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Summary
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Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)

Summary of the Judgment of 4 June 2008

Chronology of the procedure and submissions of the Parties (paras. 1-18)

On 9 January 2006, the Republic of Djibouti (hereinafter "Djibouti") filed in the Registry of the Court an Application, dated 4 January 2006, against the French Republic (hereinafter "France") in respect of a dispute:

> "concern[ing] the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the Case against X for the murder of Bernard Borrel, in violation of the Convention on Mutual Assistance in Criminal Matters between the [Djiboutian] Government and the [French] Government, of 27 September 1986, and in breach of other international obligations borne by [France] to . . . Djibouti".

In respect of the above-mentioned refusal to execute an international letter rogatory, the Application also alleged the violation of the Treaty of Friendship and Co-operation concluded between France and Djibouti on 27 June 1977.

The Application further referred to the issuing, by the French judicial authorities, of witness summonses to the Djiboutian Head of State and senior Djiboutian officials, allegedly in breach of the provisions of the said Treaty of Friendship and Co-operation, the principles and rules governing the diplomatic privileges and immunities laid down by the Vienna Convention on Diplomatic Relations of 18 April 1961 and the principles established under customary international law relating to international immunities, as reflected in particular by the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973.

In its Application, Djibouti indicated that it sought to found the jurisdiction of the Court on Article 38, paragraph 5, of the Rules of Court and was "confident that the French Republic will agree to submit to the jurisdiction of the Court to settle the present dispute".

The Registrar, in accordance with Article 38, paragraph 5, of the Rules of Court, immediately transmitted a copy of the Application to the Government of France and informed both States that, in accordance with that provision, the Application would not be entered in the General

List of the Court, nor would any action be taken in the proceedings, unless and until the State against which the Application was made consented to the Court's jurisdiction for the purposes of the case.

By a letter dated 25 July 2006 and received in the Registry on 9 August 2006, the French Minister for Foreign Affairs informed the Court that France "consents to the Court's jurisdiction to entertain the Application pursuant to, and solely on the basis of . . . Article 38, paragraph 5", of the Rules of Court, while specifying that this consent was "valid only for the purposes of the case, within the meaning of Article 38, paragraph 5, i.e. in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein" by Djibouti. The case was entered in the General List of the Court under the date of 9 August 2006.

By letters dated 17 October 2006, the Registrar informed both Parties that the Member of the Court of French nationality had notified the Court of his intention not to take part in the decision of the case, taking into account the provisions of Article 17, paragraph 2, of the Statute. Pursuant to Article 31 of the Statute and Article 37, paragraph 1, of the Rules of Court, France chose Mr. Gilbert Guillaume to sit as judge ad hoc in the case. Since the Court included upon the Bench no judge of Djiboutian nationality, Djibouti proceeded to exercise its right conferred by Article 31 of the Statute to choose a judge ad hoc to sit in the case: it chose Mr. Abdulqawi Ahmed Yusuf.

By an Order dated 15 November 2006, the Court fixed 15 March 2007 and 13 July 2007, respectively, as the time-limits for the filing of the Memorial of Djibouti and the Counter-Memorial of France; those pleadings were duly filed within the time-limits so prescribed. The Parties not having deemed it necessary to file a Reply and a Rejoinder, and the Court likewise having seen no need for these, the case was therefore ready for hearing.

Public hearings were held between 21 and 29 January 2008. At the conclusion of the oral proceedings, the Parties presented the following final submissions to the Court:

On behalf of the Government of Djibouti,

"The Republic of Djibouti requests the Court to adjudge and declare:

1. that the French Republic has violated its obligations under the 1986 Convention:

   (i) by not acting upon its undertaking of 27 January 2005 to execute the letter rogatory addressed to it by the Republic of Djibouti dated 3 November 2004;

   (ii) in the alternative, by not performing its obligation pursuant to Article 1 of the aforementioned Convention following its wrongful refusal given in the letter of 6 June 2005;

   (iii) in the further alternative, by not performing its obligation pursuant to Article 1 of the aforementioned Convention following its wrongful refusal given in the letter of 31 May 2005;

2. that the French Republic shall immediately after the delivery of the Judgment by the Court:

   (i) transmit the "Borrel file" in its entirety to the Republic of Djibouti;

   (ii) in the alternative, transmit the "Borrel file" to the Republic of Djibouti within the terms and conditions determined by the Court;

3. that the French Republic has violated its obligation pursuant to the principles of customary and general international law not to attack the immunity, honour and dignity of the President of the Republic of Djibouti:

   (i) by issuing a witness summons to the President of the Republic of Djibouti on 17 May 2005;

   (ii) by repeating such attack or by attempting to repeat such attack on 14 February 2007;

   (iii) by making both summonses public by immediately circulating the information to the French media;

   (iv) by not responding appropriately to the two letters of protest from the Ambassador of the Republic of Djibouti in Paris dated 18 May 2005 and 14 February 2007 respectively;

4. that the French Republic has violated its obligation pursuant to the principles of customary and general international law to prevent attacks on the immunity, honour and dignity of the President of the Republic of Djibouti;

5. that the French Republic shall immediately after the delivery of the Judgment by the Court withdraw the witness summons dated 17 May 2005 and declare it null and void;

6. that the French Republic has violated its obligation pursuant to the principles of customary and general international law not to attack the person, freedom and honour of the procureur général of the Republic of Djibouti and the Head of National Security of Djibouti;

7. that the French Republic has violated its obligation pursuant to the principles of customary and general international law to prevent attacks on the person, freedom and honour of the procureur général of the Republic of Djibouti and the Head of National Security of the Republic of Djibouti;

8. that the French Republic shall immediately after the delivery of the Judgment by the Court withdraw the summonses to attend as témoins assistés and the arrest warrants issued against the procureur général of the Republic of Djibouti and the Head of National Security of the Republic of Djibouti and declare them null and void;

9. that the French Republic by acting contrary to or by failing to act in accordance with Articles 1, 3, 4, 6 and 7 of the Treaty of Friendship and Co-operation of 1977 individually or collectively has violated the spirit and purpose of that Treaty, as well as the obligations deriving therefrom;

10. that the French Republic shall cease its wrongful conduct and abide strictly by the obligations incumbent on it in the future;

11. that the French Republic shall provide the Republic of Djibouti with specific assurances and guarantees of non-repetition of the wrongful acts complained of."

On behalf of the Government of France,

"For all the reasons set out in its Counter-Memorial and during its oral argument, the French Republic requests the Court:

(1) (a) to declare that it lacks jurisdiction to rule on those claims presented by the Republic of Djibouti upon completion of its oral argument which go beyond the subject of the dispute as set out in its Application, or to declare them inadmissible;

(b) in the alternative, to declare those claims to be unfounded;

(2) to reject all the other claims made by the Republic of Djibouti."

The facts of the case (paras. 19-38)

The Court notes initially that the Parties concur that it is not for it to determine the facts and establish responsibilities in the Borrel case, and in particular, the circumstances in which Mr. Borrel met his death. It adds that they agree that the dispute before the Court does however originate in that case, as a result of the opening of a number of judicial proceedings, in France and in Djibouti, and the resort to bilateral treaty mechanisms for mutual assistance between the Parties. The Court describes at length the facts, some admitted and others disputed by the Parties, and the judicial proceedings brought in connection with the Borrel case.

Jurisdiction of the Court (paras. 39-95)

The Court recalls that Djibouti sought to found the Court's jurisdiction on Article 38, paragraph 5, of the Rules of Court. It notes that while France acknowledges that the Court's jurisdiction to settle the dispute is "beyond question" by virtue of that provision, it contests the scope of that jurisdiction ratione materiae and ratione temporis to deal with certain violations alleged by Djibouti

Preliminary question regarding jurisdiction and admissibility (paras. 45-50)

The Court notes that in determining the scope of the consent expressed by one of the parties, it pronounces on its jurisdiction and not on the admissibility of the application. It then proceeds to examine the objections raised by France relating to the scope of its jurisdiction.

Jurisdiction ratione materiae (paras. 51-64)

After stating the positions of the Parties, the Court notes that its jurisdiction is based on the consent of States, under the conditions expressed therein, and that neither the Statute of the Court nor its Rules require that the consent of the parties which thus confers jurisdiction on the Court be expressed in any particular form. The Court recalls that it has also interpreted Article 36, paragraph 1, of the Statute as enabling consent to be deduced from certain acts, thus accepting the possibility of forum prorogatum. Thus for it to exercise jurisdiction on the basis of forum prorogatum, the Court is of the opinion that the element of consent must be either explicit or clearly to be deduced from the relevant conduct of a State.

The Court observes that this is the first time it falls to the Court to decide on the merits of a dispute brought before it by an application based on Article 38, paragraph 5, of the Rules of Court. It indicates that this provision, introduced by the Court into its Rules in 1978, allows a State which proposes to found the jurisdiction of the Court to entertain a case upon a consent thereto yet to be given or manifested by another State to file an application setting out its claims and inviting the latter to consent to the Court dealing with them, without prejudice to the rules governing the sound administration of justice. It notes that the State which is asked to consent to the Court's jurisdiction to settle a dispute is completely free to respond as it sees fit; if it consents to the Court's jurisdiction, it is for it to specify, if necessary, the aspects of the dispute which it agrees to submit to the judgment of the Court. It explains that the deferred and ad hoc nature of the Respondent's consent, as contemplated by Article 38, paragraph 5, of the Rules of Court, makes the procedure set

out there a means of establishing forum prorogatum. The Court adds that its jurisdiction can be founded on forum prorogatum in a variety of ways, by no means all of which fall under Article 38, paragraph 5. It stipulates, however, that no applicant may come to the Court without being able to indicate, in its Application, the State against which the claim is brought and the subject of the dispute, as well as the precise nature of that claim and the facts and grounds on which it is based.

Extent of the mutual consent of the Parties (paras. 65-95)

The Court then turns to discerning the extent of the mutual consent of the Parties. To this end, it examines the terms of France's acceptance of the jurisdiction of the Court and the terms of Djibouti's Application to which that acceptance responds.

The Court notes that France has taken the view that it has only accepted the Court's jurisdiction over the stated subject-matter of the case which is to be found, and only to be found, in paragraph 2 of the Application, under the heading "Subject of the dispute".

That paragraph reads as follows:

> "The subject of the dispute concerns the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the Case against X for the murder of Bernard Borrel, in violation of the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic, of 27 September 1986, and in breach of other international obligations borne by the French Republic to the Republic of Djibouti."

Basing itself upon its jurisprudence, the Court indicates that the subject of the dispute was not to be determined exclusively by reference to matters set out under the relevant section heading of the Application. The Court thus notes that the Application, taken as a whole, has a wider scope than that described in the aforementioned paragraph and that it includes the summonses sent to the Djiboutian President on 17 May 2005 and those sent to other Djiboutian officials on 3 and 4 November 2004.

The Court indicates that the Parties do not contest that the claims relating to the Djiboutian letter rogatory of 3 November 2004 and thus the question of compliance, in particular, with the 1986 Convention on Mutual Assistance in Criminal Matters are subject to its jurisdiction. It notes, however, that they disagree on the issue of whether the claims relating to the summonses sent by France to the Djiboutian President, the procureur de la République of Djibouti and the Djiboutian Head of National Security, as well as the arrest warrants issued against the latter two officials, fall within its jurisdiction.

The operative phrases in France's response to Djibouti's Application read as follows:

> "I have the honour to inform you that the French Republic consents to the Court's jurisdiction to entertain the Application pursuant to and solely on the basis of said Article 38 paragraph 5 [of the Rules of Court].
>
> The present consent to the Court's jurisdiction is valid only for the purposes of the case within the meaning of Article 38, paragraph 5, i.e. in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein by the Republic of Djibouti."

After examining the France's letter of acceptance, the Court declares that on the basis of a plain reading of the text of that letter, by its choice of words, the consent of the Respondent is not limited to the "subject of the dispute" as described in paragraph 2 of the Djibouti's Application. It finds that when France, which had full knowledge of the claims formulated by Djibouti in its Application, sent its letter to the Court, it did not seek to exclude certain aspects of the dispute forming the subject of the Application from its jurisdiction. The Court consequently holds that, with regard to jurisdiction ratione materiae, the claims concerning both subject-matters referred to in Djibouti's Application, namely, France's refusal to comply with Djibouti's letter rogatory and the summonses to appear sent by the French judiciary, on the one hand to the President of Djibouti dated 17 May 2005, and on the other hand to two senior Djiboutian officials dated 3 and 4 November 2004 and 17 June 2005, are within the Court's jurisdiction.

The Court then turns to the question of its jurisdiction over the witness summons of 2007 served on the President of Djibouti and the arrest warrants of 2006 issued against the senior Djiboutian officials [actions which took place after the filing of the Application]. It recalls that, in its Memorial, Djibouti argued that it had reserved the right, in the Application, "to amend and supplement [it]" and that it noted that the claims based on violations of the international law on immunities which took place after 9 January 2006 were not "new or extraneous to the initial claims" and that they "all relate[d] to the claims set out in the Application and [were] based on the same legal grounds". The Court notes that France, for its part, has submitted that any possible jurisdiction of the Court to address such violations could not be exercised in respect of facts occurring after the filing of the Application

With respect to the arrest warrants issued for senior Djiboutian officials, the Court indicates that it is clear from France's letter that its consent does not go beyond what is in that Application. It emphasizes that where jurisdiction is based on forum prorogatum, great care must be taken regarding the scope of the consent as it has been circumscribed by the respondent State. The Court recalls that France's consent is valid "only for the purposes of the case", that is, regarding "the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein by the Republic of Djibouti"; that in Djibouti's Application there are no claims relating to arrest warrants; and that, although the arrest warrants could be perceived as a method of enforcing the summonses, they represent new legal acts in respect of which France cannot be considered as having implicitly accepted the Court's jurisdiction. Therefore the Court is of the opinion that the claims relating to the arrest warrants arise in respect of issues which are outside the scope of the Court's jurisdiction ratione materiae.

With respect to the summons addressed to the President of Djibouti on 14 February 2007, the Court indicates that it was in relation to the same case as the initial summons sent to the President of Djibouti on 17 May 2005, was issued by the same judge, and it was in relation to the same legal question, but that this time it followed the proper form under French law. The Court finds that, even though it had been corrected as to form, it was a repetition of the witness summons of 17 May 2005. It emphasizes that in the list of the legal grounds on which Djibouti bases its Application (see paragraph 3 of that document), it referred expressly to the attacks on the person of a Head of State. Noting that France has accepted the jurisdiction of the Court in relation to the "claims formulated" in Djibouti's Application, the Court reaches the conclusion that it has jurisdiction to examine both of the aforementioned summonses.

The alleged violation of the Treaty of Friendship and Co-operation between France and Djibouti of 27 June 1977 (paras. 96-114)

Djibouti argues that France violated a general obligation of co-operation provided for by the Treaty of Friendship and Co-operation (singed by the two States on 27 June 1977) by not co-operating with it in the context of the judicial investigation into the Borrel case, by attacking the dignity and honour of the Djiboutian Head of State and other Djiboutian authorities and by acting

in disregard of the principles of equality, mutual respect and peace set out in Article 1 of the Treaty. France, for its part, contends that any interpretation of the Treaty resulting in the acknowledgment of the existence of a general obligation to co-operate which is legally binding on it in respect of the execution of the international letter rogatory is inconsistent not only with the wording of the Treaty, but also with its object, its purpose, its context, and the will of the parties.

The Court engages in a meticulous examination of the provisions of the Treaty. While it notes that the respective obligations of the Treaty are obligations of law, articulated as obligations of conduct, committing the Parties to work towards the attainment of certain objectives, it finds that mutual assistance in criminal matters, the subject regulated by the 1986 Convention, is not a matter mentioned among the fields of co-operation enumerated in the Treaty of 1977.

If, moreover, the Court concludes that the Treaty of Friendship and Co-operation of 1977 does have a certain bearing on the interpretation and application of the Convention on Mutual Assistance in Criminal Matters (of 27 September 1986 between Djibouti and France), inasmuch as it must be interpreted and applied in such a way as to take into consideration the friendship and co-operation established by France and Djibouti as the basis for their mutual relations in the 1977 Treaty, it notes nevertheless that that is as far as the relationship between the two instruments can be explained in legal terms. The Court is thus of the opinion that, in the light of its jurisprudence and of the customary rule laid down in Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties of 23 May 1969, an interpretation of the 1986 Convention duly taking into account the spirit of friendship and co-operation stipulated in the 1977 Treaty cannot possibly stand in the way of a party to that Convention relying on a clause contained in it which allows for non-performance of a conventional obligation under certain circumstances.

The alleged violation of the Convention on Mutual Assistance in Criminal Matters between France and Djibouti of 27 September 1986 (paras. 115-156)

Djibouti claims that France violated the aforementioned Convention by refusing to execute the letter rogatory issued on 3 November 2004 by the Djiboutian judicial authorities. The Court examines in turn the three arguments presented by Djibouti to support this claim.

The obligation to execute the international letter rogatory (paras. 116-124)

According to Djibouti, the obligation to execute the international letter rogatory laid down in Article 1 of the 1986 Convention allegedly imposes on the two Parties an obligation of reciprocity in implementing the Convention. The Court notes in this respect that in the relations between Djibouti and France, Article 1 of the Convention of 1986 refers to mutuality in the performance of the obligations laid down therein. It considers in this regard that each request for legal assistance is to be assessed on its own terms by each Party. It notes, moreover, that the Convention nowhere provides that the granting of assistance by one State in respect of one matter imposes on the other State the obligation to do likewise when assistance is requested of it in turn. The Court accordingly considers that Djibouti cannot rely on the principle of reciprocity in seeking execution of the international letter rogatory it submitted to the French judicial authorities.

As for the obligation to execute international letters rogatory laid down in Article 3 of the 1986 Convention, the Court observes that it is to be realized in accordance with the procedural law of the requested State. It indicates that the ultimate treatment of a request for mutual assistance in criminal matters clearly depends on the decision by the competent national authorities, following the procedure established in the law of the requested State. While it must of course ensure that the procedure is put in motion, the State does not thereby guarantee the outcome, in the sense of the transmission of the file requested in the letter rogatory. The Court notes that Article 3 must be read in conjunction with Articles 1 and 2 of the Convention.

The alleged undertaking by France to execute the international letter rogatory requested by Djibouti (paras. 125-130)

The Court then comes to the assessment of a letter dated 27 January 2005 addressed to the Ambassador of Djibouti in Paris by the Principal Private Secretary to the French Minister of Justice written as follows:

> "I have asked for all steps to be taken to ensure that a copy of the record of the investigation into the death of Mr. Bernard Borrel is transmitted to the Minister of Justice and Penal and Muslim Affairs of the Republic of Djibouti before the end of February 2005 (such time being required because of the volume of material to be copied).
>
> I have also asked the procureur in Paris to ensure that there is no undue delay in dealing with this matter."

Djibouti argues that this amounted to an undertaking by the Principal Private Secretary (which was binding on the French Ministry of Justice and the French State as a whole) and that that undertaking gave rise to a legitimate expectation on its part that the file would be transmitted.

The Court notes that the terms of the letter of 27 January 2005, when given their ordinary meaning, entail no formal undertaking by the Principal Private Secretary to the Minister of Justice to transmit the Borrel file; the letter rather informed the Ambassador of Djibouti to France of the steps that had been undertaken to set in motion the legal process to make possible the transmission of the file. It adds that in any event the Principal Private Secretary could not have given a definitive commitment, because French law (Art. 694-2 of the French Code of Criminal Procedure) grants the authority to execute letters rogatory exclusively to investigating judges. Accordingly, the Court considers that, by virtue of its content and the factual and legal circumstances surrounding it, the letter of 27 January 2005 does not, by itself, entail a legal undertaking by France to execute the international letter rogatory transmitted to it by Djibouti on 3 November 2004.

France's refusal to execute the international letter rogatory (paras. 131-156)

Djibouti argues that France cannot rely on the provisions of Article 2 (c) of the Convention of 1986, by virtue of which a State may refuse mutual assistance, if it considers that execution of the request is likely to prejudice its essential interests. It further indicates that French law cannot be interpreted as giving the investigating judge sole authority to determine the essential interests of the State. Djibouti asserts that France, in the letter from its Ambassador in Djibouti to the Djiboutian Minister for Foreign Affairs of 6 June 2005, omitted to provide any reason for its "unilateral" refusal of mutual assistance, in violation of Article 17 of the Convention of 1986, which lays down that "[r]easons shall be given for any refusal of mutual assistance". According to Djibouti, the obligation to give reasons is in fact a condition of the validity of the refusal. It points out in this respect that the mere mention of Article 2 (c) is at best to be considered as a very general sort of "notification", which is in its opinion certainly not the same as providing "reasons".

France, for its part, points out that it is not for another State to determine how France should organize its own procedures. It notes that penal matters, more than others, affect the national sovereignty of States and their security, ordre public and other essential interests, as mentioned in Article 2 (c) of the Convention of 1986. It adds that not only did it inform Djibouti on 31 May 2005, in a letter from the Director of Criminal Affairs and Pardons at the Ministry of Justice to the Ambassador of Djibouti to France, of the investigating judge's refusal of the request for mutual assistance concerned, but that it also gave explicit reasons for its refusal by referring to Article 2 (c) of the Convention of 1986. France considers in that respect that the citation of that article suffices as the statement of reasons required by Article 17 of the Convention.

As Djibouti denies that its Ambassador in Paris ever received the letter dated 31 May 2005 and as France was unable to demonstrate that it had indeed been sent to the Djiboutian authorities, the Court concludes that it cannot take this document into consideration in its examination of the present case

After recalling the circumstances in which the French judicial authorities took the decision to refuse to execute the international letter rogatory and how Djibouti was informed of that decision, the Court indicates that it is unable to accept the contention of Djibouti that, under French law, matters relating to security and ordre public could not fall for determination by the judiciary alone. It declares that it is aware that the Ministry of Justice had at a certain time been very active in dealing with such issues. However, the Court adds, where ultimate authority lay in respect of the response to a letter rogatory was settled by the Chambre de l'instruction of the Paris Court of Appeal in its judgment of 19 October 2006. The Chambre de l'instruction held that the application, in one way or another, of Article 2 of the 1986 Convention to a request made by a State is a matter solely for the investigating judge (who will have available information from relevant government departments). The Court of Appeal further determined that such a decision by an investigating judge is a decision in law, and not an advice to the executive. It is not for this Court to do other than accept the findings of the Paris Court of Appeal on this point.

As to whether the decision of the competent authority was made in good faith, and falls within the scope of Article 2 of the 1986 Convention, the Court recalls that Judge Clément's soit-transmis of 8 February 2005 states the grounds for her decision to refuse the request for mutual assistance. The judge explained in it that transmission of the file was considered to be "contrary to the essential interests of France", in that the file contained declassified "defence secret" documents, as well as information and witness statements in respect of another case in progress, the transmission of which to a foreign political authority would have amounted "to an abuse of French law", as they were "documents that are accessible only to the French judge". The Court indicates moreover that it was not evident from this soit-transmis why Judge Clément found that it was not possible to transmit part of the file, even with some documents removed or blackened out. It explains, however, that it was able to deduce from the written and oral pleadings of France that the intelligence service documents and information permeated the entire file. Consequently, the Court finds that those reasons that were given by Judge Clément do fall within the scope of Article 2 (c) of the 1986 Convention.

The Court is unable to accept, as France contends, that there has been no violation of Article 17 on the ground that Djibouti was allegedly informed that Article 2 (c) had been invoked. Equally, the Court is unable to accept the contention of France that the fact that the reasons have come within the knowledge of Djibouti during these proceedings means that there has been no violation of Article 17. A legal obligation to notify reasons for refusing to execute a letter rogatory is not fulfilled through the requesting State learning of the relevant documents only in the course of litigation, some long months later. As no reasons were given in the letter of 6 June 2005, the Court concludes that France failed to comply with its obligation under Article 17 of the 1986 Convention.

The Court observes in this respect that even if it had been persuaded of the transmission of the letter of 31 May 2005, the bare reference it was said to contain to Article 2 (c) would not have sufficed to meet the obligation of France under Article 17. It considers that some brief further explanation was called for and that this is not only a matter of courtesy. It also allows the requested State to substantiate its good faith in refusing the request.

The Court observes finally that there is a certain relationship between Articles 2 and 17 of the Convention in the sense that the reasons that may justify refusals of mutual assistance which are to be given under Article 17 include the grounds specified in Article 2. At the same time, Articles 2 and 17 provide for distinct obligations, and the terms of the Convention do not suggest

that recourse to Article 2 is dependent upon compliance with Article 17. The Court thus finds that, in spite of the non-respect by France of Article 17, the latter was entitled to rely upon Article 2 (c) and that, consequently, Article 1 of the Convention has not been breached.

The alleged violations of the obligation to prevent attacks on the person, freedom or dignity of an internationally protected person (paras. 157-200)

Djibouti considers that France, by sending witness summonses to the Head of State of Djibouti and to senior Djiboutian officials, has violated "the obligation deriving from established principles of customary and general international law to prevent attacks on the person, freedom or dignity of an internationally protected person".

The alleged attacks on the immunity from jurisdiction or the inviolability of the Djiboutian Head of State (paras. 161-180)

Djibouti calls into question two witness summonses in the Borrel case, issued by the French investigating judge, Judge Clément, to the President of the Republic of Djibouti on 17 May 2005 and 14 February 2007 respectively.

— The witness summons addressed to the Djiboutian Head of State on 17 May 2005

The Court recalls that the investigating judge responsible for the Borrel case sent a witness summons to the President of Djibouti, on an official visit to France at the time, on 17 May 2005, simply by facsimile to the Djiboutian Embassy in France, inviting him to attend in person at the judge's office the following day. For Djibouti, this summons was not only inappropriate as to its form, but was, in the light of Articles 101 and 109 of the French Code of Criminal Procedure, an element of constraint. Djibouti has, moreover, inferred from the absence of an apology and from the fact that that summons was not declared void that the attack on the immunity, honour and dignity of the Head of State has continued.

France, for its part, submits that the summoning of a foreign Head of State as an ordinary witness in no sense constitutes an infringement of "the absolute nature of the immunity from jurisdiction and, even more so, from enforcement that is enjoyed by foreign Heads of State". In its view, the witness summons addressed to the Djiboutian Head of State was purely an invitation which imposed no obligation on him.

The Court indicates that it has already recalled in the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) case "that in international law it is firmly established that . . . certain holders of high-ranking office in a State, such as the Head of State . . . enjoy immunities from jurisdiction in other States, both civil and criminal" (Judgment, I.C.J. Reports 2002, pp. 20-21, para. 51). In its opinion, a Head of State enjoys in particular "full immunity from criminal jurisdiction and inviolability" which protects 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" (ibid., p. 22, para. 54). 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.

In the present case, the Court finds that the summons was not associated with the measures of constraint provided for by Article 109 of the French Code of Criminal Procedure; it was in fact merely an invitation to testify which the Head of State could freely accept or decline. Consequently, the Court holds that there was no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State.

However, the Court notes that the investigating judge, Judge Clément, addressed the summons to Djibouti's President notwithstanding the formal procedures laid down by Article 656 of the French Code of Criminal Procedure, which deals with the "written statement of the representative of a foreign Power". The Court considers that by inviting a Head of State to give evidence simply through sending him a facsimile and by setting him an extremely short deadline without consultation to appear at her office, the investigating judge failed to act in accordance with the courtesies due to a foreign Head of State.

Having taken note of all the formal defects surrounding the summons under French law, the Court considers that these do not in themselves constitute a violation by France of its international obligations regarding the immunity from criminal jurisdiction and the inviolability of foreign Heads of State. Nevertheless, the Court observes that an apology would have been due from France.

The Court recalls, moreover, that the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, whereby receiving States are under the obligation to protect the honour and dignity of diplomatic agents, necessarily applies to Heads of State. The Court observes, in this respect, that if it had been shown by Djibouti that confidential information relating to the witness summons addressed to its President had been passed from the offices of the French judiciary to the media, such an act could have constituted, in the context concerned, not only a violation of French law, but also a violation by France of its international obligations. However, the Court recognizes that it does not possess any probative evidence that would establish that the French judicial authorities are the source behind the dissemination of the confidential information in question.

— The witness summons addressed to the Djiboutian Head of State on 14 February 2007

With respect to the second summons, the Court finds that it was issued following the procedure laid down by Article 656 of the French Code of Criminal Procedure, and therefore in accordance with French law. It notes that the consent of the Head of State is expressly sought in this request for testimony, which was transmitted through the intermediary of the authorities and in the form prescribed by law. The Court consequently considers that this measure cannot have infringed the immunities from jurisdiction enjoyed by the Djiboutian Head of State.

As for Djibouti's argument, that the disclosure to the media of confidential information regarding the second witness summons, in breach of the confidentiality of the investigation, must be regarded as an attack on the honour or the dignity of its Head of State, the Court indicates once again that it has not been provided with probative evidence which would establish that the French judicial authorities were the source behind the dissemination of the confidential information at issue here.

The alleged attacks on the immunities said to be enjoyed by the procureur de la République and the Head of National Security of Djibouti (paras. 181-200)

The Court examines the four summonses as témoins assistés addressed in 2004 and 2005 by French judges to senior Djiboutian officials, Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh, respectively procureur de la République and Head of National Security of Djibouti. According to Djibouti, these witness summonses violate international obligations on immunities, both conventional and deriving from general international law.

The Court recalls that in the event of summonses as témoins assistés, the situation envisaged 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". The person concerned is thus 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).

Djibouti initially contended that the procureur de la République and the Head of National Security benefited from personal immunities from criminal jurisdiction and inviolability, before rejecting this argument during the oral proceedings. It then argued in terms of "functional immunity, or ratione materiae". 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. The Court observes 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.

France, in replying to this new formulation of Djibouti's argument, indicated that as functional immunities are not absolute, it is for the justice system of each country to assess, when criminal proceedings are instituted against an individual, whether, in view of the acts of public authority performed in the context of his duties, that individual should enjoy, as an agent of the State, the immunity from criminal jurisdiction that is granted to foreign States. According to France, the two senior officials concerned have never availed themselves before the French criminal courts of the immunities which Djibouti claims on their behalf.

The Court observes, initially, that it has not been "concretely verified" before it that the acts which were the subject of the summonses as témoins assistés issued by France were indeed acts within the scope of their duties as organs of State. It then points out that it is not apparent from the terms of the final submissions of Djibouti that the claim that Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh benefited from functional immunities as organs of State still constitutes the only or the principal argument being made by Djibouti.

The Court notes 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.

The Court must also observe 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 of the State of Djibouti and that the procureur de la République and the Head of National Security were its organs, agencies or instrumentalities in carrying them out.

The Court emphasizes that the State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned, thereby enabling 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.

Given all these elements, the Court does not uphold the sixth and seventh final submissions of Djibouti.

Remedies (paras. 201-204)

Having found that the reasons invoked by France, in good faith, under Article 2 (c) fall within the provisions of the 1986 Convention, the Court will not order the Borrel file to be transmitted with certain pages removed, as Djibouti has requested in the alternative. Having itself no knowledge of the contents of the file, the Court considers that it would not have been in a position so to do.

With respect to remedies to the violation by France of its obligation to Djibouti under Article 17 of the 1986 Convention, the Court declares that it will not order the publication of the reasons underlying the decision, as specified in the soit-transmis of Judge Clément, underlying the refusal of the request for mutual assistance, these having in the meantime passed into the public domain. The Court determines that its finding that France has violated that obligation constitutes appropriate satisfaction.

Operative clause (para. 205)

"For these reasons,

THE COURT,

(1) As regards the jurisdiction of the Court,

(a) Unanimously,

Finds that it has jurisdiction to adjudicate upon the dispute concerning the execution of the letter rogatory addressed by the Republic of Djibouti to the French Republic on 3 November 2004;

(b) By fifteen votes to one,

Finds that it has jurisdiction to adjudicate upon the dispute concerning the summons as witness addressed to the President of the Republic of Djibouti on 17 May 2005, and the summonses as "témoins assistés" (legally assisted witnesses) addressed to two senior Djiboutian officials on 3 and 4 November 2004 and 17 June 2005;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Buergenthal, Owada, Simma, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judges ad hoc Guillaume, Yusuf;

AGAINST: Judge Parra-Aranguren;

(c) By twelve votes to four,

Finds that it has jurisdiction to adjudicate upon the dispute concerning the summons as witness addressed to the President of the Republic of Djibouti on 14 February 2007;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Shi, Koroma, Buergenthal, Owada, Simma, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Yusuf;

AGAINST: Judges Ranjeva, Parra-Aranguren, Tomka; Judge ad hoc Guillaume;

(d) By thirteen votes to three,

Finds that it has no jurisdiction to adjudicate upon the dispute concerning the arrest warrants issued against two senior Djiboutian officials on 27 September 2006;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Simma, Tomka, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Guillaume;

AGAINST: Judges Owada, Skotnikov; Judge ad hoc Yusuf;

(2) As regards the final submissions of the Republic of Djibouti on the merits,

(a) Unanimously,

Finds that the French Republic, by not giving the Republic of Djibouti the reasons for its refusal to execute the letter rogatory presented by the latter on 3 November 2004, failed to comply with its international obligation under Article 17 of the Convention on Mutual Assistance in Criminal Matters between the two Parties, signed in Djibouti on 27 September 1986, and that its finding of this violation constitutes appropriate satisfaction;

(b) By fifteen votes to one,

Rejects all other final submissions presented by the Republic of Djibouti.

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Buergenthal, Owada, Simma, Tomka, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Guillaume;

AGAINST: Judge ad hoc Yusuf."

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Judges Ranjeva, Koroma, Parra-Aranguren append separate opinions to the Judgment of the Court; Judge Owada appends a declaration to the Judgment of the Court; Judge Tomka appends a separate opinion to the Judgment of the Court; Judges Keith and Skotnikov append declarations to the Judgment of the Court; Judge ad hoc Guillaume appends a declaration to the Judgment of the Court; Judge ad hoc Yusuf appends a separate opinion to the Judgment of the Court.

Separate opinion of Judge Ranjeva

In the opinion of Judge Raymond Ranjeva, the Judgment failed to meet the requirements of forum prorogatum when, by finding that the second witness summons, dated 14 February 2007, fell within the Court's jurisdiction, it extended that jurisdiction ratione materiae. While the errors which marred the first witness summons explain why the second was issued, the fact remains that, in law, the latter is an independent judicial act.

Indeed, for the second witness summons to exist in legal form, it was necessary for the investigating judge to use discretion and deliberately opt to take a new judicial decision. Judge Ranjeva considers that the Judgment arrived at the above finding by abandoning the definition of the subject of the dispute as set out in the Application and adopting instead the definition contained in the Memorial: "in breach of . . . obligations . . ." (see the Application) under the Convention on Mutual Assistance in Criminal Matters cannot mean, in French, the official language of both Parties, "as well as the . . . breaching of . . . international obligations" (see the Memorial). In this case, the Respondent's consent was founded on the definition of the subject of the dispute according to the terms used in the Application. In the event of doubt, a critical analysis of the terms of the Application should have been made, but the Judgment did not undertake this. Consequently, and contrary to the rules of forum prorogatum, by extending the Court's jurisdiction ratione materiae, the Judgment has considered not the justiciable dispute itself, but the dispute in its entirety.

Separate opinion of Judge Koroma

In his separate opinion, Judge Koroma states that he voted in favour of the operative paragraphs, for various reasons, including the decision by France to give its consent under Article 38, paragraph 5, of the Rules of Court, which allowed the Court to exercise its jurisdiction in this case.

In Judge Koroma's view, the issue before the Court is not whether the 1986 Convention on Mutual Assistance in Criminal Matters allows for the non-performance of a conventional obligation under certain circumstances but rather whether, in applying that Convention in the context of an investigation into the murder of a citizen of one of the parties to the Convention, due regard ought not to be paid to the 1977 Treaty of Friendship and Co-operation between the two parties, especially when the Treaty is being invoked not with the intention of impeding or subverting the investigation but to further it. Allowing the Parties to avail themselves of the Treaty in this way not only serves their interests but also accords with its object, purpose and spirit, as both Parties have an interest in uncovering the facts and circumstances surrounding the death of Judge Borrel.

Judge Koroma also points out in his separate opinion that, apart from the obligation of the two parties to the 1977 Treaty to co-operate, the Treaty also recognizes equality and mutual respect to be the basis of relations between the two countries. In applying the 1986 Convention due account ought to have been taken of those principles, especially when Djibouti, in a spirit of co-operation, equality and mutual respect, had complied with France's request to execute the international letters rogatory relating to the investigation of Mr. Borrel's death, providing access to necessary documents, witnesses and sites, including the presidential palace in Djibouti. On the other hand, had Djibouti declined such co-operation by not executing France's letters rogatory, not only could it have been regarded to be in breach of its obligation to co-operate in the investigation of the death but a negative inference would have arisen as to its culpability.

The Judge further recalls that a party to a treaty may not invoke its domestic law as justification for the non-fulfilment of its obligation, responding to the contention of the Respondent that it had to comply with the domestic law in discharging its obligation under the 1986 Convention on Mutual Assistance in Criminal Matters between the two countries.

In Judge Koroma's view, the Court should have taken into account the principle of reciprocity — a principle which is inherent and comprehended within a bilateral treaty, such as the 1986 Convention. He emphasizes that a State enters into a treaty relationship expecting that the other party will perform its own treaty or conventional obligations. Accordingly, Djibouti was entitled to expect that France would comply, on the basis of reciprocity, with Djibouti's request for the execution of its letter rogatory, since it had earlier complied with France's requests dealing with the same subject-matter, namely, the investigation into the death of Mr. Borrel.

Judge Koroma takes the view that the obligation to respect the dignity and honour of the Djiboutian Head of State was violated by the French magistrate not only when the witness summonses were sent to him by facsimile and setting him a short deadline to appear at her office, but also when these were leaked to the press. The Judge points out that international law imposes on receiving States the obligation to respect the inviolability, honour and dignity of Heads of State — meaning immunity from all interference whether under colour of law or right or otherwise, and connotes a special duty of protection from such interference or from mere insult, on the part of the receiving State. In his view, the matters complained of involved not merely matters of courtesy but the obligation to respect the immunity of the Head of State from legal process. In Judge Koroma's view, when the Court came to the conclusion that there was a violation and an apology due in the form of a remedy, this should have been reflected in the operative paragraph as a finding of the Court, as such paragraph has a legal significance of its own and for a party in whose favour a determination has been made and who is entitled to have it enforced.

Separate opinion of Judge Parra-Aranguren

1. Judge Parra-Aranguren's vote in favour of paragraph 205, subparagraphs (1) (a) and (d), and of subparagraph (2) of the Judgment does not mean that he agrees with each and every part of the Court's reasoning in reaching its conclusions. The limited time available to present the separate opinion within the period fixed by the Court did not permit him to set out a complete explanation of his disagreement with paragraph 205, subparagraphs (1) (b) and (c). He has however advanced some of his main reasons for voting against them.

2. Djibouti sought in its Application to found the jurisdiction of the Court on Article 38, paragraph 5, of the Rules of Court. France informed the Court, by a letter from its Minister for Foreign Affairs dated 25 July 2006, of its consent "to the Court's jurisdiction to entertain the Application pursuant to and solely on the basis of said Article 38, paragraph 5", of the Rules of Court specifying that its consent was valid only "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein by the Republic of Djibouti".

3. In the opinion of France, the jurisdiction of the Court is restricted to deciding only "the dispute forming the subject of the Application" as determined in its paragraph 2, i.e., "the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the 'Case against X for the murder of Bernard Borrel', in violation of the Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic, of 27 September 1986, and in breach of other international obligations borne by the French Republic to the Republic of Djibouti".

4. Djibouti maintains to the contrary that "the dispute forming the subject of the Application" in respect of which France gave its consent involves not only the French authorities' refusal to execute the letter rogatory issued on 3 November 2004, but also all violations by France of its obligation to prevent attacks on the person, the freedom and the dignity of Djibouti's Head of State, Djibouti's procureur général and Djibouti's Head of National Security.

5. In determining its jurisdiction ratione materiae in the Judgment, the Court accepts Djibouti's contention.

6. The Court maintains that the subject-matter of the dispute may be discerned from a reading of the whole Application and observes: that paragraph 2 of Djibouti's Application, entitled "Subject of the dispute", does not mention any other matters which Djibouti also seeks to bring before the Court, namely, the various summonses sent to the President of Djibouti and two senior Djiboutian officials; that said summonses are mentioned in Djibouti's Application under the heading "Legal Grounds" and "Nature of the Claim"; that the Application, "despite a confined description of the subject of the dispute in its second paragraph, taken as a whole, has a wider scope which includes the summonses sent to the Djiboutian President on 17 May 2005 and those sent to other Djiboutian officials on 3 and 4 November 2004"; and that France had full knowledge of the claims formulated by Djibouti in its Application when sending its letter of 25 July 2006 to the Court but did not seek to exclude certain aspects of the dispute forming the subject of the Application from its jurisdiction.

7. Judge Parra-Aranguren considers that France did not consent to the jurisdiction of the Court in the present case in respect of all claims mentioned in Djibouti's Application, because, had that 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. In his opinion, the reference to Djibouti's Application in general terms is found in the first paragraph of the French letter, not in the second, where France expresses its limited consent to the jurisdiction of the Court. Consequently, France did not agree to have the Court decide all claims mentioned 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 of the claims formulated" by Djibouti. Therefore, contrary to the finding in the final sentence of paragraph 83 of the Judgment, the French declaration "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.

8. Moreover Judge Parra-Aranguren observes that in the second paragraph of its letter dated 25 July 2006 France consented to the Court deciding "the dispute forming the subject of the Application", not to its deciding the Application as a whole. Therefore, France's consent was given in respect of the dispute described by Djibouti not in the whole Application but only in paragraph 2, under the heading "Subject of the Dispute", which does not mention any alleged violations by France of its obligation to prevent attacks on the person, the freedom or the dignity of Djibouti's Head of State, Djibouti's procureur général or Djibouti's Head of National Security. Consequently, in his opinion, these are not part of "the dispute forming the subject of the Application", which is the only matter in respect of which France consented to a decision by the Court, and for this reason the Court does not have jurisdiction to rule upon them.

9. Additionally, Judge Parra-Aranguren notes that, in paragraphs 1 and 22 of its Application, Djibouti describes the "Subject of the Dispute" in similar terms to those used in paragraph 2. As

noted in the Judgment, Djibouti mentions the summonses issued by France in violation of its international obligations under the headings "Legal Grounds" and "Nature of the Claim". However, Judge Parra-Aranguren observes that they are also mentioned in the Application under the headings "Statement of Facts" and "Statement of the Grounds on Which the Claim is Based"' and that, notwithstanding these references to them, the last section of the Application, under the heading "Jurisdiction of the Court and Admissibility of the Present Application", describes the "Subject of the Dispute" in the same manner as in paragraph 2.

10. Given the above, in Judge Parra-Aranguren's opinion, "the dispute forming the subject of the Application" referred to by France in the second paragraph of its letter dated 25 July 2006 is to be understood to be that described in paragraph 2 of Djibouti's Application under the heading "Subject of the Dispute", as well as in paragraphs 1 and 22.

11. Finally, Judge Parra-Aranguren observes that no mention of any alleged violations by France of its obligation to prevent attacks on the person, the freedom or the dignity of Djibouti's Head of State, Djibouti's procureur général or Djibouti's Head of National Security is found in Documents I, III or IV attached to Djibouti's Application: i.e., the letter of 4 January 2006 from Mr. Djama Souleiman Ali, State Prosecutor of the Republic of Djibouti, to the President of the International Court of Justice; the "Delegation of Powers" signed by the President of the Republic of Djibouti on 28 December 2005; and an undated letter from the Minister for Foreign Affairs and International Co-operation of the Republic of Djibouti to the President of the International Court of Justice. Therefore, in Judge Parra-Aranguren's opinion it may be concluded from the silence of Djibouti's State Prosecutor, its President and its Minister for Foreign Affairs and International Co-operation, that none of them considered "the dispute forming the subject of the Application" to include any alleged violations by France of its obligation to prevent attacks on the person, the freedom or the dignity of Djibouti's Head of State, Djibouti's procureur général or Djibouti's Head of National Security.

12 The above-indicated reasons led Judge Parra-Aranguren to conclude that the Court does not have jurisdiction ratione materiae to decide any claims mentioned by Djibouti but not included in paragraph 2 of its Application. Therefore, it is mainly because of the Court's lack of jurisdiction, not for the reasons set out in the Judgment, that he voted in favour of subparagraphs (1) (d) and (2) (b).

Declaration of Judge Owada

Judge Owada appends a short declaration to the Judgment. In this declaration Judge Owada explains the reason why he has voted against subparagraph 1 (d) of the operative clause of the Judgment, relating to jurisdiction to adjudicate over the dispute concerning the arrest warrants issued against the two senior Djiboutian officials on 27 September 2006.

In the view of Judge Owada, while it is true that "[f]or the Court to exercise jurisdiction on the basis of forum prorogatum, the element of consent must be either explicit or clearly to be deduced from the relevant conduct of a State" (Judgment, para. 62), the task of the Court in the present case should not be any different from a case based on two declarations under the optional clause, given the fact that the Respondent in the present case has given its express consent ad hoc to the jurisdiction of the Court in a written form by the letter of the Respondent of 25 July 2006 in relation to the Application of the Applicant. All that is required is to interpret and apply the two relevant documents, so that the precise scope of the common consent of the parties may be defined through identifying the overlapping elements common to the two relevant documents.

However, in determining whether the Court has jurisdiction over events that took place after the filing of the Application, i.e., the witness summons of 2007 served on the President of Djibouti and the arrest warrants of 2006 issued against the Djiboutian senior officials, the Judgment departs from the criteria established in its jurisprudence as to whether those facts or events which are subsequent to the filing of the Application are inseparably connected to the facts or events expressly falling within the purview of the Court's jurisdiction, so that they may be covered by the scope of the subject of the dispute (e.g., Fisheries Jurisdiction (Federal Republic of Germany v. Iceland); LaGrand (Germany v. United States of America); and Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)). The Judgment makes a distinction in the present case by stating that "[i]n none of these cases was the Court's jurisdiction founded on forum prorogratum" and declares that "[a]lthough the arrest warrants could be perceived [to be] a method of enforcing the summonses, they represent new legal acts in respect of which France cannot be considered as having implicitly accepted the Court's jurisdiction". On this basis, the Court concludes that "[t]herefore, the claims relating to the arrest warrants arise in respect of issues which are outside the scope of the Court's jurisdiction ratione materiae" (Judgment, para. 88), whereas the issuance of the new summons to the President was "a repetition of the preceding one", and thus "in its substance, it is the same summons" (Judgment, para. 91), thus bringing this latter act within the purview of the jurisdiction of the Court.

In Judge Owada's view, the issue in both instances is the same. It is the issue of whether the acts subsequent to the filing of the Application fall within the scope of the acceptance by France of the Court's jurisdiction ratione materiae as deduced from the language used in France's letter of 25 July 2006, in particular the expression "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein by the Republic of Djibouti" (Judgment, para. 77). In this context, the jurisprudence of the Court as established in the above cases is of relevance to the present case in determining the scope of jurisdiction accepted by France in its letter of 25 July 2006.

For these reasons Judge Owada cannot agree with the Judgment, in that the Judgment departs from the established jurisprudence on the issue of the scope of the "subject-matter of the dispute" in introducing a new criterion of whether the subsequent events after the submission of the Application were "new legal acts" or not (Judgment, para. 88).

Separate opinion of Judge Tomka

In his separate opinion, Judge Tomka deals with the question of forum prorogatum, explaining that, in this case, to determine the scope of the Court's jurisdiction, the agreement of the Parties concluded by unilateral acts must be interpreted: the Application and the Respondent's reply. He states that it was the Applicant which, in its Application, introduced a contradiction between the subject of the dispute specified expressis verbis and the claims which did not wholly correspond with the subject of the dispute as circumscribed by the Applicant. He presents the arguments that it was possible for the Court to conclude that its jurisdiction was limited to France's refusal to execute an international letter rogatory from Djibouti. In the light of France's somewhat elliptical reply to Djibouti's Application, it was also possible for the Court to conclude that its jurisdiction ratione materiae was broader and included the invitations to appear as witnesses sent to the Head of State and certain Djiboutian senior officials. The majority decided in favour of this extended jurisdiction and Judge Tomka concurred with the majority. But he could not subscribe to the conclusion on one aspect of the jurisdiction ratione temporis. For him, that jurisdiction was limited to the claims formulated in the Application relating to the facts which occurred before the Application was filed on 9 January 2006, but not to the claims relating to the facts which occurred after the filing of the Application. France consented to the jurisdiction "in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein".

Judge Tomka notes that, in order to avoid problems relating to the scope of jurisdiction, it is always preferable for States to conclude a special agreement submitting questions agreed by the Parties to the Court for settlement.

Declaration of Judge Keith

Judge Keith in his declaration explains his conclusion that France, in the person of the investigating judge, did not exercise its power of refusal under Article 2 (c) of the 1986 Convention in accordance with the purpose of the Convention and relevant principles of law. In particular, the judge did not expressly consider whether she might hand over part of the file or suggest to Djibouti that it reformulate its request. That conclusion would not however have led Judge Keith, for reasons he sets out, to the conclusion that the file should be transferred to Djibouti.

Declaration Judge Skotnikov

Judge Skotnikov disagrees with the Court's reading of France's consent to its jurisdiction as excluding developments arising directly out of the questions which constitute the subject-matter of the Application of Djibouti but which occurred after it was filed. 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. By giving its consent, France has not "frozen" the ongoing dispute. Judge Skotnikov considers that the Court should have decided that it has jurisdiction in respect of the arrest warrants issued against two senior Djiboutian officials on 27 September 2006. This would have been in line with the Court's jurisprudence which has been dismissed by the Court on the grounds that its jurisdiction in the present case is founded on forum prorogatum. In Judge Skotnikov's view this jurisprudence is pertinent in the present case and in forum prorogatum cases in general. For these reasons he voted against paragraph (1) (d) of the operative clause.

For exactly the same reasons he voted in favour of the Court's finding in paragraph (1) (c) of the operative clause that it has jurisdiction to adjudicate upon the dispute concerning the summons to testify as witness addressed to the President of Djibouti on 14 February 2007 (after the date the Application was filed). However, he disagrees with the Court's reasoning on that subject.

Judge Skotnikov is critical of the Court's conclusion that, if it was established that information concerning the two invitations to testify addressed to the President of Djibouti had been passed to the media from the offices of the French judiciary, it could have constituted a violation by France of its international obligations (see Judgment, paras. 176 and 180). In his view, providing the media with information about these procedural acts, which, as it has been found by this Court, do not constitute a violation of the terms of Article 29 of the Vienna Convention on Diplomatic Relations, cannot be considered a violation of these very same terms. Further, he points out that the terms of Article 29 relate to the inviolability of the person of a Head of State. They do not provide for protection from negative media reports. He agrees with the Court that "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority". 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. Had it been proven that the relevant information was passed to the press from the offices of the French judiciary, this, under the circumstances of the present case, concludes Judge Skotnikov, could have constituted a failure by France to act in accordance with the courtesy due to a foreign Head of State rather than a violation of its obligations under international law.

Declaration of Judge ad hoc Guillaume

In this case, France consented to the Court's jurisdiction in accordance with the procedure laid down in Article 38, paragraph 5, of the Rules of the Court, but made it clear that its consent was valid "only for the purposes of the case, i.e. in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein".

Consequently, the Court does not have jurisdiction to deal with those claims by Djibouti which are not formulated in the Application and concern decisions taken by the French investigating judges after the Application was filed. That applies, as the Court has held, to the claim concerning the arrest warrants issued on 27 September 2006 against two senior Djiboutian officials. But that same approach should have been adopted with regard to the claim concerning the witness summons addressed to the Djiboutian Head of State on 14 February 2007.

Moreover, France had restricted its consent to the Court's jurisdiction to the dispute forming the subject of Djibouti's Application. That dispute was defined in an extremely confused manner in the Application, and France could legitimately have understood it to relate solely to its refusal of mutual assistance to Djibouti. Indeed, the Court itself entitled the case "Certain Questions of Mutual Assistance in Criminal Matters".

In the end, however, the Court has opted to give the Application a broad interpretation, taking the view that its subject included the summonses to appear as witnesses or témoins assistés (legally assisted witnesses) issued by the investigating judges before the Application was filed. That decision is understandable, 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 total lack of rigour, and to deter recourse to 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.

Separate opinion of Judge ad hoc Yusuf

The Court has decided that it has jurisdiction to adjudicate not only the dispute regarding execution of the letter rogatory addressed by the Republic of Djibouti to France on 3 November 2004, but also those concerning the witness summonses addressed to the President of the Republic of Djibouti (on 17 May 2005 and 14 February 2007) and to senior Djiboutian officials (on 3 and 4 November 2004 and 17 June 2005), and I am glad that it has done so. On the other hand, I cannot subscribe to the decision of the Court that it lacks jurisdiction to entertain the dispute regarding the arrest warrants issued on 27 September 2006 against two senior Djiboutian officials. In my view, the Court should have applied the same criteria to both the acts subsequent to the filing of the Application (the arrest warrants issued against the two senior Djiboutian officials and the summons of 14 February 2007 addressed to the Djiboutian Head of State).

I agree entirely with the decision of the Court that France has breached its international obligation under Article 17 of the 1986 Convention by not giving reasons for its refusal to execute the letter rogatory presented by Djibouti on 3 November 2004. However, I take the view that France's violation of its obligations under the 1986 Convention goes much further, extending to Article 1, paragraphs 1, 2 (c) and 3, and Article 3, paragraph 1.

In my opinion, by twice refusing to grant the requests for mutual assistance presented by the Republic of Djibouti, France has not afforded that State "the widest measure" of mutual assistance in accordance with Article 1, paragraph 1, of the Convention, thereby engaging its international responsibility. Without reciprocity and mutual co-operation, the Convention would no longer be a convention for mutual assistance in proceedings, but an instrument to assist one or other of the

Parties. It would be deprived of all meaning, and would answer the purpose for which it was concluded for one of the Parties only (in this case France).

I take the view with regard to Article 3, paragraph 1, of the Convention that the lawfulness of France's conduct should have been assessed by the Court on the basis of whether it complied with the relevant procedures laid down by French internal law. In my opinion, France has not acted in accordance with those procedures, especially as regards the authority that has the capacity, under the French Code of Criminal Procedure, to assess the concepts of prejudice to sovereignty, security and ordre public. Failure to comply with internal legal procedures entails a violation of the Convention, and when the Court is seised by the Parties to such a convention, it can and must exercise some degree of review. In the present Judgment, however, the Court has not done so.

With regard to the attacks on the immunity and inviolability of the Djiboutian Head of State, the Court concludes in its reasoning that "an apology would have been due from France", in view of the fact that the French judge had not followed French procedure in the summons addressed to the Djiboutian Head of State on 17 May 2005. It also acknowledges in the Judgment, in accordance with recent case law, that the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations "translates into positive obligations for the receiving State as regards the actions of its own authorities, and into obligations of prevention as regards possible acts by individuals" (Judgment, para. 174). In addition, it imposes on receiving States "the obligation to protect the honour and dignity of Heads of State, in connection with their inviolability" (Judgment, para. 174). In the operative clause, however, the Court does not address the requirement for apologies.

For my part, I consider that the two summonses addressed to the Djiboutian Head of State (on 17 May 2005 and 14 February 2007) are not merely a breach of the "courtesy due to a foreign Head of State"; they also amount to a violation of France's obligation to protect the honour and dignity of foreign Heads of State. Given that the French courts can neither summon nor compel the President of their own country to appear before them during his term of office, it is difficult to accept that they should be able to ask foreign Heads of State to attend at their offices in order to be heard as witnesses. The Court had the opportunity in the present case to state clearly and unambiguously that this practice was a violation of international law, and that by acting in this way, the French judges were engaging France's international responsibility. Unfortunately, the language used in the reasoning of the Judgment, together with the absence of a clear decision in the operative clause, could lead to repetition of a practice that is disrespectful of international law. For these reasons, I take the view that the Court should have enjoined France to offer formal apologies, not only in the reasoning of the Judgment, but also in its operative clause.

The fact that the Republic of Djibouti and France wished to submit their dispute to the Court by mutual consent and by way of forum prorogatum is evidence of their willingness to find a complete and final solution to this dispute in order to strengthen the traditional ties of friendship between the two countries. The finding by the Court of all the violations described above could have made a further contribution to a return by the two States to better co-operation in their relations in general, as well as to more effective mutual assistance in criminal matters, and on a clearer legal basis.
