims formulated therein by the Republic of Djibouti'" (Judgment, para. 88). Taking the view that "in Djibouti's Application there are no claims relating to arrest warrants" (*ibid.*, para. 88) issued against senior Djiboutian officials on 27 September 2006, the Court finds that it has no jurisdiction to entertain them. However, it comes to a contrary finding regarding the summons addressed to the President of the Republic of Djibouti on 14 February 2007 — a fact also subsequent to the filing of the Application — because it "was but a repetition of the preceding one, even though it had been corrected as to form" (*ibid.*, para. 91).

4. In the opinion of the Court,

> "what is decisive is that the question of its jurisdiction over the claims [relating to the arrest warrants issued against the senior Djiboutian officials] is not to be answered by recourse to jurisprudence relating to 'continuity' and 'connexity', which are criteria relevant for determining limits *ratione temporis* to its jurisdiction, but by that which France has expressly accepted in its letter of 25 July 2006" (*ibid.*, para. 88).

However, the Court relies on the same criterion of "connexity" to establish its jurisdiction to consider the witness summons addressed to the Djiboutian President on 14 February 2007.

5. There is no doubt that the jurisdiction of the Court is based on the consent of the Parties and "only exists in so far as this consent has been given . . ." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 16). However, the Court seems to be saying that when consent is given on the basis of *forum prorogatum* as laid down in Article 38, paragraph 5, of its Rules, determining its jurisdiction must meet criteria completely different from those that have to be used for other ways of expressing consent to its jurisdiction. However, I take the view that the fact that consent has been given pursuant to Article 38, paragraph 5, of the Rules does not affect the relevance of the criteria regarded by the Court in the past as decisive in determining its jurisdiction *ratione temporis* in respect of acts or events subsequent to the filing of the Application.

6. Thus the Court has consistently recognized that its jurisdiction over acts subsequent to the filing of an Application was dependent on the one hand on the existence of a close link between those acts and those already within its jurisdiction, and on the other by the absence of any effect which would transform the nature of the dispute (see, *inter alia, Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67; *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 36;

Fisheries Jurisdiction (Federal Republic of Germany v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72).

7. These criteria are applicable in the present case. There is no doubt that the arrest warrants issued against senior Djiboutian officials are acts stemming directly from issues that are the subject of the Application, more particularly those relating to the immunity of senior Djiboutian officials. The above-mentioned arrest warrants were issued following the two senior Djiboutian officials' refusal to answer the summonses to appear as *témoins assistés* addressed to them on 3 and 4 November 2004 and then on 17 June 2005. Thus the Court accepts that according to French legislation (Article 109 of the French Code of Criminal Procedure) a person called as a witness "is obliged to appear before the judge, on pain of being compelled to do so by the law enforcement agencies . . . through the issuing of an arrest warrant against him" (Judgment, para. 184). However, the Court refuses to draw the conclusions in terms of a finding of "connexity" between the refusal to answer to the witness summonses and the issue of the arrest warrants. It is nevertheless clear that these arrest warrants were a way of executing the witness summonses which, according to Djibouti in the Application, violated international obligations relating to immunities binding on France. So these arrest warrants, though issued after the date of the filing of the Application, are certainly within the Court's jurisdiction *ratione temporis*.

8. Moreover, the Court has applied the "connexity" criterion in the present case to the witness summons addressed to the Djiboutian Head of State on 14 February 2007. It considered this summons "identical in substance" to the summons of 17 May 2005 because it was "in relation to the same case", "was issued by the same judge" and "was in relation to the same legal question" (*ibid*., para. 91). So there was a close connection between the summons of 14 February 2007 and the summons of 17 May 2005. Also, since the Court had recognized that it had jurisdiction to entertain the first summons, the situation could not reasonably be otherwise with the second. Therefore the Court should have dealt with both acts subsequent to the date of the filing of the Application (the arrest warrants issued against the two senior Djiboutian officials and the summons of 14 February 2007 addressed to the Djiboutian Head of State) in the same way, stating that it had jurisdiction to entertain them.

II. Violation by France of the 1986 Convention on Mutual Assistance in Criminal Matters (CMACM)

9. I voted in favour of paragraph 2 *(a)* of the operative part, in which the Court states that France was in breach of its international obligation under Article 17 of the Convention on Mutual Assistance in Criminal Matters. However, I consider that France has also violated other provi-

sions of the Convention, *inter alia* Articles 1, paragraphs 1 and 2 *(c)* and 3, paragraph 1. I will set out my reasons below.

A. Violation by France of Article 1, paragraph 1, of the Convention on Mutual Assistance in Criminal Matters

10. It follows from the wording of Article 1, paragraph 1, of the Convention on Mutual Assistance in Criminal Matters that the two parties undertake

> "to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting State".

The undertaking "to afford each other . . . the widest measure of mutual assistance" is a fundamental duty of the States parties to the Convention, which must be assessed in the light of its object and purpose. And the object and purpose of the Convention is to facilitate "mutual assistance" in criminal matters. This duty must be discharged mutually and on the basis of equality and co-operation between the two parties.

11. The expression "the widest measure" describes the extent of the mutual assistance in criminal matters that each party undertakes to afford the other. Its aim is the fullest and most open co-operation, both as regards the conditions necessary for providing mutual assistance and the practical implementation of certain forms of mutual assistance, such as letters rogatory. As for the expression "to afford mutual assistance", it refers to the duty of reciprocity incumbent on the parties to the Convention. It means that each party discharging its duty to co-operate in good faith is entitled to expect similar conduct from the other.

12. The Court accepts that "Article 1 of the Convention of 1986 refers to mutuality in the performance of the obligations laid down therein" (Judgment, para. 119). However, it considers that "Djibouti cannot rely on the principle of reciprocity in seeking execution of the international letter rogatory it submitted to the French judicial authorities" *(ibid.)*. Even if it took the view that a distinction was to be made between the performance of duties "mutually" and "reciprocally", which is not the case, it must be acknowledged that in the present case France has not fulfilled its obligation to afford Djibouti "the widest measure of mutual assistance" as laid down in Article 1 of the Convention.

13. France refused to comply with a request for mutual assistance from Djibouti in the context of the *Borrel* case on two occasions. The first request, submitted by the *procureur de la République* of Djibouti on

17 June 2004 was rejected by the French authorities on the ground that it was "'outside the framework'" of the Convention and "'without regard for its provisions'" (Judgment, para. 25). This statement, however, does not reflect the reality.

14. According to Article 1 of the Convention, the parties undertake "to afford each other" "the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party". Also, it can be inferred from the wording of Article 13 of the Convention that requests for mutual assistance may take various forms, the letter rogatory being one of them. Meanwhile, Article 13, paragraph 1, states that requests for mutual assistance must indicate: the authority making the request, the object of and the reason for the request, the identity and the nationality of the person concerned (where possible), and where necessary, the name and address of the person to be served or as much information as possible allowing for the person to be identified and located. Article 13, paragraph 2, requires compliance with additional conditions when the request for mutual assistance takes the form of a letter rogatory, in particular a statement of the offence and a summary of the facts.

15. The first request for mutual assistance by Djibouti, on 17 June 2004, was in the form prescribed by Article 13, paragraph 1, of the Convention. France nevertheless refused to execute this request and insisted that it should be in the form of an international letter rogatory. It would seem that Djibouti agreed to submit a second request in that form on 3 November 2004, in the interests of co-operation. This was also refused by the French authorities.

16. While it is true that a State party may refuse to comply with a request for mutual assistance in criminal matters, such a refusal may only be exceptional, and must in any event be based on proper grounds. This was not so in the present case. Without reciprocity and mutual co-operation the Convention would no longer be a convention for mutual assistance, but merely an instrument to assist one of the parties. It would be devoid of all meaning and would answer the purpose for which it was concluded for one of the parties only (in this case France).

17. So the necessity for both parties to comply with the fundamental and reciprocal duty "to afford each other the widest measure of mutual assistance" is at the very heart of the Convention. Djibouti was entitled to demand execution of the letter rogatory submitted to the French judicial authorities on the basis of the principle of reciprocity stated in Article 1, paragraph 1, of the Convention on Mutual Assistance, since it had itself afforded France the widest measure of mutual assistance by executing the three letters rogatory requested by the French authorities in the *Borrel* case.

B. Violation by France of Articles 2, 3, paragraph 1, and Article 17 of the Convention on Mutual Assistance in Criminal Matters

18. Article 3, paragraph 1, of the Convention on Mutual Assistance in Criminal Matters states the following principle:

> "The requested State shall execute *in accordance with its law* any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting State for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents." (Emphasis added.)

19. The Court observes that "the obligation to execute international letters rogatory laid down in Article 3 of the 1986 Convention is to be realized in accordance with the procedural law of the requested State" (Judgment, para. 123). It deduces from this that "the ultimate treatment of a request for mutual assistance in criminal matters . . . depends on the decision by the competent national authorities, following the procedure established in the law of the requested State" *(ibid.)*. However, the Court refrains from considering whether France fulfilled its obligations under Article 3 of the 1986 Convention, more specifically whether it executed the letter rogatory issued by Djibouti in accordance with French procedural law.

20. Article 3, paragraph 1, of the Convention is a typical case of *renvoi* by international law to internal law. This occurs when international law makes compliance with internal law a condition for its application. In this case Article 3, paragraph 1, of the Convention imposes upon Djibouti and France the obligation to execute their respective letters rogatory in accordance with their respective laws. Conformity with internal law is relevant from the viewpoint of international responsibility "because the rule of international law makes it relevant, e.g., by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it" (J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge, Cambridge University Press 2002, p. 89). Compliance with the provisions of the Franco-Djiboutian Convention on Mutual Assistance, more specifically those relating to letters rogatory, is dependent on compliance with French criminal procedure relating thereto. Failure by France to comply with its criminal procedure may therefore engage its international responsibility.

21. The Court has jurisdiction to ascertain whether the procedure prescribed by internal law (in this case the French Code of Criminal Procedure) was complied with in the decision by France to refuse to execute the letter rogatory requested by Djibouti. Although normally it is not for international courts to check whether internal law has been complied with by national authorities, the situation is otherwise in cases where a

convention refers directly to that law. In these cases failure to comply with internal legal procedures entails a violation of the Convention, and when the Court is seised by the parties to such a convention it can and must exercise a measure of control. In the present Judgment, however, the Court has not done so.

22. In the present case the legality of France's conduct should have been assessed on the basis of whether it was in conformity with the procedures laid down by its internal law. France has not acted in accordance with these procedures, especially with regard to judgmental authority which, according to the French Code of Criminal Procedure is responsible for assessing the concepts of threats to sovereignty, security and *ordre public*. The French Code of Criminal Procedure makes no provision for an investigating judge, on his own initiative, to reject a request for mutual assistance likely to prejudice the *ordre public* or the fundamental interests of France, or to assess the effect of such a request on these interests, even though, on the basis of Article 694-9 of the Code of Criminal Procedure, he may make the information forwarded subject to certain conditions.

23. The relevant provision to which the *renvoi* is made by Article 3, paragraph 1, of the Convention when a request for international mutual assistance is deemed likely to prejudice the *ordre public* or the fundamental interests of France is Article 694-4 of the French Code of Criminal Procedure. According to this provision,

> "if the enforcement of a request for judicial assistance coming from a foreign judicial authority is liable to prejudice *ordre public* or the fundamental interests of the nation, the district prosecutor seised of this request in accordance with the third paragraph of Article 694-1 sends this to the prosecutor general who decides, if appropriate, to seise the Minister of Justice and gives, where applicable, notice of this reference to the investigating judge. If he is seised, the Minister of Justice informs the authority which made the request, if appropriate, that no action, total or partial, may be taken in relation to the request . . ."

24. According to this provision, should the *procureur de la République* take the view that a request for mutual assistance "is likely to prejudice *ordre public* or the fundamental interests of the nation", he forwards it to the *procureur général.* If the latter considers this opinion to be justified, he seises the Minister of Justice, who, on the basis of the information he has, decides whether or not to give effect to the request for mutual assistance. Thus it is for the Minister of Justice, and for him alone, to determine whether the request is likely to prejudice *ordre public* or the fundamental interests of France. The investigating judge is not involved at any stage in this decision: it is not for him either to seise the Minister of Justice or to refuse to execute the request for mutual assistance when the request from the requesting State is considered likely to prejudice the sovereignty or other fundamental interests of France. At most he may be

informed that the request has been forwarded by the *procureur de la République* to the *procureur général* if the request concerns him.

25. Thus the decision whether or not to execute a request for mutual assistance likely to prejudice *ordre public* or the fundamental interests of France is not within the jurisdiction of an investigating judge. So the government alone assesses whether it is appropriate to forward the documents to the requesting State or to refuse. Control by the French courts extends only to whether investigations at the request of foreign authorities have been properly conducted from the viewpoint of French procedural rules. In fact the French courts have assumed a measure of control over the execution of international letters rogatory in France. That control was expressly recognized in a judgment of 24 June 1997 by the Criminal Division of the French *Cour de cassation.* In that case the Criminal Division recognized the principle that the procedure in France for the execution of an international letter rogatory is subject to the formalities prescribed by the law of the requested State. It deduced from this that the courts of that State may control whether international letters rogatory are properly executed.

26. The Criminal Division has also ruled on the extent of the powers of an investigating judge as regards refusing to execute an international letter rogatory. In a judgment of 30 March 1999 it found that the investigating judge responsible for executing a letter rogatory issued pursuant to the Franco-Senegalese Convention on Mutual Assistance in Criminal Matters had exceeded his powers by refusing to perform the acts requested owing to the political nature of the offences concerned. The solution adopted by the highest French court seems to mean that it was not for the investigating judge requested to pass judgment on this point. The decision to reject a request for mutual assistance thus allegedly falls within the exclusive jurisdiction of the Minister of Justice. It is therefore possible to assert "the possible effects of mutual assistance on the security, *ordre public* or the fundamental interests of the nation are the only, not very legal, matters which the delegated judge should not assess" (see Study by M. F. Desportes, Assistant Judge at the *Cour de cassation,* Internet site: http://www.courdecassation.fr/article5791.html). *[Translation by the Registry.]*

27. In the present case, the *procureur de la République* in Paris interpreted Article 694-4 of the Code of Criminal Procedure in this way, declaring that the investigating judge dealing with the international letter rogatory could do no more than express an opinion on the compatibility of the measures requested with the *ordre public* and the fundamental interests of the nation, because the decision not to execute a letter rogatory was a matter for the Ministry of Justice. The *procureur général* confirmed this interpretation, maintaining that only the Minister was competent to determine whether the request for mutual assistance might be prejudicial to the fundamental interests of France, the investigating judge

having no decision-making powers in matters of international mutual assistance. The *chambre d'instruction* of the Court of Appeal in Paris itself declared in its judgment of 19 October 2006 that government authorities alone were competent to assess the concepts of prejudice to the sovereignty, security, *ordre public* or other fundamental interests of the nation. It added that the provisions of Article 694-4 of the Code of Criminal Procedure:

> "establish[ed] the conditions on which the government authority may ultimately determine, in the light of the *ordre public* or the essential interests of the Nation, whether it is to oppose compliance with the foreign request for mutual assistance by transmitting or not transmitting the items requested therein" (see Counter-Memorial of France, Ann. XI).

28. The Djiboutian request for mutual assistance was transmitted by the Foreign Minister of Djibouti to the French Minister for Foreign Affairs through the Embassy of France in Djibouti. The request was then transmitted to the *procureur de la République* in Paris. At this stage the Ministry of Justice's Director of Criminal Affairs and Pardons had already drawn the Ministry's attention to the need to omit from the record any documents likely to prejudice the sovereignty, the security, the *ordre public* or other essential interests of the Nation, pursuant to Article 2, paragraph *(c)*, of the Franco-Djiboutian Convention on Mutual Assistance. However, a letter dated 27 January 2005 sent by the French Minister of Justice's Principal Private Secretary to the Djiboutian authorities shows that he had asked "for all steps to be taken to ensure that a copy of the record of the investigation into the death of Mr. Bernard Borrel is transmitted to the Minister of Justice . . . of the Republic of Djibouti before the end of February 2005".

29. He also allegedly "asked the *procureur de la République* in Paris to ensure that there is no undue delay in dealing with this matter". On 8 February 2005 the French investigating judge refused to transmit the Borrel file on the ground that this was likely to compromise the fundamental interests of France, pursuant to Article 2, paragraph *(c)*, of the 1986 bilateral Convention. On 6 June 2005 the Ambassador of France to Djibouti informed the Djiboutian Foreign Minister that France was not in a position to comply with the request to execute the international letter rogatory.

30. An examination of these factors shows that the decision to refuse mutual assistance was not taken by a person competent under French law, in violation of Articles 3, paragraph 1, and 2 *(c)*, of the Convention. The investigating judge had no basis for assessing the fundamental interests of France that might be compromised by execution of the letter rogatory or for refusing the request for mutual assistance on that basis. The French Code of Criminal Procedure, to which Article 3, paragraph 1, of the Convention refers, makes no provision for an investigating

judge to reject a request for mutual assistance on his own initiative, even though, on the basis of Article 694-9 of the Code of Criminal Procedure, he may make the information subject to certain conditions. French criminal law makes no provision for an investigating judge to oppose the forwarding of the said information, or even for his opinion to be sought on this matter. This decision by the investigating judge by letter of 8 February 2005 was allegedly then forwarded to the Djiboutian authorities by letter of 31 May 2005. However, the wording of the letter suggests that the Ministry of Justice confined itself to informing the Djiboutian authorities of the decision by the French investigating judge to refuse to forward the Borrel file on the basis of Article 2, paragraph *(c)*, of the Mutual Assistance Convention. The suggestion was therefore that it had not itself decided to refuse to forward the record. The letter is worded as follows:

> "After giving the matter careful attention, the investigating judge, by a judicial decision not open to appeal, 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. I have no alternative but to inform you of this sovereign decision of the competent judicial authority." (Counter-Memorial of the French Republic, Ann. V.)

In any event the Court found that it "c[ould] not take this document into consideration in its examination of the present case" for the following reasons: France did not allege that this letter "was delivered to Djibouti's Ambassador in Paris or to a member of his staff through the usual diplomatic channels", did not adduce evidence that the letter "was sent by post or conveyed by courier" and lastly did not offer "evidence that the despatch of the letter was recorded in a mail registry at the Ministry of Justice or the Ministry of Foreign Affairs, in accordance with French administrative practice" (Judgment, para. 143).

31. The last letter in which there was a reference to the refusal of mutual assistance was the one addressed by the Ambassador of France in Djibouti to the Djiboutian Foreign Minister. In this letter, dated 6 June 2005, the Ambassador stated that "after consulting [my] authorities", France was not in a position to comply with this request for mutual assistance. This letter did not reveal the grounds on which France was refusing to afford mutual assistance.

32. It is therefore apparent that, by its letter of 6 June 2005, France violated Articles 3, paragraph 1, and 2 *(c)* of the Convention in that it informed the Djiboutian authorities of the refusal by the investigating judge to comply with the request for mutual assistance, although that official was not competent to take such a decision.

33. France also violated Article 17 of the Convention in that the letter

of 6 June 2005 gave no reasons whatever. Although this provision is in a section of the Convention separate from the one containing Article 2, it does not mean that there is no direct and effective link between the two provisions, because this is a provision common to all the forms of mutual assistance covered by the Convention. In fact, Article 2 is not the only provision in the Convention that provides for a possible refusal of mutual assistance. For example, Article 5 lays down that the requested State "may delay the handing over of any property, records or documents requested, if the said property, records or documents are required in connection with pending criminal proceedings". Article 10 on transfer is even more specific, and states that transfer can be refused under certain conditions. Thus Article 17 applies to all provisions envisaging a possible refusal, stating that reasons must be given for "any refusal of mutual assistance" (whether general or specific). Giving no reasons for a refusal constitutes a violation of the Convention. France's failure to comply with Article 17 therefore involves a violation of Article 1 of the Convention, given that France cannot rely on Article 2 *(c)*, without giving reasons for its refusal.

34. Also, any refusal without giving reasons in conformity with Article 17 of the Convention is devoid of legal effect. The co-operation and mutual assistance that Djibouti was entitled to expect under the Convention are not given, either by the letter of 31 May 2005, which should not be taken into account, or by the letter of 6 June 2005, in which the Ambassador of France to Djibouti wrote to the Djiboutian Foreign Minister as follows: "I regret to inform you that we are not in a position to comply with this request." The mere reference by France in the letter of 31 May 2005 to Article 2 *(c)*, of the Convention and the refusal pure and simple in the letter of 6 June 2005 amount to a breach of its international obligations under Article 1 and Article 17 of the Convention, given that neither the obligation to "afford each other . . . the widest measure of mutual assistance" nor the obligation to give reasons for any refusal was complied with.

35. I regret that the Court did not wish to take up these violations of the Convention that engage France's international responsibility, and that it decided to reject the submissions by the Republic of Djibouti regarding the violation by France of the rules relating to mutual assistance laid down by the 1986 Convention, leaving aside its conclusion in paragraph 2 *(a)* of the operative part on the breach by France of its obligation under Article 17 of the Convention. Had the Court taken note of all the violations described above, this might have helped the two States to return to better co-operation in their relations in general, and to more effective mutual assistance in legal matters and on firmer legal bases. The fact that these two States were willing to submit their dispute to the Court by mutual consent and by way of *forum prorogatum* is evidence of their willingness to find a complete and final solution

to this dispute in order to strengthen the traditional ties of friendship between them.

III. Attacks on the Immunity from Jurisdiction and Inviolability of the Head of State of Djibouti

36. The Court treats attacks on the immunity and inviolability of the Head of State of Djibouti as acts in the past, submitted to the Court solely for historical reasons. The witness summonses addressed to the Djiboutian Head of State in 2005 and 2007 have never been withdrawn by the French judicial authorities. Therefore, instead of saying in the reasons for the judgment that "an apology [was] due", the Court should have included the requirement for apologies in the operative part of the judgment itself and should have asked France to withdraw both summonses. There was indeed a violation by France of its international obligations regarding the immunity from jurisdiction and inviolability of the Head of State of Djibouti, a violation worthy of a firm, clear decision by the Court in order to avoid continuing violation as well as a repetition of it in the future.

37. The customary validity of the immunity of a Head of State abroad has been recognized by several conventions. Thus Article 21, paragraph 1, of the Convention on Special Missions and Article 3, paragraph 2, of the Draft Articles on Jurisdictional Immunities of States and Their Property expressly recognize the immunity conferred upon Heads of State by general international law. The Vienna Convention on Diplomatic Relations of 18 April 1961 contains no provision specifically devoted to Heads of State. However, it does codify many aspects of the status enjoyed by diplomatic representatives when they are in a receiving State. Heads of State are by definition the highest representatives of the States that they lead. Therefore the rules in this Convention may be applied to them in many cases. Article 29 of this Convention states in particular:

> "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

38. The immunity granted to Heads of State may be of various types: personal inviolability, immunity from jurisdiction and immunity from execution. The inviolability and immunity from criminal jurisdiction of a Head of State are aimed in particular at protecting him from any form of coercion when on a visit abroad. Article 1 of the resolution of the Institut de droit international of 26 August 2001 summarizes the type of immunity quite clearly:

> "When in the territory of a foreign State, the person of the Head of State is inviolable. While there, he or she may not be placed under any form of arrest or detention. The Head of State shall be treated by the authorities with due respect and all reasonable steps shall be taken to prevent any infringement of his or her person, liberty, or dignity."

39. The Court recognizes in the present Judgment, in accordance with its recent jurisprudence, that the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations "translates into positive obligations for the receiving State as regards the actions of its own authorities, and into obligations of prevention as regards possible acts by individuals" (Judgment, para. 174). It also imposes on receiving States "the obligation to protect the honour and dignity of Heads of State, in connection with their inviolability" *(ibid.)*.

40. However, examination of the witness summonses addressed to the Djiboutian Head of State on 17 May 2005 and 14 February 2007 lead the Court to conclude that France had not infringed the rules on immunity from criminal jurisdiction and inviolability applicable to him. Nevertheless it is clear that these summonses are not merely a breach of the "courtesy due to a foreign Head of State", but also violate the duty incumbent on France to protect the honour and dignity of foreign Heads of State.

41. The Court finds first that the summons addressed to the Djiboutian Head of State on 17 May 2005 "was not associated with the measures of constraint provided for by Article 109 of the French Code of Criminal Procedure". On the contrary, it was "merely an invitation to testify which the Head of State could freely accept or decline" (*ibid.*, para. 171). This statement is unsound, because the summons was certainly associated with measures of constraint which infringed the immunity of the Djiboutian Head of State.

A. The witness summons of 17 May 2005

42. The witness summons of 17 May 2005 related to "the murder of Mr. Bernard Borrel on 18 or 19 October 1995 in Djibouti, punishable under Articles 113-7, 221-1, 221-3, 221-8, 221-9 and 221-11 of the Penal Code". The question that arises is whether these proceedings fall under Article 101 or Article 656 of the Code of Criminal Procedure, because France allegedly infringed the immunities from jurisdiction and the inviolability of the Djiboutian Head of State in the former case only. Article 656 of the Code of Criminal Procedure states:

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

43. In this instance the Djiboutian President was invited to attend in person the judge's chambers to be heard as a witness. He was not invited by the Minister for Foreign Affairs to make a written statement. Thus the procedure was clearly not based on Article 656 of the Code of Criminal Procedure, which requires a request for a written statement through the intermediary of the Minister for Foreign Affairs. It is closer to the procedure laid down by Article 101 of the Code.

44. According to the first paragraph of Article 101 of the Code of Criminal Procedure, "The investigating judge summons any person whose statement appears useful to him before him through a bailiff or a police officer. A copy of this summons is handed over to the person." In this case the investigating judge did indeed summon the Djiboutian President before him. A copy of the summons was indeed handed over to him. Paragraph 3 of this Article states that "[w]here he is summoned or sent for, the witness is informed that if he does not appear or refuses to appear, he can be compelled to by the law enforcement agencies in accordance with the provisions of Article 109". Article 109 of the Code of Criminal Procedure provides that "[a]ny person summoned to be heard in the capacity of a witness is obliged to appear, to swear an oath, and to make a statement, subject to the provisions of Articles 226-13 and 226-14 of the Penal Code [which relate to professional secrecy]". "If the witness does not appear or refuses to appear, the investigating judge may, on the request of the district prosecutor, order him to be produced by the law enforcement agencies." Also, Article 434-15-1 of the Penal Code states that:

> "Any person, summoned by an investigating judge or a judicial police officer acting in the exercise of a rogatory commission in order to be heard as a witness, who refuses to appear, to take the oath or to make a deposition without justification or excuse, is punished by a fine of €3,750."

45. The Djiboutian President naturally refused to comply with this summons, so he could have been compelled to appear by the law enforcement agencies and liable to penal sanctions, in breach of the rules on the immunity from criminal jurisdiction and inviolability of Heads of State. This immunity enjoyed by Heads of State is supposed to cover all the stages of criminal proceedings. Consequently it should not be possible for a Head of State to be summoned to testify. He can only be requested to make a written statement through the intermediary of the Minister for Foreign Affairs (Article 656 of the Code of Criminal Procedure). This was not done in the present case.

46. In a judgment of 10 October 2001, the French *Cour de cassation* recognized the incompatibility between the status of the President of the French Republic and the duty to appear as a witness. It stated:

> "during his term of office the President of the Republic cannot be

> heard as a *témoin assisté* or indicted, summoned or brought before any criminal court for any offence whatever, neither is he subject to the duty to appear as a witness laid down by Article 101 of the Code of Criminal Procedure because that duty is associated with a measure of constraint by the law enforcement agencies provided for by Article 109 of the French Code of Criminal Procedure and punishable under criminal law". *[Translation by the Registry.]*

The reason relied on by the *Cour de cassation* to demonstrate the impossibility for the President to testify is certainly the fact that this duty is associated with a measure of constraint by the law enforcement agencies and punishable under criminal law.

47. Given the fact that the French courts can neither summon nor subpoena the President of their own country during his term of office, it is difficult to accept that they could ask foreign Heads of State to attend at their offices in order to be heard as witnesses. The Court had the opportunity in the present case to state clearly and unambiguously that this practice was a violation of international law and that by acting in this way French judges engaged the international responsibility of France. Unfortunately the language used in the Court's conclusions, as well as the lack of a clear decision in the operative part, might lead to a repetition of this disrespectful practice of international law.

48. Also, in the case concerning the *Arrest Warrant (Democratic Republic of the Congo* v. *Belgium)*, the Court stated that the issue and circulation of the arrest warrant against Mr. Yerodia, who was then Minister for Foreign Affairs of the Congo, had infringed his immunity from criminal jurisdiction and his inviolability on the ground that these two actions, "given the nature and purpose of the [arrest] warrant" had been "intended to enable the arrest" of the person concerned on Belgian territory and abroad. In the present case the witness summons was intended to enforce a measure of constraint by law enforcement agencies against the Djiboutian Head of State when he was exercising his legal right to refuse to comply with the witness summons.

49. All these factors clearly show that the witness summons of 17 May 2005 did indeed infringe the rules of international law relating to the immunity of Heads of State. The Court recognized that this summons did not observe the form prescribed by Article 656 of the Code of Criminal Procedure, which refers to a written statement "by a representative of a foreign Power". Yet it confined itself to noting that "by inviting a Head of State to give evidence simply through sending him a facsimile and by setting him an extremely short deadline without consultation to appear at her office, [the investigating judge had] failed to act in accordance with the courtesies due to a foreign Head of State" (Judgment, para. 172). The immunity and inviolability of a Head of State are not simply matters of diplomatic courtesy, but derive from rules firmly anchored in international conventional and customary law.

50. France itself has recognized that the witness summons of 2005 did not comply with the procedure laid down for statements by representatives of a foreign Power. While it regarded this summons as null and void because it did not comply with the provisions of Article 656 of the Code of Criminal Procedure, France offered no apologies to the Djiboutian Head of State, contrary to what the French Minister for Foreign Affairs had done when a similar summons was addressed to the Ambassador of Djibouti in France in 2004. He had apologized for this "infringement of diplomatic usage", adding that the investigating judge concerned "had acknowledged his mistake and wished the summons to be null and void". The Court, meanwhile, simply regarded it as "regrettable" that the procedure was not complied with and that "whilst being aware of that fact, the French Minister for Foreign Affairs did not offer apologies to the Djiboutian Head of State, as he had done previously to Djibouti's Ambassador when he found himself in a similar situation" (Judgment, para. 172). In my opinion, the Court should indeed have required France to offer its apologies to the Djiboutian Head of State.

51. Also, it is clear that the leaking to Agence France-Presse, in breach of confidentiality of the investigation, of information about the witness summons to the Djiboutian Head of State should be regarded as an attack on his dignity. Agence France-Presse had made a public announcement about the witness summons to the Djiboutian Head of State only minutes after he had been informed of it. This shows that the action by the French legal authorities was clearly meant as an attack on the dignity and honour of the Djiboutian Head of State.

B. The witness summons of 14 February 2007

52. The witness summons of 14 February 2007 was issued during the Djiboutian President's stay in France on the occasion of the 24th Conference of the Heads of State of Africa and France, to be held in Cannes on 15 and 16 February.

53. The summons of 14 February 2007 seems only outwardly to follow the procedure laid down in Article 656 of the Code of Criminal Procedure. This provision governs *written statements* by representatives of a foreign Power. In this case the investigating judge expressed the wish to obtain the *testimony* of the Djiboutian Head of State. By failing to comply with the requirements of its own legislation, France acted in violation of the rules of customary international law relating to the immunities of Heads of State.

54. Furthermore, it should be noted that media coverage of this summons and its publication during the Djiboutian President's stay in France on the occasion of a conference attended by many delegations from Africa, as well as by representatives of the United Nations Organization and the African Union, was evidence of a deliberate intention to embar-

rass the Djiboutian Head of State. The French press (*L'Express*, *Le Monde* and AFP) attributed the origin of the information on the summons served on the Djiboutian Head of State to "legal sources", even before the letter from the French Ministry of Foreign Affairs had been sent to the Embassy of Djibouti in Paris. This shows that deliberate leaks about a summons covered by the confidentiality of the investigation had been well and truly orchestrated in order to attack the honour and dignity of the Djiboutian Head of State and lead the public to believe that he was involved in one way or another in the death of Judge Borrel.

55. All these factors demonstrate that the French authorities did indeed attack the honour and dignity of the Djiboutian Head of State and did not take all necessary steps to protect his immunity from jurisdiction and his person during his visits to France. Consequently the Court should have called upon France to put an end to the unlawful act by cancelling both witness summonses addressed to the Djiboutian Head of State and to offer Djibouti apologies and guarantees seeking to avoid a repetition of the attacks on the honour and dignity of its Head of State in the future.

56. In conclusion, I take the view that the violation by France of the Convention on Mutual Assistance in Criminal Matters was much more extensive than was recognized by the Court in the present Judgment. Furthermore, I consider that France has infringed customary rules relating to the immunity, inviolability, honour and dignity of the Djiboutian Head of State and that the Court should have required France to offer public apologies, both in its reasons and in the operative part of the Judgment.

(Signed) Abdulqawi A. YUSUF.