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DJIBOUTI V. FRANCE: REFLECTIONS ON THE JURISPRUDENTIAL CONTRIBUTIONS OF THE JUDGMENT

DJIBOUTI V. FRANÇA: REFLEXÕES SOBRE AS CONTRIBUIÇÕES JURISPRUDENCIAIS DO JULGAMENTO

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ABSTRACT

This commentary analyzes the International Court of Justice (ICJ)´s judgment in the *Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. It is a qualitative research done through bibliographical and documentary reviews. The thesis sustained is that the case presents relevant discussions of International Law on four key issues: (i) jurisdiction based on *forum prorogatum*; (ii) the relationship between general treaties and specific treaties; (iii) self-judging clauses and (iv) immunity of heads of States and immunity *ratione materiae*. It begins with an overview of Djibouti. Next, the main events and the decision are summarized. Lastly, it dives into critical legal discussions on the abovementioned issues. It concludes that the judgment presented a much more jurisprudential than practical scope and offered food for thought to the international legal debate. Regarding *forum prorogatum* it emphasizes that States must be cautious in formulating the terms of acceptance, or they might be surprised by ICJ. On the relationship between general and specific treaties, ICJ could have given more content on how a general treaty could serve as an interpretative guide. The ICJ revised the self-judging clause based on the principle of good faith but missed the opportunity of explaining the *modus operandi* of the good-faith principle. The ICJ reaffirmed the immunity of the heads of State and ruled that the criterion for verifying the occurrence of a breach was to be subject to a "constraining act

RESUMO

Este comentário analisa o julgamento da Corte Internacional de Justiça (CIJ) no Caso sobre Certas Questões de Assistência Mútua em Matéria Penal (Djibuti v. França). Trata-se de pesquisa qualitativa realizada por meio de revisão bibliográfica e documental. A tese sustentada é que o caso apresenta discussões relevantes para o Direito Internacional em quatro questões principais: (i) jurisdição baseada no forum prorogatum; (ii) a relação entre tratados gerais e tratados específicos; (iii) cláusulas de autojulgamento e (iv) imunidade de chefes de Estado e imunidade ratione materiae. Inicia com um panorama do Djibuti. A seguir, são resumidos os principais acontecimentos e a decisão da CIJ. Por fim, mergulha em discussões jurídicas críticas sobre as quatro questões acima mencionadas e conclui que o julgamento apresentou um escopo muito mais jurisprudencial que prático e ofereceu subsídios para o debate jurídico internacional. Sobre forum prorogatum, enfatiza que os Estados devem ser cautelosos ao formular os termos de aceitação, ou poderão ser surpreendidos pela CIJ. Quanto à relação entre tratados gerais e específicos, a CIJ poderia ter dado mais conteúdo sobre como um tratado geral pode servir de guia interpretativo. A CIJ revisou a cláusula de autojulgamento com base no princípio da boa-fé, mas perdeu a oportunidade de explicar o modus operandi de tal princípio. A CIJ reafirmou a imunidade dos chefes de Estado e determinou que o critério para verificar

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of authority.” However, its application of such a criterion is open to criticism.

KEYWORDS: *Forum prorogatum*. Immunity of the head of States. Immunity *ratione materiae*. International Court of Justice. Relationship between treaties. Self-judging clauses.

a ocorrência de uma violação deveria estar sujeito a um “ato restritivo de autoridade”. No entanto, a aplicação de tal critério é passível de críticas.

PALAVRAS-CHAVE: *Forum prorogatum. Imunidade do chefe de Estado Imunidade ratione materiae. Corte Internacional de Justiça. Relação entre tratados. Cláusulas de autojulgamento.*

1. INTRODUCTION

The *Case concerning Certain Questions of Mutual Assistance in Criminal M*atters between Djibouti and France has some of the elements of an Agatha Christie novel. A French Magistrate, Bernard Borrel, went to Djibouti in 1994 to serve as technical advisor to the Ministry of Justice. Unfortunately, his body was found half carbonized on the top of a cliff the following year. After more than twenty-five years, the circumstances of his death remain unclear.

Djibouti and France investigated the incident. However, France’s refusal to send copies of its investigation files to Djibouti lead to a dispute before the International Court of Justice (the Court or ICJ).[2] The judgment presented relevant discussions of international law on four key points: (i) the ICJ’s jurisdiction based on *forum prorogatum*; (ii) the relationship between general treaties and special treaties; (iii) self-judging clauses and (iv) immunity of the head of States immunity *ratione materiae*.

The commentary begins with an overview of Djibouti, the African country where the facts underlying the dispute occurred. Then, the main events and ICJ´s decision are summarized. Next, the commentary dives into the legal discussions on *forum prorogatum*, the relationship between general and special treaties, self-judging clauses, and immunities. In conclusion, a critical reflection on the main legal issues of the judgment is presented.

This paper is a qualitative research and addresses the question of what were the main rulings from the judgment of the *Case concerning Certain Questions of Mutual Assistance in Criminal Matters* by ICJ, and what their importance was to the development of international law. Bibliographical research was conducted in history and international law doctrine. Documentary research was also carried out in the legislation of the international system, and ICJ rulings. The results of the bibliographical research were analyzed using the hypothetical-deductive method. The results of the documentary research on legislation and jurisprudence were analyzed using the inductive method.

2 INTERNATIONAL COURT OF JUSTICE, Separate Opinion of Judge Tomka, 2008, p. 177, par.1 “*The Judgment (...) is more jurisprudential than practical in scope because the Court has been called upon to interpret and clarify its jurisdiction established by forum prorogatum.*”

2. ABOUT DJIBOUTI

Djibouti is one of the smallest countries in Africa, with 23,200 square kilometers and approximately 990,000inhabitants. Strategically situated in the Bab el-Mandeb Strait, an area connecting the Red Sea to the Arden Gulf, Djibouti, which borders Somalia, Ethiopia, and Eritrea is an important connecting point between the Middle East and Africa.[3] Its geographic location and relative stability in an area marked by different international tensions make it a strategic point for military bases of great powers. France has a significant military presence in Djibouti. Djibouti also hosts the most extensive military base of the United States in Africa, the first Chinese military base abroad, and the first Japanese military base since World War II. [4]

Djibouti was a French colony and only became independent in 1977, years after most French colonies in Africa. Late independence is explained by the relevant role Djibouti plays concerning the French military network. [5]

Between 1991 and 2000, Djibouti experienced a civil war between the government (mainly of the Issa ethnic group) and the Front for Restoration of Unity and Democracy (of Afar ethnic group). The war ended with the power-sharing agreement between the Afar and the Issa.

3. MAIN EVENTS AND THE DECISION OF THE ICJ

In the context of the civil war, in 1994, the French Magistrate Bernard Borrel became a technical advisor to Djibouti´s Minister of Justice to assist in the reform of Djibouti's criminal code, create a court of appeals, abolish the death penalty, and improve Djibouti's prison system.[6] However, on October 19th, 1995, Borrell's body was found carbonized on the edge of a cliff 80 km from Djibouti, the capital of the homonymous State.

In 2003, the investigations conducted by Djibouti concluded that the magistrate had committed suicide.[7] However, due to the testimony of a former presidential guard of Djibouti, investigations in France have raised the possibility of the involvement of high-level Djiboutian officers in Judge Borrel's death, including Ismail Omar Guelleh, the current President of Djibouti, the then-Attorney General, and the then-Chief of Public Security.[8]

France and Djibouti are parties to the Treaty of Amity and Cooperation between Djibouti and France of 1977 (TAC) and the Convention on Mutual

3 THE WORLD BANK, The World Bank In Djibouti, 2021.
4 BBC NEWS, 2018.
5 PLIOT, 2008, p. 201-213.
6 SERVENAY, 2019.
7 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. par. 20.
8 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. par. 21.

Assistance in Criminal Matters between Djibouti and France of 1986 (CMACM). Based on these treaties, France sent letters rogatory to Djibouti in 1998, 2000, and 2001 requesting cooperation on the investigations concerning Borrel's death, which were promptly met. However, in 2004, France refused to send Djibouti a copy of the judicial investigation proceeding "against X for the murder of Bernard Borrel" under the responsibility of Judge Sophie Clément.[9] She reasoned that since the closure of the case in Djibouti in 2003, no new elements had emerged. Thus, the new investigation in Djibouti appeared to be an abuse of process, which had as its only scope securing access to the documents of the French investigation, which included files relating to Djibouti officials. Judge Clément argued that these files contained documents classified as State secrets and that Article 2 (c) of the CMACM provided for the possibility of rejecting a request for assistance if the requested State party considered that the execution of the request could jeopardize its sovereignty, security, and public order or other interest.[10] In 2005 and 2007, French authorities requested the testimony of President Omar Guelleh, who was on an official visit to France. However, the Djiboutian delegation refused the request on both occasions.

In actions related to the judicial investigation proceeding "against X for the murder of Bernard Borrel," summonses to testify were issued to the Chief of National Defense and to the Attorney General of the Republic of Djibouti. Due to non-attendance, in September 2006, arrest warrants were issued in France against them.

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9 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. par. 22 and 23.

10 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. par. 28.
"On 8 February 2005, by an order (soit-transmis) communicated to the procurator of the République in Paris, Judge Clément presented her conclusions, which may be summarized as follows. No new element having come to light since the closing in December 2003 of the first judicial investigation which had been opened in Djibouti, and in the absence of any reason connected with the opening of the new investigation in Djibouti, the new investigation:
"appears to be an abuse of process only at the contents of a file which includes, among other things, documents implicating the procurur of the Republic of Djibouti in another [judicial] investigation being conducted at Versailles. . . where his personal appearance had been requested prior to any hearing by the judge dealing with the case. " (For this other judicial investigation, see paragraphs 35 and 36 below.)
The investigating judge recalled moreover that:
"Article 2 (c) of the [1986] Convention. . . [the] sovereignty,. that the request is likely to prejudice. . . security . . ordre public or other. . . essential interests [of France] ", and concluded that" [t] hat is the case with regard to transmission of the record of our proceedings ". In this connection Judge Clément pointed out that she had on several occasions in the course of her investigation requested the French Ministry of the Interior and the French Ministry of Defense to communicate documents classified under "defense secrecy", documents which had been authorized for declassification by the Commission consultive du secret de la defense nationale. The judge thus concluded as follows: "[t] he access to the Djiboutian judge's request would amount to an abuse of French law by permitting the handing over of documents which are accessible only to the French judge. Handing over our record would entail indirectly delivering French intelligence service documents to a foreign political authority. Without contributing in any way to the discovery of the truth, such transmission would seriously compromise the fundamental interests of the country and the security of its agents."

On January 9 th, 2006, Djibouti filed an application against France before the ICJ. The application was based on two lines of argument: First, it argued that France's refusal to transmit the investigation files regarding the murder of Judge Borrel infringed the TAC and CMACM. Second, it claimed that, by issuing subpoenas and making media disclosure of the summons, France had violated the immunities and inviolability of the President of the Republic, the Attorney General, and the Head of National Security of Djibouti.

In its judgment, the ICJ considered that France invoked Article 2 (c) of the CMACM in good faith. It ruled that there had been no breach of the Head of State´s immunity and inviolability since he had been merely invited to testify, and Djibouti had not proven that French authorities had sent information to the media. As for the other officers, the ICJ understood that it was the case of immunity *ratione materiae* and that, as Djibouti did not invoke this kind of immunity, there had been no violation. In sum, the ICJ rejected Djibouti's main claims, recognizing that France had violated international law only concerning the duty to communicate the reasons for refusing to send the case investigation files, under Article 17 of the CMACM.[11] The ICJ also held that acknowledging the breach was already the appropriate form of satisfaction.

4. JURISDICTION: *FORUM PROROGATUM.*

Forum prorogatum is an internationally recognized basis of jurisdiction before an international court that occurs when, after the unilateral institution of the proceedings by the applicant and seeing that no other jurisdictional basis applies to the case,[12] the respondent State consents to have that specific case processed and judged by the Court in question. Essentially, this means that the jurisdiction of the Court is established after the case is filed.[13] This procedural institute enables "States to settle their disputes in an *ad hoc* basis when there is no political will to agree on a compromise." [14]

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11 CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN FRANCE AND DJIBOUTI, 1986, art. 17.
Article 17 of the Convention on Mutual Assistance in Criminal Matters between Djibouti and France of 1986 foresses that "Tout refus d'entraide judiciaire sera motivé."

12 SALMON, 2001. See also GRANT, and BARKER, p.224.

13 SHAW, 2008, p.1076
"The idea whereby the consent of a State to the Court's Jurisdiction may be established by means of acts subsequent to the initiation of proceedings is referred to the doctrine of forum prorogatum "
"(...) is the possibility that if a State A commences proceedings against State B on a non-existing or defective jurisdictional basis, State B can remedy the situation by conduct amounting to an acceptance of the jurisdiction of the court . "Paragraph 24 (ICJ Reports 1993, pp. 325, pp.416-442 Separate opinion of Judge ad Hoc Lauterpacht of 13 September 1993 relating to the Further Requests for the Indication of Provisional Measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1993).

14 TASSINIS, 2013.

Djibouti filed its suit before the ICJ without France's consent. It was the first time that the ICJ issued a judgment on the merits recognizing its jurisdiction based on Article 38(5) of its Rules of Procedure.[15] This provision establishes that, when the requesting State institutes proceedings before the ICJ without a prior jurisdictional basis or the consent of the respondent State, the application shall be transmitted to the latter.[16] According to its Rules, the ICJ cannot include the application in its list of pending cases nor conduct further proceedings until the respondent State consents to the Court's jurisdiction.

France accepted the jurisdiction of the ICJ by a letter dated July 25th, 2006.[17] However, the extension of the acceptance was object of dispute between the States parties to the case. France argued that its consent was restricted to the content of the subtitle "object of the dispute" of Djibouti´s application, in which only allegations of non-compliance with the CMACM were made. On the other hand, Djibouti argued that France's acceptance covered the whole application, including the discussion over summonses to testify issued against Djiboutian officers. The ICJ, by 15 votes to 1,[18] agreed with Djibouti. The Court invoked

15 Note that the case *Certain Criminal Proceedings in France* (Republic of the Congo v. France), was also initiated on the basis of *forum prorogatum* and France accepted CIJ´s jurisdiction. However, Congo withdraw its application before a decision on the merits.

16 INTERNATIONAL COURT OF JUSTICE, 1978, art. 38.

"38 (5).When the applicant State has proposed to the jurisdiction of the Court upon a request thereto 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 be entered in the General List, nor any action 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."

17 INTERNATIONAL COURT OF JUSTICE, Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Letter from the Minister for Foreign Affairs of the French Republic, (Consent to the Jurisdiction of the Court to Entertain the Application Pursuant to Article 38, paragraph 5, of the Rules of Court), 2006.

"J'ai l'honneur de vous faire connaître que la République française accepte la compétence de la Cour pour connaître de l'a requête en application et sur le seul fondement de l'article 38, paragraphe 5 susmentionné.

La présente acceptation de la compétence de la Cour ne vaut qu'aux fins de l'affaire, au sens de l'article 38, paragraphe 5 précité, c'est-à-dire pour le différend qui fait l'objet de la requête et dans les strictes limites des demandes formulées dans celle-ci par la République de Djibouti."

18 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Dissenting Parra- Aranguren p. 258-264, par.17 and 18.

17. In my opinion, France did not consent to the jurisdiction of the Court in the present case in respect of all claims described in the Application presented by Djibouti. If that had been the case, its letter of 25 July 2006 would have simply stated that France consented to have the Court decide on Djibouti's Application, with no further elaboration.

18. However, that is not what the French declaration says. The reference to Djibouti's Application in general terms is found in its first paragraph, not in the second, where France expresses its limited consent to the jurisdiction of the Court. France did not agree to have the Court decide all claims described by Djibouti in its Application but only some of them, i.e., those "in respect of the dispute forming the subject of the Application" and "strictly within the limits

its jurisprudence in the case of the Right of Passage over Indian Territory and stated that the "(...) subject of the dispute was not to be determined exclusively by reference to relevant matters set out under the relevant section heading of the application."[19] Accordingly, the ICJ ruled that France referred to the application and not to the section "object of the dispute."

Gilbert Guillaume, the *ad hoc* French judge, agreed with the operative part of the decision. However, he pointed out that the original application was very confusing and that France had not been cautious enough in giving its consent to the Court's jurisdiction. In his view, the case sets a bad precedent and may encourage States to file - even deliberately - applications devoid of rigor.[20] Judge Tomka stressed the importance of States being highly cautious in formulating their acceptance of the Court's jurisdiction to avoid unexpected decisions in this regard.[21]

In agreement with Cryer and Kalpouzos, this commentary argues that the ICJ faced a poorly written application and that care must be taken to bar States from intentionally formulating confusing applications that make it possible to "sneak claims in the back door."[22]. However, it would be extremely formalistic to understand that the decisive factor for the ICJ´s jurisdiction is the headings contained in the application and not an integral consideration of its content.[23]

of the claims formulated" by Djibouti. Therefore, contrary to the finding in the final sentence of paragraph 81 of the Judgment, the French declaration, in my opinion, "read as a whole", interpreted "in harmony with a natural and reasonable way of reading the text", leads to the conclusion that France's true intention was to consent to the jurisdiction of the Court only over "the dispute forming the subject of the Application", as it was unilaterally defined by Djibouti in paragraph 2 of its Application."

19 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177, par. 70.

20 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Separate Opinion Guillaume, p. 288-292, par 17
"In these circumstances, the Court was faced with a very confused Application and a somewhat elliptical consent to jurisdiction. It could have focused on the shortcomings of either one or the other. It decided to treat the former as a normal application, and concluded that France had consented to its jurisdiction in respect of all the claims which Djibouti had formulated in the Application. That decision is understandable in law, but it seems to me to set a bad precedent. It is, in fact, likely to encourage the submission of applications drafted — sometimes deliberately — with a complete lack of rigour, and to inhibit the use of Article 38, paragraph 5, of the Rules of Court. I have supported it in the interest of Franco-Djiboutian relations, in order to secure a more comprehensive settlement of the dispute, but wished to record here my regrets and my concerns."

21 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Separate Opinion Tomka, p. 269-277 par. 31 "(...)What lessons does it hold ? Despite the apparent flexibility of forum progatum, this case shows that a State which is invited to accept the jurisdiction of the Court according to the procedure laid down in Article 38, paragraph 5, of the Rules of Court must be meticulous in the drafting of its positive response if it wishes to avoid any surprises on the part of the Court (...)"

22 CRYER, and KALPOUZOS, 2008, p. 195.
"(...) it would be excessively formalistic to use the headings in the application in a normative sense, however, the Court needs to be careful here to allow applications to sneak claims in the back door "

23 CRYER, and KALPOUZOS, 2008, p. 195.

In the following paragraphs, the jurisdiction of the ICJ will be dealt with concerning the events that occurred after the initiation of the proceedings: the arrest warrants issued against the Attorney General and the Chief of National Security of Djibouti in September 2006; and the second subpoena to testify addressed to Djibouti´s President in 2007.

Regarding the arrest warrants of September 27th, 2006, the ICJ stressed the importance of being very careful about the scope of consent when the jurisdiction is based on *forum prorogatum*.[24] The Court also stated that its case-law on "continuity "and" connexity," that understands that ICJ has jurisdiction over facts that occurred after the application was filed if those facts arise "directly out of the question which is the subject-matter of that Application," [25] does not apply to present case. The ICJ understood that where jurisdiction is based on *forum prorogatum*, the party's express consent is the determining factor.[26] By 13 votes to 3, the ICJ concluded that it had no jurisdiction over the 2006 arrest warrants since France did not consent to them.

24 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Par. 87 "Where jurisdiction is based on forum prorogatum , great care should be taken regarding the scope of the consent to be circumscribed by the respondent State."

25 See for instance INTERNATIONAL COURT OF JUSTICE, 1974, p. 203, par. 72. "The Court cannot accept the view that it would lack jurisdiction to deal with this submission. The matter raised therein is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court's jurisdiction defined in the compromissory clause of the Exchange of Notes of 19 July 1961."

26 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. par.87-88 "When the Court has examined its jurisdiction over facts or events subsequent to the filing of the application, it has emphasized the need to determine whether those facts or events were connected to the facts or events already falling within the Court's jurisdiction and whether the nature of the dispute (see Fisheries Jurisdiction (Federal Republic of Germany v. United States of America).Iceland), Merits, Judgment, ICJ Reports 1974, p. 203, for. 72; LaGrand (Germany v. United States of America), Judgment, ICJ Reports 2001, pp. 483-484, para. 45; see also Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, pp. 264-267, paras. 69-70; and Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, p. 16, for. 36). 88. 88. In none of these cases was the Court of First Instance founded on the forum prorogatum. In the present case, where it is so founded, the Court considers it immaterial whether these later elements would "go beyond the declared subject of (the) Application" (as France argued, an argument against which Djibouti referred to the Court's case law liberty to amend submissions). So far as the arrest warrants issued against senior officials are concerned, in the Court's view, what is decisive is the question of their jurisdiction over the claims relating to these arrest warrants is not to be answered by recourse to jurisprudence relating to "continuity "and" connexity ", which are relevant criteria for determining limits ratione temporis to its jurisdiction, but by which France has expressly accepted in its letter of 25 July 2006."

Judge Owada[27] and *ad hoc* Judge Yusuf[28] disagreed with the majority of the Court. They expressed their view that the basis of the Court´s jurisdiction, being it *forum prorogatum* or Article 36, paragraph 2, of the Statute of the Court, does not impact the criteria the Court uses to assess its jurisdiction as regards to facts that occurred after the filing of the application. Arrest warrants under French law are a necessary legal consequence of a refusal to testify. Thus, they have argued that the case law on "continuity" and "connexity "applies to the present case. Moreover, in its acceptance, France did not present limitations *ratione temporis*. Judge Skotnikov pointed out that France did not "freeze" the ongoing dispute between the States.[29]

This commentary claims that the ICJ´s decision was legally adequate and prudent on this point. It was legally adequate because the jurisdiction of the ICJ in a contentious case is based entirely on the consent of the parties. It was also prudent because extending jurisdiction beyond the consent of France, as the dissenting judges proposed, could put in check the legitimacy of the ICJ and create obstacles for States to accept jurisdiction in the future based on *forum prorogatum*.

Regarding the summons to testify issued in February 2007 against Djibouti´s President, the ICJ, by 12 votes to 4, concluded that it had jurisdiction. It argued that it was a mere repetition of the summons issued in 2005 and that France did not temporarily limit its acceptance. The first summon, issued in 2005, did not observe the rules of the French Criminal Procedure Code, and France acknowledged its nullity. In 2007, when Djibouti´s President was again on an official visit to France, a new warrant was issued.

27 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Declaration Judge Owada p. 265-268, par.3
"When reduced to these essential elements, the present case brought before the Court on the basis of forum prorogatum is no different in its legal analysis from a case brought under Article 36, paragraph 2, of the
Statute of the Court on the basis of two unilateral declarations accepting the jurisdiction of the Court under the optional clause, except for the fact that the consent of the Respondent in the present case has been given ad hoc by the letter(…)"

28 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Separate opinion of Judge ad hoc Yusuf ,p. 293-309, par 5. "(...) However, the Court seems to be saying that when consent is given on the basis of forum prorogatum as laid down in Article 38, paragraph 5, of its Rules, determining its jurisdiction must meet criteria completely different from those that have to be used for other ways of expressing consent to its jurisdiction. However, I take the view that the fact that consent has been given pursuant to Article 38, paragraph 5, of the Rules does not affect the relevance of the criteria regarded by the Court in the past as decisive in determining its jurisdiction ratione temporis in respect of acts or events subsequent to the filing of the Application(...)".

29 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Declaration Judge Skotnikov p. 284-287, par.4 "By giving its consent, France has not "frozen" the ongoing dispute. It is evident that the claims contained in Djibouti's Application, for which, as found by the Court, France accepted adjudication by the Court, refer to the dispute in progress.(...)"

Judges Skotnikov and Yusuf, while agreeing with the operative part of the decision, stated that the ICJ had jurisdiction because of the jurisprudence of continuity and connectivity. Yusuf pointed to the ICJ´s contradiction which, although not literary stated in such a way, "(...) used the same criterion of" continuity "and" connection "to establish its jurisdiction to appreciate the warrant issued to the president of Djibouti on February 14th, 2007." [30]

In a separate opinion, Judge Parra-Aranguren disagreed with the Court's majority because, in his view, jurisdiction was limited to refusing to transmit the investigations´ files. Judges Tomka, Ranjeva, and *ad hoc* Guillaume stated that the second warrant was a different act and could not be considered a mere repetition of the first warrant, which had been declared void. Guillaume emphasized that France had consented to the dispute that was the subject of the application strictly within the limits of the requests formulated therein.

The ICJ´s argument does not seem convincing on this point. In line with some dissenting views, this commentary argues that it is unreasonable to rule that the second writ of summons, issued about two years later, is considered as a mere repetition of an earlier act that had been declared null and void. If the act is null, it does not exist in the juridical sphere and cannot be reiterated. The ICJ would have been more consistent if it had used the same standard it used to analyze its jurisdiction over the arrest warrants issued against the Attorney General and the Chief of National Security in September 2006. This means if it had understood that considering that jurisdiction was based on *forum prorogatum*, the party's express consent is required and does not embrace facts that occurred after filling the application.

5. RELATIONSHIP BETWEEN GENERAL TREATIES AND SPECIAL TREATIES

Djibouti and France are parties to the 1977 TAC, the treaty that deals with general matters (*lex generalis*), and 1986 CMACM, a treaty that deals specifically with mutual criminal assistance (*lex specialis*). In the proceedings before the ICJ, Djibouti alleged that an infringement of the CMACM would automatically entail an infringement of the TAC. The ICJ's reasoning on this point was contradictory since, in paragraph 111 of the judgment, it first stated that the TAC was not relevant because it did not include cooperation in criminal matters. However, in paragraph 113, the ICJ understood that the 1977 treaty was a relevant rule of international law, under the terms of art. 31 (3) (c) of the Vienna Convention on the Law of Treaties (CVLT) and thus had significance as

30 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Separate opinion of Judge ad hoc Yusuf ,p. 293-309, par 4 "However, the Court relies on the same criterion of" connexity "to establish its jurisdiction to consider the witness summons addressed to the Djiboutian President on 14 February 2007."

an interpretative guide. Such contradiction did not have any practical effect on the case.

Cryer and Kalpouzos point out that the legal scholarship does not elucidate the relationship between general treaties and subsequent specific treaties. They criticize the judgment: "the court, by not explaining the difference between normative applicability and interpretative relevance, oscillates somewhat confusingly on the relationship between the general and specific rules." [31]

Significantly enough, the ICJ´s judgment opens the discussion on the relation of international *lex generalis* and subsequent *lex specialis*. This means, whether a general treaty can impose obligations on a later specific treaty. However, the Court did not provide a precise answer since it did not explain the normative applicability of the TAC, the general treaty. Despite stating the relevance of the TAC, *lex generalis,* as an interpretive guide, it did not explain the practical effect of such an interpretive vector.

6. SELF-JUDGING CLAUSES

"Self-judging clauses are clauses that allow states to reserve the right to non-compliance with international legal obligations in certain circumstances."[32] Such clauses foster international cooperation, considering that States are more prone to commit if, in exceptional circumstances, they may escape obligations without breaching international law. Paradoxically, since they present a great potential for abuse, they can reduce international cooperation.

Article 2 (c) of the CMACM contains a self-judging clause. It reads as follows: "Assistance may be refused (...) (c) if the requested State considers that the execution of the request is likely to prejudice its sovereignty, its security, its public policy or other of its essential interests". [33] Djibouti v. France was the first case in which an international dispute settlement body directly assessed a self-judging clause [34] .

Regarding the criterion for judicial review of self-judging clauses, the ICJ determined that: a) the principle of good faith must be applied, according to Article 26 of the CVLT and; b) it must be verified whether the competent authority has taken the decision. However, the ICJ, without explaining what it

31 CRYER, and KALPOUZOS, 2010, p. 198-199. "(…) the Court, by not explaining the difference between normative applicability and interpretative relevance, oscillates somewhat confusingly on the relationship between the general and specific rules. While this might allow the Court to position itself for the further interpretation of the lex specialis, in the process, the relation between general framework agreements and subsequent specific ones is not doctrinally clarified."

32 BRIESE, and SCHILL, 2009 p. 308.

33 CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN FRANCE AND DJIBOUTI, 1986, art. 2 (c).

34 BRIESE, and SCHILL, 2009.

meant by a review backed by good faith, concluded that the reasons declined by the domestic judge, the competent authority for the case, fall within the scope of Article 2 (c) of the CMACM and therefore satisfy the requirement of good faith.

While agreeing with the operative part of the decision, Judge Keith advocated a more robust and structured review of self-judging clauses inspired by internal administrative law criteria. He affirmed that the pillars for revision should be: good faith, abuse of rights, and abuse of power (*détournement de pouvoir)*. Abuse of power is the "(...) exercise of power for the wrong reasons and frustrating the purpose of the convention."[35] As for good faith, he stressed that Article 26 of the CVLT obliges the contracting parties to apply the treaties reasonably to achieve the treaty's purposes.[36] The criteria of good faith, abuse of rights, and abuse of power require that the parties "to exercise the power for the purposes for which it was conferred and without regard to improper purposes or irrelevant factors."[37]

Briese and Schill point out that "decisions of international courts or tribunals supervising whether a state has invoked a self-judging clause in good faith are unpredictable and confer too wide a discretion on the courts and tribunals themselves."[38] In the same vein, Cryer and Kalpouzos claim that "(a) more sophisticated discussion of good faith and more transparent application of that principle in assessing the French judiciary´s actions would fend off accusations that the court choose to interpret good Faith as a toothless concept in order to fully defer to the French judge´s decision." [39]

On the same line as Briese and Schill and Cryer and Kalpouzos, this commentary claims that the ICJ, in an overly concise argumentation, did a review based on good faith that lacked content and criteria and could lead to any result. It is important to emphasize that the review of self-judging clauses presents a risk to the Court's legitimacy and may be the object of great distrust on the part of the States. It should be noted, therefore, that while reviewing the application of self-judging clauses, international courts must "balance the need to apply a sufficiently robust standard of review to prevent abuse of such clauses

35 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Declaration of Judge Keith, p. 278-283, par.7. "In my view this appears to be an abuse of power or a *detournement de pouvoir* — an exercise of the power for wrong reasons and a thwarting of the purpose of the Convention."

36 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Declaration of Judge Keith, p. 278-283, par 6.

37 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Declaration of Judge Keith, p. 278-283, par 6. " good faith, abuse of rights and détournement de pouvoir . (...) to exercise the power for the purposes for which it was conferred and without regard to improper purposes or irrelevant factors."

38 BRIESE, and SCHILL, 2009, p. 308.

39 BRIESE, and SCHILL, 2009, p. 200.

against the need to respect the discretion that such clauses confer upon the state relying on them."[40]

7. IMMUNITY AND INVIOLABILITY

The ICJ decided that to verify whether the head of State´s immunity was violated, one must consider whether he or she was subjected to "a constraining act of authority."[41] Accordingly, the ICJ reaffirmed its Arrest Warrant case jurisprudence,[42] stating the criterion of restriction to the fulfillment of the authority´s attributions.

About inviolability,[43] the ICJ invoked Article 29 of the Vienna Convention on Diplomatic Relations (CVDR): "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity"[44] The ICJ stated that this provision "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." [45]

As to the summons issued against President Guelleh, the ICJ, by 15 votes to 1, took the view that there was no violation of his immunity and

40 BRIESE, and SCHILL, 2009, p. 308 "In adjudicating on disputes concerning the application of self-judging clauses, international dispute settlement bodies must therefore balance the need to apply a sufficiently robust standard of review to prevent abuse of such clauses against the need to respect the discretion that such clauses confer upon the state relying on them."

41 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Par. 170 " (…)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."

42 INTERNATIONAL COURT OF JUSTICE, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) Judgment, I.C.J. Reports 2002.

43 In Djibouti v. France ICJ treated inviolability and immunity jointly and without distinguishing the two concepts.

INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Separate Opinion of Judge Koroma, p. 252-257, par.13.

In this regard Koroma stated that "Inviolability has been construed to imply immunity from all interference whether under color of law or right or otherwise, and connotes a special duty of protection, whether from such interference or from mere insult, on the part of the receiving State. "

PEDRETTI, 2014, p. 29. (The author says that this concept is according to Denza): "(...) inviolability comprises the duty of the host State to refrain from any imposition of sovereign imperatives, especially enforcement measures, on the person in question, to prevent any restriction upon his or her person, freedom or dignity and to treat him or her with respect. (...) Immunity ratione personae from foreign criminal jurisdiction is often understood as comprising inviolability .It affords protection from criminal proceedings as well as from coercive measures imposed by a foreign State in the context of criminal procedures."

44 VIENNA CONVENTION ON DIPLOMATIC RELATIONS, 1961, p. 95. Art. 29.

45 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. par. 174 "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."

inviolability. It emphasized that France merely invited Guelleh to serve as a witness, which could freely be accepted or refused. The ICJ argued that France did not act with courtesy as it sent the invitation by fax and did not request the testimony in advance. However, the ICJ stressed that courtesy differs from a legal obligation. As for the media coverage, the ICJ understood that there was no proof that the French judiciary transmitted the files to the media.

As Pedrett pointed out, in Djibouti v. France, the ICJ held that immunity *ratione personae* safeguard the dignity of the Head of State:

> In deliberating on the inviolability of Heads of State, the ICJ has recently emphasized that their honor and dignity have to be respected. Although the notion of dignity is subject to criticism. Immunity *ratione personae* shields the highest representatives of the State, who deserve to be treated with due respect precisely because they hold that office. [46]

The ICJ´s application of the criterion "a constraining act of authority." regarding the summons issued in 2005 against Djibouti´s President was the subject of divergence among the judges. If, on the one hand, the ICJ considered it to be a mere invitation, on another Judge Yusuf, in his separate opinion, pointed out that according to French law, the President of Djibouti, in refusing to appear for testimony, could have been subject to coercive measures and criminal penalties.[47] In the same sense, Buzzini points out that the President "(...) 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." According to the author, "(i)t 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".[48]

The ICJ turned a blind eye to the possibility of coercive measures against President Guelleh, thus weakening the head of State's immunity. If, under French law, he could be subject to constrictions by refusing to testify, the summons cannot be regarded as a mere invitation. In addition, the consequences were uncertain at the time when he took the decision not to attend.

As for the Attorney General and the Chief of Public Security, the ICJ decided, by 15 votes to 1, that they were not entitled to personal immunity, without reference to the criterion used in the Arrest Warrant case, that is, to

46 PEDRETTI, 2014, p. 29.

47 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Separate opinion of Judge ad hoc Yusuf ,p. 293-309, par 45 "The Djiboutian President naturally refused to comply with this summons, so he could have been compelled to appear by the law enforcement agencies and liable to penal sanctions, in breach of the rules on the immunity from criminal jurisdiction and inviolability of Heads of State".

48 BUZZINI, 2009, p.455-483.

analyze the authorities´ main attributions. The ICJ argued that the State of origin should invoke material immunity. It ruled that there was no breach since Djibouti did not claim material immunity before French authorities.[49] Judge Yusuf, despite disagreeing with the ICJ's decision, did not comment on this point.

This commentary claims that the need to invoke immunity *ratione materiae* significantly weakens the institute, reducing its scope of protection. In this sense, Buzzini, disagreeing with the ICJ, contends that the conventions on the immunity *ratione personae* from diplomatic agents only dispose about waving of such immunity and say nothing about the need to invoke it. He mentions that in the "Arrest Warant"[50] case, the ICJ recognized the immunity of the Minister of Foreign Affairs without raising the question of whether his immunity was invoked by the Democratic Republic of the Congo. Immunity issues should be considered *in limine litis*, as the ICJ acknowledged in the Advisory Opinion on Immunity from Legal Process.[51] The author argues that State authorities should preventively seek information. Based on the principle of good faith and given the circumstances of the case, Djibouti should have sought information. Buzzini questions whether the failure to invoke immunity could be considered an implicit waiver but concludes that the ICJ could not appreciate such an argument since France did not raise it. [52]

The ICJ left many questions concerning immunity unanswered: it did not provide a criterion for distinguishing between private and official conducts, a necessary criterion for material immunity; it has not stated whether material immunity embraces *ultra vires* acts. Moreover, the ICJ dealt with material immunity under the prism of State responsibility, which is problematic for *jure gestionis acts*. [53]

8. CONCLUSION

The legal considerations presented throughout the commentary reinforces Judge Tomka's contention that the ICJ´s judgment had a much more jurisprudential than practical impact.[54] Indeed, the discussions of the Djibouti v.

49 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. par. 194 and 196.

50 INTERNATIONAL COURT OF JUSTICE, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) Judgment, I.C.J. Reports 2002.

51 INTERNATIONAL COURT OF JUSTICE, 1999, p. 90 "By fourteen votes to one, That the Malaysian courts had the obligation to deal with the question of immunity from legal process as a preliminary issue to be expeditiously decided *in limine litis*".

52 BUZZINI, 2009, p. 470.

53 BUZZINI, 2009, p. 470.

54 INTERNATIONAL COURT OF JUSTICE, 2008, p. 177. Separate Opinion of Judge Tomka. p. 269 par.1 "*The Judgment (...) is more jurisprudential than practical in scope because the Court has been called upon to interpret and clarify its jurisdiction established by forum prorogatum.*"

France case on (i) jurisdiction based on *forum prorogatum*; (ii) the relationship between general treaties and specific treaties; (iii) self-judging clauses, and (iv) immunities may impact future judgments.

Regarding jurisdiction based on *forum prorogatum*, the ICJ considered that formal defects should not impede the exercise of jurisdiction. Therefore, the application's entire content should be considered, and not only what was stated in one of its headings. States have taken the lesson that they must be very cautious in formulating the terms of the acceptance, or they might be surprised by the Court. The ICJ clarified that its jurisprudence of "continuity" and "connection" concerning facts that occurred after the initial filing, when the jurisdiction is based on *forum prorogatum*, does not apply. Thus, plaintiffs wishing to embrace possible future events should expressly make such a request at the outset. The jurisdiction will only contemplate such facts if the responding party accepts. ICJ´s conservative position is prudent since it safeguards its legitimacy before the States.

On the relationship between general and specific treaties, the ICJ stated that a general treaty could serve as an interpretative guide to a later specific treaty. However, it did not offer guidelines as to the extent of such effect and its practical application. Thus, the ICJ opened the debate on the possibility of a general treaty having an interpretive effect in a specific later treaty, but the subject still needs further doctrinal and jurisprudential development.

The ICJ revised the self-judging clause based on the criteria of the competent authority and the principle of good faith. Nevertheless, it did not explain the *modus operandi* of the good-faith principle in the revisional process. Unfortunately, in conducting an analysis devoid of content and systematicity, it left the message that a *bona fide* review has overly discretionary results and thus placed States in a situation of legal uncertainty.

Concerning immunity, the ICJ reaffirmed the immunity of the heads of State and ruled that the criterion for verifying the occurrence of a breach was to be subject to a "constraining act of authority." However, the ICJ´s application of such a criterion in the Djibouti v France case is open to criticism. This commentary claimed that Djibouti´s President did not know *ex-ante* the legal consequences of his refusal to testify and could, in theory, have been subjected to coercive measures. The ICJ denied personal immunity to Dijibouti´s Attorney General and Head of National Security since it understood that the postulating State has to invoke material immunity before the respondent State. States should take the recommendation that they should always invoke material immunity from other States. However, the ICJ, in understanding the need to invoke material immunity, has weakened the institute.

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