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HAGUE INTERNATIONAL TRIBUNALS

Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the *Djibouti* v. *France* Case

GIONATA PIERO BUZZINI*

Abstract
This article examines the reasoning and findings of the International Court of Justice in its judgment in *Djibouti* v. *France* on issues pertaining to the immunities and inviolability of state officials. While recognizing the Court's contribution to the clarification of certain aspects of the legal regime of the immunities and inviolability of state officials, the article emphasizes a number of points on which a clear response cannot be found in the judgment. Moreover, some concerns or doubts are raised about the way in which the Court dealt with certain issues regarding, in particular, the classification of immunities, their scope, their implementation, and the acts precluded by their operation. The Court's judgment clearly shows the complexities surrounding the legal treatment of numerous aspects of a topic which continues to be of the highest importance and sensitivity in international law and international relations.

Key words
acta jure gestionis; 'constraining acts of authority'; immunity *ratione materiae*; immunity *ratione personae*; International Court of Justice; inviolability; invocation and waiver of immunity; private and official acts; state immunity; state officials; *ultra vires* acts; witness summons

I. Introductory remarks and relevant facts of the case

The *Djibouti* v. *France* case originated in the suspicious circumstances surrounding the death of Bernard Borrel, a French national who had been seconded as a technical adviser to the Ministry of Justice of Djibouti and whose charred body was discovered, on 19 October 1995, 80 km from the city of Djibouti. In connection with the *Borrel* case, a number of judicial proceedings were opened in France and in Djibouti, and bilateral treaty mechanisms of mutual assistance were resorted to by the parties. Those judicial proceedings, as well as the implementation of such mechanisms, gave rise to a dispute which Djibouti finally brought to the International Court of

* Ph.D. in international law, Graduate Institute of International Studies, Geneva; Legal Officer, Codification Division, UN Office of Legal Affairs. The views expressed herein are solely those of the author and do not necessarily reflect those of the United Nations. The author wishes to thank Dr Santiago M. Villalpando for his enlightening comments.

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Justice (ICJ, Court) while seeking – and obtaining within certain limits – the consent of France to the jurisdiction of the Court under Article 38(5) of the Rules of the Court.[1]

In its judgment rendered on 4 June 2008,[2] the International Court of Justice was called upon to examine several questions, including issues relating to the jurisdiction of the Court; the alleged violation by France of the Treaty of Friendship and Co-operation between France and Djibouti of 27 June 1977; the alleged violation by France of the Convention on Mutual Assistance in Criminal Matters between France and Djibouti of 27 September 1986; and the alleged violation by France of the jurisdictional immunity and/or the inviolability of three state officials, including Djibouti's head of state.

The present comments deal only with the Court's reasoning and findings on issues pertaining to the immunity from foreign criminal jurisdiction and the inviolability of state officials.[3]

The judgment addresses issues relating to jurisdictional immunities in respect of Djibouti's claims in connection with (i) two witness summonses addressed by a French investigating judge to the president of the Republic of Djibouti while he was on an official visit to France on 17 May 2005, and again on 14 February 2007;[4] and (ii) a number of witness summonses as '*témoins assistés*' addressed to the *procureur de la République* and to the head of national security of Djibouti on 3 and 4 November 2004 and on 17 June 2005, in the context of judicial proceedings for subornation of perjury.[5]

In contrast, the Court did not pronounce itself on Djibouti's claims in connection with two arrest warrants that were subsequently issued, on 27 September 2006, by the Chambre de l'Instruction of the Versailles Court of Appeal against the *procureur de la République* and the head of national security of Djibouti. Those claims were considered by the Court to fall outside the acceptance by France of the jurisdiction of the Court pursuant to Article 38(5) of the Rules of the Court.[6]

The question of inviolability was touched upon by the Court in relation to Djibouti's claim that, in view of the circumstances surrounding the witness summonses addressed to its head of state – in particular, the communication to the press, in breach of the confidentiality of the investigation, of information concerning the witness summonses as well as the time at which one of the summonses in particular

1 This provision, which was introduced into the Rules of the Court in 1978, reads as follows: '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.' As recalled by the Court at para. 63 of its judgment in the present case (see *infra* note 2), it was the first time it fell to the Court to decide on the merits of a dispute brought to it by an application based on that provision.

2 *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008 (hereinafter Judgment), available at www.icj-cij.org.

3 Ibid., paras. 157–197.

4 Ibid., paras. 161–180.

5 Ibid., paras. 181–197.

6 Ibid., paras. 85–88.

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was notified – the French authorities had violated the obligation to respect the honour and dignity of a foreign head of state.[7] On the contrary, the Court held that the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[8] which had also been invoked by Djibouti in support of some of its claims, was not relevant to the present case since it was 'not applicable to the specific question of immunity from jurisdiction in respect of a witness summons addressed to certain persons in connection with a criminal investigation'.[9]

One of the specificities of the Court's judgment in the present case is that issues relating to immunity and inviolability were examined in relation to acts which, although adopted in the context of criminal proceedings, were addressed to state officials who were not themselves accused – or not yet formally accused – of criminal conduct. This is certainly the case concerning the summonses as an 'ordinary' witness addressed to the Djiboutian head of state; but it is also true, to a certain extent, in relation to the summonses as '*témoins assistés*' that were sent to the *procureur de la République* and to the head of national security of Djibouti.[10] Although, at a later stage, the two last officials were indeed regarded as 'accused' by the French authorities, as they were made subject to arrest warrants and were found guilty, *in absentia*, of subornation of perjury, all these events fell beyond the Court's jurisdiction in the present case.

Nevertheless, in spite of this peculiarity, the judgment rendered by the Court still constitutes an important contribution to the clarification of certain aspects of the legal regime of immunities of state officials, in particular with respect to the scope and operation of such immunities. This being said, it must be recognized that the Court's reasoning on a number of specific points does raise some questions, and that some controversial issues did not find a clear response in the judgment.

2. Types of immunities

A number of points deserve to be discussed in respect of the Court's contribution to the understanding of different types of immunities from foreign criminal jurisdiction which may accrue to state officials under international law.

2.1. Reaffirmation of the 'personal' immunity (immunity *ratione personae*) of an incumbent head of state

In its judgment the Court clearly reaffirmed the 'personal' immunity from foreign criminal jurisdiction of an incumbent head of state – immunity which is

7 Ibid., paras. 174–175 and 180. See *infra*, section 6.
8 1035 UNTS 67.
9 Judgment, *supra* note 2, para. 159.
10 Ibid., para. 184, where the Court recalled that, according to Art. 113-2 of the French Code of Criminal Procedure, '"[a]ny person implicated by a witness or against whom there is evidence making it seem probable that he could have participated, as the perpetrator or accomplice, in committing the offence of which the investigating judge is seised" . . . may be summoned as a *témoin assisté*. The situation envisaged here by French law is one where suspicions exist regarding the person in question, without these being considered sufficient grounds to proceed with a "*mise en examen*".'

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often also referred to as '*ratione personae*', and sometimes even as 'full', 'absolute', or 'total', in the light of its broad material scope. The Court did so by recalling a passage of its judgment in the *Arrest Warrant* case,[11] in which it had referred to the 'full immunity from criminal jurisdiction and inviolability' of, *inter alia*, the incumbent head of state, protecting him or her 'against any act of authority of another state which would hinder him or her in the performance of his or her duties'.[12]

This immunity *ratione personae* which accrues to a foreign head of state while in office appears to be unchallenged.[13] It is widely recognized in legal doctrine[14] and has also been confirmed by national courts in several judicial instances.[15] Moreover, in the proceedings before the Court, the personal immunity of an incumbent head of state was also recognized by France, whose argument was not that such immunity did not exist, but that it had not been infringed by the two witness summonses addressed to the president of Djibouti.[16]

This immunity is generally referred to as '*ratione personae*', since it attaches to the status of the individual as an incumbent head of state, thus covering both official and private conduct, irrespective of whether such conduct was carried out by that

11 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. (hereinafter *Arrest Warrant*), at 22, para. 54.

12 Judgment, *supra* note 2, para. 170.

13 As stated in a recent study for the International Law Commission prepared by the UN Secretariat, Immunity of State Officials from Foreign Criminal Jurisdiction, Memorandum by the Secretariat, UN Doc. A/CN.4/596 (2008) (hereinafter Immunity of State Officials), para. 99. See also R. A. Kolodkin, Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/601 (2008), para. 110. For an overview of the subject see the work undertaken by the Institut de droit international: 'Les immunités de juridiction et d'exécution du chef d'Etat et de gouvernement en droit international/Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law', J. Verhoeven (Rapporteur), (2000–1) 69 *Annuaire de l'Institut de droit international* 441.

14 See the numerous bibliographical references cited in Immunity of State Officials, *supra* note 13, n. 240. Attention should also be drawn to the resolution adopted by the Institut de droit international at its Vancouver session in 2001, on 'Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law'. Art. 2 of the resolution recognizes the absolute immunity from foreign criminal jurisdiction of the incumbent head of state: 'In criminal matters, the Head of State shall enjoy immunity from jurisdiction before the Courts of a foreign State for any crime he or she may have committed, regardless of its gravity.'

15 See, in particular, the following cases: Federal Supreme Court of the Federal Republic of Germany, *Re Honecker*, Case No. 2 ARs 252/84, Judgment of 14 December 1984, 80 ILR 365, at 365–6; France, Cour de cassation, *Affaire Kadhafi*, Judgment No. 1414 of 13 March 2001, 125 ILR 508, at 508–10 (the original text in French is reproduced in (2001) 105 RGDIP 474); United Kingdom, Senior District Judge at Bow Street, *Tatchell v. Mugabe*, Judgment of 14 January 2004, (2004) 53 ICLQ 769; Spain, Audiencia Nacional, *Acto del Juzgado Central de Instrucción No. 4*, 6 February 2008, Fourth paragraph, No. 1, pp. 151–7 (where the Audiencia Nacional found that Spanish authorities lacked jurisdiction to prosecute Mr Kagame, the incumbent head of state of Rwanda, because of the jurisdictional limitations arising from the immunities recognized under international law). See also House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte*, 24 March 1999, (1999) 38 ILR 581, in particular the position adopted by Lord Hope of Craighead (at 624), Lord Hutton (at 637–8), Lord Saville of Newdigate (at 642), and Lord Millet (at 651), who found that, as had also been recognized by the prosecution (at 637), immunity would have had to be granted if Pinochet had still been an incumbent head of state at the time of the prosecution.

16 See Judgment, *supra* note 2, para. 166, where the Court noted that France had recalled that it 'fully recognize[d], without restriction, the absolute nature of the immunity from jurisdiction and, even more so, from enforcement that is enjoyed by foreign Heads of State', while arguing that the summoning of a foreign head of state as a witness was in no sense an attack on him. See also Public Sitting, President Higgins presiding, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 25 January 2008, CR 2008/5 (original), at 24–7 (Pellet, on behalf of France).

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individual before or during his or her term of office.[17] Moreover, it appears that such immunity accrues to the incumbent head of state irrespective of his or her presence in the forum state and, when present, of the circumstances of the visit (official, private, or even incognito).[18]

2.2. Uncertainties regarding the categories of state officials possibly enjoying immunity *ratione personae*

Another aspect of the judgment on which some comments are warranted is the position adopted by the Court regarding the question of which categories of state officials may enjoy immunity *ratione personae* from foreign criminal jurisdiction, as opposed to immunity *ratione materiae* (also called 'functional' or 'organic' immunity[19]) which is more limited in scope as regards the acts that it covers.[20]

By denying in categorical terms the benefit of personal immunity to the *procureur de la République* and to the head of national security of Djibouti,[21] the Court appears to support the position that, apart from diplomatic agents or those state officials who may enjoy personal immunities under the 1969 Convention on Special Missions,[22] only a very limited number of incumbent high-ranking state officials such as the head of state, the head of government, and the minister for foreign affairs – that is, those officials explicitly referred to in the Court's judgment in the *Arrest Warrant* case[23] – enjoy personal immunity under current international law.

It may well be that both parties, and in particular Djibouti in the oral proceedings,[24] finally agreed on this very limited scope of personal immunity as regards the categories of state officials covered by it (although in the initial submissions by Djibouti the issue of personal immunities was also specifically raised in connection with the claims regarding its *procureur de la République* and its head of

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17 See on this point Immunity of State Officials, *supra* note 13, paras. 137–140.

18 See, for a recent analysis of this issue, ibid., para. 110.

19 As suggested in ibid., para. 89, n. 211, the expression 'immunity *ratione materiae*' would seem to be preferable to the expression 'functional immunity' if consideration is given to the fact that, under contemporary international law, the main rationale of both immunity *ratione personae* and immunity *ratione materiae* appears to be the need to preserve the ability of the officials concerned to perform their functions effectively as organs of the state.

20 See *infra*, section 3.

21 See Judgment, *supra* note 2, at para. 194: 'The Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case.'

22 1969 Convention on Special Missions, 1400 UNTS 231. Among other state officials of a lower rank who may enjoy immunity *ratione personae* under specific conventional regimes are the head of mission and the members of the diplomatic mission to an international organization of a universal character, under Art. 30 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, Vol. 2 (UN publication, Sales No. E.75.V.112). Not yet in force.

23 *Arrest Warrant*, *supra* note 11, para. 51: 'in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, *such as* the Head of State, Head of Government or the Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal' (emphasis added).

24 As recalled by the Court at para. 185 of its Judgment, *supra* note 2. See, in particular, Public sitting, President Higgins presiding, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, 22 January 2008, CR 2008/3 (original), at 15 (Condorelli).

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national security).[25] However, the Court still noted that it did not appear absolutely certain that Djibouti had completely abandoned its claims relating to the alleged violation of personal immunities in respect of its *procureur de la République* and its head of national security.[26] Under such circumstances one could have expected the Court to address in a more detailed manner the question of the categories of state officials who may benefit from personal immunity. A need for some clarification in this respect does seem to exist in the light of the wording ('such as') used by the Court in its previous judgment in the *Arrest Warrant* case, whereby the door seemed to be left open to the possible recognition of immunity *ratione personae* to certain high-ranking state officials other than heads of state, heads of government, and ministers for foreign affairs.[27]

It is true that the conclusion reached by the Court in the *Arrest Warrant* case as to the granting of immunity *ratione personae* to an incumbent minister for foreign affairs was largely based on the international nature of such a minister's functions, in particular on the fact that a minister for foreign affairs is frequently called upon to travel internationally and must be in constant communication with the state's diplomatic missions around the world as well as with representatives of other states.[28] In other words, it seems that, in the opinion of the Court, the 'high rank' criterion is not 'conclusive as such'[29] in determining the categories of state officials who may enjoy personal immunity. It is also noteworthy that, in the proceedings before the Court, France made a similar argument by stating that the *procureur de la République* and the head of national security of Djibouti did not enjoy 'absolute immunity from criminal jurisdiction or inviolability *ratione personae*' precisely because of 'the essentially internal nature of their functions'.[30]

That said, the Court's judgment in the present case does not provide a clear answer to the question of whether certain incumbent high-ranking state officials, other than those identified by the Court in the *Arrest Warrant* case, could also enjoy immunity *ratione personae* under international law.[31] This question seems to remain unclear at the present stage of international law,[32] although such a possibility has recently been envisaged in the legal literature[33] and by the Special Rapporteur of the International Law Commission on the topic 'Immunity of State Officials from Foreign Criminal

25 See Judgment, *supra* note 2, paras. 181 (containing a short description by the Court of the arguments made in Djibouti's Application and Memorial) and 185.
26 Ibid., paras. 192–193.
27 See *supra* note 23.
28 *Arrest Warrant*, *supra* note 11, paras. 53–54.
29 Immunity of State Officials, *supra* note 13, para. 132.
30 Judgment, *supra* note 2, para. 186.
31 For an overview of this question, see Immunity of State Officials, *supra* note 13, paras. 132–136.
32 It is interesting to note that this question was left open by the Institut de droit international in its 2001 resolution (*supra* note 14). Article 15(2) thereof contains a 'without prejudice' clause aimed at preserving 'such immunities to which other members of the Government may be entitled on account of their official functions'.
33 See, in particular, A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on *The Congo v. Belgium* Case', (2002) 13 EJIL 853, at 864 (suggesting, although somewhat hesitantly, that immunity *ratione personae* might also accrue to 'other senior members of cabinet').

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Jurisdiction'.[34] Moreover, while some instances have been reported in which domestic courts have denied immunity *ratione personae* to certain high-ranking state officials such as a minister of state, a minister of the interior, and a solicitor general, as well as heads of entities of federal states,[35] two recent pronouncements by British courts appear to have recognized a wider scope of immunity *ratione personae* by granting the benefit of such immunity to an acting defence minister and to an incumbent minister of commerce and international trade. It is to be noted, however, that these two decisions expressly referred to the Court's judgment in the *Arrest Warrant* case, thus relying on the functions – involving international travel and the conduct of diplomatic missions on behalf of the state – of, respectively, a defence minister[36] and a trade minister[37] in their own fields of activities and responsibilities. Indeed, as recently pointed out by one commentator, it may well be that the possibility of extending immunity *ratione personae* to other categories of state officials would depend on the degree of the involvement of such officials in international relations.[38]

In any event, as underlined by the Special Rapporteur of the International Law Commission, there seems to be a real need for identifying the criteria that would have to be met by those other state officials in order possibly to enjoy immunity *ratione personae*.[39] According to him, the question arises, in particular, as to whether 'the importance of the functions performed by high-ranking officials for ensuring the state's sovereignty' could constitute 'an additional criterion' in this context.[40]

2.3. Immunity *ratione personae*, immunity *ratione materiae*, and state immunity

Another aspect to be considered is the way in which the Court handled in its judgment the traditional distinction, which seems to be widely accepted by judicial organs and scholars,[41] between two different types of immunities which may accrue to state officials: (i) immunity *ratione personae* (sometimes also called 'personal', 'full', 'absolute', or 'total' immunity), which has already been alluded to and which has a broad material scope in that it exempts the state official from the jurisdiction of

34 See Kolodkin, *supra* note 13, paras. 117–121. While mentioning, in this context, ministers of defence and ministers of foreign trade, the Special Rapporteur indicated that he was 'not aware that an exhaustive list of such officials exist[ed] anywhere' (ibid., para. 119).

35 See Immunity of State Officials, *supra* note 13, para. 134.

36 See District Court (Bow Street), *Re General Shaul Mofaz*, Judgment of 12 February 2004, (2004) 53 ICLQ 771, at 771–3. This case concerned an application for an arrest warrant against General Shaul Mofaz, acting defence minister of Israel.

37 See Bow Street Magistrate's Court, *Re Bo Xilai*, Judgment of 8 November 2005, 128 ILR 713. This case concerned a request for an arrest warrant against Bo Xilai, incumbent Chinese minister for commerce and international trade. However, as noted in the judgment, Bo participated in the official delegation for a state visit of the president of China, thus being also a member of a special mission and enjoying, on that basis, immunity in accordance with customary law as embodied in 1969 Convention on Special Missions.

38 C. Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations', in M. D. Evans (ed.), *International Law* (2006), at 409.

39 Kolodkin, *supra* note 13, para. 120.

40 Ibid., para. 121, and see also paras. 90, 93.

41 For numerous references to judicial decisions and scholarly opinions, see Immunity of State Officials, *supra* note 13, para. 88, nn. 206–7. See also Kolodkin, *supra* note 13, paras. 78–83.

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a foreign state in relation to both private and official conduct;[42] and (ii) immunity *ratione materiae* (also called 'functional' or 'organic' immunity), which, according to several commentators, would cover all state officials,[43] including former state officials, but only in relation to official conduct – that is, conduct performed by the state official in the discharge of his or her functions as organ of the state.[44] It seems that both parties to the dispute before the Court recognized the distinction between these two categories of immunities.[45]

In the *Arrest Warrant* case, the Court did not explicitly refer to the above distinction,[46] and this may be understood in the light of the fact that the case concerned the issuance of an arrest warrant against an incumbent minister for foreign affairs who, according to the findings of the Court, enjoyed personal immunity from foreign criminal jurisdiction. In other words, although immunity *ratione personae* and immunity *ratione materiae* may well coexist and, to some extent, overlap with regard to certain conduct performed by a state official,[47] the question of the more limited immunity *ratione materiae* that might also accrue to a foreign minister in relation to acts performed in an official capacity did not need to be specifically addressed in the *Arrest Warrant* case. The situation in the *Djibouti* v. *France* case was quite different, since, as has already been mentioned, the Court denied the benefit of personal immunities to the *procureur de la République* and to the head of national security of Djibouti.

Under those circumstances, the issue of immunity *ratione materiae* could not be ignored by the Court, and this was even more the case since, in the oral proceedings,[48] the argument relating to immunity *ratione materiae* was developed in some detail by Djibouti in connection with its claims regarding the alleged violation of the jurisdictional immunities of its *procureur de la République* and its head of national security.

In its judgment the Court did make a distinction between two different types of immunity. It did so by opposing the 'personal' or 'full' immunity which, in the present case, only accrued to the Djiboutian head of state, to another type of immunity which was more limited in scope in that it only covered acts performed in the discharge of the official functions of the two other Djiboutian state officials. However, the

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42 See *supra*, section 2.1.

43 See, on this point, the clear position taken by Kolodkin, *supra* note 13, para. 80 ('State officials enjoy immunity *ratione materiae* regardless of the level of their post, by virtue of the fact that they are performing official State functions. . .'), and para. 107 ('In the practice of States, especially in national courts rulings and in doctrine, it is generally recognized that all State officials enjoy immunity from foreign criminal jurisdiction in respect of acts performed by them in their official capacity, or immunity *ratione materiae*'). However, some members of the International Law Commission seemed to suggest that immunity *ratione materiae* should cover only those State officials 'who exercise the specific powers of the State', thus possibly excluding certain categories of officials such as teachers, medical workers, etc.; see Report of the International Law Commission (60th session, 5 May–6 June and 7 July–8 August 2008), Official Records of the General Assembly, 63rd session, Supplement No. 10, UN Doc. A/63/10, para. 288.

44 For an analysis of the distinction between these two types of immunities, including numerous bibliographical references, see Immunity of State Officials, *supra* note 13, paras. 88–93.

45 See in particular Oral proceedings, CR 2008/3 (original), *supra* note 24, at 15 (Condorelli, on behalf of Djibouti); and CR 2008/5 (original), *supra* note 16, at 50 (Pellet, on behalf of France).

46 For a criticism of the lack of reliance by the Court on this distinction, see Cassese, *supra* note 33, at 862–4.

47 Ibid., 864.

48 See CR 2008/3 (original), 22 January 2008, *supra* note 24, at 15–18 (Condorelli, on behalf of Djibouti).

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Court apprehended the latter type of immunity through the prism of the immunity of the state itself, as opposed to an immunity that would accrue individually to state officials in respect of conduct performed in the discharge of their functions as organs of the state. Thus, with respect to Djibouti's claim to functional immunity (immunity *ratione materiae*) on behalf of its *procureur de la République* and its head of national security, the Court observed 'that such a claim is, in essence, a claim of immunity for the Djiboutian State, from which the *procureur de la République* and the Head of National Security would be said to benefit'.[49] In other words, the Court substantially equated functional immunity of state officials (immunity *ratione materiae*) with state immunity.[50]

Although this approach seems to find some support in the legal literature, in particular in relation to immunity from civil proceedings,[51] it is submitted that equating immunity *ratione materiae* with the immunity of the state itself may be problematic in some respects.[52]

In particular, it is generally recognized that, under contemporary international law, state immunity is no longer absolute, in that it only covers so-called *acta jure imperii*, as opposed to *acta jure gestionis*.[53] Admittedly, this point did not raise any specific problems in connection with the judicial proceedings for subornation of perjury allegedly committed by the *procureur de la République* and by the head of national security of Djibouti; for it would be rather difficult to argue that the subornation of perjury – had it occurred and had it been attributable to Djibouti – would have constituted an *actum jure gestionis*. That said, if the immunity *ratione materiae* of a state official were nothing other – or nothing more – than the immunity of the state itself, one might be tempted to conclude that a state official would not enjoy immunity in respect of conduct performed in the discharge of his or her official functions, if such conduct were to be performed in connection with what would be considered an *actum jure gestionis* from the perspective of the state itself. However,

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49 Judgment, *supra* note 2, para. 188.

50 Such an equation was also suggested by Lord Hoffmann in the *Jones* case before the United Kingdom House of Lords; see *Jones (Respondent) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Mitchell and others (Respondents) v. Al-Dali and others and Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Appellants); Jones (Appellant) v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) (Respondents) (Conjoined Appeals)*, Appellate Committee, 14 June 2006, (2006) UKHL 26, at para. 68: 'I would ... prefer to say ... that state immunity affords individual employees or officers of a foreign state "protection under the same cloak as protects the state itself". But this is a difference in the form of expression and not the substance of the rule.'

51 See Immunity of State Officials, *supra* note 13, para. 89, n. 218.

52 For an argument according to which state immunity, being 'civil' in nature, could not cover immunity of state officials from foreign *criminal* jurisdiction, see N. Ronzitti, 'L'immunità funzionale degli organi stranieri dalla giurisdizione penale: Il caso *Calipari*', (2008) XCI *Rivista di diritto internazionale* 1033, at 1039.

53 It is worth noting that the UN Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004, annexed to General Assembly Resolution 59/38, UN Doc. A/RES/59/38, not yet in force), although not referring explicitly to the above distinction, enumerates several cases (which would seem to correspond, *grosso modo*, to those that are generally regarded in the legal literature as falling under the category of *acta jure gestionis*) in which state immunity does not apply. Those cases, which are listed in Arts. 10–17 of the Convention, relate to 'commercial transactions', 'contracts of employment', 'personal injuries or damage to property', 'ownership, possession and use of property', 'intellectual property', 'participation in companies or other collective bodies', 'ships owned or operated by a State', and 'effect of an arbitration agreement'.

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due consideration should be given to the fact that an *actum jure gestionis*, although not covered by state immunity under current international law, may still qualify, from the perspective of the state official who performs it, as an act carried out in the discharge of his or her functions as an organ of the state.[54] Hence, since it is widely recognized that immunity *ratione materiae* has to be afforded to officials of a foreign state in respect of conduct performed in their capacity as organs of that state,[55] it does not appear to be acceptable to exclude *acta jure gestionis* from the scope of such immunity. This point is perfectly seen by one commentator who refers, *inter alia*, to this asymmetry between the scope of immunity *ratione materiae* of state officials and that of state immunity as a clear indication of the distinct nature of the two immunity regimes.[56]

Moreover, as will be shown later, equating immunity *ratione materiae* with the immunity of the state itself might also have some implications when dealing with issues relating to invocation and waiver of immunity.[57]

3. Acts covered by immunity (material scope)

Neither the Court nor the parties raised any question with respect to the acts covered by immunity in connection with Djibouti's claims regarding the witness summonses addressed to its president. The Court simply referred in this context to the 'full immunity from criminal jurisdiction and inviolability' of the head of state;[58] as already mentioned, it is indeed undisputed that immunity *ratione personae* covers both official and private conduct of the state official who enjoys that immunity. The only doubts that could be raised regarding the material scope of immunity *ratione personae* relate to whether or not such immunity must also be afforded in relation to conduct that would constitute a crime under international law,[59] a question which clearly did not arise in the context of the present case.

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54 For a discussion and a similar conclusion on this issue, see Immunity of State Officials, *supra* note 13, para. 161. In this regard, see also para. 6 of the commentary to Art. 4 of the Articles on Responsibility of States for Internationally Wrongful Acts (as adopted by the International Law Commission on second reading in 2001 and as subsequently annexed to General Assembly Resolution 56/83 of 12 December 2001): 'It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as *acta jure gestionis*', in *Yearbook of the International Law Commission*, Vol. II (Part Two) (2001), 41, para. 77. The argument that *acta jure gestionis*, when performed by a state organ in an official capacity, are attributable to the state in the same way as are *acta jure imperii* was clearly made, at a time when a different view seemed to prevail on that point in the International Law Commission, by L. Condorelli, 'Imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances', (1984-VI) 189 RCADI 9, at 66–76.

55 See *infra*, section 3. This is without prejudice to the delicate question of whether immunity *ratione materiae* is to be regarded as procedural or substantive in nature (*infra*, notes 112–15 and accompanying text).

56 R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (2008), 106: 'That [the] principle [according to which foreign-state officials do not incur personal responsibility for acts committed under the authority of their home state] is distinct from the law of state immunity is already clear from the fact that state officials may be immune in cases where the state – under the restrictive approach to state immunity – is not. A claim for payment of, say, pencils ordered for the office – a pure *actum jure gestionis* for the purposes of the law of state immunity – cannot be recovered from the personal bank account of the state official that happens to have placed the order.'

57 See *infra*, section 4.

58 Judgment, *supra* note 2, para. 170.

59 For a detailed discussion of this issue see Immunity of State Officials, *supra* note 13, paras. 141–153. The memorandum also addresses, at paras. 180–212, the same issue with respect to immunity *ratione materiae*.

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In contrast, as already recalled, it is unchallenged that immunity *ratione materiae* covers only official conduct – that is, acts or omissions by a state official in the discharge of his or her functions. The Court clearly confirmed the limited scope of this immunity when noting that

> it ha[d] not been 'concretely verified' [to use the words of Djibouti[60]] before it that the acts which were the subject of the summonses as *témoins assistés* issued by France [against the *procureur de la République* and the head of national security of Djibouti] were indeed acts within the scope of their duties as organs of State.[61]

Furthermore, the Court indicated that

> [a]t 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.[62]

The Court's enunciation of this limited scope of immunity *ratione materiae* appears to be acceptable as a matter of principle. However, the reasoning followed by the Court on this issue does raise some questions.

First of all, no clarification is provided in the judgment regarding the precise criteria that need to be applied in order to distinguish between private and official conduct for purposes of immunity *ratione materiae* (or, following the Court's approach, for purposes of state immunity). In particular, the question arises as to whether or not such criteria should correspond to those governing the attribution of conduct to the state in the context of responsibility for internationally wrongful acts. Although the Court did not provide a clear response to this question, one may be tempted to believe that the Court's answer would be positive, especially in the light of its statement according to which 'the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs'.[63]

Assuming that the criteria applicable in the context of state responsibility are also relevant in order to circumscribe the material scope of immunity *ratione materiae*, it would follow that conduct carried out by a state official 'in an apparently official capacity, or under colour of authority' would be covered by such immunity, irrespective of the personal motives of the author of such conduct, regardless of any abuse of power that might have occurred, and even if the official, in performing such conduct, acted *ultra vires* by exceeding his or her authority or contravening instructions.[64]

60 As reflected in para. 190 of the Judgment, *supra* note 2.
61 Ibid., para. 191.
62 Ibid., para. 196.
63 Ibid.
64 On this point, see para. 13 of the commentary to Art. 4 of the ILC Articles on Responsibility of States for internationally wrongful acts (*supra* note 54), in *Yearbook of the International Law Commission*, *supra* note 54, at 42, para. 77. On the specific question of *ultra vires* acts, see also Art. 7, entitled 'Excess of authority or contravention of instructions' ('The conduct of an organ of a State or of a person or entity empowered to

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Arguably, this issue appears to be highly relevant to the present case, since it is most likely that any subornation of perjury, if perpetrated 'under colour of authority', would have constituted, on the part of the officials concerned, an excess of authority and should therefore be regarded as *ultra vires*. However, the question whether immunity *ratione materiae* also covers acts that are performed *ultra vires* remains controversial.[65] Domestic courts appear to have adopted conflicting positions on this point,[66] and the judgment rendered by the Court in the present case does not provide any indication in that respect.[67] In any event, it is submitted that excluding in general terms *ultra vires* acts from the scope of immunity *ratione materiae* from foreign criminal jurisdiction would be problematic, since this might lead to defeating the whole purpose of such immunity; for it would seem that, in most cases, official conduct giving rise to a criminal offence should probably also be regarded as *ultra vires*.[68]

That being said, the Court's findings, according to which the official character of the conduct that was the subject of the summonses as '*témoins assistés*' against the two Djiboutian state officials had not been 'concretely verified',[69] do raise some questions, both with regard to the extent to which the state invoking immunity *ratione materiae* needs to substantiate its claim and with regard to the determination of the material scope of such immunity in relation to a witness summons.

On the first point, there is no intention on our part to suggest that, in determining whether an act is covered by immunity *ratione materiae*, the position of the state invoking immunity would necessarily be decisive or should, as a matter of principle, be given more weight than the position that might be taken in this regard by the forum state.[70] In other words, as rightly pointed out by one commentator, '[t]he rule of functional immunity does of course not oblige courts to blindly accept *any* claim

exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions'), and the Commission's commentary thereto (ibid., at 45–7, para. 77).

65 For a recent analysis, suggesting that such acts are also covered, see Immunity of State Officials, *supra* note 13, paras. 159–160. A different view seems to be taken by R. Van Alebeek, 'The Pinochet Case: International Human Rights Law on Trial', (2000) LXXI BYIL 29, at 66. Recently, this issue has also been raised by Ronzitti, *supra* note 52, at 1038, n. 14. With respect to the immunity *ratione materiae* of a former head of state, attention should be drawn to Art. 13(2) of the 2001 resolution of the Institut de droit international (*supra* note 14), which provides an exception to that immunity, not only if the alleged acts 'constitute a crime under international law', but also when such acts 'are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State's assets and resources'. According to Art. 16 of that resolution, the same rule applies to former heads of government.

66 See Immunity of State Officials, *supra* note 13, para. 159, nn. 452–5, 457, citing numerous pronouncements in support of both positions.

67 It is true that the Court referred to 'acts within the scope of [the] *duties* [of the officials concerned] as organs of State' (Judgment, *supra* note 2, at para. 191, emphasis added), which could perhaps be interpreted as implicitly excluding *ultra vires* acts from the scope of immunity *ratione materiae*. However, the French text – which is in this case the authoritative one – appears to be more neutral in this regard by simply referring to the '*fonctions*' ('functions') rather than the '*devoirs*' ('duties') of the state officials concerned.

68 A similar argument is made in Immunity of State Officials, *supra* note 13, para. 160. It should be stressed, however, that recognizing the applicability of immunity *ratione materiae* in respect of *ultra vires* acts is without prejudice to the question of whether such immunity should also cover conduct that constitutes a crime under international law; in this author's view, that question should be given a negative answer. On this issue see also *supra* note 59.

69 See *supra* note 61 and accompanying text.

70 A situation of that kind may well arise, *mutatis mutandis*, in other contexts, in particular with respect to the functional immunities accruing to officials of international organizations such as the United Nations.

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of a foreign state that an official has acted under its authority'; hence 'a court may independently inquire into the reasonableness of such claim'.[71] However, it may be argued, especially in the context of an alleged immunity from testimony, that a state wishing to invoke such immunity cannot be deemed to have a duty to substantiate its claim by providing detailed information or evidence which might possibly defeat the whole purpose of that immunity.

Under the circumstances of this case it may be asked whether there were not sufficient grounds to believe that the alleged subornation of perjury, had it actually occurred, would most likely have been carried out by the two Djiboutian officials 'under colour of authority' – maybe by abusing their position as high-ranking state officials – and not merely in a private capacity.[72] Admittedly, Djibouti did not provide the Court with detailed information or evidence regarding the precise circumstances in which the alleged acts would have been perpetrated by the two officials concerned. It could be that the highly sensitive nature of this case discouraged Djibouti's authorities from doing so. But it could also be that the two individuals concerned might have been the only ones – or among the few – that would have been in a position to provide such information or evidence. Alternatively, it is also possible that the Djiboutian authorities might have considered that the disclosure of detailed information or evidence about the circumstances surrounding the alleged subornation of perjury would have been tantamount to a waiver of the alleged immunity from testimony. That said, it might be difficult to understand the reasons why Djibouti alluded in the oral proceedings to the need to 'verify concretely the acts in question'.[73]

Be that as it may, and without prejudice to the question of the lack of invocation of immunity before the French authorities,[74] it seems difficult to accept the Court's view that Djibouti had not informed *the Court itself* of the alleged official nature of

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See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 29 April 1999, [1999] ICJ Rep. 62 (hereinafter *Immunity from Legal Process*, Advisory Opinion), at 87: 'As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity. This means that the Secretary-General has the authority and responsibility to inform the Government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings' (para. 60); 'When national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts' (para. 61).

71 Van Alebeek, *supra* note 56, 115.

72 Regarding the subornation of perjury allegedly committed by the Djiboutian *procureur de la République*, counsel for Djibouti stated in the oral proceedings, 'No one could claim that the State Prosecutor travelled to Brussels for his own amusement and there happened to run into Mr Alhoumekani while strolling about. On the contrary, it was indisputably in the full exercise of his official duties as State Prosecutor of the Republic of Djibouti that, following a meeting organized through Mr Alhoumekani's lawyer via contacts with the Palais de justice in Djibouti, our senior Djiboutian official travelled there for a discussion with Mr Alhoumekani in his lawyer's chambers and presence'; see CR 2008/3, *supra* note 24 (translation), 22 January 2008, at 6 (Condorelli). Concerning the acts allegedly perpetrated by the Djiboutian head of national security, see ibid. (original), 22 January 2008, at 14 (Condorelli).

73 See Judgment, *supra* note 2, at para. 190.

74 On this issue see *infra*, section 4.

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the acts complained of by France.[75] For, at least in the course of the oral proceedings, Djibouti made it clear that the justification of the immunity invoked in respect of its *procureur de la République* and its head of national security was to be found in the fact that acts carried out in an official capacity – as opposed to private acts – 'are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as the organ'.[76]

Some comments are also warranted concerning the way in which the Court formulated the limited scope of immunity *ratione materiae* in connection with a witness summons.

As already mentioned, the Court considered the relevant question to be whether the acts that were the subject of the witness summonses were indeed 'within the scope of [the] duties [of the two officials] as organs of State'. In formulating the question in such terms, the Court was probably influenced by the specific nature of a summons as '*témoin assisté*', which, in accordance with French law, is issued against an individual regarding whom some suspicions of criminal conduct indeed exist.[77] In other words, the subject of a summons as '*témoin assisté*' may well relate to acts allegedly committed by the official concerned. However, the provision of information or evidence as a '*témoin assisté*' may also concern facts which are not directly related to acts or conduct carried out by that official. Thus the criterion relied upon by the Court appears to be too restrictive when applied to a witness summons, be it as an ordinary witness or as a '*témoin assisté*'. Arguably a more appropriate criterion would be whether the required testimony possibly involves the provision of information or evidence on facts knowledge of which would have been acquired by the state official in connection with the performance of his or her functions as an organ of the state.[78] Such a broader criterion finds some support in domestic case law[79] and seems also to be applied in the context of other types of immunity *ratione materiae*, such

75 See *supra* note 62 and accompanying text.

76 See CR 2008/3 (original), *supra* note 24, 22 January 2008, at 12 and 14 (Condorelli). Regarding the nature of the acts concerned, see also *supra* note 72. Djibouti's argument on this point is summarized in the Judgment, *supra* note 2, at para. 187.

77 For the definition of '*témoin assisté*' according to French law, see *supra* note 10.

78 It goes without saying that this opinion is based on the assumption that immunity *ratione materiae* also covers immunity from testimony. It may be recalled, however, that a different position was adopted on this issue by the Appeals Chamber of the ICTY in the *Krstić* case; see *Prosecutor v. Radislav Krstić*, Case No. IT-98–33-A, Decision on Application for Subpoenas, 1 July 2003 (Judge Shahabudden dissenting), esp. paras. 20–28. The Appeals Chamber expressed the radical view that functional immunity of state officials did not entail 'an immunity against being compelled to give evidence of what the official saw or heard in the course of exercising his official functions'. The Appeals Chamber stated that, '[u]nlike the production of State documents, the State cannot itself provide the evidence which only such a witness could give' (ibid., para. 24), and that its findings in the *Blaškić* case (*infra* note 115) as to the incompatibility of a subpoena with the rule of functional immunity '[could] be justified only in relation to the production [by state officials] of documents in their custody in their official capacity' (ibid., para. 27). In this author's opinion, it remains difficult to understand why a subpoena to give evidence as a witness on facts knowledge of which was acquired by the state official in the discharge of his or her official functions should be treated differently, for purposes of immunity *ratione materiae*, from a subpoena to produce official documents. See, on this point, the convincing analysis by Judge Shahabuddeen, at paras. 2–19 of his Dissenting Opinion.

79 Thus, the German Bundesverwaltungsgericht (Federal Administrative Court) granted the Indian defence minister immunity from providing testimony on 'sovereign acts' such as the mission of Indian troops deployed in Sri Lanka, their motives, and their official acts; see Bundesverwaltungsgericht, Judgment of 30 September 1988, 1989 *Deutsches Verwaltungsblatt* 261, summarized in Council of Europe, Committee of Legal Advisers on Public International Law (CADHI), Database on State Practice Regarding State Immunities,

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as the immunity accruing to officials of international organizations.[80] It has also been relied upon in a situation which, although arguably not involving immunity in a technical sense, raised the question of the admissibility of the disclosure, by a potential witness, of information 'based on knowledge gathered . . . while carrying out official duties'.[81]

4. Invocation and waiver of immunity

One of the decisive factors relied upon by the Court in order to reject Djibouti's claim that France had violated, through the issuance of the witness summonses, the immunity accruing to the *procureur de la République* and the head of national security of Djibouti, was that 'these various claims regarding immunity were not made known to France, whether through diplomatic exchanges or before any French

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available at www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/State_Immunities/ (last accessed 26 March 2009).

80 For instance, in the context of the immunity from legal process of UN officials, and in particular regarding the issue of testimony by UN officials in domestic courts, a reference has been made by the UN Office of Legal Affairs to 'matters within their knowledge as United Nations officials' (or 'matters within their official knowledge'); letter addressed in 1978 by the UN Office of Legal Affairs to the Legal Liaison Officer of the UN Office in Geneva, partially reproduced in The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities: Supplementary Study Prepared by the Secretariat, UN Doc. A/CN.4/L.383 and Add.1–3, *Yearbook of the International Law Commission*, 1985, Vol. II, Part One (Addendum), 145, at 172, para. 58.

81 Reference is made here to a decision adopted by the ICTY in the *Simić* case regarding the confidentiality interest of the International Committee of the Red Cross (ICRC). Having recognized the existence of a rule of customary international law protecting that interest, the ICTY denied the admissibility of a testimony by a former ICRC employee on information acquired in the performance of his functions; see *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Torodović and Simo Zarić*, Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the Testimony of a Witness, IT-95–9-PT, T. Ch. III, 27 July 1999, especially at paras. 36 and 37:

> It is the Trial Chamber's view that the ICRC has an interest in this matter sufficient to entitle it to present arguments on the Motion if the Information is based on knowledge gathered by a former employee while carrying out official duties, as ICRC's interests could then be potentially affected. It is acknowledged that a distinction should be drawn between information gathered in an official capacity and information gathered in a private capacity. If the information was obtained in the course of performing official functions, it can be considered as belonging to the entity on whose behalf the individual was working. It follows from this that the relevant entity can be considered to have a legal interest in such information and accordingly may raise objections to the disclosure of the Information. By contrast, in cases where information is acquired by an individual in his private capacity, the entity has no legal interest. Further, if the Information had been obtained in the course of carrying out tasks which do not fall within the competence of the ICRC, it follows that the ICRC could not claim an interest in relation to the non-disclosure of the Information.
>
> . . . In the instant case, it is not disputed that the Information was acquired in the course of official duties, namely during visits to places of detention and while attending an exchange of prisoners supervised by the ICRC. The Trial Chamber notes that, as will be discussed below, these functions are entrusted to the ICRC by the Geneva Conventions and form part of the ICRC's mandate. The proposed witness would not have acquired the Information, had he not worked for the ICRC. The Trial Chamber is of the view that the Information relates directly to the performance of the ICRC's functions under its mandate.

The confidentiality interest of the ICRC was recognized again by the ICTY in a subsequent decision in the same case; see *Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Torodović and Simo Zarić*, Decision Denying Request for Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross, IT-95–9-PT, T. Ch. III, 7 June 2000.

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judicial organ, as a ground for objecting to the issuance of the summonses in question'.[82]

The Court's reasoning on this point is extremely brief and raises certain questions with regard to two issues which, although interrelated, ought to be distinguished.

4.1. Invocation of immunity

The first issue relates to the *invocation of immunity*. In this respect, the question to be asked is whether immunity, in order to be applied, needs to be specifically invoked before the courts of the forum state by the foreign state or by the official(s) concerned, or whether those courts are under an obligation to afford immunity *ex officio* as soon as they become aware of the situation giving rise to it.

There may be no clear-cut answer to this question, on which divergent views have been expressed in the legal literature.[83] However, at least with respect to state immunity and immunity *ratione personae*, several elements may be identified which would seem to support the view that, when applicable, immunity should be given effect by the authorities of the forum state regardless of any specific invocation.

For instance, as far as state immunity is concerned, it is noteworthy that the 2004 Convention on Jurisdictional Immunities of States and Their Property[84] does not enunciate any requirement that immunity be specifically invoked by the state concerned in order for it to be applied by the forum state; rather, the legal regime that the Convention purports to codify appears to be based on the assumption that immunities have to be granted by the authorities of the forum state unless they have been waived by the responding state. This is confirmed by the wording of Article 6 of that convention, entitled 'Modalities for giving effect to State immunity'; paragraph 1 thereof provides, *inter alia*, that a state 'shall ensure that its courts determine on their own initiative' that the immunity of a foreign state is respected.[85] Similarly, as regards the personal immunities accruing to diplomatic agents and members of special missions, the relevant conventions address only the question of waiver of such immunities (which must always be express) and not the question of their

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82 Judgment, *supra* note 2, para. 195. As already mentioned, this argument appears to be linked, to some extent, to the other argument according to which it had not been 'concretely verified' that the acts which were the subject of the witness summonses were indeed within the scope of the duties of the two Djiboutian officials as organs of the State; see *supra*, section 3.

83 For an overview of this question, see Immunity of State Officials, *supra* note 13, paras. 215–219.

84 See *supra* note 53.

85 This sentence was already contained in draft Article 6 as adopted by the International Law Commission on second reading in 1991; see *Yearbook of the International Law Commission*, 1991, Vol. II (Part Two), at 23, as well as para. 5 of the commentary to that article, at 24: 'The second part of paragraph 1 reading "and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected" has been added to the text as adopted on first reading. Its purpose was to define and strengthen the obligation set forth in the first part of the provision. Respect for State immunity would be ensured all the more if the courts of the State of the forum, instead of simply acting on the basis of a declaration by the other State, took the initiative in determining whether the proceedings were really directed against that State, and whether the State was entitled to invoke immunity. *Appearance before foreign courts to invoke immunity would involve significant financial implications for the contesting State and should therefore not necessarily be made the condition on which the question of State immunity is determined.* On the other hand, the present provision is not intended to discourage the court appearance of the contesting State, which would provide the best assurance for obtaining a satisfactory result' (emphasis added).

See also C. Rousseau, *Droit international public, Tome IV: Les relations internationales* (1980), 17, considering that the lack of jurisdiction with regard to foreign States must be raised *ex officio* by the judge of the forum state.

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invocation.[86] The same solution appears to be implied, as regards the immunities of heads of state and heads of government, in the wording of the resolution adopted by the Institut de droit international at its Vancouver session in 2001.[87] Article 6 of that resolution provides that '[t]he authorities of the State shall afford to a foreign Head of State, the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, *as soon as that status is known to them*' (emphasis added).[88] Also, it should be noted that the Court, in its judgment in the *Arrest Warrant* case, held that Belgium had violated the immunity of the minister for foreign affairs of the Democratic Republic of the Congo without raising the question of whether such immunity had been properly invoked, before the Belgian authorities, by the Democratic Republic of the Congo or by the minister himself.[89]

It may still be asked whether, with respect to immunity *ratione materiae*, a different solution should be given to the issue of its invocation.[90] Counsel for France had suggested, in the oral proceedings before the Court, that a distinction should be made in this context between personal immunity (immunity *ratione personae*) and functional immunity (immunity *ratione materiae*). While, in respect of a head of state or a minister for foreign affairs, it could be considered that 'a presumption of immunity' existed and that such a presumption might even be 'absolute and probably irrebuttable', the same was not true with regard to other state officials, who may only enjoy immunity *ratione materiae*. In the latter case, it was for national courts to assess, in each particular case, whether the conduct at issue had been performed by the state official in the context of his or her official functions.[91] Hence,

86 See, in particular, Art. 32 of the 1961 Vienna Convention on Diplomatic Relations (500 UNTS 95), and Art. 41 of the Convention on Special Missions (*supra* note 22).

87 See *supra* note 14.

88 See, however, the view expressed during the discussions at the Institut by Jacques-Yves Morin, according to whom immunity was an issue of *admissibility* ('*irrecevabilité*'), rather than an issue of *jurisdiction* ('*compétence*'), precisely because it would need to be invoked in order to be applied; see (2000–1) 69 *Annuaire de l'Institut de droit international*, *supra* note 13, at 584.

89 *Arrest Warrant*, *supra* note 11. It may be recalled, however, that the Court touched upon the question of the exhaustion of local remedies in connection with Belgium's preliminary objection that, since Mr Yerodia had ceased to be a member of the Congolese government, the case had 'assumed the character of an action of diplomatic protection but one in which the individual being protected ha[d] failed to exhaust local remedies' (Judgment, para. 37). The Court dismissed that objection by holding that the Democratic Republic of the Congo 'ha[d] never sought to invoke before [the Court] Mr Yerodia's personal rights'; that, 'despite the change in professional situation of Mr Yerodia, the character of the dispute submitted to the Court by means of the Application ha[d] not changed'; and that '[a]s the Congo [was] not acting in the context of protection of one of its nationals, Belgium [could not] rely upon the rules relating to the exhaustion of local remedies' (ibid., para. 40).

90 For a negative answer, see J.-Y. De Cara, 'L'affaire Pinochet devant la Chambre des Lords', (1999) 45 *Annuaire Français de droit international* 72, at 76. In the context of the alleged immunity of Pinochet as the former head of state of Chile, the author states, 'La revendication d'une immunité est une exception préliminaire. Il s'agit d'une fin de non-recevoir qui n'affecte pas seulement la compétence de la juridiction saisie mais prive le juge de son pouvoir de juger. L'immunité paralyse la demande. *S'agissant d'une exception d'ordre public, le tribunal doit la relever d'office* mais l'Etat accréditant peut renoncer à l'immunité des personnes qui en bénéficient, à condition que la renonciation soit expresse. En l'espèce, le Chili n'a pas renoncé à l'immunité' (footnotes omitted; emphasis added). With respect to the immunity *ratione materiae* of a former head of state or of government, it is interesting to note that the above-mentioned Art. 6 of the 2001 resolution of the Institut de droit international (*supra* note 14), providing that immunity should be afforded as soon as the status of the individual is known to the authorities of the forum state, is also applicable *mutatis mutandis* to former heads of state or of government, 'to the extent that they enjoy immunity under article 13' (see Articles 14 and 16 of the resolution).

91 CR 2008/5 (original), *supra* note 16, 25 January 2008, at 51 (Pellet).

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according to counsel for France, since none of the two officials had invoked, in the present case, any immunity before the French authorities, the latter had not been given the opportunity to appraise the immunity claims that were subsequently brought to the International Court.[92] Thus, according to France, the Court did not have 'sufficient evidence available to it to make a decision'; consequently, by issuing the summonses as '*témoins assistés*' against the two Djiboutian officials, the French judicial authorities could not be held to have violated any international obligation.[93]

Counsel for Djibouti, while rejecting the idea of any 'presumption' in this context, pointed to the need to assess, 'when of course the issue of immunity has been raised', whether the acts in question indeed fell within the scope of immunity *ratione materiae*.[94] Counsel for Djibouti also noted that it would be absurd to seek to apply to the present case 'a sort of principle of prior exhaustion of local remedies',

> [j]ust as it would be absurd to claim that the fact that the two Djiboutian high officials have yet to avail themselves of their immunity within the context of the investigation into subornation of perjury wrongfully initiated against them in France prevents the Republic of Djibouti from asking the Court to adjudge and declare that France is violating to its detriment the principles of international law on immunities.[95]

In substance, the Court followed the line of reasoning suggested by France, and summarily dismissed Djibouti's claims regarding the alleged violation of the jurisdictional immunities of its *procureur de la République* and its head of national security by stating that

> 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 immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.[96]

The conclusion reached by the Court would appear highly questionable if it were to be considered that no general requirement exists in international law to the effect that immunity should be specifically invoked in order for it to be applied by the authorities of the forum state; as has been shown already, a number of elements may be found in support of that position. However, even if such a general requirement

92 Ibid., at 52.

93 See the Court's description of the arguments presented by France in Judgment, *supra* note 2, para. 189.

94 Public Sitting, President Higgins presiding, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, CR 2008/6 (original), 28 January 2008, at 52 (Condorelli).

95 Public Sitting, President Higgins presiding, case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, CR 2008/6 (translation), 28 January 2008, at 46–7 (Condorelli).

96 Judgment, *supra* note 2, para. 196.

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were deemed to exist, the Court's findings on this point may be problematic in some respects.

In particular, since it is generally recognized that issues relating to immunity need to be considered *in limine litis*,[97] it could be argued that the authorities of the forum state, when envisaging the issuance of an act which could reasonably entail the risk of infringing an entitlement to immunity *ratione materiae*, should preventively seek the position of the foreign state on whether the circumstances of the case might involve conduct performed by the state official in the exercise of his or her functions as an organ of the state. As has already been explained, this is not to suggest that the determination made by the foreign state should necessarily bind the forum state.[98] However, it is submitted that issuing an act without giving the potential problem of immunity the consideration which is required by the circumstances of the case could be regarded as incompatible with the principle of good faith.

In the present case, it does not appear that the French judicial authorities had ever taken any steps to seek the position of Djibouti before issuing the summonses as '*témoins assistés*' against the two Djiboutian officials. It rather appears that Djibouti and its two officials were faced with a fait accompli. Moreover, in the event that these summonses had indeed violated the immunity of those officials,[99] it would be difficult to understand how such a violation could have been eliminated by a subsequent failure by Djibouti, or by the officials concerned, to notify the French authorities of their claims relating to immunity *ratione materiae*.[100] Also, given the circumstances of the case, it would be difficult to pretend that the French authorities could have found themselves in a situation of 'excusable ignorance' as to the potential risk of an infringement of the immunity *ratione materiae* of the Djiboutian officials.

Assuming, as the Court did, that immunity *ratione materiae* needs to be specifically invoked, an additional question would arise as to whether that invocation should necessarily be made by the home state or could also be made by the state official concerned. There does not seem to be a clear-cut answer to this question.[101] In this regard, the judgment refers to a lack of invocation by 'the Government of Djibouti'[102] – that is, the state itself. This is not surprising, since the Court equated functional immunity with state immunity.[103] However, it should be noted that counsel for France had referred, in his pleadings, to a lack of invocation by the two officials concerned.[104]

97 See Immunity of State Officials, *supra* note 13, para. 220. This point has also been emphasized by the International Court of Justice; see *Immunity from Legal Process*, Advisory Opinion, *supra* note 70, para. 63, where the Court considered questions of immunity to be 'preliminary issues which must be expeditiously decided *in limine litis*', while also indicating that '[t]his is a generally recognized principle of procedural law'.

98 See *supra*, section 3.

99 Ibid.

100 This is of course without prejudice to the question of waiver, which is discussed *infra*, section 4.2.

101 See Immunity of State Officials, *supra* note 13, para. 219.

102 Judgment, *supra* note 2, para. 196.

103 See *supra*, section 2.3.

104 See *supra* note 92 and accompanying text.

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4.2. Waiver of immunity

While relying in its reasoning on Djibouti's failure to invoke immunity in respect of its *procureur de la République* and its head of national security, the Court did not explicitly address the question of waiver.[105] However, it could still be asked whether this alleged failure on the part of Djibouti to invoke immunity could have amounted to an implicit waiver thereof.

If, following the Court's approach, the immunity at issue were to be regarded as boiling down to the immunity of the state itself, rather than as a separate type of immunity accruing *ratione materiae* to the state officials,[106] the only question to be addressed would be whether, under the circumstances of the present case, Djibouti had indeed waived its own immunity; for there may be no doubt that a state is entitled to do so.[107] However, even if it were to be admitted that a waiver of state immunity need not always be express,[108] it might still be difficult to consider that, in the present case, Djibouti's conduct could have given rise to a waiver of immunity. In particular, although the letter sent by the lawyer of the two Djiboutian officials to Judge Bellancourt on 11 October 2005 did not attempt to justify non-compliance with the summonses by relying on the rules on immunity, but rather on the impossibility for Djibouti 'as a sovereign State' to 'accept one-way co-operation of this kind with the former colonial Power' and therefore to authorize the two individuals summoned to give evidence,[109] it is difficult to infer from this response any waiver of immunity on the part of Djibouti. For, besides the lack of any indication to that effect in the letter, it is widely recognized that a waiver of immunity may be made only by the state itself, through the organs that are competent to that effect in accordance with its domestic laws, and not by the official whose immunity is at issue.[110] Furthermore, it is not entirely clear until which point in time in the proceedings an immunity issue can still be raised.[111] These factors, together with the fact that the issue of waiver had not been specifically raised by France, probably explain why the Court did not state in its judgment that the relevant immunity had been waived due to a lack of invocation, but simply concluded that, because of Djibouti's failure to invoke immunity, it could not be held that France had committed any violation of such immunity.

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105 For a well-known example of waiver which also covered the immunity *ratione materiae* of a former state official (the case of the former president of the Philippines, Ferdinand Marcos, and his wife), see Swiss Federal Tribunal, *Ferdinand et Imelda Marcos v. Office fédéral de la police (recours de droit administratif)*, Judgment of 2 November 1989 (ATF 115 Ib 496), partially reproduced in (1991) *Revue suisse de droit international et de droit européen* 534, at 537 (English version in 102 ILR 198).

106 See *supra*, section 2.3.

107 Such a possibility is clearly recognized in the UN Convention on Jurisdictional Immunities of States and Their Property (*supra* note 53); see Arts. 7, 8 and 9.

108 See, for example, Rousseau, *supra* note 85, at 18, stressing, however, that waiver, although it may be tacit, must be non-equivocal. In contrast, it should be recalled that in the context of diplomatic immunities and immunities of members of special missions '[w]aiver must always be express' (see the Vienna Convention on Diplomatic Relations, Art. 32(2), and the 1969 Convention on Special Missions, Art. 41(2)).

109 See Judgment, *supra* note 2, para. 35.

110 See, on this point, Immunity of State Officials, *supra* note 13, paras. 265–268. See also Kolodkin, *supra* note 13, paras. 94 and 102(i).

111 In the context of state immunity it has been suggested that a defending state is entitled to raise its immunity at any time during the dispute, even after the submission of the conclusions on the merits. See Rousseau, *supra* note 85, 18.

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In contrast, the question of waiver could become more problematic if immunity *ratione materiae* were considered to be an autonomous institution, distinct from the immunity of the state itself. In such a case, a waiver may well be conceivable if immunity *ratione materiae* were to be viewed, like personal immunity, as a mere procedural bar to the exercise of jurisdiction.[112] However, the situation with respect to waiver might be different if immunity *ratione materiae* were to be regarded, as some authors do[113] and as Djibouti itself did in the proceedings before the Court,[114] as a substantive defence predicated upon the assumption that the state official does not bear personal responsibility for conduct performed in the discharge of his or her functions as organ of the state, such conduct being only attributable to the state.[115] Arguably, if this rationale of immunity *ratione materiae* were accepted, a waiver of such immunity by the home state would be difficult to conceive, at least in respect of acts that have not been performed *ultra vires*.[116] It must be recognized, however,

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112 Such a position is clearly expressed by C. Wickremasinghe, *supra* note 38, at 397, who considers that both types of immunity 'operate simply as procedural bars to jurisdiction, and can be waived by the appropriate authorities of the sending State, thus enabling the courts of the receiving State to assert jurisdiction'. The view that immunity *ratione personae* and immunity *ratione materiae* are both procedural in nature has also been expressed by the Special Rapporteur of the International Law Commission on this topic; see Kolodkin, *supra* note 13, paras. 81 (n. 157), 89, 102(g).

See also the following observation made by the International Court of Justice, regarding immunity in general, in its judgment in the *Arrest Warrant* case, *supra* note 11, para. 60: '. . . Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.' The Court referred to the possibility of waiver in respect of the immunities enjoyed under international law by an incumbent or former minister for foreign affairs, thus also alluding to the waiver of immunity *ratione materiae*; see ibid., para. 61: '. . . they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity'. Furthermore, it is worth mentioning that the possibility of waiver is recognized, in the 2001 resolution of the Institut de droit international (see *supra* note 14), also in relation to the immunity *ratione materiae* of former heads of state or of government (see Arts. 7, 14, and 16 of the resolution).

113 See, in particular, H. Kelsen, *Principles of International Law* (1952), 358–9; G. Morelli, *Nozioni di diritto internazionale* (1967), 215–16; S. Zappalà, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The *Ghaddafi* Case before the French *Cour de Cassation*', (2001) 12 EJIL 595, at 598; P. Gaeta, 'Official Capacity and Immunities', in A. Cassese, P. Gaeta, et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002), 976; and Cassese, *supra* note 33, at 862–3.

114 See Judgment, *supra* note 2, para. 185: 'For Djibouti, it is a principle of international law that a person cannot be held as individually criminally liable for acts performed as an organ of State, and while there may be certain exceptions to that rule, there is no doubt as to its applicability in the present case'; as well as para. 187: 'What Djibouti requests of the Court is to acknowledge that a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that is to say in the performance of his duties. Such acts, indeed, are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as the organ.'

115 This is, for instance, the understanding of immunity *ratione materiae* by the Appeals Chamber of the ICTY in its Subpoena decision in the *Blaškić* case; see *Prosecutor v. Blaškić*, Judgment on the Request of the Republic of Croatia for the review of the decision of the Trial Chamber II of 18 July 1997, Case No. IT-95-14, App. Ch., 28 October 1997, para. 38: 'State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoyed so-called "functional immunity".'

116 An even more extreme position has been taken in this regard by Van Alebeek, who considers that '[w]aiver of immunity for real official acts is not possible' (*supra* note 56, at 131, n. 101 omitted); in other words, according to that author, '[t]he waiver of the substantive immunity from personal liability for acts performed as an arm or mouthpiece of a foreign State is conceptually inconceivable' (ibid., at 135). It has to be noted, however, that the author does recognize the possibility for the home state to 'defeat the presumption of authority' by declaring that 'despite the *ostensible* exercise of authority, its official did *in fact* exceed his

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that this issue appears to be less problematic in the context of an alleged immunity from testimony.

5. Acts precluded by the operation of immunities: the notion of 'constraining act of authority' and its application to the present case

The judgment also contains some interesting considerations regarding the determination of those acts which, by their own nature, may constitute an infringement of the jurisdictional immunity of a state official.

The Court relied on a general criterion in order to determine which acts would be precluded by the operation of immunity from foreign criminal jurisdiction. According to the Court, such acts are those which qualify as 'constraining acts of authority'.[117] This criterion appears to be consistent with the approach already followed by the Court in the *Arrest Warrant* case,[118] while also providing a further qualification regarding the nature of such 'acts of authority' which, indeed, need to be 'constraining' ('*contraignants*', in the authoritative French text of the judgment).

As a matter of principle, the criterion identified by the Court seems to be convincing. Also persuasive appears to be the Court's view that the concept of 'constraining act of authority' covers not only those acts that are addressed to state officials who are themselves accused of criminal conduct, but also certain acts – such as witness summonses or other orders – that may be notified, in connection with a judicial proceeding, to individuals who are not (or not yet) accused of criminal conduct.[119] Indeed, as has been pointed out recently, 'the general trend appears to be to extend immunity from exercises of power by a foreign criminal justice system also to those State officials who are not themselves directly accused of a criminal act'.[120] Such a conclusion is supported by the findings of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), according to which the issuance of a *sub poena duces tecum* against a state official in order to secure the production of

authority performing a certain act', although such a 'defeat of presumption' is not regarded by the author as being 'technically' a waiver (ibid., at 131).

117 Judgment, *supra* note 2, para. 170: '... Thus 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.'

118 *Arrest Warrant*, *supra* note 11, para. 54: '[the] immunity and [the] inviolability [of a minister for foreign affairs] protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties'.

119 This broad scope of jurisdictional immunities as regards the acts precluded by their operation has also been recognized in the context of the immunity from legal process enjoyed by UN officials 'in respect of words spoken or written and all acts performed by them in their official capacity', in accordance with Section 18 of the 1946 Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15. See, in particular, The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities: Study Prepared by the Secretariat, UN Doc. A/CN.4/L.118 and Add.1 & 2, in *Yearbook of the International Law Commission* (1967), II, 154, at 266, para. 250: 'The expression "legal process" has been interpreted by the United Nations in accordance with the standard definition as comprising the entire judicial proceedings, including the writ, mandate, summons or act by which the court assumes jurisdiction and compels the appearance of the defendant and witnesses and acts of execution, as well as other acts on the part of public authorities, such as arrest and detention in custody, in connection with legal proceedings.'

120 Immunity of State Officials, *supra* note 13, para. 237.

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documents would constitute an infringement of the functional immunity enjoyed by that official.[121] Furthermore, with regard to the issuance of a witness summons, it should be recalled that, according to Article 31(2) of the Vienna Convention on Diplomatic Relations, 'a diplomatic agent is not obliged to give evidence as a witness'.[122] The same rule is enunciated, concerning the members of a special mission, in Article 31(3) of the 1969 Convention on Special Missions.

The application of the criterion of the 'constraining act of authority' did not give rise to any problems in connection with the witness summonses as '*témoins assistés*' that were issued against the *procureur de la République* and the head of national security of Djibouti. This was so because, as recalled by the Court, under French law an individual against whom a witness summons as '*témoin assisté*' has been issued 'is obliged to appear before the judge, on pain of being compelled to do so by the law enforcement agencies (Art. 109 of the French Code of Criminal Procedure), through the issuing of an arrest warrant against him'.[123] Hence these witness summonses could potentially constitute an infringement of the jurisdictional immunity enjoyed by the two Djiboutian state officials.

Similarly, although for the opposite reason, the application of the criterion of the 'constraining act of authority' did not raise any particular difficulty with respect to the second witness summons of 14 February 2007, notified to the Djiboutian head of state through the transmission service of the presidency of the French Republic. The Court observed that this 'summons' had taken the form of an invitation to testify issued following the procedure laid down by Article 656 of the French Code of Criminal Procedure, and therefore in accordance with French law. More importantly, '[t]he consent of the Head of State [was] expressly sought in this request for testimony, which [had been] transmitted through the intermediary of the authorities and in the form prescribed by law.' The Court thus concluded that this measure '[could not] have infringed the immunities from jurisdiction enjoyed by the Djiboutian Head of State'.[124] On this point, the conclusion reached by the Court appears to be convincing.[125] Moreover, as will be shown later, the arguments invoked by Djibouti in connection with the alleged unlawfulness of this second witness summons relate

121 *Prosecutor v. Blaškić*, *supra* note 115, para. 38. See, however, with respect to a subpoena to give evidence as a witness, the different – and questionable – view adopted by the Appeals Chamber in the *Krstić* case (*supra* note 78).

122 Admittedly, this provision is intended to be a substantive exemption from the obligation to testify rather than a mere procedural immunity. However, this distinction was relied upon by the International Law Commission merely to reflect the fact that, in matters relating to the provision of evidence, a diplomat was under no legal obligation; in other words, that a failure to comply with a witness summons did not constitute a breach of a legal duty; see on this point E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (1998), 259–60. For the debate in the Commission on this question, see *Yearbook of the International Law Commission* (1958), I, 147–52.

123 Judgment, *supra* note 2, para. 184.

124 Ibid., para. 179.

125 See, however, the Separate opinion of Judge ad hoc Yusuf, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008 (Judge ad hoc Yusuf, Separate Opinion), para. 53, holding that France had violated its own legislation by requesting the testimony of the Djiboutian head of state on the basis of a provision of the French Code of Criminal Procedure – Art. 656 – which only regulated written depositions of a representative of a foreign state. However, it may be difficult to accept Judge Yusuf's argument that France, by violating the provisions of its own legislation, would have acted in violation of the customary rules of international law relating to immunities of heads of state.

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more to the issue of due respect for the honour and dignity of a foreign head of state than to the question of jurisdictional immunities per se.[126]

In contrast, the application of the criterion identified by the Court was more problematic with regard to the witness summons issued against the Djiboutian head of state on 17 May 2005, especially in the light of the ambiguity as to the binding effect of that summons under French law. In substance, the Court accepted the argument of France,[127] according to which this summons did not qualify as a 'constraining act of authority' as it was to be considered a mere 'invitation' addressed to the president. The Court found, in this respect, that the summons 'was not associated with the measures of constraint provided for by Article 109 of the French Code of Criminal Procedure', that 'it was in fact merely an invitation to testify which the Head of State could freely accept or decline', and that '[c]onsequently, 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 in connection with the investigation of the *Borrel* case'.[128]

The failure by the French investigating judge to follow the formal procedures laid down by Article 656 of the French Code of Criminal Procedure, dealing with the 'written statement of the representative of a foreign Power', and, in particular, the channel through which the invitation was sent to the head of state – a simple fax – as well as the extremely short deadline that was set to him and the absence of previous consultation, were only regarded by the Court as a 'regrettable' failure to act 'in accordance with the courtesies due to a foreign Head of State', demands of international courtesy that French law itself took into account.[129] In other words, according to the Court, 'all the formal defects under French law surrounding the summons', for which 'an apology would have been due from France', '[did] 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'.[130]

The above conclusion may raise some questions in view of the consequences normally attached by French legislation to a failure to comply with a witness summons issued in accordance with Article 101 of the French Code of Criminal Procedure. It is true that no warning on such consequences was included in the summons notified to the president of Djibouti, as was indeed acknowledged by Djibouti in the proceedings before the Court.[131] However, as recalled by Judge ad hoc Yusuf in

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126 See *infra*, section 6.

127 The French position is summarized by the Court as follows: '... France contends that only limiting the freedom of action he requires in order to perform his duties might fail to respect the immunity from criminal jurisdiction and the inviolability of a foreign Head of State' (Judgment, *supra* note 2, para. 167); and: 'The witness summons addressed to Djibouti's Head of State is, in France's view, purely an invitation which imposes no obligation on him. According to the Respondent, it is neither binding nor enforceable, and therefore cannot infringe the immunity from criminal jurisdiction or the inviolability of a Head of State' (ibid., para. 168).

128 Ibid., para. 171.

129 Ibid., para. 172.

130 Ibid., para. 173.

131 Ibid., para. 163.

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his Separate Opinion,[132] according to Article 109 of the French Code of Criminal Procedure (to which Art. 101(3) thereof expressly refers), a failure to comply with a witness summons without excuse or justification exposes the individual concerned to the risk of being compelled to appear by the law enforcement agencies and is also an offence punishable by a fine in accordance with Article 434-15-I of the French Criminal Code. Judge Yusuf also recalled that the French Cour de cassation had held, in a judgment of 10 October 2001, that the incumbent president of the French Republic was not subject to the obligation to appear as a witness in accordance with Article 101 of the French Code of Criminal Procedure precisely because such an obligation was associated with the enforcement measures provided in Article 109 of the French Code, and also because non-compliance with that obligation was regarded as a criminal offence.[133] It is worth mentioning that these elements had been specifically invoked by Djibouti in the oral proceedings.[134]

Hence, irrespective of whether or not, according to French law, the consequences set forth in the above-mentioned provisions would indeed be applicable in the event of non-compliance with a witness summons which does not expressly recall them, it should be recognized that the Djiboutian head of state was put in a situation of considerable legal uncertainty as to the potentially binding nature of the witness summons and as to the consequences that he might have faced, under French law, in case of non-compliance therewith.[135] It may be argued that creating a situation in which a foreign head of state could reasonably believe him- or herself to have been made subject to a 'constraining act of authority' would by itself constitute a violation of his or her jurisdictional immunity. In this respect, it may be doubtful to what extent such uncertainty might have been eliminated, or attenuated, by the general assurances – referred to in the judgment[136] – that were given by the spokesman of the French minister for foreign affairs, according to which France respected the immunity from jurisdiction enjoyed by heads of state 'when travelling internationally'. Whether these assurances could be regarded as sufficient is highly questionable if due consideration is given, in particular, to the independence of the judiciary from the executive.

6. Issues relating to inviolability

As previously indicated, the Court found that the notification of the two witness summonses to the Djiboutian head of state did not constitute a violation of his

132 Separate Opinion of Judge ad hoc Yusuf, *supra* note 125, para. 44.

133 Ibid., para. 46.

134 Public Sitting, President Higgins presiding, case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, 21 January 2008, CR 2008/1 (original), 38–44 (Van den Biesen). See also Public Sitting, President Higgins presiding, case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, 28 January 2008, CR 2008/6 (original), 19–23 (Van den Biesen).

135 See on this point Djibouti's argument as summarized at para. 163 of the Judgment, *supra* note 2: 'For Djibouti, however, even though such a warning was not included in the summons addressed to the Head of State, Article 109 of the French Code of Criminal Procedure and Article 434-15-1 of the French Penal Code could still be applied. Consequently, the non-appearance of the Head of State is likewise punishable under French law and may lead to the use of public force.'

136 Judgment, *supra* note 2, paras. 31, 164, 171.

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jurisdictional immunity because those summonses did not qualify as 'constraining acts of authority'. Moreover, the Court held that the modalities whereby the summons of 17 May 2005 had been notified to the Djiboutian head of state, although not in conformity with international courtesy, did not amount to a violation by France of its obligations under international law.

The question of jurisdictional immunities as such being now put aside, a sensitive issue still arises with regard to the distinction between a 'simple' disregard of 'international courtesy' and a violation by a state of its obligation to show respect for the honour and dignity of a foreign head of state. As suggested by the wording of Article 29 of the Vienna Convention on Diplomatic Relations, which the Court considered to reflect a customary rule that was 'necessarily applicable' to heads of state,[137] respect for the honour and dignity of a head of state may be viewed as *one of the aspects of his or her inviolability*. Moreover, according to the Court, the provision of Article 29 of the Vienna Convention

> 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. In particular, it imposes on receiving States the obligation to protect the honour and dignity of Heads of State, *in connection with their inviolability*.[138]

Admittedly, it might be difficult to draw the line, in abstract terms, between the requirements of international courtesy and the obligations imposed by international law 'in connection with [the] inviolability [of heads of state]'. The matter clearly needs to be addressed in the light of all the circumstances surrounding each specific case.

With respect, in particular, to the witness summons notified by fax to the Djiboutian head of state on 17 May 2005, it is worth noting that in his Separate Opinion Judge Koroma found, contrary to the Court, that France had indeed violated its obligations to respect the honour and dignity of a foreign head of state, due to the modalities of the notification of the witness summons.[139]

The Court itself dealt with issues relating to inviolability in connection with the specific claims made by Djibouti regarding certain circumstances which had surrounded the issuance of the two witness summonses to its head of state.[140] In contrast, as already seen, the issuance of the witness summons as such was apprehended by the Court in relation to the question of jurisdictional immunity.

As regards the summons of 17 May 2005, Djibouti had claimed 'that the communication to Agence France-Presse, in breach of the confidentiality of the investigation, of information concerning the witness summons addressed to its Head of State, [was]

137 Ibid., para. 174.

138 Ibid. (emphasis added).

139 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment 4 June 2008 (Judge Koroma, Separate Opinion), para. 13.

140 The question of inviolability could also have arisen if the witness summonses had been executed by the law enforcement authorities. See, on this point, the Separate Opinion of Judge ad hoc Van den Wyngaert in the *Arrest Warrant* case (*supra* note 11), para. 75: while pointing out that the Court, in its judgment, had not offered a definition of the concept of 'inviolability', she quoted Jonathan Brown in noting that 'in the case of a diplomat, the issuance of a charge or summons is probably contrary to the diplomat's *immunity*, whereas its execution would be likely to infringe the agent's *inviolability*' (n. 147, quoting J. Brown, 'Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations', (1988) 37 ICLQ 53).

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to be regarded as an attack on his honour or dignity'.[141] While considering that it '[did] not possess any probative evidence that would establish that the French judicial authorities [were] the source behind the dissemination of the confidential information in question', the Court stated that, should that have been the case, such conduct 'could have constituted, in the context of an official visit by the Head of State of Djibouti to France, not only a violation of French law, but also a violation by France of its international obligations'.[142] The Court reached the same conclusion with respect to Djibouti's similar allegations concerning the media coverage of the summons of 14 February 2007.[143]

The question of the honour and dignity of a foreign head of state was also alluded to by the Court when summarily rejecting Djibouti's claim[144] that the summons of 14 February 2007 had been issued at an inappropriate time, when the president was in France to attend the 24th Conference of Heads of State of Africa and France.[145] The Court considered that this factor did not constitute a violation of the honour and dignity of the president of Djibouti.[146]

Admittedly, a determination of what constitutes, in a given case, an attack on the honour and dignity of a head of state may entail delicate value judgements.[147] This is confirmed by the radically opposing assessments made by Judge Skotnikov[148] and Judge ad hoc Yusuf[149] regarding the media coverage of the witness summonses addressed to the Djiboutian head of state.

7. CONCLUDING REMARKS

In its judgment in the *Djibouti* v. *France* case, the Court has undoubtedly made a valuable contribution to the clarification of certain aspects relating to the legal regime of immunities of state officials under international law. However, the Court's

141 As recalled at para. 175 of the Judgment, *supra* note 2. See CR 2008/1 (original), 21 January 2008, *supra* note 134, at 43 (Van den Biesen).
142 Judgment, *supra* note 2, para. 175.
143 Ibid., para. 180. See CR 2008/1 (original), 21 January 2008, *supra* note 134, at 46 (Van den Biesen).
144 This claim is briefly described by the Court at para. 177 of the Judgment, *supra* note 2. See also CR 2008/1 (original), 21 January 2008, *supra* note 134, 45–50 (van den Biesen).
145 Judgment, *supra* note 2, para. 180.
146 Ibid.
147 As recalled by counsel for France in the oral proceedings (CR 2008/5 (original), 25 January 2008, *supra* note 16, at 35 (Pellet)), the notion of respect for the dignity of a head of state has been characterized as 'elusive' by Sir Arthur Watts; see 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', (1994-III) 247 RCADI 9, at 41.
148 *Questions Concerning Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, (Judge Skotnikov, Separate Opinion) para. 22. See also para. 19 of the Separate Opinion, where it is argued that, in any event, '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 not be considered a violation of these very same terms. Judge Skotnikov was also of the view that the terms of Art. 29 of the Vienna Convention, which relate to inviolability, 'do not provide protection from negative media reports' (para. 20), and that '[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' (para. 21).
149 Separate Opinion of Judge ad hoc Yusuf, *supra* note 125, para. 51, emphasizing that the communication to Agence France-Presse, in breach of the confidentiality of the investigation, of information concerning the witness summons addressed to the president of Djibouti was to be considered an attack on the honour and dignity of the latter.

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reasoning on certain points may raise concerns, and a number of important questions have not received a clear response in the judgment.

With respect to immunity *ratione personae*, the Court reaffirmed with no ambiguity the 'personal' and 'full' immunity of an incumbent head of state from foreign criminal jurisdiction. It also confirmed the limited scope of personal immunity in terms of the individuals covered, by denying the benefit of such immunity to the *procureur de la République* and to the head of national security of Djibouti. However, the Court did not expressly indicate that the two Djiboutian officials did not enjoy immunity *ratione personae* because of the internal nature of their functions as organs of the state; nor did the Court provide any indication as to whether and, in the affirmative, under what conditions certain high-ranking state officials other than heads of state, heads of government, and ministers for foreign affairs could enjoy immunity *ratione personae* under international law.

As regards immunity *ratione materiae* (functional immunity), the approach followed by the Court, whereby such immunity was simply equated with the immunity of the state itself, raises some difficulties, especially in relation to the material scope of that immunity and, in particular, to the issue – although arguably not relevant to the present case – of *acta jure gestionis*. Also, the criteria for distinguishing in this context between 'private' and 'official' conduct are still surrounded by a considerable amount of uncertainty – which the judgment did not contribute to reduce – in particular with regard to the complex and sensitive question of the legal treatment to be given to *ultra vires* acts. Moreover, the criterion adopted by the Court, whereby the acts at issue should be 'within the scope of [the] duties [of the officials concerned] as organs of State' in order to be covered by immunity *ratione materiae*, appears to be too restrictive when applied to a witness summons. In that case, it is submitted that immunity *ratione materiae* should be granted if the information or evidence potentially disclosed through the testimony concerns facts knowledge of which would have been acquired by a state official in the discharge of his or her functions as an organ of the state. Furthermore, as has been shown, the Court's treatment of the question of the invocation of immunity *ratione materiae* appears to be problematic in some respects, even if one were ready to acknowledge the existence of a general requirement that immunities be specifically invoked for them to be applied by the authorities of the forum state – a requirement the existence of which is doubtful in the opinion of the present writer.

The judgment provides some clarifications on the question of the acts precluded by the operation of jurisdictional immunity, be it *ratione personae* or *ratione materiae*. The Court referred in this context to the notion of 'constraining act of authority' as the determining factor in order to assess whether an act may constitute an infringement of immunity. While this criterion would seem to be acceptable as a matter of principle, the manner in which the Court applied it to one of the disputed acts – the first witness summons addressed to the Djiboutian head of state – appears to be questionable. The Court, in holding that the summons constituted a mere invitation to testify, relied on the rather formalistic argument that the summons did not contain any warning as to any legal consequence to which non-compliance might have led. However, it is submitted that an infringement of the jurisdictional

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immunity accruing to a head of state may occur when the latter is placed in a situation of considerable legal uncertainty regarding the binding character of a summons and the legal consequences which he or she could face in the event of non-compliance. As a minimum, it could be argued that the mere fact of creating a reasonable appearance that a foreign head of state may have been subjected to a 'constraining act of authority' would constitute by itself a violation of the honour and dignity, and therefore of the inviolability, of that head of state.

The present case confirms (if such confirmation were needed) that the issue of immunity of state officials from foreign criminal jurisdiction remains of the highest importance and sensitivity in international law and international relations. Moreover, the recent developments in the field of international criminal law and international criminal justice have made this issue even more controversial than it was in the past. It is therefore to be welcomed that the International Law Commission decided, at its 59th session in 2007, to include this topic in its current programme of work.[150] The Commission is still at a very early stage in its consideration of the topic. In 2008 a preliminary report was submitted by the Special Rapporteur, Roman Kolodkin.[151] The approach to the topic proposed therein is quite comprehensive, since it covers most of the aspects of the legal regime of immunity of state officials from foreign criminal jurisdiction. In particular, the Special Rapporteur proposed that the Commission examine the question of immunity of 'all incumbent and former State officials'[152] (while also pointing out that the general perception in the Commission was that the scope of the topic did not include the immunities of diplomatic agents, consular officials, members of special missions, and representatives of states in and to international organizations[153]). There is little doubt that the Commission has embarked on a heavy task. This is not only because of the numerous issues to be addressed, but also – and above all – because of their enormous complexity. As the judgment in the *Djibouti* v. *France* case shows, in this area of international law the most 'elementary' question (according to the etymological meaning of that term) may become, in the light of the unforeseeable circumstances that may characterize or surround any given case, the most transcendental.

150 See Report of the International Law Commission (59th session, 7 May–5 June and 9 July–10 August 2007), Official Records of the General Assembly, 62nd session, Supplement No. 10, UN Doc. A/62/10 (2007), para. 376.

151 See *supra* note 13.

152 Ibid., para. 106.

153 See the report of the Commission on its 60th session, *supra* note 43, para. 304.

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