

DECLARATION OF JUDGE SKOTNIKOV

JURISDICTION

1. The Court has determined that the Parties accepted its jurisdiction to examine the claims contained in Djibouti's Application as a whole. I concur with that conclusion.

2. However, I cannot agree with the Court's reading of France's letter of acceptance of the Court's jurisdiction as excluding developments arising directly out of the questions which constitute the subject-matter of the Application but which occurred after it was filed.

3. France specifies that its consent is valid "only for the purposes of the case", regarding "the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein". In my view, on the basis of a plain reading of the text of France's letter, the Respondent has not excluded from the Court's jurisdiction new developments within the case as it was framed in the Application.

4. By giving its consent, France has not "frozen" the ongoing dispute. It is evident that the claims contained in Djibouti's Application, for which, as found by the Court, France accepted adjudication by the Court, refer to the dispute in progress. For example, in the submissions contained in paragraph 4 of its Application, Djibouti requests the Court to adjudge and declare:

"(e) that the French Republic is under an international legal obligation to ensure that the Head of State of the Republic of Djibouti, as a foreign Head of State, is not subjected to any insults or attacks on his dignity on French territory;

(f) that the French Republic is under a legal obligation scrupulously to ensure respect, vis-à-vis the Republic of Djibouti, of the principles and rules concerning diplomatic privileges, prerogatives and immunities, as reflected in the Vienna Convention on Diplomatic Relations of 18 April 1961".

5. It is clear that these submissions are relevant to events occurring in the past, in the present and in the future. Moreover, Djibouti asks the Court to adjudge and declare:

"(h) that the French Republic is under an obligation immediately to cease and *desist* from breaching the obligations referred to above and, to that end, shall in particular:

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 (ii) withdraw and cancel the summonses of the Head of State

of the Republic of Djibouti and of internationally protected Djiboutian nationals to testify as *témoins assistés* [legally represented witnesses] in respect of subornation of perjury in the ‘Case against X for the murder of Bernard Borrel’” (emphasis added).

6. It is obvious that the summonses are mentioned in the Application only as specific instances of the alleged breaches to be corrected by France. These instances certainly do not exhaust Djibouti’s claim that France is under a legal obligation to “*desist*” from breaching the obligations referred to in the Application.

7. Since the Court has concluded that France had accepted its jurisdiction to examine the claims contained in Djibouti’s Application as a whole, it should have decided that it has jurisdiction to pronounce on the developments which form part of the dispute even if these developments occurred after the date when the Application was filed. This would have been in line with the Court’s jurisprudence (see *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Merits, Judgment*, *I.C.J. Reports 1974*, p. 203, para. 72; *LaGrand (Germany v. United States of America)*, *Judgment*, *I.C.J. Reports 2001*, pp. 483-484, para. 45; see also *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1992*, pp. 264-267, paras. 69-70; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment*, *I.C.J. Reports 2002*, p. 16, para. 36), which has been dismissed by the Court in paragraphs 87 and 88 of the Judgment on the grounds that its jurisdiction in the present case is founded on *forum prorogatum*.

8. I do not see why this jurisprudence would not be pertinent in the present case or in a *forum prorogatum* case in general.

9. For these reasons I oppose the Court’s decision that it has no jurisdiction in respect of the arrest warrants issued against two senior Djiboutian officials on 27 September 2006.

10. For exactly the same reasons I support the Court’s finding that it has jurisdiction to adjudicate upon the dispute concerning the summons to testify as witness addressed to the President of Djibouti on 14 February 2007 (after the date the Application was filed). Understandably, however, I do not agree with the Court’s reasoning on that subject.

11. The Court has decided that it has jurisdiction in respect of this summons because it is a mere repetition, corrected as to the form, of the first summons which had been mentioned in the Application. The Court considers that “it is the same summons in its substance” (*Judgment*, para. 95). It is implied that for that reason the second summons was “visible” to France when it gave its consent and therefore the Court has jurisdiction with respect to it.

12. The second summons was not, however, a repetition of the first one. France has declared in respect of the first summons that “[t]hat procedural act, which was not followed up, is null and void under French law . . . ” (CR 2008/5, p. 28, para. 17). Can there be a “repetition” of an act which is null and void?

13. The summons of 14 February 2007 clearly is a new legal act which, according to France, “in contrast to the summons of 17 May 2005 . . . scrupulously obeys the provisions of Article 656 of the Code of Criminal Procedure” (*ibid.*, p. 37, para. 39).

14. Extending the Court’s jurisdiction to this new act would be in line with the Court’s case law referred to in paragraph 7 above since it would not alter the nature of the dispute. The continuity and the connexity with the preceding summons are evident.

15. Ironically, the Court’s insistence that the second summons is a repetition of the first one only supports the relevance and the applicability of the Court’s jurisprudence relating to continuity and connexity (is repetition not a manifestation of continuity and connexity?) which, according to the Court’s finding in paragraph 88 of the Judgment, is of no pertinence in this case.

MERITS

16. The Court has found that the two invitations to testify addressed to the President of Djibouti do not represent an attack by France on the immunities from criminal jurisdiction enjoyed by a Head of State.

17. At the same time, in paragraphs 175 and 180 of the Judgment the Court has concluded that if it was established that information concerning these procedural acts, which did not affect the immunities of the President of Djibouti, had been passed to the press from the offices of the French judiciary, it could have constituted a violation by France of its international obligations.

18. In this connection, the Court points to the rule of customary international law codified in Article 29 of the Vienna Convention on Diplomatic Relations. This Article, which is necessarily applicable to Heads of State, reads as follows:

“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.”

19. It is true that Article 29 “translates into positive obligations for the receiving State as regards the actions of its own authorities” (Judgment, para. 174). However, I do not see how providing the media with information about a procedural act, which, as it has been already found by this

Court, is not a violation of the terms of Article 29 of the Vienna Convention, could be considered a violation of these very same terms.

20. Essentially, what Djibouti complains about is a media campaign against its President conducted by *la partie civile* and the French judicial authorities. The media coverage may indeed have been damaging for the President of Djibouti. However, the terms of Article 29 relate to the inviolability of the person of a Head of State. They do not provide for protection from negative media reports.

21. As the Court stated in this Judgment “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” (Judgment, para. 170). A media campaign directed against a foreign Head of State, even if it is based on leaks from the authorities of the receiving State, cannot in itself be seen as a constraining act of authority.

22. Accordingly, in my view, had it been proven that the relevant information was passed to the press from the offices of the French judiciary, this, under the circumstances of the present case, could have constituted a failure by France to act in accordance with the courtesy due to a foreign Head of State rather than a violation of its obligations under international law.

(Signed) Leonid SKOTNIKOV.
