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RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À CERTAINES QUESTIONS CONCERNANT L'ENTRAIDE JUDICIAIRE EN MATIÈRE PÉNALE

(DJIBOUTI c. FRANCE)

ARRÊT DU 4 JUIN 2008

2008

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING CERTAIN QUESTIONS OF MUTUAL ASSISTANCE IN CRIMINAL MATTERS

(DJIBOUTI *v.* FRANCE)

JUDGMENT OF 4 JUNE 2008

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ARRÊT

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CASE CONCERNING CERTAIN QUESTIONS OF MUTUAL ASSISTANCE IN CRIMINAL MATTERS

(DJIBOUTI *v.* FRANCE)

JUDGMENT

Present: *President* HIGGINS; *Vice-President* AL-KHASAWNEH; *Judges* RANJEVA, SHI, KOROMA, PARRA-ARANGUREN, BUERGENTHAL, OWADA, SIMMA, TOMKA, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV; *Judges* ad hoc GUILLAUME, YUSUF; *Registrar* COUVREUR.

In the case concerning certain questions of mutual assistance in criminal matters,

between

the Republic of Djibouti,

represented by

H.E. Mr. Siad Mohamed Doualeh, Ambassador of the Republic of Djibouti to the Swiss Confederation,

as Agent;

Mr. Phon van den Biesen, Attorney at Law, Amsterdam,

as Deputy Agent;

Mr. Luigi Condorelli, Professor at the Faculty of Law of the University of Florence,

as Counsel and Advocate;

Mr. Djama Souleiman Ali, *procureur général* of the Republic of Djibouti,

Mr. Makane Moïse Mbengue, Doctor of Law, Researcher, Hauser Global Law School Program, New York University School of Law,
Mr. Michail S. Vagias, Ph.D. Cand. Leiden University, Researcher, Scholar of the Greek State Scholarships Foundation,
Mr. Paolo Palchetti, Associate Professor at the University of Macerata (Italy),
Ms Souad Houssein Farah, Legal Adviser to the Presidency of the Republic of Djibouti,

as Counsel,

and

the French Republic,

represented by

Ms Edwige Belliard, Director of Legal Affairs, Ministry of Foreign and European Affairs,

as Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the United Nations International Law Commission, Associate of the Institut de droit international,

Mr. Hervé Ascensio, Professor at the University of Paris I (Panthéon-Sorbonne),

as Counsel;

Mr. Samuel Laine, Head of the Office of International Mutual Assistance in Criminal Matters, Ministry of Justice,

as Adviser;

Ms Sandrine Barbier, Chargée de mission, Directorate of Legal Affairs, Ministry of Foreign and European Affairs,
Mr. Antoine Ollivier, Chargé de mission, Directorate of Legal Affairs, Ministry of Foreign and European Affairs,
Mr. Thierry Caboche, Foreign Affairs Counsellor, Directorate for Africa and the Indian Ocean, Ministry of Foreign and European Affairs,

as Assistants,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. 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.

2. 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". In the Application it also reserved the right

> "to have recourse to the dispute settlement procedure established by the conventions in force between itself and the French Republic, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons [, including Diplomatic Agents, of 14 December 1973]".

3. 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.

4. 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 Registry immediately transmitted a copy of this letter to the Djiboutian Government, and the case was entered in the General List of the Court under the date of 9 August 2006, of which the Secretary-General of the United Nations was notified on the same day.

5. Pursuant to Article 40, paragraph 3, of the Statute of the Court, all States entitled to appear before the Court were notified of the Application.

6. 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.

7. 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.

8. 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.

9. 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.

10. On 22 November 2007, Djibouti filed additional documents which it wished to produce in the case. By a letter dated 4 December 2007, the Agent of France informed the Court that her Government had no objection to the production of these documents, while observing firstly that this lack of objection could not "be interpreted as consent to an extension of the jurisdiction of the Court as accepted by France in the letter dated 25 July 2006" and, secondly, that "some of the documents produced constitute publications which are readily available, within the meaning of Article 56 [paragraph 4] of the Rules of Court". By letters of 7 December 2007, the Registrar notified the Parties that the Court had decided to authorize the production of the documents concerned and had duly taken note of the observations made by the Agent of France regarding the interpretation to be given to France's lack of objection to these documents being produced.

11. By a letter dated 26 December 2007 and received in the Registry on 8 January 2008, France, referring to one of the documents filed by Djibouti on 22 November 2007 (see paragraph 10 above), explained that this document was from the record in judicial proceedings pending in France, and that French law forbade its publication before it had been read in a public hearing. It consequently requested the Court to delay making the document available to the public until 13 March 2008, when the oral proceedings before the *Tribunal de première instance* in Versailles would open. By letters of 18 January 2008, the Registrar informed the Parties that the Court had decided: (1) that the document in question would not be made available to the public before 13 March 2008 or any other date to which the opening of the relevant oral proceedings in France might be postponed, in order to comply with the ban on publication provided for by French law; and (2) that during the oral proceedings before the Court, the Parties would in no circumstances be able to refer to the document concerned or comment on its contents in a way which could be regarded as equivalent to publication.

12. By a letter dated 7 January 2008, France informed the Court, pursuant to Article 57 of the Rules of Court, that it wished to call Mrs. Elisabeth Borrel, the widow of Bernard Borrel (see paragraphs 20 and 21 below), as a witness during the hearings. By a letter dated 10 January 2008, Djibouti objected to France's request. By letters of 17 January 2008, the Registrar informed the Parties that the Court had deemed that the evidence to be obtained from Mrs. Borrel did not appear to be that of a witness called to establish facts

within her personal knowledge which might help the Court to settle the dispute brought before it, and that consequently the Court had decided not to accede to France's request.

13. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings (but see paragraph 11 above).

14. Public hearings were held from 21 to 29 January 2008, at which the Court heard the oral arguments and replies of:

For Djibouti: H.E. Mr. Siad Mohamed Doualeh,
Mr. Phon van den Biesen,
Mr. Luigi Condorelli.

For France: Ms Edwige Belliard,
Mr. Alain Pellet,
Mr. Hervé Ascensio.

15. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally. Djibouti submitted written comments on the reply provided by France to one of the questions it was asked.

*

16. In its Application, the following requests were made by Djibouti:

"Accordingly, reserving the right to supplement and elaborate upon the present claim in the course of the proceedings, the Republic of Djibouti requests the Court to:

Adjudge and declare:

(a) that the French Republic is under an international legal obligation to foster all co-operation aimed at promoting the speedy disposition of the *Case against X for the murder of Bernard Borrel*, in compliance with the principle of sovereign equality between States, as laid down in Article 2, paragraph 1, of the United Nations Charter and in Article 1 of the Treaty of Friendship and Co-operation between the French Republic and the Republic of Djibouti;

(b) that the French Republic cannot invoke principles or doctrines under its internal law (such as those relating to separation of powers) to hinder the exercise of the rights conferred upon the Republic of Djibouti by the Convention on Mutual Assistance in Criminal Matters;

(c) that the French Republic is under an international legal obligation to execute the 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*;

(d) that the French Republic is under an international legal obligation to act in conformity with the obligations laid down by the Convention on Mutual Assistance in Criminal Matters in the context not only of the investigation in the *Case against X for the murder of Bernard Borrel* but also of any other proceedings it may initiate in the future, whether such proceedings are undertaken by a delegated, legislative,

executive, judicial or other authority, whether such authority occupies a superior or subordinate position in the organization of the French Republic and whether such authority's functions are international or domestic in nature;

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

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

(g) that the French Republic bears responsibility for the violation of the international obligations referred to above;

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

(i) execute without further delay the letter rogatory cited in point *(c)* above, by immediately placing the record referred to above in Djiboutian hands, and

(ii) withdraw and cancel the summonses of the Head of State of the Republic of Djibouti and of internationally protected Djiboutian nationals to testify as *témoins assistés* in respect of subornation of perjury in the *Case against X for the murder of Bernard Borrel*;

(i) that the French Republic owes reparation for the prejudice caused to the Republic of Djibouti and to its citizens;

(j) that the French Republic shall give the Republic of Djibouti a guarantee that such wrongful acts will not reoccur."

17. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Djibouti,

in the Memorial:

"For the reasons given above, as well as those contained in its Application instituting proceedings of 4 January 2006, the Republic of Djibouti, while reserving the right to supplement or to amend the present submissions and to provide the Court with further evidence or relevant legal arguments in connection with the present dispute, requests the Court to adjudge and declare:

1. that the French Republic has breached its obligations under 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 under the Treaty of Friendship and Co-operation between the French Republic and the Republic of Djibouti signed in Djibouti on 27 June 1977 and other rules of international law applicable to the present case, by its refusal to comply with the letter rogatory presented by the Republic of Dji-

bouti and more specifically by its refusal to transmit the "Borrel" file to the judicial authorities in Djibouti;

2. that the French Republic has breached the obligations deriving from established principles of customary and general international law to prevent attacks on the freedom, dignity and immunities of an internationally protected person by summoning as *témoins assistés* the Djiboutian Head of State and high-ranking figures in Djibouti, and by issuing international arrest warrants against the latter;

3. that, by its conduct, the French Republic has engaged its international responsibility vis-à-vis the Republic of Djibouti;
4. that the French Republic is obliged to cease its wrongful conduct and to abide strictly by its obligations in the future;

5. that the French Republic shall execute without further delay the above-mentioned letter rogatory, by immediately placing the file referred to above in Djiboutian hands;
6. that the French Republic shall withdraw and cancel the summonses of the Head of State of the Republic of Djibouti and of internationally protected Djiboutian nationals to testify as *témoins assistés* in respect of subornation of perjury in the *Case against X for the murder of Bernard Borrel*;
7. that the French Republic shall withdraw and cancel the international arrest warrants issued and circulated against internationally protected Djiboutian nationals;
8. that the French Republic shall provide the Republic of Djibouti with specific assurances and guarantees of non-repetition of the wrongful acts complained of;
9. that the French Republic is under an obligation to the Republic of Djibouti to make reparation for any prejudice caused to the latter by the violation of the obligations deriving from international law and set out in points (1) and (2) above;
10. that the nature, form and amount of reparation shall be determined by the Court, in the event that the Parties cannot reach agreement on the matter, and that it reserves for this purpose the subsequent procedure in the case.

The Republic of Djibouti reserves the right to submit further points of law and additional arguments at the oral proceedings stage."

On behalf of the Government of France,

in the Counter-Memorial:

"For the reasons set out in this Counter-Memorial and on any other grounds that may be produced, inferred or substituted as appropriate, the French Republic requests the International Court of Justice:

1. to declare inadmissible the claims made by the Republic of Djibouti in its Memorial which go beyond the declared subject of its Application;
2. to reject, on the merits, all the claims made by the Republic of Djibouti."

18. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Djibouti,

at the hearing of 28 January 2008:

"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,

at the hearing of 29 January 2008:

"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."

* * *

I. The Facts of the Case

19. The Parties concur that it is not for the Court to determine the facts and establish responsibilities in the *Borrel* case, and in particular, the circumstances in which Mr. Borrel met his death. 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 facts, some admitted and others disputed by the Parties, and the judicial proceedings brought in connection with that case may be described as follows.

20. On 19 October 1995, the charred body of Judge Bernard Borrel, a French national who had been seconded as Technical Adviser to the Ministry of Justice of Djibouti, was discovered 80 km from the city of

Djibouti. As certain aspects of Mr. Borrel's death remained unexplained, the *procureur de la République* of Djibouti opened a judicial investigation on 28 February 1996 into the cause of the French judge's death; that investigation concluded that it was suicide, and was closed on 7 December 2003.

21. In France, a judicial investigation to determine the cause of Bernard Borrel's death was opened on 7 December 1995 at the *Tribunal de grande instance* in Toulouse. On 3 March 1997, Bernard Borrel's widow and children took action as civil parties on the basis of the same facts, and, further to additional forensic reports casting doubt on the hypothesis of suicide, a judicial investigation was opened on 22 April 1997 "against X for the murder of Bernard Borrel" at the Toulouse *Tribunal de grande instance*. These two proceedings were joined on 30 April 1997. The case was removed from the Toulouse *Tribunal de grande instance* on 29 October 1997 by judgment of the *Cour de cassation* and transferred to the Paris *Tribunal de grande instance*. The French investigating judges, Ms Marie-Paule Moracchini and Mr. Roger Le Loire, having deemed it necessary to obtain various documents and statements, to reconstruct the events and, to these ends, to make a visit to the scene, twice made use of mechanisms under the Convention on Mutual Assistance in Criminal Matters of 27 September 1986 between the Republic of Djibouti and the French Republic (hereinafter "the 1986 Convention"). The investigating judges issued two international letters rogatory, on 30 October 1998 and 15 February 2000 respectively, which Djibouti executed, *inter alia* granting access to presidential premises in Djibouti. The second letter rogatory was issued particularly in the light of statements made by a witness, Mr. Mohamed Saleh Alhoumekani, a former officer in the Djiboutian presidential guard, according to which several Djiboutian nationals, including Mr. Ismaël Omar Guelleh — now President of the Republic of Djibouti and at that time Principal Private Secretary to the then President of the Republic of Djibouti, Mr. Hassan Gouled Aptidon — were implicated in the murder of Bernard Borrel. The testimony of Mr. Mohamed Saleh Alhoumekani was challenged by Mr. Ali Abdillahi Iftin, who in 1995 was the commander of the Djiboutian presidential guard, and who withdrew his statements in 2004 (see paragraph 35 below). The investigating judges concluded after execution of these letters rogatory that the theory of homicide should again be ruled out.

22. By judgment dated 21 June 2000 in which it was held that the reconstruction of events carried out in Djibouti had been unlawful in the absence of the civil parties, the *Chambre d'accusation* of the Paris Court of Appeal removed the case from the investigating judges Moracchini and Le Loire and transferred it to another investigating judge at the Paris *Tribunal de grande instance*, Mr. Jean-Baptiste Parlos. Judge Parlos issued a new international letter rogatory on 15 May 2001 with a view to carrying out a reconstruction of the events in the presence of the civil parties, as well as taking statements and medical documents and conduct-

ing further investigations calling for a visit to the scene. The Djiboutian authorities responded positively to this letter rogatory as well.

23. Since June 2002, the judicial investigation opened "against X for the murder of Bernard Borrel" has been led by Ms Sophie Clément, an investigating judge at the Paris *Tribunal de grande instance*. At the date of this Judgment, the judicial investigation is still in progress. In the meantime, various French media sources have adopted the theory of murder. On 16 December 2003, the Djiboutian Minister for Foreign Affairs wrote to the French Minister for Foreign Affairs, complaining of campaigns in the French press targeting Djibouti and its President of the Republic and requesting the French Government "to remove all obstacles delaying the judicial conclusion of the case, which has dragged on too long, including the 'defence secret' claim . . . asserted by the civil party".

24. According to Djibouti, on 6 May 2004, during an official visit by the President of Djibouti to Paris, the *procureur de la République* of Djibouti, Mr. Djama Souleiman Ali, raised the possibility of the Djiboutian judicial authorities reopening the *Borrel* case with the diplomatic adviser to the President of the French Republic, the Principal Private Secretary to the French Minister of Justice and the Public Prosecutor at the Paris Court of Appeal. This meeting allegedly gave rise to an initial request for transmission of the record in the investigation being conducted by Judge Clément; that request was transmitted by the *procureur de la République* of Djibouti to the French authorities on 17 June 2004 and made, according to Djibouti, pursuant to the 1986 Convention. In the request, the *procureur de la République* of Djibouti complained about the stance taken by "the civil party and [certain] French media", which, "by systematically implicating the highest authorities in Djibouti on the basis of fanciful statements, . . . are seeking to influence the judicial investigation currently under way". In a letter further to a decision taken by Judge Clément on 13 September 2004, the Principal Private Secretary to the French Minister of Justice informed his opposite number at the French Ministry of Foreign Affairs that:

> "the investigating judge responsible for the case, who alone is competent to hand over copies of the documents (which in material terms amount to 35 volumes), takes the view that [Djibouti's request of 17 June 2004] is not in the form required by the Convention on Mutual Assistance in Criminal Matters between France and Djibouti of 27 September 1986 and refuses to execute this request.
>
> Consequently, a letter explaining the difficulties will be sent by the *procureur de la République* in Paris to the *procureur de la République* in Djibouti in order to enable him to transmit an international letter rogatory that satisfies the formal requirements.
>
> This request for documents will then be fulfilled, allowing for the

time that will be required to copy 35 volumes of judicial proceedings."

25. As Djibouti's request of 17 June 2004 had been made, according to France, "outside the framework" of the 1986 Convention and "without regard for its provisions", the French Ministry of Justice on 1 October 2004 sent the Djiboutian authorities a number of technical documents to enable them to present the request for transmission of the record in accordance with the Convention.

26. Further to the opening in Djibouti on 3 November 2004 of a new judicial investigation in respect of the murder of Bernard Borrel, in response to an application dated 20 October 2004 by the *procureur de la République* of Djibouti, a second request for transmission of the *Borrel* file was made on 3 November 2004 by Ms Leila Mohamed Ali, investigating judge at the Djibouti *Tribunal de première instance*, in the form of an international letter rogatory addressed to the French judicial authorities and transmitted through diplomatic channels on 6 December 2004. The French Ministry of Foreign Affairs forwarded this international letter rogatory to the French Ministry of Justice on 28 December 2004, which in turn forwarded it, by letter of 18 January 2005 from its Director of Criminal Affairs and Pardons, to the Public Prosecutor at the Paris Court of Appeal, asking him to carry out the request in collaboration with the investigating judge. He drew attention "to the need to omit from the certified copy [of the record in the judicial investigation] any documents likely to prejudice the sovereignty, the security, the *ordre public* or other essential interests of the Nation". In his letter, the Director of Criminal Affairs and Pardons mentioned the documents referred to in a note from the Minister of Defence, namely 25 Notes from two French intelligence services. He added that "[t]he communication of [these] French intelligence service documents . . . would provide a foreign political authority with information likely seriously to compromise the abovementioned interests". A few days earlier, on 6 January 2005, the French Minister of Defence had in fact informed the Minister of Justice that he was not opposed to the partial handing over of the file, purged of all the information that had been classified under "defence secrecy" and declassified. In a letter dated 27 January 2005, responding to a Note Verbale of 6 December 2004 from Djibouti's Ambassador to France, the Principal Private Secretary to the French Minister of Justice stated:

"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."

27. The spokesman for the French Ministry of Foreign Affairs stated in a press release issued two days later, on 29 January 2005:

"A judicial investigation into the death of Judge Bernard Borrel is currently under way at the Paris *Tribunal de grande instance*, following the filing of a complaint by his widow.

Contrary to the claims made in certain sections of the press, no judicial investigation into this matter has ever been opened by the Djiboutian authorities. The present enquiry falls solely within the jurisdiction of the French investigating judge.

In this context, France wishes to emphasize the excellent co-operation on the part of the Djiboutian authorities and judiciary, which have always displayed the complete openness required for the investigation in France to proceed smoothly.

The French judges who have visited Djibouti on several occasions in connection with international letters rogatory have always enjoyed full collaboration from the Djiboutian authorities, which have provided them with access to the necessary places, documents and witnesses.

During the current enquiry, documents classified under 'defence secrecy' have been the subject of a number of decisions on declassification. Contrary to what may have been written recently in certain newspapers, nothing in these documents points to the implication of the Djiboutian authorities.

At the request of those authorities, a copy of the record concerning the death of Judge Borrel will shortly be transmitted to the Djiboutian judiciary in order to allow the competent authorities of that country to decide whether there are grounds for opening an investigation into the matter."

28. On 8 February 2005, by an order *(soit-transmis)* communicated to the *procureur de la 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 aimed solely at ascertaining the contents of a file which includes, amongst other things, documents implicating the *procureur de la République* 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 . . . provides that the requested State may refuse a request for mutual assistance if it considers that execution of the request is likely to prejudice [the] sovereignty, . . . 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 Defence to communicate documents classified under "defence secrecy", documents which had been authorized for declassification by the *Commission consultative du secret de la défense nationale*. The judge thus concluded as follows:

> "[t]o accede to the Djiboutian judge's request would amount to an abuse of French law by permitting the handing over of documents that 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."

Judge Clément thus informed the *procureur de la République* in Paris of her refusal to comply with the Djiboutian request.

29. The decision by Judge Clément was, according to France, made known to the Ambassador of Djibouti in Paris by a letter from the Director of Criminal Affairs and Pardons at the French Ministry of Justice dated 31 May 2005. In the copy of that letter produced by France, the refusal was justified by the fact that "Article 2 *(c)* of the Convention on Mutual Assistance in Criminal Matters between France and Djibouti of 27 September 1986 had to be applied". In that same letter, according to France, the Director of Criminal Affairs and Pardons informed the Ambassador that the decision by the judge was "sovereign" and "not open to appeal".

Djibouti denied at the hearings that France had informed it, by such a letter, of Judge Clément's refusal to execute the international letter rogatory of 3 November 2004. It contended, as emerges from its written pleadings, the documents it submitted to the Court on 22 November 2007 (see paragraph 10 above) and its oral arguments, that Djibouti's Ambassador to France never received a letter dated 31 May 2005 from the French Ministry of Justice.

France stated that it had no proof that Djibouti's Ambassador to France had received the letter. In reply to a question put by the President

of the Court at the hearings, France added that it had only "traced a despatch note, for information, of a copy of [the letter of 31 May 2005] to the French Ambassador in Djibouti, which in any event confirms its existence".

30. By letter dated 18 May 2005 and referring to the 27 January 2005 letter from the French Minister of Justice's Principal Private Secretary (see paragraph 26 above), Djibouti's Minister for Foreign Affairs and International Co-operation reminded his French counterpart that "France has not yet honoured its commitments". France's Ambassador to Djibouti replied to the Djiboutian Minister for Foreign Affairs by letter dated 6 June 2005, simply stating that "[a]fter consulting my authorities, I regret to inform you that we are not in a position to comply with [the] request [for the execution of the international letter rogatory presented by the Djiboutian authorities on 3 November 2004]".

31. Meanwhile, Judge Clément continued her investigations, and on 17 May 2005, further to the statements by Mr. Mohamed Saleh Alhoumekani received in 2000 by Judges Moracchini and Le Loire (see paragraph 21), she issued directly to the Djiboutian Embassy in Paris a first witness summons to the President of the Republic of Djibouti, who was then on an official visit to France. This witness summons was issued to President Ismaël Omar Guelleh without the provisions of Article 656 of the French Code of Criminal Procedure having been applied; these stipulate in particular that:

> "[t]he written statement of the representative of a foreign power is requested through the intermediary of the Minister for Foreign Affairs. If the application is granted, the statement is received by the president of the appeal court or by a judge delegated by him."

President Ismaël Omar Guelleh did not respond to this summons and Djibouti's Ambassador to France, emphasizing that it was null and void and not in accordance with French law, drew the attention of France's Minister for Foreign Affairs the following day to the fact that the summons had been sent to Agence France-Presse (AFP) only 20 minutes after being communicated to him by facsimile on 17 May 2005. He took the view that this was "a serious violation of the most elementary rules governing an investigation". In a radio statement by the spokesman of the Ministry of Foreign Affairs and by a press release of 18 May 2005, the texts of which were forwarded the next day to Djibouti's Ambassador to France, the French Ministry of Foreign Affairs recalled, in relation to this summons, that "all incumbent Heads of State enjoy immunity from jurisdiction when travelling internationally", that "[t]his is an established principle of international law and France intends to ensure that it is respected", and that "any request addressed to a representative of a foreign State

in the context of judicial proceedings is subject to particular forms, which are prescribed by law".

32. On 14 February 2007, the investigating judge informed the Minister of Justice that she wished to obtain the testimony of the President of Djibouti through the intermediary of the Minister for Foreign Affairs. According to Djibouti, the information concerning this request was passed by judicial sources to AFP and French media, even before the Minister for Foreign Affairs had transmitted it to Djibouti's representatives. Djibouti reacted to this invitation to testify through a communiqué of the same date from its Embassy in France, in which it "recall[ed] the immunity from jurisdiction enjoyed by any incumbent Head of State during visits abroad" and emphasized that "for a summons to be addressed to the representative of a foreign State, the investigating judge is obliged to comply with the procedure in full, in particular through the intermediary of the Ministry of Foreign Affairs, which was not done at all in this instance". The same day, in a press release, the French Ministry of Justice commented on this witness summons in terms similar to those used in the press release of the Ministry of Foreign Affairs of 18 May 2005. The following day, the summons was transmitted by the French Minister of Justice to the French Minister for Foreign Affairs and then relayed by the Private Office of the President of the French Republic to the representatives of the Republic of Djibouti attending the Conference of Heads of State of Africa and France in Cannes. The Djiboutian delegation then communicated President Ismaël Omar Guelleh's refusal to respond to this new request.

At the hearings, Djibouti acknowledged that the Djiboutian Head of State had been summoned, both in 2005 and in 2007, as an "ordinary" witness under French law and not as a *"témoin assisté"* (legally assisted witness), as Djibouti had initially claimed in its Application. (For a definition of the status of *témoin assisté*, see paragraph 184 below.)

*

33. Five other summonses to attend as witnesses or *témoins assistés* have also been addressed to a diplomat and two senior Djiboutian officials in connection with two other judicial proceedings conducted in France. An account should therefore be given here of these two proceedings, as they are connected to the principal judicial investigation opened against X for the murder of Bernard Borrel. A third set of proceedings, also connected to this principal judicial investigation, is of significance to the present case in other respects and will likewise be referred to below.

34. In the first of these proceedings, opened in respect of public defamation before the Toulouse *Tribunal de grande instance* and then transferred to the Paris *Tribunal de grande instance* by judgment of the *Cour*

de cassation of 15 January 2003, Mrs. Borrel filed a civil action on 14 October 2002 against the Djiboutian newspaper *La Nation*, after it had published an article which she considered to be defamatory of her. The proceedings led the investigating judge responsible for the case, Mr. Baudouin Thouvenot, to address a witness summons to Djibouti's Ambassador to France on 21 December 2004, without applying the provisions of Article 656 of the French Code of Criminal Procedure. By a Note Verbale of 7 January 2005, the Embassy informed the French Ministry of Foreign Affairs that, as provided for in Article 31 of the Vienna Convention on Diplomatic Relations of 18 April 1961, the Ambassador did not wish to give evidence as a witness, at the same time expressing its surprise at the fact that the summons could be "addressed to him without passing through the intermediary of the [French] Ministry of Foreign Affairs". In reply, the Head of Protocol at the Ministry deplored the fact that the written statement of the Ambassador had not been requested in accordance with Article 656 of the French Code of Criminal Procedure and presented the apologies of the French authorities for "this breach of diplomatic custom". He further informed Djibouti's Ambassador on 14 January 2005 that the investigating judge had "recognized his mistake" and "wished the summons to be now deemed null and void". The case has been the subject of a decision not to proceed, upheld on 27 April 2007 by the Paris Court of Appeal.

35. A second set of judicial proceedings was opened in respect of subornation of perjury before the Toulouse *Tribunal de grande instance* and then transferred to the Versailles *Tribunal de grande instance* by judgment of the *Cour de cassation* of 5 March 2003. These proceedings originated from a civil action filed by Mrs. Borrel on 19 November 2002 against Mr. Djama Souleiman Ali, then *procureur de la République* of Djibouti, and Mr. Hassan Said Khaireh, the Djiboutian Head of National Security. Mr. Djama Souleiman Ali was accused of having exerted various forms of pressure upon Mr. Mohamed Saleh Alhoumekani in order to make him reconsider his previous statements (see paragraph 21 above). For his part, Mr. Hassan Said Khaireh was accused of having exerted various forms of pressure on Mr. Ali Abdillahi Iftin so as to make him produce testimony which would discredit the statements of Mr. Mohamed Saleh Alhoumekani. On 10 August 2004, in a letter of protest to his French counterpart, the Djiboutian Minister of Justice referred to the investigation under way at Versailles and claimed that "[t]hese proceedings should have been declared inadmissible by the investigating judge in Versailles, or at least closed by a dismissal order", for lack of jurisdiction. On 3 and 4 November 2004, Judge Pascale Belin addressed summonses to Mr. Hassan Said Khaireh and Mr. Djama Souleiman Ali respectively for them to be heard in France as *témoins assistés* on 16 December 2004. The addressees of these summonses did not respond. On 17 June 2005, Judge Thierry Bellancourt issued further summonses for Mr. Hassan Said Khaireh and Mr. Djama Souleiman Ali to appear as *témoins*

assistés on 13 October 2005. By letter of 11 October 2005, the lawyer for the two senior Djiboutian officials informed Judge Bellancourt that "these two persons, one an official and the other a judge, cannot comply with that summons". Recalling Djibouti's full co-operation in the procedures conducted by the judicial authorities in the *Borrel* case, and the lack of co-operation from the French judiciary "in return", he concluded that "[i]n such circumstances, the Republic of Djibouti, as a sovereign State, cannot accept one-way co-operation of this kind with the former colonial Power, and [that] the two individuals summoned are therefore not authorized to give evidence". On 27 September 2006, the *Chambre de l'instruction* of the Versailles Court of Appeal issued European arrest warrants against these two individuals.

36. On 27 March 2008, i.e., after the close of the oral proceedings in the present case before this Court, the sixth *Chambre correctionnelle* of the Versailles *Tribunal de grande instance* found Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh guilty, *in absentia*, of subornation of perjury and sentenced them to 18 months and one year of imprisonment respectively. In its judgment, a copy of which was obtained by the Court, the *Chambre correctionnelle* indicated that Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh had agreed to be tried *in absentia* and had appointed their lawyer to represent them. It emphasized that no reference had been made to immunity at any time during the hearings, and stated that the arrest warrants issued by the *Chambre de l'instruction* against the two individuals in question remained in force. The Court has received no observations from the Parties regarding this judgment.

37. Lastly, the circumstances in which the French authorities examined the international letter rogatory issued on 3 November 2004 by the Djiboutian judge Leila Mohamed Ali in the *Borrel* case gave rise to a third set of judicial proceedings. These proceedings were initiated by a civil action filed by Mrs. Borrel on 7 February 2005 against the spokesman of the French Ministry of Foreign Affairs for "statements seeking to exert pressure to influence the decision of a judicial investigating authority or trial court". The spokesman had stated, in his press release of 29 January 2005 (see paragraph 27 above), that "a copy of the record concerning the death of Judge Borrel will shortly be transmitted to the Djiboutian judiciary . . .", when no decision had yet been taken on the outcome of Djibouti's request. Following Mrs. Borrel's complaint, a judicial investigation was opened on 2 September 2005 before the Paris *Tribunal de grande instance* in respect of pressure on the judiciary. Whereas the Public Prosecutor at the Paris Court of Appeal had taken the view that there were no grounds for a judicial investigation in this case, the Paris Court of Appeal decided, in a judgment of 19 October 2006, to approve the continuation of the proceedings. In this judgment, the Court of

Appeal set out as follows the position adopted by the Public Prosecutor in Paris:

> "[T]he ministerial authority alone is competent to determine whether the request for mutual assistance is likely to prejudice the essential interests of the Nation, and that it is for the requested State to oppose the request or act upon it. The investigating judge, who has moreover expressed her refusal in the form of an order, had no power to take a judicial decision in matters of international mutual assistance, the judicial authority merely delivering an opinion . . ."

After noting that "where [the] text [of the bilateral convention of 27 September 1986] is silent, the provisions of the law of the requested State on criminal procedure are applied", the Court of Appeal dismissed the reasoning of the Public Prosecutor in Paris on the following grounds:

> "[T]he provisions of Article 694-4 of the Code of Criminal Procedure, being applicable, were immediately applied, which entailed obtaining the prior opinion of the government authorities, they alone being competent to assess the concepts of prejudice to the sovereignty, the security, the *ordre public* or other essential interests of the Nation;
>
> . . . . . .
>
> It follows from the timing and the terms of the [relevant] letters . . . that the notice required by the provisions of Article 694-4 of the Code of Criminal Procedure had been given by the competent government authorities, and that it was therefore for the principal investigating judge, contrary to the submissions of the *procureur général*, or for a judge nominated for the purpose, to take such action as he saw fit on the execution of th[e] request for mutual assistance;
>
> It follows in particular from the terms of the letter of 6 January 2005 (000262/DEF/CAB/CCL) from the Minister of Defence to the Minister of Justice that the former is not opposed to partial handing over of the file, without all the information classified under 'defence secrecy' and declassified, any transmission of which could seriously compromise the higher interests of the State and of its agents;
>
> . . . . . .
>
> After receiving the detailed notice from the government authorities, through the Public Prosecutor's Department, a notice that is necessary but not sufficient in order to act on a request for mutual assistance, it is for the investigating judge . . . to decide on the impact and the judicial consequences of the French response in terms of international mutual assistance, in the light of the development of the proceedings in France, which she did by her reasoned order of 8 February 2005;
>
> In the present case, the issuing and transmission of an entire record of an investigation cannot be regarded as a decision that will

have no impact in terms of the smooth conduct of the enquiries under way in France, particularly in Paris but also in Versailles;

Although under internal law, the decision to issue a copy of proceedings is not necessarily one that has a judicial character, the decision to do so is at the discretion of the investigating judge, and the response from the investigating judge as to whether or not to issue such a copy constituted in this case the positive or negative response to the request for mutual assistance;

Consequently, the response by order of 8 February 2005, from Ms Clément to the principal investigating judge, refusing to act on the Djiboutian judicial authorities' request for mutual assistance, without having to distinguish between the various procedures for transmitting a request for mutual assistance and without having to pronounce on a possible abuse of the French law on declassified documents, constitutes a decision and not merely an opinion, contrary to what is maintained by the *procureur général*."

38. The Paris Court of Appeal thus concluded that "the possibility cannot be excluded that the publication of the communiqué from the Quai d'Orsay may or might have been such as to constitute a statement seeking to exert pressure to influence the decision of the investigating judge".

* * *

II. Jurisdiction of the Court

39. In the absence of a declaration by France accepting the compulsory jurisdiction of the Court formulated under Article 36, paragraph 2, of the Statute or of a compromissory clause contained in a treaty between the Parties and applicable in the present dispute, Djibouti sought to found the Court's jurisdiction on Article 38, paragraph 5, of the Rules of Court. By its letter of 25 July 2006, France consented to the Court's jurisdiction "pursuant to and solely on the basis of said Article 38, paragraph 5", specifying that this consent "is 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".

40. Djibouti asserts that the dispute concerns the interpretation and application of customary and conventional commitments. Djibouti infers from what it terms the "full and wholehearted consent" expressed by the Parties that the Court's jurisdiction to settle the dispute is beyond question. At the hearings, Djibouti recalled, by quoting from the *Corfu Channel (United Kingdom* v. *Albania)* case, that there is nothing to prevent consent to the jurisdiction of the Court "from being effected by two separate and successive acts, instead of jointly and beforehand by a special

agreement" (*Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 28), and it is then for the Court to establish to what extent such consent on "a single, specific subject precisely delineating the scope" of the jurisdiction of the Court arises due to those distinct acts.

41. France acknowledges that the Court's jurisdiction to settle the dispute by virtue of Article 38, paragraph 5, of the Rules of Court is "beyond question". Regarding its consent to the jurisdiction of the Court, however, France contests the scope of that jurisdiction *ratione materiae* and *ratione temporis* to deal with certain violations alleged by Djibouti.

42. In its Application, Djibouti twice sought to reserve the right to add, at a later date, additional bases of jurisdiction of the Court. In paragraph 4 of the Application, Djibouti stated that it "reserv[es] the right to supplement and elaborate on the present claim in the course of the proceedings . . .". In paragraph 26, it further stated: "The Republic of Djibouti reserves the right to amend and supplement the present Application." Djibouti initially argued that these reservations enabled it to

> "have recourse to the dispute settlement procedure established by the conventions in force between itself and the French Republic, such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons".

In its Memorial, Djibouti reaffirmed its "right if necessary to invoke other international instruments that bind the Parties, which would also be relevant in founding the jurisdiction of the Court for the purposes of this dispute".

43. France, for its part, pointed out that it would be unacceptable to allow the belated discovery of a "hypothetical" new legal basis for the Court's jurisdiction to enable Djibouti to expand the scope of its Application or to alter its character subsequent to the Respondent's consent to the Court's jurisdiction for the purposes of the case.

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44. The Court observes that, on the one hand, in the oral proceedings, Djibouti declared that reliance on other bases for the Court's jurisdiction "appears unnecessary in the present case to enable the Court to adjudicate all the claims in Djibouti's Application" and that, on the other hand, France took due note of this declaration.

* *

(1) Preliminary question regarding jurisdiction and admissibility

45. France, in its Counter-Memorial, presented the following submission: "the French Republic requests the International Court of Justice:

. . . to declare inadmissible the claims made by the Republic of Djibouti in its Memorial which go beyond the declared subject of its Application". At the hearings, France justified this formulation, referring to the fact that the Permanent Court of International Justice, in the *Phosphates in Morocco* case, had, while accepting the preliminary objection raised by France based on considerations *ratione temporis*, decided that "the application submitted . . . by the Italian government [was] not admissible" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 29).

46. France subsequently indicated that, in the present case, its "objections to the exercise by the Court of its jurisdiction arise from the fact that France has not consented to it; in accordance with the prevailing jurisprudence of the Court . . . consent governs its jurisdiction, not the admissibility of the application". France specifically cited the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)* (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88). France finally submitted that it would "be led to state in its final submissions that it asks the Court to decide both that it has no jurisdiction and that the Application is inadmissible".

47. At the end of its oral statements, France reformulated its conclusions as follows:

> "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".

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48. The Court first notes that in determining the scope of the consent expressed by one of the parties, the Court pronounces on its jurisdiction and not on the admissibility of the application. The Court confirmed, in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda) (Jurisdiction and Admissibility, Judgment)*, that "its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them" (*I.C.J. Reports 2006*, p. 39, para. 88), and further, that:

> "the conditions to which such consent is subject must be regarded as constituting the limits thereon . . . The examination of such conditions relates to its jurisdiction and not to the admissibility of the application." *(Ibid.)*.

This remains true, whether the consent at issue has been expressed through a compromissory clause inserted in an international agreement,

as was contended to be the case in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, or through "two separate and successive acts" (*Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 28), as is the case here.

49. The Court concludes that, in reference to the final formulation of France's submissions, the conditions under which the Parties expressed their consent in the present case are a matter of jurisdiction and not of the admissibility of the Application or any claims formulated therein. This applies to all objections raised by France to the Court's jurisdiction, whether *ratione materiae* or *ratione temporis*.

50. The Court will now examine the objections raised by France relating to the scope of the Court's jurisdiction *ratione materiae*.

* *

(2) *Jurisdiction* ratione materiae

(a) *Positions of the Parties*

51. According to France, the Court can only have jurisdiction to deal with facts that bear a direct relation to the stated subject of the dispute. In its view, the Court has no jurisdiction regarding alleged violations of further obligations, whether these derive from treaties or general international law, to prevent attacks on the person, freedom or dignity of internationally protected persons or in the field of respect for diplomatic privileges and immunities.

52. France argues that, in the Application, the section entitled "Subject of the dispute" (para. 2) only mentions its refusal to execute the letter rogatory of 3 November 2004. France admittedly takes note that Djibouti refers to the alleged violations of obligations to prevent attacks on the person of Djibouti's Head of State and senior Djiboutian officials in the sections entitled "Legal grounds" (para. 3) and "Nature of the claim" (para. 4). It nevertheless asserts that, while the summoning of the Head of State of Djibouti and of the senior officials as witness and *témoins assistés*, respectively, and the issuing of European arrest warrants against senior Djiboutian officials are indeed linked to the *Borrel* case in the broader sense, these judicial processes "bear no relation to the international letter rogatory" that is in issue.

53. France maintains, moreover, that "Djibouti's Memorial goes beyond the claims formulated in the Application" and that the applicant State is not allowed to extend the subject of the dispute. France submits, in this respect, that by the addition, in its Memorial, of some words which were not contained in the Application, Djibouti altered the definition of the subject of the dispute. The dispute is now said to concern "the refusal by the French . . . authorities to execute an international letter rogatory . . . *and the related breaching* . . . of other international

obligations . . .” (instead of “*in breach* of other international obligations”). France asserts that the dispute, as defined in the Application, concerned

> “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*”,

whereas according to Djibouti’s Memorial, “all the claims listed on the basis of paragraphs [3, 4 and 5] of the Application . . . fall within the jurisdiction of the Court *ratione materiae*”.

54. France contends that this statement by Djibouti is the result of a confusion between the claims and submissions contained in the Application, on the one hand, and the legal grounds supporting them, on the other. France refers in this context to the jurisprudence of the Court, according to which a distinction must be made “between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute”, pointing out in particular that the Court’s jurisdiction “must be determined exclusively on the basis of the submissions”.

55. France concludes that the Court lacks jurisdiction both in respect of the witness summonses addressed to the Djiboutian Head of State and senior Djiboutian officials and the arrest warrants issued against the said officials.

56. Djibouti, for its part, referring to the terms of the letter whereby France consented to the jurisdiction of the Court, acknowledges that the extent of the Court’s jurisdiction is “strictly delimited” *ratione materiae* and that “there is no doubt that the Court is entitled to deal solely with the claims as set out in [the] Application”. However, Djibouti claims that there is “agreement between the Parties that [the Court] can entertain all these claims and settle them entirely, in every aspect and with all their implications”. Analysing the mechanism of Article 38, paragraph 5, of the Rules of Court as a combination of two intersecting unilateral declarations concerning the jurisdiction of the Court, Djibouti, for the purpose of identifying the true intention of the drafters of the instruments of consent, relied at the hearings on the Court’s jurisprudence regarding the interpretation of unilateral declarations of acceptance of the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute.

57. With regard to the wording of its Application and the lack of any reference, under the heading therein “Subject of the dispute”, to the international immunities which France allegedly infringed, Djibouti, citing the *Mavrommatis Palestine Concessions* case, recalls that the Court, whose jurisdiction is of an international nature, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34). Further, Djibouti points out that

its claims, under the heading "Nature of the claim", relate explicitly to the violation of the principles of international law on international immunities. These two headings, "Subject of the dispute" and "Nature of the claim", are said to form a "whole", attesting to the intention of Djibouti to put before the Court not merely the issue of the violation of obligations of mutual assistance, but a dispute consisting of a number of claims. Djibouti acknowledges in this respect that it expanded its Application in its Memorial, as it had reserved the right to do, but maintains that those expansions have not given rise to an alteration in the subject of the Application.

58. Djibouti points out, moreover, that, when consenting to the jurisdiction of the Court on the basis of Article 38, paragraph 5, of the Rules of Court, the Respondent was free to give only partial consent to the jurisdiction contemplated by the Application, which, according to Djibouti, France did not do. Djibouti thus concludes that France gave its consent for all the claims included in the Application to be covered by the jurisdiction of the Court *ratione materiae*.

59. Djibouti further asserts that a link exists between the judicial proceedings opened in France against senior Djiboutian officials for subornation of perjury and the refusal of the French judicial authorities to execute the letter rogatory issued by Djibouti. Such a link is said to be shown by the Order *(soit-transmis)* of 8 February 2005, wherein Judge Clément cited, as the first reason justifying the refusal, the inclusion in the case file of documents concerning the judicial investigation opened for subornation of perjury.

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(b) Forum prorogatum *as a basis of the jurisdiction of the Court*

60. The jurisdiction of the Court is based on the consent of States, under the conditions expressed therein. However, 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 (*Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 27). The Statute of the Court does explicitly mention the different ways by which States may express their consent to the Court's jurisdiction. Thus, in accordance with Article 36, paragraph 1, of the Statute, such consent may result from an explicit agreement of the parties, that agreement being able to be manifested in a variety of ways. Further, States may recognize the jurisdiction of the Court by making declarations to this effect under Article 36, paragraph 2, of the Statute.

61. The Court 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*. This modality is applied when a

respondent State has, through its conduct before the Court or in relation to the applicant party, acted in such a way as to have consented to the jurisdiction of the Court (*Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 24).

62. The consent allowing for the Court to assume jurisdiction must be certain. That is so, no more and no less, for jurisdiction based on *forum prorogatum*. As the Court has recently explained, whatever the basis of consent, the attitude of the respondent State must "be capable of being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 18; see also *Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 27; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 620-621, para. 40; and *Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 24). For 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 (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, pp. 113-114; see also *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States of America), Judgment, I.C.J. Reports 1954*, p. 30).

63. 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. This provision was introduced by the Court into its Rules in 1978. The purpose of this amendment was to allow 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. Before this revision, the Court treated this type of application in the same way as any other application submitted to it: the Registry would issue the usual notifications and the "case" was entered in the General List of the Court. It could only be removed from the List if the respondent State explicitly rejected the Court's jurisdiction to entertain it. The Court was therefore obliged to enter in its General List "cases" for which it plainly did not have jurisdiction and in which, therefore, no further action could be taken; it was consequently obliged to issue orders so as to remove them from its List (see *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America* v. *Hungary), Order of 12 July 1954, I.C.J. Reports 1954*, p. 99; *Treatment in Hungary of Aircraft and Crew of United States of America (United States of*

America v. *Union of Soviet Socialist Republics), Order of 12 July 1954, I.C.J. Reports 1954*, p. 103; *Aerial Incident of 10 March 1953 (United States of America* v. *Czechoslovakia), Order of 14 March 1956, I.C.J. Reports 1956*, p. 6; *Antarctica (United Kingdom* v. *Argentina), Order of 16 March 1956, I.C.J. Reports 1956*, p. 12; *Antarctica (United Kingdom* v. *Chile), Order of 16 March 1956, I.C.J. Reports 1956*, p. 15; *Aerial Incident of 7 October 1952 (United States of America* v. *Union of Soviet Socialist Republics), Order of 14 March 1956, I.C.J. Reports 1956*, p. 9; *Aerial Incident of 4 September 1954 (United States of America* v. *Union of Soviet Socialist Republics), Order of 9 December 1958, I.C.J. Reports 1958*, p. 158; *Aerial Incident of 7 November 1954 (United States of America* v. *Union of Soviet Socialist Republics), Order of 7 October 1959, I.C.J. Reports 1959*, p. 276). Article 38, paragraph 5, now provides, firstly, that no entry is made in the General List unless and until the State against which such application is made consents to the Court's jurisdiction to entertain the case and, secondly, that, except for the transmission of the application to that State, no action is to be taken in the proceedings. The State which is thus 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. 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*.

64. Article 38, paragraph 5, of the Rules of Court must also be read and interpreted in the light of paragraph 2 of that Article, which reads as follows: "The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based." The expression "as far as possible" used in this provision was inserted in the Rules of Court of the Permanent Court of International Justice in 1936, precisely in order to preserve the possibility for the Court to found its jurisdiction on *forum prorogatum* (*Acts and Documents Concerning the Organization of the Court: Elaboration of the Rules of Court of March 11th, 1936, P.C.I.J., Series D, No. 2, Add. 3*, pp. 159-160). This expression was used in the original Rules of Court of the International Court of Justice in 1946 and has remained there ever since. Obviously, the jurisdiction of the Court can be founded on *forum prorogatum* in a variety of ways, by no means all of which fall under Article 38, paragraph 5. The Court would add that, while doubts may previously have existed in this respect, since the revision in 1978, the wording of Article 38, paragraph 2, excludes the possibility of the phrase "as far as possible" also being applied to the statement of "the precise nature of the claim" or of "the facts and grounds on which the claim is based". Applying it in such a way would in

any event have been out of keeping with the reasons which led the phrase to be included in 1936. 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.

(3) Extent of the mutual consent of the Parties

65. France has, in the present case, expressly agreed to the Court's jurisdiction under Article 38, paragraph 5, of the Rules of Court, in its letter of acceptance dated 25 July 2006. France's expression of consent must, however, be read together with Djibouti's Application to discern properly the extent of the consent given by the Parties to the Court's jurisdiction, and thereby to arrive at that which is common in their expressions of consent.

(a) *Djibouti's Application*

66. In light of the foregoing, the Court will examine not only the terms of France's acceptance, but also the terms of Djibouti's Application to which that acceptance responds. Only then can the scope of the claims in respect of which France has accepted the jurisdiction of the Court be properly understood. As Djibouti readily acknowledges, when consent is given *post hoc*, a State may well give only partial consent, and in so doing narrow the jurisdiction of the Court by comparison with what had been contemplated in the Application. The Court will therefore examine the various claims raised in the Application, and the extent to which the Respondent has accepted the Court's jurisdiction with regard to them in its letter of 25 July 2006.

67. 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". So far as the question of identifying the subject-matter of the dispute is concerned, while indeed it is desirable that what the Applicant regards as the subject-matter of the dispute is specified under that heading in the Application, nonetheless, the Court must look at the Application as a whole.

68. In paragraph 2 of its Application, Djibouti set out as the "Subject of the dispute" the following:

> "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 Gov-

> ernment 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."

69. Neither Article 40 of the Statute nor Article 38 of the Rules of Court subject the application to particular formal (as opposed to substantive) requirements regarding the manner by which the necessary elements of the application should be presented. Thus, if a section entitled "Subject of the dispute" does not entirely circumscribe the extent of the issues intended to be brought before the Court, the subject-matter of the dispute may nonetheless be discerned from a reading of the whole Application.

70. Ruling on this issue in the case concerning *Right of Passage over Indian Territory (Portugal* v. *India)*, the Court stated that it would not confine itself to the formulation by the Applicant when it was called upon to determine the subject of the dispute. It then defined the subject of the dispute in the following terms:

> "A passage in the Application headed 'Subject of the Dispute' indicates that subject as being the conflict of views which arose between the two States when, in 1954, India opposed the exercise of Portugal's right of passage. If this were the subject of the dispute referred to the Court, the challenge to the jurisdiction could not be sustained. But it appeared from the Application itself and it was fully confirmed by the subsequent proceedings, the Submissions of the Parties and statements made in the course of the hearings, that the dispute submitted to the Court has a threefold subject . . ." (*Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 33.)

The Court thus clearly stated 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.

*

71. Paragraph 2 of Djibouti's Application, entitled "Subject of the dispute" (see paragraph 68 above), focuses on the (non-)transmission of the *Borrel* case file to Djibouti. That paragraph 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. Naturally, no reference was made in that paragraph to the summons addressed to the President of Djibouti on 14 February 2007, nor to the arrest warrants made out against the two above-mentioned officials on 27 September 2006, as these were events subsequent to the filing of the Application.

72. A further examination of the Application, on the other hand,

reveals that both under the headings "Legal grounds" and "Nature of the claim", Djibouti mentions the summonses issued before the filing of the Application and requests specific remedies in so far as it considers them to be violations of international law.

73. Thus, under the heading "Legal grounds", Djibouti lists in paragraph 3, subparagraph *(c)*, of its Application:

> "violation by the French Republic of 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, whether a Head of State or any representative or official of a State".

74. Further, under the heading "Nature of the claim" (paragraph 4 of the Application), Djibouti asks the Court to adjudge and declare:

> "*(e)* that the French Republic is under an international obligation to ensure that the Head of State of the Republic of Djibouti, as a foreign Head of State, is not subjected to any insults or attacks on his dignity on French territory;
>
> *(f)* that the French Republic is under a legal obligation scrupulously to ensure respect, vis-à-vis the Republic of Djibouti, of the principles and rules concerning diplomatic privileges, prerogatives and immunities, as reflected in the Vienna Convention on Diplomatic Relations of 18 April 1961;
>
> . . . . . .
>
> *(h)* that the French Republic is under an obligation immediately to cease and desist from breaching the obligations referred to above and, to that end, shall in particular:
>
> . . . . . .
>
> (ii) withdraw and cancel the summonses of the Head of State of the Republic of Djibouti and of internationally protected Djiboutian nationals to testify as *témoins assistés* [legally represented witnesses] in respect of subornation of perjury in the 'Case against X for the murder of Bernard Borrel'."

75. The Court notes that, despite a confined description of the subject of the dispute (its *"objet"*) in the second paragraph of the Application, the said Application, 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. The Court will in due course examine the later summons addressed to the President of Djibouti, as well as the arrest warrants issued against the other Djiboutian officials.

(b) *France's response to the Application*

76. The Court will now analyse the letter which France sent to the Court, dated 25 July 2006 and received in the Registry on 9 August 2006, whereby it accepted the Court's jurisdiction on the conditions described therein, in the light of the content of the Application of Djibouti.

77. The operative phrases in France's response to Djibouti's Application are reproduced here in full:

> "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."

78. This response to Djibouti's Application seeks first to provide the Court with jurisdiction to entertain the Application of Djibouti, and second, to ensure that only the dispute which is the subject of the Application, to the exclusion of any others, would be dealt with by the Court.

79. What is uncontested by both Parties is 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 the Court's jurisdiction. Djibouti's Application and France's response overlap on this issue. What remains to be answered, however, is the question whether such an overlap exists also as regards 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.

(c) *Findings of the Court*

80. The Court is thus required to decide first, proceeding from the Application and the French response thereto dated 25 July 2006, whether the claims relating to the summons sent to the President of Djibouti on 17 May 2005, as well as the summonses sent to the Head of National Security and the *procureur de la République* of Djibouti on 3 and 4 November 2004, respectively, and on 17 June 2005, fall within the Court's jurisdiction.

81. France's response, whereby it accepted the jurisdiction of the Court, allowed the contentious proceedings to be set in motion, on the basis of Djibouti's Application. It was upon receipt of this response that the case was put on the Court's General List. It is clear, on the basis of

Djibouti's Application, that France could have either chosen to consent to the Court's jurisdiction also in respect of alleged violations of the privileges and immunities said to be owed to the Head of State of Djibouti and certain of its senior officials, or that it could have chosen to deny the Court jurisdiction over these matters. The question at hand is to know what France decided in that regard.

82. France claims that its agreement is limited to the "subject of the dispute" as it is described under that heading in paragraph 2 of the Application, that is, that it consented to provide the Court with jurisdiction solely to adjudicate the claim regarding the Djiboutian letter rogatory.

83. However, it is the view of the Court that, on the basis of a plain reading of the text of France's letter to the Court, 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 Application.

First, as observed above, the subject of the dispute appears from the Application, viewed as a whole, to be broader than that specified in paragraph 2. Further, the expression "subject of the Application" used in France's letter of acceptance is not the same as the expression "subject of the dispute". Furthermore, in accordance with its ordinary meaning, the term "Application" used in the letter of acceptance must be read as comprising the entirety of the Application. Finally, there is nothing in France's letter of acceptance suggesting that it intended to limit the scope of its consent, as it could have done, to any particular aspect of the Application. By its inclusion in the letter of the phrase "in respect of the dispute forming the subject of the Application *and* strictly within the limits of the claims formulated *therein*" (emphasis added), France had intended to prevent Djibouti from presenting claims at a later stage of the proceedings which might have fallen within the subject of the dispute but which would have been new claims. As regards the use of the conjunctive "and" in the phrase in question, France presented several arguments aiming to demonstrate that the wording employed in the letter was "carefully weighed". Given these circumstances, the Court finds that when France, which had full knowledge of the claims formulated by Djibouti in its Application, sent its letter of 25 July 2006 to the Court, it did not seek to exclude certain aspects of the dispute forming the subject of the Application from its jurisdiction.

84. With regard to jurisdiction *ratione materiae*, the Court finds that 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.

85. The Court now examines the question of the Court's 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. It recalls that, in its Memorial, Djibouti did not address that question. At the hearings, Djibouti disputed that its claims based on the violations of international immunities which took place after 9 January 2006 (the date at which it filed the Application) were, as France claims, inadmissible; it argued that it had reserved the right, in the Application, "to amend and supplement the present Application". Djibouti noted that the claims based on violations of the international law on immunities which took place after 9 January 2006 are not "new or extraneous to the initial claims" and that they "all relate to the claims set out in the Application and are based on the same legal grounds". They do not transform the subject of the dispute as it was originally submitted to the Court, nor do they extend it. Djibouti contends that these violations would not have taken place if France had fulfilled the obligations to which the Application refers, and relies on the jurisprudence of the Court in this respect (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203). Those violations thus constitute "one sole continuous wrongful act".

86. The Court also recalls France's argument that even if the Court should find jurisdiction in principle to deal with the alleged violations regarding the prevention of attacks on the person, liberty or dignity of internationally protected persons, such jurisdiction could not be exercised in respect of facts occurring subsequent to the filing of the Application. That would be the case with the invitation to testify sent to the Djiboutian President on 14 February 2007, and with the arrest warrants issued on 27 September 2006 against the Head of National Security and the *procureur de la République* of Djibouti in connection with the proceedings opened for subornation of perjury (see paragraph 35 above). In this respect, France rejects the Applicant's argument, as it believes it would result in a gradual extension of the jurisdiction of the Court in a way that is incompatible with the principle of consensualism.

87. Although the Court has not found that France's consent is limited to what is contained in paragraph 2 of Djibouti's Application, it is clear from France's letter that its consent does not go beyond what is in that Application. Where jurisdiction is based on *forum prorogatum*, great care must be taken regarding the scope of the consent as circumscribed by the respondent State. The arrest warrants against the two senior Djiboutian officials, having been issued after the date the Application was filed, are nowhere mentioned therein. 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 consideration of those later facts or events would transform

the "nature of the dispute" (see *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, pp. 483-484, para. 45; see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, paras. 69-70; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 16, para. 36).

88. In none of these cases was the Court's jurisdiction founded on *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 regarding liberty to amend submissions). So far as the arrest warrants issued against senior Djiboutian officials are concerned, in the Court's view, what is decisive is that the question of its 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 criteria relevant for determining limits *ratione temporis* to its jurisdiction, but by that which France has expressly accepted in its letter of 25 July 2006. There, France specifies that its 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".

As was already mentioned, in Djibouti's Application there are no claims relating to arrest warrants. 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 claims relating to the arrest warrants arise in respect of issues which are outside the scope of the Court's jurisdiction *ratione materiae*. Having arrived at this conclusion, the Court does not have to rule on the question whether these claims were or were not directly derived from matters in dispute at the time of the Application.

89. The Court will now examine the Respondent's contention relating to the summons (invitation) sent to the President of Djibouti on 14 February 2007.

90. In the present case, France has, under the procedure outlined in Article 38, paragraph 5, of the Rules of Court, agreed to the Court's jurisdiction in relation to the claims described in Djibouti's Application, filed on 9 January 2006. The Court will have to examine the implications for the summons of 14 February 2007, that is, an event occurring after that date.

91. A first summons to appear was sent by facsimile to the Djiboutian President on 17 May 2005 at the Djiboutian Embassy in Paris while he was on an official visit to France. It was rejected by Djibouti, for reasons of form and substance. The second summons was sent on 14 February 2007: it was in relation to the same case, as the invitation was issued by the same judge, and it was in relation to the same legal question; however, this time it followed the proper form under French law. The summons sent to the President of Djibouti on 14 February 2007 was but a repetition of the preceding one, even though it had been corrected as to form. Consequently, it is apparent that, in its substance, it is the same summons.

92. The Court must consider whether the second summons is covered by the mutual consent represented by the terms of the Djiboutian Application and the French response.

93. Djibouti lists the legal grounds on which it bases its Application in the latter's paragraph 3. According to the wording found therein, the Application is, *inter alia*, founded on:

> "*(c)* violation by the French Republic of 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, whether a Head of State or any representative or official of a State".

This ground, which relates to Djibouti's claim regarding the witness summonses, refers expressly to the attacks on the person of a Head of State and also extends, therefore, to the summons addressed to the Djiboutian Head of State in 2005.

94. The French response to Djibouti's Application, as already mentioned above, was worded to limit the scope of the Court's jurisdiction. The French letter of acceptance did not, however, contain a temporal limitation; rather, it specified that France accepted the jurisdiction of the Court in relation to the "claims formulated" in Djibouti's Application.

95. Pursuant to its examination of Djibouti's Application and of France's response, the Court reaches the conclusion that the Parties had accepted its jurisdiction to deal with the summons addressed to the President of Djibouti on 17 May 2005. As regards the summons addressed to the President on 14 February 2007, as has already been indicated above (paragraph 91), the Court finds that it is the same summons in its substance, as it is simply a repetition of the first. The Court thus finds that it has jurisdiction to examine both.

* * *

III. The Alleged Violation of the Treaty of Friendship and Co-operation between France and Djibouti of 27 June 1977

96. The Treaty of Friendship and Co-operation between France and Djibouti was signed on 27 June 1977, that is, on the date on which Djibouti gained independence. The Treaty was subsequently ratified by the Parties and entered into force on 31 October 1982 (United Nations, *Treaty Series (UNTS)*, Vol. 1482, p. 196).

Djibouti argues that France violated a general obligation of co-operation provided for by the Treaty of Friendship and Co-operation through the following acts: not co-operating with it in the context of the judicial investigation into the *Borrel* case; attacking the dignity and honour of the Djiboutian Head of State and other Djiboutian authorities; and acting in disregard of the principles of equality, mutual respect and peace set out in Article 1 of the Treaty.

97. In the Preamble to the Treaty, the Presidents of the two States express their desire "to develop and strengthen the friendly relations between their two countries, and the co-operation between the French Republic and the Republic of Djibouti in the political, military, economic, financial, cultural, social and technical fields". In Article 1 of the Treaty, the Parties "decide to found the relations between their two countries on equality, mutual respect and peace"; Article 2 expresses their "firm desire to preserve and strengthen" the existing co-operation and friendship, to work to fortify peace and security, as well as to "foster all international co-operation promoting peace and social, economic and cultural progress". The first paragraph of Article 3 embodies an obligation of consultation in favour of the stability of the currency of Djibouti, while the second paragraph contains undertakings relating to the economic development of the two countries. Article 4 deals with co-operation "in the areas of culture, science, technology and education". In Article 5, the Parties promise to foster co-operation, the sharing of experience, and the exchange of information between their "public and private national organizations" and their "cultural, social and economic institutions". Article 6 provides for the establishment of a "France-Djibouti Co-operation Commission", whose functioning is governed by rules set out in Article 7 of the Treaty. The task of the Commission is "to oversee the implementation of the principles and the pursuit of the objectives defined in the . . . Treaty and in the conventions and specific agreements entered into between the two Governments"; its jurisdiction is to comprise "[a]ll relations of co-operation, as well as the application of the various agreements entered into between the two States".

98. Djibouti contends that Article 1 of the Treaty should be regarded as "fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied", making reference to the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (*I.C.J. Reports 1996 (II)*, p. 814, para. 28). According to Djibouti, that general obligation allegedly arises from the object and purpose of the

Treaty as interpreted on the basis of its Articles 1, 2 and 4, and its Preamble. Djibouti also argues that the goal pursued by the Parties, in choosing to express these obligations in the form of a treaty, was to be bound "by means of a genuine legal commitment giving rise to all the effects of an authentic international agreement". Djibouti observes in this respect that the majority of the provisions of the Treaty (Arts. 1-5) are clearly expressed as obligations, and considers that the fact that the Treaty was ratified by the President of the French Republic without parliamentary approval "does not in any way change the fact that it establishes obligations of a legal kind".

99. Djibouti argues that the general obligation of co-operation enshrined in the Treaty creates reciprocal obligations which it has honoured by manifesting an "exemplary spirit of co-operation" and making all possible good-faith efforts to shed light on the *Borrel* case. In contrast, France is said to have violated the obligations of reciprocity and good faith incumbent upon it in terms of co-operation.

100. Djibouti also maintains that, in addition to the general obligation of co-operation, the Treaty provides for specific obligations to co-operate in all the areas which the Treaty covers, in an indicative rather than an exhaustive manner. Djibouti thus claims that judicial co-operation in criminal matters falls within the undertakings deriving from Articles 3 and 5 of the Treaty. Relying on Article 6 of the Treaty, Djibouti argues that the Treaty:

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

Djibouti concludes from this that any serious violation of a subsequent specific agreement, such as the 1986 Convention, automatically and simultaneously gives rise to a breach of the Treaty.

101. France argues 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 France 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. Basing itself on the principles of interpretation established by the Court with regard to other friendship treaties, and referring to the cases concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (*I.C.J. Reports 1996 (II)*, p. 814, para. 28) and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1986*, p. 137, para. 273), France emphasizes in particular that Article 1 of the Treaty merely lays down guiding principles, that Article 2 expresses a common desire to pursue certain objectives which cannot constitute legal obligations, and that

the legal obligations contained within the Treaty (Arts. 3 and 4) have nothing to do with judicial co-operation in criminal matters. With regard to Article 5, France points out that the wording used reflects a "fairly vague" obligation to act, that it does not relate to the judicial authorities, and that the area covered by the Article "cannot extend beyond the scope of the Treaty itself", which does not address judicial co-operation. In addition, France claims that its interpretation of the Treaty is supported by the fact that it was ratified by the President of the Republic without the need for parliamentary approval, and that, had the Treaty involved specific legal obligations (as was the case for the 1986 Convention), such approval would have been required by Article 53 of its Constitution.

102. France further disputes that Article 6 "oversees" all of the other successive bilateral agreements, noting in particular that neither the provisions of the Treaty nor those of the 1986 Convention establish a legal link between the two instruments. In this respect, no violation of the 1986 Convention could give rise to any effects under the Treaty of 1977.

103. France concludes that the principles embodied in the Treaty of 1977 cannot by themselves "give rise to a violation of international law". Furthermore, it contends that the manner in which the principles of good faith and reciprocity are linked to the Treaty is, formally speaking, artificial, and that the said principles should be examined in relation to specific obligations which are contained, according to the Application, in the 1986 Convention and not in the Treaty of 1977. France thus addresses the issue of reciprocity in dealing with the violations of the 1986 Convention that are alleged by Djibouti.

104. The Court observes that, notwithstanding the broad intention to promote mutual respect as described in Article 1 of the Treaty of 1977, the principal objective of the Treaty is the development of co-operation in the economic, monetary, social and cultural fields. Its substantive provisions speak of objectives to be attained, friendship to be fostered and goodwill to be developed. While these provisions refer to the realization of aspirations, they are not bereft of legal content. The respective obligations of the Treaty are obligations of law, articulated as obligations of conduct or, in this case, of co-operation, of a broad and general nature, committing the Parties to work towards the attainment of certain objectives defined as progress in a variety of fields, as well as in matters relating to peace and security. These goals are to be achieved by the employment of certain procedures and institutional arrangements. That France has ratified the Treaty without finding it necessary to submit it for parliamentary approval does not alter the fact that the Treaty creates legal obligations of the kind just described.

105. 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. Judicial co-operation is

therefore not subject to the undertakings and procedures governed by Article 3, paragraph 2, and Articles 5 and 6 of the Treaty. Therefore the question arises whether the Treaty of 1977 can have any juridical impact on the 1986 Convention, despite the fact that the Convention deals with a kind of co-operation which is not envisaged in the Treaty of 1977.

106. In the view of the Applicant, such a relationship between the two instruments exists in two regards: first, the 1986 Convention on Mutual Assistance must be construed in the light of the ties of friendship existing between the Parties to it; and second, any "serious" violation of the 1986 Convention must be regarded as a "major" violation of the 1977 Treaty of Friendship.

107. The Court has had occasion to address similar questions in two earlier cases. At the merits stage of the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court had to determine the purport and scope of a treaty of friendship, commerce and navigation concluded in 1956 between the two States. In its own words,

> "[T]he Court is asked to rule that a State which enters into a treaty of friendship binds itself, for so long as the Treaty is in force, to abstain from any act towards the other party which could be classified as an unfriendly act, even if such act is not in itself the breach of an international obligation. Such a duty might of course be expressly stipulated in a treaty, or might even emerge as a necessary implication from the text; but as a matter of customary international law, it is not clear that the existence of such a far reaching rule is evidenced in the practice of States. There must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty. That object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense." (*Merits, Judgment, I.C.J. Reports 1986*, pp. 136-137, para. 273.)

Thus, the Court ruled that, while Article I of the United States-Nicaraguan Treaty did create a general obligation to act towards the other party in a friendly manner, that obligation did not extend to all relations between the parties, but rather was restricted to the specific fields regulated by the treaty.

108. Similarly, in its preliminary ruling on jurisdiction in the case of the *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, the Court was called upon to interpret Article I of the Treaty of Amity, Economic Relations and Consular Rights concluded in 1955 between Iran and the United States, providing that "[t]here shall be firm and enduring peace and sincere friendship" between the two States. Iran contended that this Article imposed a positive obligation on the parties,

whereas the United States submitted that Article I was simply a statement of aspiration.

109. The Court proceeded once again to put the general clause stipulated in Article I in context. It considered "that such a general formulation cannot be interpreted in isolation from the object and purpose of the Treaty in which it is inserted" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), I.C.J. Reports 1996 (II)*, p. 813, para. 27). The Court emphasized:

> "Article I cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning such relations . . . It follows that Article I must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied." (*Ibid.*, p. 814, para. 28.)

Against this background the Court concluded:

> "that the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions . . . Article I is thus not without legal significance for such an interpretation, but cannot, taken in isolation, be a basis for the jurisdiction of the Court." (*Ibid.*, p. 815, para. 31.)

110. The Court observes that, whereas in the *Oil Platforms* case the question before the Court was how to interpret provisions of the same treaty in the light of the general clause of Article I of the same treaty, in the present case the question is whether the Treaty of 1977 can bear on obligations of a different treaty, namely those contained in the 1986 Convention. This issue did not arise in either of the two earlier cases mentioned. In accordance with the findings of the Court in the *Military and Paramilitary Activities in and against Nicaragua* and *Oil Platforms* cases, the principles agreed by Djibouti and France in Articles 1 and 2 of the Treaty of 1977 can throw light on the interpretation to be made of the other provisions in that same Treaty. Whether these principles may also inform the way in which obligations extraneous to the Treaty of 1977, namely, those of the 1986 Convention, are to be understood and applied, has yet to be determined.

111. In the light of the case law of the Court mentioned above, a positive answer to this question could perhaps be given if the 1986 Convention referred to and specified co-operation in an area previously chosen by the 1977 Treaty. However, this is not the case; the fields of co-operation envisaged in the Treaty do not include co-operation in the judicial field.

112. In the view of the Court, Article 31, paragraph 3, of the Vienna Convention on the Law of Treaties of 23 May 1969 is pertinent as regards this matter. It states that, in interpreting a treaty, "[t]here shall be taken into account, together with the context: . . . *(c)* any relevant rules of international law applicable in the relations between the parties". This provision is to be regarded as a codification of customary international law (see *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1075, para. 18) and is therefore applicable to the treaty relations between Djibouti and France under consideration in the present case despite the fact that neither Djibouti nor France is a party to the Vienna Convention.

113. The provisions of the 1977 Treaty of Friendship and Co-operation are "relevant rules" within the meaning of Article 31, paragraph (3) *(c)*, of the Vienna Convention. That is so even though they are formulated in a broad and general manner, having an aspirational character. According to the most fundamental of these rules, equality and mutual respect are to govern relations between the two countries; co-operation and friendship are to be preserved and strengthened. While this does not provide specific operational guidance as to the practical application of the Convention of 1986, that Convention must nevertheless be interpreted and applied in a manner which takes into account the friendship and co-operation which France and Djibouti posited as the basis of their mutual relations in the Treaty of 1977.

114. The Court thus accepts 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 1986. But this is as far as the relationship between the two instruments can be explained in legal terms. 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 Court can thus not accede to the far-reaching conclusions on the impact of the Treaty of 1977 upon the Convention of 1986 put forward by the Applicant.

* * *

IV. The Alleged Violation of the Convention on Mutual Assistance in Criminal Matters between France and Djibouti of 27 September 1986

115. The Application filed by Djibouti on 9 January 2006 also relates to the alleged violation of the Convention on Mutual Assistance in Criminal Matters between France and Djibouti, which was signed on

27 September 1986 and entered into force on 1 August 1992 (*UNTS*, Vol. 1695, p. 298). The violation of that Convention is said to lie in France's refusal to execute the letter rogatory issued on 3 November 2004 by the Djiboutian judicial authorities.

Djibouti claimed in the first place that Article 1 of the Convention places France under an obligation to execute the international letter rogatory. It added in the second place that France undertook to carry this out in January 2005 and that it failed to perform this undertaking. Lastly, Djibouti contended, as a subsidiary argument, that France breached the obligation in question when it gave Djibouti notice of its refusal to execute the letter rogatory.

The Court will examine in turn these three points.

* *

(1) The obligation to execute the international letter rogatory

116. According to Djibouti, the obligation to execute the international letter rogatory is laid down in Article 1 of the 1986 Convention, which provides that:

> "The two States undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting State."

The Applicant contends that this creates reciprocity in commitments and an obligation to execute the international letter rogatory.

117. Djibouti considers that this Article imposes on the two Parties an obligation of reciprocity in implementing the Convention. It adds that the French judicial authorities have benefited from its assistance and co-operation on a number of occasions since 1996 and that it was entitled to expect reciprocity from France when it submitted its own international letter rogatory on 3 November 2004.

118. France does not dispute that Djibouti fully executed the international letters rogatory issued by French judicial authorities, but it maintains that requests for mutual assistance must be assessed case by case, as the 1986 Convention provides. In the view of France, its dispute with Djibouti is over the execution of a specific letter rogatory and no issue of reciprocity can arise in regard to it.

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119. The Court now turns to arguments relating to reciprocity in the implementation of the Convention of 1986 that have been raised by Djibouti.

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.

Thus, it is the provisions of the Convention which must be looked to in determining case by case whether or not a State has breached its mutual assistance obligations. The Court notes that in the present case, the concept of reciprocity has been invoked in support of the contention that the execution by one State of a request for mutual assistance requires as a consequence the other State to do the same. However, the Court considers that, so far as the 1986 Convention is concerned, each request for legal assistance is to be assessed on its own terms by each Party. Moreover, the way in which the concept of reciprocity is advanced by Djibouti would render without effect the exceptions listed in Article 2. The Court observes 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.

* *

120. The Court will now turn to examining the obligation to execute the international letter rogatory set out in Article 1 of the 1986 Convention and, according to Djibouti, elaborated in Article 3, paragraph 1, of the Convention, in the following terms:

> "The requested State shall execute in accordance with its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting State for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents."

121. Djibouti argues that the wording of this Article confirms that the requested State is required to execute the international letter rogatory, since it contains an "obligation of result". The Applicant adds that, while the provision does state that execution must take place "in accordance with [the] law" of the requested State, this must be interpreted as simply an indication of the procedure to be followed in performing this "obligation of result", not a means for shirking it. In this regard, Djibouti contends that France may not invoke its internal law to escape its obligation to execute the international letter rogatory and, in support of this contention, relies on Article 27 of the Vienna Convention on the Law of Treaties as the codification of customary law on the subject, which provides: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

122. France asserts that, under the natural and ordinary meaning of the terms in Article 3 of the Convention, the desired outcome, that is, the transmission of the Borrel file, is linked with the means to that end, consisting of respecting the internal procedure of the requested State. Accordingly, the means determines the outcome, which is never achieved until the procedure has been completed. France adds that Article 3 must be read in its context, by reference to Article 1, which provides for the "widest measure" of mutual assistance, and to Article 2, under which assistance "may be refused". Further, account must be taken of the object and purpose of the treaty, which is mutual assistance in criminal matters "in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting State". Finally, France claims that it has not tried to escape responsibility by hiding behind its internal law, since, on the contrary, it is seeking to apply the terms of the Convention, which itself refers to that law.

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123. The Court observes that the obligation to execute international letters rogatory laid down in Article 3 of the 1986 Convention is to be realized in accordance with the procedural law of the requested State. Thus, 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. Interpreted in context, as called for by the rule of customary law reflected in Article 31, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, Article 3 of the 1986 Convention must be read in conjunction with Articles 1 and 2 of the Convention. While Article 1 does provide that there must be "the widest measure" of mutual assistance, there are cases in which it will not be possible. Article 2, for its part, describes situations in which "[a]ssistance may be refused". It follows that those who are empowered to address these matters will do so by applying the provisions of Article 2 or of other Articles in the Convention that may lead to the rejection of the requesting State's démarche.

124. Having thus clarified the purport of Article 3 of the 1986 Convention, the Court sees no reason why the rule of customary law reflected in Article 27 of the Vienna Convention on the Law of Treaties would be applicable in this instance. In fact, here the requested State is invoking its internal law not to justify an alleged failure to perform the international

obligations contained in the 1986 Convention, but, on the contrary, to apply them according to the terms of that Convention.

* *

(2) The alleged undertaking by France to execute the international letter rogatory requested by Djibouti

125. The Court will now turn to the undertaking that France is claimed to have given to execute the international letter rogatory transmitted by Djibouti.

It will first recall that, by letter of 17 June 2004, the *procureur de la République* of Djibouti asked the *procureur de la République* at the Paris *Tribunal de grande instance* to transmit the Borrel file to him (see paragraph 24 above). The French Ministry of Justice responded to the request as follows, by letter dated 1 October 2004:

> "the investigating judge responsible for the case, who alone is competent to hand over copies of the documents (which in material terms amount to 35 volumes), takes the view that this letter is not in the form required by the Convention on Mutual Assistance in Criminal Matters between France and Djibouti of 27 September 1986 and refuses to execute this request".

These were the circumstances under which the investigating judge at the Djibouti *Tribunal de première instance*, Ms Leila Mohamed Ali, opened a judicial investigation on 3 November 2004 into the murder of Bernard Borrel and addressed an international letter rogatory to the French judicial authorities, seeking the transmission of the Borrel file.

Having been requested by Djibouti's Ambassador in Paris to expedite the process, the Principal Private Secretary to the French Minister of Justice responded as follows in a letter dated 27 January 2005:

> "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."

126. Basing itself on this letter, Djibouti has argued that this response 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 the undertaking gave rise to a legitimate expectation on Djibouti's part that the file would be transmitted. It has added that a

statement on 29 January 2005 by the spokesman of the French Ministry of Foreign Affairs (see paragraph 27 above) confirmed the letter of 27 January from the Principal Private Secretary to the Minister of Justice.

Djibouti considers the letter to be the official response by the Ministry of Justice of the requested State to the requesting State's letter rogatory, in accordance with Article 14, paragraph 1, of the 1986 Convention, which provides that: "[l]etters rogatory referred to in Article 3 shall be addressed by the Ministry of Justice of the requesting State". Djibouti alleges that the French Ministry of Justice also gave instructions to the *procureur de la République*, to whom French law (Art. 694-2 of the French Code of Criminal Procedure) assigns the responsibility for executing international letters rogatory. The French State is thus said to have given an undertaking to perform the obligation established by the 1986 Convention and to have failed to honour it.

127. France denies that any promise or undertaking was given by the French Ministry of Justice, which could not act in contravention of Article 3 of the 1986 Convention, requiring execution of the letter rogatory to be "in accordance with [the] law" of the requested State, and this, in its view, calls for a decision by the investigating judge before execution.

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128. The Court first 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 is true that, in stating that all steps would be taken to ensure that such transmission would be effected before the end of the following month (February 2005), the Principal Private Secretary might have led his interlocutors to believe that it was simply a question of formalities and that the process would automatically result in transmission of the file.

129. It must however be kept in mind that the Principal Private Secretary was responding to the Ambassador's urgent request to expedite transmission of the file. In any event, he 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, by way of exception to execution by a *procureur de la République*, where the letters concern measures taken in the investigation itself (which the Principal Private Secretary to the Minister of Justice pointed out in his above-mentioned letter of 1 October 2004 (see paragraph 125) to his counterpart at the Ministry of Foreign Affairs, and as had become known to Djibouti). The exclusive competence of the investigating judge in this regard was affirmed in the

19 October 2006 judgment of the *Chambre de l'instruction* of the Paris Court of Appeal, which notes that the decision to make available a copy of the file "is at the discretion of the investigating judge" (see paragraph 37 above).

130. 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.

* *

(3) France's refusal to execute the international letter rogatory

131. At first, Djibouti noted in its Memorial that France cannot rely on the provisions of Article 2 *(c)* of the Convention of 1986. In the first place, according to it, it would seem highly debatable whether an investigating judge alone is in a position to assess whether the fundamental interests of a State could be damaged by execution of an international letter rogatory. Djibouti considers that this type of assessment, concerning a possible risk to the sovereignty, security, *ordre public* or other essential interests of a State, must by its nature lie with the highest organs of that State. Having later taken note in the hearings of the judgment of the *Chambre de l'instruction* of the Paris Court of Appeal of 19 October 2006 (see paragraph 37 above), Djibouti nonetheless maintains that French law could not be interpreted as giving the said investigating judge sole authority to determine the essential interests of the State. According to Djibouti, the independence of the judicial system must not lead a State to ignore entirely the rules of co-operation in good faith and equality between States which that State must observe under general international law.

132. Concerning the reasons of the refusal mentioned in the *soit-transmis*, Djibouti maintains that no *détournement* of French law could result from the declassified documents being transmitted to a foreign authority (and not merely to the French judge), when the parties to the judicial investigation opened in France have access to the file and the declassified documents in question would not appear likely to compromise the essential interests of France. Moreover, Djibouti disputes that its request can be countered by the assertion that it is impossible to hand over even a part of the file. It contends in this respect that the few pages which have been declassified and included in the record cannot have "permeated the entire file".

133. Djibouti recalls that its Ambassador to France never received the letter of 31 May 2005 which was supposedly sent to him by the Director of Criminal Affairs and Pardons at the French Ministry of Justice,

informing Djibouti of the investigating judge's refusal of the request for mutual assistance. Djibouti also emphasizes 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 whatsoever for its "unilateral" refusal of mutual assistance, in violation of Article 17 of the Convention of 1986. Djibouti thus recalls that it only learned the reasons for the refusal, as reflected by the *soit-transmis* of Judge Clément of 8 February 2005, through the filing of France's Counter-Memorial on 13 July 2007, which should not be retroactively considered as an integral part of the refusal under the Convention.

134. The Court observes that, while the Parties concur that Article 2 and Article 17 must be read in conjunction, they do not draw the same inferences from this. According to Djibouti, the obligation to give reasons is a condition of the validity of the refusal. Djibouti 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". The same would apply *a fortiori* in the absence of any explicit reference to one of the reasons listed in Article 2 *(c)*.

135. Djibouti acknowledges that under Article 2 *(c)* the requested State enjoys wide discretion in deciding to refuse mutual assistance, since it is the requested State which "considers that execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests". But, Djibouti contends, even in reliance on what it describes as a "self-judging clause", the requested State must act reasonably and in good faith. It adds that, in any case, the obligation to give reasons requires the requested State to go beyond a bald reference to Article 2 *(c)* and to state the reasons justifying its decision in the specific case, failing which the decision is not valid.

136. As regards the competence of the investigating judge alone to assess the fundamental interests of France, France points out that it is not for another State to determine how France should organize its own procedures, nor to interpret French law in a manner contrary to the judgment handed down by the Paris Court of Appeal on 19 October 2006 or to the *soit-transmis* handed down by Judge Clément, which confirm France's position in this respect.

France points out 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.

137. As regards the reasons advanced in the *soit-transmis* which allegedly justify its refusal to transmit the file to Djibouti, France explains that, under the terms of the Law of 8 July 1998 establishing a National Defence Secrets Consultative Committee, the French judiciary alone may have possession of the declassified documents which it is entitled to request, and that the communication to a foreign authority of notes pre-

pared by the French intelligence services, even after declassification, is likely to prejudice the essential interests of France. France claims that the protection of defence secrets falls under the grounds set out in Article 2 *(c)* of the Convention of 1986. To justify the non-transmission of even a part of the file, France contends that the declassified notes were used by the investigating judge in such a way that the information they contain runs through the whole of the file, and that therefore, it was not possible to transmit a file from which they had simply been removed. France adds on this subject that what is at issue here is not, as Djibouti claims, two pages of declassified documents, but some 25 notes transmitted to the judge.

138. France asserts 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.

139. Since in its view Article 17 imposes no obligation to notify, France further contends that explicit citation of Article 2 *(c)* in the refusal suffices as the statement of reasons required by Article 17. It considers that the obligation to give reasons for a refusal of mutual assistance is not a condition for the lawfulness of the refusal under Article 2 *(c)*, but a separate condition arising under Article 17 of the Convention. France adds that the two provisions are removed from each other in the text of the 1986 Convention and that the validity of the decision under Article 2 *(c)* to refuse to give assistance is unaffected by the lack of a statement of reasons under Article 17. Nor does France accept that it would need to have done more than make a mere reference to Article 2 *(c)* as a statement of reasons for its decision of refusal.

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140. The Court must review the circumstances under which the French judicial authorities took the decision to refuse to execute the international letter rogatory and the way in which the decision was notified to Djibouti. The international letter rogatory of 3 November 2004 was first forwarded, by letter dated 18 January 2005, from the Director of Criminal Affairs and Pardons at the Ministry of Justice to the Public Prosecutor at the Paris Court of Appeal. The Public Prosecutor was instructed to execute it "in collaboration with the investigating judge responsible for the case". The Director took care to point out that the file contained "documents likely to prejudice [the] sovereignty, [the] security, [the] *ordre public* or other essential interests of the nation" and he cited Article 2 *(c)* of the Convention of 27 September 1986, allowing a requested State to refuse to provide mutual assistance.

The *procureur de la République* subsequently referred the matter to Judge Clément, who informed him of her decision by letter dated 8 February 2005, to which was attached a copy of a document entitled *"soit-transmis"* and which was communicated on the same day to the senior investigating judge. In a judgment dated 19 October 2006, the *Chambre de l'instruction* of the Paris Court of Appeal considered that document to be a decision, lying within the discretion of the investigating judge alone, in response to Djibouti's request for mutual assistance. The decision was not immediately communicated to the Djiboutian authorities; it was not until 31 May 2005 that, according to France, the Director of Criminal Affairs and Pardons informed Djibouti's Ambassador in Paris by letter that:

> "After giving the matter careful attention, the investigating judge, by a judicial decision not open to appeal, considered that Article 2 *(c)* of the Convention on Mutual Assistance in Criminal Matters between France and Djibouti of 27 September 1986 had to be applied and that this did not allow a favourable response to be given to the request from your judicial authorities."

141. Djibouti denies that its Ambassador in Paris ever received this letter and claims to have had no knowledge of the content of the letter until the Respondent submitted it to the Court (see paragraph 133 above): it should, according to Djibouti, therefore be disregarded and deemed non-existent.

142. Responding to the question on this point put to it during the oral proceedings by President Higgins regarding whether France keeps any records of letters which are sent by it to officials of other States, France replied that it was not the practice of the French Ministry of Foreign Affairs to send registered letters with acknowledgment of receipt to its "foreign counterparts" and that it was therefore unable to provide proof substantiating the despatch of the letter of 31 May 2005 to the Ambassador of Djibouti to France. Thus, France claimed to be unable to prove receipt by the Ambassador. France recognizes that the only evidence it has submitted regarding the transmission of the letter of 31 May 2005 is a despatch Note dated 16 June 2005, wherein reference to the letter of 31 May 2005 is made, sent by the Ministry of Foreign Affairs to the Ambassador of France to Djibouti. However, France does claim that this despatch Note confirms, in any event, the existence of the said letter.

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143. The Court observes that France does not allege that the letter of 31 May 2005 was delivered to Djibouti's Ambassador in Paris or to a member of his staff through the usual diplomatic channels. It does not adduce evidence that the letter was sent by post or conveyed by courier. It does not even offer evidence that the despatch of the letter was recorded in a mail registry at the Ministry of Justice or the Ministry of

Foreign Affairs, in accordance with French administrative practice. Having regard to the nature of the letter and the circumstances described above, the Court cannot take this document into consideration in its examination of the present case.

144. The Court further observes that shortly before that, on 18 May 2005, Djibouti's Minister for Foreign Affairs had written to France's Ambassador to Djibouti to point out that France had not as yet honoured "its commitments" to transmit the file requested in the letter rogatory. In reply, France's Ambassador sent the Minister a letter of refusal on 6 June 2005, worded as follows: "I regret to inform you that we are not in a position to comply with this request". The Court notes that Djibouti never responded to this letter to inquire into the grounds for the refusal.

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145. The Court begins its examination of Article 2 of the 1986 Convention by observing that, while it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties (see *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A*, p. 30, and *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167; for the competence of the Court in the face of provisions giving wide discretion, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222, and *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 183, para. 43). This requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2. Further, the Convention requires (in Art. 3) that the decision not to execute the letter must have been taken by those with the authority so to decide under the law of the requested State. The Court will examine all of these elements.

146. The Court 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. The Court is aware that the Ministry of Justice had at a certain time been very active in dealing with such issues. However, 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. It 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 deci-

sion 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.

147. 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, explaining why transmission of the file was considered to be "contrary to the essential interests of France", in that the file contained declassified "defence secret" documents, together with information and witness statements in respect of another case in progress. The reasoning is expressed in part as follows:

> "On several occasions in the course of our investigation, we have requested the Ministry of the Interior and the Ministry of Defence to communicate documents classified under 'defence secrecy'.
>
> The *Commission consultative du secret de la défense nationale* delivered a favourable opinion on the declassification of certain documents.
>
> The above-mentioned ministries, following that opinion, transmitted those documents to us.
>
> To accede to the Djiboutian judge's request would amount to an abuse of French law by permitting the handing over of documents that 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."

148. It is 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, as suggested by Djibouti during the oral proceedings. It was only through the written and oral pleadings of France that the Court has been informed that the intelligence service documents and information permeated the entire file. However, 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.

149. The Court now turns to Djibouti's claim that France has violated Article 17 of the 1986 Convention. Article 17 provides that "[r]easons shall be given for any refusal of mutual assistance".

150. The Court cannot accept that, as France contends, there was no violation of Article 17, as Djibouti in any event knew that Article 2 *(c)*

was being invoked. To this end, France cites paragraph 146 of Djibouti's Memorial, which alludes to a letter of 11 February 2005 as follows:

> "As a letter dated 11 February 2005 from the Paris investigating judge, Ms Sophie Clément, would appear to indicate, the refusal to execute the letter rogatory presented by Djibouti was based on the fact that the French judiciary viewed the transmission of the Borrel file to the Djiboutian judicial authorities as 'contrary to France's fundamental interests'."

In response to a question from Judge *ad hoc* Guillaume, counsel for Djibouti responded that they did not possess the letter referred to in the Memorial, having made an assumption based on information circulated by the French media that a letter to that effect had been sent around that time by Judge Clément, which raised an issue of fundamental interest. The Court cannot draw the conclusion that France seeks that Djibouti knew Article 2 *(c)* had been invoked. If the information eventually came to Djibouti through the press, the information disseminated in this way could not be taken into account for the purposes of the application of Article 17.

151. 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.

152. As no reasons were given in the letter of 6 June 2005 (see paragraph 144 above), the Court concludes that France failed to comply with its obligation under Article 17 of the 1986 Convention.

The Court observes 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. Some brief further explanation was called for. This is not only a matter of courtesy. It also allows the requested State to substantiate its good faith in refusing the request. It may also enable the requesting State to see if its letter rogatory could be modified so as to avoid the obstacles to implementation enumerated in Article 2.

153. Having found that France's reliance on Article 2 *(c)* was for reasons that fell under that provision, but that it has not complied with its obligation under Article 17, the Court now considers whether, as Djibouti has contended, a violation of Article 17 precludes a reliance on Article 2 *(c)* that might otherwise be available. The Court recalls that France maintained that Articles 2 and 17 impose distinct and unrelated

obligations, and claimed in particular that they are removed from each other in the text of the Convention (see paragraph 139 above).

This question is to be answered by an interpretation of the 1986 Convention according to the rules of customary law reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.

154. That Articles 2 and 17 are in a sense linked is undeniable. Article 2 refers to possible exceptions to the granting of mutual assistance and Article 17 to the duty to give reasons for the invocation of such exceptions in refusing mutual assistance. The legal relationship between these cannot be answered by interpretation of either of these provisions "in accordance with [its] ordinary meaning", as no provision exists in the Convention on the relationship between these Articles. Having regard to the requirement that the terms of a treaty are to be interpreted "in their context and in the light of its object and purpose", the Court makes the following observations.

155. The object of the 1986 Convention on Mutual Assistance in Criminal Matters is to provide for mutual assistance to the fullest extent possible (Art. 1), with refusals being limited to a category of permitted exceptions.

156. The Court observes that Articles 2 and 17 are located in different sections of the 1986 Convention. It notes in this regard that the Convention contains other provisions which, like Article 2, in certain cases authorize a refusal to provide mutual assistance which requires reasons to be given in accordance with Article 17. For example, Article 10, paragraph 2, indicates certain situations where the "transfer [of a] person in custody", in the sense of paragraph 1 of that Article, could be refused. Furthermore, the Court notes that it is common, in comparable conventions, for similar provisions to be so deployed (see, for example, European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (*UNTS*, Vol. 472, Arts. 2 and 19); Convention Concerning Reciprocal Legal Assistance in Criminal Matters between France and Spain of 9 April 1969 (*ibid.*, Vol. 746, Arts. 4, 7 and 14); and Convention on Judicial Assistance in Criminal Matters between Mexico and France of 27 January 1994 (*ibid.*, Vol. 1891, Arts. 4 and 20)). The Court therefore considers that no legal inference is to be drawn from the arrangement of the text of the Convention.

On the other hand, the Court observes that there is a certain relationship between Articles 2 and 17 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. Further, had it been so intended by the Parties, this would have been expressly stipulated in the Convention.

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.

* * *

V. The Alleged Violations of the Obligation to Prevent Attacks on the Person, Freedom or Dignity of an Internationally Protected Person

157. 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". For Djibouti, this is on the one hand an obligation of a negative kind, to refrain from committing acts that are likely to prejudice the protection of these persons, and on the other hand an affirmative obligation to take all appropriate measures to prevent attacks on their freedom, honour and dignity. Djibouti invokes the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, signed in New York on 14 December 1973, in support of these claimed violations.

158. France has argued that the Convention of 1973 has no relevance in this case, inasmuch as it concerns solely the prevention of crimes defined in Article 2 thereof, namely:

> "The intentional commission of:
>
> *(a)* a murder, kidnapping or other attack upon the person or liberty of an internationally protected person;
>
> *(b)* a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty."

For France, the crimes referred to in this convention have nothing to do with the facts at issue in this case, namely the alleged attacks on the immunities from jurisdiction enjoyed by leading Djiboutian figures and on their honour and dignity.

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159. The Court notes that the purpose of the 1973 Convention is to prevent serious crimes against internationally protected persons and to

ensure the criminal prosecution of presumed perpetrators of such crimes. It is consequently not applicable to the specific question of immunity from jurisdiction in respect of a witness summons addressed to certain persons in connection with a criminal investigation, and the Court cannot take account of it in this case.

160. The Court will first examine the alleged attacks on the immunity from jurisdiction or the inviolability of the Djiboutian Head of State, before turning to those against the other Djiboutian nationals.

* *

(1) The alleged attacks on the immunity from jurisdiction or the inviolability of the Djiboutian Head of State

161. 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, which the Court will examine in turn.

(a) *The witness summons addressed to the Djiboutian Head of State on 17 May 2005*

162. During an official visit by the Djiboutian Head of State to the President of the French Republic in Paris, the investigating judge responsible for the *Borrel* case sent a witness summons to the President of Djibouti on 17 May 2005, simply by facsimile to the Djiboutian Embassy in France, inviting him to attend in person at the judge's office at 9.30 a.m. the following day, 18 May 2005.

163. For Djibouti, this summons was not only inappropriate as to its form, but was an element of constraint, since according to Article 101 of the French Code of Criminal Procedure: "Where he is summoned or sent for, the witness is informed that if he does not appear or refuses to appear, he can be compelled to by the law enforcement agencies in accordance with the provisions of Article 109." Djibouti does indeed note that this warning was not referred to either in this summons of 17 May 2005 or in that previously addressed to Djibouti's Ambassador to France on 21 December 2004, but observes that it is included in another summons, that was sent to Ms Geneviève Foix, a person also asked to testify in connection with the *Borrel* case. This summons was addressed to her at the Hôpital Bouffard in Djibouti on 15 October 2007 in the proceedings and contained the following passage:

> "If you fail to attend or refuse to attend, you may be compelled to do so by the law enforcement agencies, in accordance with the provisions of Article 109 of the Code of Criminal Procedure.
>
> The witness is further informed that, under Article 434-15-1 of the

Penal Code, failure to attend without excuse or justification is punishable by a fine of €3,750."

For Djibouti, however, even though such a warning was not included in the summons addressed to the Head of State, Article 109 of the French Code of Criminal Procedure and Article 434-15-1 of the French Penal Code could still be applied. Consequently, the non-appearance of the Head of State is likewise punishable under French law and may lead to the use of public force.

164. Djibouti further notes that as of 18 May 2005, its Ambassador in Paris sent a letter to the French Minister for Foreign Affairs protesting at the summons issued to the Head of State, describing it as "null and void in content and in form" and asking for the necessary measures to be taken against the investigating judge. The Ambassador informed the Minister that the facsimile containing the summons had been sent at 3.51 p.m. on 17 May 2005, and that at 4.12 p.m., Agence France-Presse was publicly reporting it. Djibouti has pointed out that the Minister did not reply to the Ambassador nor send a letter of apology to the Head of State, as had been done previously, by letter of 14 January 2005, when the Ambassador himself had been the subject of a witness summons. The French Minister for Foreign Affairs merely sent Djibouti's Ambassador the transcript of an interview given by his spokesman to a French radio station, recalling that "all incumbent Heads of State enjoy immunity from jurisdiction when travelling internationally". This was in due course reiterated by the spokesman of France's Minister for Foreign Affairs in his press report of 19 May 2005.

165. Djibouti has inferred from the absence of an apology and from the fact that the summons was not declared void that the attack on the immunity, honour and dignity of the Head of State has continued. It has added that France is required to take preventive measures to protect the immunity and dignity of a Head of State who is on its territory on an official visit, relying on Article 29 of the Vienna Convention on Diplomatic Relations. For Djibouti, France has made itself responsible for "internationally wrongful acts consisting of infringements of the principles of international comity and of the customary and conventional rules relating to immunities".

166. France, for its part, has recalled that it "fully recognizes, without restriction, the absolute nature of the immunity from jurisdiction and, even more so, from enforcement that is enjoyed by foreign Heads of State", while arguing that the summoning of a foreign Head of State as a witness is in no sense an attack on him.

It points out in this respect that the Djiboutian Head of State was summoned as an ordinary witness, in other words as a person whose statement appears useful to the investigating judge for the discovery of the truth (Art. 101, first paragraph, of the French Code of Criminal Procedure); this is in contrast to a summons as a *témoin assisté*, i.e., a person

against whom there is evidence that he could have participated, "as the perpetrator or accomplice, in committing the offence of which the investigating judge is seised" (Art. 113-2, second paragraph, of the French Code of Criminal Procedure).

167. Referring to the Judgment of the Court in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium)* (*Judgment, I.C.J. Reports 2002*, pp. 29-30, paras. 70-71), France contends that only limiting the freedom of action he requires in order to perform his duties might fail to respect the immunity from criminal jurisdiction and the inviolability of a foreign Head of State.

168. According to France, it is Article 656 of the French Code of Criminal Procedure that applies to the statement of a Head of State. The said Article provides that

> "The written statement of the representative of a foreign Power is requested through the intermediary of the Minister for Foreign Affairs. If the application is granted, the statement is received by the president of the appeal court or by a judge delegated by him."

The witness summons addressed to Djibouti's Head of State is, in France's view, purely an invitation which imposes no obligation on him. According to the Respondent, it is neither binding nor enforceable, and therefore cannot infringe the immunity from criminal jurisdiction or the inviolability of a Head of State. And while, under the terms of Article 31, paragraph 2, of the Vienna Convention on Diplomatic Relations of 18 April 1961, "[a] diplomatic agent is not obliged to give evidence as a witness", France takes the view that nothing prevents him from being asked to do so. However, it admits that, in terms of form, the summons addressed to the Djiboutian Head of State did not comply with the provisions of Article 656 of the French Code of Criminal Procedure.

169. France, in its pleadings, has endorsed the terms of the resolution adopted by the Institut de droit international at its meeting in Vancouver in 2001 on "Immunities from Jurisdiction and Execution of Heads of State and Government in International Law", according to which the authorities of a foreign State must take "all reasonable steps to prevent any infringement of a [Head of State's] person, liberty or dignity". However, it does not believe that there has been an attack on the freedom or dignity of the President of Djibouti as a result of inviting him to "tell the whole truth", inasmuch as he "is entirely at liberty to maintain his silence, if he so wishes, without anyone being able to criticize him for it".

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170. The Court 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 immu-

nities from jurisdiction in other States, both civil and criminal" (*Judgment, I.C.J. Reports 2002*, pp. 20-21, para. 51). 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.

171. In the present case, the Court finds that the summons addressed to the President of the Republic of Djibouti by the French investigating judge on 17 May 2005 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, there was no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State, since no obligation was placed upon him in connection with the investigation of the *Borrel* case. The spokesman of the French Ministry of Foreign Affairs, in his statements of 17 and 18 May 2005, recalled that France respected these immunities. As regards the summons in question, it was not further acted upon, having been considered from the outset by Djibouti, in a letter of 18 May 2005 from its Ambassador in Paris to the French Minister for Foreign Affairs, as "null and void in content and in form" and "not even observ[ing] the provisions of French law".

172. However, the Court must note that the investigating judge, Judge Clément, addressed the summons to the Djiboutian 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, Judge Clément failed to act in accordance with the courtesies due to a foreign Head of State. Moreover, French law itself takes account of the demands of international courtesy in laying down specific procedures for the testimony of representatives of foreign Powers, for example by requiring that all requests for a statement be transmitted through the intermediary of the Minister for Foreign Affairs, and that the statement be received by the first president of the Court of Appeal (Art. 656 of the French Code of Criminal Procedure) (see paragraph 31 above).

It is regrettable that these procedures were not complied with by the investigating judge and that, whilst being aware of that fact, the French Ministry of Foreign Affairs did not offer apologies to the Djiboutian President, as it had done previously to Djibouti's Ambassador when he found himself in a similar situation (see paragraph 34 above).

173. The Court has taken note of all the formal defects under French

law surrounding the summons addressed to the Djiboutian Head of State on 17 May 2005 by Judge Clément; however, it considers that these do not in themselves constitute a violation by France of its international obligations regarding the immunity from criminal jurisdiction and the inviolability of foreign Heads of State. Nevertheless, as the Court has indicated above, an apology would have been due from France.

174. The Court recalls that the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, is necessarily applicable to Heads of State. This provision reads as follows:

> "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

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

175. Djibouti has claimed that the communication to Agence France-Presse, in breach of the confidentiality of the investigation, of information concerning the witness summons addressed to its Head of State, is to be regarded as an attack on his honour or dignity. The Court observes that if it had been shown by Djibouti that this confidential information had been passed from the offices of the French judiciary to the media, such an act could have constituted, in the context of an official visit by the Head of State of Djibouti to France, not only a violation of French law, but also a violation by France of its international obligations. However, the Court must recognize that it does not possess any probative evidence that would establish that the French judicial authorities are the source behind the dissemination of the confidential information in question.

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(b) *The witness summons addressed to the Djiboutian Head of State on 14 February 2007*

176. The Court observes, as regards this second witness summons, that on this occasion the investigating judge sent a letter to the Minister of Justice on 14 February 2007 in which she expressed the wish "to obtain the testimony of Mr. Ismaël Omar Guelleh, President of the Republic of Djibouti, in connection with the inquiry [into the murder of Bernard Borrel]". The judge asked the Minister to make contact with the

Minister for Foreign Affairs "with a view to seeking the consent of Mr. Ismaël Omar Guelleh to giving such a statement". In his letter of 15 February 2007 to the Minister for Foreign Affairs, the Minister of Justice noted that the judge's request had been presented "on the basis of Article 656 of the Code of Criminal Procedure". The request concerned was relayed to its recipient by the transmission service of the Presidency of the French Republic. On 20 February 2007, the Minister for Foreign Affairs informed the Minister of Justice that "President Guelleh does not intend to respond to this request [from the investigating judge seeking to obtain his testimony]".

177. Djibouti considers that "[t]he follow-up to these events on 14 February 2007 seems to have developed into an approach which would come close to the Article 656 procedure", but it contests the propriety of the time chosen by the investigating judge for taking this action. It thus recalls that this second witness summons was issued on 14 February 2007, when the President of Djibouti was in France for the 24th Conference of Heads of State of Africa and France which was to be held in Cannes on 15 and 16 February 2007. For Djibouti, the investigating judge was seeking the best time to achieve media coverage of her request. As for the French Ministry of Foreign Affairs, Djibouti takes the view that it could have waited until President Ismaël Omar Guelleh had returned home before sending him an invitation to testify in writing. Moreover, Djibouti asserts that the judiciary informed the press at a very early stage, since the information was reported the same day, 14 February 2007, by several news agencies, some of them indicating that they had received it from "judicial sources". In any event, Djibouti considers that the President was placed in a situation "which obviously was an embarrassment . . . especially so, since the Respondent at the time did not see any need to apologize" and that France has consequently not sought to make up for "the damage inflicted on the immunity, the honour and the dignity of the President of Djibouti".

178. France, for its part, considers that as regards the summons of 14 February 2007, the investigating judge applied the procedure laid down by Article 656 of the French Code of Criminal Procedure and that, in any case, the refusal of the President of the Republic of Djibouti to respond to her request drew a line under the episode. In these circumstances, such an invitation to testify in writing "cannot be regarded as failing to respect the immunities enjoyed by a foreign Head of State . . . or as an attack of any kind on his dignity".

Pointing out that it has a free press, even if some of the reporting of these procedural steps in the media may be regretted, France contends that this does not engage its responsibility. In its view, the summons of 14 February 2007 was addressed to President Ismaël Omar Guelleh with all the necessary respect and was not in any way an attack on his honour or dignity.

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179. The Court finds that the invitation to testify of 14 February 2007 addressed by Judge Clément to the President of Djibouti was issued following the procedure laid down by Article 656 of the French Code of Criminal Procedure, and therefore in accordance with French law. 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. This measure cannot have infringed the immunities from jurisdiction enjoyed by the Djiboutian Head of State.

180. Moreover, the Court does not consider that there was an attack on the honour or dignity of the President merely because this invitation was sent to him when he was in France to attend an international conference. The Court observes again that if it had been proven by Djibouti that this confidential information had been passed from the offices of the French judiciary to the media, such an act could, in the context of the attendance of the Head of State of Djibouti at an international conference in France, have constituted not only a violation of French law, but also a violation by France of its international obligations. However, the Court must again recognize, as it has already done regarding the summons of 17 May 2005 (see paragraph 175 above), 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.

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(2) The alleged attacks on the immunities said to be enjoyed by the procureur de la République *and the Head of National Security of Djibouti*

181. In its Application filed on 9 January 2006 Djibouti makes reference to the issuing of summonses as *témoins assistés* to senior Djiboutian officials. Djibouti claims that these witness summonses have violated international obligations, both conventional and deriving from general international law, notably the principles and rules governing the diplomatic privileges, prerogatives and immunities laid down in the Vienna Convention on Diplomatic Relations of 18 April 1961 and the principles established in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973. These claims were elaborated in the Memorial of Djibouti.

182. Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh were summoned by Judge Belin to appear in France on 16 December 2004 as *témoins assistés*. Two further summonses were issued to them by the investigating judge at the Versailles *Tribunal de grande instance*, Judge Bellancourt, to appear, again as *témoins assistés*, on 13 Octo-

ber 2005; these summonses were transmitted to the Minister of Justice of Djibouti by his French counterpart.

183. Judge Bellancourt was informed, by a letter from the lawyer of the two individuals summoned, dated 11 October 2005, that "these two persons, one an official and the other a judge, cannot comply with that summons". After recalling all the co-operation provided until then by Djibouti in connection with the *Borrel* case, this letter added that "the Republic of Djibouti, as a sovereign State, cannot accept one-way co-operation of this kind with the former colonial Power, and the two individuals summoned are therefore not authorized to give evidence".

184. The Court recalls that, according to French legislation,

> "[a]ny person implicated by a witness or against whom there is evidence making it seem probable that he could have participated, as the perpetrator or accomplice, in committing the offence of which the investigating judge is seised" (Art. 113-2 of the French Code of Criminal Procedure)

may be summoned as a *témoin assisté*. The situation envisaged here by French law is one where suspicions exist regarding the person in question, without these being considered sufficient grounds to proceed with a *"mise en examen"*. The person concerned is obliged to appear before the judge, on pain of being compelled to do so by the law enforcement agencies (Art. 109 of the French Code of Criminal Procedure), through the issuing of an arrest warrant against him. As the Court has explained above (paragraph 35), the two European arrest warrants issued on 27 September 2006 against Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh are outside its jurisdiction in the present case.

185. Djibouti initially contended that the *procureur de la République* and the Head of National Security benefited from personal immunities from criminal jurisdiction and inviolability. Subsequently, during the oral proceedings, the Applicant declared that it "entirely rejects the idea that . . . persons enjoying the status of an organ of State, even of a high rank, benefit from personal immunity (also known as *ratione personae*)". It then argued in terms of "functional immunity, or *ratione materiae*", which it claimed was "the only category concerned" as regards the two officials. 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.

Having framed its argument in terms of immunity *ratione materiae*, Djibouti, other than a brief mention in its Memorial, made no further reference, in support of the immunities which the two officials were said to enjoy, to the Convention on Special Missions of 8 December 1969, to which, moreover, neither it nor the Respondent is a party.

186. In response to Djibouti's initial argument, France considers firstly

that the *procureur de la République* and the Head of National Security do not, given the essentially internal nature of their functions, enjoy absolute immunity from criminal jurisdiction or inviolability *ratione personae*.

187. In the oral pleadings before the Court, Djibouti for the very first time reformulated its claims in respect of the *procureur de la République* and Head of National Security. It was then asserted that the *procureur de la République* and the Head of National Security were entitled to functional immunities:

> "What Djibouti requests of the Court is to acknowledge that a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that is to say in the performance of his duties. Such acts, indeed, are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as the organ."

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188. 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.

189. France, in replying to this new formulation of Djibouti's argument that its State officials were immune from the criminal jurisdiction of France, stated that such a claim would fall to be decided on a case-by-case basis by national judges. The contrary, according to France, "would be devastating and would signify that all an official, regardless of his rank or functions, needs to do is assert that he was acting in the context of his functions to escape any criminal prosecution in a foreign State". As functional immunities are not absolute, it is, in France's view, 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 (France illustrates its argument by citing the judgment of 23 November 2004 of the *Chambre criminelle* of the French *Cour de cassation* in the case concerning the sinking of the oil tanker *Erika*). However, according to France, the two senior officials concerned have never availed themselves before the French criminal courts of the immunities which Djibouti now claims on their behalf; the Court does not therefore, in view of that fact, have sufficient evidence available to it to make a decision. Consequently, by summoning them to appear as *témoins assistés*, the investigating judge did not, in France's view, violate any international obligation.

190. The Court notes further that Djibouti later responded as follows:

> "As for officials, either they act in their official capacity, in which case their personal criminal liability cannot be invoked, or they act in a private capacity, in which case no functional immunity can operate to their benefit. In this instance too there is really no place for the least presumption which might *a priori* and in the abstract tilt the scales one way or another. The issue is not to presume anything whatsoever, but to verify concretely the acts in question, when of course the issue of immunity has been raised."

191. The Court observes 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.

192. The Court has noted that, in its first round of pleadings, Djibouti asserted that the claim of immunity arising from the fact that the persons concerned enjoyed the status of an organ of Djibouti, acting in the performance of their duties, was now the only argument relied upon in respect of Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh. In its second round of pleadings, Djibouti withdrew somewhat from that position, referring to the said claim as being its "principal argument" in respect of the immunities enjoyed by Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh.

193. At the same time, the final submissions of Djibouti are not clearly articulated in terms of a main claim of State immunity, with diplomatic or other personal immunities of the *procureur de la République* and Head of National Security having been abandoned, as is shown in Djibouti's final seventh submission, which requested the Court to adjudge and declare

> "[t]hat 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".

These final submissions are not clearly couched in the language of either diplomatic or State immunities. It is thus not apparent to the Court that the claim that Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh benefited from functional immunities as organs of State remains as the only or the principal argument being made by Djibouti.

194. The Court notes first that there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the

Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case.

195. The Court must also observe that these various claims regarding immunity were not made known to France, whether through diplomatic exchanges or before any French judicial organ, as a ground for objecting to the issuance of the summonses in question. As recalled above, the French authorities rather were informed that the Djiboutian *procureur de la République* and Head of National Security would not respond to the summonses issued to them because of the refusal of France to accede to the request for the Borrel file to be transmitted to the Djiboutian judicial authorities.

196. At no stage have the French courts (before which the challenge to jurisdiction would normally be expected to be made), nor indeed this Court, been informed by the Government of Djibouti that the acts complained of by France were its own acts, and that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying them out.

The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.

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

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198. The Court notes that as a component element of its legal arguments relating to the treatment of Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh, Djibouti has further challenged the lawfulness of the assertion of jurisdiction by France over the events leading to the issuance of the witness summonses as *témoins assistés* to Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh on 8 September 2005.

Mr. Djama Souleiman Ali, *procureur de la République* of Djibouti, travelled to Brussels at the beginning of 2002 and possibly in December 2001, allegedly to persuade Mr. Mohamed Saleh Alhoumekani, a former presidential guard, in the presence of his lawyer, to withdraw the evidence he was to give (see paragraph 35 above).

199. This was later to constitute a central allegation in the civil action for subornation of perjury filed on 19 November 2002 by Mrs. Borrel.

Mr. Hassan Said Khaireh was accused of having exerted, in Djibouti, various forms of pressure on Mr. Ali Abdillahi Iftin to make him produce testimony which would discredit the statements of Mr. Mohamed Saleh Alhoumekani (see paragraph 35 above).

Djibouti challenged France's jurisdiction over these matters as matters being outside of France and arising between persons not of French nationality.

200. The Court observes that Djibouti did not in its Application of 9 January 2006 ask the Court to find that France lacked jurisdiction as regards the acts alleged to have been engaged in by Mr. Djama Souleiman Ali and Mr. Hassan Said Khaireh in Brussels and Djibouti respectively. That being so, such a contention cannot fall within the scope of what France, in its letter to the Court dated 25 July 2006, has accepted shall be determined by the Court. Accordingly, the Court makes no observation on the contention of each of the Parties on this matter.

* * *

VI. Remedies

201. Djibouti has in its final submissions requested various remedies which it regarded as constituting appropriate redress for claimed violations of the 1986 Convention and other rules of international law.

202. 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 and specified in more detail in response to the question put by Judge Bennouna during the hearings. Nor, in any event, would it have been in a position so to do, having itself no knowledge of the contents of the file.

203. The Court has found a violation by France of its obligation under Article 17 of the 1986 Convention. As regards possible remedies for such a violation, the Court will not order the publication of the reasons underlying the decision, as specified in the *soit-transmis* of Judge Clément, to refuse the request for mutual assistance, these having in the meantime passed into the public domain.

204. The Court determines that its finding that France has violated its obligation to Djibouti under Article 17 constitutes appropriate satisfaction.

* * *

VII. Operative Clause

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.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourth day of June, two thousand and eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Djibouti and the Government of the French Republic, respectively.

(Signed) Rosalyn HIGGINS,
President.

(Signed) Philippe COUVREUR,
Registrar.

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.

(Initialled) R.H.

(Initialled) Ph.C.