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DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS

Edited by J Craig Barker

- I. International Court of Justice *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* Judgment of 4 June 2008**
- II. The International Criminal Court Arrest Warrant Decision For President Al Bashir of Sudan**

I. INTERNATIONAL COURT OF JUSTICE, *CERTAIN QUESTIONS OF MUTUAL ASSISTANCE IN CRIMINAL MATTERS (DJIBOUTI V FRANCE)* JUDGMENT OF 4 JUNE 2008¹

A. The Facts

Judge Borrel, a French national, had been seconded to the Ministry of Justice of Djibouti. He did not return alive: His body was found outside the city of Djibouti in October 2005. This led to judicial proceedings in both States, which put Franco-Djiboutian judicial cooperation to the test. Although the official Djiboutian view of the circumstances in which Borrel met his end, confirmed by its initial judicial proceedings, pointed to suicide, a French investigating judge entertained evidence of involvement of Djiboutian officials in his death. Although initially the parallel proceedings co-existed harmoniously, with Djibouti fully cooperating with France's requests for cooperation under the 1986 Convention on Mutual Assistance on Criminal Matters between Djibouti and France, eventually tension erupted, which led to Djibouti bringing a claim to the ICJ on 9 January 2006.

There were two main bases for the claim. The first was the refusal by France to transmit the voluminous file of its judicial investigation to Djibouti, after the latter renewed its own investigation and requested it. The French investigating judge took the view that the renewed Djiboutian proceedings were an 'abuse of process' and that, in any case, the transmission of the file would jeopardize vital security information, thus prejudicing the 'sovereignty, . . . security, . . . *ordre public* or other . . . essential interests' of France as per article 2(c) of the 1986 Convention. Djibouti claimed that the refusal constituted a violation of France's obligations under the 1986 treaty as well as the 1977 Treaty of Friendship and Co-operation between the two.

The second bone of contention related to summonses issued to various Djiboutian officials. On 17 May 2005, whilst the President of Djibouti (President Guelleh) was on an official visit to France, a French judge issued a witness summons for him. The summons was not issued in accordance with French procedural law. A new summons, this time in the appropriate form, was issued on 14 February 2007 but, like the first, was leaked, it was alleged by Djibouti, to the French media. Five other summonses

¹ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* Judgment of 4 June 2008 ICJ General List no 136 [hereinafter 'Decision'].

were issued for the appearance of three other Djiboutian officials as ‘*témoins assistés*’ (legally assisted witnesses) in relation to two other parallel proceedings. In one case this was a summons to the Djiboutian ambassador to France, in relation to a proceeding for defamation initiated by Mrs Borrel.² In the other case, summons for the appearance of MM Djama Souleiman Ali and Hassan Said Khaireh as *témoins assistés*, were issued in 2004 with respect to a case opened on subornation of perjury for the alleged pressure that they exerted to Djiboutian officials to either retract inculpatory statements or make exculpatory ones. These witnesses did not appear in France. Djibouti claimed, by letter, that owing to the lack of cooperation of the French judiciary ‘the Republic of Djibouti, as a sovereign State, cannot accept one-way co-operation of this kind with the former colonial Power, and [that] the two individuals summoned are therefore not authorized to give evidence.’³ A French court issued arrest warrants for them on 27 September 2006, and later convicted them *in absentia*.⁴ Djibouti claimed that all these actions violated France’s obligations ‘pursuant to the principles of customary and general international law to prevent attacks on the freedom, dignity and immunities of’ President Guelleh, and made cognate claims relating to other ‘high ranking’ Djiboutian officials.⁵

B. *The Jurisdiction of the Court*

Djibouti issued proceedings in the absence of any recognized jurisdictional basis for the case, but expressing its confidence ‘that the French republic will agree to submit to the jurisdiction of the Court to settle’ the dispute pursuant to article 38(5) of the Rules of the Court, which reads

When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court’s jurisdiction for the purposes of the case.⁶

Hence, the Court passed the application on to France and took no further action. However, rather than ignore or reject the request, France, on 25 July 2006, expressed its consent to the jurisdiction of the Court ‘pursuant to and solely on the basis of’ article 38(5),⁷ and making clear that its consent ‘is valid only for the purposes of the

² Since this had been declared null and void, and France had apologized for its issuance (Decision, para 34), this played little part in the proceedings.

³ Decision, para 35.

⁴ Tribunal de Grande Instance de Versailles, Numero d’affaire 0307960961, 27 Mars 2008. The judgment can be found at http://www.ardhd.org/proces_14mars/27_mars_jugement_subornationV2.pdf

⁵ Decision, paras 17–18. After the decision, the convictions were overturned by the Cour d’Appel de Versailles on 28 May 2009. See <http://news.bbc.co.uk/1/hi/world/europe/8073407.stm>

⁶ The practice of not entering the case onto the list was understandably adopted to avoid polemic or spurious applications gaining entry and publicity, see Decision, para 63, and S Yee, ‘Article 40’ in A Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford, 2006) 849, 899–900.

⁷ Interestingly, France has done this once before, in April 2003, in *Certain Criminal Proceedings in France (Republic of Congo v France)*, however, that case has yet to come to judgment.

case... i.e. in respect of the dispute forming the subject of the application and strictly within the limits of the claim formulated therein'.⁸ Such consent ought to have given Djibouti cause for concern. A State that was uncertain of its (legal) grounds would be unlikely to be such a willing defendant.

As the Court noted, this was the first time it had ever fallen to it to determine jurisdiction under article 38(5), and, as it said, when that article is used

The State which is thus asked to consent to the Court's jurisdiction... is completely free to respond as it sees fit; if it consents to the Courts jurisdiction, it is for it to specify, if necessary, the aspects of the dispute which it agrees to submit to the judgement of the Court. The deferred and *ad hoc* nature of the Respondent's consent as contemplated by Article 38, paragraph 5, of the rules of the Court, makes the procedure set out there a means of establishing *forum prorogatum*.⁹

Here, the consent was express. However, that consent was given in relation to the Djiboutian application, and therefore, as the Court pointed out, the mutual consent of the parties had to be established by reference to both the letter expressing consent to jurisdiction with respect to the application, and the application itself.¹⁰ Hence it still fell to the Court to decide precisely over what France had consented to it determining. This was, *inter alia*, because Djibouti sought to raise other issues related to the proceedings. France, for its part, argued that the dispute which it had consented to the ICJ hearing was limited to the refusal of the French Courts to execute the letter rogatory requesting the French file, and not to other aspects related to the case, such as the requests to the Head of State and other Djiboutian officials to appear as witnesses in France, as this was the only matter mentioned in the section of the Djiboutian application entitled 'subject of the dispute'.¹¹ There was thus, no dispute about the ICJ's right to pronounce on the refusal to execute the letter rogatory.

The Court disagreed with France, and said that its consent was not to be interpreted solely by reference to the headings in the Djiboutian application, but by reference to it as a whole.¹² There is sense in this; it would be excessively formalistic to use the headings in an application in a normative sense,¹³ however, the Court needs to be careful here not to allow applications to sneak claims in through the back door. In this case, the part of the application entitled 'Legal Grounds' included reference to summonses issued to President Guelleh and other State officials, although some of the summonses Djibouti was seeking to bring before the Court post-dated the application (as did the arrest warrants).¹⁴

The Court indicated that the summonses extant at the time of the application were within its jurisdiction, the reason being that France had consented to the jurisdiction of the Court over the 'subject of the application', not simply the 'subject of the dispute', and the Application had to be read as a whole. France could have simply ignored the

⁸ Decision, paras 3–4, 39.

⁹ Decision, para 63.

¹⁰ Decision, paras 65–6.

¹¹ Decision, para 52. As Djibouti said nothing about the lawfulness of French jurisdiction over events outside France in the Application, the Court did not consider such matters as having been consented to by France, Decision, para 200.

¹² Decision, para 69.

¹³ It is also consistent with the decision in the *Rights of Passage* Case, Decision, para 70, although Judge Para-Aranguren distinguished that case on the basis that it did not deal with *forum prorogatum*, where there is a greater need for care, Separate Opinion of Judge Para-Aranguren, para 16. This is true, but there can also be undue caution.

¹⁴ Decision, para 73.

application, or limited its consent to the letter rogatory, but chose not to.¹⁵ With respect to these particular summonses, this is understandable, and referable to France's acceptance of the jurisdiction of the Court. France had the application, which fairly clearly included reference to the issued summonses, and consented to the ICJ determining the matters it contained.¹⁶

Djibouti also claimed, more controversially, that the Court had jurisdiction to entertain claims relating to the summonses and arrest warrants issued after the date of the application, as they were related to the claims it had made in the application. The Court, rightly, was not impressed by such claims with respect to the arrest warrants. As they said, France's consent was to the application, and the arrest warrants and summonses were not mentioned in it, and '[w]here jurisdiction is based on *forum prorogatum*, great care must be taken regarding the scope of the consent as circumscribed by the respondent State.'¹⁷ Although, as the Court accepted, in some other cases, it asked whether consideration of the other issues would 'transform the nature of the dispute', these cases did not relate to *forum prorogatum*, and, on this point, such jurisprudence was not applicable: The question was what France consented to in its letter.¹⁸

As such, the arrest warrants, although related to the proceedings at issue 'represent new legal acts in respect of which France cannot be considered as having implicitly accepted the Court's jurisdiction' and were thus outside the jurisdiction of the Court.¹⁹ Given that France had expressly said that it only consented to the jurisdiction of the Court for those matters in the application, and strictly within its limits, this is sensible. In particular with respect to *forum prorogatum* the Court needs to ensure that it is not too quick to infer consent, or take a broad view of it. Were it to take an overly elastic view of consent, the legitimacy of the Court would be negatively affected.²⁰ The strongest counter-argument to this came from Judge Owada, who asserted that, since, in this case, the consent was exhibited through documents, the same considerations ought to apply as do to article 36(2) declarations.²¹ However, since this was a case of *forum prorogatum*, the principles the majority were setting down would apply also to

¹⁵ Decision, para 83.

¹⁶ Although Judge Para-Aranguen dissented on this, asserting that the French declaration, read as a whole, only referred to the claims on paragraph 2 of the application (ie the letter rogatory) para 18–19. He also noted that some other statements of Djibouti only referred to the letter rogatory. However, this does not alter the fact that the application did include matters relating to immunities.

¹⁷ Decision, para 87.
¹⁸ Decision, para 88. Judge Skotnikov disagreed with the distinction. See Declaration of Judge Skotnikov, paras 7–8.

¹⁹ *ibid.* Judge Skotnikov was one of the three dissenters here, asserting that France could not freeze the dispute at the time of the acceptance *ibid* para 4. This may be true, but the question is whether or not the court has jurisdiction over the matters not whether they are ongoing or not. Judge Owada saw them as a natural part of the process, therefore within the jurisdiction of the court, on his view of its jurisdiction, para 8–9.

²⁰ See S Rosenne, *The Law and Practice of the International Court 1920–2005* (Martinus Nijhoff, Leiden, 2006) 698–699. More generally see H Lauterpacht, *The Development of International Law by the International Court of Justice* (Stevens, London, 1958) Chapter 6.

²¹ Declaration of Judge Owada, paras 5–6. For the view that there is no requirement that jurisdiction be interpreted narrowly see A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP, Oxford, 2008) Chapter 12, although this does not directly deal with *forum prorogatum*.

implicit conduct and as such, the possibility of abuse of the doctrine argues in favour of care.²²

With respect to witness summons sent to President Guelh in 2007, however, the Court took a slightly different approach. The Court noted that the 2007 invitation was essentially a repeat of that issued in 2005, and therefore, since the French letter of acceptance did not contain a temporal limitation, the Court had jurisdiction.²³ This is questionable. Djibouti had rejected the first invitation as it did not comply with the relevant form,²⁴ and the second issuance post-dated the application. It must be questioned whether the second issuance of the request really fell within the scope of French consent to the Court's jurisdiction, or its claimed strict interpretation of consent in *forum prorogatum* cases.²⁵

C. The 1977 Treaty and The 1986 Convention

The first substantive issue the Court entertained was the claim that France, by refusing to comply with the letter rogatory and sending the summons, had violated its obligations under the 1977 Treaty on Friendship and Co-operation and the 1986 Convention on Mutual Assistance in Criminal Matters. The claims pointed to violations of both treaties separately and in combination. In particular the latter aspect leads to some interesting legal issues.

Djibouti argued that France's refusal to execute the letter rogatory, 'act[ed] in disregard of the principles of equality, mutual respect and peace set out in Article 1 of the 1977 Treaty.'²⁶ This treaty provides for 'friendly relations [...] and the co-operation [...] in the political, military, economic, financial, cultural, social and technical fields' in the Preamble, as well as 'equality, mutual respect and peace' in article 1. These general clauses were complemented by provisions on co-operation in specific fields in articles 3 to 5 (which did not include judicial cooperation).²⁷ Relying on article 6, providing for the establishment of a 'France-Djibouti Co-operation Commission', Djibouti argued that the Treaty

'oversees' ... all the other successive bilateral agreements, including the 1986 Convention, and must be observed in all areas with which they are concerned. In other words, all agreements subsequent to 1977 must be interpreted and applied in the light of the object and purpose of the 1977 Treaty and the undertakings regarding co-operation that derive from it.

Therefore, any serious violation of a subsequent treaty 'automatically and simultaneously' amounted to a breach of the 1977 Treaty.²⁸

There are two sides to Djibouti's claim. The first one is that the 1977 Treaty itself was violated and the second one that the 1977 Treaty influences the interpretation of the 1986 Treaty and, conversely, a violation of the latter is a violation of the former. In

²² Yee (n 5) 902–904.

²³ Decision, para 95.

²⁴ As Judge Skotnikov said, France accepted the first act was a nullity, therefore this was not simply a repetition (Skotnikov, paras 12–3), although he would have accepted jurisdiction over it as he rejected the distinction between *forum prorogatum* and other instances of jurisdiction.

²⁵ See Déclaration de M Le Juge *ad hoc* Guillaume, para 12; Opinion Individuelle de M le Juge Ranjeva, paras 1–13; Opinion Individuelle de M le Juge Tomka.

²⁶ Decision, para 96.

²⁷ Decision, para 97.

²⁸ Decision, para 100.

relation to the first part of the claim the Court admitted that the obligations in the 1977 Treaty are ‘obligations of law, articulated as obligations of conduct or, in this case, co-operation, of a broad and general nature. . .’²⁹ but observed that criminal cooperation was not included in the specific issues dealt with by the Treaty. Although it did not say so explicitly, this means that it rejected Djibouti’s argument that the enumeration was indicative rather than exhaustive. In support, it quoted its Judgment in *Nicaragua* to the effect that

[t]here must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty. That object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense.³⁰

Accordingly, as the Court had already said in the *Oil Platforms* case, the objective of friendship and co-operation, although not without legal significance, can only be used in relation to the specific areas mentioned in the same Treaty.³¹

As judicial co-operation was not mentioned in the 1977 Treaty, however, the general obligation of co-operation would only be legally relevant to the case if it could influence the obligations not in that treaty, but also in a subsequent one, here the 1986 Convention.³² There the authority of *Nicaragua* and *Oil Platforms* ends as the relation between the general and the specific in these decisions did not deal with subsequent Treaties.³³ The Court’s answer to this is two-fold and rather contradictory. The Court argued that the general obligation of the 1977 Treaty is, once more, not relevant to the extent that judicial co-operation is not mentioned in that Treaty. If it was mentioned, the Court appears to argue, article 1 would be emancipated from the 1977 Treaty and this was not the case.

This, however, is not the end of it. The general clause is reincarnated as a ‘relevant rule of international law applicable in the relations between the parties’ pursuant to article 31(3)(c) of the Vienna Convention on the Law of Treaties. Hence, the general obligation for ‘equality and mutual respect . . . co-operation and friendship’³⁴ is relevant, but only as a matter of interpretation of the 1986 Treaty. Therefore the general clause is given independent legal significance, if only as an interpretative guideline. This significance, however, after being carefully constructed, is quickly rendered nugatory, as ‘[a]n interpretation of the 1986 Convention duly taking into account the spirit of friendship and co-operation stipulated in the 1977 Treaty cannot possibly stand in the way of a party to that Convention relying on a clause contained in it which allows for non-performance of a conventional obligation under certain circumstances.’³⁵

This conclusion seems sensible, but the Court, by not explaining the difference between normative applicability and interpretative relevance, oscillates somewhat confusingly on the relationship between the general and specific rules. While this

²⁹ Decision, para 104.

³⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 4, para 273.

³¹ Decision, para 109, citing *Oil Platforms (Islamic Republic of Iran v United States of America)* [1996] ICJ Rep (II) 815, para 31.

³² And, specifically, as will be seen, article 2(c) of that Convention stipulating the reasons why a State can refuse co-operation.

³⁴ Decision, para 113.

³³ Decision, para 110.

³⁵ Decision, para. 114.

might allow the Court to position itself for the further interpretation of the *lex specialis*, in the process, the relation between general framework agreements and subsequent specific ones is not doctrinally clarified.

D. Judicial Co-Operation Under The 1986 Convention

While the 1986 Convention created an obligation of co-operation between the States, article 2(c) allows either State to refuse assistance 'if the requested State considers that execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or others of its essential interests.' Because article 2(c), appeared to defer to the refusing State, Djibouti's arguments on France's obligation attempted to appeal to general principles and obligations to undermine or relativize the article. The more general rules and principles could be used to interpret article 2, the more its application by the State could be second-guessed. While the use, for this purpose, of the 1977 Treaty failed, Djibouti attempted a similar strategy in relation to the 1986 Convention. It claimed that the reference in article 1 of the Convention to the mutuality of assistance created 'reciprocity in commitments', which, due to Djibouti's previous exemplary co-operation in the matter, should lead to an obligation of result, ie to execute the letter rogatory.³⁶

The reciprocity argument got short shrift from the Court: article 2(c) undermined it. As the Court correctly said: 'it is the provisions of the Convention which must be looked to in determining case by case whether or not a State has breached its mutual assistance obligations. . . [T]he way in which the concept of reciprocity is advanced by Djibouti would render without effect the exceptions listed in Article 2.'³⁷ Thus the general feeling of inequality and injustice that inspired the Djiboutian argument was not translated into law.³⁸

However, Djibouti argued for an obligation of result independently of reciprocity averring that:

[W]hile the provision does state that execution must take place 'in accordance with [the] law' of the requested State, this must be interpreted as simply an indication of the procedure to be followed in performing this 'obligation of result', not a means of shirking it.

The argument was referred to article 27 of the VCLT's admonition that internal law is no justification for treaty violation. France countered that the requirement was not one of result, but of conduct, such that 'the means determines the outcome. . .'³⁹

The VCLT angle in Djibouti's argument was problematic. The argument failed to account for the fact that the treaty defers aspects of their application to the municipal legal process. As the Court said, '[w]hile it must of course ensure that the procedure is put in motion, the State does not thereby guarantee the outcome. . .'⁴⁰ Even so, questions remain; can the municipal legal conduct be second-guessed? Does the obligation stop at setting a certain process in motion or does it extend to the conduct during the process? If so how could this conduct be scrutinized?

³⁶ Decision, paras 116, 121.

³⁷ Decision, para 119.

³⁸ Although, it survived in some of the judges' perceptions. See Judge Koroma's Separate Opinion, para 10.

³⁹ Decision, paras 121–2.

⁴⁰ Decision, para 123.

The Court therefore had to delimit its powers of examination over the municipal judge's conduct. The judge had expressed, if not sent to Djibouti, the reasons for her refusal in a letter (*soit-transmis*) sent to the French *Procureur Général* and in the following terms: 'Handing over our record would entail indirectly delivering French intelligence service documents to a foreign political authority. Without contributing in any way to the discovery of the truth, such transmission would seriously compromise the fundamental interests of the country and the security of its agents.'

The Court, having already rejected general principles such as reciprocity or those emanating from the 1977 Treaty, did not wish, though, to completely defer to the French judge's appreciation of the matter. It therefore turned to the principle of good faith, as included, *inter alia*, in article 26 of the VCLT.⁴¹ This may have been because it provided a flexible but generally accepted way for the Court to look at France's actions and judge them on their own terms. This seems sensible in terms of both law and judicial strategy. The Court interpreted 'good faith' as requiring it to be shown that the judge's reasoning was within article 2(c) and that it was made with right authority.⁴² The latter element was settled by the Paris Court of Appeal in its judgment of 19 October 2006 which held that the application of article 2 'is a matter solely for the investigating judge'. As they said, 'It is not for this Court to do other than accept the findings of the Paris Court of Appeals on this point.'⁴³

The former element was also viewed as unproblematic. Although the Court did not see how the judge's reasons meant that the file could not be sent after the intelligence documents had been removed, it declared itself convinced by France's written and oral pleadings that the intelligence information in fact 'permeated the entire file'. As such, the Court found, without further ado, that the Judge's reasons fell within article 2(c).⁴⁴

This, again, might well be the sensible result. Nevertheless, the Court should have explained how it reached it. It is not unreasonable to read an element of derision for the Djiboutian judicial process in the French Judge's words. A more sophisticated discussion of 'good faith' and a more transparent application of that principle in assessing the French judiciary's actions would fend off accusations that the Court chose to interpret good faith as a toothless concept in order to fully defer to the French judge's decision.⁴⁵

Article 17 of the 1986 Convention, however, also requires the parties to 'give reasons . . . for any refusal of mutual assistance'. France, the Court decided that had failed to communicate the judge's decision to Djibouti. Although France claimed that it had sent a letter to Djibouti referring to article 2(c) its receipt was not proved, and, in any event, the mere reference to article 2(c) would have been insufficient.⁴⁶ For

⁴¹ The Court provided some pedigree in the use of 'good faith', quoting the decisions of the PCIJ in the cases of *Polish Upper Silesia* and *Free Zones of Upper Savoy*, para 145. Judge Keith argued that the criterion of 'good faith' in these decisions existed alongside 'abuse of rights' or *détournement de pouvoir*. He entertained the possibility that the judge's language pointed towards such *détournement* but decided it probably did not, Declaration of Judge Keith, para 5–11.

⁴² Decision, para 145.

⁴⁴ Decision, para 148.

⁴⁵ Some of this necessary discussion is provided in Judge Keith's clear and pertinent declaration. He perceptively points out, at para 10, the distinction between the State's assessment of its national interests, which cannot be second-guessed, and the assessment of the compatibility of the State's actions with the purpose of the Convention. It seems that the clarity of the former imposed on the willingness of the Court to engage with the latter.

⁴⁶ Decision, para 152.

Djibouti the requirement of giving reasons was 'a condition of the validity of the refusal'.⁴⁷ For France, the requirement of giving reasons was separate to the question of refusal per se.⁴⁸ The Court again sided with France, as 'the terms of the Convention do not suggest that recourse to Article 2 is dependent upon compliance with Article 17. Further, had it been so intended by the Parties, this would have been expressly stipulated in the Convention.'⁴⁹

Thus, the Court interpreted the obligation to give reasons as an obligation to communicate them. As Judge Keith observed, one of the functions of the obligation to give reasons is to 'inform the requesting State whether the power has been properly exercised in accordance with the law'.⁵⁰ Of course, some justification is necessary if there is to be any second-guessing of conduct.⁵¹ However, this weakened obligation of justification, to communicate the reasons, was the only point where France was found in breach of its legal obligations.⁵²

E: Heads of State, Immunities and Assertions of Jurisdiction

Moving on to the other matter at issue between the parties, as the Court found that it had jurisdiction to determine the lawfulness of the 'invitation' to President Guelleh to appear as a witness it was led to an often overlooked aspect of the nature of jurisdiction, namely, what amounts to an assertion of adjudicative jurisdiction. This is a matter that has caused considerable confusion, inter alia, in relation to universal jurisdiction.⁵³ Parts of the Court have perhaps contributed to the confusion with rather ill-advised *obiter* comments in the *Yerodia* case.⁵⁴ In this case, however the Court, minus only judge ad hoc Yusuf, took an understandable and appropriate approach. In relation to the 2005 request, which invited President Guelleh to come to the Judge's office the next day, leaving aside issues of comity, the Court decided it was not an assertion of jurisdiction.

It is true that the French Code of Procedure provides that if a person refuses to attend pursuant to a request, they may be required to do so by coercive process. However, this fact was not included in the request and France accepted that the request was issued contrary to French procedural law, which provides for different processes where a possibly immune foreign official is the subject of a request.⁵⁵

The Majority took the view that 'the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority'.⁵⁶ Looking to the 2005 invitation, the Court noted that the request 'was in fact merely an invitation to testify which the Head of State could freely accept or decline. Consequently, there was no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State, since no obligation was placed upon him...'⁵⁷ This is correct, non-coercive measures do not, in

⁴⁷ Decision, para 134

⁴⁹ Decision, para 156.

⁵¹ Declaration of Judge Keith, para 10.

⁵³ See eg R O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735.

⁵⁴ *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v Belgium) ICJ General List 121, 14 February 2002. See O'Keefe *ibid*.

⁵⁵ *ibid* paras 163,168, 172.

⁵⁷ Decision, para 171.

⁴⁸ Decision, para 139.

⁵⁰ para 10.

⁵² Decision, para 204.

⁵⁶ Decision, para 170.

themselves, violate immunity.⁵⁸ Since the 2005 request had no coercive force, and indeed, as it was not lawfully issued according to French law, had no force whatsoever, it could not violate international (as opposed to French) law. It is acceptable to ask, but forbidden to force. The request did not cross the line.

The 2007 request (which also occurred whilst President Guelleh was in France), also required comment. This request, from the investigating judge, asked the French Minister of Foreign Affairs to ask Guelleh's to consent to make a statement, on the basis of the relevant French procedural law. Djibouti accepted that this was at least close to compliance with the relevant French law, but claimed the timing implied that France had dubious *fides* on point.⁵⁹ Given that the French request expressly sought the consent of President Guelleh, the Court held, rightly, that this did not violate his immunity.⁶⁰ Immunity, as they noted, is from coercive process, not requests.

Nonetheless, for heads of State, there is also the question of the respect they are entitled to outside of immunity. Pursuant to article 29 of the Vienna Convention on Diplomatic Relations, which, although only directly applicable to diplomats, is generally considered as being applicable, *mutatis mutandis*, to Heads of State: '[t]he receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.'⁶¹

Both requests had been issued whilst President Guelleh was in France, and had been reported very quickly by the press.⁶² The Court was concerned about this, 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, Judge Clément failed to act in accordance with the courtesies due to a foreign Head of State. . . . It is regrettable that these procedures [of French procedural law] . . . were not complied with by the investigating judge and that, whilst being aware of that fact, the French Ministry of Foreign Affairs did not offer apologies to the Djiboutian President, . . . however, it considers that these do not in themselves constitute a violation by France of its international obligations regarding the immunity from criminal jurisdiction and the inviolability of foreign Heads of State. Nevertheless, as the Court has indicated above, an apology would have been due from France.⁶³

It is worth noting that the Court does not say that these actions violated international law, it does not claim that an apology was mandatory. And, in the disposition of the case, the Court does not declare the absence of an apology to have violated any rule of international law. Assumedly, therefore, they were speaking in terms of comity rather than legal obligation.⁶⁴

Had there been some form of French complicity in making the requests public, the matter might have been different. The Court accepted that article 29 'imposes on receiving States the obligation to protect the honour and dignity of Heads of State, in

⁵⁸ Judge ad hoc Yusuf disagreed, Opinion Individuelle de M. le Juge ad hoc Yusuf, paras 36–56. ⁵⁹ Decision para 177. ⁶⁰ *ibid* para 179.

⁶¹ On the relationship see J Craig Barker, 'The Future of Head of State Immunity after Ex Parte Pinochet' (1999) 48 ICLQ 937. ⁶² Decision, para 164.

⁶³ Decision, paras 172–3.

⁶⁴ Judge Koroma thought that the requirement of an apology ought to have been placed in the disposition, Separate Opinion of Judge Koroma, paras 12–14. See though H Fox, *The Law of State Immunity* (2nd edn, OUP, Oxford, 2008) 688–9.

connection with their inviolability'.⁶⁵ As such if France had passed on confidential information to the media

such an act could have constituted, in the context of an official visit by the Head of State of Djibouti to France. . . a violation by France of its international obligations. However, the Court must recognize that it does not possess any probative evidence that would establish that the French judicial authorities are the source behind the dissemination of the confidential information in question.⁶⁶

A similar position was taken in relation to the 2007 request, which was also reported rather quickly by the French press. The reason for rejecting the Djiboutian claims relating to these (remarkably coincidental) events was thus evidential,⁶⁷ rather than conceptual. Judge Skotnikov, however, went further, on the basis that in his view, a media campaign against a visiting head of State, when the judicial authorities are involved did not constrain the authority of the Head of State was not unlawful, as it did not subject him to a 'constraining act of authority'. If the procedural step (the request) was not unlawful, informing the media about it would not be either.⁶⁸ Some scepticism may be expressed at this, as the Majority noted, since the duties related to inviolability include some level of protection of dignity, and the first request was unlawful under French law.

F. Other Officials

The Court had, of course, also accepted that it had jurisdiction over the summonses of Djiboutian officials (the Head of national security and the *procureur de la République*). This led the Court into an interesting discussion of the immunities of State officials. The two were summonsed as *témoins assistés*. Djibouti initially claimed that as State officials, they were immune from French jurisdiction, however, later in the process, conceded that State officials are only immune from criminal process with regard to actions undertaken in their official capacity.⁶⁹ Very interestingly, given the broad interpretation given to the *Yerodia* decision in the UK,⁷⁰ the Court accepted that they were clearly not entitled to personal immunity.⁷¹

The Court chose a narrow ground, however, to reject the claim of functional immunity, namely that Djibouti had not raised the matter properly either before French courts or the ICJ:

At no stage have the French courts (before which the challenge to jurisdiction would normally be expected to be made), nor indeed this Court, been informed by the Government of Djibouti that the acts complained of by France were its own acts, and that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying them out. The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of

⁶⁵ Decision, para 174. It is worth noting that the comments of the court here relate to the obligations owed to a Head of State when in another country, rather than more generally.

⁶⁶ Decision, para 185.

⁶⁸ Declaration of Judge Skotnikov, paras 20–22.

⁶⁹ Decision, paras 185–190.

⁷⁰ *Mofaz*, reported in (2008) 53 ICLQ 771.

⁶⁷ Decision, paras 179–180.

⁷¹ Decision, para 194.

immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.⁷²

This is interesting, in that the Court ducks the question of whether or not the conduct of the relevant officials actually fell within the functional immunity of the State. The method of dealing with the question was to deal with it almost as a failure of exhaustion of domestic remedies.⁷³ This might appear idiosyncratic, however the position taken by the Court is understandable, in that the question was whether France (through its courts) had violated the functional immunities of the two officials, and, since this had not been claimed before (and thus not ignored by) the French courts, there was no violation attributable to France.

It might be thought that this is at variance with the fact that immunity of officials for acts within their official duties is a rule of international law, and that, at least under the UN Convention on the Immunity of States, Courts are under an obligation to determine, if necessary, any immunity issues *ex proprio motu* if needs be.⁷⁴ However, the Treaty (which is not in force) is not applicable to criminal proceedings.⁷⁵ Also, here we are not dealing with those who are personally immune, but State officials, whose conduct is not necessarily that of the State.⁷⁶ It would be difficult to claim that in such an instance, a Court needs to look into every nook and cranny for a possible immunity claim, particularly when, as here, a State has given other reasons for the non-appearance of its officials.⁷⁷ In this particular case, therefore, it is understandable that the Court took (rather quickly -the reasoning on point is notable by its absence) the view that Djibouti needed to give France the chance to grant it immunity before (possibly) raising this elsewhere. On the other hand, though, where such an obligation to inform has sprung from, other than a general feeling that it would be appropriate, is not clear. This may be as the Court (except judge ad hoc Yusuf) could agree on result rather than reasoning.⁷⁸ In certain other cases, in particular where a person has been held in custody prior to an immunity claim being belatedly made, more difficulties may arise than here.⁷⁹ The *Rainbow Warrior* arbitrations never quite got to grips with this, or settled the point,⁸⁰ and it might be thought that the (almost unanimous) Court could have given this part of the judgment more 'meat'.

G. Conclusion

This was the first time the Court had an opportunity to discuss its jurisdiction pursuant to article 38(5) of its Rules. It will soon have the chance to return to the matter, in

⁷² Decision, para 196.

⁷³ On the relationship see Fox (n 64) 142–145.

⁷⁴ UN Convention, art 5.

⁷⁵ Fox (n 64) 401–402.

⁷⁶ On the distinction see R van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP, Oxford, 2008) chapter 3.

⁷⁷ It should be remembered that this is not a question of waiver of immunity, but a matter prior to that, i.e. whether there is such an arguable claim of immunity that a court could determine.

⁷⁸ On the tension between the depth of reasoning and the advisability of having opinions passed by large majorities see I Scobbie, 'Smoke, Mirrors and Killer Whales: the International Court's Opinion on the Israeli Barrier Wall' (2004) 5 *German Law Journal* 1107.

⁷⁹ Such was the case in the well known Caroline incident, see, eg van Alebeek (n 76) 108–10.

⁸⁰ M Pugh, 'Legal Aspects of the *Rainbow Warrior* Affair' (1987) 36 *ICLQ* 656; J Scott Davidson, 'The *Rainbow Warrior* Arbitration Concerning the Treatment of the French Agents Mafart and Prier' (1991) 40 *ICLQ* 446.

relation to the same defendant State.⁸¹ The case, on first impression, might appear to be a rather narrow one, when compared, for example, to cases such as the *Armed Activities* case,⁸² and politically less contentious than the *Wall Opinion*.⁸³ However, there is much food for thought in the decision, for example on the relationship of principles of determining jurisdiction in *forum prorogatum* cases when compared to other forms of jurisdiction, what is an assertion of jurisdiction, the relationship between law and comity for the treatment of dignitaries, and the relationship between general and particular treaties. All of which had an admixture of post-coloniality. In this case, perhaps there is no little irony that the only violation found related to the issue on which there was abundantly clear consent by France to the jurisdiction of the Court, the failure to give reasons for refusal to execute the Djiboutian letter rogatory, and for that the declaration of violation was considered sufficient recompense.⁸⁴

ROBERT CRYER* AND IOANNIS KALPOUZOS**

II. THE INTERNATIONAL CRIMINAL COURT ARREST WARRANT DECISION FOR PRESIDENT AL BASHIR OF SUDAN

A. Introduction

The International Criminal Court (ICC or the Court) was established on 17 July 1998 by the Rome Statute of the International Criminal Court (hereinafter 'Rome Statute' or 'Statute').¹ The Rome Statute which entered into force on 1 July 2002 has been widely ratified by a vast majority of States demonstrating an increasing international recognition by States of the need to hold individuals accountable for international crimes within the jurisdiction of the ICC.² Since the ICC became operational, all its active investigations carried out by the Office of the ICC Prosecutor by the end of 2009 were in Africa in four situations in The Democratic Republic of Congo (DRC), Northern Uganda, the Darfur region of Sudan, and the Central African Republic (CAR). Other situations were under preliminary examination by the Office of the ICC Prosecutor in Afghanistan, Colombia, Côte d'Ivoire, Chad, Georgia, Guinea, Kenya, and Palestine.³ By 2009 the ICC's highest profile case, which is examined in this article, was the case

⁸¹ France similarly consented (before doing so in this case) to the jurisdiction of the Court pursuant to art 38(5) in the *Certain Criminal Proceedings in France* case (DRC v France).

⁸² (DRC v Uganda) Judgment 19 December 2005, ICJ List 116.

⁸³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Rep 36.

⁸⁴ Decision, para 204.

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¹ 2187 UNTS 90.

² As of 21 July 2009, 110 States (out of 192 UN Member States) were parties to the Rome Statute of the International Criminal Court. Out of them 30 were African States, 14 were Asian States, 17 were from Eastern Europe, 24 were from Latin American and Caribbean States, and 25 were from Western European and other States.

³ See Office of the Prosecutor, *ICC Prosecutor Confirms Situation in Guinea under Examination*, ICC-OTP-20091014-PR464 (14 October 2009).